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SERVICE DATE - JUNE 12, 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

Decision No. 9<sup>1</sup>

Decided: June 11, 1997

On April 10, 1997, CSX Corporation (CSXC), CSX Transportation, Inc. (CSXT), Norfolk Southern Corporation (NSC), Norfolk Southern Railway Company (NSR), Conrail Inc. (CRI), and Consolidated Rail Corporation (CRC)<sup>2</sup> filed their notice of intent to file an application seeking our authorization for: (a) the acquisition by CSX and NS of control of Conrail, and (b) the division of Conrail's assets by and between CSX and NS. In Decision No. 5, served and published in the *Federal Register* on May 13, 1997, at 62 FR 26352, we invited comments from interested persons respecting the CSX-1 and NS-1 petitions filed May 2, 1997, by applicants CSX and NS, wherein applicants seek, for seven construction projects, waivers of our otherwise applicable "everything goes together" rule.<sup>3</sup> The requested waivers, if granted, would allow CSX and NS to begin construction on the seven projects following the completion of our environmental review of the constructions, and our issuance of further decisions exempting or approving construction, but in advance of a final ruling on the primary application.

Seven construction projects, more fully detailed below, are the focus of the two petitions. Applicants contend that it is important that these projects (all of which involve relatively short

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<sup>1</sup> This decision also embraces the following proceedings: STB Finance Docket No. 33388 (Sub-No. 1), *CSX Transportation, Inc., and Consolidated Rail Corporation--Construction--Crestline, OH*; STB Finance Docket No. 33388 (Sub-No. 2), *CSX Transportation, Inc., and Consolidated Rail Corporation--Construction--Willow Creek, IN*; STB Finance Docket No. 33388 (Sub-No. 3), *CSX Transportation, Inc., and Consolidated Rail Corporation--Construction--Greenwich, OH*; STB Finance Docket No. 33388 (Sub-No. 4), *CSX Transportation, Inc., and Consolidated Rail Corporation--Construction--Sidney Junction, OH*; STB Finance Docket No. 33388 (Sub-No. 5), *Norfolk Southern Railway Company and Consolidated Rail Corporation--Construction--Colson/Bucyrus, OH*; STB Finance Docket No. 33388 (Sub-No. 6), *Norfolk Southern Railway Company and Consolidated Rail Corporation--Construction--Alexandria, IN*; and STB Finance Docket No. 33388 (Sub-No. 7), *Norfolk Southern Railway Company--Construction--Sidney, IL*.

<sup>2</sup> CSXC and CSXT are referred to collectively as CSX. NSC and NSR are referred to collectively as NS. CRI and CRC are referred to collectively as Conrail. CSX, NS, and Conrail are referred to collectively as applicants.

<sup>3</sup> Our regulations provide that applicants shall file, concurrently with their 49 U.S.C. 11323-25 primary application, all "directly related applications, e.g., those seeking authority to construct or abandon rail lines, \* \* \* " 49 CFR 1180.4(c)(2)(vi). Our regulations also provide, however, that, for good cause shown, we can waive a portion, but not all, of the requirements otherwise imposed by our regulations. 49 CFR 1180.4(f)(1).



connections between two rail carriers and which have a total length of fewer than 4 miles) be constructed prior to a decision on the primary application. Applicants claim that these connections must be in place prior to a decision on the primary application so that, if and when we approve the primary application, CSXT (with respect to four of the connections) and NSR (with respect to the other three) will be immediately able to provide efficient service in competition with each other. Applicants contend that, without early authorization to construct these connections, both CSXT and NSR would be severely limited in their ability to serve important (though different) customers. At the same time, applicants recognize that there can be no construction until we complete our environmental review of each of these construction projects and we issue a decision approving the construction, or an exemption from our otherwise applicable construction approval criteria, and impose whatever environmental conditions that we find appropriate.

**The CSX Connections.** If we grant its waiver request, CSXT will file, in four separate dockets,<sup>4</sup> a notice of exemption pursuant to 49 CFR 1150.36 for construction of a connection at Crestline, OH, and petitions for exemption pursuant to 49 U.S.C. 10502 and 49 CFR 1121.1 and 1150.1(a) for the construction of connections at Greenwich and Sidney, OH, and Willow Creek, IN. CSXT indicates that it would consult with appropriate federal, state, and local agencies with respect to any potential environmental effects from the construction of these connections and would file environmental reports with our Section of Environmental Analysis (SEA) at the time that the notice and petitions are filed. The connections at issue are as follows:

- (1) Two main line CRC tracks cross at Crestline and CSXT proposes to construct in the northwest quadrant a connection track between those two CRC main lines. The connection would extend approximately 1,507 feet<sup>5</sup> between approximately MP 75.4 on CRC's North-South main line between Greenwich, OH, and Indianapolis, IN, and approximately MP 188.8 on CRC's East-West main line between Pittsburgh, PA, and Ft. Wayne, IN.
- (2) CSXT and CRC cross each other at Willow Creek, and CSXT proposes to construct a connection track in the southeast quadrant between the CSXT main line and the CRC main line. The connection would extend approximately 2,800 feet between approximately MP BI-236.5 on the CSXT main line between Garrett, IN, and Chicago, IL, and approximately MP 248.8 on the CRC main line between Porter, IN, and Gibson Yard, IN (outside Chicago).
- (3) The lines of CSXT and CRC cross each other at Greenwich, and CSXT proposes to construct connection tracks in the northwest and southeast quadrants between the CSXT main line and the CRC main line. The connection in the northwest quadrant would extend approximately 4,600 feet between approximately MP BG-193.1 on the CSXT main line between Chicago and Pittsburgh, and approximately MP 54.1 on the CRC main line between Cleveland and Cincinnati. A portion of this connection in the northwest quadrant would be constructed utilizing existing trackage and/or right-of-way of the Wheeling & Lake Erie Railway Company. The connection in the southeast quadrant would extend approximately 1,044 feet between approximately MP BG-192.5 on the CSXT main line and approximately MP 54.6 on the CRC main line.

<sup>4</sup> These dockets will be sub-dockets 1, 2, 3, and 4 under STB Finance Docket No. 33388.

<sup>5</sup> CSXT's correction, filed May 21, 1997, modified the length of this connection from 1,142 feet at MP 75.5 to 1,507 feet at MP 75.4.

- (4) CSXT and CRC lines cross each other at Sidney Junction, and CSXT proposes to construct a connection track in the southeast quadrant between the CSXT main line and the CRC main line. The connection would extend approximately 3,263 feet between approximately MP BE-96.5 on the CSXT main line between Cincinnati, OH, and Toledo, OH, and approximately MP 163.5 on the CRC main line between Cleveland, OH, and Indianapolis, IN.

CSXT argues that, if it cannot begin the early construction of these four connections, its ability to compete with NSR will be severely compromised. CSXT claims that, if it could not offer competitive rail service from New York to Chicago and New York to Cincinnati using lines that it proposes to acquire from CRC, the achievement of effective competition between CSXT and NSR would be delayed significantly. CSXT adds that, if it cannot compete effectively with NSR "out of the starting blocks," this initial competitive imbalance could have a deleterious and long-term effect on CSXT's future operations and its ability to compete effectively with NSR, even when the connections are ultimately built. CSXT claims that, if its waiver was not granted, the time needed for construction and signal work could delay competitive operations for as long as 6 months after we take final action on the primary application.

**The NS Connections.** If we grant its waiver request, NSR will file, in three separate dockets,<sup>6</sup> petitions for exemption pursuant to 49 U.S.C. 10502 and 49 CFR 1121.1 and 1150.1(a) for the construction of connections at Alexandria, IN, Colson/Bucyrus, OH,<sup>7</sup> and Sidney, IL. NSR indicates that it would consult with appropriate federal, state, and local agencies with respect to any potential environmental effects from the construction of these connections and would file environmental reports with SEA at the time that the petitions are filed. The connections at issue are as follows:

- (1) The Alexandria connection would be in the northeast quadrant between former CRC Marion district lines to be operated by NSR and NSR's existing Frankfort district line. The new connection would allow traffic flowing over the Cincinnati gateway to be routed via a CRC line to be acquired by NSR to CRC's Elkhart Yard, a major CRC classification yard for carload traffic. This handling would permit such traffic to bypass the congested Chicago gateway. NSR estimates that the Alexandria connection would take approximately 9.5 months to construct.
- (2) The Colson/Bucyrus connection would be in the southeast quadrant between NSR's existing Sandusky district line and the former CRC Ft. Wayne line. This new connection would permit NSR to preserve efficient traffic flows, which otherwise would be broken, between the Cincinnati gateway and former CRC northeastern points to be served by NSR. NSR estimates that the Colson/Bucyrus connection would take approximately 10.5 months to construct.
- (3) The Sidney connection would be between NSR and Union Pacific Railroad Company (UPRR) lines. NSR believes that a connection would be required in the southwest quadrant of the existing NSR/UPRR crossing to permit efficient handling of traffic flows between UPRR points in the Gulf Coast/Southwest and NSR points in the Midwest and Northeast, particularly customers on CRC properties to be served by NSR. NSR estimates that the Sidney connection would take approximately 10 months to construct.

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<sup>6</sup> These dockets would be sub-dockets 5, 6, and 7 under STB Finance Docket No. 33388.

<sup>7</sup> Although NSR in its petition describes this connection as Colson/Bucyrus, the correct designation is Colson/Bucyrus. See diagram attached to NS-1.

**Comments.** Four comments opposing applicants' waiver requests were filed. Steel Dynamics, Inc. (SDI) filed comments (SDI-3) on May 6, 1997; The Allied Rail Unions (ARU)<sup>8</sup> filed comments (ARU-3) on May 15, 1997; American Trucking Associations, Inc. (ATA) filed comments on May 16, 1997; and The Council on Environmental Quality, Executive Office of the President (CEQ) late-filed comments on June 4, 1997.<sup>9</sup> On June 4, 1997, CSX filed a reply (CSX-3) to the comments of ARU and ATA; and NS filed a reply (NS-3) to the comments of SDI, ARU, and ATA. On June 6, 1997, CSX and NS filed a joint reply (CSX/NS-16) to the comments of CEQ.

**Steel Dynamics, Inc.** SDI asks us to deny NSR's waiver petition and to require NSR to file any construction application or exemption with its primary application.<sup>10</sup> SDI believes that NSR's three proposed construction connections are intertwined with the issues involved in the primary application. Creating separate dockets for these connections, according to SDI, will not be an efficient use of the Board's resources nor permit an adequate review of the issues involved in the Midwest region. SDI contends that the proposed transfer of NSR's Fort Wayne line to CRC, followed by CRC's transfer of the line, under a long-term operating agreement, to CSXT, see Decision No. 4, slip op. at 6-7, is intended to disguise the asserted fact that the acquisition of Conrail will create duplicate Chicago-bound lines only about 25 miles apart, running through Waterloo and Fort Wayne, IN. SDI maintains that our consideration of issues as complex as NSR's proposed connections and the possible divestiture of duplicate lines should not precede our review of the primary application.<sup>11</sup>

**The Allied Rail Unions.** ARU opposes the CSX-1 and NS-1 waiver petitions as inconsistent with our review of the primary application. ARU argues that, by requesting the waivers, CSXT and NSR seek leverage for our ultimate approval of the application, while allegedly evading public scrutiny and comment on the transaction as a whole. ARU maintains that the construction projects are directly related to, and are dependent on, our approval of the primary transaction, and that the construction projects should be authorized only if the transaction itself is authorized. ARU argues that our merger regulations already confer a significant advantage on the applicants because they may immediately file for related abandonments and line transfers, even though they do not currently own the affected lines. ARU avers that, as a consequence, CSXT and NSR have no basis to seek additional advantage through

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<sup>8</sup> ARU's membership includes American Train Dispatchers Department/BLE; Brotherhood of Locomotive Engineers; Brotherhood of Maintenance of Way Employees; Brotherhood of Railroad Signalmen; Hotel Employees and Restaurant Employees International Union; International Brotherhood of Boilermakers, Iron Ship Builders, Blacksmiths, Forgers and Helpers; International Brotherhood of Electrical Workers; The National Conference of Firemen & Oilers/SEIU; and Sheet Metal Workers' International Association.

<sup>9</sup> As indicated in Decision No. 5, the comments filed by CEQ were due no later than June 2, 1997. We have accepted and considered CEQ's comments, and have permitted applicants to reply to the comments by June 6, 1997.

<sup>10</sup> SDI did not address the merits of CSXT's waiver petition.

<sup>11</sup> SDI also asserts that NS has not sought waiver of our requirement that waiver petitions be filed at least 45 days prior to the filing of the primary application. See 49 CFR 1180.4(f)(2). SDI therefore asks us to clarify that NS may not file its application before June 16, 1997, regardless of whether NS-1 is granted. We note that, in accordance with the procedural schedule adopted in Decision No. 6 (served and published on May 30, 1997) applicants may not file their primary application until 30 days after the filing of applicants' Preliminary Environmental Report, which was filed on May 16, 1997. The primary application, therefore, may be filed only on or after June 16, 1997. SDI's request in this regard is moot.

their waiver requests. ARU contends that applicants offered no evidence to support their "competitive disadvantage" or "delay of public benefits" arguments. According to the unions, the applicants' arguments on competitive disadvantage are inherently inconsistent because both carriers assert that they will be disadvantaged unless their respective petitions are granted. Accordingly, ARU believes that a reasonable competitive balance can be maintained by denying both waiver petitions.

*American Trucking Associations, Inc.* ATA asks us to reserve judgment on the seven construction projects until the primary application is filed and reviewed by the parties. ATA contends that our approval of the waivers, despite any disclaimer to the contrary, could be interpreted by the public as tacit support for the primary application and inadvertently stifle full debate on the relevant issues. According to ATA, early consideration of the construction projects will unreasonably burden the parties and the Board's staff by requiring incremental participation in the transaction approval process. ATA also maintains that the competitive impact of the seven construction projects could not be adequately determined in the absence of consideration of the primary application.

*The Council on Environmental Quality, Executive Office of the President.* CEQ believes that the construction and operation aspects of applicants' track connection projects should be assessed at the same time so that the environmental impacts of operating these rail lines can be properly evaluated. CEQ cites its regulations at 40 CFR 1508.25(a)(1) that, when actions are "closely related," they "should be discussed in the same impact statement." CEQ also maintains that bifurcation of the related decisions appear to conflict with 40 CFR 1506.1(c)(3), which prohibits agencies from taking actions that will prejudice the ultimate decision in a programmatic environmental impact statement (EIS). In this regard, CEQ contends that, even though the proposed merger does not involve a programmatic EIS, if we grant the proposed waivers, the likelihood that we will subsequently deny the merger tends to decrease.

According to CEQ, courts have recognized the need to prepare a comprehensive EIS when actions are functionally or economically related in order to prevent projects from being improperly segmented. CEQ argues that the fact that applicants are willing to risk our eventual disapproval of the merger does not remove the interdependence of these individual decisions.

## DISCUSSION AND CONCLUSIONS

Applicants' waiver petitions will be granted. It is understandable that applicants want to be prepared to engage in effective, vigorous competition immediately following consummation of the control authorization that they intend to seek in the primary application.<sup>12</sup> We are not

<sup>12</sup> In this regard, we note that ARU is simply wrong in its assertion that a reasonable competitive balance can be maintained by denying both waiver petitions, so that neither carrier would face unanswered competition from the other. In their original petitions requesting waiver, both CSX and NS separately explained that these connections would permit each carrier to be able, as soon as possible following any Board approval of the primary application, to link its expanded system and compete with the other carrier in areas in which the other carrier's infrastructure would already be in place. As CSX has further explained (CSX-3 at 8):

CSX and NS have requested permission to construct connections that largely address different markets. Three of CSX's connections are intended to allow it to provide competitive services on routes linking Chicago and New York and the fourth on Northeast-Southeast routes served via Cincinnati. These are routes that NS will be able to serve immediately upon any Board approval of the Acquisition. NS's proposed

(continued...)



inclined to prevent applicants from beginning the construction process simply to protect them from the attendant risks. We emphasize what applicants acknowledge--that any resources they expend in the construction of these connections may prove to be of little benefit to them if we deny the primary application, or approve it subject to conditions unacceptable to applicants, or approve the primary application but deny applicants' request to operate over any or all of the seven connections. Nonetheless, given applicants' willingness to assume those risks, we will grant the waivers they seek in CSX-1 and NS-1.

ARU maintains in its comments that applicants have no basis for seeking the waivers. Our rules, however, specifically provide for such requests, and we have entertained numerous waiver and clarification petitions in previous rail merger cases, as well as this one. See, e.g. Decision No. 7 (STB served May 30, 1997). ATA and SDI argue that the competitive effect of the involved connections should be considered as part of the primary application. We agree. Applicants' operations over these connections are interdependent with the primary application, and we will consider the competitive impact of the projects and the environmental effects of those operations along with our consideration of the primary application. Without authority to operate over the seven track connections for which the waivers are sought, applicants' construction projects alone will have no effect on competition. We emphasize that the waiver petitions that we are granting here are restricted to the construction of, and not the operation over, the seven connection projects described above.

The commenters complain that granting the waivers constitutes a prejudicial "rush to judgment" with respect to the primary application. However, as we emphasized in our May 13, 1997 request for comments, our grant of these waivers will not, in any way, constitute approval of, or even indicate any consideration on our part respecting approval of, the primary application. We also found it appropriate to note that, if we granted the waivers sought in the CSX-1 and NS-1 petitions, applicants would not be allowed to argue that, because we had granted the waivers, we should approve the primary application. We affirm those statements here.

**Environmental considerations.** CEQ has advised us not to consider the proposed construction projects separately from the operations that will be conducted over them. CEQ's recommendation is based upon its regulations at 40 CFR 1508.25(a)(1)(i)-(iii), and upon various court decisions, indicating that "when a given project effectively commits decisionmakers to a future course of action [ ] this form of linkage argue[s] strongly for joint environmental evaluation." *Coalition of Sensible Transp. v. Dole*, 826 F.2d 60, 69 (D.C. Cir. 1987). We believe, however, that we have the authority to consider the proposed construction projects separately, and agree with the applicants that permitting the construction proceedings to go forward now would be in the public interest and would not foreclose our ability to take the requisite hard look at all potential environmental concerns.

After reviewing the matter, we do concur with CEQ that regulatory and environmental issues concerning both the construction and operating aspects of these seven small construction projects should be viewed together.<sup>12</sup> Thus, in reviewing these projects separately, we will

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<sup>12</sup>(...continued)

connections, on the other hand, are focused on allowing it to compete with CSX in serving southwestern markets and to make use of an important Chicago-area yard used for interchanging traffic with western carriers. Denying the waiver petitions will only assure that inequality in competition, and the potential long term problems created by such inequality, will occur.

<sup>13</sup> The applicable statute for both construction and operation of new rail lines is 49 U.S.C. 10901, which requires us to permit such actions unless they are shown to be inconsistent (continued...)

consider the regulatory and environmental aspects of these proposed constructions and applicants' proposed operations over these lines together in the context of whether to approve each individual physical construction project.<sup>14</sup> The operational implications of the merger as a whole, including operations over the 4 or so miles embraced in the seven construction projects, will be examined in the context of the EIS that we are preparing for the overall merger. That EIS may result in further environmental mitigating conditions. No rail operations can begin over these seven segments until completion of the EIS process and issuance of a further decision.

We believe that CEQ may have misconstrued the merger project as consisting of just two roughly equivalent elements: construction and operation. In fact, these seven construction projects, including the operations over them, are but a tiny facet of an over \$10 billion merger project. To put matters in perspective, the construction projects together amount to fewer than 4 miles of connecting track for a 44,000-mile rail system covering the eastern half of the United States.<sup>15</sup> Our approval of the construction exemptions will in no way predetermine the outcome of our merger decision. As was the case in *North Carolina v. City of Virginia Beach*, 951 F.2d 596, 602 (4th Cir. 1991) (*North Carolina*), segmentation of one phase of a larger project prior to completion of environmental review will not have "direct and substantial probability of influencing [the agency's] decision" on the overall project. *Accord, South Carolina ex. rel. Campbell v. O'Leary*, 64 F.3d 892, 898-99 (4th Cir. 1995). Approval of the constructions will not make approval of the merger any more likely, and we have made that clear to the railroads in advance. *Compare Thomas* (where the Forest Service committed substantial public funds to a road project that could not be recovered absent its approval of related logging projects) with *North Carolina*, 951 F.2d at 602 (where, as here, the facts reflect that the city proposing the project accepted the risk that funds expended or constructed could be lost if the overall project were not approved).

Nor will separate consideration and approval of these small construction projects in any way undermine our ability to give meaningful and thorough consideration to all environmental issues surrounding the larger merger proposal. We have not, by segmenting these construction projects, broken down the environmental impacts of the merger into insignificant pieces escaping environmental review. See *Swain v. Brinegar*, 542 F.2d 364 (7th Cir. 1976). Indeed, we are preparing an EIS for the overall merger, and we will undertake appropriate environmental documentation for each of the seven individual construction projects. Our approach is appropriate because the environmental impacts of these constructions tend to be localized, whereas the impacts of the merger will affect a much larger area (quite likely the Eastern United States).

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<sup>13</sup>(...continued)

with the public convenience and necessity.

<sup>14</sup> We will have the information we need to do this because applicants' environmental report that will accompany the application will address the environmental impacts of both the construction and proposed operation of these projects. In addition, as discussed below, applicants will be required to file a detailed preliminary draft environmental assessment (PDEA) for each of the seven projects.

<sup>15</sup> Applicants point out that much of the construction on these short segments will take place within existing rights-of-way, suggesting that they will be unlikely to have significant environmental impacts. *Compare Thomas v. Peterson*, 753 F.2d 754 (9th Cir. 1985)(*Thomas*)(where the Forest Service proposed to construct a road through a pristine wilderness). Applicants also suggest that there are no alternative routings for these projects. That issue, however, has not yet been determined; it will be examined in the environmental assessments (EAs) or other environmental documents that will be prepared for each of these construction projects.

In sum, separate consideration of the seven construction projects and their environmental impacts should not be precluded by 40 CFR 1508.25 because: (1) approval of the construction projects will not automatically trigger approval of the merger; moreover, we have already determined to do an EIS for the merger and separate approval of these construction projects will in no way affect that decision; and (2) these appear to be "garden-variety connection projects" that will proceed at the railroads' financial risk, independent of the much larger merger proposal.

Having decided to grant the petitions for waiver, we will now set out some details of how we plan to proceed. In order to fulfill our responsibilities under the National Environmental Policy Act (NEPA) and related environmental laws, we will require applicants to submit certain information on the environmental effects of the construction and operation of the seven proposed connections. As noted, the applicants will file an environmental report with the primary application that will address all of the construction projects associated with the proposed merger, including the seven connections discussed in this decision.

In addition, we will require that applicants provide a specific PDEA for each individual construction project covered by this decision. Each PDEA must comply with all of the requirements for environmental reports contained in our environmental rules at 49 CFR 1105.7. Also, the PDEA must be based on consultations with our Section of Environmental Analysis (SEA) and the federal, state, and local agencies set forth in 49 CFR 1105.7(b), as well as other appropriate parties. The information in the PDEA should be organized as follows: Executive Summary; Description of Each Construction Project Including Proposed Operations; Purpose and Need for Agency Action; Description of the Affected Environment; Description of Alternatives; Analysis of the Potential Environmental Impacts; Proposed Mitigation; and Appropriate Appendices that include correspondence and consultation responses. If a PDEA is insufficient, we may require additional environmental information or reject the document. We advise the applicants to consult with SEA as soon as possible concerning the preparation and content of each PDEA.

As part of the environmental review process, SEA will independently verify the information contained in each PDEA, conduct further independent analysis, as necessary, and develop appropriate environmental mitigation measures. For each project, SEA plans to prepare an EA, which will be served on the public for its review and comment. The public will have 20 days to comment on the EA, including the proposed environmental mitigation measures. After the close of the public comment period, SEA will prepare Post Environmental Assessments (Post EAs) containing SEA's final recommendations, including appropriate mitigation. In making our decision, we will consider the entire environmental record, including all public comments, the EAs, and the Post EAs.

Should we determine that any of the construction projects could potentially cause, or contribute to, significant environmental impacts, then the project will be incorporated into the EIS for the proposed merger and will not be separately considered. In order to provide SEA with adequate time to incorporate the proposed connections into the draft EIS, if warranted, applicants must file the PDEAs no later than Day F+75 under the procedural schedule established in Decision No. 6.

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

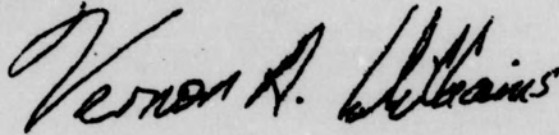
*It is ordered:*

1. The CSX-1 and NS-1 petitions for waiver are granted.
2. NSR and CSXT must serve copies of this decision on the Council on Environmental Quality, the Environmental Protection Agency's Office of Federal Activities, and the Federal

Railway Administration, and certify that they have done so within 5 days from the date of service of this decision.

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

By the Board, Chairman Morgan and Vice Chairman Owen.

A handwritten signature in dark ink, appearing to read "Vernon A. Williams". The signature is written in a cursive, flowing style with a large initial "V".

Vernon A. Williams  
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SERVICE DATE - JUNE 9, 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. 8**

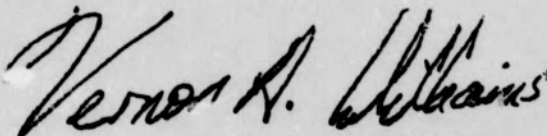
**Decided: June 5, 1997**

The merging parties filed a motion on June 5, 1997, requesting that a conference be convened to consider the setting of discovery guidelines.

Accordingly, a conference will be held on June 17, 1997, at 10:00 A.M., in a hearing room of the Federal Energy Regulatory Commission, 888 First Street N.E., Washington, D.C.

This decision is effected on the service date.

By the Board, Jacob Leventhal, Administrative Law Judge.

A handwritten signature in dark ink, appearing to read "Vernon A. Williams". The signature is fluid and cursive, with the first name "Vernon" being more prominent.

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Secretary**



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SERVICE DATE: MAY 30, 1997 - LATE RELEASE

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. 7

Decided: May 29, 1997

On April 10, 1997, CSX Corporation (CSXC), CSX Transportation, Inc. (CSXT), Norfolk Southern Corporation (NSC), Norfolk Southern Railway Company (NSR), Conrail Inc. (CRI), and Consolidated Rail Corporation (CRC) filed their CSX/NS-1 notice of intent to file an application (the primary application) seeking Surface Transportation Board (Board) authorization for: (1) the acquisition of control by CSXC and NSC of CRI, which is to be jointly owned by CSXC and NSC by and through a special purpose limited liability company (LLC) and LLC's wholly owned subsidiary, Green Acquisition Corporation (Tender Sub); and (2) as soon as practicable after the authorization and exercise of such control, the division of Conrail's assets by and between, and for the benefit of, CSX and NS.<sup>1</sup>

*Prior Decisions.* In Decision No. 1 (served April 16, 1997), in order to facilitate the prompt and efficient resolution of this proceeding, the parties to this proceeding were directed to comply with the protective order attached to that decision as Appendix A, and, in addition, this proceeding was assigned to Administrative Law Judge Jacob Leventhal for handling of all discovery matters and the initial resolution of all discovery disputes.

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<sup>1</sup> 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. CRI and CRC, and their wholly owned subsidiaries, are referred to collectively as Conrail. CSX, NS, and Conrail are referred to collectively as applicants.

The acquisition of control by CSXC and NSC of CRI is referred to as the Control Transaction. Certain interrelated aspects of the Control Transaction, more fully described below, are referred to as the Transaction Elements. The division of Conrail's assets between CSX and NS is referred to as the Division.

The primary application, which applicants now expect to file in mid-June 1997, *see* CSX/NS-10 at 7, will seek authorization under 49 U.S.C. 11323-25 for the Control Transaction and the Transaction Elements. A separate authorization will not be sought for the Division; what applicants call the Division amounts to a general description of the interrelated aspects of the Control Transaction that applicants refer to as the Transaction Elements. See also the schedule attached to CSX/NS-1 (it provides a general description of the major divisions and assignments of assets and rights agreed upon by CSXC and NSC).

Applicants also intend to file, in addition to the primary application, a number of directly related but separate applications, petitions, and/or notices to authorize abandonments and construction activities that applicants anticipate will take place if the primary application is approved. Applicants will also file an application or petition to authorize control by CSXC of The Lakefront Dock and Railroad Terminal Company (LD&RT), a terminal railroad in which CSXT and CRC each hold a 50% interest.



In Decision No. 2 (served April 21, 1997, and published that day in the *Federal Register* at 62 FR 19390), we found that the transaction contemplated by applicants is a major transaction, as that term is defined at 49 CFR 1180.2(a); we waived the 3-month prefiling notification requirement of 49 CFR 1180.4(b)(1); and we invited comments from interested persons on a proposed procedural schedule.

In Decision No. 3 (served April 22, 1997), Judge Leventhal announced that, on May 7, 1997, oral argument would be heard on a discovery motion filed in this proceeding.

In Decision No. 4 (served May 2, 1997), we reaffirmed our waiver of the 49 CFR 1180.4(b)(1) 3-month prefiling notification requirement; we reaffirmed the propriety of the previously adopted protective order; but, acting out of an abundance of caution, we modified that protective order to restrict, to outside counsel and outside consultants, exchanges of competitively sensitive information between CSX and NS.

In Decision No. 5 (served May 13, 1997, and published that day in the *Federal Register* at 62 FR 26352), we invited comments from interested persons respecting the CSX-1 and NS-1 petitions filed May 2, 1997, by applicants, wherein applicants seek, for seven construction projects, a waiver of the otherwise applicable "everything goes together" rule of 49 CFR 1180.4(c)(2)(vi).

In Decision No. 6 (served May 30, 1997, and published in the *Federal Register* on May 30, 1997, at 62 FR 29387), we adopted a procedural schedule to govern the course of this proceeding.

*This Decision.* We address, in this decision, the CSX/NS-10 petition, filed May 2, 1997, by applicants, wherein applicants seek waiver or clarification of certain requirements of the Board's Railroad Consolidation Procedures at 49 CFR part 1180, in connection with the Control Transaction and the Transaction Elements. Applicants also seek waiver or clarification to permit them to seek Board approval of the Control Transaction and the Transaction Elements in a single primary application. Applicants additionally seek exemption from certain requirements otherwise applicable to directly related constructions and abandonments.<sup>2</sup>

## BACKGROUND

**The Control Transaction.** CSXC and NSC will participate jointly in the acquisition of control of CRI consistent with the Agreement and Plan of Merger dated as of October 14, 1996, between CSXC, CRI, and Tender Sub, as amended (the Merger Agreement),<sup>3</sup> and the Letter Agreement dated as of April 8, 1997, between CSXC and NSC (the CSX/NS Letter Agreement). In accordance with the CSX/NS Letter Agreement: CSXC will contribute to LLC all of the capital stock of Tender Sub, which currently holds a beneficial interest in approximately 19.9% of the common stock of CRI; and NSC will cause its wholly owned subsidiary, Atlantic Acquisition Corp., to contribute to LLC its beneficial interest in approximately 9.9% of the common stock of CRI. Following these contributions and the closing of the current pending joint tender offer of CSXC and NSC for the remaining outstanding CRI common stock,<sup>4</sup> CSXC and NSC will each have a 50% voting interest in LLC and will each have the right to appoint 50% of

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<sup>2</sup> Applicants seek waiver or clarification pursuant to 49 CFR 1110.9, 1180.4(f), and 1152.24(e)(5).

<sup>3</sup> The last amendment to date to the Merger Agreement is the Fourth Amendment dated as of April 8, 1997.

<sup>4</sup> Both CSXC and NSC will contribute, directly or indirectly, cash to LLC to enable LLC to purchase the remaining outstanding shares of CRI.

LLC's board of managers or directors or similar governing persons. CSXC will have a 42% equity interest in LLC; NSC will have a 58% equity interest in LLC.

Following the closing of the current pending joint tender offer, and assuming the success thereof, there will be a merger (the Merger) of Green Merger Corp. (Merger Sub), a wholly owned subsidiary of Tender Sub, with and into CRI, with CRI as the surviving corporation. That surviving corporation will be a wholly owned indirect subsidiary of LLC and, immediately upon the Merger, will continue to be named "Conrail Inc."<sup>5</sup>

**The Voting Trust.** Prior to such time, if ever, as the Board approves the primary application, the CRI common stock owned by Tender Sub will be held in a Joint Voting Trust. By letter dated May 8, 1997, the Board's Secretary advised applicants that, in his opinion, the Joint Voting Trust contemplated by applicants will effectively insulate CSXC and NSC, and their respective affiliates, from the violation of Subtitle IV of Title 49, United States Code, and the policy of the Board that would result if CSXC and/or NSC were to acquire, without authorization, what would otherwise be a controlling interest in CRI's carrier subsidiaries.

**The Division.** Applicants indicate that, if and when the Board approves the primary application, applicants will effect the Division as promptly as possible.<sup>6</sup> Two wholly owned CRC subsidiaries, Sub A and Sub B (sometimes referred to collectively as the Subsidiaries),<sup>7</sup> will be created, and each will acquire certain of CRC's assets. Sub A will acquire certain CRC assets designated to be operated as part of CSX's rail system, and Sub B will acquire certain CRC assets designated to be operated as part of NS's rail system. Not all CRC assets will be divided between Sub A and Sub B; certain CRC assets will continue to be held by CRI and CRC (or their other subsidiaries), although such assets will be operated for the benefit of CSX and NS. Sub A and Sub B will operate the CRC assets held by them for the benefit of CSX and NS, respectively, and CSX and NS will operate certain properties of Sub A and Sub B pursuant to long-term operating agreements, leases, and indemnity arrangements. Similarly, Conrail will enter into operating arrangements with CSX and NS pursuant to which Conrail will operate the assets held by CRI or CRC (or their subsidiaries other than Sub A and Sub B) for the shared benefit of CSX and NS.

As part of the Division, CSX and NS will acquire trackage rights on certain of the Conrail lines and will jointly use certain Conrail lines and facilities. Conrail will retain certain incidental trackage rights over certain line segments to be acquired by the Subsidiaries to facilitate its operation of such lines and facilities.

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<sup>5</sup> Applicants anticipate that, of the cash contributed by CSXC and NSC to LLC, any cash not used to purchase CRI common stock in connection with the current pending joint tender offer will be used to purchase CRI common stock in connection with the Merger.

<sup>6</sup> The Division is variously described both as bipartite and as tripartite. The bipartite description, *see* CSX/NS-10 at 2, emphasizes the division of Conrail's assets into: (i) certain assets that will be assigned individually either to CSX or to NS through operating agreements or other mechanisms; and (ii) certain assets that will be shared by, and operated for the benefit of, both CSX and NS. The tripartite description, *see* CSX/NS-10 at 1-2, stresses the division of Conrail's assets into: (i) certain assets that will be the subject of separate long-term operating agreements, operating leases, or other operating arrangements with CSX and NS, respectively; (ii) certain assets that will be separately owned by CSX and NS, respectively; and (iii) certain assets that will continue to be held by CRI and CRC or their subsidiaries (other than the subsidiaries referred to as Sub A and Sub B) and operated for the benefit of CSX and NS.

<sup>7</sup> Applicants anticipate that the Subsidiaries, the precise names of which have not yet been determined, will be limited liability companies, with CRC as their sole "member" (the equivalent to "stockholder" in a corporation).

In addition, the former Conrail line now owned by NS that runs from Fort Wayne, IN, to Chicago, IL (the Fort Wayne line), will be transferred to CRC or a newly created subsidiary of CRC in a like-kind exchange for CRC's Chicago South/Illinois Lines (the Streator Line). CRC or that newly created subsidiary of CRC, as the case may be, will in turn assign the Fort Wayne line to Sub A, to be operated together with the other Conrail lines to be assigned to Sub A and used by CSX as part of CSX's rail system.<sup>8</sup>

**The Transaction Elements.** As described by applicants, the Transaction Elements (i.e., the interrelated aspects of the Control Transaction) embrace seven categories of authorizations:

(1) *The Sub A/Sub B Acquisitions:* Authorization under 49 U.S.C. 11323 for Sub A to acquire certain assets of Conrail designated to be operated as part of CSX's rail system, and for Sub B to acquire certain assets of Conrail designated to be operated as part of NS's rail system. The assets to be acquired by Sub A and Sub B will include, among other things, trackage rights and other rights.

(2) *The Continuance in Control:* Authorization under 49 U.S.C. 11323 for CSX, NS, and Conrail to continue to control Sub A and Sub B, subsequent to Sub A and Sub B acquiring the assets of Conrail identified in the preceding paragraph, and thereby becoming rail carriers. Applicants note that this authorization will be necessary because, although Sub A and Sub B will continue after the Division to be wholly owned subsidiaries of CRC and thus under the control of CSX, NS, and CRI, they will no longer be part of a Conrail "single system" of rail carriers to the extent their operations are conducted under the operating arrangements referred to in the following paragraph for the respective separate accounts of CSX and NS.

(3) *The Operating Arrangements:* Authorization under 49 U.S.C. 11323: (a) for Sub A to enter into operating arrangements with CSX for the operation of the Conrail assets held by Sub A for the benefit of CSX; (b) for Sub B to enter into operating arrangements with NS for the operation of the Conrail assets held by Sub B for the benefit of NS; and (c) for CRI, CRC, or one or more of their subsidiaries (other than Sub A and Sub B) to enter into operating arrangements with CSX and NS for the operation of assets held by CRI, CRC, or one or more of their subsidiaries (other than Sub A and Sub B), as the case may be, for the benefit of CSX or NS or both.

(4) *The CSX/NS Trackage Rights:* Authorization under 49 U.S.C. 11323 for the acquisition of trackage rights by Sub A or CSX over NS (these being trackage rights formerly held by Conrail over NS) and by Sub B or NS over CSX (these being trackage rights formerly held by Conrail over CSX), and for the acquisition of any other trackage rights by Sub A or by CSX over Sub B or by Sub B or NS over Sub A.

(5) *The Joint Use:* Authorization under 49 U.S.C. 11323 for the acquisition by CSX and NS of trackage rights over certain Conrail rail lines (and the retention of certain incidental trackage rights by Conrail over certain line segments to be acquired by the Subsidiaries) and for the joint use of certain Conrail rail lines, rights, and facilities.

(6) *The Pooling:* Authorization under 49 U.S.C. 11322, to the extent that any of the activities of CRI, CRC, the Subsidiaries, or other subsidiaries of CRI or CRC, or the performance

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<sup>8</sup> Applicants contend that all of the proposed actions and agreements described above are integral elements of the Control Transaction and the Division. However, as we noted in Decision No. 4 (served May 2, 1997, the same day that applicants filed their CSX/NS-10 pleading), the transfer of the Fort Wayne line from NSR to CRC is neither integral to nor an inseparable part of the Control Transaction, and, for this reason, the transfer of the Fort Wayne line will be considered not in the STB Finance Docket No. 33388 lead docket but rather in a separate ("directly related") sub-docket. See Decision No. 4, slip op. at 6-7.

by CSX or NS of any contracts of Conrail entered into prior to the effective date on which the Board shall have authorized the control of Conrail by CSX and NS (the Control Date), might be deemed to be a pooling or division by CSX and NS of traffic or services or any part of their earnings.

(7) *The Like-Kind Exchange*: authorization under 49 U.S.C. 11323 for the transfer of the Fort Wayne line from NS to Conrail and the transfer of the Streator line from Conrail to NS.<sup>9</sup>

## DISCUSSION AND CONCLUSIONS

**DEFINITION OF "APPLICANT."** The Railroad Consolidation Procedures define "applicant" as one of "[t]he parties initiating a transaction." 49 CFR 1180.3(a). Applicants seek waiver or clarification that, with respect to the Control Transaction and the Transaction Elements, the term "applicant" includes only CSXC, CSXT, NSC, NSR, CRI, and CRC, and does not include LLC, Tender Sub, Merger Sub, Sub A, or Sub B, or any other subsidiary of CRC created or used for the purpose of providing services to CSX and/or NS. CSX/NS-10 at 12-14 and 34. We agree that there is no need for LLC, Tender Sub, Merger Sub, Sub A, or Sub B, or any other subsidiary of CRC created or used for the purpose of providing services to CSX and/or NS, to be a formal applicant. These entities currently have no rail activities or operations, nor will any of such entities have any such activities or operations prior to such time, if ever, as we approve the primary application; rather, these entities have been, or will be, created simply to effectuate the Control Transaction and the Transaction Elements. We will therefore grant the waiver or clarification sought by applicants.<sup>10</sup>

**DEFINITION OF "APPLICANT CARRIERS."** The Railroad Consolidation Procedures define "applicant carriers" as the "[a]pplicant, *all carriers related to the applicant*, and all other carriers involved in the transaction." 49 CFR 1180.3(b) (*italics in original*). Applicants seek waiver or clarification, with respect to the Control Transaction and the Transaction Elements, to limit the definition of "applicant carriers" to CSXT, NSR, and CRC, and any other Board-regulated rail carriers in which either CSXC, NSC, or CRI now holds, directly or indirectly, a majority interest (i.e., an interest greater than 50%). CSX/NS-10 at 14-16 and 34. The requested waiver or clarification would exclude from the definition of "applicant

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<sup>9</sup> We agree that the transfer of the Streator line from Conrail to NS should be considered in the lead docket. See Decision No. 4, slip op. at 7 n.16. As previously noted, however, the transfer of the Fort Wayne line will be considered in a separate sub-docket. In our view, the transfer of the Streator line is a Transaction Element, but the transfer of the Fort Wayne line is not a Transaction Element.

<sup>10</sup> Similar relief has been granted in prior cases. See *Norfolk Southern Corporation and Norfolk Southern Railway Company--Control--Conrail Inc. and Consolidated Rail Corporation*, STB Finance Docket No. 33286, Decision No. 5 (STB served Feb. 21, 1997) (*NS/CRC No. 5*, slip op. at 4); *CSX Corporation and CSX Transportation, Inc.--Control and Merger--Conrail Inc. and Consolidated Rail Corporation*, STB Finance Docket No. 33220, Decision No. 7 (STB served Jan. 24, 1997) (*CSX/CRC No. 7*, slip op. at 3); *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 Grande Western Railroad Company*, Finance Docket No. 32760, Decision No. 3 (ICC served Sept. 5, 1995) (*UP/SP No. 3*, slip op. at 1-2); *Union Pacific Corporation, Union Pacific Railroad Company and Missouri Pacific Railroad Company--Control--Chicago and North Western Holdings Corp. and Chicago and North Western Transportation Company*, Finance Docket No. 32133, Decision No. 3 (ICC served Oct. 26, 1992) (*UP/CNW No. 3*, slip op. at 1-2).



carriers": any rail carrier subsidiary not subject to our jurisdiction;<sup>11</sup> any rail carrier subsidiary subject to our jurisdiction but in which neither CSXC, nor NSC, nor CRI now holds, directly or indirectly, a majority interest;<sup>12</sup> and any carrier subsidiary that is not a rail carrier.<sup>13</sup>

We will grant the waiver or clarification sought by applicants, by confirming that, with respect to the Control Transaction and the Transaction Elements, the term "applicant carriers" refers to CSXT, NSR, and CRC, and any other Board-regulated rail carrier in which CSXC, NSC, or CRI, respectively, now holds, directly or indirectly, a majority interest. We agree with applicants that the burdens of including financial and other data with respect to carriers other than those described in the preceding sentence would be unjustified because these data would not contribute to our evaluation of the primary application. We have no need for these data with respect to rail carrier subsidiaries not subject to our jurisdiction.<sup>14</sup> We similarly have no need for these data with respect to rail carrier subsidiaries in which neither CSXC, nor NSC, nor CRI has (directly or indirectly) a majority interest.<sup>15</sup> Furthermore, we have no need for these data with respect to carrier subsidiaries other than rail carriers because under the ICC Termination Act of 1995, Pub. L. No. 104-88, 109 Stat. 803 (ICCTA), regulatory approval is no longer required for common control of rail carriers together with motor and water carriers.<sup>16</sup>

<sup>11</sup> Applicants indicate that this exclusion has reference to rail carrier subsidiaries located entirely in foreign countries.

<sup>12</sup> Applicants indicate that this exclusion has reference to a number of terminal, switching, or shortline railroads which are operated and managed independently of CSXT, NSR, and CRC, and which maintain their own records.

<sup>13</sup> Applicants indicate that this exclusion has reference to: American Commercial Barge Line Company (ACBL), CSX Intermodal, Inc. (CSX Intermodal), Customized Transportation, Inc. (Customized Transportation), Sea-Land Service, Inc. (Sea-Land), Conrail Direct, Inc. (Conrail Direct), North American Van Lines (NAVL), and Triple Crown Services Company (Triple Crown). ACBL, an indirect wholly owned CSXC subsidiary, is a water carrier. CSX Intermodal and Customized Transportation, both indirect wholly owned CSXC subsidiaries, have motor carrier authority. Sea Land, a direct wholly owned CSXC subsidiary, is an ocean carrier subject to the authority of the Federal Maritime Commission. Conrail Direct, an indirect wholly owned CRI (but not CRC) subsidiary, is a motor carrier with broker authority; its applications for freight forwarder and motor contract carrier authority are pending before the Federal Highway Administration. NAVL, a direct NSC subsidiary, is a motor carrier. Triple Crown, which is owned indirectly by NSC (a 50% interest) and CRI (also a 50% interest), is an intermodal carrier that also holds motor carrier authority.

<sup>14</sup> Similar relief has been granted in prior cases. See *NS/CRC No. 5*, slip op. at 5; *CSX/CRC No. 7*, slip op. at 4.

<sup>15</sup> Similar relief with respect to rail carrier subsidiaries in which no applicant carrier had a majority interest has been granted in prior cases, even with respect to those subsidiaries in which the applicant carriers together held a combined interest greater than 50%. See *NS/CRC No. 5*, slip op. at 5 n.12; *CSX/CRC No. 7*, slip op. at 4 n.10; *UP/SP No. 3*, slip op. at 2-3; *UP/CNW No. 3*, slip op. at 2; *Burlington Northern Inc. and Burlington Northern Railroad Company--Control and Merger--Santa Fe Pacific Corporation and The Atchison, Topeka and Santa Fe Railway Company*, Finance Docket No. 32549, Decision No. 3 (ICC served Oct. 3, 1994) (*BN/SF No. 3*, slip op. at 2-3).

<sup>16</sup> Similar relief was granted even in cases decided prior to the enactment of ICCTA, during the time when regulatory approval was required for common control of rail carriers together with motor and water carriers. See *UP/SP No. 3*, slip op. at 3-4; *BN/SF No. 3*, slip op. at 3; *UP/CNW No. 3*, slip op. at 2-3. See also *NS/CRC No. 5*, slip op. at 6 n.13; *CSX/CRC No. 7*,

(continued...)

We expect, however, that all such excluded carriers will be identified either in the corporate chart required by 49 CFR 1180.6(b)(6) or in the statement of direct or indirect intercorporate or financial relationships required by 49 CFR 1180.6(b)(8). We also expect that applicants will fully describe, in the primary application, the effects, if any, of the Control Transaction and the Transaction Elements on the operations of the excluded carriers. We further expect that applicants will file, along with the primary application, either an application for approval or a petition for exemption with respect to control by CSXC or NSC of any Board-regulated rail carrier in which CSXC or NSC, respectively, does not now hold, directly or indirectly, a majority interest but will hold such an interest if the primary application is approved and control of Conrail consummated.<sup>17</sup>

**SUBMISSION OF CONSOLIDATED DATA.** Applicants request clarification that, for the purposes of the Control Transaction and the Transaction Elements, information and data pertaining to CSXT, NSR, or CRC (or CSXC, NSC, or CRI) that are required by the Railroad Consolidation Procedures may be submitted on a consolidated basis. Applicants have in mind: that, with the one exception noted in the next paragraph, information and data pertaining to CSXT (or CSXC) and its majority-owned rail subsidiaries would be submitted on a consolidated basis; that information and data pertaining to NSR (or NSC) and its majority-owned rail subsidiaries would likewise be submitted on a consolidated basis; and that information and data pertaining to CRC (or CRI) and its majority-owned rail subsidiaries would similarly be submitted on a consolidated basis, except insofar as such information and data are, pursuant to the relief granted in this decision, submitted with and/or reflected in the information and data pertaining either to the CSX entities or the NS entities, as appropriate. CSX/NS-10 at 16-17 and 34. Applicants indicate that, with the one exception noted in the next paragraph, CSX, NS, and Conrail can provide consolidated information for all of their majority-owned subsidiaries. We agree that separate information regarding majority-owned subsidiaries is not necessary for our consideration and disposition of the primary application, and that use of consolidated information and data will avoid the unnecessary burden and redundancy of preparing and providing the information and data on a carrier-by-carrier basis. We will therefore permit the filing of information and data pertaining to each of the applicant carriers (including their majority-owned subsidiaries) on a consolidated basis.<sup>18</sup>

Applicants indicate that CSXT obtained authority to control The Indiana Rail Road Company (INRD), a majority-owned subsidiary, in November 1996. Applicants request that, to the extent CSX's consolidated information/data does not include information/data relating to INRD, CSXT and CSXC be permitted to provide any unconsolidated information/data that may be called for with respect to INRD in footnotes to the consolidated CSXT or CSXC information/data. This request is reasonable, and we will therefore approve it.<sup>19</sup>

**CLASSIFICATION AND FORMAT OF EMPLOYEE IMPACT DATA.** Our regulations at 49 CFR 1180.6(a)(2)(v) require a discussion of the "effect of the proposed transaction upon applicant carriers' employees (by class or craft), the geographic points where the impact will occur, the time frame of the impact (for at least 3 years after consolidation), and whether any employee protection agreements have been reached." Because the regulations do

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<sup>16</sup>(...continued)  
slip op. at 5 n.11.

<sup>17</sup> The only such rail carrier identified in the CSX/NS-10 petition is the LD&RT, in which CSXT and CRC each hold a 50% interest.

<sup>18</sup> Similar relief has been granted in prior cases. See *NS/CRC No. 5*, slip op. at 6; *CSX/CRC No. 7*, slip op. at 5-6; *UP/SP No. 3*, slip op. at 4; *BN/SF No. 3*, slip op. at 3-4; *UP/CNW No. 3*, slip op. at 2.

<sup>19</sup> Similar relief has been granted in a prior case. See *CSX/CRC No. 7*, slip op. at 6.

not specify the "class or craft" to be used, applicants seek, with respect to the Control Transaction, confirmation that they may use the system of classification shown in attached Appendix A. CSX/NS-10 at 17-18. Applicants' proposal is adequate to provide the information we need, and we will therefore approve it.<sup>20</sup>

**BASE PERIOD DATA FOR LABOR-RELATED MATTERS.** Although applicants intend to use the year 1995 as the base year for their 49 CFR 1180.7 impact analyses, *see* Decision No. 2, slip op. at 2, they would prefer to use periods other than the year 1995 in connection with their 49 CFR 1180.6(a)(2)(v) labor impact analyses. Applicants therefore request, with respect to the Control Transaction, waiver or clarification of 49 CFR 1180.6(a)(2)(v) and 1180.7 to permit the use of periods other than the year 1995 as a base line for setting forth the impacts on rail carrier employees. CSX/NS-10 at 9 and 22-23. To create the base line for rail carrier employees not covered by collective bargaining agreements (CBAs), applicants wish to use figures from the most recent practicable month in the first half of 1997; that, applicants note, is a more recent period for which figures are available. To create the base line for rail carrier employees covered by CBAs, applicants wish to use figures from November 1996; that, applicants argue, is the most recent period for which figures are available and for which the figures would not be affected by seasonal fluctuations.

The Allied Rail Unions (ARU)<sup>21</sup> oppose the waiver or clarification sought by applicants with respect to employees covered by CBAs, and particularly with respect to employees covered by CBAs and represented by the BMWE. *See* ARU-4 (filed May 20, 1997). Late autumn and early winter, ARU argues, tend to be low points in maintenance-of-way employment; maintenance-of-way employees are regularly furloughed in the late autumn and early winter months because weather conditions are bad, because the programmed work of large production gangs often ends in late autumn, and because maintenance-of-way budgets tend to run out at the end of the calendar year. Use of employment figures for November, ARU therefore insists, would understate the number of persons affected by the Control Transaction. ARU adds that, if applicants really want to use a single month for a base line, a better candidate would be July 1996.

Applicants have moved to strike ARU-4, *see* CSX/NS-14 (filed May 22, 1997), on the ground that the ARU-4 pleading is not permitted by our Railroad Consolidation Procedures. *See*

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<sup>20</sup> Similar relief has been granted in prior cases. *See* NS/CRC No. 5, slip op. at 6; CSX/CRC No. 7, slip op. at 6; UP/SP No. 3, slip op. at 4-5; BN/SF No. 3, slip op. at 4; UP/CNW No. 3, slip op. at 3. In past cases, however, the parties seeking relief have sought confirmation both that they might use the system of classification shown in an attached Appendix A and also that, in presenting the required data, they might use the format presented in an attached Appendix B. *See, e.g.,* NS/CRC No. 5, slip op. at 6; CSX/CRC No. 7, slip op. at 6. Applicants in this proceeding have sought confirmation that they may use the system of classification shown in an attached Appendix A; they have not sought confirmation that they may use the format presented in an attached Appendix B (and no such appendix was attached to the CSX/NS-10 petition). We assume that the omission of an Appendix B was an inadvertent oversight, and, for this reason, we will, on our own initiative, confirm that applicants may use the format presented in the Appendix B attached to this decision. *See* NS/CRC No. 5, slip op. at 16 (the source for the Appendix B attached hereto).

<sup>21</sup> American Train Dispatchers Department/BLE; Brotherhood of Locomotive Engineers; Brotherhood of Maintenance of Way Employees (BMWE); Brotherhood of Railroad Signalmen; Hotel Employees and Restaurant Employees International Union; International Brotherhood of Boilermakers, Iron Ship Builders, Blacksmiths, Forgers and Helpers; International Brotherhood of Electrical Workers; The National Conference of Firemen & Oilers/SEIU; and Sheet Metal Workers' International Association.



49 CFR 1180.4(f)(3) (reply to a petition for waiver generally not permitted).<sup>22</sup> Applicants have also addressed, in their CSX/NS-14 pleading, the merits of ARU's argument. Applicants insist that the November 1996 figures provide the most accurate basis for formulating the required labor impact analysis for rail carrier employees covered by CBAs. Applicants add that, for all crafts, Conrail's employment figures for July 1996 "were essentially the same as for November 1996 (some slightly lower, some slightly higher)." CSX/NS-14 at 4. Applicants therefore contend that use of November 1996, as opposed to July 1996, as a base line for rail carrier employees covered by CBAs would not result in an understatement of the difference between employment before the proposed transaction and employment thereafter. Applicants claim that use of calendar year 1995 figures, however, would not provide the most accurate projection of the impact of the transaction on Conrail's employees because such figures include the effect of seasonal furloughs and fail to reflect post-1995 changes in employment levels that were unrelated to the proposed transaction.

The waiver or clarification sought by applicants is not reasonable, neither with respect to employees covered by CBAs nor with respect to employees not so covered,<sup>23</sup> and we shall therefore require that applicants use the year 1995 as the base line for setting forth the impacts the Control Transaction and the Transaction Elements will have on rail carrier employees. Applicants have failed to justify that the use of employment figures for a single month is appropriate to eliminate seasonal fluctuations; as between employment figures for an entire year and employment figures for a single month, the latter are more likely, not less likely, to be distorted by seasonal (or other) fluctuations. Applicants may, if they are so inclined, supplement 1995 data with data demonstrating employment reductions in 1996 and/or 1997.<sup>24</sup>

**FORM 10-K'S, FORM S-14'S, AND ANNUAL REPORTS.** Under our regulations at 49 CFR 1180.6(b)(1), (2), and (4), applicant carriers must submit their most recent Form 10-K and Form S-14 (now S-4) filings with the Securities and Exchange Commission (SEC) as Exhibits 6 and 7, respectively, and they must submit their two most recent annual reports as Exhibit 9. Furthermore, they are also required to submit any Form 10-K's, Form S-4's, and annual or quarterly reports to stockholders issued during the pendency of the proceeding. Applicants request, with respect to the Control Transaction, a waiver or clarification of these requirements as indicated in the next three paragraphs. CSX/NS-10 at 18-19.

1. Applicants request waiver or clarification of 49 CFR 1180.6(b)(1) to permit satisfaction of the Form 10-K requirement by the filing of the most recent Form 10-K's for CSXC, CSXT, NSC, NSR, CRI, and CRC, together with any Form 10-K's issued by these entities during the course of the proceeding. Applicants note that, although two of CSXT's majority-owned carrier subsidiaries filed Form 10-K's for 1995 and one filed a Form 10-K for 1996, none of NSR's or CRC's majority-owned carrier subsidiaries did so in 1995 or 1996; and applicants contend that no useful purpose would be served by requiring such additional reports.

<sup>22</sup> In view of the importance of the issue raised in the late-filed ARU-4 pleading, and because acceptance of that pleading will not delay the issuance of this decision, we will grant ARU's request for leave to file that pleading, and we will deny the CSX/NS-14 motion to strike.

<sup>23</sup> The cases cited by applicants, *see* CSX/NS-10 at 23 n.23, are not on point. *See* ARU-4 at 4 (discussing these cases in somewhat greater detail than provided by applicants).

<sup>24</sup> Moreover, the "rail carrier employees affected by the proposed transaction," whose interests we must consider in our decision on the primary application, *see* 49 U.S.C. 11324(b)(4), include not only the rail carrier employees of Conrail but also the rail carrier employees of CSX and NS. But we note that the CSX/NS-14 pleading says nothing about the impact of the transaction on employees of CSX and NS. We expect that applicants will include, in the primary application, evidence respecting the projected impact of the Control Transaction on rail carrier employees of all of the applicant carriers.



as data for the CSXT subsidiaries are included in the CSX consolidated data. Applicants' request is reasonable, and we will therefore grant it.<sup>25</sup>

2. Applicants request waiver of the requirement in 49 CFR 1180.6(b)(2) that applicant carriers file past Form S-4's. Applicants indicate that CSXC filed a form S-4 in January 1997 in connection with its now abandoned unilateral effort to acquire control of CRI, that CRC last filed a Form S-4 in 1993, and that no other applicant carrier has filed a Form S-4 or S-14 for at least 5 years. Applicants contend that financial information relevant to this proceeding will be contained in the applicants' various Form 10-K's and annual reports, as well as in the SEC Schedule 14D-1's relating to the tender offers of CSX and NS for the stock of CRI, and in amendments to those filings. Given the circumstances, we conclude that the requested waiver will not have a significant impact on our review of the proposed transaction. We will therefore grant the requested waiver of 49 CFR 1180.6(b)(2) as respects past Form S-4's and Form S-14's. We note, however, that applicants have not requested, and that we are not granting, a waiver of 49 CFR 1180.6(b)(2) as respects Form S-4's issued during the pendency of this proceeding.<sup>26</sup>

3. Applicants request waiver of the requirement in 49 CFR 1180.6(b)(4) that the primary application include each applicant carrier's two most recent annual reports to stockholders. Applicants note: that CSXT does not issue annual reports (although certain majority-owned carrier subsidiaries of CSXT do issue annual reports); and that no NS or Conrail majority-owned carrier subsidiary other than NSR issues annual reports. Applicants request that they be allowed to submit, in lieu of the annual reports called for by 49 CFR 1180.6(b)(4): the two most recent annual reports issued by CSXC, NSC, NSR, and CRI; and any annual or quarterly reports issued by CSXC, NSC, NSR, and CRI during the duration of the proceeding. This request is reasonable, and we will therefore grant it.<sup>27</sup>

**CORPORATE INFORMATION AND REPORTS.** The Railroad Consolidation Procedures require applicants to submit information respecting changes in control (Exhibit 8), a corporate chart (Exhibit 11), and certain information respecting intercorporate or financial relationships not disclosed elsewhere in the primary application. 49 CFR 1180.6(b)(3), (6), and (8), respectively. Applicants request, with respect to the Control Transaction, that we authorize omission or modification of the particular requirements indicated in the next three paragraphs. CSX/NS-10 at 19-21.

1. Section 1180.6(b)(3) requires applicants to list, among other things, any change in officers not indicated on the most recent Form R-1. Applicants note that CSXT, NSR, and CRC, and their subsidiaries, have a large number of officer positions that could arguably come within the scope of this requirement, and applicants contend that compiling this list would be burdensome and that the list itself would be of little or no value in this proceeding. Applicants therefore request that they be required to list only the principal 6 officers of CSXT, NSR, CRC,

<sup>25</sup> Similar relief has been granted in prior cases. See *NS/CRC No. 5*, slip op. at 7; *CSX/CRC No. 7*, slip op. at 6-7; *UP/SP No. 3*, slip op. at 5; *UP/CNW No. 3*, slip op. at 3-4.

<sup>26</sup> Similar relief has been granted in prior cases. See *NS/CRC No. 5*, slip op. at 7; *CSX/CRC No. 7*, slip op. at 7; *UP/SP No. 3*, slip op. at 5; *BN/SF No. 3*, slip op. at 4-5; *UP/CNW No. 3*, slip op. at 4.

<sup>27</sup> Similar relief has been granted in prior cases. See *NS/CRC No. 5*, slip op. at 7 (although we apparently erred in indicating in that decision that no NS majority-owned carrier subsidiary issues annual reports); *CSX/CRC No. 7*, slip op. at 7; *UP/SP No. 3*, slip op. at 6; *BN/SF No. 3*, slip op. at 4-5; *UP/CNW No. 3*, slip op. at 4.

and their majority-owned subsidiaries. We believe that the proposed submissions will provide sufficient information, and we will therefore grant the request.<sup>28</sup>

2. Section 1180.6(b)(6) requires applicants to submit a corporate chart which includes, for each company identified in the chart, a statement indicating any directors or officers which that company has in common with any other company on the chart. Applicants seek a partial waiver or clarification of this requirement. In order to present the information on the corporate chart in a concise and intelligible manner, applicants propose to list only those officers and directors who are either: (1) common to CSXC (including majority-owned subsidiaries) and CRI (including majority-owned subsidiaries); (2) common to NSC (including majority-owned subsidiaries) and CRI (including majority-owned subsidiaries); (3) common to CSXC (including majority-owned subsidiaries) and NSC (including majority-owned subsidiaries); or (4) common to (a) either CSXC, NSC, CRI, or any of their majority-owned subsidiaries, on the one hand, and (b) any carrier outside the CSX, NS, and Conrail corporate families, on the other hand. This request appears reasonable because our primary interests concern the relationship between the transportation activities of the applicant carriers and our immediate informational needs will be met by the information applicants propose to file. We will therefore permit applicants to indicate common officers or directors as they propose.<sup>29</sup>

3. Section 1180.6(b)(8) requires applicants to disclose intercorporate or financial relationships between applicant carriers or affiliated persons and other carriers or any persons affiliated with them. Applicants request waiver or clarification that this requirement pertains only to significant intercorporate or financial relationships. Applicants propose to describe only those relationships involving ownership by applicants or their affiliates of more than 5% of a non-affiliated carrier's stock, including those relationships in which a group affiliated with applicants owns more than 5% of a non-affiliated carrier's stock. This proposal will not impede our review of the financial and competitive impacts of the Control Transaction. Accordingly, we will grant it.<sup>30</sup>

**FINANCIAL INFORMATION.** Our regulations require the submission of: *pro forma* balance sheets, 49 CFR 1180.9(a); *pro forma* income statements, 49 CFR 1180.9(b); and statements of sources and application of funds, 49 CFR 1180.9(c). Applicants request, with respect to the Control Transaction, waiver or clarification of these requirements to permit them to reflect Conrail financial information in the respective statements of CSX and NS, as appropriate; applicants would prefer not to file separate statements for Conrail. CSX/NS-10 at 21-22. Applicants acknowledge, of course, that Conrail and its subsidiaries will continue to exist as separate entities following the acquisition of control of Conrail by CSX and NS, but applicants maintain that the ultimate transportation and other economic effects of the Control Transaction (including gains and losses from continuing Conrail operations) will be fully reflected in the respective statements of CSX and NS. Those statements, applicants contend, will provide the most accurate reporting of the effects of the Control Transaction.

<sup>28</sup> Similar relief has been granted in prior cases. See *NS/CRC No. 5*, slip op. at 8; *CSX/CRC No. 7*, slip op. at 8; *UP/SP No. 3*, slip op. at 6; *BN/SF No. 3*, slip op. at 5; *UP/CNW No. 3*, slip op. at 4.

<sup>29</sup> Similar relief has been granted in prior cases. See *NS/CRC No. 5*, slip op. at 8; *CSX/CRC No. 7*, slip op. at 8; *UP/SP No. 3*, slip op. at 6; *BN/SF No. 3*, slip op. at 5; *UP/CNW No. 3*, slip op. at 4.

<sup>30</sup> Similar relief has been granted in prior cases. See *NS/CRC No. 5*, slip op. at 8; *CSX/CRC No. 7*, slip op. at 8; *UP/SP No. 3*, slip op. at 6; *BN/SF No. 3*, slip op. at 5; *UP/CNW No. 3*, slip op. at 4-5.

The Port Authority of New York and New Jersey (the Port Authority) contends that applicants should be required to file separate financial statements for Conrail and its subsidiaries. See NYNJ-3 (filed May 7, 1997). The Port Authority argues: that if, as applicants intend, Conrail is kept in place as the only carrier serving the New York/New Jersey metropolitan area (the NY/NJ Metro Area), there may be a lessened incentive to construct additional rail infrastructure in that area; that the incentives of CSX and NS to invest in Conrail rail facilities in the NY/NJ Metro Area will depend, in part, upon the profitability of Conrail and the return Conrail will provide on any such investment; and that the question of what, if any, investment CSX and NS plan to have Conrail make in NY/NJ Metro Area rail facilities will be critical in determining whether other parties, including the Port Authority, file "inconsistent" applications seeking to acquire Conrail assets located in the NY/NJ Metro Area.<sup>31</sup>

Applicants have moved to strike NYNJ-3, see CSX/NS-13 (filed May 16, 1997), on the ground that the NYNJ-3 pleading is not permitted by our Railroad Consolidation Procedures. See 49 CFR 1180.4(f)(3) (reply to a petition for waiver generally not permitted).<sup>32</sup> Applicants have also addressed, in their CSX/NS-13 pleading, the merits of the Port Authority's argument. Applicants insist that the creation of separate Conrail *pro forma* statements would entail a complex and duplicative effort that would serve no useful purpose. And, applicants add, the creation of separate Conrail *pro forma* statements would not address the Port Authority's concerns because such statements would reflect the consolidated financial activities of Conrail, Sub A, and Sub B over the entire physical plant of Conrail, Sub A, and Sub B, not the particularized financial activities in the NY/NJ Metro Area (which, applicants note, will be but one of several areas to which both CSXT and NSR will have access).

We will grant the relief requested by applicants, by confirming that, in the balance sheets, income statements, and statements of sources and application of funds required by 49 CFR 1180.9(a), (b), and (c), respectively, applicants may reflect information respecting Conrail in the statements of CSX and NS, as appropriate. We agree that, because applicants envision that Conrail will cease to be an independent rail carrier, separate statements for Conrail on a freestanding basis would not be meaningful and would not contribute to the analysis of the Control Transaction. Applicants should be advised, however, that we expect that the primary application will fully describe the post-transaction Conrail, its structure, its management, and its operations, and, in particular, will address the concerns raised by the Port Authority (the nature of applicants' operations in the NY/NJ Metro Area, the competitive and economic effect of those operations, the investment CSX and NS anticipate making in the NY/NJ Metro Area, and the level of competition that the NY/NJ Metro Area will experience following the proposed transaction). Applicants should be further advised that we also expect that the primary application will fully explain the ultimate disposition of all of Conrail's assets and liabilities (including all revenues and expenses associated with those assets and liabilities), and will also fully explain how Conrail's debt is to be serviced.

**MARKET ANALYSES AND OPERATIONAL DATA.** Section 1180.7 requires impact analyses showing the anticipated effects of the proposed transaction, and Section 1180.8 requires a summary of proposed operating plan changes, based on the impact analyses. Applicants note that, if we approve and applicants effectuate the Control Transaction, CSX and NS will be, immediately following the Control Date, jointly in control of the entire, undivided

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<sup>31</sup> What the Port Authority refers to as an "inconsistent" application is probably more accurately described as a "responsive" application. See 49 CFR 1180.3(h) (definition of responsive application), as recently amended in *Railroad Consolidation Procedures--Modification of Fee Policy*, STB Ex Parte No. 556, 62 FR 9714, 9717 (Mar. 4, 1997) and 62 FR 28375 (May 23, 1997) (*Railroad Consolidation Fees*).

<sup>32</sup> We will deny the CSX/NS-13 motion to strike, and will accept the NYNJ-3 pleading in the interest of having a more complete record on this matter.

Conrail. Applicants add, however, that joint control of an undivided Conrail will continue only until applicants are able to implement the Transaction Elements and thus effect the Division, and applicants insist that it would be misleading and irrelevant to present impact analyses and related information on the basis of an undivided Conrail jointly controlled by CSX and NS. Applicants therefore request, with respect to the Control Transaction, that they be allowed to submit: a separate set of impact analyses and a separate operating plan regarding each post-acquisition system (i.e., one set of analyses and plans for the post-acquisition CSX system, and another set of analyses and plans for the post-acquisition NS system); and, either as part of these separate sets or in addition thereto, appropriate information about the continuing post-Division operations of Conrail. CSX/NS-10 at 23-24. This request is reasonable, and we will therefore approve it.

**INCORPORATION OF THE TRANSACTION ELEMENTS INTO THE PRIMARY APPLICATION.** Applicants request, with respect to each of the Transaction Elements: that they not be required to file separate directly related applications for each such element,<sup>33</sup> but, rather, that they be allowed to incorporate in the primary application information otherwise required to be submitted in such separate directly related applications. CSX/NS-10 at 11 and 34-36.<sup>34</sup>

We agree with applicants that the Transaction Elements should not be considered in isolation. The Division is an essential feature of the Control Transaction because CSX and NS, in seeking to acquire control of Conrail, intend, for the most part, to divide it up, not to continue it in its entirety as a stand-alone entity; the Transaction Elements are simply technical descriptions of the means by which the Division will be effectuated; the transportation and competitive effects of the Transaction Elements can be evaluated only in light of the entire integrated transaction, based on the same record that we will consider in addressing the Control Transaction itself; and applicants have promised that, in seeking approval of the Control Transaction in the primary application, they will provide a full description of the entire transaction, including the Division of CRC's assets, the operation of those assets by CSX and NS, and the continuing operations of what will be a much-reduced Conrail. We agree that no useful purpose would be served by requiring applicants to file separate applications for each of the Transaction Elements, and we therefore confirm that, with the one exception noted in the next paragraph and taking into account the waivers, clarifications, and related relief provided in this decision, applicants will not be required to file, with respect to the Transaction Elements, separate directly related applications, but may, if they so choose, incorporate in the primary application information that would otherwise have been submitted in such separate directly related applications.

The one exception concerns the transfer of the Fort Wayne line from NSR to CRC. As indicated in Decision No. 4, slip op. at 6-7, and referenced above, that transfer is neither integral to nor an inseparable part of the Control Transaction,<sup>35</sup> and, for this reason, it will be considered not in the lead docket but rather in a directly related sub-docket, for which NSR and CRC must file a separate directly related application. Because the transfer of the Fort Wayne line from NSR

<sup>33</sup> See 49 CFR 1180.4(c)(2)(vi), as recently amended in *Railroad Consolidation Fees*, 62 FR at 9717: "Applicant shall file concurrently all directly related applications, e.g., those seeking authority to construct or abandon rail lines, obtain terminal operations, acquire trackage rights, etc."

<sup>34</sup> This request applies only to those interrelated aspects of the Control Transaction that applicants refer to as the Transaction Elements. For this reason, this request does not apply to directly related construction projects or directly related abandonments. CSX/NS-10 at 34 n.41.

<sup>35</sup> "The division of CRC's assets does not inherently require that anything be done with respect to a line that is not, at the present time, a CRC asset." Decision No. 4, slip op. at 7.



Conrail. Applicants add, however, that joint control of an undivided Conrail will continue only until applicants are able to implement the Transaction Elements and thus effect the Division, and applicants insist that it would be misleading and irrelevant to present impact analyses and related information on the basis of an undivided Conrail jointly controlled by CSX and NS. Applicants therefore request, with respect to the Control Transaction, that they be allowed to submit: a separate set of impact analyses and a separate operating plan regarding each post-acquisition system (i.e., one set of analyses and plans for the post-acquisition CSX system, and another set of analyses and plans for the post-acquisition NS system); and, either as part of these separate sets or in addition thereto, appropriate information about the continuing post-Division operations of Conrail. CSX/NS-10 at 23-24. This request is reasonable, and we will therefore approve it.

**INCORPORATION OF THE TRANSACTION ELEMENTS INTO THE PRIMARY APPLICATION.** Applicants request, with respect to each of the Transaction Elements: that they not be required to file separate directly related applications for each such element,<sup>33</sup> but, rather, that they be allowed to incorporate in the primary application information otherwise required to be submitted in such separate directly related applications. CSX/NS-10 at 11 and 34-36.<sup>34</sup>

We agree with applicants that the Transaction Elements should not be considered in isolation. The Division is an essential feature of the Control Transaction because CSX and NS, in seeking to acquire control of Conrail, intend, for the most part, to divide it up, not to continue it in its entirety as a stand-alone entity; the Transaction Elements are simply technical descriptions of the means by which the Division will be effectuated; the transportation and competitive effects of the Transaction Elements can be evaluated only in light of the entire integrated transaction, based on the same record that we will consider in addressing the Control Transaction itself; and applicants have promised that, in seeking approval of the Control Transaction in the primary application, they will provide a full description of the entire transaction, including the Division of CRC's assets, the operation of those assets by CSX and NS, and the continuing operations of what will be a much-reduced Conrail. We agree that no useful purpose would be served by requiring applicants to file separate applications for each of the Transaction Elements, and we therefore confirm that, with the one exception noted in the next paragraph and taking into account the waivers, clarifications, and related relief provided in this decision, applicants will not be required to file, with respect to the Transaction Elements, separate directly related applications, but may, if they so choose, incorporate in the primary application information that would otherwise have been submitted in such separate directly related applications.

The one exception concerns the transfer of the Fort Wayne line from NSR to CRC. As indicated in Decision No. 4, slip op. at 6-7, and referenced above, that transfer is neither integral to nor an inseparable part of the Control Transaction,<sup>35</sup> and, for this reason, it will be considered not in the lead docket but rather in a directly related sub-docket, for which NSR and CRC must file a separate directly related application. Because the transfer of the Fort Wayne line from NSR

<sup>33</sup> See 49 CFR 1180.4(c)(2)(vi), as recently amended in *Railroad Consolidation Fees*, 62 FR at 9717: "Applicant shall file concurrently all directly related applications, e.g., those seeking authority to construct or abandon rail lines, obtain terminal operations, acquire trackage rights, etc."

<sup>34</sup> This request applies only to those interrelated aspects of the Control Transaction that applicants refer to as the Transaction Elements. For this reason, this request does not apply to directly related construction projects or directly related abandonments. CSX/NS-10 at 34 n.41.

<sup>35</sup> "The division of CRC's assets does not inherently require that anything be done with respect to a line that is not, at the present time, a CRC asset." Decision No. 4, slip op. at 7.



to CRC is not, in our view, a Transaction Element, the relief granted with respect to the Transaction Elements does not apply to that transfer.<sup>36</sup>

**OPINION OF COUNSEL.** Section 1180.6(a)(4), as recently amended in *Railroad Consolidation Fees*, 62 FR at 9717, provides that an application filed under 49 U.S.C. 11323 shall include, among other things, "[a]n opinion of applicants' counsel that the transaction meets the requirements of the law and will be legally authorized and valid, if approved by the Board. This should include specific references to any pertinent provisions of applicants' bylaws or charter or articles of incorporation."

Applicants indicate that, with respect to the Control Transaction, they will satisfy the 49 CFR 1180.6(a)(4) opinion of counsel requirement by submitting opinions of CSX's and NS's counsel. CSX/NS-10 at 36. An opinion of Conrail's counsel will not be submitted with respect to the Control Transaction because a footnote to 49 CFR 1180.6(a)(4) provides that, in a control transaction, an opinion of counsel is not required for the party sought to be controlled. 49 CFR 1180.6(a)(4) n.2.

Applicants seek waiver or clarification that, with respect to the Transaction Elements, they may satisfy the opinion of counsel requirement of 49 CFR 1180.6(a)(4) by submitting either: (i) the opinions of CSX's and NS's counsel; or (ii) the opinions of CSX's, NS's, and Conrail's counsel. CSX/NS-10 at 36-37.

We think that the better approach would be to submit: an opinion of CSX's counsel respecting the Control Transaction, the Transaction Elements, and any directly related applications, petitions, and/or notices, to the extent such transaction, elements, and directly related matters involve CSX; an opinion of NS's counsel respecting the Control Transaction, the Transaction Elements, and any directly related applications, petitions, and/or notices to the extent such transaction, elements, and directly related matters involve NS; and an opinion of Conrail's counsel respecting the Transaction Elements and any directly related applications, petitions, and/or notices, to the extent such elements and directly related matters involve Conrail. The CSX and NS opinions should be in substantially this form: "It is my opinion that the Control Transaction, including the Transaction Elements and any directly related applications, petitions, and/or notices, to the extent such transaction, elements, and directly related matters involve [CSX or NS], meet the requirements of the law, are within the corporate powers of [the various CSX or NS entities], and will be legally authorized and valid, if approved by the Surface Transportation Board." The Conrail opinion should be in substantially this form: "It is my opinion that the Transaction Elements and any directly related applications, petitions, and/or notices, to the extent such elements and directly related matters involve Conrail, meet the requirements of the law, are within the corporate powers of [the various Conrail entities], and will be legally authorized and valid, if approved by the Surface Transportation Board."

**REQUIREMENTS OF PART 1150, SUBPART A.** Applicants indicate that, because the rail lines to be acquired by Sub A and Sub B will be operated as integral parts of the CSX and NS systems, respectively, they intend to seek, in the primary application: (i) authorization for the Sub A/Sub B Acquisitions under 49 U.S.C. 11323; and (ii) a declaratory order that 49 U.S.C. 10901 is not applicable to the Sub A/Sub B Acquisitions. Applicants add, however, that they

<sup>36</sup> Our references to separate directly related "applications" embrace, within an expanded interpretation of the word "application," both exemption petitions and exemption notices. The transfer of the Fort Wayne line from NSR to CRC cannot properly be subject to an exemption notice, *see* 49 CFR 1180.2(d) (this transfer does not qualify for any existing class exemption). The transfer of the Fort Wayne line, however, may or may not properly be subject to an exemption petition, *see* 49 CFR part 1121, as revised in *Expedited Procedures For Processing Rail Rate Reasonableness, Exemption and Revocation Proceedings*, STB Ex Parte No. 527, 61 FR 52710, 52714 (Oct. 8, 1996) (*Expedited Procedures*).

will include in the primary application, as a precaution, a backup request for authorization for the Sub A/Sub B Acquisitions under 49 U.S.C. 10901. CSX/NS-10 at 37.

Applicants request waiver or clarification, CSX/NS-10 at 11 (lines 10-13),<sup>37</sup> and we hereby confirm, that, subject to the exceptions referenced in the next paragraph, the informational requirements of 49 CFR part 1150, subpart A (which will govern the backup request for authorization under 49 U.S.C. 10901) will be satisfied if, and to the extent that, the informational requirements of 49 CFR part 1180, subpart A (which will govern the request for authorization under 49 U.S.C. 11323) are satisfied.

As applicants note, however, a few provisions of 49 CFR part 1150, subpart A impose informational requirements that have no precise analogues in 49 CFR part 1180, subpart A. With respect to these few provisions, and also with respect to the otherwise applicable procedural requirements of 49 CFR part 1150, subpart A, applicants seek waiver or clarification as indicated in the next eight paragraphs.

1. Section 1150.3(d) requires applicants to submit a statement indicating any affiliation by stock ownership or otherwise with any industry to be served by the acquired rail line; and section 1150.3(e) requires applicants to submit information regarding the date and place of organization of applicants, applicable State statutes, and a brief description of the nature and objectives of applicants. Applicants, noting that they need not submit this information in the primary application in connection with the Control Transaction, request waiver or clarification that this information is not required for the Board's evaluation of the Sub A/Sub B Acquisitions. CSX/NS-10 at 38. The request is reasonable (we agree that this information is not required in this context), and we will therefore approve it.

2. Section 1150.3(f)(2) requires applicants to submit, as an exhibit, any resolution of the stockholders or directors authorizing the proposal. Applicants, noting that they need not submit this information in the primary application in connection with the Control Transaction, indicate that they will submit: opinions of counsel, as required by 49 CFR 1180.6(a)(4); copies of the acquisition agreements, as required by 49 CFR 1180.6(a)(7)(ii); and, subject to the waivers granted in this decision, various financial filings, as required by 49 CFR 1180.6(b)(1), (2), and (4). Applicants seek waiver or clarification that this information will be sufficient to satisfy the requirements of 49 CFR 1150.3(f)(2). CSX/NS-10 at 38-39. We agree that this information will be sufficient for this purpose, and we will therefore grant the requested waiver or clarification.

3. Section 1150.4(e) requires applicants to submit, among other things, a list of the counties and cities to be served under the proposal. Applicants indicate that they will provide a list in the primary application in connection with the Control Transaction, as required by 49 CFR 1180.6(a)(5), of the States (but not the counties and cities) in which the applicant carriers' property is located. Applicants contend that, given the size of the networks that CSX, NS, and Conrail operate, compilation of a list of counties and cities would be burdensome to the applicants and of little value to the Board. Applicants accordingly seek waiver or clarification that they may satisfy this requirement of 49 CFR 1150.4(e) through information responsive to 49 CFR 1180.6(a)(5). CSX/NS-10 at 39. This request is reasonable, and we will therefore approve it.

4. Section 1150.6(c) requires a present value determination of the full costs of the proposal. Applicants, noting that they need not submit this information in the primary application in connection with the Control Transaction, indicate that they will submit a variety of financial information that will permit the Board to evaluate the financial impact of the Sub A/Sub B Acquisitions on applicants, including the information required by 49 CFR 1180.6(a)(1)(i), (a)(1)(iv), (a)(2)(ii), and (a)(7)(i), as well as the information required by 49 CFR

<sup>37</sup> See also CSX/NS-10, Appendix B (referenced at CSX/NS-10 at 38).

1180.9. Applicants request waiver or clarification that this information will be sufficient to satisfy the requirements of 49 CFR 1150.6(c). CSX/NS-10 at 39. This request is reasonable, and we will therefore approve it.

5. Section 1150.9 requires a summary of the proposed transaction which will be used to provide the notice required by 49 CFR 1150.10(f). Applicants note: that they need not submit this summary in the primary application in connection with the Control Transaction; that, as required by 49 CFR 1180.6(a)(1), they will include, in the primary application, a description of the entire transaction proposed in the primary application; and that (as noted below) they are also requesting a waiver of 49 CFR 1150.10(f). Applicants therefore seek clarification that the information provided pursuant to 49 CFR 1180.6(a)(1) will satisfy 49 CFR 1150.9. CSX/NS-10 at 39-40. The clarification sought by applicants is reasonable, and we will therefore approve it.

6. Section 1150.10(e) requires: (i) service of the application upon the Governor (or Executive Officer), Public Service Commission, and Department of Transportation of each State in which any part of the involved properties are located; and (ii) within 2 weeks of the filing of the application, submission to the Board of a certificate of service indicating that all persons so designated have been served a copy of the application. Applicants seek waiver or clarification, CSX/NS-10 at 40, and we hereby confirm, that compliance with the service requirements of 49 CFR part 1180, subpart A, will constitute compliance with 49 CFR 1150.10(e). See 49 CFR 1180.4(c)(5)(i) (similar service requirement, but no explicit certification requirement).

7. Section 1150.10(f) provides: (i) that, within 2 weeks of filing an application, applicants must publish a summary thereof in a newspaper of general circulation in each county in which the lines to be affected by the transaction are located; and (ii) that the Board will, as soon as practicable, either publish the summary in the *Federal Register* or reject the application if it is incomplete. Applicants, noting that the proposed transaction has received extensive media coverage both in trade journals and newspapers of general circulation throughout the country, and noting also that Decision No. 2 constituted *Federal Register* publication of their CSX/NS-1 notice of intent, seek waiver or clarification that compliance with 49 CFR 1150.10(f) is not necessary. CSX/NS-10 at 40. The waiver or clarification sought by applicants is reasonable, and we will therefore approve it.

8. Sections 1150.10(g) and (h) provide a procedure for the processing of an application filed under 49 CFR part 1150, subpart A. Applicants request that compliance with this procedure be waived and that we evaluate the Sub A/Sub B Acquisitions under the procedural schedule adopted in connection with the primary application. CSX/NS-10 at 40-41. This request is reasonable, and we will therefore approve it.

**REVOCATION OF CERTAIN CLASS EXEMPTIONS.** Applicants intend to seek authorization under 49 U.S.C. 11323 for the Transaction Elements referred to as the Sub A/Sub B Acquisitions, the Continuance in Control, the Operating Arrangements, and the CSX/NS Trackage Rights; and, with respect to the Sub A/Sub B Acquisitions, applicants also intend to seek backup authorization under 49 U.S.C. 10901. Applicants note: that, with respect to the Sub A/Sub B Acquisitions, the Continuance in Control, and the Operating Arrangements, the 49 CFR 1180.2(d)(3) corporate family class exemption may be applicable; that, with respect to the CSX/NS Trackage Rights, the 49 CFR 1180.2(d)(7) trackage rights class exemption may be applicable; and that, with respect to the backup authorization of the Sub A/Sub B Acquisitions under 49 U.S.C. 10901, the 49 CFR 1150.31-35 noncarrier acquisition class exemption may be applicable. Applicants, however, would rather not seek authorization by exemption; applicants would prefer instead to seek authorization by approval. Applicants therefore request, with respect to the Sub A/Sub B Acquisitions, the Continuance in Control, the Operating Arrangements, and the CSX/NS Trackage Rights, and apparently also with respect to the Control Transaction, revocation of the 49 CFR 1180.2(d)(3), 1180.2(d)(7), and 1150.31-35 class exemptions. CSX/NS-10 at 11-12 and 41-42.



Applicants' revocation request is intended to eliminate any question respecting the coverage of the 49 U.S.C. 11321(a) immunity provision. This Board and its predecessor (the Interstate Commerce Commission) have "consistently taken the position that [the immunity provision] applies to authorizations by exemption [under what is now 49 U.S.C. 10502] as well as to approvals." *Delaware and Hudson Railway Co.--Lease and Trackage Rights--Springfield Terminal Ry. Company*, Finance Docket No. 30965 (Sub-Nos. 1 and 2) (ICC served Apr. 21, 1993) (slip op. at 2 n.4).<sup>38</sup> As applicants note, however, there is some authority to the contrary. *See Railway Labor Executives' Ass'n v. U.S.*, 987 F.2d 806, 813 (D.C. Cir. 1993).

The class exemption procedures were adopted in order to ease regulatory burdens. We realize, however, that, in certain instances, parties may find it easier or more desirable to seek authorization by approval rather than by exemption, and we see no reason to require applicants in the present proceeding to seek authorization by exemption. Under 49 U.S.C. 10502(d), we may revoke an exemption when we find that application in whole or in part of a provision of Title 49, Subtitle IV, Part A (49 U.S.C. 10101-11908) is necessary to carry out the transportation policy of 49 U.S.C. 10101. In prior cases, class exemptions have been revoked in similar circumstances. *See Rio Grande Industries, Inc., et al.--Purchase and Trackage Rights--Chicago, Missouri & Western Railway Company Between St. Louis, MO and Chicago, IL*, Finance Docket No. 31522, Waiver Decision (ICC served Aug. 18, 1989) (*RGI/CM&W Waiver*, slip op. at 4-5); *Rio Grande Industries, Inc., et al.--Purchase and Related Trackage Rights--Soo Line Railroad Company Line Between Kansas City, MO and Chicago, IL*, Finance Docket No. 31505, Decision No. 3 (ICC served Aug. 16, 1989) (*RGI/Soo*, slip op. at 4-5). Adhering to these prior cases, and recognizing that authorization by approval would eliminate any dispute respecting the applicability of the immunity provision to an authorization by exemption, we find that permitting applicants to seek authorization by approval here is necessary to carry out the transportation policy of 49 U.S.C. 10101. Accordingly, we will revoke the 49 CFR 1180.2(d)(3), 1180.2(d)(7), and 1150.31-35 class exemptions with respect to the Control Transaction and the Transaction Elements referred to as the Sub A/Sub B Acquisitions, the Continuance in Control, the Operating Arrangements, and the CSX/NS Trackage Rights, and we will allow applicants to seek authorization by approval as opposed to authorization by exemption.<sup>39</sup>

**APPLICABLE FEES.** Applicants request waiver or clarification regarding the fees they must pay when they file the primary application and any directly related applications, petitions, and/or notices. CSX/NS-10 at 42-44.

The user fees we charge are intended to make the services of the Board self-sustaining to the maximum extent possible, *Railroad Consolidation Fees*, 62 FR at 9714. We think that, with the one exception indicated in the next paragraph, the approach advocated by applicants is

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<sup>38</sup> See also *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 Grande Western Railroad Company*, Finance Docket No. 32760, Decision No. 44 (STB served Aug. 12, 1996) (*UP/SP* No. 44, slip op. at 173 n.221); *Union Pacific Corporation, Union Pacific Railroad Company, and Missouri Pacific Railroad Company--Control--Chicago and North Western Transportation Company and Chicago and North Western Railway Company*, Finance Docket No. 32133, Decision No. 25 (ICC served Mar. 7, 1995) (*UP/CNW* No. 25, slip op. at 63-64).

<sup>39</sup> We realize that the 49 U.S.C. 11321(a) rationale that applicants have advanced and we have adopted is not applicable to the backup authorization of the Sub A/Sub B Acquisitions under 49 U.S.C. 10901. The 49 U.S.C. 11321(a) immunity provision cannot possibly apply to an authorization under 49 U.S.C. 10901, even if such authorization is by approval. Nevertheless, if applicants would prefer to seek backup authorization under 49 U.S.C. 10901 by approval, we see no reason to require them to seek such backup authorization by exemption.



correct. Applicants recognize that the primary application constitutes, for fee purposes, two primary applications, one by CSX and one by NS, and applicants therefore indicate that they do not object to paying two "major transaction" fees.<sup>40</sup> Applicants also indicate that they are prepared to pay any additional fees required for directly related construction projects and directly related abandonments, and also any additional fees required with respect to incidental control of third-party carriers (although applicants indicate that the LD&RT is the only third-party carrier that applicants will seek authorization to control). Applicants argue, however, and (with the one exception indicated in the next paragraph) we agree, that they should not be required to pay any additional fees with respect to the Transaction Elements. We therefore confirm that, with the one exception indicated in the next paragraph, the two "major transaction" fees to be paid by CSX and NS will cover the Control Transaction and all of the Transaction Elements.

The one exception relates to the transfer of the Fort Wayne line from NSR to CRC. As previously noted, we do not regard this transfer as a Transaction Element. Applicants will therefore be required to seek authorization for this transfer in a separate directly related sub-docket, and will be required to pay a separate fee with respect thereto.

**DIRECTLY RELATED CONSTRUCTION PROJECTS.** Applicants may have certain directly related construction projects for which they seek approval or exemption in applications, petitions, and/or notices submitted with the primary application.<sup>41</sup> These construction projects would ordinarily be subject to the prefiling notice requirements of section 1150.1(b), section 1105.10(a), and/or section 1150.36(c)(1). Section 1150.1(b) requires consultation with the Board's Section of Environmental Analysis (SEA) at least 6 months prior to the filing of a 49 U.S.C. 10901 construction application; section 1105.10(a) requires submission of a written notice to SEA at least 6 months prior to the filing of a construction application if the proposed construction might require preparation of an environmental impact statement (EIS); and section 1150.36(c)(1) requires notification to various state agencies at least 20 days prior to filing a notice of exemption with the Board with respect to the construction of connections on existing rail rights-of-way or on land owned by the connecting railroads.<sup>42</sup>

Applicants indicate: that they have begun the process of consulting with SEA with regard to the primary application and all related applications, petitions, and notices; that they intend to furnish a Preliminary Environmental Report (PER) advising SEA of all specific directly related construction projects no later than 30 days prior to the filing of the primary application;<sup>43</sup> and that they will provide SEA with such other reasonably available information as may be required regarding those projects. Applicants add that they will file their detailed environmental report

<sup>40</sup> See 49 CFR 1002.2(f)(38)(i), (39)(i), (40)(i), and (41)(i), as amended in *Regulations Governing Fees For Services Performed in Connection With Licensing and Related Services--1997 Update*, STB Ex Parte No. 542 (Sub-No. 1), 62 FR 3487, 3488-89 (Jan. 23, 1997), and further amended in *Railroad Consolidation Fees*, 62 FR at 9715-16.

<sup>41</sup> If we ultimately deny the CSX-1 and NS-1 waiver petitions discussed in Decision No. 5, the directly related construction projects to be submitted with the primary application would include the 7 projects referenced in the CSX-1 and NS-1 petitions.

<sup>42</sup> Sections 1150.1(b) and 1105.10(a) refer to "applications" and "applicants," but the prefiling notice requirements also apply to construction projects for which exemption is sought either by petition or by notice. See 49 CFR 1105.4(b) (for the purposes of the 49 CFR part 1105 environmental regulations, "applicant" means any person or entity seeking Board action, whether by application, petition, or notice). See also 49 CFR 1121.3(b), as revised in *Expedited Procedures*, 61 FR at 52714 (a 49 U.S.C. 10502 exemption petition must comply with the 49 CFR part 1105 environmental regulations). See also 49 CFR 1150.36(a) (a 49 CFR 1150.36 exemption notice must comply with the 49 CFR part 1105 environmental regulations).

<sup>43</sup> Applicants submitted their PER on May 16, 1997.

with the primary application. See 49 CFR 1180.6(a)(8) (requirement that applicants submit information and data with respect to environmental matters in accordance with 49 CFR part 1105). Applicants therefore request that we waive or clarify the prefiling notice requirements of 49 CFR 1150.1(b) and 49 CFR 1105.10(a), and find that notice to SEA of directly related construction projects will be satisfactory if provided no later than 30 days prior to the filing of the primary application. Applicants also request that we waive the 49 CFR 1150.36(c)(1) prefiling notification requirement, and allow them to serve the notice required by 49 CFR 1150.36(c)(1) no later than the date on which they file with the Board any verified notices of exemption that may accompany the primary application. Applicants further request that we waive the 49 CFR 1150.36(c)(2) requirement that any verified notices of exemption filed with the Board certify compliance with the prefiling notice requirements of 49 CFR 1150.36(c)(1). CSX/NS-10 at 24-26.

In view of applicants' previous consultations with SEA and in light of the submission, in the PER, of detailed descriptive information, and on the condition that the consultations with SEA continue, waiver of the 6-month time periods required in both 49 CFR 1150.1(b) and 49 CFR 1105.10(a), waiver of the 20-day time period required in 49 CFR 1150.36(c)(1), and waiver of the 49 CFR 1150.36(c)(2) certification requirement, will be granted as requested by applicants.<sup>44</sup>

As indicated in Decision No. 6, SEA has determined, and we have agreed, that the preparation of an EIS is warranted for this proceeding. This determination is based on the nature and scope of the environmental issues (e.g., issues respecting intercity passenger service and commuter rail service) that are likely to arise in this proceeding in connection with the Control Transaction and the Transaction Elements, but not necessarily in connection with the directly related construction projects. If we ultimately approve the waivers sought in the CSX-1 and NS-1 petitions, we will determine, either in the decision approving the waivers or at some time thereafter, the appropriate level of environmental review for the proposed physical construction of the seven projects referenced in those petitions. If we do not approve the waivers sought in the CSX-1 and NS-1 petitions, the physical construction of the seven projects referenced in those petitions will be considered as part of the EIS that will be prepared in the overall proceeding. Whether or not the waivers sought in the CSX-1 and NS-1 petitions are granted, all questions respecting operation by CSXT or NSR (or their affiliates) over the seven projects referenced in those petitions will be addressed in the EIS for the overall proceeding.

**DIRECTLY RELATED ABANDONMENTS.** Applicants request that they be allowed to file any directly related abandonment applications, petitions, and notices together with the primary application, and that all directly related abandonments be processed on the same schedule as the Control Transaction. Applicants further request, pursuant to 49 CFR

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<sup>44</sup> Similar relief has been granted in prior cases. See *NS/CRC No. 5*, slip op. at 9-10; *CSX/CRC No. 7*, slip op. at 9-10; *UP/SP No. 3*, slip op. at 7; *BN/SF No. 3*, slip op. at 6-7. The relief granted here includes, but is not limited to, the seven construction projects referenced in the CSX-1 and NS-1 waiver petitions. If we ultimately approve the waivers sought in the CSX-1 and NS-1 petitions, the relief granted here will apply, as regards the seven projects referenced therein, as follows: with respect to 49 CFR 1150.1(b) and 49 CFR 1105.10(a), notice to SEA of the seven projects will be satisfactory if provided no later than 30 days prior to the filing of the primary application; with respect to 49 CFR 1150.36(c)(1), the notice required by that provision must be provided no later than the date on which applicants file with the Board any 49 CFR 1150.36(c)(2) exemption notices; and, with respect to 49 CFR 1150.36(c)(2), applicants need not certify compliance with the prefiling notice requirements of 49 CFR 1150.36(c)(1).

1152.24(e)(5), the waiver or clarification of certain information requirements applicable to abandonment applications.<sup>45</sup>

**Waiver of 49 CFR 1152.13(c) System Diagram Map Requirement.** Applicants indicate that they will not be able to identify lines for which directly related abandonment authority will be sought until the process of preparing the primary application is nearer to completion. Applicants add that, for this reason, it will not be possible, if abandonment applications are to be filed with the primary application, to comply with the requirement in 49 CFR 1152.13(c), 61 FR at 67885, that a line for which abandonment approval is sought be identified in category 1 on the abandoning railroad's system diagram map for at least 60 days prior to the filing of the abandonment application. Applicants therefore request that the 60-day notice requirement of 49 CFR 1152.13(c) be waived, and that applicants be permitted to file directly related abandonment applications simultaneously with the primary application without first including the segments proposed for abandonment in category 1 of the appropriate system diagram map. CSX/NS-10 at 26-27.

We find applicants' request reasonable, and we will therefore grant the requested waiver of the 60-day notice requirement of 49 CFR 1152.13(c).<sup>46</sup> Because all directly related abandonments will be processed on the same schedule as the Control Transaction, the planning needs of shippers and state and local governments affected by the proposed abandonments will be adequately met even if these parties first learn of the proposed abandonments when the primary application is filed. The procedural schedule established in Decision No. 6 provides that parties opposing any proposed directly related abandonments will have adequate time to prepare their opposition submissions.<sup>47</sup>

**Waiver of 49 CFR 1105.7(b) Environmental Report Requirement and 49 CFR 1105.8(c) Historic Report Requirement.** A railroad seeking to abandon a line is required to serve copies of an Environmental Report upon certain agencies, as well as a Historic Report upon the appropriate State Historic Preservation Officer, at least 20 days prior to the filing of an application, a petition, or a notice. See 49 CFR 1105.7(b) and 1105.8(c), 61 FR at 67883 (revising the Part 1105 environmental regulations to conform to the new Part 1152 abandonment regulations). See also 49 CFR 1152.20(c), 61 FR at 67885 (referencing, in the application context, the requirement respecting the Environmental Report and the Historic Report). Applicants request that these advance filing requirements be waived, and that applicants be permitted: (i) to notify SEA of the proposed abandonments in the Preliminary Environmental Report filed 30 days prior to the filing of the primary application; and (ii) to file the full Environmental Report, which will include, among other things, the information required in the Historic Report, concurrently with the primary application. CSX/NS-10 at 27-28.

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<sup>45</sup> All references herein to our 49 CFR part 1152 abandonment regulations are to our new regulations, which took effect on January 23, 1997. See *Abandonment and Discontinuance of Rail Lines and Rail Transportation Under 49 U.S.C. 10903*, STB Ex Parte No. 537, 61 FR 67876 (Dec. 24, 1996). Any relief granted for directly related abandonments proposed by applicants will be equally applicable to any directly related discontinuances proposed by applicants. See 49 CFR 1152.1(b), 61 FR at 67883 (the 49 CFR part 1152 regulations govern both abandonment of, and discontinuance of service over, rail lines).

<sup>46</sup> Similar relief has been granted in prior cases. See *NS/CRC No. 5*, slip op. at 10-11; *CSX/CRC No. 7*, slip op. at 10-11.

<sup>47</sup> We expect that, no later than the date of filing of the primary application, applicants will include, in the appropriate system diagram map or maps, all of the lines subject to directly related abandonment applications.

We find applicants' request reasonable, and we will therefore grant the requested waiver of the advance filing requirements of 49 CFR 1105.7(b) and 1105.8(c). A decision on any directly related abandonments proposed by applicants will not be issued until approximately 350 days after the date of filing of the primary application. See Decision No. 6. Interested parties will therefore have ample time, and more time than would normally be available in a freestanding abandonment setting, to review any proposed directly related abandonments and to participate in the environmental process prior to the time a decision authorizing any abandonment is ever issued.<sup>48</sup>

**Procedural Schedule Applicable to Abandonments.** Applicants request that proceedings arising out of directly related abandonments be exempted, pursuant to 49 U.S.C. 10502, from the offer of financial assistance (OFA) procedural requirements of 49 U.S.C. 10904(b)-(f). CSX/NS-10 at 28-30. We are unable to discern, however, precisely what procedural schedule applicants would prefer. Applicants indicate, see CSX/NS-10 at 28-29, that they would like a procedural schedule similar to those adopted in *NS/CRC No. 5*, slip op. at 12, and *CSX/CRC No. 7*, slip op. at 12; but applicants also indicate, see CSX/NS-10 at 30, that they would like a procedural schedule under which consideration of OFAs would be deferred until after: (i) the Board has made a determination on the primary application; and (ii) applicants have determined to effect the Control Transaction. The two procedural schedules that applicants have in mind are not entirely compatible.

The procedural schedules established by the 49 CFR part 1152 abandonment regulations must, of necessity, be conformed to the overall procedural schedule applicable to the Control Transaction, and we therefore agree with applicants that we should process any directly related abandonment applications in accordance with the overall procedural schedule, rather than applying the procedures found at 49 U.S.C. 10904. We will therefore grant a 49 U.S.C. 10502 exemption from the procedural requirements of 49 U.S.C. 10904. We find that application of 49 U.S.C. 10904 is not necessary here to carry out the transportation policy of 49 U.S.C. 10101, and that the procedures we are modifying are of limited scope here within the meaning of 49 U.S.C. 10502.

The procedural schedule established in Decision No. 6 provides that all directly related abandonment proposals (which may be filed as applications, petitions, and/or notices): are to be filed, with any and all supporting documentation, simultaneously with the primary application; and will be processed on the same schedule as the Control Transaction. The procedural schedule established in Decision No. 6 further provides that, if the primary application is complete, we shall publish in the *Federal Register*, by the 30th day after the date of filing of the primary application, notice of the acceptance of that application, see 49 U.S.C. 11325(a), and also notice of any directly related abandonment proposals. Thereafter, with respect to each directly related abandonment proposal: (1) interested parties must file, by the 45th day after the date of filing of the primary application, notifications of intent to participate in the specific abandonment proceedings; (2) interested parties must file, by the 120th day after the date of filing of the primary application, opposition submissions, requests for public use conditions,<sup>49</sup> and/or Trails Act requests;<sup>50</sup> (3) applicants may file, by the 175th day after the date of filing of the primary application, rebuttal in support of their abandonment proposal, and/or responses to any requests for public use conditions and Trails Act requests; (4) as with the primary application and all related matters, briefs will be due by the 245th day after the date of filing of the primary application, oral argument will be held on the 290th day after the date of filing of the primary

<sup>48</sup> Similar relief has been granted in prior cases. See *NS/CRC No. 5*, slip op. at 11; *CSX/CRC No. 7*, slip op. at 11.

<sup>49</sup> See 49 CFR 1152.28 (61 FR at 67894).

<sup>50</sup> See 49 CFR 1152.29 (61 FR at 67894-96).



application, and a voting conference will be held, at the Board's discretion, on the 295th day after the date of filing of the primary application; and (5) if, in the final decision served on the 350th day after the date of filing of the primary application, we approve the primary application, we shall also address, in that final decision, each of the abandonment proposals, and all matters (including requests for public use conditions and Trails Act requests) relative thereto; and if we either approve or exempt any of the abandonment proposals, we shall require interested persons to file, no later than 10 days after the date of service of the final decision, OFAs<sup>51</sup> with respect to any of the approved or exempted abandonments.<sup>52</sup>

**Information Requirements Applicable to Abandonment Applications.** Applicants request the waiver or clarification of certain of the information requirements made applicable to abandonment applications by 49 CFR 1152.22, 61 FR at 67886-88.

1. Section 1152.22(c)(8), 61 FR at 67887, requires information on any important changes in train service during the 2 calendar years immediately preceding the filing of the abandonment application. Applicants note, however, that much of the trackage that could be the subject of their abandonment applications is trackage being used primarily for overhead operations, and applicants claim that, on this trackage, numerous changes in overhead train service undoubtedly occurred without any relation to local traffic. Applicants contend that 49 CFR 1152.22(c)(8) would impose a substantial burden on applicants to accumulate data that would be of little or no value to the Board in evaluating the merits of a directly related abandonment application. Applicants therefore request that we limit 49 CFR 1152.22(c)(8) to important changes in local train service. CSX/NS-10 at 31. This request is reasonable, and we will therefore approve it.<sup>53</sup>

2. Section 1152.22(d), 61 FR at 67887, requires detailed revenue and cost data relating to the line to be abandoned. Applicants request that, where the combined CSX/Conrail or NS/Conrail systems will retain overhead traffic, we grant a waiver permitting: (i) the exclusion of data on revenues and costs associated with overhead traffic; and (ii) the preparation of cost data on a *pro forma* basis reflecting the exclusion of overhead traffic. Applicants argue that the submission of financial data respecting overhead traffic that will be retained either by the combined CSX/Conrail system or by the combined NS/Conrail system would impose a burden on applicants and would not serve any useful purpose. CSX/NS-10 at 31-32. The requested waiver is reasonable (because data respecting overhead traffic that will be retained on other mainline tracks is not germane to an abandonment application), and we will therefore approve it.<sup>54</sup>

3. Section 1152.22(d), 61 FR at 67887, also requires that abandonment applications include information about costs attributable to traffic on the line to be abandoned for a Base Year and a Forecast Year. The Base Year is the latest 12-month period, ending no earlier than 6 months prior to the filing of the abandonment application, for which data have been collected at the branch level. See 49 CFR 1152.2(c), 61 FR at 67883. The Forecast Year is the 12-month period, beginning with the first day of the month in which the application is filed with the Board, for which future revenues and costs are estimated. See 49 CFR 1152.2(h), 61 FR at 67883. Applicants contend that, in the case of abandonments related to a major combination that will result in a substantial alteration in operations on the affected lines, "historic data" (i.e., Base Year

<sup>51</sup> See 49 CFR 1152.27 (61 FR at 67891-94).

<sup>52</sup> Similar procedural schedules have been adopted in prior cases. See *NS/CRC No. 5*, slip op. at 11-12; *CSX/CRC No. 7*, slip op. at 11-12.

<sup>53</sup> Similar relief has been granted in prior cases. See *NS/CRC No. 5*, slip op. at 13; *CSX/CRC No. 7*, slip op. at 13; *UP/SP No. 3*, slip op. at 11.

<sup>54</sup> Similar relief has been granted in prior cases. See *NS/CRC No. 5*, slip op. at 13; *CSX/CRC No. 7*, slip op. at 13; *UP/SP No. 3*, slip op. at 11-12.

data) are particularly misleading. Applicants therefore request that the requirements of 49 CFR 1152.22(d) concerning revenue and cost data for a Base Year be waived, and that applicants be authorized to present revenue and cost data for the Forecast Year only. CSX/NS-10 at 33. The requested waiver, in our opinion, is not reasonable, and we will therefore deny it. Compilation of Base Year data is necessary for comparison purposes; without Base Year data, there would be nothing against which Forecast Year data could be compared.<sup>55</sup>

4. Applicants also request clarification (or, if necessary, a waiver to the effect) that any abandonment applications may report costs on a *pro forma* consolidated post-acquisition basis, using the same consolidated cost data that are to be used in the operating plan and in other parts of the primary application. Applicants contend that the purpose of the cost data in a directly related abandonment application is to permit an assessment of the cost of handling the traffic that will remain on the line after the Control Transaction and a determination whether handling that traffic will constitute a burden on the carrier. Applicants maintain that, for this purpose, the relevant cost data are those of the combined systems (i.e., the CSX/Conrail system and the NS/Conrail system), and that it thus makes sense for the Forecast Year in the application to be based on the consolidated cost data of the appropriate combined system. Applicants add that, if Base Year data are required, it likewise makes sense to use the same consolidated cost data for the Base Year so that interested persons can make comparisons on a common basis between the Base Year and the Forecast Year. Applicants also note that use of the same consolidated data for the abandonment applications as will be used in the primary application will simplify the process of preparing the abandonment applications. CSX/NS-10 at 32-33. The requested waiver is reasonable (because the information applicants propose to submit will be sufficient for our purposes), and we will therefore approve it.<sup>56</sup>

**OPERATING TIMETABLES.** We request that applicants submit, with the primary application, 10 copies of each of their operating timetables. This information will facilitate our analysis of a number of aspects relating to this proceeding.<sup>57</sup>

**SUPPLEMENTATION OF THE PRIMARY APPLICATION.** We appreciate the difficulties applicants may face in coordinating, and avoiding duplications in, estimates of changes in key factors such as traffic flows. We understand that these difficulties are quite real, but we will nevertheless insist on having, in the record, information and data that will allow us to make accurate projections respecting both the benefits of the Control Transaction as a whole and the competitive, environmental, financial, and labor impacts thereof. Applicants are therefore advised that, if necessary, they may be required to supplement or clarify information and data contained in the primary application.

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<sup>55</sup> Similar waivers were requested, and denied, in prior cases. See NS/CRC No. 5, slip op. at 13; CSX/CRC No. 7, slip op. at 13. Applicants, urging "reconsideration" of such prior denials, see CSX/NS-10 at 33, contend, with respect to each line for which an abandonment application will be filed: that the revenues and costs associated with the overhead traffic that will be rerouted if a line is abandoned will be reflected in the revenue and cost projections set forth in the primary application; and that the revenues and costs associated with the local traffic that will remain if the line is not abandoned will be reflected in the Forecast Year projections in the abandonment application. Applicants, however, have not addressed our main concern respecting the requested waiver: that without Base Year data, there will be nothing against which Forecast Year data can be compared.

<sup>56</sup> Similar relief has been granted in prior cases. See NS/CRC No. 5, slip op. at 13-14; CSX/CRC No. 7, slip op. at 13-14; UP/SP No. 3, slip op. at 12. We expect, of course, that applicants will fully explain and justify their consolidated, post-acquisition cost calculations.

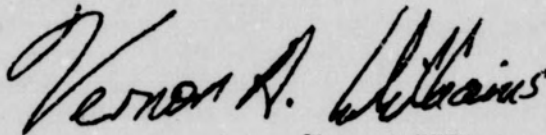
<sup>57</sup> Similar requests have been made in prior cases. See NS/CRC No. 5, slip op. at 14; CSX/CRC No. 7, slip op. at 14.

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-13 motion to strike is denied.
2. ARU's request for leave to file the ARU-4 pleading is granted, and the CSX/NS-14 motion to strike is denied.
3. The CSX/NS-10 petition for waiver or clarification, and related relief, is granted to the extent set forth in this decision.
4. This decision is effective on the date of service.

By the Board, Chairman Morgan and Vice Chairman Owen.

A handwritten signature in dark ink, appearing to read "Vernon A. Williams". The signature is fluid and cursive, with the first name "Vernon" being more prominent.

Vernon A. Williams  
Secretary

APPENDIX A

CLASSIFICATION OF JOBS SHOWN IN  
LABOR IMPACT DATA, 49 CFR 1180.6(a)(2)(v)

Blacksmiths  
Boilermakers  
Bridge Inspectors  
Carmen  
Clerical Employees  
Communication Workers  
Dock Workers  
Electricians  
Engineers  
Fireman and Oilers  
Foremen  
Laborers  
Machinists  
Maintenance of Way  
Nonagreement  
Police  
Railway Supervisors  
Sheet Metal Workers  
Signalmen  
Train Dispatchers  
Trainmen  
Yardmasters



APPENDIX B

EFFECTS ON APPLICANT CARRIERS' EMPLOYEES  
49 CFR 1180.6(a)(2)(v)

(Applicant Carrier)

Current Location	Classification	Jobs Transferred to	Jobs Abolished	Jobs Created	Year
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ARNOLD K SHIMELMAN  
CONNECTICUT ASSISTANT ATTORNEY GENERAL  
P O BOX 317546  
NEWINGTON CT 06131 US

G W HERKNER JR  
NJ TRANSIT RAIL OPERATIONS  
ONE PENN PLAZA EAST  
NEWARK NJ 07105 US

PHILIP G SIDO  
UNION CAMP CORPORATION  
1600 VALLEY ROAD  
WAYNE NJ 07470 US

R E HERRMANN  
ATLANTIC CITY ELECTRIC CO  
6801 BLACK HORSE PIKE  
EGG HARBOR TOWNSHIP NJ 08234 US

THEODORE H MATTHEWS  
N J DEPARTMENT OF TRANSPORTATION  
1035 PARKWAY AVENUE CN-600  
TRENTON NJ 08625 US

NICOLE E. CLARK  
WACHTELL, LIPTON, ROSEN & KATZ  
51 WEST 52ND STREET  
NEW YORK NY 10019-6150 US

JAMES W HARRIS  
THE METROPOLITAN PLANNING ORGANIZATION  
1 WORLD TRADE CENTER STE 82 EAST  
NEW YORK NY 10048-0043 US

HUGH H. WELSH  
LAW DEPT., SUITE 67E  
ONE WORLD TRADE CENTER  
NEW YORK NY 10048-0202 US

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NIAGARA MOHAWK POWER CORP  
300 ERIE BLVD WEST  
SYRACUSE NY 13202 US

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SERVICE DATE - MAY 30, 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

AGENCY: Surface Transportation Board.

ACTION: Decision No. 6, Notice of Issuance of Procedural Schedule.

SUMMARY: Having received public comments on applicants' proposed procedural schedule and applicants' reply to those comments, the Board is issuing a final procedural schedule. This schedule provides for issuance of a final decision no later than 350 days after filing of the primary application.

EFFECTIVE DATE: The effective date of this decision is May 30, 1997. Notices of intent to participate in this proceeding will be due 45 days after the primary application is filed. All descriptions of inconsistent and responsive applications, as well as any petitions for waiver or clarification with respect thereto, will be due 60 days after the primary application is filed. All comments, protests, requests for conditions, inconsistent and responsive applications, and any other opposition evidence and argument will be due 120 days after the primary application is filed. For further information, see the procedural schedule set forth below.

ADDRESSES: An original and 25 copies<sup>1</sup> of all documents, referring to STB Finance Docket No. 33388, must be sent to the Office of the Secretary, Case Control Branch, ATTN: STB Finance Docket No. 33388, Surface Transportation Board, 1925 K Street, N.W., Washington, DC 20423-0001.<sup>2</sup> In addition, one copy of all documents in this proceeding must be sent to Administrative Law Judge Jacob Leventhal, Federal Energy Regulatory Commission, 888 First Street, N.E., Suite 11F, Washington, DC 20426 [(202) 219-2538; FAX: (202) 219-3289] and to

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<sup>1</sup> In addition to submitting an original and 25 copies of all documents filed with the Board, parties are requested also to submit all pleadings and attachments as computer data contained on a 3.5-inch diskette formatted for WordPerfect 7.0 (or formatted so that it can be converted into WordPerfect 7.0) and clearly labeled with the identification acronym and number of the pleading contained on the diskette. See 49 CFR 1180.4(a)(2). The computer data contained on the computer diskettes submitted to the Board will be subject to the protective order granted in Decision No. 1, served on April 16, 1997 (as modified in Decision No. 4, served May 2, 1997), and is 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.

<sup>2</sup> 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. Documents transmitted by facsimile (FAX), as in the past, will not be considered formal filings and thus are not encouraged because they will result in unnecessarily burdensome, duplicative processing in what we expect to become a voluminous record.

Applicants may file in bound volumes an original and 25 copies of related applications, petitions, and notices of exemption; however, to facilitate our processing of these related filings, we will require that applicants also file two unbound copies of each of these filings.



each of the applicants' representatives: (1) Dennis G. Lyons, Esq., Arnold & Porter, 555 12th Street, N.W., Washington, DC 20004-1202; (2) Richard A. Allen, Esq., Zuckert Scoutt & Rasenberger, L.L.P., Suite 600, 888 Seventeenth Street, N.W., Washington, DC 20006-3939; and (3) Paul A. Cunningham, Esq., Harkins Cunningham, Suite 600, 1300 Nineteenth Street, N.W., Washington, DC 20036.

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

SUPPLEMENTARY INFORMATION: On April 10, 1997, CSX Corporation (CSXC), CSX Transportation, Inc. (CSXT), Norfolk Southern Corporation (NSC), Norfolk Southern Railway Company (NSR), Conrail Inc. (CRI), and Consolidated Rail Corporation (CRC)<sup>3</sup> filed a notice of intent (CSX/NS-1) that they intend to file an application under 49 U.S.C. 11323-25 (referred to as the "primary application") seeking Board authorization for, among other things, (a) the acquisition by CSX and NS of control of Conrail, and (b) the division of the assets of Conrail by and between CSX and NS.<sup>4</sup> Applicants expect to file their primary application, and any related applications, petitions, and notices, on or before July 10, 1997, but not before June 16, 1997.

In Decision No. 2, served April 21, 1997, and published that day in the *Federal Register* at 62 FR 19390, we determined that the transaction contemplated by applicants is a major transaction as defined at 49 CFR 1180.2(a), and we invited comments due May 1, 1997, on applicants' proposed procedural schedule. Comments were filed, and on May 8, 1997, applicants filed a consolidated reply to the comments (CSX/NS-11).

Over 25 comments were received in response to Decision No. 2. Comments were filed by shipper organizations, shippers (including electric utilities), ports, railroads, government parties, and rail labor unions. We have carefully reviewed all of the comments that we received on the proposed procedural schedule. Given the magnitude of applicants' proposed transaction concerning the restructuring of rail service within the entire Eastern United States, we have determined that a 350-day procedural schedule (which is more than applicants had proposed, but less than the statutory maximum) will ensure that all parties are accorded due process and allow us time to consider fully all of the issues in this proceeding, including environmental issues, and reach a timely resolution of this matter.

In particular, this schedule will permit us to take the hard look at environmental issues as required by the National Environmental Policy Act (NEPA) and the related regulations of the

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<sup>3</sup> CSXC and CSXT are referred to collectively as CSX. NSC and NSR are referred to collectively as NS. CRI and CRC are referred to collectively as Conrail. CSX, NS, and Conrail are referred to collectively as applicants.

<sup>4</sup> By letter dated April 24, 1997, applicants submitted, pursuant to 49 CFR 1013.3(a), an Amended and Restated Voting Trust Agreement (hereinafter referred to as Joint-VTA-1) that NSC, CSXC, and Green Acquisition Corporation propose to enter into with an institutional trustee, Deposit Guaranty National Bank, and a limited liability company to be formed shortly. NSC and CSXC intend that the Trustee will hold, in the voting trust (hereinafter referred to as the Joint Voting Trust) to be established pursuant to Joint-VTA-1, all common shares of Conrail Inc. (CRI): (1) acquired previously, and separately, by NSC and CSXC and currently held in separate voting trusts; or (2) hereafter acquired by NSC and CSXC pursuant to the Third Supplement (dated April 10, 1997) to the Second Offer to Purchase (the Second Offer, dated December 6, 1996). NSC and CSXC intend that the Joint Voting Trust to be established pursuant to Joint-VTA-1 will be a single consolidated voting trust ultimately superseding and replacing the previously established separate voting trusts. An informal staff opinion letter with respect to the voting trust was issued on May 8, 1997.

Council on Environmental Quality. The Board's Section of Environmental Analysis (SEA) has determined that the preparation of an Environmental Impact Statement (EIS) is warranted for this proceeding. This determination is based on the nature and scope of environmental issues (e.g., intercity passenger service and commuter rail service) that are likely to arise in this proceeding as well as SEA's evaluation of the information available to date, including the Preliminary Environmental Report filed on May 16, 1997. We agree with SEA that an EIS is warranted in this proceeding. The procedural schedule that we are adopting will provide the necessary time to enable us to undertake an EIS.

Within this procedural schedule, we will be able to consider fully all issues affecting the public interest, and will also be able to address cumulative impacts and crossover effects of prior mergers as appropriate. Further, we will consider the transaction in light of any settlement agreements that the applicants may reach with any parties.

We are not unmindful of the concerns parties have raised regarding the amount of time necessary to prepare their cases or of the concerns applicants have raised regarding employment uncertainty among Conrail management and possible deterioration in Conrail service during the pendency of this proceeding, and have crafted the attached procedural schedule with fairness to all parties in mind. While we are sensitive to applicants' concerns and their desire to have an expedited schedule, we believe that the 350-day schedule that we are adopting is not unduly long and will not result in lasting adverse effects on the Conrail system or properties. We believe that the longer schedule is necessary and appropriate for this case to allow sufficient time for participation by the public and consideration by the Board, including the preparation of an EIS. Accordingly, we have adjusted the procedural schedule proposed by applicants to give more time for the submission and review of evidence and arguments, and to provide adequate time for preparing an EIS.

*Environmental reporting for primary applicants.* As indicated above, applicants filed their joint Preliminary Environmental Report (PER) on May 16, 1997. CSX and NS will provide detailed and updated information (with supporting documentation) and environmental impact analyses in the Environmental Report (ER) they will file with their primary application and related applications, petitions, and notices. CSX and NS will provide a copy of the ER to all parties of record in this proceeding; appropriate federal, state, and local agencies; and affected parties according to the Board's environmental rules found in 49 CFR part 1105.

As discussed above, SEA has determined that the preparation of an EIS is warranted for this proceeding. A notice of intent to prepare an EIS will be published in the *Federal Register* shortly, which will explain in further detail the EIS process for this proceeding. SEA will initiate public scoping as soon as possible after the joint application and environmental report are filed to allow interested persons to participate in determining the scope of the EIS that will be prepared. SEA anticipates that the final scope of the EIS will be issued approximately 80 days after the filing of the joint application.

When, as here, the preparation of an environmental impact statement is contemplated for a railroad proceeding, the Board's environmental rules at 49 CFR 1105.10(a)(1) normally require the prospective applicants to submit to SEA a 6-month prefilng notice in advance of the application. However, where appropriate, 49 CFR 1105.10(c) allows the waiver of this 6-month prefilng notice. Here, SEA for some time has been engaged in on-going consultations with both CSX and NS about the proposed merger and the potential associated environmental impacts. Moreover, the applicants' joint PER provided detailed descriptive information about the project. In these circumstances, SEA believes that there is no need for the 6-month waiting period. Therefore, as indicated in Decision No. 7 (served concurrently herewith, but not published in the *Federal Register*), the 6-month prefilng notice requirement will be waived in this case.

*Environmental reporting for inconsistent and responsive applicants.* In order for us to fulfill our responsibilities under NEPA and other environmental laws, inconsistent and

responsive applicants must submit certain environmental information. To facilitate the environmental review process, inconsistent and responsive applicants will be required to file by Day F + 100 either (1) a verified statement that the inconsistent or responsive application will have no significant environmental impact or (2) a responsive environmental report (RER) that contains detailed environmental information regarding the inconsistent or responsive application.

*The RER.* The RER should comply with all requirements for environmental reports contained in our environmental rules at 49 CFR 1105.7. Also, the RER should address the environmental issues identified in the final scope of the EIS for the entire merger, to the extent such issues are applicable to the particular inconsistent or responsive application. (For example, if, in the final scope of the EIS, SEA identified potential rail commuter service impacts as an issue to be addressed, we would expect the RER also to address that issue if commuter services were involved in the particular inconsistent or responsive application.)

The RER should be based on consultations with SEA and the various agencies set forth in 49 CFR 1105.7(b). In addition, the information in the RER should be organized as follows: Executive Summary; Purpose and Need for Agency Action; Description of the Inconsistent or Responsive Application and Related Operations; Description of the Affected Environment; Description of Alternatives; Analysis of the Potential Environmental Impacts; Proposed Mitigation; and Appropriate Appendices that include correspondence and consultation responses, bibliography, and a list of preparers.

The purpose of an RER is to provide us the information we need to assess the potential environmental impacts of all inconsistent and responsive applications in the context of the overall merger proposal. After an RER is received, SEA will verify the information contained in the document. If the RER is acceptable, SEA will include the RER with the Draft EIS for the entire merger that will be served and made available for public comment.

In order to ensure timely, consistent, and appropriate environmental documentation, inconsistent and responsive applicants must consult with SEA as early as possible. If an RER is insufficient, we may require additional environmental information or reject the inconsistent or responsive application.

*A verified statement of no significant impact.* If an action proposed under an inconsistent or responsive transaction would typically fall within 49 CFR 1105.6(c)(2), an RER would not be required because such an action is generally exempt from environmental review. In such a case, the inconsistent or responsive applicant would be required to file only a verified statement. The verified statement must demonstrate that the inconsistent or responsive application meets the exemption criteria of 49 CFR 1105.6(c)(2). Again, anyone desiring to file an inconsistent application or responsive application must consult with SEA as early as possible regarding the appropriate environmental documentation.

SEA will review the verified statements. If a verified statement is insufficient, we may require additional environmental information or reject the inconsistent or responsive application. The verified statements, like the RERs, will be included in the Draft EIS, which will be available for public review and comment.

*Notice of intent to participate.* All documents received by the Board concerning this proceeding will become part of the public record and will be placed in the public docket for inspection and copying. Only those documents considered formal filings (i.e., those meeting the filing specifications discussed above in the ADDRESSES section) will be downloaded to the so-called pleading list. Moreover, persons who submit documents that are not considered formal filings will not be placed on the service list in this proceeding.

We will compile and issue an official service list at an early stage in this proceeding to facilitate the participation of those persons who will be actively participating as "parties of



record" (POR). We are requiring these persons to notify the Board, in writing, within 45 days after the primary application is filed, of their intent to participate actively in this proceeding. In order to be designated a POR, a person must submit an original plus 25 copies of the notice along with a certificate of service to the Secretary of the Board indicating that the notice has been properly served on applicants' representatives and Judge Leventhal.<sup>5</sup> Every future filing by an POR must have its own certificate of service indicating that all PORs on the service list and Judge Leventhal have been served with a copy of the filing. Members of the United States Congress will be designated as MOC and Governors will be designated as GOV on the service list. They are *not* parties of record and need *not* be served with copies of filings, unless designated as a POR.

We will continue to follow our practice regarding the service of Board actions established in *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 Grande Western Railroad Company*, Finance Docket No. 32760 (UP/SP). See UP/SP, Decision No. 15 (STB served Feb. 16, 1996), at 2-3. Copies of decisions, orders, and notices will be served only on those persons who are designated as POR, MOC, or GOV on the official service list. All other interested parties are encouraged to make advance arrangements with the Board's copy contractor, DC News & Data, Inc. (DC News), to receive copies of Board decisions, orders, and notices served in this proceeding. DC News will handle the collection of charges and the mailing and/or faxing of decisions to persons who request this service. The telephone number for DC News is: (202) 289-4357.

*Comments, protests, requests for conditions, and any other opposition evidence and argument.* Most commenters support Day F + 120 as the minimum time necessary to prepare comments, protests, requests for conditions, and any other opposition evidence and argument. Applicants support giving persons at least 120 days to make such submissions. We will keep Day F + 120 as the due date for the filing of comments, protests, requests for conditions, and any other opposition evidence and argument. All inconsistent and responsive applications, including comments from the United States Department of Justice (DOJ) and the United States Department of Transportation (DOT), are also due on Day F + 120. Every party intending to file an inconsistent or responsive application must contact the Office of the Secretary at (202) 565-1681 to reserve an STB Finance Docket No. 33388 Sub-Number to use in filing the description of anticipated inconsistent or responsive application due on Day F + 60. Also, as set forth above in our discussion of environmental reporting, every party intending to file an inconsistent or responsive application must file a Responsive Environmental Report or Environmental Verified Statement on Day F + 100.

*Responses and rebuttals.* Numerous commenters (including DOT) have requested additional time (ranging from 40-70 days) to digest and respond to comments, protests, requested conditions, and inconsistent and responsive applications. Given the complexity and magnitude of issues that potentially may arise in this proceeding, we will extend the due date proposed by applicants in their schedule by 25 days, thus providing the parties with a total of 55 days to file these responses. Responses to inconsistent and responsive applications, comments, protests, requested conditions, and opposition evidence and argument, as well as rebuttal in support of the primary application, will be due on Day F + 175.

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<sup>5</sup> The Office of the Secretary will start compiling the official service list in this proceeding after service of this decision adopting a procedural schedule. Persons named on any earlier service list will not automatically be placed on the official service list for this proceeding. Therefore, any person who wishes to be a POR must file a notice of intent to participate after the date of service of the decision and on or before Day F + 45.



We will not allow parties filing comments, protests, and requests for conditions to file rebuttal in support of those pleadings. Parties filing inconsistent and/or responsive applications have a right to file rebuttal evidence, while parties simply commenting, protesting, or requesting conditions do not. *UP/SP*, Decision No. 6 (ICC served Oct. 19, 1995, at 7-8, and published Oct. 23, 1995, at 60 FR 54384); *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. 16 (ICC served Apr. 20, 1995), at 11. Several commenters seek additional time for parties to prepare rebuttal filings. The National Industrial Transportation League (NITL) seeks 25 days for the preparation of rebuttal filings; Allied Rail Unions (ARU), the Port Authority of New York and New Jersey, and DOT seek 30 days; and three electric utilities seek 40 days. Rebuttal in support of inconsistent and responsive applications will be due on Day F + 205, which will allow inconsistent and responsive applicants 30 days instead of 15 days to prepare their rebuttals.

**Briefs.** Many commenters request more time to prepare their briefs. We will expand the schedule to allow parties 20 more days to prepare their briefs (not to exceed 50 pages), which will be due on Day F + 245. Applicants state that, while their proposed transaction involves a single, overall primary application and an agreed-upon division of Conrail, their proposed transaction also involves the extension of two separate and competing railroads into the territory now served by Conrail, and separate, competing operating and marketing plans for those two railroads. Applicants therefore request to file separate, 50-page briefs because, as applicants contend, there may be a considerable number of arguments made individually by CSX and NS, and many points of opposition to be responded to that are peculiar to one or the other. Some parties argue that applicants should file a single brief. Some parties argue that, if applicants are permitted to file separate briefs, then all other parties should be permitted to file longer briefs. We will allow CSX and NS to file separate, 50-page briefs. We are unpersuaded that other parties should be permitted to file longer briefs. Applicants will have only 50 pages to address arguments of dozens of parties. Other parties should easily be able to respond to several parties in the same number of pages or less. We therefore will continue to restrict briefs to 50 pages, which we think will be more than adequate for the parties succinctly to present their arguments.

**Other dates.** A number of parties request additional time to prepare for oral argument (e.g., NITL requests to have 25 days to prepare for oral argument; and ARU requests to have 60 days to prepare for oral argument). Several parties urge that the Board should take more time (e.g., at least 45 days) to consider briefs before the voting conference and to take the time necessary to consider fully the overall record. We will extend the schedule to allow parties to have 45 days (Day F + 290), rather than 15 days, to prepare for oral argument (close of record). The voting conference (at the Board's discretion) is scheduled 5 days thereafter on Day F + 295, which will allow the Board 50 days, rather than 20 days, to consider the briefs. The date of service of the final decision is scheduled 55 days thereafter on Day F + 350.

**Discovery.** The Society of Plastics raises concern that applicants may burden parties with discovery requests before the filing of comments, and proposes revised language for the procedural schedule. We do not find it necessary to revise any language in the procedural schedule. We will clarify, however, that discovery on parties filing comments, protests, requests for conditions, and inconsistent and responsive applications may begin on Day F + 120, or earlier if parties mutually agree.

In accordance with our decision in STB Ex Parte No. 527 served on October 1, 1996, and published in the *Federal Register* on October 8, 1996 (61 FR 52710), parties should not file any discovery requests or materials with the Board unless they are attached as part of an evidentiary submission, motions to compel, or responses thereto. The Secretary's Office will otherwise reject them.

If the parties wish to engage in any discovery or establish any discovery guidelines, they are directed to consult with Administrative Law Judge Jacob Leventhal. Judge Leventhal is

authorized to convene a discovery conference, if necessary and as appropriate, in Washington, DC, and to establish such discovery guidelines, if any, as he deems appropriate. However, Judge Leventhal is not authorized to make adjustments to, or to modify, the dates in the procedural schedule. We believe the schedule as adopted allows sufficient time for meaningful discovery. Any interlocutory appeal to a decision issued by Judge Leventhal will be governed by the stringent standard of 49 CFR 1115.1(c): "Such appeals are not favored; they will be granted only in exceptional circumstances to correct a clear error of judgment or to prevent manifest injustice." See *Union Pacific Corporation, Union Pacific Railroad Company and Missouri Pacific Railroad Company--Control--Chicago and North Western Transportation Company and Chicago and North Western Railway Company*, Finance Docket No. 32133, Decision No. 17, at 9 (ICC served July 11, 1994) (applying the "stringent standard" of 49 CFR 1115.1(c) to an appeal of an interlocutory decision issued by former Chief Administrative Law Judge Paul S. Cross).

*Deadlines applicable to appeals and replies.* As in prior merger proceedings, we think it appropriate to tighten the deadlines provided by 49 CFR 1115.1(c). Accordingly, the provisions of the second sentence of 49 CFR 1115.1(c) to the contrary notwithstanding, an appeal to a decision issued by Judge Leventhal must be filed within 3 working days of the date of his decision, and any response to any such appeal must be filed within 3 working days thereafter. Likewise, any reply to any procedural motion filed with the Board itself in the first instance must also be filed within 3 working days of the date the motion is filed.

*Errata filings.* The procedural schedule that we are adopting should provide parties ample time to build a sufficient record for us to make a reasoned decision in this proceeding. We do not intend to permit this process to be marred by the filing of errata sheets significantly altering the evidence and conclusions contained in earlier submissions, as such filings may curtail the ability of parties to respond fully and adequately to the record within the time frames we have established.

*Merger-related abandonments.* As indicated in Decision No. 7, the procedural schedule applicable to merger-related abandonments will be as follows: (1) all merger-related abandonment proposals (which may be filed as applications, petitions, and/or notices) are to be filed, with any and all supporting documentation, simultaneously with the primary application; and (2) if the primary application is complete, we shall publish in the *Federal Register*, by Day F + 30, notice of the acceptance of the primary application as well as notice of any merger-related abandonment proposals. Thereafter, with respect to each merger-related abandonment proposal: (3) interested parties must file notifications of intent to participate in the proceeding by Day F + 45; (4) interested parties must file opposition submissions, requests for public use conditions, and/or Trails Act requests by Day F + 120; (5) applicants may file rebuttal in support of their abandonment proposals, and/or responses to any requests for public use conditions and Trails Act requests, by Day F + 175; (6) as with the primary application and all related matters, briefs shall be due by Day F + 245, oral argument will be held on Day F + 290, and a voting conference will be held, at the Board's discretion, on Day F + 295; and (7) if, in the final decision served on Day F + 350, we approve the primary application, we shall also address, in that final decision, each of the abandonment proposals, and all matters (including requests for public use conditions and Trails Act requests) relative thereto; and if we either approve or exempt any of the abandonment proposals, we shall allow interested parties to file, no later than 10 days after the date of service of the final decision, offers of financial assistance with respect to any approved or exempted abandonments.

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

Decided: May 22, 1997.

By the Board, Chairman Morgan and Vice Chairman Owen.

Vernon A. Williams  
Secretary

### FINAL PROCEDURAL SCHEDULE

- F - 30 Preliminary Environmental Report, including supporting documents due.
- F Primary application & related applications, petitions, and notices filed.  
[Environmental Report, including all supporting documents due.]
- F + 30 *Federal Register* publication of: notice of acceptance of primary application and related applications, petitions, and notices; and notice(s) of any merger-related abandonment applications, petitions, and notices of exemption.
- F + 45 Notification of intent to participate in proceeding due.
- F + 60 Description of anticipated inconsistent and responsive applications due; petitions for waiver or clarification due with respect to such applications.
- F + 100 Responsive Environmental Report and Environmental Verified Statements for inconsistent and responsive applicants due.
- F + 120 Inconsistent and responsive applications due. All comments, protests, requests for conditions, and any other opposition evidence and argument due. Comments by U.S. Department of Justice and U.S. Department of Transportation due. With respect to all merger-related abandonments: opposition submission, requests for public use conditions, and Trails Act requests due.
- F + 150 Notice of acceptance (if required) of inconsistent and responsive applications published in the *Federal Register*.
- F + 175 Response to inconsistent and responsive applications due. Response to comments, protests, requested conditions, and other opposition arguments and evidence due. Rebuttal in support of primary application and related applications, petitions, and notices due. With respect to all merger-related abandonments: rebuttal due; and responses to requests for public use and Trails Act conditions due.
- F + 205 Rebuttal in support of inconsistent and responsive applications due.
- F + 245 Briefs due, all parties (not to exceed 50 pages).
- F + 290 Oral argument (close of record).
- F + 295 Voting conference (at Board's discretion).
- F + 350 Date of service of final decision.  
With respect to any approved or exempted abandonments: offers of financial assistance may be filed no later than 10 days after the date of service of the final decision.

Notes: Immediately upon each evidentiary filing, the filing party will place all documents relevant to the filing (other than documents that are privileged or otherwise protected from discovery) in a depository open to all parties, and will make its witnesses available for discovery depositions. Access to documents, subject to protective order, will be appropriately restricted. Parties seeking discovery depositions may proceed by agreement. Discovery on responsive and inconsistent applications will begin immediately upon their filing. The Administrative Law Judge assigned to this proceeding will have the authority initially to resolve any discovery disputes.



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SERVICE DATE - MAY 13, 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

AGENCY: Surface Transportation Board.

ACTION: Decision No. 5: Notice of petitions filed by applicants seeking waiver of otherwise applicable requirements respecting seven construction projects; Request for comments.

SUMMARY: CSX Corporation (CSXC), CSX Transportation, Inc. (CSXT), Norfolk Southern Corporation (NSC), Norfolk Southern Railway Company (NSR), Conrail Inc. (CRI), and Consolidated Rail Corporation (CRC)<sup>1</sup> intend to file, on or before July 10, 1997, a "primary application" seeking Surface Transportation Board (Board) authorization for, among other things, (a) the acquisition by CSX and NS of control of Conrail, and (b) the division of the assets of Conrail by and between CSX and NS. See Decision No. 2, served April 21, 1997, and published that day in the *Federal Register* at 62 FR 19390. Applicants have now filed petitions seeking waiver of certain otherwise applicable requirements respecting seven related construction projects. These waivers, if granted, would allow applicants to begin construction on these projects following the completion by the Board of its environmental review of the constructions, and the issuance of a further decision approving construction, but prior to approval by the Board of the primary application. The Board seeks comments from interested persons respecting the waivers sought by applicants.

DATES: Written comments must be filed with the Board no later than June 2, 1997. Replies may be filed by applicants no later than June 4, 1997.

ADDRESSES: An original and 25 copies of all documents must refer to STB Finance Docket No. 33388 and must be sent to the Office of the Secretary, Case Control Unit, ATTN: STB Finance Docket No. 33388, Surface Transportation Board, 1925 K Street, N.W., Washington, DC 20423-0001.<sup>2</sup> In addition, one copy of all documents in this proceeding must be sent to Administrative Law Judge Jacob Leventhal, Federal Energy Regulatory Commission, 888 First Street, N.E., Suite 117, Washington, DC 20426 [(202) 219-2538; FAX: (202) 219-3289] and to

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<sup>1</sup> CSXC and CSXT are referred to collectively as CSX. NSC and NSR are referred to collectively as NS. CRI and CRC are referred to collectively as Conrail. CSX, NS, and Conrail are referred to collectively as applicants.

<sup>2</sup> In addition to submitting an original and 25 copies of all documents filed with the Board, the parties are encouraged to submit all pleadings and attachments as computer data contained on a 3.5-inch floppy diskette formatted for WordPerfect 7.0 (or formatted so that it can be converted into WordPerfect 7.0) and clearly labeled with the identification acronym and number of the pleading contained on the diskette. See 49 CFR 1180.4(a)(2). The computer data contained on the computer diskettes submitted to the Board will be subject to the protective order granted in Decision No. 1, served April 16, 1997 (as modified in Decision No. 4, served May 2, 1997), and is 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 expedited review by the Board and its staff.

each of applicants' representatives: (1) Dennis G. Lyons, Esq., Arnold & Porter, 555 12th Street, N.W., Washington, DC 20004-1202; (2) Richard A. Allen, Esq., Zuckert, Scoutt & Rasenberger, L.L.P., Suite 600, 888 Seventeenth Street, N.W., Washington, DC 20006-3939; and (3) Paul A. Cunningham, Esq., Harkins Cunningham, Suite 600, 1300 Nineteenth Street, N.W., Washington, DC 20036.

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

SUPPLEMENTARY INFORMATION: On April 10, 1997, CSX, NS, and Conrail filed a notice of intent (CSX/NS-1) that indicates that they intend to file a 49 U.S.C. 11323-25 application (referred to as the "primary application") seeking Board authorization for, among other things, (a) the acquisition by CSX and NS of control of Conrail, and (b) the division of the assets of Conrail by and between CSX and NS. In Decision No. 2, served April 21, 1997, and published that day in the *Federal Register* at 62 FR 19390, we determined that the transaction contemplated by applicants is a major transaction as defined at 49 CFR 1180.2(a), and we invited comments on the procedural schedule proposed by applicants. Comments were filed on or before May 1, 1997, and a decision respecting the procedural schedule will be issued shortly.

Our regulations provide that applicants shall file, concurrently with their 49 U.S.C. 11323-25 primary application, all "directly related applications, e.g., those seeking authority to construct or abandon rail lines," etc. 49 CFR 1180.4(c)(2)(vi). Our regulations also provide, however, that, for good cause shown, we can waive the requirements otherwise imposed by our regulations. 49 CFR 1180.4(f)(1).

We address, in this decision, two petitions filed by applicants that seek a waiver of the otherwise applicable requirements of 49 CFR 1180.4(c)(2)(vi): the CSX-1 waiver petition filed May 2, 1997, by CSXC, CSXT, CRI, and CRC; and the NS-1 waiver petition filed May 2, 1997, by NSC and NSR.

Seven construction projects, more fully detailed below, are the focus of the two petitions. Applicants contend that it is critical that these projects, all of which involve connections, be constructed prior to a decision on the primary application if at all possible. Applicants claim that these connections must be in place prior to a decision on the primary application so that, if and when we approve the primary application, CSXT (with respect to four of the connections) and NSR (with respect to the other three) will be immediately able to provide efficient service in competition with each other. Applicants contend that, without early authorization to construct these connections, both CSXT and NSR would be severely limited in their ability to serve important (though different) customers. At the same time, applicants recognize that there can be no construction until we have completed our environmental review of each of these construction projects and the Board has issued a decision approving the construction, and imposing whatever environmental conditions are found to be appropriate.

If we were to grant the waivers sought in the CSX-1 and NS-1 petitions, applicants would file, with respect to each of the seven connections, either a petition or a notice seeking, in either instance, a 49 U.S.C. 10502 exemption for the construction of the particular connection. We emphasize that, with respect to each of the seven connections, the petition or the notice (hereinafter referred to as the exemption filing) would seek an exemption only for the construction by CSXT or NSR of, and not for the operation by CSXT or NSR over, the particular connection. All questions respecting operation by CSXT or NSR over these connections would be addressed in the environmental review process of the primary application proceeding and the decision disposing of the primary application; only questions respecting the construction by CSXT or NSR of these connections would be addressed in the decisions disposing of the exemption filings.



We emphasize that, if these waivers are granted, there will be full environmental review of each construction and operation proposal. The environmental effects of operations to be conducted would, as noted, be assessed in our processing of the primary application. As for the proposed constructions, if the waivers are granted, the applicants will be required to file an environmental report containing detailed environmental information regarding construction, assessment of environmental impacts due to construction, and proposed mitigation in this regard for each construction project. The environmental report must reflect consultations with appropriate federal, state, and local agencies, and affected parties. In addition, all written responses from these agencies and parties must be included in the environmental report. The Board's Section of Environmental Analysis (SEA) would then prepare an appropriate environmental document (an environmental assessment (EA) or a full environmental impact statement (EIS)) in each case and provide for input from the public and appropriate federal, state, and local agencies. After full consideration of the public comments and issuance of a final environmental document, we would issue a decision addressing the environmental issues and imposing any necessary environmental mitigation, and if appropriate allowing construction to begin. In short, the environmental review process for these constructions would be precisely what we would undertake in assessing the physical effects of these projects, if these constructions were filed independently of the merger case.

If we were to grant the waivers sought in the CSX-1 and NS-1 petitions, and applicants were thereafter to make their seven exemption filings, and we were to approve the construction of the seven connections following the completion of the environmental review, and if applicants were thereafter to construct these connections, and we were then to deny the primary application (or approve it subject to conditions unacceptable to applicants), the resources expended in constructing the seven connections might prove to be of no benefit to applicants. Similarly, if we were generally to approve the primary application but, concurrently therewith, deny (perhaps on environmental grounds) applicants' request to operate over any particular connection, the resources expended in constructing that particular connection might prove to be of no benefit to applicants. Applicants have acknowledged, and have indicated that they are willing to accept, these risks.

We emphasize that, if we were to grant the waivers sought in the CSX-1 and NS-1 petitions, our grant of these waivers would not in any way constitute approval of, or even indicate any consideration on our part respecting approval of, the primary application. It is also appropriate to note that, if we were to grant the waivers sought in the CSX-1 and NS-1 petitions, applicants would not be allowed to argue that, because we had granted the waivers, we should approve the primary application.

**The CSX Connections.** If we were to grant the waiver sought in the CSX-1 petition, CSXT would file, in four separate dockets,<sup>3</sup> a notice of exemption pursuant to 49 CFR 1150.36 for construction of a connection at Crestline, OH, and petitions for exemption pursuant to 49 U.S.C. 10502 and 49 CFR 1121.1 and 1150.1(a) for the construction of connections at Willow Creek, IN, Greenwich, OH, and Sidney, OH. CSXT indicates that it would consult with appropriate federal, state, and local agencies with respect to any potential environmental effects from the construction of these connections and would file environmental reports with SEA at the time that the notice and petitions are filed. The connections at issue are as follows.

(1) Two main line CRC tracks cross at Crestline, and CSXT proposes to construct in the northwest quadrant a connection track between those two CRC main lines. The connection would extend approximately 1,142 feet between approximately MP 75.5 on CRC's North-South main line between Greenwich, OH, and Indianapolis, IN, and approximately MP 188.8 on CRC's East-West main line between Pittsburgh, PA, and Ft. Wayne, IN.

<sup>3</sup> These dockets would be sub-dockets under STB Finance Docket No. 33388.

(2) CSXT and CRC cross each other at Willow Creek, and CSXT proposes to construct a connection track in the southeast quadrant between the CSXT main line and the CRC main line. The connection would extend approximately 2,800 feet between approximately MP BI-236.5 on the CSXT main line between Garrett, IN, and Chicago, IL, and approximately MP 248.8 on the CRC main line between Porter, IN, and Gibson Yard, IN (outside Chicago).

(3) The lines of CSXT and CRC cross each other at Greenwich, and CSXT proposes to construct connection tracks in the northwest and southeast quadrants between the CSXT main line and the CRC main line. The connection in the northwest quadrant would extend approximately 4,600 feet between approximately MP BG-193.1 on the CSXT main line between Chicago and Pittsburgh, and approximately MP 54.1 on the CRC main line between Cleveland and Cincinnati. A portion of this connection in the northwest quadrant would be constructed utilizing existing trackage and/or right-of-way of the Wheeling & Lake Erie Railway Company. The connection in the southeast quadrant would extend approximately 1,044 feet between approximately MP BG-192.5 on the CSXT main line and approximately MP 54.6 on the CRC main line.

(4) CSXT and CRC lines cross each other at Sidney Junction, and CSXT proposes to construct a connection track in the southeast quadrant between the CSXT main line and the CRC main line. The connection would extend approximately 3,263 feet between approximately MP BE-96.5 on the CSXT main line between Cincinnati, OH, and Toledo, OH, and approximately MP 163.5 on the CRC main line between Cleveland, OH, and Indianapolis, IN.

CSXT argues that, if it must wait for approval of the primary application before it can begin construction of these four connections, its ability to compete effectively with NSR upon the effectiveness of a Board order approving the primary application will be severely compromised. CSXT claims that, if it could not offer competitive rail service from New York to Chicago and New York to Cincinnati using lines that it proposes to acquire from CRC (including its new "Water Level Route" between New York and Cleveland), the achievement of effective competition between CSXT and NSR would be delayed significantly. CSXT adds that, if it cannot compete effectively with NSR "out of the starting blocks," this initial competitive imbalance could have a deleterious, and long term, effect on CSXT's future operations and its ability to compete effectively with NSR even when the connections are ultimately built.

CSXT claims that, if construction could not begin prior to any approval of the primary application, the time needed for construction and signal work could delay competitive operations for as long as 6 months after the Board did take action on the primary application. CSXT asserts that it would like to begin construction by as early as September 1, 1997, to avoid the delay that would result from the interruption of construction due to the onset of winter.<sup>4</sup> CSX-1 at 8 n.8.

**The NS Connections.** If we were to grant the waiver sought in the NS-1 petition, NSR would file, in three separate dockets,<sup>5</sup> petitions for exemption pursuant to 49 U.S.C. 10502 and 49 CFR 1121.1 and 1150.1(a) for the construction of connections at Alexandria, IN, Colsan/Bucyrus, OH, and Sidney, IL. NSR indicates that it would consult with appropriate federal, state, and local agencies with respect to any potential environmental effects from the construction of these connections and would file environmental reports with SEA at the time that the petitions are filed. The connections at issue are as follows.

<sup>4</sup> We note that our environmental review of these constructions may not be completed by that time, even if these waiver requests are granted.

<sup>5</sup> These dockets would be sub-dockets under STB Finance Docket No. 33388.

(1) The Alexandria connection would be in the northeast quadrant between former CRC Marion district lines to be operated by NSR and NSR's existing Frankfort district line. The new connection would allow traffic flowing over the Cincinnati gateway to be routed via a CRC line to be acquired by NSR to CRC's Elkhart Yard, a major CRC classification yard for carload traffic. This handling would permit such traffic to bypass the congested Chicago gateway. NSR estimates that the Alexandria connection would take approximately 9.5 months to construct.

(2) The Colsan/Bucyrus connection would be in the southeast quadrant between NSR's existing Sandusky district line and the former CRC Ft. Wayne line. This new connection would permit NSR to preserve efficient traffic flows, which otherwise would be broken, between the Cincinnati gateway and former CRC northeastern points to be served by NSR. NSR estimates that the Colsan/Bucyrus connection would take approximately 10.5 months to construct.

(3) The Sidney connection would be between NSR and Union Pacific Railroad Company (UPRR) lines. NS believes that a connection would be required in the southwest quadrant of the existing NSR/UPRR crossing to permit efficient handling of traffic flows between UPRR points in the Gulf Coast/Southwest and NSR points in the Midwest and Northeast, particularly customers on CRC properties to be served by NSR. NSR estimates that the Sidney connection would take approximately 10 months to construct.

NSR states that prompt construction of its three connections is critical to permit NSR to provide service competitive with CSXT if and when the Board approves the primary application.

**Request for Comments.** We understand the central purpose of the CSX-1 and NS-1 waiver petitions: a desire to be ready to engage in effective, vigorous competition immediately following consummation of the control authorization applicants intend to seek in their primary application, if such application is approved. We emphasize again what applicants acknowledge--that any resources expended in the construction of these connections may prove to be of no benefit to them if we ultimately deny the primary application, or approve it subject to conditions unacceptable to applicants, or approve the primary application but deny applicants' request to operate over any or all of the seven connections. Nonetheless, given applicants' willingness to assume those risks, we are not inclined to prevent applicants from pursuing this approach simply to protect them from the attendant risks.

As noted, we believe that there would be full environmental review of these constructions even if these waivers were granted. Moreover, there would be ample opportunity for public involvement, except that the public would have to comment now on the seven construction projects and separately later on the operation proposals during the course of the primary application proceeding. To ensure that granting the relief sought in the waiver petitions would not have an adverse effect on persons with concerns, including environmental concerns, involving the seven connections, we are inviting all interested persons to submit written comments respecting the CSX-1 and NS-1 waiver petitions.<sup>6</sup> Comments must be filed by June 2, 1997. Replies may be filed by applicants by June 4, 1997.

Furthermore, we think it appropriate to impose upon CSXT and NSR the following additional service/certification requirements: (1) No later than May 16, 1997: CSXT must serve copies of its CSX-1 petition, and a copy of this Decision No. 5, upon all persons with whom it would be required to consult pursuant to our 49 CFR part 1105 environmental regulations if its CSX-1 petition were an exemption petition; and CSXT must certify to the Board, in writing, that it has complied with this service requirement (and must attach to its certification a list of all such

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<sup>6</sup> We note that, on May 6, 1997, Steel Dynamics, Inc., filed a reply (SDI-3) to the NS-1 petition. We will consider SDI-3 along with other comments received in our subsequent decision deciding the CSX-1 and NS-1 waiver petitions.

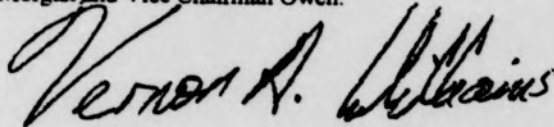
persons). (2) No later than May 16, 1997: NSR must serve copies of its NS-1 petition, and a copy of this Decision No. 5, upon all persons with whom it would be required to consult pursuant to our 49 CFR part 1105 environmental regulations if its NS-1 petition were an exemption petition; and NSR must certify to the Board, in writing, that it has complied with this service requirement (and must attach to its certification a list of all such persons). (3) NSR and CSXT also must serve copies of their petitions and this decision on the Council on Environmental Quality, the Environmental Protection Agency's Office of Federal Activities, and the Federal Railway Administration, and certify that they have done so.<sup>7</sup>

Following receipt of any comments and any replies, we will endeavor to issue a decision on the CSX-1 and NS-1 waiver petitions as soon after June 4, 1997, as is practicable.

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

Decided: May 7, 1997.

By the Board, Chairman Morgan and Vice Chairman Owen.

A handwritten signature in dark ink, appearing to read "Vernon A. Williams". The signature is fluid and cursive, with the first name "Vernon" being the most prominent.

Vernon A. Williams  
Secretary

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<sup>7</sup> With respect to any person upon whom the petitions have already been served, CSXT and NSR are not required to serve their petitions a second time. Rather, with respect to any such person, CSXT and NSR should serve only a copy of Decision No. 5, but should otherwise comply with the certification requirement.



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SERVICE DATE - MAY 13, 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

AGENCY: Surface Transportation Board.

ACTION: Decision No. 5, Notice of petitions filed by applicants seeking waiver of otherwise applicable requirements respecting seven construction projects; Request for comments.

SUMMARY: CSX Corporation (CSXC), CSX Transportation, Inc. (CSXT), Norfolk Southern Corporation (NSC), Norfolk Southern Railway Company (NSR), Conrail Inc. (CRI), and Consolidated Rail Corporation (CRC)<sup>1</sup> intend to file, on or before July 10, 1997, a "primary application" seeking Surface Transportation Board (Board) authorization for, among other things, (a) the acquisition by CSX and NS of control of Conrail, and (b) the division of the assets of Conrail by and between CSX and NS. See Decision No. 2, served April 21, 1997, and published that day in the *Federal Register* at 62 FR 19390. Applicants have now filed petitions seeking waiver of certain otherwise applicable requirements respecting seven related construction projects. These waivers, if granted, would allow applicants to begin construction on these projects following the completion by the Board of its environmental review of the constructions, and the issuance of a further decision approving construction, but prior to approval by the Board of the primary application. The Board seeks comments from interested persons respecting the waivers sought by applicants.

DATES: Written comments must be filed with the Board no later than June 2, 1997. Replies may be filed by applicants no later than June 4, 1997.

ADDRESSES: An original and 25 copies of all documents must refer to STB Finance Docket No. 33388 and must be sent to the Office of the Secretary, Case Control Unit, ATTN: STB Finance Docket No. 33388, Surface Transportation Board, 1925 K Street, N.W., Washington, DC 20423-0001.<sup>2</sup> In addition, one copy of all documents in this proceeding must be sent to Administrative Law Judge Jacob Leventhal, Federal Energy Regulatory Commission, 888 First Street, N.E., Suite 11F, Washington, DC 20426 [(202) 219-2538; FAX: (202) 219-3739] and to

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<sup>1</sup> CSXC and CSXT are referred to collectively as CSX. NSC and NSR are referred to collectively as NS. CRI and CRC are referred to collectively as Conrail. CSX, NS, and Conrail are referred to collectively as applicants.

<sup>2</sup> In addition to submitting an original and 25 copies of all documents filed with the Board, the parties are encouraged to submit all pleadings and attachments as computer data contained on a 3.5-inch floppy diskette formatted for WordPerfect 7.0 (or formatted so that it can be converted into WordPerfect 7.0) and clearly labeled with the identification acronym and number of the pleading contained on the diskette. See 49 CFR 1180.4(a)(2). The computer data contained on the computer diskettes submitted to the Board will be subject to the protective order granted in Decision No. 1, served April 16, 1997 (as modified in Decision No. 4, served May 2, 1997), and is 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 expedited review by the Board and its staff.

each of applicants' representatives: (1) Dennis G. Lyons, Esq., Arnold & Porter, 555 12th Street, N.W., Washington, DC 20004-1202; (2) Richard A. Allen, Esq., Zuckert, Scoutt & Rasenberger, L.L.P., Suite 600, 888 Seventeenth Street, N.W., Washington, DC 20006-3939; and (3) Paul A. Cunningham, Esq., Harkins Cunningham, Suite 600, 1300 Nineteenth Street, N.W., Washington, DC 20036.

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

SUPPLEMENTARY INFORMATION: On April 10, 1997, CSX, NS, and Conrail filed a notice of intent (CSX/NS-1) that indicates that they intend to file a 49 U.S.C. 11323-25 application (referred to as the "primary application") seeking Board authorization for, among other things, (a) the acquisition by CSX and NS of control of Conrail, and (b) the division of the assets of Conrail by and between CSX and NS. In Decision No. 2, served April 21, 1997, and published that day in the *Federal Register* at 62 FR 19390, we determined that the transaction contemplated by applicants is a major transaction as defined at 49 CFR 1180.2(a), and we invited comments on the procedural schedule proposed by applicants. Comments were filed on or before May 1, 1997, and a decision respecting the procedural schedule will be issued shortly.

Our regulations provide that applicants shall file, concurrently with their 49 U.S.C. 11323-25 primary application, all "directly related applications, e.g., those seeking authority to construct or abandon rail lines," etc. 49 CFR 1180.4(c)(2)(vi). Our regulations also provide, however, that, for good cause shown, we can waive the requirements otherwise imposed by our regulations. 49 CFR 1180.4(f)(1).

We address, in this decision, two petitions filed by applicants that seek a waiver of the otherwise applicable requirements of 49 CFR 1180.4(c)(2)(vi): the CSX-1 waiver petition filed May 2, 1997, by CSXC, CSXT, CRI, and CRC; and the NS-1 waiver petition filed May 2, 1997, by NSC and NSR.

Seven construction projects, more fully detailed below, are the focus of the two petitions. Applicants contend that it is critical that these projects, all of which involve connections, be constructed prior to a decision on the primary application if at all possible. Applicants claim that these connections must be in place prior to a decision on the primary application so that, if and when we approve the primary application, CSXT (with respect to four of the connections) and NSR (with respect to the other three) will be immediately able to provide efficient service in competition with each other. Applicants contend that, without early authorization to construct these connections, both CSXT and NSR would be severely limited in their ability to serve important (though different) customers. At the same time, applicants recognize that there can be no construction until we have completed our environmental review of each of these construction projects and the Board has issued a decision approving the construction, and imposing whatever environmental conditions are found to be appropriate.

If we were to grant the waivers sought in the CSX-1 and NS-1 petitions, applicants would file, with respect to each of the seven connections, either a petition or a notice seeking, in either instance, a 49 U.S.C. 10502 exemption for the construction of the particular connection. We emphasize that, with respect to each of the seven connections, the petition or the notice (hereinafter referred to as the exemption filing) would seek an exemption only for the construction by CSXT or NSR of, and not for the operation by CSXT or NSR over, the particular connection. All questions respecting operation by CSXT or NSR over these connections would be addressed in the environmental review process of the primary application proceeding and the decision disposing of the primary application; only questions respecting the construction by CSXT or NSR of these connections would be addressed in the decisions disposing of the exemption filings.

We emphasize that, if these waivers are granted, there will be full environmental review of each construction and operation proposal. The environmental effects of operations to be conducted would, as noted, be assessed in our processing of the primary application. As for the proposed constructions, if the waivers are granted, the applicants will be required to file an environmental report containing detailed environmental information regarding construction, assessment of environmental impacts due to construction, and proposed mitigation in this regard for each construction project. The environmental report must reflect consultations with appropriate federal, state, and local agencies, and affected parties. In addition, all written responses from these agencies and parties must be included in the environmental report. The Board's Section of Environmental Analysis (SEA) would then prepare an appropriate environmental document (an environmental assessment (EA) or a full environmental impact statement (EIS)) in each case and provide for input from the public and appropriate federal, state, and local agencies. After full consideration of the public comments and issuance of a final environmental document, we would issue a decision addressing the environmental issues and imposing any necessary environmental mitigation, and if appropriate allowing construction to begin. In short, the environmental review process for these constructions would be precisely what we would undertake in assessing the physical effects of these projects, if these constructions were filed independently of the merger case.

If we were to grant the waivers sought in the CSX-1 and NS-1 petitions, and applicants were thereafter to make their seven exemption filings, and we were to approve the construction of the seven connections following the completion of the environmental review, and if applicants were thereafter to construct these connections, and we were then to deny the primary application (or approve it subject to conditions unacceptable to applicants), the resources expended in constructing the seven connections might prove to be of no benefit to applicants. Similarly, if we were generally to approve the primary application but, concurrently therewith, deny (perhaps on environmental grounds) applicants' request to operate over any particular connection, the resources expended in constructing that particular connection might prove to be of no benefit to applicants. Applicants have acknowledged, and have indicated that they are willing to accept, these risks.

We emphasize that, if we were to grant the waivers sought in the CSX-1 and NS-1 petitions, our grant of these waivers would not in any way constitute approval of, or even indicate any consideration on our part respecting approval of, the primary application. It is also appropriate to note that, if we were to grant the waivers sought in the CSX-1 and NS-1 petitions, applicants would not be allowed to argue that, because we had granted the waivers, we should approve the primary application.

**The CSX Connections.** If we were to grant the waiver sought in the CSX-1 petition, CSXT would file, in four separate dockets,<sup>3</sup> a notice of exemption pursuant to 49 CFR 1150.36 for construction of a connection at Crestline, OH, and petitions for exemption pursuant to 49 U.S.C. 10502 and 49 CFR 1121.1 and 1150.1(a) for the construction of connections at Willow Creek, IN, Greenwich, OH, and Sidney, OH. CSXT indicates that it would consult with appropriate federal, state, and local agencies with respect to any potential environmental effects from the construction of these connections and would file environmental reports with SEA at the time that the notice and petitions are filed. The connections at issue are as follows.

(1) Two main line CRC tracks cross at Crestline, and CSXT proposes to construct in the northwest quadrant a connection track between those two CRC main lines. The connection would extend approximately 1,142 feet between approximately MP 75.5 on CRC's North-South main line between Greenwich, OH, and Indianapolis, IN, and approximately MP 188.8 on CRC's East-West main line between Pittsburgh, PA, and Ft. Wayne, IN.

<sup>3</sup> These dockets would be sub-dockets under STB Finance Docket No. 33388.



(2) CSXT and CRC cross each other at Willow Creek, and CSXT proposes to construct a connection track in the southeast quadrant between the CSXT main line and the CRC main line. The connection would extend approximately 2,800 feet between approximately MP BI-236.5 on the CSXT main line between Garrett, IN, and Chicago, IL, and approximately MP 248.8 on the CRC main line between Porter, IN, and Gibson Yard, IN (outside Chicago).

(3) The lines of CSXT and CRC cross each other at Greenwich, and CSXT proposes to construct connection tracks in the northwest and southeast quadrants between the CSXT main line and the CRC main line. The connection in the northwest quadrant would extend approximately 4,600 feet between approximately MP BG-193.1 on the CSXT main line between Chicago and Pittsburgh, and approximately MP 54.1 on the CRC main line between Cleveland and Cincinnati. A portion of this connection in the northwest quadrant would be constructed utilizing existing trackage and/or right-of-way of the Wheeling & Lake Erie Railway Company. The connection in the southeast quadrant would extend approximately 1,044 feet between approximately MP BG-192.5 on the CSXT main line and approximately MP 54.6 on the CRC main line.

(4) CSXT and CRC lines cross each other at Sidney Junction, and CSXT proposes to construct a connection track in the southeast quadrant between the CSXT main line and the CRC main line. The connection would extend approximately 3,263 feet between approximately MP BE-96.5 on the CSXT main line between Cincinnati, OH, and Toledo, OH, and approximately MP 163.5 on the CRC main line between Cleveland, OH, and Indianapolis, IN.

CSXT argues that, if it must wait for approval of the primary application before it can begin construction of these four connections, its ability to compete effectively with NSR upon the effectiveness of a Board order approving the primary application will be severely compromised. CSXT claims that, if it could not offer competitive rail service from New York to Chicago and New York to Cincinnati using lines that it proposes to acquire from CRC (including its new "Water Level Route" between New York and Cleveland), the achievement of effective competition between CSXT and NSR would be delayed significantly. CSXT adds that, if it cannot compete effectively with NSR "out of the starting blocks," this initial competitive imbalance could have a deleterious, and long term, effect on CSXT's future operations and its ability to compete effectively with NSR even when the connections are ultimately built.

CSXT claims that, if construction could not begin prior to any approval of the primary application, the time needed for construction and signal work could delay competitive operations for as long as 6 months after the Board did take action on the primary application. CSXT asserts that it would like to begin construction by as early as September 1, 1997, to avoid the delay that would result from the interruption of construction due to the onset of winter.<sup>4</sup> CSX-1 at 8 n.8.

**The NS Connections.** If we were to grant the waiver sought in the NS-1 petition, NSR would file, in three separate dockets,<sup>5</sup> petitions for exemption pursuant to 49 U.S.C. 10502 and 49 CFR 1121.1 and 1150.1(a) for the construction of connections at Alexandria, IN, Colsan/Bucyrus, OH, and Sidney, IL. NSR indicates that it would consult with appropriate federal, state, and local agencies with respect to any potential environmental effects from the construction of these connections and would file environmental reports with SEA at the time that the petitions are filed. The connections at issue are as follows.

<sup>4</sup> We note that our environmental review of these constructions may not be completed by that time, even if these waiver requests are granted.

<sup>5</sup> These dockets would be sub-dockets under STB Finance Docket No. 33388.

(1) The Alexandria connection would be in the northeast quadrant between former CRC Marion district lines to be operated by NSR and NSR's existing Frankfort district line. The new connection would allow traffic flowing over the Cincinnati gateway to be routed via a CRC line to be acquired by NSR to CRC's Elkhart Yard, a major CRC classification yard for carload traffic. This handling would permit such traffic to bypass the congested Chicago gateway. NSR estimates that the Alexandria connection would take approximately 9.5 months to construct.

(2) The Colsan/Bucyrus connection would be in the southeast quadrant between NSR's existing Sandusky district line and the former CRC Ft. Wayne line. This new connection would permit NSR to preserve efficient traffic flows, which otherwise would be broken, between the Cincinnati gateway and former CRC northeastern points to be served by NSR. NSR estimates that the Colsan/Bucyrus connection would take approximately 10.5 months to construct.

(3) The Sidney connection would be between NSR and Union Pacific Railroad Company (UPRR) lines. NS believes that a connection would be required in the southwest quadrant of the existing NSR/UPRR crossing to permit efficient handling of traffic flows between UPRR points in the Gulf Coast/Southwest and NSR points in the Midwest and Northeast, particularly customers on CRC properties to be served by NSR. NSR estimates that the Sidney connection would take approximately 10 months to construct.

NSR states that prompt construction of its three connections is critical to permit NSR to provide service competitive with CSXT if and when the Board approves the primary application.

**Request for Comments.** We understand the central purpose of the CSX-1 and NS-1 waiver petitions: a desire to be ready to engage in effective, vigorous competition immediately following consummation of the control authorization applicants intend to seek in their primary application, if such application is approved. We emphasize again what applicants acknowledge-- that any resources expended in the construction of these connections may prove to be of no benefit to them if we ultimately deny the primary application, or approve it subject to conditions unacceptable to applicants, or approve the primary application but deny applicants' request to operate over any or all of the seven connections. Nonetheless, given applicants' willingness to assume those risks, we are not inclined to prevent applicants from pursuing this approach simply to protect them from the attendant risks.

As noted, we believe that there would be full environmental review of these constructions even if these waivers were granted. Moreover, there would be ample opportunity for public involvement, except that the public would have to comment now on the seven construction projects and separately later on the operation proposals during the course of the primary application proceeding. To ensure that granting the relief sought in the waiver petitions would not have an adverse effect on persons with concerns, including environmental concerns involving the seven connections, we are inviting all interested persons to submit written comments respecting the CSX-1 and NS-1 waiver petitions.<sup>6</sup> Comments must be filed by June 2, 1997. Replies may be filed by applicants by June 4, 1997.

Furthermore, we think it appropriate to impose upon CSXT and NSR the following additional service/certification requirements: (1) No later than May 16, 1997: CSXT must serve copies of its CSX-1 petition, and a copy of this Decision No. 5, upon all persons with whom it would be required to consult pursuant to our 49 CFR part 1105 environmental regulations if its CSX-1 petition were an exemption petition; and CSXT must certify to the Board, in writing, that it has complied with this service requirement (and must attach to its certification a list of all such

<sup>6</sup> We note that, on May 6, 1997, Steel Dynamics, Inc., filed a reply (SDI-3) to the NS-1 petition. We will consider SDI-3 along with other comments received in our subsequent decision deciding the CSX-1 and NS-1 waiver petitions.

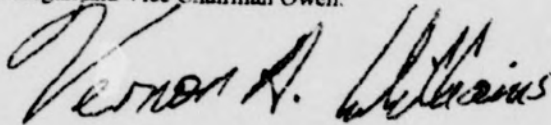
persons). (2) No later than May 16, 1997: NSR must serve copies of its NS-1 petition, and a copy of this Decision No. 5, upon all persons with whom it would be required to consult pursuant to our 49 CFR part 1105 environmental regulations if its NS-1 petition were an exemption petition; and NSR must certify to the Board, in writing, that it has complied with this service requirement (and must attach to its certification a list of all such persons). (3) NSR and CSXT also must serve copies of their petitions and this decision on the Council on Environmental Quality, the Environmental Protection Agency's Office of Federal Activities, and the Federal Railway Administration, and certify that they have done so.<sup>7</sup>

Following receipt of any comments and any replies, we will endeavor to issue a decision on the CSX-1 and NS-1 waiver petitions as soon after June 4, 1997, as is practicable.

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

Decided: May 7, 1997.

By the Board, Chairman Morgan and Vice Chairman Owen.



Vernon A. Williams  
Secretary

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<sup>7</sup> With respect to any person upon whom the petitions have already been served, CSXT and NSR are not required to serve their petitions a second time. Rather, with respect to any such person, CSXT and NSR should serve only a copy of Decision No. 5, but should otherwise comply with the certification requirement.

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VTA-1



*Surface Transportation Board  
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*Office of the Secretary*

May 8, 1997

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

Dear Mr. Allen:

**Summary.** By letter dated April 24, 1997, you submitted, on behalf of Norfolk Southern Corporation (NSC),<sup>1</sup> CSX Corporation (CSXC),<sup>2</sup> and Green Acquisition Corporation (Acquisition), and pursuant to 49 CFR 1013.3(a), an Amended and Restated Voting Trust Agreement (hereinafter referred to as Joint-VTA-1) that NSC, CSXC, and Acquisition propose to enter into with an institutional trustee, Deposit Guaranty National Bank (Deposit Guaranty or Trustee), and a limited liability company to be formed shortly (LLC). NSC and CSXC intend that the Trustee will hold, in the voting trust (hereinafter referred to as the Joint Voting Trust) to be established pursuant to Joint-VTA-1, all common shares of Conrail Inc. (CRI):<sup>3</sup> (1) acquired previously, and separately, by NSC and CSXC and currently held in the separate voting trusts referenced below; or (2) hereafter acquired by NSC and CSXC pursuant to the Third Supplement (the Third Supplement, dated April 10, 1997) to the Second Offer to Purchase (the Second Offer,

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<sup>1</sup> NSC is the parent holding company of Norfolk Southern Railway Company (NSR). NSC and NSR are referred to collectively as NS.

<sup>2</sup> CSXC is the parent holding company of CSX Transportation, Inc. (CSXT). CSXC and CSXT are referred to collectively as CSX.

<sup>3</sup> CRI is the parent holding company of Consolidated Rail Corporation (CRC). CRI and CRC are referred to collectively as Conrail.

dated December 6, 1996).<sup>4</sup> NSC and CSXC intend that the Joint Voting Trust to be established pursuant to Joint-VTA-1 will be a single consolidated voting trust ultimately superseding and replacing the previously established separate voting trusts.

In my opinion, the Joint Voting Trust to be established under Joint-VTA-1 will effectively insulate NSC and CSXC, and their respective affiliates, from the violation of Subtitle IV of Title 49 of the United States Code (Subtitle IV of Title 49) and the policy of the Surface Transportation Board (the Board) that would result if NSC and/or CSXC were to acquire, without authorization, what would otherwise be a controlling interest in CRI's carrier subsidiaries.

**Background: The CSX-VTA's.** By letter dated October 23, 1996, Mr. Dennis G. Lyons submitted, on behalf of CSXC and Acquisition (which was then a wholly owned subsidiary of CSXC), a voting trust agreement (hereinafter referred to as CSX-VTA-1) proposed to be entered into by and between CSXC, Acquisition, and a trustee, for use in connection with the acquisition, by CSXC and Acquisition, of a controlling interest in CRI. On November 1, 1996, Mr. Lyons submitted a revised VTA (hereinafter referred to as CSX-VTA-2), which provided that Deposit Guaranty was to be the trustee in place of the previously designated trustee. By letter dated November 1, 1996, I advised that, in my opinion, the voting trust to be established under CSX-VTA-2 would effectively insulate CSXC and its affiliates from the violation of Subtitle IV of Title 49 and the policy of the Board that would result if CSXC were to acquire, without authorization, what would otherwise be a controlling interest in CRI's carrier subsidiaries.

On November 26, 1996, CSXC, acting through Acquisition, bought and paid for approximately 19.9% of the common stock of CRI. This stock was deposited in a voting trust (hereinafter referred to as the CSX Voting Trust) pursuant to a voting trust agreement in the form of CSX-VTA-2.

By letter dated December 27, 1996, Mr. Lyons submitted, again on behalf of CSXC and Acquisition, another revised VTA (hereinafter referred to as CSX-VTA-3) proposed to be entered into by and between CSXC, Acquisition, and Deposit Guaranty. By letter dated January 8, 1997, I advised that, in my opinion, the voting trust to be established under CSX-VTA-3 would effectively insulate CSXC and its affiliates from the violation of Subtitle IV of Title 49

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<sup>4</sup> The Second Offer, dated December 6, 1996, was made by CSXC. The Third Supplement, dated April 10, 1997, includes NSC as a co-bidder.

and the policy of the Board that would result if CSXC were to acquire, without authorization, what would otherwise be a controlling interest in CRI's carrier subsidiaries.<sup>5</sup>

**Background: The NS-VTA's.** By letter dated October 25, 1996, you submitted, on behalf of NSC and Atlantic Acquisition Corporation (Acquiror), a voting trust agreement (hereinafter referred to as NS-VTA-1) proposed to be entered into by and between NSC, Acquiror, and a Bank (to be named as trustee) for use in connection with the acquisition, by NSC and Acquiror, of a controlling interest in CRI. By letter dated November 1, 1996 (addressed to your colleague, Mr. James A. Calderwood), I advised that, in my opinion, the voting trust to be established under NS-VTA-1 would effectively insulate NSC and its affiliates from the violation of Subtitle IV of Title 49 and the policy of the Board that would result if NSC were to acquire, without authorization, what would otherwise be a controlling interest in CRI's carrier subsidiaries.

By letter dated November 6, 1996, you submitted, again on behalf of NSC and Acquiror, an alternative version of NS-VTA-1 (hereinafter referred to as NS-VTA-2). By letter dated November 18, 1996, I advised that, in my opinion, the voting trust to be established under NS-VTA-2 would effectively insulate NSC and its affiliates from the violation of Subtitle IV of Title 49 and the policy of the Board that would result if NSC were to acquire, without authorization, what would otherwise be a controlling interest in CRI's carrier subsidiaries.

By letter dated January 31, 1997 (as supplemented by an errata letter dated February 3, 1997), you submitted, again on behalf of NSC and Acquiror: NS-VTA-3, which was another alternative version of NS-VTA-1; and NS-VTA-4, which was an entirely new voting trust agreement. By letter dated February 14, 1997, I advised that, in my opinion, the voting trusts to be established under NS-VTA-3 and NS-VTA-4 would effectively insulate NSC and its affiliates from the violation of Subtitle IV of Title 49 and the policy of the Board that would result if NSC were to acquire, without authorization, what would otherwise be a controlling interest in CRI's carrier subsidiaries.<sup>6</sup>

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<sup>5</sup> The letters and other submissions respecting the CSX-VTA's were docketed in STB Finance Docket No. 33220.

<sup>6</sup> The letters and other submissions respecting the NS-VTA's were docketed in STB Finance Docket No. 33286.

On February 18, 1997, NSC, acting through Acquiror, bought and paid for approximately 9.9% of the common stock of CRI. This stock was deposited in a voting trust (hereinafter referred to as the NS Voting Trust) pursuant to a voting trust agreement substantially in the form of NS-VTA-3.

**The Joint Conrail Acquisition Transaction.** Joint-VTA-1 reflects the fact that whereas NSC and CSXC formerly planned to pursue two separate CRI acquisition transactions, they now plan to pursue one joint CRI acquisition transaction. Under the Third Supplement to the Second Offer, CSXC and NSC, acting in concert through Acquisition, are now offering to purchase all outstanding common shares of CRI for \$115 per share in cash. Unless further extended, the Second Offer will expire on May 23, 1997.

NSC and CSXC have agreed that, upon consummation of the Second Offer (as supplemented by the Third Supplement), they will establish a single consolidated voting trust to hold: (i) the CRI shares previously acquired by NSC and CSXC and now held in the separate voting trusts; and (ii) the remaining CRI shares to be acquired in the Second Offer (as supplemented by the Third Supplement). This single consolidated voting trust will be an amended and restated version of the CSX Voting Trust (i.e., the voting trust established pursuant to CSX-VTA-2), which is currently holding the 19.9% of the common stock of CRI acquired by Acquisition for CSXC on November 26, 1996.

NSC and CSXC intend to form a new limited liability company (LLC), to which CSXC will contribute both 100% of the stock of Acquisition and also a specified amount of cash, and to which NSC will contribute both 100% of its interest in the approximately 9.9% of the common stock of CRI now held in the NS Voting Trust and also a specified amount of cash. NSC and CSXC will have equal voting control of LLC, but it is contemplated that NSC will own 58% of the equity of LLC and that CSXC will own 42% of the equity of LLC. The cash contributed by NSC and CSXC to LLC will be transferred to Acquisition to pay for the remaining CRI shares that Acquisition will acquire pursuant to the Second Offer (as supplemented by the Third Supplement). Upon consummation of the Second Offer (as supplemented by the Third Supplement), Acquiror will cause the trustee of the NS Voting Trust to transfer to the Trustee of the Joint Voting Trust to be established pursuant to Joint-VTA-1 the approximately 9.9% of the common stock of CRI now held in the NS Voting Trust. Once this stock has been transferred, the NS Voting Trust will be terminated.

**The Joint Voting Trust: My Opinion.** In my opinion, the Joint Voting Trust to be established under Joint-VTA-1 will effectively insulate NSC and CSXC, and their respective affiliates, from the violation of Subtitle IV of Title 49 and the policy of the Board that would



result if NSC and/or CSXC were to acquire, without authorization, what would otherwise be a controlling interest in CRI's carrier subsidiaries. By and large, the language of Joint-VTA-1 mirrors the language of the prior VTA's submitted by NSC and CSXC (respecting such matters as the irrevocability of the voting trust, the independence of the Trustee, the ban on direct or indirect business arrangements or dealings between the Trustee and either NSC or CSXC, etc.), and, like the language in the prior VTA's, effectively insulates NSC and CSXC from premature control of CRI.

The key issue concerns the control of CRI prior to such time (if ever) as the Board approves, and NSC and CSXC consummate, control of CRI.

Joint-VTA-1 provides, in general, that, prior to the merger of an Acquisition subsidiary into CRI (at which time CRI shall become a wholly owned subsidiary of Acquisition), the Trustee shall vote the Trust Stock with respect to all matters in the same proportion as all shares of CRI Common Stock other than Trust Stock are voted with respect to such matters. This provision is acceptable because, during the time it is effective, it will leave control of CRI in the hands of CRI shareholders other than NSC and CSXC.

Joint-VTA-1 further provides, in general, that, after the merger of an Acquisition subsidiary into CRI, the Trustee shall vote the Trust Stock "in accordance with the instructions of a majority of the persons who are currently the directors of [CRI] and their nominees as successors and who shall then be directors of [CRI]." This provision is acceptable because, during the time it is effective, it will leave control of CRI in the hands of its current directors and/or successors nominated by the current directors.

Joint-VTA-1 further provides "that if there shall be no such persons qualified to give such instructions hereunder, or if a majority of such persons refuse or fail to give such instructions, then the Trustee shall vote the Trust Stock in its sole discretion, having due regard for the interests of the holders of Trust Certificates as investors in the stock of [CRI], determined without reference to such holders' interests in railroads other than the subsidiaries of [CRI]." This provision is acceptable because, during the time it is effective, it will leave control of CRI in the hands of an independent Trustee.

**Divestiture.** I think it appropriate to reiterate and emphasize what I said in my prior letters concerning the divestiture of the CRI stock that will be necessary in the event that either: (a) the CRI control transaction does not receive regulatory authorization; or (b) the CRI control transaction does receive regulatory authorization, but NSC and CSXC choose not to exercise that authorization. If the CRI control transaction ultimately collapses, the Board will have the

authority to approve both a plan of divestiture and the sale (or other disposition) of the CRI stock, whenever such divestiture and disposition take place, and whether or not the person acquiring the CRI stock requires 49 U.S.C. 11323 authority to consummate such acquisition. *See Santa Fe Southern Pacific Corp.--Control--SPT Co.*, 2 I.C.C.2d 709, 834 (1986) (the jurisdiction of the Interstate Commerce Commission "to oversee the orderly divestiture" of the Trust Stock is "inherently within [its] authority to approve consolidations and acquisitions of control.").

**Informal Staff Opinion Not Binding On Board.** My opinion respecting the Joint Voting Trust to be established under Joint-VTA-1 is an informal staff opinion that is not binding on the Board. *See* 49 CFR 1013.3(a).

**Merits Not Considered.** In arriving at my opinion respecting the Joint Voting Trust to be established under Joint-VTA-1, I have given no consideration whatsoever to the merits of the 49 U.S.C. 11323-25 control application that NSC and CSXC have indicated they intend to file on or about June 10, 1997. Thus, my opinion should not be interpreted by any person as an indication that I think the Board will or will not approve any such application.

**Ancillary Matter.** By letter dated April 25, 1997, Mr. Michael F. McBride, representing American Electric Power Service Corporation, Atlantic City Electric Company, Delmarva Power & Light Company, Indianapolis Power & Light Company, and The Ohio Valley Coal Company, has asked that, in arriving at my opinion respecting the Joint Voting Trust to be established under Joint-VTA-1, I consider certain pleadings (hereinafter referred to as the ACE-1 and CURE-1 pleadings) that were filed in STB Finance Docket No. 33388 on or about April 18, 1997. *See* Decision No. 4, slip op. at 1-2 (reference to the ACE-1 and CURE-1 pleadings). *See also* Decision No. 4, slip op. at 2-3 (discussion of the issues raised in the ACE-1 and CURE-1 pleadings).

For the reasons below, in arriving at the opinion expressed in this letter, I have given no consideration to the ACE-1 and CURE-1 pleadings. My opinion is limited to the question whether the Joint Voting Trust to be established under Joint-VTA-1 will effectively insulate NSC and CSXC, and their affiliates, from the violation of Subtitle IV of Title 49 and the policy of the Board that would result if NSC and/or CSXC were to acquire, without authorization, what would otherwise be a controlling interest in CRI's carrier subsidiaries. The ACE-1 and CURE-1 pleadings are not directed to this question; rather, these pleadings (particularly the ACE-1 pleading) are directed to the question whether the price NSC and CSXC have agreed to pay for the CRI shares still outstanding is too high. This is a matter that the Board has addressed. *See* Decision No. 4, slip op. at 3 (any arguments respecting the reasonableness of the purchase price

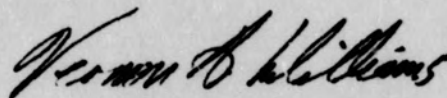
Richard A. Allen  
May 7, 1997  
Page 7

STB Finance Docket No. 33388

will be addressed by the Board in its review of the merits of the 49 U.S.C. 11323-25 control application).

**Public Docket.** A copy of this letter will be placed in the public docket in STB Finance Docket No. 33388.

Sincerely,



Vernon A. Williams  
Secretary

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SERVICE DATE - DECEMBER 23, 1998

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. 111

Decided: December 22, 1998

In Decision No. 89, in addition to approving the primary application,<sup>1</sup> the Board imposed a condition requiring applicants to provide Indianapolis Power & Light Company (IP&L) a competitive rail routing into IP&L's Stout plant via a new interchange between NS and Indiana Southern Railroad, Inc. (ISRR) at milepost 6.0 on ISRR. See Decision No. 89, slip op. at 116 and 177. In response to complaints from IP&L and ISRR that milepost 6.0 is not a practical interchange point, the Board subsequently directed applicants, ISRR, and IP&L to attempt to negotiate a mutually satisfactory solution to this interchange issue and report back to the Board in 60 days. See Decision No. 96, served October 19, 1998, slip op. at 14 and 26.

In separate letters filed December 18, 1998, applicants indicate that the parties have discussed the issue, but have been unable to reach a mutually satisfactory solution. Applicants therefore request a 30-day extension to negotiate an agreement. By letter filed December 18, 1998, IP&L indicates that CSX has not discussed the interchange issue with it and requests that, because CSX has not been responsive to communications sent by IP&L to CSX, and the applicable tariff in question, Conrail Tariff No. 4611, expires in February 1999, the extension should be conditioned on removal of the expiration date of that tariff. The requested extension is reasonable and will be granted.<sup>2</sup> This decision takes no action on IP&L's request for removal of the expiration date of Conrail Tariff No. 4611. IP&L may renew that request if an agreement has not been reached by January 19, 1999.

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<sup>1</sup> In Decision No. 89, served July 23, 1998, the Board approved, subject to conditions, the application by CSX Corporation and CSX Transportation, Inc. (collectively CSX), and Norfolk Southern Corporation and Norfolk Southern Railway Company (collectively NS) under 49 U.S.C. 11321-26 for: (1) the acquisition of control of Conrail Inc., and Consolidated Rail Corporation (collectively Conrail); and (2) the division of Conrail's assets by and between CSX and NS.

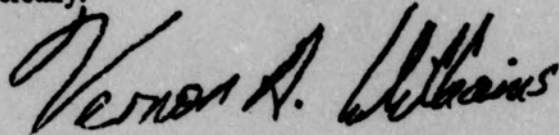
<sup>2</sup> Although NS requested an extension to and including Sunday, January 17, 1999, the extension will be granted to January 19, 1999, the next day which is not a Saturday, Sunday or holiday. See 49 CFR 1104.7.

**It is ordered:**

1. The extension request is granted. The parties should attempt to negotiate a mutually satisfactory solution respecting any milepost 6.0 interchange problems and advise us of the status of their negotiations by January 19, 1999.

2. This decision is effective on its service date.

By the Board, Vernon A. Williams, Secretary.

A handwritten signature in dark ink, appearing to read "Vernon A. Williams", is written over the typed name and title.

Vernon A. Williams  
Secretary

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SERVICE DATE - DECEMBER 22, 1998

**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. 110**

**Decided: December 21, 1998**

This decision resolves the anticompetitive problems posed by the two contracts referenced in Decision No. 106.

**BACKGROUND**

**Decision No. 89.** In Decision No. 89, we approved the acquisition of control of Conrail Inc. (CRR) and Consolidated Rail Corporation (CRC), and the division of the assets thereof, by (1) CSX Corporation (CSXC) and CSX Transportation, Inc. (CSXT), and (2) Norfolk Southern Corporation (NSC) and Norfolk Southern Railway Company (NSR).<sup>1</sup> In approving the CSX/NS/CR transaction, we noted our expectation that the transaction would result in the creation of head-to-head two-railroad competition in several corridors in which the pre-transaction Conrail had no Class I competition. See Decision No. 89, slip op. at 50. One of these corridors links Chicago, IL, and Northern New Jersey. Prior to the CSX/NS/CR transaction, Conrail was the only Class I railroad operating over the length of this corridor. On Day One, however, two railroads -- CSX and NS -- will operate between Chicago and Northern New Jersey.<sup>2</sup>

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<sup>1</sup> CSXC and CSXT and their wholly owned subsidiaries, and also the wholly owned CRC subsidiary to be known as New York Central Lines LLC (NYC), are referred to collectively as CSX. NSC and NSR and their wholly owned subsidiaries, and also the wholly owned CRC subsidiary to be known as Pennsylvania Lines LLC (PRR), are referred to collectively as NS. CRR and CRC, and also their wholly owned subsidiaries other than NYC and PRR, are referred to collectively as Conrail or CR. CSX, NS, and Conrail are referred to collectively as applicants.

<sup>2</sup> Acquisition of control of Conrail was effected by CSX and NS on August 22, 1998 (referred to as the Control Date). The division of the assets of Conrail will be effected on a date not yet determined  
(continued...)

CSX-168 Petition. In its CSX-168 petition filed December 2, 1998, CSX brought to our attention two contracts that, if allowed to continue in effect past Day One, would weaken the CSX vs. NS competition we intended to create in the Chicago-Northern New Jersey corridor. CSX contends: that, some years ago, its intermodal affiliate, CSX Intermodal, Inc. (CSXI), entered into contracts with Conrail and NS respecting the movement of traffic between Chicago and Northern New Jersey, via Buffalo, NY;<sup>3</sup> that these contracts contain volume and trainset commitments, which are expressed as percentages of the total traffic handled by CSXI in this corridor; and that these contracts also provide for liquidated damages, which are applicable in the event CSXI fails to comply with its contractual commitments. CSX asks that we declare that, effective on Day One, the volume and trainset requirements contained in the two CSXI contracts will be null and void, and unenforceable by Conrail and NS.

Decision No. 106. In our decision directing NS to file an expedited reply to the CSX-168 petition, we encouraged NS to address, in its reply, "a question that will arise if we decide to order CSX not to comply with the requirements provisions in the two CSXI contracts: What then will become of the liquidated damages provisions?" Perhaps, we suggested, "the future handling of this matter could reflect the way it might have been handled if these contracts had been 'on the table' during the negotiation of the CSX/NS/CR Transaction Agreement and had been subject, at that time, to the general give-and-take that accompanied the negotiation of that agreement." See Decision No. 106, slip op. at 3.

NS-73 Reply. In its NS-73 reply filed December 17, 1998, NS argues, in essence, that, if we take action to eliminate the anticompetitive problems posed by the two CSXI contracts that were referenced in the CSX-168 petition, we should also take action to eliminate the anticompetitive problems posed by two Conrail/APL arrangements that were not mentioned in the CSX-168 petition.<sup>4</sup>

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<sup>2</sup>(...continued)

(that date is generally referred to as Day One; it has also been referred to as the Closing Date and the Split Date).

<sup>3</sup> The traffic moves between Chicago and Buffalo on Conrail (under the Conrail contract) and on NS (under the NS contract). The traffic moves between Buffalo and Northern New Jersey on the New York, Susquehanna and Western Railroad (NYS&W).

<sup>4</sup> APL Limited is referred to as APL.



## DISCUSSION AND CONCLUSIONS

The Two CSXI Contracts. We agree with CSX that the two CSXI contracts had prior to the Control Date, and continue to have in the interim period between the Control Date and Day One, no anticompetitive impacts, because CSX did not in the past, and does not now, operate between Chicago and Northern New Jersey. We further agree with CSX that the two CSXI contracts, if allowed to continue in effect without modification, would have anticompetitive impacts commencing on Day One. The CSX vs. NS competition that would otherwise exist on Day One would be thwarted by the continued existence of these contracts, which would require CSXI to ship most of its Chicago-Northern New Jersey intermodal movements on NS (under the NS contract) or under a 50-50 pooling arrangement with NS (under the Conrail contract, as modified by the terms of the CSX/NS/CR Transaction Agreement).<sup>5</sup> We realize, of course, that the anticompetitive impacts of the two CSXI contracts, if allowed to continue, would last for only six months or some period not much longer than six months, see CSX-168 at 15 n.9; but even six months is unacceptable. We had in mind, when we issued Decision No. 89, that CSX vs. NS competition would begin in the Chicago-Northern New Jersey corridor on Day One, not on some day some months after Day One. It is, therefore, necessary to take action to assure that CSX vs. NS competition begins in the Chicago-Northern New Jersey corridor on Day One, as we contemplated in Decision No. 89.<sup>6</sup>

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<sup>5</sup> CSX and NS have debated whether the two CSXI contracts constitute "pooling" arrangements, and, if so, whether approval under 49 U.S.C. 11322 would be appropriate. Compare CSX-168 at 19-20 and 23-24 with NS-73 at 4-5. We have no need to enter this debate; it suffices for present purposes to observe that the two CSXI contracts will have anticompetitive impacts in the Chicago-Northern New Jersey corridor, and that these anticompetitive impacts are at odds with our approval of the CSX/NS/CR transaction. NS has also suggested that, in Decision No. 89, we expressly approved any pooling arrangement that might be construed to arise from implementation of the transaction. See NS-73 at 5, referencing Decision No. 89, slip op. at 175-76 (ordering paragraph 11). We reject this interpretation of ordering paragraph 11. The broad language of ordering paragraph 11 does not encompass arrangements that were known or should have been known to applicants during the pendency of this proceeding and that applicants should have brought to our attention but did not. In this regard, we would hope that there are no more such issues that the parties knew or should have known about but did not appropriately bring to our attention.

<sup>6</sup> See Decision No. 89, slip op. at 173-74 (ordering paragraph 1): "The Board expressly reserves jurisdiction over the STB Finance Docket No. 33388 proceeding and all embraced proceedings in order to implement the 5-year oversight condition imposed in this decision and, if necessary, to impose additional conditions and/or to take other action if, and to the extent, we determine it is necessary to impose additional conditions and/or to take other action to address harms caused by the CSX/NS/CR transaction."

The requirements provisions of the two CSXI contracts, if allowed to continue in effect past Day One, would have anticompetitive impacts and would operate as impediments to our intention that full competition exist in the Chicago-Northern New Jersey corridor from Day One. We will, therefore, override these requirements provisions, making them (effective on Day One) null and void, and unenforceable by Conrail and NS. We will not explicitly override the liquidated damages provisions, but only because an explicit override is not necessary; the requirements provisions having been nullified, CSXI cannot breach such provisions by failing to comply with them; and, therefore, our explicit override of the requirements provisions effectively nullifies, by implication, the liquidated damages provisions.<sup>7</sup>

The Two Conrail/APL Arrangements. NS contends that, if the two CSXI contracts had been "on the table" during the negotiation of the CSX/NS/CR Transaction Agreement, and if NS had known then what it knows now regarding Conrail's intermodal contracts, NS would have insisted on linking, for purposes of negotiation, the two CSXI contracts and the two Conrail/APL arrangements. NS therefore argues that, if CSX is granted relief from the operation of the volume commitment contained in either of the CSXI contracts, we should relieve APL from its volume commitment in the Conrail/APL contract and the tie of such commitment to the Conrail/APL lease (i.e., we should allow APL to continue to have the benefit of the Conrail/APL lease even if APL elects to terminate, effective on the 180th day after Day One, the Conrail/APL contract).

NS recognizes that we are already "familiar" with the Conrail/APL arrangements. See NS-73 at 10-11. Indeed we are. See Decision No. 78, slip op. at 3 (second full paragraph); Decision No. 91, slip op. at 3 (first full paragraph); Decision No. 96, slip op. at 35-36 (carryover paragraph) & n.82. See also Decision No. 89, slip op. at 285-89 (discussing the Conrail/APL relationship, and the implications of the CSX/NS/CR transaction, in great detail). See also Decision Nos. 84, 87, and 90 (respecting other aspects of the CSX/APL controversy). We are, in fact, sufficiently familiar with the Conrail/APL arrangements to realize that NS' NS-73 arguments respecting such arrangements appear to be identical to the APL arguments referenced in Decision Nos. 78, 91, and 96. And our response, therefore, is also identical: "We remain unpersuaded that APL should be afforded special relief because the exercise of such a clause [i.e., an antiassignment clause] in the Conrail/APL transportation contract may result in the termination of APL's lease of a portion of Conrail's South Kearny, NJ, yard." See Decision No. 96, slip op. at 11 n.29.

NS claims, in essence, that it would be unfairly disadvantaged if we were to grant the relief sought by CSX vis-à-vis the two CSXI contracts without also granting the relief now sought by NS (and previously sought by APL) vis-à-vis the two Conrail/APL arrangements. We think that NS is overreaching in its attempt to link the two CSXI contracts and the two Conrail/APL arrangements,

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<sup>7</sup> We are not persuaded by NS' suggestion that merely assigning the CSXI/Conrail contract to CSX under Section 2.2(c) of the Transaction Agreement would resolve the anticompetitive problems presented by that contract.

particularly given that the very relief now sought by NS vis-à-vis the two Conrail/APL arrangements was previously sought by APL.<sup>8</sup> It does not suffice to contend that, when the Transaction Agreement was negotiated, NS did not know (although CSX may perhaps have known, see NS-73 at 13 & n.21) of the tie between the Conrail/APL contract and the Conrail/APL lease. NS learned of the tie in advance of Decision No. 89,<sup>9</sup> and could have indicated, on the record, its support for the arguments advanced by APL.<sup>10</sup> Nor does it suffice to contend that CSX has initiated an arbitration proceeding that (in NS' view) threatens to deprive Conrail, as the operator of the North Jersey Shared Assets Area, of the facilities necessary to enable both NS and CSX to serve the APINY facility.<sup>11</sup> NS should pursue its remedies in the arbitration proceeding; and, if arbitration (either in this matter or in any of the other matters referenced by NS, see NS-73 at 15 n.25) produces a result that, in NS' view, threatens to nullify the procompetitive environment we attempted to secure in our decision approving the CSX/NS/CR transaction, NS should petition for relief under the auspices of our oversight jurisdiction.

For the reasons stated herein, we reject NS' request to consider the two Conrail/APL arrangements in conjunction with the two CSXI contracts.<sup>12</sup>

Prospective Relief Only. The relief we are ordering vis-à-vis the two CSXI contracts is intended to operate prospectively from Day One, and is not intended to have any effect with respect to traffic that moved, or that should have moved, prior to Day One. This decision has no bearing on any claims arising under either of the two CSXI contracts with respect to traffic that moved prior to Day One or that should have moved prior to that day.<sup>13</sup>

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<sup>8</sup> The time for seeking reconsideration of Decision No. 96 has long since passed.

<sup>9</sup> NS claims that it learned of the tie "considerably after the Application was filed." See NS-73 at 14. While NS has not indicated exactly when it learned of the tie, however, the crucial point, we think, is that NS learned of the tie in advance of Decision No. 89, and even in advance of the oral argument and voting conference we held in June 1998. See CSX-168, Exhibit A.

<sup>10</sup> At the very least, NS could have said something in reply to the APL-27 petition filed August 12, 1998 (which we addressed in Decision No. 96).

<sup>11</sup> See NS-73 at 14-15. See also Decision No. 96, slip op. at 34 n.78 (the APINY facility is located in South Kearny, NJ).

<sup>12</sup> In this regard, the Board is aware that parties, for the purposes of private negotiations, do on occasion package issues needing to be resolved. However, the Board's responsibility is to resolve as appropriate the matters that are brought before it.

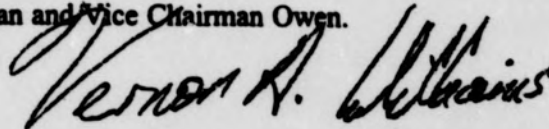
<sup>13</sup> Because the anticompetitive effects that would otherwise flow from the two CSXI contracts  
(continued...)

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

It is ordered:

1. The requirements provisions of the two CSXI contracts are overridden as an impediment to our intention that full competition exist in the Chicago-Northern New Jersey corridor from Day One.
2. The override provided for in ordering paragraph 1 is intended to operate prospectively from Day One.
3. This decision shall be effective on the date of service.

By the Board, Chairman Morgan and Vice Chairman Owen.



Vernon A. Williams  
Secretary

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<sup>13</sup>(...continued)

would exist only with respect to traffic that moves (or that should, under such contracts, move) on or after Day One, this decision should have no impact in any arbitration proceeding respecting contractual remedies vis-à-vis traffic that moved under either such contract, or that should have moved under either such contract, prior to Day One.



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SERVICE DATE - DECEMBER 17, 1998

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. 108

Decided: December 16, 1998

By letter filed December 11, 1998, the State of Ohio parties (i.e., the State of Ohio by and through the Ohio Attorney General, the Ohio Rail Development Commission, and the Public Utilities Commission of Ohio) have requested a 60-day extension of the deadline provided for in Environmental Condition 8(B), which requires applicants<sup>1</sup> to complete any negotiations with the State of Ohio regarding highway/rail at-grade crossing improvements by December 20, 1998. See Decision No. 89, slip op. at 399.<sup>2</sup> The State of Ohio parties advise that, although applicants and the State of Ohio parties have made considerable progress in their negotiations and are committed to completing such negotiations as expeditiously as possible, the December 20th deadline has proved to be overly ambitious. The State of Ohio parties further advise that applicants concur in the request for a 60-day extension.

The request for a 60-day extension is reasonable. The revised deadline contemplated by the State of Ohio parties will therefore be adopted.

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<sup>1</sup> CSX Corporation (CSXC), CSX Transportation, Inc. (CSXT), and their wholly owned subsidiaries, and also the wholly owned CRC subsidiary to be known as New York Central Lines LLC (NYC), are referred to collectively as CSX. Norfolk Southern Corporation (NSC), Norfolk Southern Railway Company (NSR), and their wholly owned subsidiaries, and also the wholly owned CRC subsidiary to be known as Pennsylvania Lines LLC (PRR), are referred to collectively as NS. Conrail Inc. (CRR) and Consolidated Rail Corporation (CRC), and also their wholly owned subsidiaries other than NYC and PRR, are referred to collectively as Conrail or CR. CSX, NS, and Conrail are referred to collectively as applicants.

<sup>2</sup> Environmental Condition 8(B) directs applicants to complete such negotiations "within 120 days of the effective date of the Board's decision." The effective date of Decision No. 89 was August 22, 1998, see Decision No. 89, slip op. at 185 (ordering paragraph 83), and the 120th day after August 22nd will be December 20th.



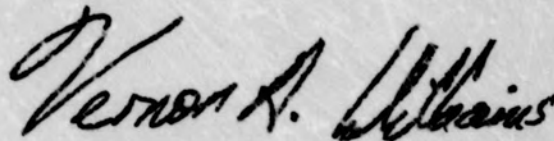
This action will not significantly affect either the quality of the human environment or the conservation of energy resources.

It is ordered:

1. Environmental Condition 8(B) is revised to read as follows: "Applicants shall complete any negotiations with the State of Ohio regarding highway/rail at-grade crossing improvements by February 18, 1999."

2. This decision is effective on its service date.

By the Board, Vernon A. Williams, Secretary.

A handwritten signature in cursive script, reading "Vernon A. Williams".

Vernon A. Williams  
Secretary

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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. 109**

**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**

**Decided: December 18, 1998**

This decision addresses the proposals, including the method of compensation, relating to the trackage/haulage rights that we imposed on behalf of the State of New York and the New York Department of Transportation (NYDOT) and the New York City Economic Development Corporation (NYCEDC) in connection with the transaction we authorized in Decision No. 89, served July 23, 1998.<sup>1</sup> In our decision approving the primary transaction, we granted in part and denied in part the New York parties' responsive application in Sub-No. 69. As pertinent here, in Decision No. 89, slip op. at 177 (Ordering Paragraph No. 28), we stated:

CSX must attempt to negotiate, with CP, an agreement pursuant to which CSX will grant CP either haulage rights unrestricted as to commodity and geographic scope, or trackage rights unrestricted as to commodity and geographic scope, over the east-of-the-Hudson Conrail line that runs between Selkirk (near Albany) and Fresh Pond (in Queens), under terms agreeable to CSX and CP, taking into account the investment that needs to continue to be made to the line.

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<sup>1</sup> In Decision No. 89, we approved, subject to conditions, the application by CSX Corporation and CSX Transportation, Inc. (collectively CSX), and Norfolk Southern Corporation and Norfolk Southern Railway Company (collectively NS) under 49 U.S.C. 11321-26 for: (1) the acquisition of control of Conrail Inc., and Consolidated Rail Corporation (collectively Conrail); and (2) the division of Conrail's assets by and between CSX and NS. NYDOT and NYCEDC are also referred to collectively as the New York parties.

## BACKGROUND

By letter filed November 10, 1998, Canadian Pacific Railway Company, Delaware and Hudson Railway Company, Inc., Soo Line Railroad Company, and St. Lawrence & Hudson Railway Company Limited (collectively CP) indicated that, because the parties have been unable to reach an agreement, CP was requesting that we institute a proceeding addressing the matter. After considering responses to CP's request, including responses from CSX and the New York parties, we established an expedited schedule requiring CP and CSX to submit simultaneous proposals with regard to the east-of-the-Hudson condition under shorter time frames than those advanced by the parties. See Decision No. 102, served November 20, 1998.

In its proposal filed November 30, 1998 (designated as CP-24), CP maintains that it should receive from CSX full-service trackage rights that includes access to all shippers,<sup>2</sup> carriers, and yard facilities located on the east-of-the-Hudson line.<sup>3</sup> On the north end, CP proposes trackage rights over three CSX line segments respectively serving: Rensselaer and Schenectady, NY (referred to as Route 1); the Selkirk Yard (referred to as Route 2); and the Albany/Rensselaer industrial area via CP's Kenwood Yard (referred to as Route 3). On the south, CP seeks a carrier interchange at Fresh Pond Junction, or other appropriate locations, as well as access to the Harlem River Yard, Oak Point Yard, and Hunts Point Terminal and all customers served by those facilities. CP contends that alternatives such as haulage rights will not permit it to obtain the operational efficiencies available from trackage rights. As regards compensation, CP proposes to pay the same car-mile rate and switching fee, i.e., \$0.29 per car-mile and \$250 per car fee, that applicants agreed to pay each other under their transaction agreement. CP maintains that, just as those rates enable applicants effectively to compete with each other, the same charges will allow CP to be an effective competitor with CSX on the line.

CSX's proposal (designated as CSX-167) includes a grant of overhead trackage rights between Selkirk and Fresh Pond, NY, with access to shippers and rail facilities in the Bronx and

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<sup>2</sup> Included in CP-24 were supporting statements by Fort Orange Paper Company, of Castleton, NY (approximately 10 miles southeast of Albany) and ADM Milling Company. Fort Orange Paper Company also filed comments (designated as FOPC-7) on December 10, 1998, in support of CP's request for access to all shippers located on the Hudson Line.

<sup>3</sup> CP states that it is separately negotiating with Metro-North Commuter Railroad (Metro-North) in regard to trackage rights over that portion of the east-of-the-Hudson line owned by Metro-North between Poughkeepsie and High Bridge, NY. CP also indicates that it is separately negotiating with the State of New York for trackage rights on the Oak Point Link from High Bridge to CSX's Harlem River Yard. In conjunction with its trackage rights proposal over CSX, CP asks us to override, under our authority at 49 U.S.C. 11321, any CSX claim of exclusive right to provide freight service over these line segments. See CP-24 at 2, n.1.



Queens, NY, including an interchange with the New York & Atlantic Railroad (NYAR) at Fresh Pond Junction and access to the Oak Point Yard.<sup>4</sup> CSX indicates that such trackage rights substantially conform to the relief sought by the New York parties in their responsive application. As compensation for CP's use of the trackage rights and applicant's rail facilities in the Bronx and Queens, CSX proposes that CP pay a variable fee based on usage and a fixed annual fee based on 50% of the condemnation value of the involved trackage and yard property.<sup>5</sup> CSX also seeks an override or cancellation of its October 20, 1997 settlement agreement with CP, on the ground that the settlement agreement is inconsistent with the additional relief CP will be obtaining in these proceedings.

In its reply (designated as CP-25) filed December 10, 1998, CP maintains that, to conform to the request by the New York parties for full-service rights on the line and the Board's imposition of such a condition, its trackage rights between Selkirk and Fresh Pond Junction should be local, rather than overhead as advanced by CSX. CP also contends that CSX's proposal for a single overhead route via the Selkirk Branch (corresponding generally to CP's Route 3) would deprive it of 20% of the available traffic on the line and prevent it from using the most efficient routings to Canadian and Southern United States markets. As regards operations at the south end of the line, CP complains that CSX would deny it direct access to Hunts Point Terminal, parts of the Harlem River Yard other than the Trailvan Terminal, and new interchanges other than at Fresh Pond Junction with NYAR. According to CP, the condemnation methodology for compensation proposed by CSX has no place in this proceeding, and that CP's proposal conforming to SSW Compensation<sup>6</sup> is based on established Board precedent and should be accepted. Finally, CP submits that CSX's effort to cancel the October 20, 1997 settlement agreement is unwarranted because CP has not

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<sup>4</sup> CSX describes its proposal for access by CP to shippers and rail yards in the Bronx and Queens as a "terminal joint facility" where CSX will be the operator of the facility, but CP will have equal access and be able to run its line haul trains to and from Oak Point Yard, the Harlem River Trailvan Terminal, and the interchange with NYAR at Fresh Pond Junction. In addition, CSX agrees to allow CP to terminate its financial obligations as to the joint facilities by giving CP the option of constructing its own terminal facilities in the metropolitan area.

<sup>5</sup> CSX proposes that CP pay in monthly installments an "annual interest rental fee" of one-half of 10% of the fair market value of its rail line and yard property, with the value to be determined by an independent appraiser jointly selected by the parties.

<sup>6</sup> St. Louis Southwestern Railway Company--Trackage Rights Over Missouri Pacific Railroad Company--Kansas City To St. Louis, 1 I.C.C.2d 776 (1985) (SSW Compensation).

breached any of its obligations thereunder and termination of the agreement would deprive CP of a number of pro-competitive rights that have nothing to do with the east-of-the-Hudson condition.<sup>7</sup>

In its reply (designated as CSX-169), CSX contends that its condemnation method of compensation should be accepted because the CSX/NS/Conrail transaction did not cause a lessening of competition which CP's trackage rights were designed to cure and, therefore, it is an "innocent" party entitled to full constitutional reimbursement for the taking of its property, i.e., a one-half interest in the east-of-the-Hudson line and yard facilities in the Bronx and Queens. On the other hand, CSX complains that CP's proposed \$0.29 per car-mile rate and \$250 per car switching charge are not cost-based, nor are they mutually agreed to or reciprocal as in the case of charges applicants CSX and NS will assess each other. CSX further contends that CP's compensation proposal is deficient because it does not reimburse CSX for the loss of its exclusive freight rights over the portion of the line, between Poughkeepsie and Oak Point Link, owned by Metro-North. According to CSX, under the Final System Plan, Conrail acquired a fee remainder interest in Metro-North's 70-mile line, subject to a 60- to 90-year lease by New York Metropolitan Transportation Authority and its agent Metro-North. Although CSX argues that only the Special Court<sup>8</sup> may determine whether Conrail's freight rights are exclusive, it concedes that the Board may override any rights

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<sup>7</sup> The CP-25 reply includes a verified statement of Joseph J. Plaistow that attempts to demonstrate that CP's compensation approach is reasonable and that CSX's is not. CSX concedes that, insofar as the Plaistow statement attempts to demonstrate that CSX's compensation approach is not reasonable, it is legitimate rebuttal. See CSX-170 (filed December 15, 1998) at 5 n.3 (lines 1-3). CSX insists, however, that, insofar as the Plaistow statement attempts to demonstrate that CP's compensation approach is reasonable, it is not legitimate rebuttal and should therefore be stricken. See CSX-170 at 5 (lines 5-8) & n.3 (lines 3-5; the title of the CSX-170 motion notwithstanding, that motion does not in fact seek to strike the Plaistow statement in its entirety). Although we agree with CSX that, insofar as the Plaistow statement attempts to demonstrate that CP's compensation approach is reasonable, the Plaistow statement should have been included in CP's CP-24 opening submission, we will nevertheless deny the CSX-170 motion to strike. CSX contends that "[n]o harm would be done to CP by striking Mr. Plaistow's evidence; the Board can look to its precedents and establish a formula for the compensation CSX is entitled to receive for the rights the Board is granting." See CSX-170 at 6. In this decision, however, we are not simply "establish[ing] a formula"; we are setting a compensation amount; and, to this end, we have had to rely on some of the data provided in the Plaistow statement. Thus, we are prepared to afford CSX, in the context of a petition for reconsideration, an opportunity to respond, if it is so inclined, to the Plaistow statement and to our calculations derived therefrom.

<sup>8</sup> The United States District Court for the District of Columbia has assumed the jurisdiction of the Special Court.

Conrail may have in the line. If the Board overrides such rights, CSX insists that it should be fully compensated for the invasion of its exclusivity.<sup>9</sup>

CSX submits that, because the east-of-the-Hudson condition is designed to inaugurate competitive rail service on behalf of New York City, CP should not be granted local access to shippers located north of the municipality, including the Albany area. CSX insists that its proposal, which would provide CP with local access to all shippers and rail facilities in the Bronx and Queens and interchange with NYAR in Long Island, fully satisfies the Board's purpose in imposing the condition. In addition, CSX criticizes CP's request for three access routes to the Hudson line by maintaining that the proposal is unwarranted, overreaching, and will cause operating problems in the Albany area by CP.<sup>10</sup>

NYCEDC and NYDOT submitted a joint reply (designated as NYC-23/NYS-32). The New York parties support the proposal advanced by CP and find fault in CSX's proposal, arguing that the condition gives CP full service trackage rights and thus CP should have access to all shippers located on the Hudson line. The New York parties contend that CSX's compensation proposal would create excessive costs to CP and is based on erroneous premises that CSX is an innocent party and that CP will be a co-equal owner of the rail properties.

#### RELATED MATTERS

Housatonic Railroad Company. In comments (designated as HRRC-14) filed December 10, 1998, Housatonic Railroad Company, Inc. (HRC) indicates that it connects with Metro-North's portion of the Hudson Line at Beacon, NY. HRC states that it currently has a trackage rights agreement with Metro-North to interchange traffic with all freight carriers operating over the Hudson Line. To preserve its interchange opportunities, HRC asks the Board to require that CP's trackage rights agreement with CSX expressly permit an interchange between CP and HRC at Beacon, NY.

Providence & Worcester Railroad Company. In a letter filed November 19, 1998, Providence & Worcester Railroad Company (P&W) requests that we assign an administrative law judge to supervise a mediation process relative to our requirement that CSX discuss with P&W "the possibility of expanded P&W service over trackage or haulage rights on the line between Fresh

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<sup>9</sup> CSX, however, asks that we first permit the parties to negotiate this matter and not exercise our override authority at this time. CSX-169 at 21.

<sup>10</sup> Because of its concerns related to the three routes, CSX has offered CP two alternative routes: a route near CP's Kenwood Yard, but requiring the construction of a connection in the \$1 million plus range; or a route currently used by CP, via the Chicago Line, that does not require any improvements or construction expenditure. See Downing R.V.S. at 7-8.



Pond, NY, and New Haven, CT . . . ." See Decision No. 89, slip op. at 83-84, 178 (Ordering Paragraph No. 31). P&W complains that, other than mutually beneficial marketing proposals, CSX is unwilling to discuss substantive opportunities by P&W to compete with CSX over the New Haven route. Comments supporting P&W's request were filed by NYCEDC and NYDOT, in a joint reply (designated as NYC-22/NYS-31), and by Congressmen Jerrold Nadler and Charles E. Schumer in a letter filed December 10, 1998, on behalf of the 24 mem. New York-Connecticut Congressional delegation.

In a reply to P&W filed December 9, 1998, CSX contends that, in court and Board proceedings, P&W has repeatedly violated its August 6, 1997 settlement agreement with CSX. According to CSX, in exchange for valuable independent rate-making authority between New Haven and New York City, P&W pledged unconditional support for the Conrail transaction. Despite P&W's litigation, CSX states that it has continued to negotiate with P&W relative to mutually beneficial arrangements over the New Haven route. CSX asks the Board to clarify that unrestricted trackage rights on behalf of P&W, over CSX's objection, is not what the Board intended when it imposed the condition.

#### DISCUSSION AND CONCLUSIONS

**Trackage Rights—Between Albany and New York City.** The purpose of our east-of-the-Hudson condition is to restore to New York City some of the rail competition that was lost when Conrail was created. In imposing the condition, our focus was not on entities or shippers located in other parts of the state, including those in the Albany area. Nor did we intend to assist particular rail carriers (CP, P&W, and HRC) vis-a-vis the applicants in the Conrail transaction. Further, CP has not shown that a grant of local rights along the entire east-of-the-Hudson route would enhance its ability to efficiently provide service to shippers within New York City. Accordingly, consistent with our intention of enhancing the competitive presence of a second carrier for New York City traffic, CP's prospective trackage rights will be limited to overhead traffic between Albany and New York City, and local access to industries situated between those points will not be permitted. We are not granting the relief HRC seeks. It has not made the case that the traffic it contemplates carrying would pass through New York City, and thus its request for an interchange with CP is not proximately related to the remedy we sought to impose through the east-of-the-Hudson condition.

We will also deny CP's request for three access routes to the Hudson Line at Albany. In view of CP's projected traffic volume (initially one train a day each way) and CP's existing extensive rail facilities in the Albany area, we do not believe that more than one access route is necessary.<sup>11</sup> We will authorize CP to use Route 1, as proposed by CP in CP-24, Exhibit 2, involving the use of the Chicago Main Line between Rensselaer and Schenectady. CSX takes no exception to

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<sup>11</sup> Should CP's traffic volume increase substantially, we will reexamine the carrier's routing requirements under our oversight jurisdiction.



this route. The route appears to make the best connection with the Hudson Line, does not involve Conrail's Selkirk Yard, and does not require complex switching movements or "backward shoves" as CSX witness Downing proposes. Its Schenectady connection makes use of CP's Mohawk Yard and provides CP with a direct connection for its northbound and southbound trains in handling New York Terminal traffic.<sup>12</sup> It is a high-speed, double track line and, other than Amtrak trains, normally handles only Conrail local service trains. The forecast level of CP service of one train in each direction daily, even with the projection of a second train in Year Two, should not adversely affect Amtrak service.

**New York Terminal Operations.** CSX has agreed to CP's request for access to all yards, terminals, other facilities and shippers, present and future, located in the Bronx and Queens, and an interchange with NYAR at Fresh Pond Junction. But, this agreement is conditioned on CP bearing one half of the full ownership costs of all the track and facilities that would be associated with CP's operations. As discussed below, CSX's compensation proposal is unacceptable.

CP proposes that CSX provide it with traditional switching services where this would be the most efficient means of engaging in local service. CP also states that it needs to have the option of providing direct service to customers and facilities in the Bronx and Queens, so as to discipline the quality of switching services provided to CP by CSX. While CP has proposed a \$250 per car switching fee that should adequately compensate CSX for this service, including the limited use by CP of Oak Point Yard, CP has not proposed suitable compensation arrangements that would become necessary if it were to make more extensive use of CSX's New York City track and terminal areas, as would be required if CP were to provide direct service to customers and facilities in the Bronx and Queens.

CP will be permitted to access all shippers in the Bronx and Queens via a \$250 per car switch performed by CSX, including the use of Oak Point Yard as necessary to efficiently perform this switching service. With respect to the contemplated interchange between CP and NYAR: (1) CSX may perform a switching service and bring cars from Oak Point to Fresh Pond or from Fresh Pond to Oak Point for the \$250 "basic" switching fee; or (2) CP could use its trackage rights to interchange directly with NYAR at Fresh Pond, but only if CP enters into a suitable compensation arrangement with CSX for the use of the Fresh Pond yard. We will also grant CP's request that NYAR be given trackage rights from Fresh Pond to Oak Point for its interchange with CP, but only if CP enters into suitable compensation arrangements with CSX for this use of the Oak Point yard. CP failed to suggest any such compensation arrangements, other than the basic \$250 switching fee, for its contemplated uses of the Fresh Pond or Oak Point facilities, even though its proposal to interchange with NYAR at Oak Point would apparently involve no compensation to (i.e., no switching by) CSX.

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<sup>12</sup> CP's access route in the Albany area will also be limited to overhead trackage rights.

**Trackage or Haulage Rights--Between New Haven, CT, and New York City.** P&W asks us to appoint an administrative law judge to supervise a mediation proceeding concerning the New Haven to New York condition we imposed in Ordering Paragraph No. 31. We are denying P&W's request because such a proceeding and the prospect of valuable commercial rights going to P&W, over CSX's opposition, are not what we intended when we asked the parties to negotiate the possibility of expanded P&W service over the New Haven route. Despite P&W's litigious posture, which might well be construed as a breach of the CSX/P&W settlement agreement, CSX has represented that, based on P&W's conduct to date, it will not cancel that agreement. The settlement agreement does comport with our pro-competitive goals and with our desire to have CSX and P&W negotiate mutually beneficial arrangements to increase competition. Accordingly, CSX will be bound to its commitment not to cancel the agreement based upon P&W's conduct up to this point.<sup>13</sup>

**Compensation.** CSX's proposal that CP compensate it for the use of CSX's tracks between the Albany area and Fresh Pond, NY, and for all terminal facilities within the Bronx and Queens based on 50% of the ownership cost is unacceptable. As an initial matter, CP does not need, and we are not providing it with, physical access to, and use and control of, all of these facilities. CSX's proposal requiring CP to pay for 50% of the ownership cost would more than likely place either CP or CSX at a competitive disadvantage unless each carrier captured an equal share of the revenues available on the line. Any compensation established in this proceeding must put the tenant in the same competitive position as the owning carrier.<sup>14</sup> In addition, as stated by CP, it appears that CSX is attempting to charge CP 50% of the ownership cost without giving CP all of the benefits associated with being an actual co-owner of the line, such as control of the facility, or full property rights in the assets.<sup>15</sup>

CP proposes that it: (1) pay a trackage rights fee of \$0.29 per car-mile for the use of CSX's line between the Albany, NY area and Oak Point Yard and pay CSX \$250 per car to perform switching; and (2) interline traffic with NYAR either at Oak Point Yard, allowing NYAR incidental trackage rights between Oak Point Yard and Fresh Pond at \$0.29 per car-mile, or at Fresh Pond via trackage rights between Oak Point and Fresh Pond.<sup>16</sup> CSX argues that both the \$0.29 per car-mile rate and \$250 switching fee, which CP adopted from Decision No. 89, were established based on

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<sup>13</sup> For the same reason, we are not granting CSX's request to cancel its October 20, 1997 settlement agreement with CP.

<sup>14</sup> See SSW Compensation, 1 I.C.C.2d at 786.

<sup>15</sup> Id. at 790, where the ICC rejected this approach.

<sup>16</sup> CP has not provided any specifics on its proposal to use CSX's facilities at Oak Point and Fresh Pond to interline traffic with NYAR. If CP desires to use CSX's yard facilities, it must first enter into a joint facilities agreement with CSX as indicated in this decision.

reciprocity between CSX and NS. CSX argues correctly that no such reciprocity is applicable here. See Union Pacific/Southern Pacific, Decision No. 47 (STB served Sept. 10, 1996), slip op. at 18-19.

**CP's Trackage Rights Fee.** To support its \$0.29 number, CP developed a trackage rights fee of \$0.27 per car-mile using the capitalized earnings (CE) method established in SSW Compensation. Although the CE method established in SSW Compensation is appropriate for developing the trackage rights fee in this proceeding,<sup>17</sup> we find that CP's calculation contains several errors. We have therefore restated CP's estimate of the trackage rights fee for use in this proceeding. The trackage rights fee developed using the SSW Compensation method contains a pro-rata share of all the "below-the-wheel" operating costs<sup>18</sup> as well as a pro-rata share of a rate of return element (referred to as interest rental).

CP's "below-the-wheel" cost calculation of \$0.13 per car-mile based on Conrail's 1995 Uniform Rail Costing System (URCS) system average data, appears to have been calculated in a reasonable manner. We accept CP's "below-the-wheel" cost. But CP's determination of the "interest rental" component of \$0.14 per car-mile contains several errors. Correcting CP's errors results in an interest rental cost of \$0.58 per car-mile. Thus, the total trackage rights compensation per car-mile, including "below-the-wheel" cost, would be \$0.71.<sup>19</sup> The difference between the \$0.71 trackage rights rental fee we have computed under SSW Compensation and the \$0.29 fee CP was prepared to pay will amount to less than \$30 per car for the segment of track over which CP will be operating as CSX's tenant. This small amount should not unduly impede CP's ability to compete for east-of-the-Hudson traffic.

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<sup>17</sup> There are four methods for developing the "interest rental" portion of the trackage rights fee: the reproduction cost new, less depreciation method; the capitalized earnings approach (CE); actual appraised valuation of the line; and stand-alone cost. St. Louis Southwestern Ry. Co. Compensation--Trackage Rights, 8 I.C.C.2d 213 (1991). However, of the four methods, the CE approach is our preferred method for developing the rental component in trackage rights compensation cases because, among other things, it values the property as a going concern for railroad use, i.e., the use to which the property would actually be put. See Atchison, T. & S.F. Ry. Co.--Operating Agreement, 8 I.C.C.2d 297, 304 (1992).

<sup>18</sup> "Below-the-wheel" refers to all operating and maintenance costs associated with operating over the specific line segment at issue, other than the costs associated with equipment (fuel, crew costs, freight cars costs, etc.).

<sup>19</sup> In approving the \$0.29 per car-mile trackage rights fee agreed to by applicants, we made a preliminary assessment that actual application of the SSW Compensation method would result in a fee no lower than \$0.46 on Conrail track, since our means of computing this figure "understate[d] the fees that would be derived under the SSW Compensation method." Decision No. 89, slip op. at 141.



CP computes the fair market value of road property using the book value relationship of road property to total road property plus equipment. See Plaistow V.S. 12/10/98 Exhibit No. (JJP-2-1). We use the value developed by Price Waterhouse for allocating road and equipment property, shown in the NS/CSX statement (CSX/NS-177 Exhibit WWW-5) in the Conrail merger case.<sup>20</sup> This results in a substantially higher number.

CP computes Conrail's earnings by taking its 1995 railroad earnings before taxes (\$571,781,000) and adding to that figure the total benefits that NS and CSX contend would derive from the merger (\$1,445,057,000). This produces a total earnings stream of \$2,016,838,000. CP's inclusion of these benefits is erroneous for several reasons. First, its figure overstates the benefits projected to be realized by NS and CSX by including various public benefits that will not be retained by those carriers. Second, the benefit numbers are for what was designated as a "normal" year, which would not be realized until after the third year following consummation of the merger. Third, and most significant, CP does not make any adjustment for merger benefits in its calculation of earnings for the line segment in question. This results in a significant understatement of the value of this particular line.

Therefore, we have excluded the merger benefits. In keeping with the procedure used in SSW Compensation, we have adjusted Conrail's 1995 earnings upward to account for inflation between 1995 and 1997. Using the change in the GDP deflator between 1997 and 1995 (4.461%), we have restated Conrail's earnings to be \$597,287,959.

CP does not make an adjustment to the earnings multiplier to separate earnings developed from road property from earnings developed from equipment. We reduced the earnings multiplier (to develop the road property earnings multiplier) to take into account the Price Waterhouse percentage of road property to total road property plus equipment. See CSX/NS-177 Exhibit WWW-5.

After making these changes, we have increased the earnings multiplier from 6.26 developed by CP to 24.54. When multiplied by the line segment earnings developed by CP (\$592,490) increased for inflation by the 4.461% GDP deflator factor (\$618,921), we arrive at a value of the line segment of \$15,186,822, compared to CP's figure of \$3,710,105.

Finally, CP uses a 17.2% pre-tax cost of capital rate in its calculations. We calculate both the 1995 and 1997 pre-tax cost of capital rate for the railroad industry to be 17.5%. We have used this higher figure to compute an annual rental payment of \$2,657,694. When divided by 4,583,979

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<sup>20</sup> We use the Price Waterhouse figures because they are the ones that CSX and NS are going to use to allocate Conrail's assets on their books. Thus, they represent the value of road and equipment that the purchasing railroads considered when they acquired Conrail.



car-miles, this produces an interest rental component of \$0.58 per car-mile. When added to the \$0.13 cost factor, the total initial per car-mile cost would be \$0.71.

Of course, trackage rights compensation is based on a retrospective determination of pro-rata shares of traffic between the owning and tenant railroads. Thus, the \$0.71 figure is merely a starting point for determining trackage rights compensation. Actual trackage rights compensation per car-mile should be adjusted periodically to reflect: (1) cost of capital rate for the specific period; (2) number of car-miles for the tenant and owning carriers for the specific time period; and (3) actual other "below-the-wheel" costs for the specific time period. In addition, as noted above, we will permit CSX to seek reconsideration based on its critique of any of the Plaistow evidence upon which we have relied here.

CP's Switching Fee. Absent any special studies of the actual switching cost per car in the New York Terminal Area, CP's \$250 appears to be a reasonable starting point. CP's evidence shows that CSX's 1995 URCS system average cost for switching is \$75.24 per car.<sup>21</sup> Although CSX argues that CP's adoption of the \$250 switching charge from Decision No. 89 is not appropriate because of the lack of reciprocity between CP and CSX, CSX has not provided any evidence that the \$250 fee would not cover the total switching cost here.<sup>22</sup> Further, CP shows that the average cost of 41 reciprocal switching fees it selected from CSX's Switching Tariff 8100 was \$251 (ranging from \$72 to \$390).

Because of the disagreement between the parties concerning this fee, and because CP's switching fee is not based on any specific cost relative to the actual operations in the New York Terminal Area, we will allow the parties, if either of them so desires, to invoke the right proposed by CP for a 6-month special switching study to determine a more precise switching cost. We reject, however, CP's proposed "cap" of \$250 if the study shows the switching cost is higher. Moreover, at the end of 5 years, the parties must renegotiate the fee to reflect costs as they exist at that time, just as is provided for in the National Industrial Transportation League settlement agreement.

CSX claims that it has inherited exclusive rights to operate freight service over Metro-North. On page 18 of its reply, CSX says that "Conrail and CSX interpret this as being an exclusive reservation of freight rights." CSX, however, cites no clear language from the Special Court decision or from the deed that requires or even supports that interpretation. In addition, Metro-North disputes CSX's claim by indicating that Conrail's trackage rights agreement with Metro-North clearly establishes that CSX will have no ownership or equity interest in the line. NYC-23/NYS-32,

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<sup>21</sup> CP uses several incorrect URCS values in developing its CSX switching cost per car. Using the correct URCS data, we find the CSX switching cost per car to be \$76.97.

<sup>22</sup> CSX argues that the \$250 switching fee per-car established between CSX and NS is based on reciprocity.

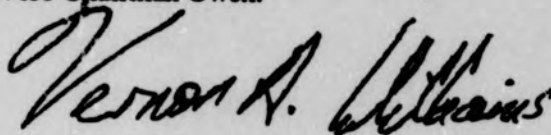
V.S. Bernard at 4. Although CP has asked us to exercise our preemption powers to override any exclusive freight rights claimed by CSX, it would not be appropriate or necessary for us to exercise that power at this time. Only if CSX is able to obtain a ruling from the Special Court that its freight rights were meant to be exclusive, and that Metro-North has contracted to give those rights to a second carrier, would preemption be necessary. With regard to compensation for these rights, we do not require compensation for the competitive or financial value of trackage rights, only the costs (including capital costs) of their use. No capital costs have been set forth by CSX for the portion of the track owned by Metro-North.

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-170 motion to strike is denied.
2. The HRRC-14 request to require that CP's trackage rights include an interchange with HRC at Beacon, NY, is denied.
3. The request by P&W to assign an administrative law judge to supervise a mediation process is denied.
4. The trackage rights and terminal operation proposals by CSX and CP are adopted to the extent set forth in this decision.
5. This decision is effective on its service date.

By the Board, Chairman Morgan and Vice Chairman Owen.



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SERVICE DATE - DECEMBER 9, 1998

**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. 107

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

**RESPONSIVE APPLICATION--WHEELING & LAKE ERIE RAILWAY COMPANY**

Decided: December 8, 1998

This decision addresses the petition for clarification (designated as WLE-10) filed October 22, 1998, by Wheeling & Lake Erie Railway Company (W&LE or petitioner) with respect to the transaction we authorized in Decision No. 89, served July 23, 1998.<sup>1</sup> In its petition, W&LE states that, as directed by the Board, it has negotiated with applicants with the goal of reaching an agreement on the conditions we imposed in Decision No. 89, but several matters remain unresolved. W&LE therefore asks us to resolve these issues in the manner and to the extent it requests.<sup>2</sup> By separate replies filed November 10, 1998 (designated as NS-72 and CSX-166), applicants CSX and NS oppose W&LE's requested relief.<sup>3</sup>

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<sup>1</sup> In Decision No. 89, we approved, subject to conditions, the application by CSX Corporation and CSX Transportation, Inc. (collectively CSX), and Norfolk Southern Corporation and Norfolk Southern Railway Company (collectively NS) under 49 U.S.C. 11321-26 for: (1) the acquisition of control of Conrail Inc., and Consolidated Rail Corporation (collectively Conrail); and (2) the division of Conrail's assets by and between CSX and NS.

<sup>2</sup> W&LE supplemented its petition for clarification by: correspondence filed October 30, 1998; a response (designated as WLE-11) filed November 10, 1998, to matters raised by applicants; and a reply (designated as WLE-12) filed November 19, 1998, to CSX-166.

<sup>3</sup> In addition, on October 22, 1998, NS filed a report and proposal with respect to the conditions (designated as NS-71), and CSX filed related correspondence on October 22 and 23, 1998.



## BACKGROUND

In our decision approving the primary transaction, we granted in part and denied in part W&LE's responsive application in Sub-No. 80. As pertinent here, in Decision No. 89, slip op. at 109, we stated:

We will require applicants to provide certain remedies to W&LE to prevent further erosion of W&LE's financial viability due to this transaction. We will require applicants to provide: (a) overhead haulage or trackage rights access to Toledo, OH, with connections to the Ann Arbor Railroad and other railroads there; (b) an extension of W&LE's lease for the Huron Docks and trackage rights access to the Huron Docks over NS' Huron Branch; (c) overhead haulage or trackage rights to Lima, OH, including a connection to the Indiana and Ohio Railroad. Further, we will require that applicants negotiate with W&LE concerning mutually beneficial arrangements, including allowing W&LE to provide service to aggregate shippers or to serve shippers along CSX's main line from Benwood to Brooklyn Junction, WV.

As regards items (a), (b), and (c) above, we required the parties to attempt to negotiate an agreement; and, if negotiations were not fully successful, applicants and W&LE could submit separate proposals 90 days after the service date of Decision No. 89. *Id.* at 109 and 181. With regard to the mutually beneficial arrangements, we required the parties to enter into negotiations and inform us of any arrangements that they have reached.

W&LE asserts that applicants CSX and NS have taken too narrow of an approach to the negotiations over the imposed conditions. According to petitioner, the conditions imposed on its behalf must be viewed from the broader perspective that W&LE provides essential rail services in a highly industrialized area, that the Conrail transaction threatens W&LE's viability as a strategic regional railroad, and that each of the Board's conditions was designed to provide W&LE with new traffic and revenue opportunities to promote the carrier's financial viability and well-being. Therefore, petitioner maintains that, in order to provide meaningful relief, applicants should be directed to grant W&LE: access to local industries in Toledo and Lima, OH,<sup>4</sup> via reciprocal switching at a switching rate of \$184 per car; permanent, lease-to-own trackage rights access to NS' Huron Docks without the existing restriction as to commodity; local trackage rights over CSX's line

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<sup>4</sup> With respect to trackage rights to Lima, OH, W&LE also seeks: direct access to Clark Oil Refinery and "the BP refining complex," including the right to purchase Conrail's tracks leading to these facilities; and an interchange with Indiana & Ohio Railway Company (IORY) and R.J. Corman Railroad Company/Western Ohio Line (RJC).

between Benwood and Brooklyn Junction, WV; and trackage rights over NS to institute service on behalf of aggregates shippers.<sup>5</sup>

CSX and NS contend that the relief sought by W&LE goes beyond the scope of our conditions and should be denied. Applicants argue that W&LE is not seeking clarification, but instead is seeking reconsideration and the imposition of new conditions on applicants. As regards W&LE's request for access to local industries in Toledo and Lima, applicants assert that petitioner is asking for additional concessions beyond anything the carrier sought in its responsive application. Such relief, according to applicants, can only properly be sought in a petition to reopen, not through a clarification request. With respect to mutually beneficial arrangements, applicants maintain that W&LE is asking for conditions that will not benefit either CSX or NS. Applicants assert that the Board's language is unambiguous and requires no clarification.

#### RELIEF SOUGHT BY W&LE

**Trackage rights access to Toledo.** W&LE states that it has elected to serve Toledo by way of trackage rights from Bellevue to Toledo, OH, via the existing NS route between these two points. According to petitioner, the parties have agreed to submit to the Board those regulatory filings necessary to enable W&LE to initiate trackage rights operations to Toledo and to permit the sale of NS' Maumee River pivot bridge to W&LE, with NS retaining operating rights over the bridge. W&LE states that discussions are progressing concerning its use of two tracks at NS' Homestead Yard for the pickup and delivery of traffic. W&LE asks that it be given access to these yard tracks for the purposes of staging its traffic. W&LE also proposes that the Board require the parties to reach an agreement as to NS' reconstruction of certain track facilities (i.e., a so-called Bellevue mini-plant) that will facilitate operations around Bellevue, subject to terms and conditions to be agreed upon by the parties.

W&LE maintains that the Board intended it to have access to local Toledo industries, and not merely to connections with other railroads in the Toledo area, including CSX and NS. According to petitioner, the Board did not intend to limit W&LE's access to Toledo only for the purpose of interchanging traffic there with the Ann Arbor and other railroads in the vicinity, as applicants have contended in negotiations. W&LE submits that, if the Board adopts applicants' interpretation of the Toledo condition, W&LE will lack sufficient traffic and revenue opportunities to support viable service to Toledo.

To minimize interfering with existing rail operations in the Toledo area, W&LE proposes to limit its local presence by depending upon other carriers in Toledo, including NS and CSX, to provide reciprocal switching services to W&LE at all points and stations in the Toledo area

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<sup>5</sup> On December 4, 1998, Lafarge Lime Ohio, Inc. (Lafarge), an aggregates shipper, also urged that W&LE be given access to Lafarge's facilities.

currently open for such service. W&LE proposes to pay \$184 per car for such reciprocal switching service. W&LE submits that the applicants have no basis to reject W&LE's reciprocal switching proposal, and urges the Board to grant its requested arrangement (including the proffered reciprocal switch charge) as necessary for W&LE to compete successfully in the Toledo market.

NS contends that the Board quite plainly granted W&LE overhead haulage or trackage rights access to Toledo and that nowhere in Decision No. 89 does the Board even suggest that its condition includes local access to shippers at Toledo. NS points out that W&LE's own responsive application and operating plan sought access to Toledo expressly to effect an interchange with IORY, Ann Arbor Railroad Company (AA), and Canadian National Railway Company (CN). WLE-4 at 74 and 82. Although NS disputes petitioner's claim that the imposed condition permits W&LE to interchange with all other railroads at Toledo, including the applicants, NS states that it is willing to permit W&LE to interchange with NS and CSX at Toledo, provided that any interchange between W&LE and CSX takes place at CSX's yard facilities.<sup>6</sup> As regards petitioner's proposals for access to NS' Homestead Yard and the construction project at Bellevue, NS maintains that these matters are not directly linked to the Board's conditions and, in view of the parties' ongoing negotiations, should not be imposed as conditions now.

**Huron Docks.** W&LE indicates that, although some progress has been made on the issue of its access to Huron Docks, NS disagrees with its proposal concerning the appropriate terms and duration of an agreement. Accordingly, W&LE renews its request for permanent, lease-to-own trackage rights access to NS' Huron Docks without the current restrictions in the lease as to commodity. W&LE maintains that its proposal provides for long-term operations that are consistent with the Board's intent to accomplish two objectives: (1) to preserve a meaningful competitive transportation alternative for Wheeling-Pittsburgh Steel at Mingo Junction, OH; and (2) to protect for the long term W&LE's access to the substantial revenue opportunity W&LE already enjoys by having access to the Huron Docks. W&LE also contends that its access to the Huron Docks is critical to its refinancing of long-term debt and consequently to W&LE's future viability.

NS states that the Board clearly did not order divestiture of the Huron Docks and did not order unrestricted access by W&LE. NS maintains that, to the contrary, the Board required applicants to "extend W&LE's lease at, and trackage rights access to," Huron Docks at Lake Erie. Decision No. 89, slip op. at 181. NS contends that, rather than accepting petitioner's overreaching request, the Board should adopt its proposal offering W&LE: an extension of longer duration than the original lease term; the right to terminate the lease on 6-months' notice, without reserving a similar right for NS; and consideration, on a case-by-case basis, of exceptions to the current commodity restrictions.

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<sup>6</sup> NS also indicates that it has agreed to provide W&LE with overhead trackage rights to interchange points in Toledo with AA and CN, and that it has reached agreement with W&LE as to route, compensation, and effective date of those rights. See NS-72 at 6.



**Trackage rights access to Lima, OH.** W&LE states that CSX has agreed to its proposed route (CSX from Carey, OH, to Lima via Upper Sandusky) and trackage rights rates. Contrary to CSX's remaining position, however, W&LE contends that the Board's condition permits W&LE to obtain access to local industries in Lima, in addition to a connection with IORY. W&LE asks the Board to extend the scope of the relief at Lima to include direct access to the BP refining complex and Clark Oil Refinery at Lima<sup>7</sup> and an interchange with RJC, a short line rail carrier also serving the Lima area.

W&LE states that access to Lima was not a part of its responsive application, but rather is a novel component of the Board's remedies extended to W&LE.<sup>8</sup> According to W&LE, applicants incorrectly assume that W&LE would derive significant economic benefit by merely having a connection with IORY. Petitioner states that, after a number of meetings with IORY, it does not appear that the two carriers have the ability to generate any appreciable interchange business between themselves. Without access to local industry, W&LE has determined that the prospective volume of interchange between W&LE and IORY (and RJC) at Lima is so small that W&LE's service to and from this point would result in an operating deficit.

W&LE stresses that its access to Lima will be meaningless unless the condition is interpreted to include local access. As it proposes in the case of Toledo, W&LE offers to limit its service to local industry at Lima to access via reciprocal switch to all industries and stations in Lima currently open to reciprocal switching, at a switching charge of \$184 per car. W&LE submits that its proposal is not merely reasonable, but also offers the least disruptive arrangement to the applicants' planned operations in Lima. W&LE believes that its reciprocal switch access to Lima, along with access to Clark Oil Refinery and the BP refining complex, IORY, and RJC, will generate sufficient traffic and revenue opportunities to permit W&LE to sustain its trackage rights operations, and maintain a constructive presence.

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<sup>7</sup> W&LE states that it has identified a route to the Clark Oil Refinery and adjacent BP facilities that appears to be a short rail segment between the IORY and the Clark/BP properties (a line that apparently will be conveyed to CSX). Petitioner believes that CSX can serve the above-mentioned facilities without the need for the Conrail branch trackage. In the event that CSX seeks to dispose of the trackage in question through abandonment or sale, W&LE requests that it be given the right to purchase this line to ensure its continued access to the industry immediately surrounding the Clark Oil Refinery.

<sup>8</sup> Although W&LE originally sought a connection with IORY and other carriers at Toledo, there is no available interchange with IORY at that location. We therefore granted W&LE overhead haulage or trackage rights to Lima to enable petitioner to connect with IORY. See Decision No. 89, slip op. at 109 and 181.



CSX maintains that, as in the case of Toledo, petitioner requests concessions at Lima that are not supported in the record. According to CSX, W&LE seeks rights at Lima that not only go beyond the Board's decision, but also beyond anything that W&LE sought in its responsive application and request for conditions. CSX contends that petitioner's new proposal for local access should not be entertained because the Board expressly denied the carrier's numerous requests in its responsive application for direct commercial access. CSX also opposes petitioner's request for additional trackage rights interchange with RJC at Lima.

**Aggregate and Benwood-to-Brooklyn Junction Service.** In its responsive application, W&LE requested haulage rights, with underlying trackage rights, between Benwood and Brooklyn Junction. W&LE states that these rights would allow it to provide single-carrier service in moving British Petroleum coke traffic from Toledo to Cressup, WV, via a more direct route, and that PPG, Bayer, and other shippers on the line would benefit from its local access. W&LE states that, although it believes that access to customers on this line is an essential component of settlement negotiations, CSX refuses to discuss W&LE operations over this line. Accordingly, W&LE seeks confirmation from the Board that conclusion of a mutually acceptable arrangement is an integral part of the remedial condition and that CSX must grant W&LE local trackage rights over the Benwood-Brooklyn Junction line. W&LE proposes trackage rights fees at NS/CSX merger-related charges of 29 cents per car-mile.

With respect to negotiations over an aggregate traffic agreement, W&LE states that NS has asserted that many of the aggregate locations where W&LE could previously have been a part of a mutually beneficial solution have essentially retained single-line CSX or NS service by virtue of other protective conditions included in Decision No. 89. In view of that response, W&LE believes that the parties have reached an impasse. Furthermore, W&LE notes that the applicants seem committed to negotiating on aggregate-related matters only at the exclusion of discussions on Benwood to Brooklyn Junction.

W&LE believes that the Board intended that the full scope of relief to be afforded W&LE should include agreements for access to provide additional service to aggregate shippers. For that reason, W&LE urges the Board to direct applicants to enter into arrangements which will allow W&LE to provide expanded service for aggregate shippers. As in the case of its Benwood-to-Brooklyn Junction operations, W&LE offers to pay trackage rights compensation equal to the CSX/NS merger related charges of 29 cents per car-mile.

CSX and NS indicate that, although they are willing to continue discussions with W&LE to identify mutually beneficial opportunities, they are not willing to provide W&LE with local trackage rights to all aggregates shippers and customers located on the Benwood-Brooklyn Junction line. Applicants contend that it would not make business sense for them to allow petitioner to use their lines and directly serve their customers with no reciprocal benefits for them. CSX indicates that it has submitted a number of proposals to W&LE for its consideration, including a proposal concerning movements on behalf of a shipper on the Benwood-Brooklyn Junction line. NS

maintains that neither it nor CSX has ever taken the position that negotiations on aggregate-related matters could only proceed if discussions as to Benwood-Brooklyn Junction are excluded, or vice versa.

### DISCUSSION AND CONCLUSIONS

The relief sought by W&LE will not be granted. In Decision No. 89, we found that W&LE's projection of an annual diversion of between \$12.7 and \$15 million in traffic revenue to applicants was overstated, and that a more realistic estimate was probably between \$1.4 and \$3.0 million. We also found that the extensive conditions sought by W&LE were a substantial overreach both in terms of geographic scope and financial impact. We concluded nevertheless that the traffic losses and W&LE's precarious financial situation warranted the imposition of less intrusive conditions. In imposing those conditions, we intended to give W&LE the opportunity

to achieve operational cost savings and expand its market reach through connections with other regional carriers. Despite petitioner's assertions to the contrary, it was not our intention to maximize W&LE's financial prospects in each instance where we imposed a condition on its behalf.<sup>9</sup>

To address petitioner's situation, we granted W&LE overhead haulage or trackage rights to Toledo with rights to connect to AA and other railroads there. We also granted W&LE identical overhead rights to Lima that included a connection with IORY. Our conditions in this regard mirrored the relief sought by W&LE in its responsive application. In its responsive application, petitioner requested access to certain carriers, including AA and IORY, and to one shipper, British Petroleum, at Toledo, but W&LE did not seek access to local industries in Toledo. W&LE stated that it wanted these new carrier connections to provide operational flexibility and opportunities to develop new, more efficient traffic patterns:

\*\*\* By the addition of a series of relatively short and simple connections, the W&LE will have the ability to bring many efficiencies to rail transportation in this region. In addition, W&LE seeks the ability to establish new interchanges that will develop traffic patterns that do not exist today. With a location central to a geographic area that includes the heart of Conrail, the W&LE needs to reach out to connections that make sense to our customers, and to provide a real transportation alternative.

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<sup>9</sup> As regards our conditions, W&LE did not seek reopening or reconsideration of Decision No. 89 for the purpose of contesting the scope of the relief we imposed on its behalf or for asking us to grant it further relief. See Decision No. 96, served October 19, 1998, slip op. at 17-18. The time has passed for an administrative appeal from our decision. W&LE cannot substitute its current petition for clarification for a substantive challenge to that decision.

WLE-4, VS Wait at 68 (emphasis in original).

\* \* \* [W&LE would operate] one train in each direction per day, six days per week between an existing connection with the Norfolk Southern at Yeomans, Ohio, and Toledo for interchange with the Ann Arbor Railroad, Canadian National, and the Indiana & Ohio. Additional traffic would be loaded hoppers of petroleum coke received from British Petroleum.

Id. at 82.

Thus, the relief that W&LE seeks goes beyond the conditions that the Board imposed as relates to Toledo and Lima--conditions that largely reflected what W&LE had originally sought and that adequately incorporate the Board's concerns regarding W&LE's viability. Regarding the other relief that W&LE seeks, W&LE also requested in its responsive application local trackage rights on CSX's Benwood-Brooklyn Junction line, access to shippers PPG and Bayer at Natrium, WV, and to BP coke traffic moving between Toledo and Cressup, WV, and commercial access to specific aggregates shippers. We did not, however, grant direct commercial access to British Petroleum, Lafarge, or any other specific shippers or locations. Instead, we required applicants to negotiate with W&LE concerning mutually beneficial arrangements, including the various rights sought by W&LE in its requests for local access. By definition, our imposition of the arrangements now sought by petitioner, over applicants' objections, would not be of mutual benefit.

W&LE renews its request for permanent, lease-to-own trackage rights access to NS' Huron Dock with the current lease's restrictions as to commodity. We did not grant that relief in Decision No. 89. To the contrary, we quite plainly required applicants to "extend W&LE's lease at, and trackage rights access to," Huron Dock on Lake Erie. Id. at 181. NS indicates that it has offered petitioner an extension of even longer duration than the current lease term and it is willing to consider exceptions to the commodity restrictions now in force. Again, petitioner's divestiture request is overreaching.

We ask the parties to continue good faith negotiations in a manner consistent with our findings in Decision No. 89. We will continue to assess this situation carefully during the course of our oversight proceeding to ensure that W&LE has the opportunity to achieve operational cost savings and remain a viable carrier in the region where it currently operates.

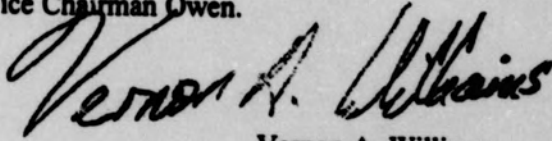
This action will not significantly affect either the quality of the human environment or the conservation of energy resources.

It is ordered:

1. The petition for clarification and further instruction (WLE-10) is denied.

2. This decision is effective on its service date.

By the Board, Chairman Morgan and Vice Chairman Owen.

A handwritten signature in dark ink, appearing to read "Vernon A. Williams". The signature is fluid and cursive, with the first name "Vernon" being the most prominent.

Vernon A. Williams  
Secretary



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SERVICE DATE - LATE RELEASE DECEMBER 7, 1998

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. 106

Decided: December 7, 1998

In Decision No. 89, we approved the acquisition of control of Conrail Inc. (CRR) and Consolidated Rail Corporation (CRC), and the division of the assets thereof, by (1) CSX Corporation (CSXC) and CSX Transportation, Inc. (CSXT), and (2) Norfolk Southern Corporation (NSC) and Norfolk Southern Railway Company (NSR).<sup>1</sup> Acquisition of control of Conrail was effected by CSX and NS on August 22, 1998 (referred to as the Control Date). The division of the assets of Conrail will be effected on a date not yet determined (that date is generally referred to as Day One; it has also been referred to as the Closing Date and the Split Date).

In approving the CSX/NS/CR transaction, we noted our expectation that the transaction would result in the creation of head-to-head, two-railroad competition in several corridors in which the pre-transaction Conrail had no Class I competition. See Decision No. 89, slip op. at 50. One of these corridors links Chicago, IL, and Northern New Jersey. Prior to the CSX/NS/CR transaction, Conrail was the only Class I railroad operating over the length of this corridor. On Day One, however, two railroads -- CSX and NS -- will operate between Chicago and Northern New Jersey.

By petition (designated CSX-168) filed December 2, 1998, CSX has brought to our attention a problem that, if CSX's assertions are accurate, threatens to weaken the CSX vs. NS competition we intended to create in the Chicago-Northern New Jersey corridor. CSX contends: that, some years ago, its intermodal affiliate, CSX Intermodal, Inc. (CSXI), entered into contracts with Conrail and NS respecting the movement of traffic between Chicago and Northern New Jersey,

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<sup>1</sup> CSXC and CSXT and their wholly owned subsidiaries, and also the wholly owned CRC subsidiary to be known as New York Central Lines LLC (NYC), are referred to collectively as CSX. NSC and NSR and their wholly owned subsidiaries, and also the wholly owned CRC subsidiary to be known as Pennsylvania Lines LLC (PRR), are referred to collectively as NS. CRR and CRC, and also their wholly owned subsidiaries other than NYC and PRR, are referred to collectively as Conrail or CR. CSX, NS, and Conrail are referred to collectively as applicants.

via Buffalo, NY;<sup>2</sup> that these contracts contain volume and trainset commitments, which are expressed as percentages of the total traffic handled by CSXI in this corridor; and that these contracts also provide for liquidated damages, which are applicable in the event CSXI fails to comply with its contractual commitments. CSX further contends that these contracts, which had in the past (and continue to have at present, in the interim period between the Control Date and Day One) no anticompetitive impacts (because CSX did not in the past, and does not now, operate between Chicago and Northern New Jersey), will have anticompetitive impacts commencing on Day One. The CSX vs. NS competition that would otherwise exist on Day One will be thwarted, CSX claims, by the continued existence of these contracts, which will require CSXI to ship most of its Chicago-Northern New Jersey intermodal movements on NS (under the NS contract) or under a 50-50 pooling arrangement with NS (under the Conrail contract, as modified by the terms of the CSX/NS/CR Transaction Agreement). CSX therefore asks that we declare that, effective on Day One, the volume and trainset requirements contained in the two CSXI contracts will be null and void, and unenforceable by Conrail and NS.

CSX concedes that, until now, nothing has been said, in this proceeding, about the two CSXI contracts. CSX excuses its own failure to mention these contracts before now, claiming that it understood that discussion of these contracts was unnecessary "since obviously they would not be enforced or deemed to be applicable after the Split Date." CSX-168 at 15. The CSX-168 petition implies, however, that NS does not share this understanding.

In view of the extensive preparations required to make Day One a success, CSX has urged us to expedite our consideration of the CSX-168 petition and, in particular, to require NS to file its reply within 12 days of the filing of that petition (i.e., by December 14, 1998). See CSX-168 at unnumbered page 26.

In a pleading (designated NS-72) filed December 4, 1998, NS has urged the denial of CSX's request that NS be required to file its response to CSX-168 within 12 days. NS notes: that CSX has not explained adequately why it waited until December 2nd to bring this matter to our attention; that, if there is indeed any need for expedited action, it is entirely the result of CSX's failure to raise this matter sooner; and that CSX's inaction provides no basis for reducing the time available to NS to address the substantial issues raised by the CSX-168 petition. NS adds that, because both of the CSXI contracts, as well as the CSX/NS/CR Transaction Agreement, require arbitration of all disputes arising under them, there is a substantial question whether the Board is the proper forum for the issues raised by the CSX-168 petition.

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<sup>2</sup> The traffic moves between Chicago and Buffalo on Conrail (under the Conrail contract) and on NS (under the NS contract). The traffic moves between Buffalo and Northern New Jersey on the New York, Susquehanna and Western Railroad (NYS&W).

## DISCUSSION AND CONCLUSIONS

While we understand that CSX believed that the two CSXI contracts would not be enforced after Day One, we agree with NS that CSX should have brought this matter to our attention quite some time ago. Matters of this sort are generally committed to writing, as was the case with so many of the details of the CSX/NS/CR transaction, see, e.g., Volumes 8A, 8B, and 8C of the CSX/NS/CR application, and it is unclear why this issue was not so handled.

Nevertheless, we do not agree with NS that CSX's delay in bringing this matter to our attention justifies the further delay that will occur if NS is allowed to take the full time ordinarily available for filing a reply to the CSX-168 petition. The public interest in the expanded CSX vs. NS competition made possible by the CSX/NS/CR transaction must be protected, and a resolution of this matter must be made well in advance of Day One. We are therefore directing NS to file its reply to the CSX-168 petition no later than close of business on Thursday, December 17, 1998, and then the Board will proceed from there.

The Board as always would hope that NS and CSX could settle this matter privately. Nevertheless, the Board is prepared to resolve this matter if necessary. In this regard, we note the following.

(1) We do not agree with NS's suggestion that the Board is not the proper forum for the issues raised by the CSX-168 petition. The arbitration remedies provided in the CSXI contracts and in the CSX/NS/CR Transaction Agreement do not extend to the core issue raised in the CSX-168 petition: whether the continued existence of the "requirements" provisions of the two CSXI contracts would thwart the CSX vs. NS competition that we intended to create in the Chicago-Northern New Jersey corridor.

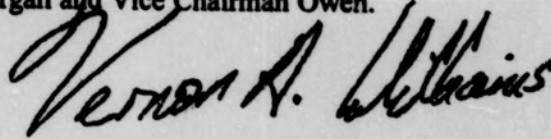
(2) Given the Board's concern about the effect of the contracts on the competition that the Board intends to begin in the Chicago-Northern New Jersey corridor on Day One between CSX and NS, we encourage NS to address, in its reply to the CSX-168 petition, a question that will arise if we decide to order CSX not to comply with the requirements provisions in the two CSXI contracts: What then will become of the liquidated damages provisions? Perhaps the future handling of this matter could reflect the way it might have been handled if these contracts had been "on the table" during the negotiation of the CSX/NS/CR Transaction Agreement and had been subject, at that time, to the general give-and-take that accompanied the negotiation of that agreement.

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

It is ordered:

1. NS must file its reply to the CSX-168 petition no later than close of business on Thursday, December 17, 1998.
2. This decision is effective on the date of service.

By the Board, Chairman Morgan and Vice Chairman Owen.

A handwritten signature in dark ink, appearing to read "Vernon A. Williams". The signature is fluid and cursive, with the first name "Vernon" being more prominent.

Vernon A. Williams  
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Records: 371



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SERVICE DATE - NOVEMBER 30, 1998

**SURFACE TRANSPORTATION BOARD  
Washington, D.C. 20423**

November 23, 1998

STB Finance Docket No. 33388<sup>1</sup>

**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**

**NOTICE**

A court action, entitled as shown below,  
was instituted on or about November 20, 1998,  
involving Decision No. 96 in the above-entitled proceeding:

No. 98-1552

Indiana Rail Road Company

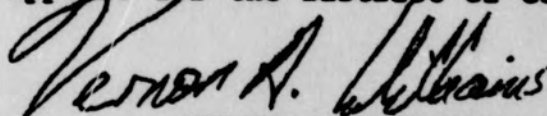
v.

Surface Transportation Board

United States of America

before the

United States Court of Appeals for the District of Columbia Circuit



**VERNON A. WILLIAMS  
Secretary**

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<sup>1</sup> Embraces STB Finance Docket No. 33388 (Sub-No. 80),  
Responsive Application-Wheeling & Lake Erie Railway Company.

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