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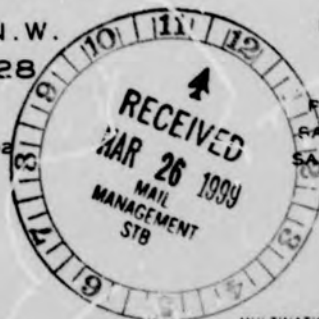
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March 25, 1999

IP&L-23

VIA HAND DELIVERY

The Honorable Vernon A. Williams
Secretary, Surface Transportation Board
1925 K Street, N.W., Seventh Floor
Washington, D.C. 20423

ENTERED
Office of the Secretary

MAR 26 1999

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Public Record

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

Dear Secretary Williams:

"Genuine competition, however, is about much more than this: it is about rate decreases and service improvements. Only the introduction of an independent second competitor can ensure continued, genuine competition." March 19, 1999 Letter (at 1) of Union Pacific Railroad Company in Finance Docket No. 33556.

This is the Reply of Indianapolis Power & Light Company ("IPL") to the Report of Norfolk Southern ("NS"), contained within NS-77, "Norfolk Southern's Reply to CSX's Petition for Reconsideration in Part or Clarification of Decision 115 and Further Report Pursuant to Decision No. 115 Regarding Access to IP&L's Stout Plant." IPL is not replying to NS' Reply to CSX's Petition for Clarification or Reconsideration (CSX-180); that would be an impermissible reply to a reply. 49 C.F.R. §1104.13(c). Rather, IPL is replying only to that portion of NS-77 that constitutes NS' "Report" in response to Decision No. 115.

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Preliminary Concerns

The Board should be aware that NS did not inform either IPL or ISRR that it had cut a deal with CSX/INRD, behind closed doors, before IPL and ISRR filed their Replies to CSX-180 on Monday, March 22, 1999. Some of what IPL contended there would not have been the same had it only known of the new but still somewhat unclear and ill-described arrangement NS now proposes. That, of course, is one of the reasons why this Reply of IPL to NS' Report is necessary. IPL regrets that it is, for if NS had only provided IPL with even some advance notice of its effort to so dramatically depart from what the Board has ordered, IPL might not have had to submit this further pleading.

Despite the claims made before this Board and elsewhere that the Class I railroads "get it," and are trying to do better with customer relations, NS, which prides itself on being better at such matters than the others, did not even have the courtesy to inform IPL that it had entered into an arrangement with its supposed competitor CSX/INRD, the effect of which is to attempt to abandon the trackage rights DOJ, IPL, the Department of Agriculture, and ISRR convinced the Board to award NS to serve IPL's Stout Plant. IPL believes that the most troubling nature of this "bushwhacking" by NS is evidence that it is not serious about even serving IPL's Stout Plant, at least so long as it uses Indiana coal.¹ The incident speaks volumes about the nature of relations between Class I railroads and their best customers.

IPL is vehemently opposed to NS' position as just announced in its latest Report, for several reasons. IPL was not involved in the discussions that occurred between CSX, NS, and The Indiana Rail Road Company ("INRD") (a non-party to these proceedings), and neither was Indiana Southern Railroad Company ("ISRR"), despite prior Board orders that IPL and ISRR be included in such discussions. Decision No. 96 at 23 ¶ 8 ("CSX, NS, ISRR, and IP&L should attempt to negotiate a mutually satisfactory solution respecting any MP 6.0 interchange problems (and respecting any related problems that may be necessarily incidental to an MP 6.0 interchange problem)..."); Decision No. 111 at 1. CSX and NS have violated the Board's orders by excluding IPL and ISRR from such discussions, while agreeing to an undisclosed and apparently inefficient arrangement for switching at Crawford Yard, an historic point of interchange for IPL's Stout and Perry K Plants. Ironically, NS now included INRD in those discussions, and reports that it has entered into an agreement which, as NS describes it, essentially inserts CSX/INRD as NS' agent to exercise NS' rights to serve the Stout Plant directly for ISRR-origin coal and, indirectly, the Perry K Plant, in a pleading that goes on to argue that the Board should not make one railroad the agent of another in the manner provided by the Board in Decision No. 115! (NS, of course, does not use the word "agent," for obvious reasons, but there can be no other description if CSX or INRD are to exercise NS'

¹ As the Board knows, NS did not utter one word in support of IPL's requests prior to the issuance of Decision No. 89, preferring instead to leave IPL and DOJ to make its case for it.

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rights.) Moreover, CSX/INRD has refused to cooperate with IPL and ISRR throughout this proceeding, refusing even to discuss this matter with IPL and ISRR. CSX/INRD will have every reason to prevent ISRR-origin coal from effectively and efficiently competing with INRD-origin coal, as the Board has consistently found throughout this proceeding. Decision No. 89 at 116-17; see also Decision Nos. 96 (at 14) and 115.

Substantive Concerns

There are two substantive aspects of NS' Report which IPL finds highly objectionable. The first is that NS' position would deprive IPL of the genuine competition that the Board provided by giving a second railroad direct access to IPL's Stout Plant. The second concerns a myriad of problems with the inadequate alternative NS proposes in lieu of genuine competition. We deal with each in turn.

Genuine Competition

IPL has been able to secure genuine competition with Conrail as a vigorous competitor to CSX/INRD at the Stout Plant. In fact, IPL's rates at the Stout Plant have declined over the last several years, in proportion to the declines in the RCAF(A) as compared to the increases in the RCAF(U), because IPL's rates from ISRR/Conrail are adjusted by the RCAF(A), as CSX admitted. CSX-152 at 4 n.1 ("The Proposal [by CSX and INRD, which IPL rejected, as was explained in IPL's motion to strike that pleading] referred to the RCAF-A index, which had been used in Conrail arrangements on this route.")(emphases added).

There is an enormous difference between the RCAF(A) and the RCAF(U), as the Board knows. For example, from the First Quarter of 1994 until the First Quarter of 1999, the percentage difference between the two was 38.5%. From the First Quarter of 1996 until the First Quarter of 1999, the percentage difference between the two was 23.8%. These figures illustrate the extent of the rate reductions IPL has obtained as a result of the ICC's productivity adjustment to the RCAF, and, correspondingly, what it would lose under NS' new proposal.² Since IPL has about three years remaining on its contract with INRD (CSX/NS-178, Vol. 3D at 396-400), NS' proposal could lead to a rate 23.8% higher than would otherwise be the case

² To illustrate, suppose IPL's ISRR/Conrail rate was \$5.00 per ton in 1994. Using the RCAF(A), it would have been \$4.20 in 1997, and \$3.90 in 1999. (IPL's actual rate was not \$5.00 per ton in 1994, but we use this illustration, which makes the same point as would be made using the actual rate, but without disclosing that highly confidential figure here.)

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-- hardly the status quo.³ Essentially, then, what NS is proposing would lead to IPL's "creeping captivity" at the Stout Plant (and thus at the Perry K Plant, too). NS' proposed alternative, although seemingly benign by providing IPL what it supposedly has today, would therefore lead to a ridiculous result, and illustrates perfectly why a rate "fix" cannot possibly substitute for actual, vigorous competition of the sort that IPL has succeeded in preserving. Indeed, what IPL has carefully set out to do, and has succeeded in doing, is to provide sufficient business to ISRR as well as INRD so that both competitors survive and continue to provide IPL with the same competition it has always enjoyed. NS' new proposal would destroy what IPL and the Board have attempted to do.

In Decision No. 89, which the Board has adhered to in Decision Nos. 93, 96, 111, and 115, the Board understood that IPL's **existing** competition at its Stout Plant could not be maintained without giving a second railroad direct access to the Stout Plant, since Conrail has been a genuine and vigorous competitor to CSX/INRD.⁴ Since CSX is taking over the Conrail lines in Indianapolis, IPL would lose its competition if CSX/INRD controlled all of the access to the Stout Plant. Therefore, the Board granted NS direct access to the Stout Plant. Decision No. 89 at 116-17, 177. Indeed, the Board's Ordering ¶ 23 in Decision No. 89 provided that "Applicants: must allow **IP&L to choose** between having its Stout Plant served by NS directly or via switching...." (emphasis added). *Id.* In Decision No. 96 (at 14, 26 ¶ 8), the Board granted IPL's request that NS' direct access be subject only to the 29 cent/car-mile fee and not also a CSX/INRD switching charge. **It is emphatically not up to the two supposed competitors to exercise the customer's right to choose between them, or to negotiate for the customer behind closed doors.** It is simply scandalous for NS, CSX, and INRD to expect IPL to be satisfied with assigning themselves the right to (ironically) act as IPL's agent in conducting those negotiations, as NS now announces they have done. It is equally scandalous for NS to propose to allow INRD -- which obviously knows what it has been able to charge IPL -- to be in a position to prevent its competition -- ISRR -- from effectively competing with CSX/INRD.

³ This is approximate, since it assumes the RCAF(U) would remain unchanged. The RCAF(U) for the Second Quarter of 1999 is 99.3% of the Fourth Quarter 1997 figure, Ex Parte No. 290 (Sub-No. 5), Quarterly Rail Cost Adjustment Factor (served March 19, 1999) at 2, so the assumption that it will stay approximately the same is eminently reasonable in this time of essentially no inflation. Even if the inputs making up the RCAF without the productivity adjustment did increase or decrease, the effect on the RCAF(A) and RCAF(U) should be essentially the same, given how the RCAF is calculated.

⁴ What is most troubling about NS' proposal is that INRD, which of course knows precisely what it has been able to extract from IPL for its service, would be in a position to know what its competition -- ISRR -- would charge, thus destroying much of IPL's leverage. Fundamentally, ISRR cannot compete with CSX/INRD if its competitor stands in the way.

Moreover, NS' Report (at 3) essentially admits that it cannot compete effectively with CSX/INRD at the Stout Plant. But rather than then advocating an assignment of those rights to ISRR, which could effectively compete with CSX/INRD, NS instead proposed a new arrangement, embodied in one, two, or three agreements⁵ the Board, IPL, ISRR, DOJ, and other interested parties have never seen. The new arrangement proposes undefined "terms" which supposedly should provide IPL with assurance that its existing arrangements will be replicated by CSX/INRD in interchange with ISRR. We deal with the several aspects in which NS' "terms" do not replicate today's arrangements below, but the most important problem is that the alternative arrangement is not genuine competition of the form that the Board ordered.

If NS is unable or unwilling to be the genuine competitor to CSX/INRD, as it now appears to be the case, that Conrail is today at the Stout Plant, the Board will have to substitute a railroad which is able or willing to provide the genuine competition that IPL is entitled to under the statute and that the Board has said IPL must receive.⁶ There is only one alternative -- ISSR -- for ISRR-origin coal, since this Transaction will otherwise turn Indianapolis into a one-railroad town. Neither CSX nor NS can complain about that characterization (which is a fact), since they were the architects of this Transaction! IPL has a statutory right to preserve its existing competition, which no one has better described than did Union Pacific in the quotation that begins this letter.⁷ The Board did the right thing in Decision No. 115; if the Board were now to deviate from its prior Decisions, IPL would be deprived of its existing competition. It is as simple as that. IPL therefore implores the Board to assure it **effective competition** by allowing IPL -- not NS, CSX, or INRD -- the right to decide which competitive option it will exercise, and to assure IPL that both options survive. IPL insists that it -- not the railroads -- will exercise its competitive rights, as it has always done. The Board need not be involved in such negotiations, so long as it allows IPL to have the rights it provided IPL to negotiate for itself its own "private-sector solutions." That is what competition, not regulation, is all about. It is the height of irony that these railroads, who complain elsewhere about regulation, and insist that they are competitors, would seek to

⁵ It is clear that NS and INRD entered into a trackage rights agreement. It is not clear whether there are separate agreements about interchange at Crawford Yard or about the "terms" NS reports it, CSX, and INRD have agreed to for this new arrangement just announced.

⁶ The Board may wonder why NS, a major coal-carrying railroad, would wash its hands of Indiana coal. The answer is that NS has admitted that its lack of a physical presence in Indianapolis will "substantial[ly] challenge" it substantially in competing with CSX/INRD for Indiana coal. Report at 3. (IPL is confident that NS would not wash its hands of an opportunity to compete with CSX/INRD for coal from locations outside Indiana.)

⁷ IPL is not a party to Finance Docket No. 33556, and takes no position on the matters at issue therein. It merely quote. UP's letter because it was so well-stated.

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deprive IPL of that competition, and force it, instead, to seek regulatory protection. The Board should not be a party to any such arrangement.

The Myriad of Problems with the New NS Alternative

First, although NS represents that the trackage rights agreement entered into by it and INRD is substantially similar to the trackage rights agreements it entered into elsewhere in this Transaction, IPL is entitled to preserve the competition it had before this Transaction, not to a form of agreement that NS and CSX have presumptuously entered into elsewhere in the country. It is the Board's obligation to ensure that IPL retains its existing competition regardless of what NS and CSX think is appropriate.

Second, although NS represents that the trackage rights agreement it entered into with CSX and INRD is "substantially the same as the standard trackage rights agreement used by NS and CSX throughout this transaction as between themselves in dealing with '2 to 1' or other similar competitive issues resulting from this transaction," NS-77 at 3, neither NS nor CSX nor INRD has provided that agreement (or any other, if there are others) to the Board, nor have they have provided it (or them) to IPL, ISRR, DOJ, or anyone else. Therefore, neither the Board nor IPL nor anyone else could possibly know whether NS' representations are true, and IPL hereby requests that the Board order NS to provide the agreement(s) to IPL, ISRR, DOJ, and the Board, and permit the parties a reasonable period of time to review it (or them) and comment if necessary, as we had the right to do in our Comments filed October 21, 1997, in our briefs, and at oral argument, on the other agreements embodying this Transaction. After all, the other trackage rights agreements that NS claims its agreement with INRD to be "substantially the same as" were included in the Application (see CSX/NS-25, especially Vol. 8B at 110, 220, and 608; see also Vol. 8C at 501-25 (Indianapolis Switching Agreement)). Given the disputes that have existed between IPL, CSX, and INRD about service to the Stout Plant, the Board has no choice but to ensure that NS' representations are correct, and that IPL and ISRR have a right to review the agreement(s) and inform the Board if they take issue with NS' representations.

Third, as we have demonstrated, IPL is entitled to effective competition (e.g., Decision No. 96 at 14), as Conrail provides today, not what NS claims are "terms that could not be changed by CSX or INRD as long as the terms of the NS trackage rights agreements with CSX and INRD (except for the standard RCAF(U) adjustments)" [apparently NS meant to complete its thought with "remain the same" or "remain in effect"]. NS seems to think that IPL was entitled only to the same terms as it has today with the addition of the RCAF(U) adjustment process, but NS is wrong, and even more importantly, its theory is wrong, because the Board held in Decision Nos. 89, 96, and 115 that IPL was entitled to effective competition, not merely the same terms as it has today.

Fourth, NS is candid enough to admit that it may not "be able to provide that service at a price equal to or lower than the price of CSX/INRD service to the [Stout] plant," depending "on many factors that cannot be predicted with certainty." Report at 3. NS even went on to admit that "[i]t cannot be denied, however, that the fact that NS's closest line is 60 miles away at Lafayette, IN will provide a substantial challenge to NS to provide a price-competitive interline service with ISRR." *Id.* Cutting throughout the "legalese," NS' carefully written letter clearly concedes what IPL and ISRR and DOJ have been saying all along -- it is effective competition that produces the benefits IPL now enjoys, not a rate cap that would not be a real rate cap for the reasons we have already explained.⁸

Conclusion

IPL is entitled to genuine competition, just as it has today. As Union Pacific stated so well in another context (*see* page 1 *supra*), "[o]nly the introduction of an independent second competitor can ensure continued, genuine competition." The proposal of NS does not constitute genuine competition, and surely cannot produce "rate decreases" and "service improvements," as UP so aptly put it, and as IPL has been able to achieve until now with the vigorous competition that Conrail has provided.

Accordingly, IPL urgently, and earnestly, requests that the Board "stick to its guns" as expressed in Decision Nos. 89, 96, and 115, and ensure that IPL enjoys the benefits of effective and efficient **competition**, as it enjoys today, at the Stout Plant, by assuring that ISRR-origin coal can compete with INRD-origin coal from southern Indiana, and that IPL -- not CSX/INRD and NS -- be allowed to conduct its own negotiations with these supposed competitors. The Board should do so either by directing NS to allow ISRR to act as NS' agent, as already ordered in Decision No. 115, or by transferring NS' rights of direct access to the Stout Plant to ISRR for Indiana coal. If the Board were to accept NS' new proposal, it

⁸ If it had been a sufficient remedy to order Applicants to provide IPL with a rate remedy (Decision No. 89 at 117), we presume the Board would have done that. But the Board rejected the separate requests of IPL and other shippers for rate caps (*see, e.g., ACE, et al.*, 18, filed October 21, 1997 and Decision No. 89 at 62-70) so we are confident that the Board understood that, with the loss of Conrail's willingness to effectively compete, IPL would not receive the same competition it enjoys today merely by allegedly continuing the "favorable" terms. Indeed, NS admits that IPL's rate would not be subject to the RCAF(A) (which is declining) as it now is, but instead be subject to the RCAF(U) (which has generally increased in the past, or more recently stayed flat) as the adjustment mechanism. So NS' proposal to replace IPL's effective competition with terms that are worse than what IPL now enjoys and an adjustment mechanism that is decidedly worse are not the equivalent of the vigorous competition IPL now enjoys. Essentially, what NS proposes is what CSX offered IPL in CSX-152 on June 1, 1998, but which the Board implicitly rejected in Decision No. 89 (at 116-17), right up to and including the RCAF(U)!

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would in essence accept CSX's public proposal to IPL in CSX-152, which the Board already implicitly rejected in Decision No. 89.

We so pray.

Respectfully submitted,

Michael F. McBride

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Brenda Durham

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March 22, 1999

BY HAND

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MAR 23 1999

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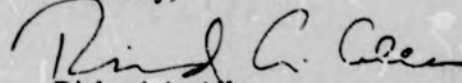
Re: CSX Corporation and CSX Transportation, Inc., Norfolk Southern Corporation
and Norfolk Southern Railway Company -- Control and Operating
Leases/Agreements -- Conrail Inc. and Consolidated Rail Corporation --
Finance Docket No. 33388

Dear Secretary Williams:

I enclose herewith an original and 25 copies of NS-77, "Norfolk Southern's Reply to CSX's Petition for Reconsideration in Part or Clarification of Decision No. 15 and Further Report Pursuant to Decision No. 115 Regarding Access to F&L's Stout Plant." A 3-1/2" computer disk of this document in Wordperfect 5.1 format, which is capable of being read by Wordperfect for Windows 7.0 is also enclosed.

Should you have any questions regarding this, please call.

Sincerely,


Richard A. Allen

Counsel for Norfolk Southern
Corporation and Norfolk
Southern Railway Company

Enclosures

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NS-77

ENTERED
Office of the Secretary

MAR 23 1999

Part of
Public Record

BEFORE THE
SURFACE TRANSPORTATION BOARD

Finance Docket No. 33388



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

NORFOLK SOUTHERN'S REPLY TO CSX'S PETITION FOR
RECONSIDERATION IN PART OR CLARIFICATION OF DECISION NO. 115
AND FURTHER REPORT PURSUANT TO DECISION NO. 115
REGARDING ACCESS TO IP&L'S STOUT PLANT

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March 22, 1999

BEFORE THE
SURFACE TRANSPORTATION BOARD

Finance Docket No. 33388

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

**NORFOLK SOUTHERN'S REPLY TO CSX'S PETITION FOR
RECONSIDERATION IN PART OR CLARIFICATION OF DECISION NO. 115
AND FURTHER REPORT PURSUANT TO DECISION NO. 115
REGARDING ACCESS TO IP&L'S STOUT PLANT**

Norfolk Southern Corporation and Norfolk Southern Railway Company (collectively "NS") hereby replies to the Petition for Reconsideration in Part or Clarification of Decision No. 115 filed by CSX Corporation and CSX Transportation, Inc. (collectively, "CSX") on March 1, 1999 (CSX-180). With this reply, NS also files a further report pursuant to Decision No. 115 with respect to NS's acquisition of trackage rights over Indiana Rail Road Company ("INRD") enabling NS directly to serve the Stout plant of the Indianapolis Power & Light Company ("IP&L").

BACKGROUND

In Decision No. 115, the Board reaffirmed that its Decision Nos. 89 and 96 were intended to enable NS directly to serve the Stout plant via trackage rights over INRD, a subsidiary of CSX. Decision No. 115 also directed CSX by February 18, 1999 to "procure the necessary trackage rights from INRD and [to] advise us in writing

that such rights have been procured," and it ordered NS, by February 23, 1999, to "advise whether the necessary rights have or have not been procured."

Also in Decision No. 115, the Board considered and denied certain requests and suggestions by Indiana Southern Railroad ("ISRR") and IP&L. These included a request by ISRR that the Board "consider allowing NS to assign its [trackage rights over INRD] to ISRR," and a request by IP&L that the Board "make clear that NS shall assign its rights (at least in part) to ISRR." Decision No. 115 at 2. Although Decision No. 115 denied these and other requests, it also stated:

If NS comes to share ISRR's concerns over any potential inefficiencies associated with an ISRR-NS movement into Stout, or if, after having been given an opportunity to work, the ISRR-NS movement into Stout proves to be problematic, ISRR and NS may choose to negotiate a mutually beneficial arrangement through which ISRR operates as NS' agent for movements into that plant. In addition, demonstrated deficiencies in the operations into Stout may be examined as part of our review in the oversight process of whether there is a need at that time to modify the terms of the relief we have granted in order to preserve competition that existed prior to implementation of the approved transaction.

Id. at 4. On March 1, 1999, CSX filed a petition seeking reconsideration or clarification of the foregoing statement.

NS's FURTHER REPORT REGARDING ACQUISITION OF TRackage RIGHTS

Before addressing CSX's petition for reconsideration or clarification, it is appropriate for NS to report further on the status of its acquisition of trackage rights over INRD, since that is pertinent to NS's response to CSX's petition.

As required by Decision No. 115, on February 23, 1999, NS advised the Board that, as of that date, it had not yet procured the necessary trackage rights to serve the Stout plant. Although NS reported that it had received a form of trackage rights

agreement, that agreement contained a number of terms that differed from the standard trackage rights agreement used by NS and CSX throughout this transaction. The form of agreement also left undetermined the highly material term of trackage rights compensation. NS stated that it expected to discuss the matter further with CSX and would submit a further report to the Board on the status of these matters on or before March 22, 1999.

NS has discussed the terms of the trackage rights further with CSX and is pleased to report that NS and INRD have agreed in principle on the terms of a trackage rights agreement that are substantially the same as the standard trackage rights agreement used by NS and CSX throughout this transaction as between themselves in dealing with "2-to-1" or other similar competitive issues resulting from the transaction. These trackage rights will enable NS effectively to serve the Stout plant either from NS or western coal origins or via interchange with ISRR at Crawford Yard, and from an operational point of view, either service is entirely feasible. Although NS's rights will provide a constraint on CSX and INRD pricing, whether NS will be able to provide that service at a price equal to or lower than the price of CSX/INRD service to the plant will depend on many factors that cannot be predicted with certainty. It cannot be denied, however, that the fact that NS's closest line is 50 miles away at Lafayette, IN will provide a substantial challenge to NS to provide a price-competitive interline service with ISRR.

Significantly, however, NS, INRD and CSX have agreed in principle on terms that will grant NS the option, in lieu of using its trackage rights, to use the switching services of CSX and INRD for the movement of coal from ISRR (either at Crawford

Yard or Milepost 6) to the Stout plant on the same terms as those that Conrail and INRD provide to ISRR today for such movements. These terms will thus ensure that, if it turns out that NS is not able itself to serve the Stout plant for southern Indiana origins at a price that equals or betters the price of CSX/INRD service, NS and ISRR will have the ability to work out a mutually beneficial arrangement that could give ISRR essentially the same access to the Stout plant (via CSX and INRD switching) as ISRR has today via Conrail and INRD switching. Accordingly, after implementation of the Transaction, the Stout plant will have the potential of being served in three competitively independent ways: direct service (single-line or interline) by CSX/INRD; direct service (single-line or interline) by NS; or service by ISRR with CSX and INRD switching on terms that could not be changed by CSX or INRD as long as the terms of the NS trackage rights agreements with CSX and INRD (except for standard RCAF(U) adjustments). The first and third ways are essentially the same service options the Stout plant has today; the second is an additional competitive alternative.

**REPLY TO CSX'S PETITION FOR
RECONSIDERATION OR CLARIFICATION**

In its petition, CSX contends that the language in Decision No. 115 quoted earlier could be read to indicate that NS, as the recipient of Board-imposed trackage rights in a consolidation proceeding, would have the right and ability effectively to assign those rights to another party, without the consent of the track owner or further authorization from the Board, by casting the assignment in the form of some sort of "agency" arrangement. CSX argues that any such reading would be contrary to well-settled precedent in consolidation cases.

NS agrees with CSX that the quoted language from Decision No. 115 is unclear and should at least be clarified. NS understands the quoted language to mean nothing more than that, if an ISRR/NS interline movement of coal to the plant proves to be an infeasible competitive alternative to CSX/INRD service, the Board will consider authorizing an alternative service pursuant to its oversight authority and its power to modify conditions imposed on the transaction. However, the language is not clear in that respect.

NS also agrees with CSX that the possible reading that concerns CSX would be contrary to Board precedent and, if such a reading were in fact intended, NS would concur that it should be reconsidered and changed. In selecting the trackage rights or other conditions that should be imposed in a transaction to remedy its anticompetitive effects, Board policy and precedent clearly establish that the remedy selected must be carefully tailored and limited to the identified harm. Whether remedial trackage rights are provided by Railroad X, Railroad Y or Railroad Z, or any combination of them, could make a large difference in the competitive alternatives provided to the shippers and on the economics of the transaction before the Board. Accordingly, when the Board imposes a condition requiring applicants to grant certain trackage rights to Railroad X, that condition should confer no authority on Railroad X unilaterally to assign those rights to Railroads Y or Z, whether in the form of an agency agreement or otherwise.¹ Any action effectively providing trackage rights to other railroads, NS

¹ Ordinarily, "agency" agreements among railroads involve transportation or other services performed by the "agent" railroad on its own lines on behalf of and in the name of another railroad. An agreement whereby one railroad operates over the lines of another railroad is a trackage rights agreement whether or not it involves agency relationships.

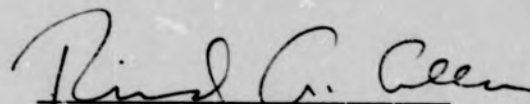
submits, would require a further decision by the Board modifying the original conditions.

NS also submits that it is not necessary to expand in that fashion the conditions imposed by the Board in Decision Nos. 89, 96 and 115 regarding service to the Stout plant in order to satisfy the Board's purpose, as the Board said in Decision No. 115, "to preserve competition that existed prior to the approved transaction." NS, CSX and INRD have negotiated agreements that will accomplish that purpose. With respect to the pre-Transaction service available to the plant from ISRR, the terms NS has agreed to with CSX and INRD will effectively ensure that the plant will continue to have that service available on essentially the same terms in the event that interline service by ISRR and NS proves to an unsatisfactory method of serving the plant in competition with CSX and INRD. As we believe the Board concluded in Decision No. 115, further relief for IP&L is not warranted.

Respectfully submitted,

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*Counsel for Norfolk Southern Corporation
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Dated: March 22, 1999

CERTIFICATE OF SERVICE

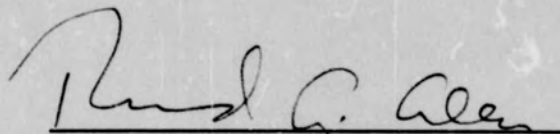
I hereby certify that on this 22nd day of March, 1999, a copy of the foregoing "Norfolk Southern's Reply To CSX's Petition For Reconsideration In Part Or Clarification Of Decision No. 115 And Further Report Pursuant To Decision No. 115 Regarding Access To IP&L's Stout Plant" was served by first class mail, postage prepaid, or by more expeditious means, on the parties listed below:

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KARL MORELL

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March 22, 1999

The Honorable Vernon A. Williams
Secretary
Surface Transportation Board
1925 K Street, N.W., Suite 715
Washington, DC 20423-0001

ENTERED
Office of the Secretary

MAR 23 1999

Part of
Public Record



Re: STB Finance Docket No. 33388, CSX CORPORATION AND CSX
TRANSPORTATION INC. NORFOLK SOUTHERN CORPORATION
AND NORFOLK SOUTHERN RAILWAY COMPANY--CONTROL
AND OPERATING LEASES/AGREEMENTS--CONRAIL INC. AND
CONSOLIDATED RAIL CORPORATION

Dear Secretary Williams:

Enclosed for filing please find the original and 25 copies of the Reply of Indiana Southern Railroad, Inc. in Opposition to Petition of CSX for Reconsideration or Clarification of Decision No. 115 (ISRR-12). Also enclosed is a 3.5 inch diskette containing the filing in Word 6.

Please time and date stamp the extra copy of the filing and return it with our messenger.

If you have any questions, please contact me.

Sincerely,

Karl Morell

Karl Morell
Attorney for:
INDIANA SOUTHERN RAILROAD, INC.

Enclosures

ORIGINAL

193795

ISRR-12

ENTERED
Office of the Secretary

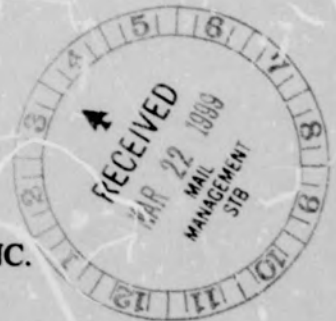
MAR 23 1999

Part of
Public Record

BEFORE THE

SURFACE TRANSPORTATION BOARD

STB FINANCE DOCKET NO. 33388



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

REPLY OF INDIANA SOUTHERN RAILROAD, INC. IN OPPOSITION TO PETITION OF
CSX FOR RECONSIDERATION OR CLARIFICATION OF DECISION NO. 115

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Attorneys for:
INDIANA SOUTHERN
RAILROAD, INC.

Dated: March 22, 1999

BEFORE THE
SURFACE TRANSPORTATION BOARD

STB FINANCE DOCKET NO. 33388

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

REPLY OF INDIANA SOUTHERN RAILROAD, INC. IN OPPOSITION TO PETITION OF
CSX FOR RECONSIDERATION IN PART OR CLARIFICATION OF DECISION NO. 115

Indiana Southern Railroad, Inc. ("ISRR"), hereby replies in opposition to the Petition of
CSX Corporation and CSX Transportation, Inc. ("CSX") for Reconsideration or Clarification of
Decision No. 119 ("CSX-189") (the "Petition for Reconsideration").

SUMMARY OF ARGUMENT

When stripped of its hyperbole and the condescending tenor of counsel, the Petition for
Reconsideration makes clear that CSX has no objection to the Surface Transportation Board
("STB") imposing a condition intended to preserve competition at Indianapolis Power & Light
Company's ("IPL") Stout Plant, as long as the condition is ineffectual and poses no competitive
threat to CSX, but CSX will vigorously oppose any modification of the condition that would
effectively preserve IPL's competitive options. CSX voiced no objections to the condition the
Board imposed on behalf of IPL as long as Norfolk Southern Railway Company ("NS") -- a
carrier which has conceded its inability to compete for coal traffic moving to the Stout Plant
because of its lack of facilities within 60 miles of Indianapolis -- was the delivering carrier. Only

after the Board modified the condition to provide for an alternative service that is truly competitive with CSX did CSX come forward to challenge the decision of the Board. CSX does not challenge that Board's findings concerning the loss of competition at the Stout Plant, nor does it challenge the Board's authority to impose a remedial condition. Interestingly, CSX does not even mount a direct challenge to the evidence of NS's inability to provide effective competition at the Stout Plant. Instead, CSX merely asks that the Board defer the date when its subsidiary is again forced to compete for IPL traffic and to delay effective relief for IPL by requiring additional rounds of unnecessary litigation. ISRR urges the Board not to delay relief for IPL and to preserve effective competition at the Stout Plant, as the Board fully intended, by denying the Petition for Reconsideration.

BACKGROUND

In Decision No. 89, the Board imposed a condition on behalf of IPL whereby IPL was given the option of having its Stout Plant served directly by NS or indirectly by NS via a switch by Indiana Rail Road Company ("INRD"), an 89 percent-owned subsidiary of CSX.¹ In order to accommodate coal movements from southern Indiana origins, NS was also granted an interchange with ISRR at Milepost 6.0 on ISRR's Petersburg Subdivision. Decision No. 89, at 116-17 and 177.

IPL subsequently sought clarification of the NS-ISRR interchange at Milepost 6.0, pointing out that there were no interchange facilities at that location and that ISRR and Consolidated Rail Corporation ("Conrail") were interchanging IPL's coal traffic at Crawford

¹ CSX erroneously claims that its Petition for Reconsideration concerns only IPL's Stout Plant and not the Perry K Plant. The Board denied relief to the Perry K Plant because of IPL's ability to truck coal from Stout to Perry K. See Decision No. 96 at 15. Consequently, to the extent competitive rail service to Stout is delayed or denied, Perry K will likewise be captive to CSX.

Yard, located on the west side of Indianapolis. *See* IP&L-15. ISRR did not seek reconsideration or clarification of the suggested Milepost 6.0 interchange because, unlike IPL, ISRR assumed that CSX would be reasonable in implementing the spirit of the Board's condition by agreeing to an interchange similar to the one being conducted between ISRR and Conrail today.

Unfortunately, CSX elected to disappoint ISRR and not IPL. On reply, CSX vigorously opposed any ISRR-NS interchange at an Indianapolis Yard, claiming, among other things, that once it takes over Conrail's physical assets in Indianapolis there would no longer be any room for an interchange in the Indianapolis Yards. *See* CSX-163. Upon seeing CSX's response, ISRR filed in support of IPL's request for clarification and pointed out the operational impracticalities of interchanging at Milepost 6.0. *See* ISRR-11. In Decision No. 96, the Board instructed CSX, NS, ISRR and IPL to negotiate a mutually satisfactory solution to the interchange problem and to report back to the Board within 60 days. Decision No. 96 at 14. In Decision No. 111, the Board, at the request of the parties, extended the reporting deadline to January 19, 1999.

In accordance with Decision Nos. 96 and 111, CSX reported to the Board that it had reached an agreement with NS and ISRR that would permit an NS-ISRR interchange at Crawford Yard for coal trains moving to the Stout Plant.² CSX also informed the Board that NS and INRD, its 89 percent-owned subsidiary, had not yet reached an agreement that would give NS access to the Stout Plant. *See* CSX letter dated January 19, 1999. NS reported that CSX had orally agreed to a procedure for a NS-ISRR interchange at Crawford Yard and that NS considered such an interchange feasible from an operating standpoint. NS did not address any of

² ISRR was neither consulted nor was it a party to the purported agreement. While ISRR supports a Crawford Yard interchange, ISRR has significant reservations about the operational constraints CSX allegedly is insisting on as conditions to permitting the NS-ISRR interchange at Crawford Yard.

the operational constraints CSX is allegedly imposing on the interchange. NS also reported that INRD had refused to grant NS trackage rights over the INRD line accessing the Stout Plant and urged the Board to order INRD to grant the necessary rights. *See* NS-74.

IPL reported that it had been informed of CSX's agreement to permit an interchange at Crawford Yard but that CSX was insisting on a headlight meet which, according to NS and ISRR, would be very inefficient. IPL also reported that it had been informed by NS that NS had reached the conclusion that it could not efficiently or effectively compete with INRD for coal movements to the Stout Plant. IPL, therefore, asked the Board to have NS's rights for Indiana-origin coal moving to the Stout Plant assigned to ISRR. IPL further informed the Board of INRD's intransigence in granting NS trackage rights and urged the Board to take appropriate action. *See* IPL letter dated January 19, 1999.

Not having been invited to any of the negotiations but feeling compelled to comply with the Board's reporting requirement, ISRR simply reported to the Board what ISRR had learned through phone conversations with NS and IPL. ISRR explained that the restrictions CSX was allegedly imposing on the NS-ISRR interchange would render the interchange uneconomical and inefficient. ISRR also informed the Board that ISRR had been made aware of INRD's refusal to grant NS trackage rights to the Stout Plant. ISRR further informed the Board that ISRR had learned of the NS meeting with IPL where NS conceded that it could not provide competitive service to the Stout Plant. NS had previously conveyed similar sentiments to ISRR. Consequently, ISRR suggested to the Board that it consider assigning NS's rights to ISRR for coal movements to the Stout Plant from Indiana origins. *See* ISRR letter dated January 19, 1999.

In Decision No. 115, the Board directed CSX to procure from INRD the necessary trackage rights for direct access to the Stout Plant as ordered by Decision Nos. 89 and 96. The Board further authorized NS to designate ISRR as NS's agent if, as reported to the Board, NS is unable to compete for coal traffic moving to the Stout Plant. On February 23, 1999, NS reported to the Board that as of that date it had been unable to procure the necessary trackage rights from INRD. CSX's Petition for Reconsideration, to which ISRR hereby responds, is directed at the Board's decision authorizing NS to designate ISRR as its agent.

ARGUMENT

Under 49 C.F.R. § 1115.3, a petition for reconsideration must demonstrate in detail the respects in which the proceeding involves material error, new evidence, or changed circumstances. As is demonstrated below, CSX has failed to show that reconsideration of Decision No. 115 is warranted under these standards.

Presumably aware of its inability to meet the standards for reconsideration, CSX first asks the Board to reverse itself through the guise of clarification.³ In Decision No. 115, the Board, after reviewing the filings by the parties, concluded that:

If NS comes to share ISRR's concerns over any potential inefficiencies associated with an ISRR-NS movement into Stout, or if, after having been given an opportunity to work, the ISRR-NS movement into Stout proves to be problematic, ISRR and NS may choose to negotiate a mutually beneficial agreement through which ISRR operates as NS' agent for movements into that plant.

Decision No. 115 at 4.

³ Clarification of an agency's decision is appropriately sought whenever a decision is subject to various interpretations by the parties. The sentence in Decision No. 115 CSX seeks to have clarified is clear and unambiguous both in isolation and particularly when read in context with the remainder of the Decision. The sentence could not possibly have confused CSX, the clear meaning of the sentence is simply not to CSX's liking.

Unable to point to any ambiguities in the Board's language, CSX claims that, for any one of three reasons, the Board could not have meant what it said. First, CSX points out that historically trackage rights agreements do not permit the tenant to assign its rights without the consent of the owner. ISRR does not dispute the general accuracy of CSX's assertion only its relevance to the issue at hand. The Board has broad conditioning authority in rail consolidation proceedings. See *United States v. Interstate Commerce Comm'n*, 396 U.S. 491 (1970); *Minneapolis & St. L. Ry. Co. V. United States*, 361 U.S. 173 (1959). In fact, 49 U.S.C. § 11324(c) specifically provides that:

The Board may impose conditions governing the transaction, including the divestiture of parallel tracks or requiring the granting of trackage rights and access to other facilities. Any trackage rights and related conditions imposed to alleviate anti-competitive effects of the transaction shall provide for operating terms and compensation levels to ensure that such effects are alleviated.

Accordingly, Section 11324(c) expressly authorized the Board not only to grant trackage rights in rail consolidation proceedings but also to specify any terms necessary to alleviate an anti-competitive effect of the transaction. Consequently, the Board is not bound by provisions historically included in privately negotiated trackage rights arrangement and can, as it has chosen to do in Decision No. 115, require CSX and INRD to enter into a trackage rights agreement with NS that expressly permits NS to designate ISRR as its agent under the agreement. Similarly, the Board could have authorized NS to assign the trackage rights to ISRR and required that any trackage rights agreement between CSX-INRD and NS permit such an assignment.

Second, CSX maintains that, if the Board meant what it said, the Board has granted both NS and ISRR direct access to the Stout Plant. CSX's contention is totally at odds with the clear meaning of the Board's language and turns the law of agency on its head. Pursuant to Decision

No. 115, NS continues to be the carrier that receives trackage rights into the Stout Plant. If, however, as reported to the Board, NS has come to the conclusion that it cannot compete for the Stout traffic, NS can elect to designate ISRR as its agent for purposes of transporting Indiana-origin coal to the plant. If NS so decides, ISRR will simply step into NS's shoes for purposes of serving the Stout Plant. ISRR will have no independent authority to serve the Stout Plant nor can NS elect to have both NS and ISRR serve the plant.⁴ Moreover, fundamental principals of agency law teach that an agent cannot act for itself, but acts as the substitute for the principal. See Black's Law Dictionary, Revised Fourth Edition, at 85-86 (An agent is "[o]ne who acts for or in place of another by authority from him; a substitute, a deputy, appointed by principal with power to do the things which principal may do.").

Third, CSX asserts that the Board did not intend the language authorizing NS to use ISRR as its agent to be a present authorization but simply a hypothetical alternative to be considered in the future under the Board's oversight condition. CSX's assertion, however, is belied by the very next sentence in Decision No. 115. After authorizing NS to choose ISRR as its agent, the Board went to state that:

In addition, demonstrated deficiencies in the operations into Stout may be examined as part of our review in the oversight process of whether there is a need at that time to modify the terms of the relief we have granted in order to preserve competition that existed prior to implementation of the approved transaction.

⁴ NS's ability to designate ISRR as its agent is premised on NS's realization that the ISRR-NS movement into Stout will not be competitive with INRD. If NS were to actually serve the plant, the premise would no longer be valid and NS would no longer want, and presumably no longer be authorized, to keep ISRR as its agent. CSX's suggestion that NS would voluntarily permit ISRR to compete with NS for the Stout traffic defies common sense. If, as CSX suggests, NS is competitive for the Stout traffic, NS will never designate ISRR as its agent.

Decision No. 115 at 4. Any reasonable reading of the overall paragraph leads one to the inescapable conclusion that the Board first authorized the agency relationship and then added, as additional relief, the potential for resolving any further deficiencies that may arise at a later date in the oversight process. The second sentence simply complements the first, it does not qualify or modify it. CSX's strained interpretation of the Board's language necessarily reads the transitional phrase "[i]n addition" out of the decision.

In an attempt to have the Board recant its finding and defer the issue to a later date, CSX asserts that NS -- which CSX facetiously refers to as the "Thoroughbred" of railroads -- will vigorously compete with CSX in Indianapolis as NS does elsewhere where their paths cross. As previously demonstrated by ISRR and IPL, NS and CSX paths do not cross in Indianapolis and NS is hopelessly handicapped in competing with CSX for the Stout traffic. Unlike CSX, which will take over all of Conrail's facilities in Indianapolis, NS will have no facilities, locomotives or crews stationed in or near that City. In order to serve the Stout Plant, NS would need to send a crew and locomotive from Muncie, Indiana some 60 miles to Crawford Yard; await the ISRR coal train, which ISRR understands will be delayed at Milepost 6.0 until the NS crew and locomotive arrive at Crawford Yard; perform an inefficient headlight interchange with ISRR in Crawford Yard; transport the loaded coal cars to the Stout Plant; return the empty cars from the Stout Plant to Crawford Yard; again await the arrival of the ISRR crew and locomotive from Milepost 6.0; perform the same inefficient headlight interchange of the empty cars with ISRR at Crawford Yard; and then return some 60 miles to its home base at Muncie. Even if all these operations worked smoothly, it is questionable whether the round-trip from Muncie could be completed before the NS crew goes out of service. Moreover, NS would be forced to make a

round-trip on the line between Indianapolis and Muncie which will become CSX's main line between Cleveland and St. Louis. In response to ISRR's Responsive Application in this proceeding, CSX explained that this line "will be part of two key CSX service routes--the St. Louis and Heartland service routes carrying automotive and general merchandise traffic." CSX/NS-177 at 520. CSX went on to complain that ISRR's operations over that "line would increase interference for both through freight and local operations." *Id.* It seems incongruous that CSX fought hard to keep ISRR off the Indianapolis-to-Muncie line because of increased interference and now is insisting that NS operate over that congested line in order to serve the Stout Plant.

ISRR does not question NS's ability to compete with CSX under comparable conditions. However, even the Thoroughbred of railroads cannot be expected to be competitive in an essentially local switching operation where it is forced to start the race 60 miles from CSX's starting gate, jump hurdles along the race, and complete the race 60 miles beyond CSX's finish line. The additional 120 miles and inefficiently interchange is too much of a handicap even for NS.

Alternatively, CSX seeks reconsideration of the Board's action in Decision No. 115, again positing three meritless arguments.

CSX first argues that the Board's reversal of Decision No. 89, imposing Condition No. 23, is "unusual, contrary to agency precedent and an unfair use of the Board's discretion." Petition for Reconsideration at 15-16. The Board, however, did not reverse Decision No. 89, it simply modified Condition No. 23 in order better to achieve the intended results of Decision No. 89. Even if the Board's action could termed a "reversal", CSX has failed to demonstrate any

material error. CSX claims that the Board's action is "contrary to agency precedent", but fails to cite any precedent that the Board violated.⁵ CSX's contention that the Board's action is "unusual" and "unfair" -- even if correct, which it is not -- hardly constitutes material error.⁶

In this same regard, CSX complains that, in imposing Condition No. 23, the Board "had before it a number of alternatives based on a substantial record, clear evidence and full arguments" whereas Decision No. 115 was based on "scant evidence put forward by IP&L." Petition for Reconsideration at 15. CSX's complaint is nonsensical since, in adopting Decision No. 115, the Board had before it the same substantial record that it reviewed before imposing Condition No. 23, only that substantial record was supplemented by further uncontroverted testimony concerning the efficacy of Condition No. 23. As already noted, the Board did not reverse Condition No. 23 in Decision No. 115, it simply modified the Condition on the basis of a more complete record.

A number of parties, including IPL, ISRR and United States Department of Justice ("DOJ"), submitted testimony in this proceeding addressing the loss of competition at the Stout Plant. While these parties generally agreed on the potential harm, they differed as to the appropriate relief. In adopting Condition No. 23, the Board elected DOJ's proposal which was first put forward in DOJ's brief. In arriving at its recommendation, DOJ criticized Applicants' proposed remedy because it would double the distance NS would need to travel and possibly produce operational problems at Hawthorne Yard, leading to rates as much as 20 to 30 percent

⁵ It is somewhat anomalous for a party to come before an agency and assert that the agency has violated its precedents without being able to cite a single case, regulation or statute that purportedly was violated.

⁶ CSX's proposed standard of granting reconsideration would produce endless reversals of agency decisions since many decisions are unusual in some respect and most are deemed unfair by the losing party.

higher than present rates to Stout. DOJ-2 at 24-26. In fashioning its recommended solution, DOJ obviously was of the view that NS would have a presence in Indianapolis and that a NS-ISRR interchange could occur without the use of a CSX yard. Otherwise, DOJ's criticisms of Applicants' proposed remedy would have been equally applicable to its own remedy. Because NS has elected not to station any employees and locomotives in Indianapolis, an ISRR-NS route to the Stout Plant is more than double the distance of the INRD route and CSX is apparently insisting on an inefficient interchange at Crawford Yard. Faced with the uncontroverted evidence that NS is unable effectively to compete for the Stout traffic, it is unlikely that DOJ would continue to support its suggested remedy. In any event, faced with this evidence, the Board was obligated to fashion a more suitable remedy, as it did in Decision No. 115.

Along these same lines, CSX next argues that there is a conflict in testimony that must be resolved before the "agency" concept is put into use. The so-called conflict that CSX presumably refers to is between NS's statement that the interchange at Crawford Yard is "feasible" and the testimony introduced by IPL that NS has come to the conclusion that it cannot efficiently or effectively compete for the Stout traffic. There is, however, no inherent conflict between the respective testimony of NS and IPL, as CSX would lead the Board to believe.

NS simply informed the Board that the interchange CSX agreed to at Crawford Yard is "feasible", not that the interchange is efficient or that it would enable NS effectively to compete for the Stout traffic. Railroads are from time-to-time compelled by facility constraints to perform headlight interchanges. Such interchanges, however, are usually performed only as a temporary measure or for small volumes of traffic because they are inefficient and uneconomical. ISRR and IPL have not disputed NS's characterization of the proposed interchange as operationally

feasible. Instead, ISRR and IPL have maintained that the proposed interchange would be inefficient and uneconomical which, in turn, CSX does not refute. Moreover, CSX focuses solely on the NS-ISRR interchange at Crawford Yard and ignores the other operational constraints NS would face in competing for the Stout traffic. Given the enormity of those constraints, ISRR is not in the least bit surprised that NS has come to the realization that it cannot effectively compete with CSX for traffic moving to the Stout Plant.

CSX portrays IPL's testimony concerning NS's stated inability to compete for the Stout traffic as "an uncollaborated (sic) assertion" and "scant evidence". Attached to IPL's January 19, 1999 letter is a sworn Affidavit of Mr. Weaver, Manager of IPL's Fuel Supply Organization, in which Mr. Weaver describes in detail his discussions with NS. In that Affidavit, Mr. Weaver unequivocally states that NS admitted to IPL that NS could not effectively compete for the Stout traffic. Mr. Weaver's testimony is uncontroverted. NS has not come forward to deny its conversations with IPL and CSX has not introduced a scintilla of evidence that refutes Mr. Weaver's testimony or undermines his credibility.

Even if there were a conflict in testimony, which, of course, there is not, the Board's findings in Decision No. 115 appropriately accommodate any such conflict. As already noted, the Board merely authorized NS to have ISRR act as its agent in the event NS has already decided or decides at some future date that NS cannot compete for the Stout traffic. If, as CSX suggests, IPL has mischaracterized NS's conversation with IPL and NS is able to compete for the Stout traffic, NS has no reason to deputize ISRR as its agent. As CSX points out throughout its Petition for Reconsideration, NS is a vigorous competitor and would hardly hand off to ISRR traffic that NS has even a remote chance of gaining. On the other hand, if NS does deputize

ISRR as its agent, NS will have confirmed IPL's testimony in a manner that speaks louder than words.

Finally, CSX argues that the Board's action in Decision No. 115 may have unforeseen consequences. The consequences CSX alludes to, however, are not precisely defined or articulated other than the suggestion that the Board's action may raise a labor issue because of the possible NS-ISRR agency relationship. Railroads routinely enter into trackage rights arrangements without any adverse labor implications. As CSX correctly points out, such arrangements are subject to Board approval and the attendant labor protective conditions imposed by the Board. The trackage rights awarded by Condition No. 23 were expressly made subject to the conditions set forth in *Norfolk and Western Ry. Co. - Trackage Rights - BN*, 354 I.C.C. 605, 610-15 (1978), as modified in *Mendocino Coast Ry., Inc. - Lease and Operate*, 360 I.C.C. 653, 664 (1980). See Decision No. 89 at 166, n 259. The same labor conditions imposed by the Board apply regardless of whether NS or ISRR performs the operations under the awarded trackage rights. In other words, the employees of CSX, INRD and Conrail are treated the same regardless of whether NS or ISRR is the performing carrier.

The only labor issue the Board's action could possibly raise is whether NS's collective bargaining agreements permit NS to use ISRR as its agent. If, as CSX suggests, the agency relationship is made tantamount to a grant of trackage rights to ISRR any impediments in NS's collective bargaining agreements would be resolved.⁷ In order to resolve any potential unforeseen consequences, the Board can do precisely what CSX suggests. Rather than having ISRR act as its agent, NS should be given the ability to assign the trackage rights to ISRR if NS

⁷ Contrary to CSX's argument, such action by the Board would not involve an "override" of labor obstacles.

finds itself unable to compete for the Stout traffic. In offering this suggestion, ISRR is not -- as CSX derisively remarked -- focusing on itself. NS's assignment would only occur if NS finds itself unable to compete for the Stout traffic and would last only for so long as NS continues to be of that same view. Such an arrangement would be no different than the one contemplated by the Board in Decision No. 115, but would resolve any possible obstacles to the timely and proper implementation of Condition No. 23 and avert needless additional litigation of this matter.

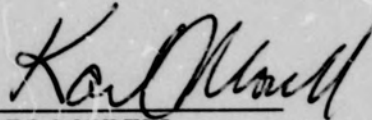
CONCLUSION

In Decision No. 89, the Board granted IPL relief in order to remedy the loss of rail competition at the Stout Plant. No one -- other than CSX's subsidiary, a non-party to these proceedings -- has challenged the Board's decision in this regard.⁸ In Decision No. 96, the Board explained that the relief granted to IPL was intended to "ensure efficient and competitive service" to the Stout Plant. Again, the Board's findings go unchallenged. In Decision No. 115, the Board, confronted with uncontroverted evidence that NS cannot compete for the Stout traffic, authorized NS to choose ISRR as its agent in order to preserve competition at the Stout Plant. CSX's challenge goes not to the merits of the Board's decision, only its timing. CSX does not refute the evidence of NS's inability to compete for the Stout traffic, it asks only that the Board postpone its decision and take it up again at some future date under the Board's oversight powers. The proper implementation of Condition No. 23 has already witnessed a flurry of filings by the parties. Mindful of the adage "justice delayed is justice denied", ISRR respectfully urges

⁸ In Decision No. 93, the Board denied INRD's petition for leave to intervene.

the Board to deny CSX's Petition for Reconsideration and to expeditiously take whatever further action is needed to properly implement Condition No. 23.

Respectfully submitted,

A handwritten signature in dark ink, appearing to read "Karl Morell", written over a horizontal line.

KARL MORELL
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Dated: March 22, 1999

CERTIFICATE OF SERVICE

I hereby certify that on this 22nd day of March, 1999, I caused a copy of the Reply of Indiana Southern Railroad, Inc. (ISRR-12), to be served on the following parties by first class mail, postage prepaid, or by more expeditious means:

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TAVARES GUERREIRO ADVOGADOS

March 22, 1999

VIA HAND DELIVERY

The Honorable Vernon A. Williams
Secretary, Surface Transportation Board
1925 K Street, N.W., 7th Floor
Washington, D.C. 20423



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

Dear Secretary Williams:

Enclosed for filing in the above-referenced proceeding are the original and 25 copies of IP&L-22, the "Reply of Indianapolis Power & Light Company in Opposition to CSX's 'Petition for Reconsideration in Part or Clarification of Decision No. 115' (CSX-180)" on behalf of Indianapolis Power & Light Company.

Also enclosed is a 3.5" diskette containing the Motion in WordPerfect format, and three additional copies for time-stamping and return via our messenger.

Respectfully submitted,

Michael F. McBride

Michael F. McBride
Brenda Durham

Attorneys for Indianapolis Power & Light
Company

Enclosure

cc (w/encl.): All Person on Certificate of Service

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BEFORE THE
SURFACE TRANSPORTATION BOARD

IP&L-22

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

REPLY OF INDIANAPOLIS POWER & LIGHT COMPANY IN
OPPOSITION TO CSX's "PETITION FOR RECONSIDERATION IN PART
OR CLARIFICATION OF DECISION NO. 115" (CSX-180)

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Attorneys for Indianapolis Power & Light Company

Dated: March 22, 1999
Due Date: March 22, 1999

UNITED STATES OF AMERICA
DEPARTMENT OF TRANSPORTATION
SURFACE TRANSPORTATION BOARD

Finance Docket No. 33388

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

**REPLY OF INDIANAPOLIS POWER & LIGHT COMPANY IN
OPPOSITION TO CSX's "PETITION FOR RECONSIDERATION IN PART
OR CLARIFICATION OF DECISION NO. 115" (CSX-120)**

COUNTERSTATEMENT OF THE ISSUES

1. May CSX -- which presented this Transaction as one that would create efficiencies (e.g., Snow Dep'n Tr. 163, copy attached hereto as IPL Exhibit No. 7) -- now be heard to attempt to make inefficient IPL's existing competitive alternative at the Stout Plant?
2. Is there any provision of law that would preclude a railroad (here, NS) from doing what any other entity may do -- appoint an agent (here, Indiana Southern Railroad Company ("ISRR")) to perform tasks within the legal authority of both principal and agent?
3. May CSX subject the tariff rates of Indianapolis Power & Light Company ("IPL") to RCAF(U) increases, as CSX announced in its Petition for Reconsideration, rather than the RCAF(A), as the statute requires?

INTRODUCTION AND SUMMARY

IPL regrets that CSX, which previously acquiesced in trackage rights for NS into IPL's Stout Plant (CSX-163, filed September 3, 1998, at 3 n.1), now seeks reconsideration in CSX-180 ("Petition") of the Board's admirable Decision No. 115 which allowed those rights to be effective by permitting NS to make ISRR the agent of NS, if NS and ISRR so agree.

It is highly questionable whether CSX should even be heard on this matter, given (a) its acquiescence, (b) that the rights in question belong to NS (and thus are not within the cognizable interests of CSX, unless safety or operational concerns were alleged, which CSX did not), and (c) that CSX is, now, obviously, acting as a stalking horse for its 89-percent-owned subsidiary, The Indiana Rail Road Company ("INRD"), which in Decision No. 93 was denied the opportunity to intervene grossly out of time. Given the inordinate amount of time that disputes about IPL's Stout Plant have already consumed, the Board may wish to reject CSX's Petition because it relates to matters that are of concern to NS, ISRR, and IPL, but are not the business of CSX.

Under the Board's Decision No. 89, of which IPL unsuccessfully sought reconsideration (see Decision No. 96) but did not further challenge, IPL must rely on CSX, as it had to rely on Conrail, to serve its Perry K Plant in downtown Indianapolis. In IPL's view, the imposed reliance on CSX lessened its existing rail-to-rail competition with INRD/CSX service to Stout (and thereafter truck delivery to Perry K). The Board, however, took a different view, holding that the provision of NS competitive service to IPL's Stout Plant provided a sufficient substitute for the existing competition Conrail provides. Decision No. 96 at 14-15. But, of course, that only could be true if NS or a substitute carrier has direct access to the Stout Plant, at a competitive trackage rights fee (i.e., no higher than the 29 cents per car-mile fee agreed to by NS and CSX) and with non-discriminatory dispatch and provision for interchange. The current effort by CSX to make

NS' direct access inefficient and uncompetitive therefore jeopardizes competition at both the Stout and Perry K Plants.

Despite the lengths CSX went to in retelling this saga to a Board well familiar with it, CSX really is challenging only one aspect of Decision No. 115 -- i.e., may NS make ISRR its agent for purpose of serving the Stout Plant? Assuming arguendo that the Board allows CSX to raise that issue, there is only one answer to it -- of course NS can do that. There is no provision of law forbidding a railroad from making another railroad its agent, and CSX cites none. Rather, it argues that the Board's explicit authorization of an agency relationship is unprecedented, but that is clearly wrong.

For one thing, Burlington Northern-Santa Fe ("BNSF") made Utah Railway its agent in Utah to effectuate the trackage rights granted BNSF by the Board in Decision No. 44 (served August 12, 1996) in Finance Docket No. 32750. No one, including Union Pacific ("UP"), ever suggested that BNSF could not do that, and it was clearly done to make the rights awarded BNSF by the Board more efficacious. **There is no conceivable objection to that, except the purely selfish concerns of the competitor.** If it had been illegal, the Board would not have allowed it. Equally important, railroads enter into haulage agreements routinely, and those agency relationships are clearly legal and are allowed by the Board. **Agency relationships are routine.**

Simply stated, there are two fundamental problems with CSX's newly-found objection to the trackage rights awarded NS (aside from CSX's earlier acquiescence in them). First, CSX relies on no authority whatsoever, except an internally-contradictory claim that such rights may somehow violate 49 U.S.C. § 11326 (even though CSX admits that the Board can override any claimed obstacle under that Section, Petition at 18-19). More fundamentally, § 11326 is no bar because Conrail's employees already received labor protection from the Board. Decision No. 89

at 124-27, 183-84. CSX (along with NS) itself advocated labor protection for Conrail's employees, and thus is estopped from complaining about it. Second, the unrebutted record supports Decision No. 115, because on January 19, 1999 IPL submitted the Weaver Affidavit which no party has refuted and which proved that NS cannot, by its own admission to Mr. Weaver, compete at the Stout Plant (for delivery of southern Indiana coal). All the Board has done is to permit NS to make the awarded rights effective, which NS already had the common law authority to do (by making ISRR its agent). There is no conceivable reason to change that arrangement at the behest of CSX.

At bottom, CSX's objection relies on its concern that the trackage rights awarded NS may now be the efficient and competitive alternative the Board described and intended in Decision No. 96 (at 14). IPL is, frankly, outraged that CSX is -- blatantly -- seeking to undercut the efficiency and competitiveness of the rights the Board properly awarded NS, while piously posturing itself as acquiescing in the award of those rights. CSX cannot claim -- and has not claimed -- that IPL's unrebutted evidence (in the Weaver Affidavit) of what NS told it is wrong.¹ The facts are as IPL stated them, under oath, through the Weaver Affidavit, with its January 19, 1999 letter. Without an opposing Affidavit, CSX has defaulted on its opportunity, if any, to dispute IPL's evidence.

BACKGROUND

The ISRR line at issue is a feeder line which used to be owned by Conrail, and was so owned by Conrail when IPL's current Conrail contract was executed. As a feeder line spun off by Conrail, Conrail had an incentive to ensure that traffic originating on that line would be

¹ NS, for understandable reasons, does not want to be the entity who seeks any change in the transaction as approved by the Board. IPL understands NS' position. But NS has been quite candid with IPL, and has stated to IPL that it has no objection if IPL informs the Board of the facts as NS related them to IPL.

competitive. This led Conrail to absorb most of the INRD switching charge for ISRR-origin coal transported to IPL's Stout Plant.² It was therefore in Conrail's interest to keep ISRR viable, but it is not necessarily in NS' interest to do so (and it is definitely not in CSX's, because CSX owns 89-percent of INRD, the alternative line). Another reason why Conrail and ISRR were able to compete was the presence of Conrail crews, locomotives, and track in Indianapolis. NS comes no closer to Indianapolis than Muncie, Indiana, some 60 miles north, and unlike Conrail will have neither crews nor locomotives nor any other presence in Indianapolis. It is obvious that NS cannot effectively compete from such a distance, which it admitted to IPL and IPL reported to the Board in an undisputed Affidavit (IPL Exhibit No. 6) filed with its January 19, 1999 letter (attached hereto for the Board's convenience). NS cannot offer IPL competitive service for ISRR-origin coal at the Stout Plant.

Moreover, the record shows that, without IPL's coal business to the Stout and Perry K Plants, ISRR may have to abandon service north of Milepost 17.0, thus eliminating service to other smaller shippers as well. The Department of Justice ("DOJ") apparently recognized this concern in advocating that NS get trackage rights to serve the Stout Plant directly, in interchange with ISRR. The Department of Agriculture supported relief for ISRR (including a remedy so that it could serve the Stout Plant), and the Department of Transportation supported a remedy for IPL at the Stout Plant so that it would have effective competition for ISRR-origin coal. The Board

² Under a joint proposal by CSX and INRD to IPL in April 1998 (see CSX-152, filed June 1, 1998), CSX suggested that IPL would receive the same competition at both Stout and Perry K Plants as it had before. IPL disputed this in its successful arguments to the Board. CSX made the same offer in CSX-152 as it and INRD had made in their joint offer, with one crucial difference -- it had offered to use the RCAF(Adjusted) in its April 1998 letter, but stated in CSX-152 that it would only offer to use the RCAF(Unadjusted) in view of IPL's rejection of the joint offer. See CSX-152 at 4 n.1 and April 1998 letter attached thereto. In its Petition, CSX now reiterates its intention to use the RCAF(Unadjusted) in any tariff rates it quotes IPL, which IPL regards as an egregious violation of 49 U.S.C. § 10708. See *infra*.

agreed with DOJ, and subsequently provided (in Decision No. 115) that NS could make ISRR its agent if **either** NS is concerned that it cannot provide effective competition at the Stout Plant without "inefficiencies" **or** the ISRR-NS movement proves to be "problematic." This was entirely appropriate.

IPL has no direct knowledge of negotiations between CSX, NS and INRD (a non-party to this proceeding) about trackage rights to the Stout Plant because IPL was not included in those discussions. It is clear, however, from NS' February 23, 1999 report, that the trackage rights agreement provided to NS by CSX on behalf of INRD did not comply with Decision No. 115 -- indeed, patently so, since it contained no trackage rights fee (despite prior rulings by the Board rejecting IPL's effort to reduce the agreed-upon fee NS and CSX set at 29 cents per car-mile to a lower fee for service to the Stout Plant, thus establishing the fee at 29 cents per car-mile), as CSX admitted in its February 18, 1999 report to the Board (CSX-178). Also, the trackage rights agreement proposed by CSX contained unusual provisions that NS informed the Board would require further negotiations. After so many months, IPL regards CSX's proposed agreement (as reported by NS) to be ridiculous. See IP&L-21 (filed February 26, 1999).

To put it bluntly, CSX is unwilling to satisfy the Board's orders. Lest the Board think IPL is overreacting, attached hereto is CSX's denial of a request from IPL for a rate and service quote to IPL (IPL Exhibit No. 8). The letter, dated March 10, 1999, **after CSX filed its Petition which nowhere raised any issue concerning the provision of service by CSX to the Stout Plant, nevertheless stating that "[t]he pending filings before the STB concerning the operating plan for the Indianapolis area have delayed our ability to properly evaluate the commercial and operational landscape for a rail proposal at this time."** This is incredible; CSX was the architect of this transaction, and supposedly knew how Indianapolis would be

served almost two years ago, when it filed the Application! There are no issues before the Board affecting CSX service to either the Stout Plant or the Perry K Plant, yet CSX's letter went on to say: "[o]nce there is a clear understanding as to how your facilities in the Indianapolis area will be served, CSXT will develop a rail proposal for Stout and Perry K. We feel this approach will allow for more meaningful negotiations once the operational issues have been resolved." What "operational issues" involving CSX service to either the Stout or Perry K Plants? There are none!! It will take over Conrail's lines and, as the owner, can operate them in any appropriate manner!

RESPONSE TO CSX'S PETITION

CSX's version of the events concerning the trackage rights issue at IPL's Stout Plant (Petition at 2-11) is replete with statements that have been taken out of context and with pejorative remarks and insinuations, evidently to divert the Board's attention from the focus of this matter: **preservation of rail-to-rail competition at the Stout Plant**. It is important that IPL set the record straight.

It is undisputed that Indianapolis is the largest "2 to 1" metropolitan area affected by the split-up of Conrail. See generally, Application, CSX/NS-25, Vol. 2A at 147-49 (Hart V.S.). This is because Conrail and CSX currently compete for traffic in Indianapolis, and Conrail's departure after the "Split Date" will turn Indianapolis, for all practical purposes, into a one-railroad town dominated by CSX. Conrail's role as an aggressive competitor for transportation of coal to IPL's Stout Plant is at the heart of the issues presented by CSX's Petition. Because of its physical presence in Indianapolis and its interest in seeing ISRR remain viable, Conrail acts a tough competitor at the Stout Plant. Decision No. 89 at 116-17. (Indeed, because Conrail sold the ISRR line to ISRR after entering into its contract with IPL, Conrail has continued to

aggressively compete along with ISRR for IPL's business.) IPL's Stout Plant has two-carrier access via (1) INRD and (2) by ISRR, in interchange with Conrail (via INRD switch, under a switching charge the Board found to be favorable, *id.* at 117, of which Conrail absorbs nearly all of it). As a result of the proposed transaction, the Stout Plant would have become a "2 to 1" destination. **Because of the loss of Conrail as a competitor, IPL sought protective conditions in order to preserve its existing competition as much as possible. The Board and DOJ correctly recognized that IPL would lose viable competition at the Stout Plant and that IPL was entitled to protective relief to preserve its existing competition. *Id.*; see DOJ-2 at 24-26.**

The solution proposed in the Application to the massive "2 to 1" problem in Indianapolis was an inefficient and costly combination of operating conditions under which NS would only have "overhead" trackage rights with all NS traffic being routed through the Hawthorne Yard, where NS would have to depend on CSX/INRD for switching.³ Traffic destined for IPL's Stout Plant would then be rerouted from the Hawthorne Yard, over the same track from which it came, into the Stout Plant. Of this arrangement, DOJ correctly noted:

[w]hile this remedy may appear to permit NS to assume Conrail's position, it is seriously flawed because NS is not granted the same means that Conrail now has at its disposal to compete with CSX at Stout . . . NS would not have Conrail's convenient access to Indiana coal because it cannot connect with ISRR at Indianapolis as does Conrail . . . NS could deliver Indiana coal to Stout by interlining . . . but all of these routes involve considerable circuitry, such that each of them is at least twice as long (in rail miles) as Conrail's current route to Stout. . . [T]his doubling of the distance that NS must travel means significantly higher costs for NS, which most likely would be reflected in NS rates to Stout as much as 20-30 percent higher than present Conrail rates In short, Applicants' remedy will not replicate current competitive conditions for IPL at Stout because it does not put NS and INRD on equal footing.

DOJ-2 at 24-26 (emphasis added).

³ NS received direct access to one GM facility in Indianapolis. CSX has never explained why GM was entitled to that access, but the Stout Plant is not.

Initially, CSX endeavored to retain this arrangement by proffering untenable theories to prevent IPL from obtaining a remedy at the Stout Plant. For example, early on in the proceeding, CSX tried to maintain the fiction that it would compete with INRD, its 89-percent owned subsidiary, see, e.g., IP&L-11, Attachment 2, Sharp Dep'n Tr. 14-15, an absurd assertion it later abandoned. In its rebuttal, CSX advanced a new fiction, contending that IPL's real competitive constraint on INRD's rates at the Stout Plant was the alleged ability of IPL to truck its coal into Stout. This later argument was equally senseless⁴ and failed to divert the Board's and DOJ's attention from focusing on preservation of IPL's rail-to-rail competition.

To remedy the loss of IPL's vigorous rail-to-rail competition at the Stout Plant, DOJ⁵ requested, and the Board granted, NS trackage rights directly into the Stout Plant. See DOJ-2 at 26-27 and Decision No. 89 at 117. The Board recognized that it could not precisely replicate pre-transaction conditions at the Stout Plant because the Transaction eliminates a Class I railroad from Indianapolis, but gave NS the trackage rights, as requested by DOJ and IPL, in an effort to "approximate more closely pre-transaction market conditions." Id. It is critical to recall that it was Applicants, especially CSX by proposing to take Conrail's lines in Indianapolis, that made it impossible to re-create the current vigorous competition from ISRR/Conrail vis-a-vis single-line service on INRD that IPL now enjoys.

⁴ In order to move 100 percent of Stout's coal requirements by truck, over 60,000 truck loads would be required per year, or approximately 460 truck loads per day. See IP&L-11 at 32. Such an undertaking is infeasible, not to mention the damage to local highways, traffic congestion, and environmental impacts of such an undertaking, as the Board correctly found in Decision No. 89 (at 116-17). We gather CSX has abandoned that fiction, too, since CSX has not re-raised its truck-competition argument in its lengthy Petition and previously acquiesced in the grant of trackage rights to NS, nor did CSX seek judicial review of Decision Nos. 89 or 96. CSX's contention was especially ironic, given its claim, touted by both CSX and NS, that this transaction would take trucks off the highway.

⁵ IPL also requested direct access for NS into the Stout Plant as an alternative to its request to make Indianapolis a Shared Assets Area. IP&L-3 at 38; IP&L-11 at 16-23.

IPL did petition the Board for clarification or reconsideration of certain aspects of Decision No. 89. However, CSX seems to imply that IPL did so to get more from the Board than the Board's remedy was meant to provide. This is misleading and untrue. First, in reply to IPL's Petition, CSX accepted the Board's grant of trackage rights to NS⁶ for movements to the Stout Plant and even opposed INRD's petition for reconsideration or clarification of the same matter. Second, IPL's requests merely clarified issues related to the Board's remedy and were intended to make effective what the Board originally provided.⁷ The Board agreed these changes were appropriate.

One example of CSX's misleading characterization of the events concerns the point of interchange issue for ISRR-origin coal. CSX implies that the Board significantly improved IPL's position in Decision No. 96 by requiring an NS interchange at Milepost 6.0 rather than Hawthorne Yard. Petition at 8-10. This is disingenuous. ISRR-origin traffic destined for the Stout Plant has never interchanged with Conrail at the Hawthorne Yard. Rather, it has always taken place at the Crawford or "GM" Yard, which are in western Indianapolis and en route to

⁶ IPL fails to understand why CSX, in response to Decision No. 115, sent NS a trackage rights agreement without a stated trackage rights fee which, as NS observed on February 23, 1999 in NS-76, is a "highly material provision. Despite IPL's desire to have its traffic subject to a lower fee, the Board said in Decision No. 96 (at 140-42) it would be subject to the 29 cents per-car-mile trackage rights fee proposed by Applicants and reiterated that in Decision No. 96 (at 14 n. 33). CSX cannot object to the very fee it agreed to with NS for trackage rights over the others' lines. The Board should direct CSX, in the trackage rights agreement provided NS, to set the fee at 29 cents per car-mile for the use of INRD's tracks, which IPL firmly believes was the Board's intention. Without the inclusion of such a fee, CSX has neither complied with Decision No. 115 nor did it seek reconsideration of the requirement that it provide a trackage rights agreement, which obviously must contain a fee.

⁷ IPL also sought to strike the word "presumably" (concerning the switching-charge fee aspect of Decision No. 89) from the statement that "traffic to IP&L's Stout plant will result in availability of direct NS service presumably free of CSX switching charges." CSX conceded this point even before the Board ruled on it. CSX-163 at 3 n.1.

the Stout Plant, unlike the Hawthorne Yard, which is east of the Stout Plant. Of CSX's plan to route IPL's traffic through the Hawthorne Yard, DOJ stated "Hawthorne Yard may be congested, and so the NS-CSX interchange is likely to be worse than the current interchange between Conrail and INRD. There is also the potential for CSX to use biased dispatching or excessive switching fees to impede NS' ability to compete." DOJ-2 at 25-26. Although DOJ mistakenly suggested that the interchange take place at Milepost 6.0, upon application to the Board by ISRR and IPL, the Board allowed the parties involved to negotiate a mutually satisfactory solution for efficient interchange. Decision No. 96 at 14. Allowing (or requiring) the interchange to occur at Crawford Yard simply maintains in one respect the status quo.⁸

By letter dated January 19, 1999, IPL submitted the Affidavit of Michael A. Weaver, Manager of IPL's Fuel Supply Organization (IPL Exhibit No. 6, attached hereto again for convenience). IPL Exhibit No. 6 chronicles the events since Decision No. 96.⁹ IPL's

⁸ CSX, in its earlier Reply (CSX-163) to IPL's Petition for Reconsideration of Decision No. 89, disparaged IPL for having the temerity to suggest that interchange should occur in Crawford or "GM" Yards (hardly an extraordinary suggestion, since that is where interchange has always occurred) rather than at Milepost 6.0 (where interchange has never occurred). It was not until January 1999 that CSX admitted that Crawford Yard was the appropriate interchange point, just as IPL argued in August 1998.

⁹ Implementation of NS' trackage rights into Stout has been fraught with delays and with intransigence from CSX and its subsidiary, INRD. Several pleadings have been filed with the Board reporting the status of, or requesting assistance in, resolution of an acceptable trackage rights arrangement into Stout. In Decision No. 96, the Board required NS, CSX, ISRR, and IPL to negotiate a mutually satisfactory solution to "any related problems that may necessarily incidental to a MP 6.0 interchange problem" and report to it on or before December 18, 1998. IPL was not allowed to participate in any meetings held by the carriers to negotiate a solution. Importantly, the Board intended the remedy that it granted at the Stout Plant "ensure efficient and competitive service." Decision No. 96 at 14. CSX's Petition now seeks to obstruct that objective. Among the various submissions to the Board about the trackage rights issues at the Stout Plant are papers filed August 12, 1998, September 3, 1998, December 18-19, 1998, January 19-20, 1999, February 3-4, 1999, February 18, 1999, February 23, 1998 and February 26, 1999, by CSX, NS, IPL, and ISRR.

uncontradicted Exhibit No. 6 demonstrates NS' inability to quote a competitive rate for ISRR-origin coal to the Stout Plant due to its location at least 60 miles away from Indianapolis.

Mr. Weaver testified that "although NS was willing to quote IPL a rate for ISRR-origin coal to the Stout Plant, it would not be able to quote a rate equal to or even close to the existing Conrail rate to the Stout Plant." *Id.* at 3. (Marketing personnel at NS presumably did not know this before June 8, 1998, because the IPL rate was highly confidential.) Thus, while it is operationally feasible for NS to provide the service by sending locomotives and a crew a one-way distance of 60 miles or more, the lack of physical presence in Indianapolis prevents NS from quoting a competitive rate.

As a result of all of the submissions, including Mr. Weaver's Affidavit, the Board issued Decision No. 115, which required 1) CSX to report that it had procured the trackage rights for NS from INRD and 2) NS to report that the trackage rights had been procured and whether they were satisfactory. Decision No. 115 at 4. Decision No. 115 also responded to IPL's and NS' concerns over potential inefficiencies associated with the ISRR/NS movement to the Stout Plant. In order to "preserve competition that existed prior to implementation of the approved transaction," the Board provided that ISRR could operate as NS' agent. *Id.* In response to Decision No. 115, NS reported (in NS-76) that it received a strange form of trackage rights agreement from CSX that did not conform to the other trackage rights agreements between NS and CSX and which contained no trackage rights fee (rightly described by NS as a "highly material" term). IPL does not consider CSX's proposed agreement to constitute compliance with Decision No. 115. See IPL-21, filed February 26, 1999.

ARGUMENT

I. CSX SHOULD NOT BE HEARD TO INTERFERE WITH A TRACKAGE RIGHTS RELATIONSHIP BETWEEN NS AND ISRR.

CSX seeks to prevent an efficient and competitive relationship between NS and ISRR over lines owned by its 89-percent-owned subsidiary INRD. There are three reasons why CSX should not be heard to do so. First, in CSX-163 (at 163), as CSX admits in its Petition, CSX acquiesced in the award of trackage rights to NS to serve the Stout Plant, and should not be heard to interfere with them. Second, the issue CSX attempts to raise -- whether NS can make ISRR its agent for purposes of transferring those trackage rights -- is not something in which CSX has any legitimate interest, unless it were to allege that there would be some operational or safety concern with ISRR (which CSX has not done, and could not do). Third, CSX's only reason in raising that issue is that it seeks to make transportation of ISRR-origin coal inefficient and uncompetitive, contrary to the Board's determination (in Decision Nos. 89, 96 and 115) that IPL was entitled to an efficient and competitive alternative for transportation of southern Indiana coal to the Stout Plant. CSX's position has no statutory basis (the statute, after all, entitles IPL to efficient service, and to preserve its existing competition) and it is inconsistent with the testimony in this proceeding of CSX's own Chairman, Mr. John Snow.

During his deposition in this proceeding, CSX Chairman Snow was asked if he was advocating that the Transaction would improve efficiency in railroad transportation. Mr. Snow replied (Snow Dep'n Tr. at 163, attached hereto as IPL Exhibit No. 7): "[w]e're not advocating it. We're saying that one of the benefits of the transaction will be greater efficiency." In light of Mr. Snow's answer, it is not only ironic, but inconsistent, for CSX now to try to use this proceeding to prevent the efficient and competitive transportation of ISRR-origin coal. The ISRR line has transported coal to IPL for at least 60 years (it may be longer, but records are

no longer available), but CSX seems determined to deny IPL its historic alternative route. The Board should hold Mr. Snow to his representation, as it said it would hold NS and CSX to all of their representations, and deny CSX's Petition on that basis alone, as well as because IPL is entitled to efficient and competitive alternative service for ISRR-origin coal, which it now has.

II. DECISION NO. 115 IS AMPLY SUPPORTED BY THE RECORD.

The evidence of record is uncontradicted and fully supports Decision No. 115. Although CSX characterizes IPL Exhibit No. 6 as "scant evidence" (Petition at 15) (presumably to try to denigrate its credibility and prevent the Board from relying on it), neither CSX nor NS have provided any contrary evidence. In fact, NS' silence (subsequent to IPL's filing on January 19, 1999 of the Weaver Affidavit) regarding the assertions made by its representatives to IPL, and CSX's failure in its Petition even to attempt to refute IPL's Affidavit despite seeking reconsideration, are compelling. More importantly, IPL's uncontradicted evidence specifically addresses the core concern of the Board and DOJ concerning a remedy at Stout -- that IPL have effective competition post-transaction just as it did pre-transaction.

The Board has consistently stated that its intention regarding a remedy at the Stout Plant is to "ensure efficient and competitive service," Decision No. 96 at 14, to "preserve competition that existed prior to implementation of the approved transaction," Decision No. 115 at 4, and "to approximate more closely pre-transaction market conditions." Decision No. 89 at 117. DOJ specifically requested that the Board "replicate current competitive conditions" at the Stout Plant. DOJ-2 at 26. Allowing NS to make ISRR its agent for movements of coal into the Stout Plant merely makes effective the Board's remedy. Otherwise, DOJ's requested remedy - which is what the Board adopted -- would be rendered meaningless.

CSX's argues that, by allowing NS to make ISRR its agent, the Board has "reversed" or "overthrown" its previous action in Decision No. 89. Petition at 15. This is obviously wrong. CSX's theory implies that DOJ and the Board would and should insist on no change in NS' trackage rights even if those rights could not accomplish the purpose for which DOJ and the Board acted -- to preserve IPL's existing competition. In any event, even without Decision No. 115, NS could have made ISRR its agent for service to the Stout Plant, just as BNSF made Utah Railway its agent, without the Board's or UP's objection, for the exercise of the trackage rights BNSF was awarded in Finance Docket No. 32760.¹⁰

Moreover, contrary to CSX's assertion, IPL and NS have not expressed any inconsistent views. NS stated it "believes that, from an operating standpoint, the procedure proposed by CSX for interchanging traffic at Crawford yard, unlike Milepost 6.0 interchange, is feasible." NS-74 at 2 (emphasis added). This is consistent with Mr. Weaver's Affidavit in which he stated:

Mr. Moon explained that while it was operationally possible for NS to send a crew and locomotives such a long distance to serve IPL, NS would necessarily incur significant costs in doing so which would be much higher than Conrail now incurs with a local crew and engines. . . [therefore] it would not be able to quote a rate equal to or even close to the existing Conrail rate to the Stout Plant.

IPL Exhibit No. 6 at 3 (emphasis added). The consistency of these statements is self-evident and they are not contradictory as CSX would have the Board believe. IPL does not dispute the operational feasibility of an ISRR/NS movement into the Stout Plant, **if CSX will permit it.**¹¹ It

¹⁰ Although the BNSF trackage rights were created by agreement between BNSF and UP, that fact does not distinguish the two situations. Whether or not created by agreement, the Board either has authority to allow a non-Class I railroad to act as agent for a Class I, or it does not. The Utah Railway precedent proves that it does.

¹¹ To say efficient interchange is "feasible" or "possible" (as NS did) is not to say that CSX will permit that approach. The history of this dispute suggests that it might not. For example, CSX has apparently insisted that NS be in the Crawford Yard before ISRR may be cleared to enter. That is not customary practice.

is the cost of that movement which renders the service uncompetitive, and those costs are clearly far too high for NS to charge only what Conrail has charged (in light of the distance NS must travel and Conrail's willingness to absorb most of INRD's switching charge). NS' inability to effectively compete with INRD therefore renders the Board's grant to NS of trackage rights into the Stout Plant ineffective to cure the harm caused by the approved transaction for ISRR-origin coal unless ISRR is allowed to act as NS' agent.

III. CSX CITES NO AUTHORITY FOR ITS POSITION.

In its Petition, CSX did not state that the Board lacks authority to allow NS to make ISRR its agent -- because of course, the Board (and NS) have that authority, simply by not being deprived of it.¹² CSX merely claims that it is unaware of any precedent for such an authorization. Petition at 12. This argument proves nothing, and is wrong for the reasons discussed *infra*. The Board's authority over mergers is exclusive. Before approving an application for acquisition of control over a railroad, the Board must find that the transaction is "consistent with the public interest." 49 U.S.C. § 11324(c) (1997). The same authority allows the Board to impose conditions upon a proposed merger to remedy any resulting harm to competition. *Id.* The Board's authority is well-known. Essentially, it can do whatever it deems necessary to prevent harm to competition that results from a proposed merger. Indeed, in this very transaction, CSX and NS have made the "new" Conrail their agent in the Shared Asset Areas!¹³ Apparently CSX

¹² Not only does the Board's broad merger authority give it all the authority it needs, but also NS could have made ISRR its agent under general principles of agency law, as BNSF did with Utah Railway for traffic moving over trackage rights granted by the Board to BNSF in Decision No. 44 (served August 12, 1996) in Finance Docket No. 32760.

¹³ Ironically, CSX points out that IPL sought to have the Board make Indianapolis a Shared Asset Area (Petition at 6), which of course the Board did not do, but which it clearly could have done. Had it done so, the "new" Conrail would have acted as NS' agent, and thus CSX would have been -- indirectly, by submitting the Application -- the cause of NS being
(continued...)

believes that when it proposes an unprecedented agency relationship it may do so, but the Board is not authorized to allow an agency relationship with clear precedent.

Moreover, there is ample authority for one railroad to make another railroad its agent. BNSF made Utah Railway its agent in Utah. There have never been any allegations that this delegation was unprecedented. Moreover, railroads enter into haulage rights arrangements, which are in effect agency arrangements, and are clearly accepted by the rail community. See, ironically, CSX's Petition at 18 n.17 (acknowledging that haulage arrangements are a form of agency relationship). More broadly, the law of agency is, generally, that one can make **any** qualified entity one's agent for **any** action within the legal authority of the principal, absent a legal bar to doing so.¹⁴ CSX never explains why allowing one railroad to be the agent of another is so extraordinary, when it happens routinely both within the railroad industry and throughout the American economy.

There is no bar to NS making ISRR its agent. CSX should not be allowed to interfere with a right given to NS. It is evident that its only motivation to do so is its concern that the trackage rights awarded to NS by the Board will now be effective in preserving IPL's existing

¹³(...continued)

allowed to use as its agent a railroad that would have had a presence in Indianapolis, as ISRR has. Since Indianapolis will not be a Shared Asset Area, NS and the "new" Conrail will not have a presence there, which is why it is necessary that NS make ISRR its agent to serve the Stout Plant.

¹⁴ Center Hill Defense Fund v. Army Corps of Engineers, 886 F. Supp. 1389, 1401 (N.D. Tenn. 1995) ("As a general rule, 'whatever a man may do of himself he may do through an agent, and what he himself cannot do he cannot authorize another to do for him.' Agency §§ 25, 144 Corpus Juris Secundum; see generally American Standard Credit v. National Cement, 643 F.2d 248 (5th Cir. 1981); United States v. Forbes, 515 F.2d 676 (D.C. Cir. 1975); Phillips Petroleum Co. v. Haslem, 218 F.2d 926 (10th Cir. 1954); In re Peters' Estate, 336 N.Y.S.2d 712, 71 Misc.2d 662 (1972).")

competition and provide the "efficient and competitive" remedy the Board intended.¹⁵ But that is a reason to deny CSX's petition, not grant it, for surely the Board intended NS' rights to be effective, and for NS and ISRR to be efficient and competitive.

IV. THE STATUTORY LABOR PROVISION IS NOT A BAR TO DECISION NO. 115.

CSX's argument that 49 U.S.C. § 11326 is a bar to Decision No. 115, if in fact that is what CSX's confusing argument means (see Petition at 16-19), is wrong, for three reasons. First, CSX seems to contradict its own arguments. *Id.* at 18-19 ("Of course, if the 'agency' was tantamount to the grant of trackage rights authority to ISRR and the Board's action was an authorization of it, an 'override' of labor obstacles could be effected, subject to appropriate labor protection.") Second, Conrail's employees have received labor protection already, so § 11326 was satisfied. And third, nothing in § 11326 would preclude a railroad from making one railroad its agent to carry out trackage rights awarded by the Board, because to do so would not interfere with existing labor arrangements (since in this case NS has not heretofore provided service using its employees into the Stout Plant, and the Conrail employees are protected). Therefore, the labor argument is just a "red herring" to try to confuse or concern the Board, and the Board should reject it.

V. CSX MAY NOT USE THE RCAF(U) TO ADJUST TARIFF RATES.

In an almost casual fashion, CSX announced in its Petition that it would subject IPL's ISRR-origin coal traffic moved via tariff to RCAF(U) adjustments (Petition at 11 n.14); See, also, *id.* at 13. CSX may not subject tariff rates to RCAF(U) adjustments, but rather must use the RCAF(A) to adjust them. 49 U.S.C. § 10708; Rail Cost Adjustment Factor --

¹⁵ Note that CSX is not contending, as it would have a right to do as owner of the line, that ISRR is not a competent or safe railroad operator.

Productivity Adjustment, 5 I.C.C.2d at 434 (1989)(“Productivity”), aff’d sub nom. Edison Electric Institute v. ICC, 969 F.2d 1221 (D.C. Cir. 1992). We therefore request the Board to adopt CSX’s representation as an additional protective condition, but to modify it to require use of a productivity-adjusted RCAF such as the RCAF(A), as the law requires.¹⁶ The law requires this because § 10708 provides that “the” RCAF contain a productivity adjustment, and that the Board merely publish another “index” without a productivity. This 1995 statute codified the ICC’s 1989 Productivity decision.¹⁷

¹⁶ Decision No. 96, which rejected use of the RCAF(A) for adjustments to the 29 cents/car-mile fee negotiated by CSX and NS, is not to the contrary, because the Board (id. at 16) appears to have relied on the negotiated agreements for its decision there whereas there is nothing negotiated (i.e., there is no quid pro quo) about CSX’s unilateral pronouncement here. Moreover, the Board rejected the application of the RCAF(A) to the CSX/NS trackage rights fee, not to tariff rates. The statute is absolutely clear that “the” RCAF must be adjusted for productivity. If the Board were not to require that a productivity-adjusted RCAF be used to adjust tariff rates, it would render the statute meaningless, and violate the ICC’s 1989 determination that tariff rates must be adjusted for productivity. In the ICCTA, Congress codified the ICC’s 1989 Productivity decision (by requiring publication of an RCAF adjusted for productivity as well as another index) and its quarterly decisions in Ex Parte No. 290 (Sub-No. 5) requiring that tariff rates be increased by no more than the level that would be permitted by “the” RCAF.

¹⁷ CSX claims the right to use the RCAF(U) for tariff rates, which is precisely what was at issue in Ex Parte No. 290 (Sub-No. 4) and Ex Parte No. 290 (Sub-No. 5) in 1989. See Productivity, 5 I.C.C.2d at 472 (explaining that the decision would not apply to contract rates). While IPL respectfully believes that the Board should have used the RCAF(A) for switching charges in Decision No. 96, there can be no argument that a railroad can use the RCAF(U) to adjust tariff rates. See EEL v. ICC, 969 F.2d at 1222-23, affirming Productivity, 5 I.C.C.2d at 473 (“Effective April 1, 1989, the ceiling for tariff increases taken under these procedures will be the RCAF(Adjusted).”); see also 49 C.F.R. § 1135.1 (same). Indeed, in CSX’s and INRD’s joint offer to IPL (see attachment to CSX-152, filed June 1, 1998) CSX and INRD offered IPL use of the RCAF(Adjusted), just as IPL’s Conrail contract provides. Moreover, the recent stipulation between NIT League and the Applicants in Finance Docket No. 33556 (CN/IC-65; NITL-5) filed March 17, 1999 provided for a limit on annual adjustments to rates and charges to an amount not greater than the annual rate of charge in the RCAF (Adjusted), which presumably CN and IC would not have agreed to if the RCAF (Adjusted) were not perforce applicable to common carrier rates and charges.

CONCLUSION

Decision No. 115 is supported by the clear and uncontradicted record provided by IPL in its Affidavit of Michael A. Weaver, as corroborated by NS' and ISRR's January 19, 1999 reports. CSX did not file an affidavit or any other evidence even attempting to refute IPL's Affidavit. Moreover, the Board obviously has authority to provide IPL an effective remedy at the Stout Plant, even if CSX disapproves, as made clear in Decision No. 96. Decision No. 115 merely gives effect to the Board's oft-expressed intention to preserve the same degree of competition that IPL has received for at least 60 years over the ISRR line prior to the CSX takeover of Conrail's tracks in Indianapolis. As the Board found, merely granting NS trackage rights might not accomplish this. IPL is grateful to the Board for its diligent efforts and its recognition of the facts, and urges the Board to admonish CSX, in no uncertain terms, that it is now past the time for CSX to avoid further distractions and carry out the Board's orders. IPL sincerely hopes that CSX Chairman Snow's assurance -- that this Transaction will promote efficiency -- proves to be correct. The Board needs no other reason than that assurance to deny CSX's Petition.

Respectfully submitted,

Michael F. McBride

Michael F. McBride

Brenda Durham

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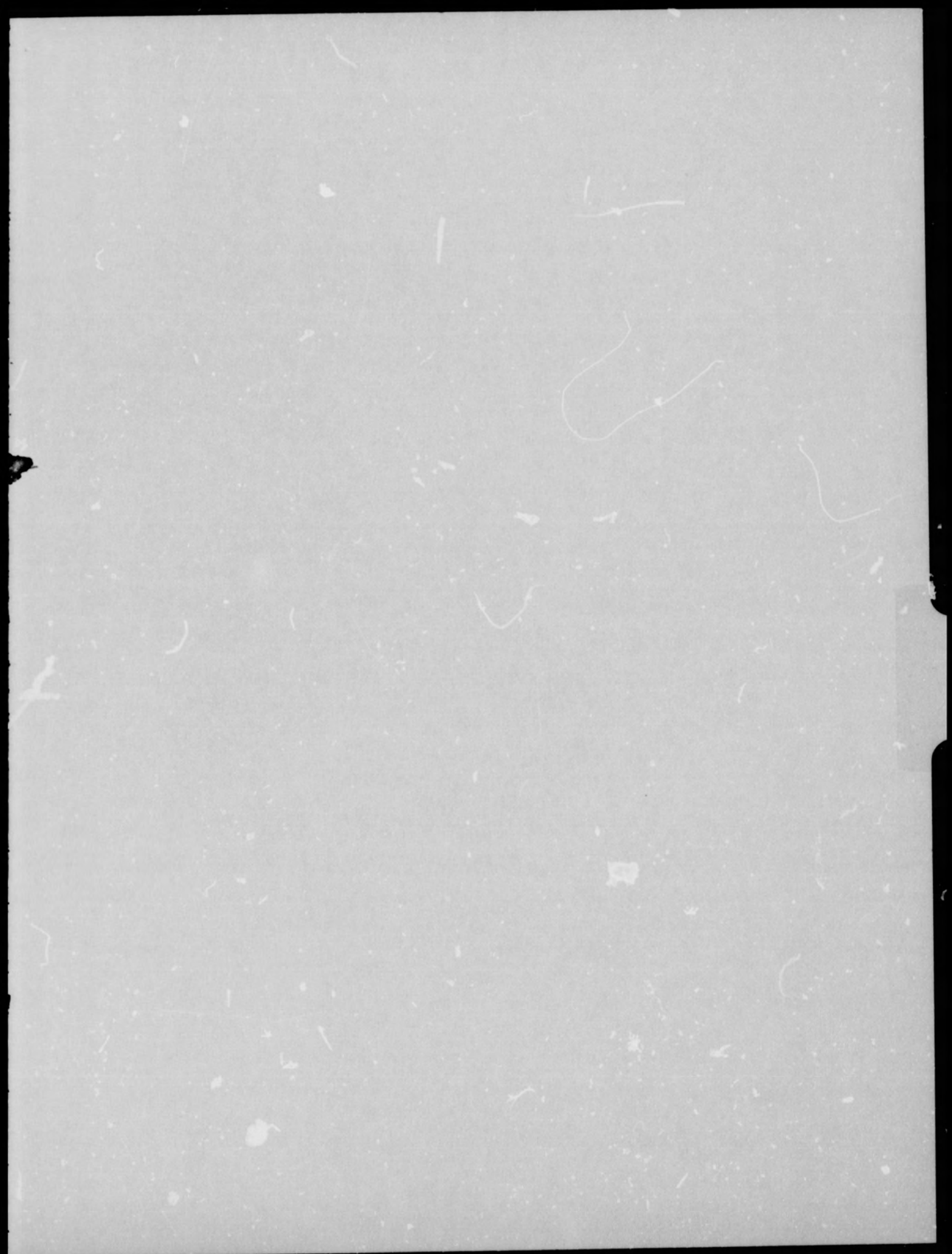
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Company



**UNITED STATES OF AMERICA
DEPARTMENT OF TRANSPORTATION
SURFACE TRANSPORTATION BOARD**

Finance Docket No. 33388

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

AFFIDAVIT OF MICHAEL A. WEAVER

1. My name is Michael A. Weaver. I am Manager of the Fuel Supply Organization of Indianapolis Power & Light Company ("IPL"), headquartered in Indianapolis, Indiana. I am the same Michael A. Weaver that testified in IP&L-3 at Exhibit 1, Supplemental Comments, Evidence, and Request for Conditions of Indianapolis Power & Light Company and in ISRR-9, the Rebuttal of Indiana Southern Railroad, Inc. ("ISRR") in this proceeding. In the interests of brevity, I refer the Board to those filings. I have a Doctorate in Jurisprudence as well as Masters Degrees in Mining Engineering and Business Administration.

BACKGROUND

2. After Decision No. 89, IPL timely petitioned the Board for clarification or modification of the new interchange that was to be created at Milepost ("MP 6.0") explaining that there is no interchange point at MP 6.0, nor could one occur there. (The Justice Department was simply incorrect, because ISRR's ownership interest changes at MP 6.0. IPL and ISRR illustrated the interchange on the "schematic" diagrams accompanying Witness

Crowley's testimony in IPL-3 and ISRR-9.) We explained that ISRR-origin trains historically interchanged with Conrail at the Crawford Yard or "Transfer" Yard. See IPL-15 at 2. As the Board is aware, ISRR also petitioned the Board with regard to the MP 6.0 issue. See ISRR-11.

3. Thereafter, in Decision No. 96, the Board required NS, CSX, ISRR, and IPL to negotiate a mutually satisfactory solution to the MP 6.0 interchange problem and report to it by December 18, 1998. See Decision No. 96 at 14 and 26. (The Board's order in Decision No. 93 was not limited to only a determination of the appropriate interchange point, but also appropriately called for a solution to "any related problems that may be necessarily incidental to a MP 6.0 interchange problem." Id. at 26.) In granting relief to IPL, the Board further explained that "it was [its] intent in imposing relief at the Stout plant, including an interchange at milepost 6, to ensure efficient and competitive service, including service from coal origins on ISRR." Decision No. 96 at 14.

4. On December 18, 1998, IPL reported to the Board that it had not had any discussions with CSX despite IPL's communications to CSX. In Decision No. 111, the Board extended the negotiation period to January 19, 1999.

SUBSEQUENT EVENTS

5. On January 6, 1999, IPL's counsel sent a letter to counsel for CSX, NS, and ISRR informing them that IPL had not yet received a proposal from any of them concerning MP 6.0 issues. In that letter, we requested that the counsel inform their respective clients that IPL wished to resolve the matter expeditiously and was willing to meet with their clients as soon as possible.

6. On January 7, 1999, Mr. John Moon, Manager Corporate Development for NS, met with IPL to discuss service to the Stout Plant. Mr. Moon told IPL that in order for NS to serve IPL's Stout Plant, NS would have to bring its locomotives and crews from Muncie or

Lafayette, Indiana (a one-way distance of at least 60 miles) in order to interchange with ISRR-origin coal and move the coal train less than 10 miles. Mr. Moon explained that while it was operationally possible for NS to send a crew and locomotives such a long distance to serve IPL, NS would necessarily incur significant costs in doing so which would be much higher than Conrail now incurs with a local crew and engines. As a result, Mr. Moon informed IPL that although NS was willing to quote IPL a rate for ISRR-origin coal to the Stout Plant, it would not be able to quote a rate equal to or even close to the existing Conrail rate to the Stout Plant. NS admitted that it would not be able to effectively compete with INRD for transportation of ISRR-origin coal to the Stout Plant.

7. IPL also later learned from Mr. Moon (after he met with CSX and its 89-percent owned subsidiary INRD the next day on January 8, 1999) that CSX finally agreed that the appropriate interchange point is the Crawford Yard. (This is consistent with an offer made to IPL by CSX and INRD on April 21, 1998 (CSX-152) which stated that interchange would occur at the Crawford Yard for ISRR-origin coal, but not with CSX-163, where CSX argued that Crawford Yard would not be an efficient interchange point.) However, we were also told that any interchange at Crawford Yard would have to be "headlight to headlight." NS and ISRR have both told us that a "headlight to headlight" interchange would be very inefficient and unnecessary. CSX has not communicated with IPL that it has agreed to interchange traffic at Crawford Yard.

8. IPL was also informed by NS that, during NS' January 8, 1999 meeting with CSX and INRD, INRD stated that, notwithstanding the Board's orders granting NS trackage rights in this proceeding, INRD would not allow another railroad to use its line and that it would not sign any agreement granting trackage rights into the Stout Plant. Unfortunately, this may be correct, because it is consistent with IPL's last meeting with Mr. John Rickoff, Senior Vice President

Marketing and Sales for INRD, in which they made it clear that INRD would fight the Board's decision granting direct access into the Stout Plant. INRD has even suggested to the Second Circuit, where its petition for review of Decision No. 96 is pending, that IPL's motion to dismiss that petition should not be granted, because under those circumstances INRD might have to defy the Board's Order so as to be able to challenge it.

9. Apart from INRD's intransigence about another railroad's use of its line or its refusal to enter into a trackage rights agreement, which IPL understands the Board has the authority to order, it is evident that NS cannot serve the Stout Plant efficiently or competitively, from 60 miles away, for ISRR-origin coal movements from the south. (NS did say, and IPL takes it at its word, that NS could serve IPL efficiently for western or eastern coal movements over its own lines and using trackage rights over CSX, because in those instances NS would participate in a substantial part of the movement as a line-haul carrier and not experience 120 miles of "dead-heading" and possible loss of crews due to time constraints.)

10. The key to NS's inability to provide "efficient" and "competitive" service is that it does not and foreseeably will not have a presence in Indianapolis, unlike Conrail or ISRR. A local presence is necessary to maintain the service level of efficiency and competition. However, if the Board were to allow NS to assign the trackage rights it was provided by the Board insofar as they pertain to ISRR-origin coal or other coal from the south, the Board's intent could be achieved. IPL believes that NS should retain its rights for direct access to the Stout Plant for coal originating from the western or eastern states in order to preserve a similar degree of competition which existed prior to the Conrail acquisition.

11. Moreover, the Board in its wisdom in Decision No. 96 at 15, noted that rail rates to IPL's Perry K Plant could be effectively constrained by the threat of trucking coal from the

Stout Plant to Perry K. However, this is possible only if the Board retains effective competition at the Stout Plant.

12. IPL informed the Board in its December 18, 1998 letter that Conrail Tariff No. 4611 presently controls the transportation of delivery of ISRR-origin coal to the Stout Plant and will expire in February 1999. At that time, IPL requested that the Board remove the expiration date of the current tariff pending resolution of the matters concerning transportation of coal to the Stout Plant. This was to assure the continuation of service until this matter is resolved. In Decision No. 111, the Board provided that IPL could again seek relief on Conrail Tariff No. 4611 if the issues affecting this movement have not been resolved by January 19, 1999. Decision No. 111 at 1. Clearly, these issues are not resolved. IPL again requests that relief. The Board has the authority to ensure that IPL retain continuity of service for ISRR-origin coal until such time that the Board's Order can be implemented, and for a reasonable time thereafter to allow IPL to negotiate a new rate with the delivering carrier for ISRR-origin coal, whoever that may be. In light of the history of this issue, the refusal of CSX and INRD to implement the Board's Order, CSX's efforts to make IPL's alternative arrangements inefficient, and NS's conclusion that it cannot efficiently serve IPL, I believe this request to be reasonable. The elimination of the expiration date of the Conrail Tariff No. 4611 is therefore critical to the continuity of efficient and effective transportation service to IPL's Stout Plant.

FURTHER AFFIANT SAITH NOT.

Michael A. Weaver
Michael A. Weaver

Subscribed and sworn to before me
this 19 day of January, 1999.

Marilyn A. Hall
Notary Public: Marilyn A. Hall

My commission expires April 4, 2000
County of Residence: Morgan

CERTIFIED COPY

1

1 BEFORE THE
2 SURFACE TRANSPORTATION BOARD
3 Finance Docket No. 33388
4 CSX CORPORATION AND CSX TRANSPORTATION, INC.
5 NORFOLK SOUTHERN CORPORATION AND
6 NORFOLK SOUTHERN RAILWAY COMPANY
7 -- CONTROL AND OPERATING LEASES/AGREEMENTS --
8 CONRAIL INC. AND CONSOLIDATED RAIL CORPORATION
9 RAILROAD CONTROL APPLICATION
10 HIGHLY CONFIDENTIAL
11 Washington, D.C.
12 Thursday, September 18, 1997
13 Deposition of JOHN W. SNOW, a witness
14 herein, called for examination by counsel for the
15 Parties in the above-entitled matter, pursuant to
16 agreement, the witness being duly sworn by MARY
17 GRACE CASTLEBERRY, a Notary Public in and for the
18 District of Columbia, taken at the offices of
19 Arnold & Porter, 555 Twelfth Street, N.W.,
20 Washington, D.C., 20004-1202, at 10:00 a.m.,
21 Thursday, September 18, 1997, and the proceedings
22 being taken down by Stenotype by MARY GRACE
23 CASTLEBERRY, RPR, and transcribed under her
24 direction.

25

1 appropriate person to talk about that, although
2 Mr. Hart might be as well.

3 Q. Would CSX have any objection to taking
4 the traffic of the sort I just described at some
5 point other than the Hawthorn yard and bringing
6 it to the Stout plant?

7 A. We may or we may not and I wouldn't be
8 the one who would know.

9 Q. I see. Do you understand that a lot of
10 shippers own their own coal cars these days?

11 A. These days and many days in the past.

12 Q. And you understand that a shipper who
13 owns its own cars might prefer to have the most
14 efficient arrangement for the delivery of coal?

15 A. In which regard they're not much
16 different from shippers of coal generally.

17 Q. Right, but you do understand that?

18 A. Sure. That's true of all coal shippers
19 that I'm aware of.

20 Q. And the applicants are advocating
21 efficiency as one of the benefits of the proposed
22 transaction, correct?

23 A. We're not advocating it. We're saying
24 that one of the benefits of the transaction will
25 be greater efficiency.



Henry T. Rupert
Director - Utility Coal

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March 10, 1999

Mr. Michael Weaver
Indianapolis Power & Light
Manager - Fuel Supply
1230 W. Morris Street
Indianapolis, IN 46221

Dear Mr. Weaver,

This letter is to update you on the status of CSXT's rail proposal that we discussed delivering to IP&L around the end of February. The pending filings before the STB concerning the operating plan for the Indianapolis area have delayed our ability to properly evaluate the commercial and operational landscape for a rail proposal at this time.

Once there is a clear understanding as to how your facilities in the Indianapolis area will be served, CSXT will develop a rail proposal for Stout and Perry K. We feel this approach will allow for more meaningful negotiations once the operational issues have been resolved.

Sincerely,

Henry T. Rupert
Director - Utility Coal

Cc: T.R. Howard
F.R. Birkholz

RECEIVED-IPL
MAR 15 1999
IPL-FUEL SUPPLY



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Sincerely,

Henry T. Rupert
Director - Utility Coal

Cc: T.R. Howard
F.R. Birkholz

RECEIVED-IPL
MAR 15 1999
IPL-FUEL SUPPLY

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

FINANCE DOCKET NO. 33388

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

CERTIFICATE OF SERVICE

I hereby certify that I have served, this 22nd day of March 1999, a copy of the foregoing "Reply of Indianapolis Power & Light Company in Opposition to CSX's 'Petition for Reconsideration in Part or Clarification of Decision No. 115' (CSX-180)," by first-class mail, postage prepaid, or by more expeditious means, upon the following:

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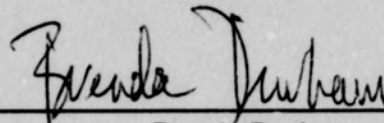
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A handwritten signature in cursive script, reading "Brenda Durham", is written over a horizontal line.

Brenda Durham

STB

FD

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3-22-99

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Senior Counsel

Admitted in Virginia
Not Admitted in Florida

ENTERED
Office of the Secretary

MAR 22 1999

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March 19, 1999

Via Airborne Express - Overnight Delivery

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Surface Transportation Board
1925 K Street, N.W.
Washington, DC 20423-0001



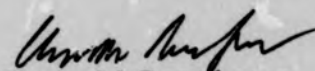
Re: STB Finance Docket No. 33388
CSX Corporation and CSX Transportation, Inc.,
Norfolk Southern Corporation and Norfolk Southern
Railway Company - Control and Operating Leases/
Agreements - Conrail Inc. and Consolidated Rail
Corporation

Dear Mr. Williams:

This refers to Decision No. 89 in the above-captioned proceeding. Ordering Paragraph No. 36 in that Decision provides that "CSX must attempt to negotiate, with IC, a resolution of the CSX/IC dispute regarding dispatching of the Leewood-Aulon line in Memphis." The Board further ordered CSX and IC to advise them of the status of their negotiations. In Decision No. 113, the Board extended until March 22, 1999 the deadline for submitting a status report on this matter.

Since the parties' latest request for extending the deadline for submitting a status report of this matter was filed, both IC and CSX have exchanged proposals for resolving this issue. IC's latest proposal is currently being reviewed by CSX; however, a final resolution of this matter will not be reached by March 22, 1999. Accordingly, CSX and IC respectfully request that the date for the status report of their negotiations be extended for an additional thirty (30) days, or until April 21, 1999.

Respectfully submitted,


Charles M. Rosenberger
Senior Counsel

CMR/dam

Mr. Vernon A. Williams, Secretary
Surface Transportation Board
March 19, 1999
Page 2

cc: Mr. Ronald A. Lane
Mr. Myles L. Tobin
Illinois Central Railroad Company
455 North Cityfront Plaza Drive
Chicago, IL 60611-5504

Mr. William C. Sippel
Mr. Thomas J. Litwiler
Oppenheimer Wolff & Donnelly
Two Prudential Plaza, 45th Floor
180 North Stetson Avenue
Chicago, IL 60601

STB

FD

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193628

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ARNOLD & PORTER

555 TWELFTH STREET, N.W.
WASHINGTON, D.C. 20004-1206

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March 10, 1999

NEW YORK
DENVER
LOS ANGELES
LONDON

DENNIS G. LYONS
(202) 942-5856

The Honorable Vernon A. Williams
Secretary, Surface Transportation Board
Mercury Building, Room 700
1925 K Street, N.W.
Washington, D.C. 20423

ENTERED
Office of the Secretary

MAR 10 1999

Part of
Public Record

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

Dear Secretary Williams:

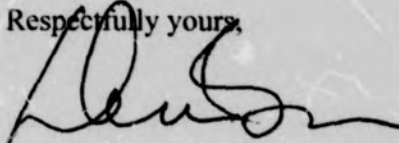
Enclosed are an original and twenty-five (25) copies of CSX-181, "Reply of CSX Corporation and CSX Transportation, Inc. to Petition of Occidental Chemical Corporation for Leave to File Reply to Response to Petition for Oversight and Modification of Remedial Condition," for filing in the above-referenced docket.

Please note that a 3.5-inch diskette containing a WordPerfect 5.1 formatted copy of the filing is also enclosed.

Kindly date stamp the enclosed additional copies of this letter and the enclosure at the time of filing and return them to our messenger.

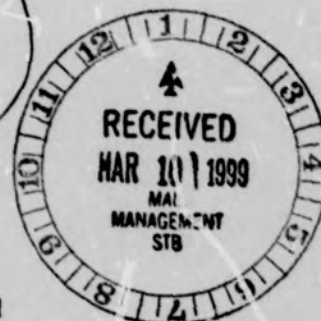
Thank you for your assistance in this matter. Please contact me if you have any questions.

Respectfully yours,


Dennis G. Lyons
Counsel for CSX Corporation
and CSX Transportation, Inc.

Enclosures
via hand delivery

cc: All Parties on the Service List
for Finance Docket No. 33388



BEFORE THE
SURFACE TRANSPORTATION BOARD

FINANCE DOCKET NO. 33388



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

ENTERED
Office of the Secretary

MAR 10 1999

Part of
Public Record

**REPLY OF CSX CORPORATION AND
CSX TRANSPORTATION, INC. TO PETITION OF
OCCIDENTAL CHEMICAL CORPORATION FOR
LEAVE TO FILE REPLY TO RESPONSE TO PETITION FOR
OVERSIGHT AND MODIFICATION OF REMEDIAL CONDITION**

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Speed Code J-120
Jacksonville, FL 32202
(904) 359-3100

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

March 9, 1999

BEFORE THE
SURFACE TRANSPORTATION BOARD

FINANCE DOCKET NO. 33388



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

**REPLY OF CSX CORPORATION AND
CSX TRANSPORTATION, INC. TO PETITION OF
OCCIDENTAL CHEMICAL CORPORATION FOR
LEAVE TO FILE REPLY TO RESPONSE TO PETITION FOR
OVERSIGHT AND MODIFICATION OF REMEDIAL CONDITION**

In its most recent Petition, filed March 3, 1999,¹ Occidental Chemical Corporation ("Oxy") seeks the Board's leave to submit additional evidence to ensure that a "complete record" is before the Board with respect to its Petition filed February 1, 1999. The additional evidence sought to be supplied consists of the commentary of Oxy's counsel on two documents that have been part of the record for well over a year, two conclusionary Verified Statements, one by an Oxy retiree and the other by an Oxy manager, as to the contents of their recollection and

¹ We refer to it, together with its accompanying tendered "Reply to Response," as the "Filing," with "Pet." or "Rep."

files, and an argument by Oxy's counsel that since Mr. Ronald A. Dunn, who submitted a Verified Statement in CSX's Response in this matter (CSX-179), was not in the habit of signing his retained file copies of his outgoing correspondence, it proves "conclusively" that his correspondence was not in fact sent. This is the reply of CSX Corporation and CSX Transportation, Inc., Applicants in this matter, to this remarkable Filing by Oxy.²

CSX expresses no view as to whether the Board should grant Oxy's request to file an otherwise unauthorized reply to a reply. CSX submits, however, that the additional evidence and arguments made by Oxy add nothing to Oxy's case and should not affect the substantive result in this matter — that Oxy's February 1, 1999, "Petition for Oversight and Modification of Remedial Condition" is an untimely petition for reconsideration, that it is without substantive merit, and that it deals with matters already in the record and makes arguments that were available, and were in fact made, in the orderly presentation of the case that closed in early June 1998. They were made by Oxy's present counsel in his capacity as counsel for the shippers/civic/governmental

² We refer to CSX Corporation and CSX Transportation, Inc. collectively as "CSX."

group of the Buffalo and Niagara Falls area, the "Erie-Niagara Rail Steering Committee" ("ENRS").

**I. The Claim That "Mr. Dunn's Letters
Were Never Received by OxyChem"**

Relying on two short, conclusionary Verified Statements, the Oxy Filing asserts that a May 14, 1997, letter and a June 30, 1997, letter which Mr. Dunn has sworn were sent by him to Oxy's Mr. Robert L. Evans were not received by Evans. In a somewhat disturbing assertion by Oxy's counsel, it is claimed that since the retained copies of Mr. Dunn's letters did not bear Mr. Dunn's "manuscript signature" and were on plain paper, rather than letterhead, it is the "inescapable conclusion" that the "letters were never sent." Filing Rep. at 2. If that contention were true, it would certainly revolutionize business office practice throughout the United States.

We submit herewith the Response Verified Statement of Mr. Dunn, which says that his computer records indicate that the letters were sent on the dates appearing on them and that he is morally certain, to the best of his knowledge and belief, that they were in fact sent. He also testifies to recalling a conversation in which Mr. Evans and he discussed one of the issues raised in the June 30, 1997, letter — the issue as to

whether CSX would be "in the route" for the movement between Niagara Falls and Buffalo, as to which he and Evans had a disagreement that was not resolved.³ It should be noted that that disagreement is reflected in the October 17, 1997, letter of Mr. Evans filed with the Board, in which Evans insists that CSX's service at Niagara Falls should be "under reciprocal switching arrangement so direct contracts can be negotiated with them [the alternative carriers, including NS] without CSX concurrence."

As to the fact that Mr. Dunn's retained copies of his outgoing letters are on plain paper (not letterhead) and are unsigned, Mr. Dunn says that he follows a practice which we believe to be very common in the current computerized conduct of business correspondence: The outgoing copy of correspondence, composed on the computer, is printed on letterhead and signed; either the electronic copy on the computer's hard

³ The issue related to whether CSX would be a party to rail transportation contracts where most of the movement was performed by other carriers, thereby obtaining information concerning the economics of those contracts which would assist CSX in competing, or whether CSX's role would be simply that of a switching carrier. A switching carrier does not see the pertinent terms for the rest of the movement and may be unaware even of the ultimate destination of the movement. According to Mr. Dunn's R.V.S., Mr. Evans evidently wanted to be spared the trouble of having side agreements between the other carriers expressing the real economics of the movements, which would supersede the contracts to which CSX would be a party if it were "in the route." Having CSX's role described as that of a "switching carrier" would have saved him the trouble of doing this.

drive is maintained for purposes of record or a plain paper copy is printed out for conventional filing. We doubt that many people familiar with office correspondence procedure would see anything unusual or sinister in that.

On the other side of the matter, evidence that Mr. Dunn's two letters were never received by Mr. Evans, a short conclusionary Verified Statement by Mr. Evans, now retired, is presented by Oxy, saying that he now has no recollection of receiving those two letters, sent 20 or so months ago. He does not positively deny ever having received them or claim to be unaware of the positions taken by CSX in them. We would comment that it is not unusual for people conducting a commercial business involving numerous paper or computer messages every day (as we assume Mr. Evans did) not to recall the details of what happened that long ago.⁴

⁴ Memory is a strange thing and can at times be short. A case in point: Presumably, Oxy's 'ENRS' counsel forgot about the existence and substance of the Evans October 17, 1997, letter he had filed with the Board in October 1997 when the February 1, 1999, Petition was filed. Otherwise, we believe he would have mentioned it and qualified the statement in Oxy's Petition (at 5) that Oxy's Petition was "generally supporting the application"; the Evans October 17, 1997, letter was much more germane to the subject matter of the Petition than the Orbegoso Verified Statement, which was mentioned in the Petition. The Evans letter supported a major protestant, not the Applicants, and sought Board-imposed conditions. The Evans letter is not as far-removed in the past as are the two Dunn letters.

A Verified Statement of Daniel A. Ballard, Mr. Evans' successor, is also presented in the Filing, again couched in conclusionary terms. Mr. Ballard says that he has "completed a comprehensive search of all files maintained by R.L. Evans in OxyChem's Transportation Department filing cabinets" and did not find the letters in question or references to them. We are not told what condition the "files maintained by R.L. Evans," now retired, are in, what the applicable document retention/destruction policies of Oxy are, or anything else that might be pertinent to a proper proof of nonreceipt.

It is a settled principle of the common law and of Federal law that the receipt of a letter duly sent in the U.S. mails is presumed. See, e.g., Anderson v. United States, 966 F.2d 487, 491 (9th Cir. 1992). But we need not rely on that presumption, which, to be sure, is rebuttable. Despite Mr. Ballard's Verified Statement, we would suggest that there is in fact a document, presumably in Mr. Evans' files, which is quite clearly relevant to Mr. Evans' receipt or nonreceipt of the June 30, 1997, letter. Indeed, it can be said to "reflect" the June 30, 1997, letter. It is Mr. Evans' letter of October 17, 1997, contained in ENRS' major filing in this case, ENRS-6. That letter reflects a knowledge by Mr. Evans that what CSX had offered Oxy up to that point was unacceptable to Oxy, and

that Oxy wanted more from the Board. Whether that knowledge was derived from the June 30, 1997, letter or was otherwise obtained by Evans is immaterial.

Evans' October 17, 1997, letter is completely inconsistent with a belief by Oxy that it already had the benefits requested by that letter. It is claimed that the letter is a reiteration of "the hope and expectation that OxyChem will receive the 2-to-1 treatment that CSX has already said that it would provide." (Filing Rep. at 4) The letter is nothing of the sort. It complains of unremedied loss and expresses a desire for Board-imposed conditions known to Oxy to be unacceptable to CSX. There is no reference to any promise from CSX. The letter is not a statement of "hope and expectation" as to the delivery of something already promised. It is consistent with the receipt of Mr. Dunn's June 30, 1997, letter and with a realization that negotiations with CSX have not been resolved. It is inconsistent with an understanding that some sort of mutually-agreeable concession had been received from CSX. It suggests that "the STB could order that CSX" grant certain concessions for movements South over Buffalo. Are we to believe that Oxy had those concessions already and was only trying to make sure its competitors in the

manufacture of commodity chemicals at Niagara Falls were not disadvantaged relative to Oxy?

Oxy does not deny that Mr. Evans sent his June 3, 1997, letter to Dunn, which is Exhibit C to the Dunn V.S. in CSX-179. That letter by itself indicates that a negotiation was still going on between Oxy and CSX. If we are to credit Oxy's contention that Dunn's June 30, 1997, letter was never sent, we have to believe that CSX did not reply to an inquiry by a major customer seeking a clarification about what sort of deal CSX was proposing. If we are to believe the alternative suggestion that the June 30 letter was never received, we must believe that Mr. Evans was content never to get an answer to the questions he put forth in his June 3 letter. The only plausible resolution is that Evans did get an answer -- that contained in the June 30, 1997, letter from Dunn -- and did not like it. This, of course, set the stage for the position taken by Oxy in Evans' October 17, 1997, letter that was included in ENRS-6. Even if we were, for the sake of argument, to assume that Evans did not receive the June 30, 1997, letter, the "state of play" between CSX and Oxy was clearly shown by Evans' October 17, 1997, letter, filed with the Board, which shows the conditions that Oxy wanted the Board to impose. See generally the discussion in CSX-179 at 13-18.

II. The Claim That "Mr. McGee's Statement Related Only to Traffic 'to and from Canada'"

In a bold effort to create some new issue out of the conditions which were unsuccessfully requested by it and ENRS in this case in 1997-98, Oxy claims that movements South from Niagara Falls through Buffalo were not known to the Board at the time of Decision No. 89, only those through the Ontario Peninsula. Oxy's Filing claims that McGee's statement refers "only to traffic moving 'to and from Canada.'" (Filing Rep. at 3-4) That is clearly false.

Oxy complains that CSX did not append Mr. McGee's statement, already in the record, to CSX-179 and does so itself. We welcome and invite a reading of the McGee statement. It is obvious from reading pages 3 and 4 of the McGee Statement that it describes not only the movements through the Ontario Peninsula in Canada, but also those over the very same route from Niagara Falls to the South over Buffalo involving the Buffalo & Pittsburgh Railroad ("B&P") that is covered by the Oxy contracts contained in the Highly Confidential Appendix to Oxy's February 1, 1999, Petition. Those movements involve the same carriers and routing South as McGee refers to in that part of his statement, not movements through Canada. See McGee R.V.S. at 4; CSX/NS-177, Vol. 2A at 353.

Oxy's present counsel took Mr. McGee's deposition on February 5, 1998, and generated 64 pages of deposition transcript in questioning Mr. McGee on his four-page Verified Statement. Mr. McGee, whose Verified Statement had described a southerly movement similar to that at issue in the Oxy Petition, answered all of the questions that counsel put to him to the best of his ability. A voluminous exhibit, consisting of the about 250 pages of Conrail tariffs, was introduced at the deposition by Oxy's present counsel, and McGee was questioned about the exhibit. Some of those tariffs, pertinent to the cancellation of reciprocal switching at Niagara Falls, of which Mr. Evans' October 1997 letter complained, were appended to that counsel's brief on behalf of the Buffalo and Niagara Falls interests. See ENRS-19, at end of attachments. The tariffs related to movements South through Buffalo as well as those through the Ontario Peninsula. Oxy's present counsel did not need Mr. McGee to tell him about the southerly movements through Buffalo even though Mr. McGee's Rebuttal Verified Statement did tell him; Mr. Evans' October 17, 1997, letter had already told him about those movements.

In sum, the Board and the parties were well aware of the various movements to and from Niagara Falls at the time of Decision No. 89.

Nothing in the recent argument on behalf of Oxy alters or affects anything said in CSX's response in CSX-179.

III. THE ASSERTION THAT "OXYCHEM'S OCTOBER 17 LETTER REQUESTED NO AFFIRMATIVE RELIEF"

The assertion that "OxyChem's October 17 Letter requested no affirmative relief" (Filing Rep. at 4) makes appropriate a repetition of what the Duke of Wellington once said: "If you believe that, you'll believe anything." We encourage a rereading of Oxy's October 17, 1997, letter, included in ENRS-6 and in CSX-179, and to facilitate that rereading, attach it as Attachment A hereto.

Oxy's concept as to what constitutes a request for affirmative relief is somewhat unusual. Mr. Evans' letter says that the "STB could order that CSX provide a reasonable charge from Niagara Falls to Buffalo to be absorbed by NS, CN, CPRS and BPRR in their pricing." Isn't that sort of "order" affirmative relief? Mr. Evans then cautions that this should be via reciprocal switching so that CSX's concurrence will not be required and contracts can be made directly without CSX. Mr. Evans goes on to say: "Another alternative would be trackage rights between Buffalo and Niagara Falls for NS or others." Isn't that affirmative relief? General support for the ENRS filing is then expressed by Mr. Evans. That ENRS

filing put forward a lengthy menu of alternative items of "affirmative relief," ranging from the creation of a Shared Assets Area or a two-and-a-half county terminal area, down to an attack on the cancellation of Conrail reciprocal switching. Presumably Mr. Evans had some knowledge of ENRS' filing before he launched Oxy's "expressions of strong support for ENRS." As developed above in Part I, the October 17, 1997, letter was not a letter expressing confidence that some satisfactory concession by CSX was already in hand; to read it as that would be absurd. There is nothing whatsoever in the letter that would suggest that. It was a statement of what Oxy wanted — what it wanted included in the way of "affirmative relief" to be granted by the Board, either through a broad scale provision or a narrow one. The Board granted substantial benefits to the Niagara Falls shippers in its Decision No. 89, but not as much as Oxy wanted then and asked for again on February 1, 1999.

CONCLUSION

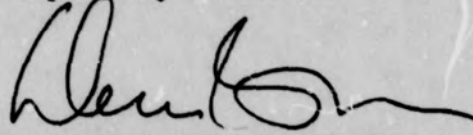
The current Filing by Oxy does not affect the conclusion that Oxy's February 1, 1999, Petition embraces the same issues the Board had before it and considered in approving the Transaction and granting specific conditions for the benefit of the Niagara Falls shippers, in its

decision served July 23, 1998. Clearly, Oxy's present Petition is a rehashing of old arguments and, in its substance, is the petition for reconsideration that ENRS could have and should have filed last Summer but which it chose not to file. The facts and issues were put before the Board by Oxy itself, by ENRS, by the McGee statement, and by the Applicants. See CSX-179 at 8-12. Despite its present contentions, it is clear that Oxy itself did not have the view, on October 17, 1997, that it had gotten satisfaction from CSX. The October 1997 filing sought substantial relief from the Board affecting the very movements which are at the heart of the February 1, 1999, Petition. Moreover, as we developed at length in CSX-179 at 22-28, even if Oxy's Petition had been timely filed as a petition for reconsideration by ENRS, it would furnish no basis for rewriting the conditions imposed by the Board or for expanding the extensive concessions to the Erie-Niagara shippers provided by the NITL Settlement or by the Board's actions in its Decision No. 89.

Regardless of what decision the Board may wish to make as to allowing the filing of Oxy's otherwise unauthorized "reply to a reply," that Filing does not change the outcome: Oxy's February 1, 1999, Petition should be denied, for the reasons stated in CSX-179, and made more

clear in the light of what Oxy has said, and what it has not said, in its most recent Filing.

Respectfully submitted.



Dennis G. Lyons

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555 Twelfth Street, N.W.
Washington, D.C. 20004-1202
(202) 942-5000

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Speed Code J-120
Jacksonville, FL 32202
(904) 359-3100

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

March 9, 1999

**Letter of October 17, 1997 from
Robert L. Evans, Corporate Manager Rail Transportation,
Occidental Chemical Corporation, to the
Erie County Industrial Development Agency,
submitted to the Board by the
Erie-Niagara Rail Steering Committee
in ENRS-65, October 21, 1997**

OxyChemResponse Care!
A Public Commitment

VIA FACSIMILE # (716) 856-6754

October 17, 1997

Dr. Ronald Coan, Executive Director
Erie County Industrial Development Agency
Liberty Building
424 Main Street, Suite 300
Buffalo, New York 14202

Dear Dr. Coan:

Enclosed is a copy of Antonio G. Orbegoso's comments for Occidental Chemical Corporation in Finance Docket No. 33388. Since OxyChem is a party of record and has submitted a direct response to the Board, I do not believe it would be proper for me to submit another verified statement to the Board for inclusion in your filing.

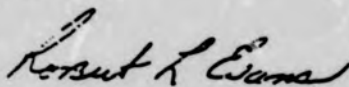
We strongly agree with the efforts of the Erie-Niagara Rail Steering Committee (ENRS) to secure competitive rail-to-rail alternatives for the Niagara Falls area.

Before CSX Transportation pulled out of the Niagara Falls area, I believe in 1996, and Conrail canceled the reciprocal switching charge with CSX at Niagara Falls, we had some competitive rail competition between major Class I carriers. It's time for the STB to restore rail competition for Niagara Falls, NY. Niagara Falls is only 27 rail miles from Buffalo. The STB could order that CSX provide a reasonable charge from Niagara Falls to Buffalo to be absorbed by NS, CN, CPRS, and BPRR in their pricing. Those carriers should show as serving Niagara Falls under reciprocal switching arrangement so direct contracts can be negotiated with them without CSX concurrence, which would restrict pricing freedom. Another alternative would be trackage rights between Buffalo and Niagara Falls for NS or others.

If you can use our expressions of strong support for ENRS in some manner in your filing, please do so.

We appreciate your efforts on behalf of Occidental and other area shippers.

Sincerely,



Robert L. Evans
Corporate Manager Rail Transportation

RLE/mrl

enclosures



Occidental Chemical Corporation
Corporate Office
Occidental Tower, 5005 LBJ Freeway
P.O. Box 809050, Dallas, TX 75380-9050
972/404-3800

**Verified Statement of
RONALD A. DUNN**

BEFORE THE
SURFACE TRANSPORTATION BOARD

FINANCE DOCKET NO. 33388

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

RESPONSE VERIFIED STATEMENT OF
RONALD A. DUNN

My name is Ronald A. Dunn. I am employed by CSX Transportation, Inc. ("CSXT") as a National Account Manager with primary responsibility to interface with a single, major customer — in my case, Occidental Chemical Corporation ("Oxy"). I have been so employed since 1996. My offices are located at 4100 Alpha Road, Suite 800, Dallas, Texas 75244. I earlier gave a Verified Statement in connection with the Petition filed by Oxy in this matter.

I understand that Oxy, through its attorneys, has claimed that I did not in fact send to Oxy's Robert L. Evans the letters dated May 14, 1997 and June 30, 1997 that are Exhibits B and D, respectively, to my earlier Verified Statement.

I can state that I am morally certain, to the best of my knowledge and belief, that I sent the letters. While I am not in the habit of obtaining postal receipts or return receipts for business correspondence in the ordinary course of business, I do keep a record, with a

computer "contacts management" software program, of the mailing of letters that have been prepared on the computer. There is a positive record on the computer of the mailing, on the days indicated in the letters, of the two letters in question.

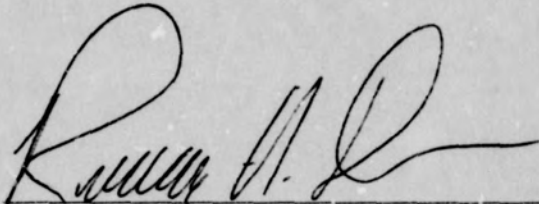
I understand that some issue has been made of the fact that the copies of the letters which were exhibits to my earlier Verified Statements were on plain paper (not CSXT letterhead) and did not bear my signature. I am not in the habit of keeping signed, letterhead copies of the letters I send, and generally do not keep copies in that form. Copies are maintained in the computer memory or, if hard copies are kept (or are needed), they are printed out from the computer on plain paper and not signed. That was the case here.

I have a distinct recollection of having a discussion with Mr. Evans which concerned one of the points made in my June 30, 1997 letter to him. That is the point described in paragraph No. 4 that "CSX will be in the route from Niagara Falls to Buffalo." Mr. Evans did not want CSXT in the route and wanted the movement from Niagara Falls to Buffalo to be a switching movement. If CSXT was in the route, then Mr. Evans said that there would be an additional administrative burden on Oxy as they would have to write refund contracts in order to disguise the economics of the movement on the other carriers from CSXT. We had a discussion as to this issue and did not come to agreement.

VERIFICATION

I, Ronald A. Dunn, declare under penalty of perjury that the foregoing is true and correct. Further, I certify that I am qualified and authorized to file this statement.

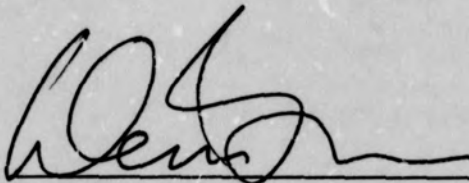
Executed on March 8, 1999.



RONALD A. DUNN

CERTIFICATE OF SERVICE

I, Dennis G. Lyons, certify that on March 10, 1999, I have caused to be served a true and correct copy of the foregoing CSX-181, "Reply of CSX Corporation and CSX Transportation, Inc. to Petition of Occidental Chemical Corporation for Leave to File Reply to Response to Petition for Oversight and Modification of Remedial Condition," to all parties on the Service List in Finance Docket No. 33388, by first-class mail, postage prepaid, or by more expeditious means.

A handwritten signature in black ink, appearing to read 'Dennis G. Lyons', is written over a horizontal line.

Dennis G. Lyons
ARNOLD & PORTER
555 Twelfth Street, N.W.
Washington, D.C. 20004-1202

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

STB

FD

33388

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D

193614

SURFACE TRANSPORTATION BOARD

Memorandum

ENTERED
Office of the Secretary


MAR - 9 1999

Part of
Public Record

DATE: March 8, 1999



TO : Ellen Keys, Assistant Secretary
Section of Publications/Records
Office of the Secretary

FROM :  Mel Clemens, Director
Office of Compliance and Enforcement

SUBJECT : STB FINANCE DOCKET NO. 33388 - OPERATIONAL MONITORING DATA

Attached are the original and two copies of the public data files provided to this office by CSX and Norfolk Southern as required in the above proceeding, which are to be committed to the docket for public reference. As requested, I am providing the three paper copies to Ron Douglas, two for the docket and one for DC News. If there are any questions, please don't hesitate to contact me or Jim Green.

Attachments

cc: Chairman Morgan
Vice Chairman Clyburn
Commissioner Burkes
Richard Armstrong
Ron Douglas
Charles Renninger

500 Water Street (J150)
Jacksonville, FL 32202
(904) 359-1246
FAX: (904) 359-1248

J. Randall Evans
Vice President-Acquisition Development

March 8, 1999

Melvin F. Clemens, Jr.
Director Office of Compliance and Enforcement
Surface Transportation Board
Washington, DC 20423-0001

Dear Mr. Clemens:

Attached to this letter are the Operational Monitoring Reports required in STB Finance Docket No. 33388.

The reports are presented in the following order:

Labor Implementing Agreements	Page 1
Labor Task Force	Page 2
Construction and Other Capital Projects Table	Pages 3-4
Information Technology	Pages 5-9
Customer Service	Pages 10
Training	Pages 11

Note: Italicized information indicates a change or update from the last report.

Please contact J. Randall Evans, Vice President-Acquisition Development at CSX Transportation (E-mail: Randy_Evans@csx.com) if there are any issues that need clarification or explanation. As information, coincident with filing this report with the STB, CSXT has made this report available on our web site (www.csx.com).

Very truly yours,

J. Randall Evans

cys: Peter J. Shudtz, Vice President
Law & General Counsel

Paul R. Hitchcock - J150
Senior Counsel

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CSX TRANSPORTATION, INC.
STB OPERATIONAL MONITORING REPORT
As of February 28, 1999

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Note: Italicized information indicates a change or update from the last report.

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LABOR

The status of the Labor Implementing Agreements is as follows:

Labor Organization	Status
International Brotherhood of Boilermakers, Iron-Ship Builders, Blacksmiths, Forgers and Helpers	Implementing agreement reached.
United Railway Supervisors Association - on behalf of the claim agents	Implementing agreement reached.
United Railway Supervisors Association - on behalf of the engineering supervisors	Implementing agreement reached.
National Conference of Firemen & Oilers	Implementing agreement reached.
American Railway and Airway Supervisors Association, Division of TCU, representing bridge inspectors	Implementing agreement reached.
Fraternal Order of Police	Implementing agreement reached.
American Train Dispatchers Department of the Brotherhood of Locomotive Engineers	Implementing agreement reached.
International Brotherhood of Electrical Worker	Implementing agreement reached.
Sheet Metal Workers International Association	Implementing agreement reached.
United Railway Supervisors Association on behalf of Mechanical Department Supervisors	Implementing agreement reached.
United Transportation Union	Implementing agreement reached.
United Transportation Union - Yardmasters Department	Implementing agreement reached.
Brotherhood of Locomotive Engineers	Implementing agreement has been reached subject to union ratification. Results have been delayed until March 4, 1999.
Brotherhood of Maintenance of Way Employees	Arbitration was held from December 15 through 18. The arbitrator has issued an award which establishes the implementing agreement. BMWWE appealed the award to the STB on February 12, 1999.
Brotherhood of Railway Signalmen	Implementing agreement has been reached.
International Association of Machinist	Implementing agreement has been reached.
Transportation Communication International Clerks Union	Implementing agreement has been reached.
*Brotherhood Railway Carmen Division - TCU and Transport Workers Union of America	Implementing agreement has been reached with TCU (BRC). Arbitration with TWU was held on January 22, 1999. The decision is now expected by March 2, 1999.
* The Notice provided for by Section 4 of the <u>New York Dock</u> conditions has been served on each of these unions.	

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LABOR

Labor Management Task Force

CSXT continues to send an invitation to each union with which an implementing agreement has been reached and which will continue to represent employees on CSXT to participate in a labor task force similar to the one established with the United Transportation Union. To date, the National Conference of Firemen & Oilers, the International Brotherhood of Boilermakers, Ironship Builders, Blacksmiths, Forgers and Helpers *and the International Brotherhood of Electrical Workers* have responded affirmatively to our invitation to participate in a labor task force similar to the one established with the United Transportation Union.

The International Association of Machinist and Aerospace Workers also was invited to establish a labor task force. The Organization respectfully declined the invitation citing its current participation in the CSXT labor/management safety program and the SACP Program currently being sponsored by the Federal Railroad Administration. The IAM did, however, state that it "will always be willing to meet with representatives of CSXT and other rail labor representatives to discuss specific issues concerning the application of our implementing agreement and safety related issues as deemed necessary and appropriate."

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CONSTRUCTION AND OTHER CAPITAL PROJECTS

Location	Project	Status	Expected Completion Date
1) Greenwich, Ohio to Pine Junction, Indiana	Construct 2 nd main track with TCS on B&O including connections.	Complete	4Q 98
2) Quaker to Greenwich, Ohio	Construction by Conrail of 2 nd main track with TCS.	Complete	4Q 98
3) Willard, Ohio	Yard Expansion	Substantially Complete	1Q 99
4a) Crestline, Ohio	a) Construct or rehabilitate connection tracks with Indianapolis Line.	a) Underway	2Q 99
4b) Sidney, Ohio	b) Connection Track	b) Complete	4Q 98
4c) Marion, Ohio	c) Rehabilitate Connection Track	c) Complete	1Q 99
5) Carleton, Michigan	Connect track with Conrail	Complete	4Q 98
6a) Alice, Indiana	a) Siding Extension	a) Complete	a) 3Q 98
6b) Harwood, Indiana	b) Siding Extension	b) Complete	b) 4Q 98
7a) Chicago, Illinois	a) Intermodal Expansions	a) Complete	a) 3Q 98
7b) Cleveland, Ohio	b) Intermodal Expansions	b) Substantially Complete	b) 1Q 99
7c) Philadelphia, Pennsylvania	c) Intermodal Expansions	c) Underway	c) 2Q 99
7d) Little Ferry, New Jersey	d) Intermodal Expansions	d) Complete	d) 3Q 98
8) Philadelphia, Pennsylvania	Rebuild Eastwick connection track with Conrail.	Complete	4Q98
9) Hobart, Indiana to Tolleston, Indiana	Restoration of connection and main track between Hobart & Tolleston.	Substantially Complete	2Q 99

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CONSTRUCTION AND OTHER CAPITAL PROJECTS

Location	Project	Status	Expected Completion Date
10) Chicago, Illinois	Chicago area-upgrade connection tracks and other improvements.	Substantially Complete	2Q 99
11) Newell & New Castle, Pennsylvania	Upgrade capacity on the Mon. Subdivision	Complete	4Q 98
12) Albany, New York to Bergen, New Jersey	Extend 3 sidings by Conrail on River Line	Complete	4Q 98
13) Little Ferry, New Jersey	Connection track Conrail/NYSW	Underway	2Q 99
14) Dolton, Illinois	Connection track @ Lincoln Avenue CSX/IHB	Substantially Complete	1Q 99

STB OPERATIONAL MONITORING REPORT

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INFORMATION TECHNOLOGY

Information Technology

The implementation strategy, training plans, and status of the Information Technology (IT) initiatives affecting the following Operating Areas are summarized:

- ❖ Customer Service
 - Electronic Customer Connectivity
- ❖ Operations Personnel
 - Crew Management
- ❖ Transportation
 - Car Management & Movement
 - Locomotive Management
 - Train Dispatching

Operating Area	Implementation Strategy	Status	Training
Customer Service Electronic Customer Connectivity	All inbound (e.g. bill-of-lading) and outbound (e.g. car tracing) electronic communications with existing Conrail customers are to be migrated to CSX and NS. All customers will be informed of their system migration options and have the opportunity to test the replacement electronic connections prior to a transfer of the customer communications links on Day 1. CSX and NS will work with all affected customers and EDI vendors to develop migration plans	Systems development in process and on schedule A joint letter was distributed to current Conrail customers Existing and new Conrail Electronic Commerce customers have been contacted by CSX in separate mailings Electronic Commerce Certification of Conrail customers acquired by CSX is in progress.	All customers will be provided adequate systems documentation and a detailed description of any changes to their current Conrail-provided electronic services

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INFORMATION TECHNOLOGY

Operating Area	Implementation Strategy	Status	Training
Operations Personnel Crew Management	<p>Separation of callings desks (CSX, NS, SAC) in Dearborn, MI has been pre-negotiated and is in place. There will be a phased roll-out of eight calling desks to TECS – the CSX Crew Calling System. The first desk will be rolled out 60 days after Day 1.</p> <p>T&E Crews will continue to submit paper time sheets to Dearborn, MI until the TECS desk roll-out is completed. Paperless payroll implementation will take place 2 weeks after each TECS desk implementation. The entire roll-out will take approximately eight months.</p>	Systems development in process and on schedule	CSX Payroll officers will train T&E employees on the CSX Payroll system immediately following the implementation of TECS. Local Chairman will participate in the training. Training documents have been prepared and presented to Conrail personnel.

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INFORMATION TECHNOLOGY

Operating Area	Implementation Strategy	Status	Training
Transportation Car Management and Movement	<p>Field personnel will continue using Conrail application systems supporting yard inventory, train consisting and work orders after Day 1.</p> <p>Disposition and management of empty cars will occur in Jacksonville using CSX systems after Day 1 to ensure coordinated system wide transportation operations.</p> <p>Customers on the acquired territory will continue to order empty cars and obtain information on order status as they do today.</p> <p>CSX systems will be rolled-out to the acquired Conrail territory in 5 phases after Day 1.</p>	Systems development in process and on schedule.	<p>Conrail Car Management team has been hired for the transition period. Training of Conrail Car Management staff will begin 60 days prior to Day 1.</p> <p>Training of affected field location personnel to begin 30 days prior to each field roll-out phase.</p>

STB OPERATIONAL MONITORING REPORT

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INFORMATION TECHNOLOGY

Operating Area	Implementation Strategy	Status	Training
Transportation Locomotive Management	<p>CSX Locomotive Management System (LMS) will be used to manage locomotives in CSX acquired territory beginning on Day 1. This will occur from the Operations Center in Philadelphia, PA for approximately 180 days after Day 1. The management team in Philadelphia will consist of two locomotive managers and one senior locomotive manager. Dual entry of locomotive assignments will be made to the Conrail Locomotive Distribution System. Shutdown of Conrail LDS will accompany field roll-out and will be dependent upon other Conrail Systems (TRIMS & TMS) no longer relying on assignments being passed from Conrail LDS.</p> <p>Within 180 days after Day 1, locomotive management for the acquired Conrail territory will be relocated to the Kenneth Dufford Center in Jacksonville. Two CSX Locomotive Managers will manage the acquired territory at that time.</p>	<p>System Testing is in progress and on schedule;</p> <p>One training class of CR personnel on CSX LMS was completed.</p>	<p>Locomotive managers for the acquired Conrail territory will be trained on the CSX Locomotive Management System 60 days prior to Day 1 with sessions in both Jacksonville, FL and Philadelphia, PA. Management will conduct the training and will include cross training of CSX and Conrail cultures.</p>

STB OPERATIONAL MONITORING REPORT

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INFORMATION TECHNOLOGY

Operating Area	Implementation Strategy	Status	Training
Transportation Train Dispatching	<p>Train dispatchers will continue to use current Conrail systems. Phase 1 geographic realignments will separate dispatchers into CSX, NS & SAC entities within current division offices. Phase 1 will complete 90-120 days after Day 1.</p> <p>Phase 2 division realignment will move dispatchers to acquiring road's division. CSX Cleveland East dispatcher in Dearborn, MI will move to CSX headquarters in Indianapolis, IN. CSX Chesapeake & Riverline dispatchers in Mt. Laurel, NJ will move to CSX headquarters in Albany, NY. Phase 2 will complete 90-120 days after an implementing agreement has been reached.</p> <p>Phase 2 moves are contingent upon Phase 1 realignment completion for territory being transferred. Also contingent upon an implementing agreement being in place with the ATDD.</p>	<p>Systems development has been completed and implementation is proceeding on schedule.</p> <p>Phase 1 realignments : Albany, & Indianapolis complete.</p> <p>Dearborn Division started.</p> <p>Philadelphia Division scheduled to start 3/15/99</p> <p>Phase 2 realignments will start 3/22/99.</p> <p>Phase 2 projected to complete 30-60 days after Day 1.</p> <p>Implementing agreements are now in place.</p>	Dispatchers will be trained on their new territory using the current processes in place at Conrail.

STB OPERATIONAL MONITORING REPORT

As of February 28, 1999

CSX Customer Service Progress Report

The following report outlines our progress toward the twin goals of 1) Achieving and maintaining customer confidence in the transaction, and 2) Insuring the integration of the acquired territories and personnel into the Customer Service Center in Jacksonville.

The Transition Process

Train and data reporting hand-off procedures between the Customer Service Centers in Pittsburgh and Jacksonville have been written and matrix charts have been created that show which train is being handled between the reporting groups. As the Operating Plan continues to evolve, charts and procedures are being revised to reflect the changes.

***Receiving Data from Conrail:* For the past three months we have been receiving all car movement events from Conrail. This data is being processed in the CSX system and posted to the car movement event files in production. The staff that handles the exceptions will continue this process through Split Day.**

***Sending Data back to Conrail:* During the month of February, we have begun sending empty car disposition and loaded car classification instructions back to Conrail. These messages are being tested for proper receipt and processing by the Conrail systems. This test and verification process will continue until Split Day and will help ensure that both systems will recognize and correctly handle reciprocal data.**

Personnel

An implementing agreement has been reached with the Transportation Communications Union, enabling the contract employee selection process for CSXT, NS, and the Shared Areas to begin. On November 20, 1998, CSXT issued notice of intent to acquire 183 clerical employees for the operation of the CSXT acquired areas, to be headquartered temporarily in the Pittsburgh NCSC facility. The roll-down process has been completed. As many as 20% of the new employees are already on the positions they will occupy on Day One. ***Training is proceeding across a broad front, to include all crafts and their supervision. Customer Service is utilizing the three months allowed by the new Split Date to perform additional clerical training.***

Non-contract managers continue to co-locate in both Pittsburgh and Jacksonville as these procedures are worked out. The objective is to promote a seamless integration of CR/CSXT operations and cultures.

Customer Familiarization

Shipping guides providing essential information on doing business with CSX have been mailed to customers in the acquired areas. Similar guides, customized for the purpose, have been sent to customers in the Shared Areas. ***All Conrail Electronic Commerce customers have been contacted. We continue to have daily dialogue with these customers, and scheduled mailings are being made as well.***

STB OPERATIONAL MONITORING REPORT

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STB Status Report on Training

Scheduling Office

Major training efforts began in January, completing over 50 of the 806 planned classes. Approximately 95% of the trainers were trained and 5% of the total Conrail population received training. Database software setup was completed to record and track all class attendance information. Weekly and monthly reporting systems were established to track class scheduling, attendance and cancellations.

Train & Engine Service Training

Pre Day One Training for train and engine service employees began during the month of January, 1999. Crews assigned to inter-territorial runs will be in training during the first week of February, 1999. All Pre-Day One training is scheduled for completion by June 1, 1999.

Clerical Training

Additional meetings were held with CR Service Lane Administrative Managers. We pinpointed additional training needs for Service Lane clerical employees to insure our training will touch all of their areas of responsibility. Based on our conversations and feedback, we are on target with the plan. Additional system servers have been placed at Philadelphia, Toledo, and Buffalo to provide access to self-paced application training.

Crew Management

Crew management training is in the process of updating Transportation Employee Calling System schedules to coincide with the new split date. During January we conducted an eight-day TECS session in Dearborn to pilot test split date materials.

Trainmasters & Yardmasters

Day One Operations training for trainmasters and yardmasters is under way at five central locations on existing CR territory. Arrangements are being made to add new training rooms in Philadelphia and possibly Cleveland. We will continue to conduct training, possibly pushing back yardmaster sessions closer to split date.

Engineering & Train Control

Materials for Engineering and Train Control non-contract training are complete. Materials for contract training are being finalized this month. Seventeen instructors have now completed train-the-trainer sessions. One non-contract class was conducted in January prior to the new split date announcement. Since that time, training schedules have been revised to reflect a start date of March 15 with all classes finishing by mid-May.

Intermodal

Training materials have been designed and pilot tested. Train-the-trainer sessions were also completed in January. Implementation plans are being adjusted to reflect the new split date.

Norfolk Southern Corporation

STB Operational Monitoring Report

As of February 28, 1999

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Note: Bold print indicates changes from previous report.

* To be disclosed under a different cover or in a later report.

** Data not required at this time.

Surface Transportation Board Operational Monitoring Report

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LABOR

Labor Implementing Agreements

Labor Organization	Status
International Brotherhood of Boilermakers, Iron Ship Builders, Blacksmiths, Forgers and Helpers	Implementing Agreement reached
United Railway Supervisors Association - on Behalf of claim agents	Implementing Agreement reached
United Railway Supervisors Association - on behalf of engineering supervisors	Implementing Agreement reached
United Railway Supervisors Association - on Behalf of the mechanical department supervisors for the Conrail properties operated by NS	Implementing Agreement reached
National Conference of Firemen & Oilers	Implementing Agreement reached
American Railway and Airway Supervisors Association, Division of TCU, representing Bridge inspectors	Implementing Agreement reached
Fraternal Order of Police	Implementing Agreement reached
International Brotherhood of Electrical Workers	Implementing Agreement reached
Sheet Metal Workers' International Association	Implementing Agreement reached
American Train Dispatchers Department, Brotherhood of Locomotive Engineers	Implementing Agreement reached
International Association of Machinists and Aerospace Workers	Implementing Agreement reached
Transportation Communications International Union	Implementing Agreement reached.
United Transportation Union	Implementing Agreement reached
Brotherhood of Railroad Signalmen	Implementing Agreement reached
United Transportation Union - Yardmasters Department	Implementing Agreement reached
Brotherhood of Locomotive Engineers	Agreement reached, subject to ratification
Brotherhood Railway Carmen - Div. TCU and Transport Workers Union of America	Agreement reached with BRC. Arbitration with TWU held on January 22, 1999.
Brotherhood of Maintenance and Way Employees	Arbitrated Implementing Agreement rendered January 14, 1999. The Referee's decision was appealed to the STB on February 12, 1999.

Note: Bold print indicates changes from previous report.

Surface Transportation Board Operational Monitoring Report

As of February 28, 1999

LABOR

Labor-Management Task Forces

Norfolk Southern and the United Transportation Union (UTU) have an ongoing Labor Management Task Force consisting of NS's Vice President - Labor Relations and the President of the UTU. The Task Force encourages frequent communications between upper-level management of the two organizations and has worked well to facilitate an implementing agreement and to assure prompt consideration of implementation and safety issues related to the Conrail transaction.

As of the end of the reporting period, NS has invited organizations with which an implementing agreement has been finalized (and which will continue to represent employees) to form Labor Management Task Forces. Similar to the UTU Task Force, each Task Force will enable upper-level management of NS and the particular labor organization to review issues and concerns about implementation of the Conrail transaction with preservation of the highest levels of safety. Invitations have been sent to: the Boilermakers, Iron Ship Builders, Blacksmiths, Forgers and Helpers; National Conference of Firemen & Oilers; American Train Dispatchers Department of the Brotherhood of Locomotive Engineers; International Brotherhood of Electrical Workers; Sheet Metal Workers International Association; the Transportation Communications International Union; the Association of Machinists and Aerospace Workers; and the Brotherhood of Railroad Signalmen. Each Task Force will be unique to each labor organization, and will involve operations, safety and labor relations staff as appropriate and the craft General Chairmen representing NS and Conrail employees.

A task force meeting with the American Train Dispatchers Department was held on November 17, 1998, at which ongoing training and qualifications procedures were reviewed. **A task force meeting with the Brotherhood of Railroad Signalmen was held on February 18, 1999.**

Note: Bold print indicates changes from previous report.

Surface Transportation Board Operational Monitoring Report

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CONSTRUCTION AND OTHER CAPITAL PROJECTS

Location	State	Project	Dept	Phase	Status
Alexandria	IN	Construct track connection Estimated Completion Date: Complete	Track	Design	Complete
				Grading	Complete
				Const	Complete
			Signal	Design Const	Complete Complete
Allentown - Reading	PA	Traffic Control System	Signal	Design	In progress
	PA	Estimated Completion Date: 4Q99		Const	
Angola	NY	Upgrade existing siding, construct new siding Estimated Completion Date: Complete	Track	Design	Complete
				Grading	Complete
				Const	Complete
			Bridge	Design Const	Complete Complete
			Signal	Design	Complete
				Const	Complete
Attica	IN	Extend siding 4,580 track feet Estimated Completion Date: Complete	Track	Design	Complete
				Grading	Complete
				Const	Complete
			Signal	Design Const	Complete Complete
Boundbrook	NJ	Extend siding 15,000 track feet Estimated Completion Date: 1Q00	Track	Design	Project being defined.
				Grading	
				Const	
			Signal	Design Const	
Bristol	VA	Extend siding 14,255 track feet Estimated Completion Date: Complete	Track	Design	Complete
				Grading	Complete
				Const	Complete
			Bridge	Design Const	Complete Complete
			Signal	Design	Complete
				Const	Complete
Bucyrus	OH	Construct track connection Estimated Completion Date: Complete	Land		Complete
			Track	Design	Complete
				Grading	Complete
				Const	Complete
			Signal	Design	Complete
				Const	Complete
Buffalo - Cleveland	NY	Traffic control system and remove pole line.	Signal	Design	In progress
	OH	Estimated Completion Date: 4Q99		Const	In progress
Butler	IN	Construct track connection Estimated Completion Date: 4Q99	Track	Design	Project being defined.
				Grading	
				Const	
			Signal	Design Const	
Chicago	IL	Expand and improve 47th St Yard Intermodal Terminal Estimated Completion Date: 4Q99	Track	Design	In progress
				Grade/Pave	
Cloggsville	OH	Track Rehabilitation Estimated Completion Date: Complete	Track	Design	Complete
				Const	Complete

Surface Transportation Board Operational Monitoring Report

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CONSTRUCTION AND OTHER CAPITAL PROJECTS

Location		Project	Dept	Phase	Status
Cloggsville	OH	Construct second main Estimated Completion Date: 4Q99	Track	Design	In progress
				Grading	
			Bridge	Const	
				Design	In progress
				Const	
			Signal	Design	
				Const	
			Track	Design	Complete
				Grading	Complete
Columbus	OH	Construct track connection Estimated Completion Date: 1Q99		Const	In progress
			Signal	Design	Complete
				Const	Complete
Crockett	VA	Construct 9,100 foot new siding Estimated Completion Date: Complete	Land		Complete
			Track	Design	Complete
				Grading	Complete
				Const	Complete
			Bridge	Design	Complete
				Const	Complete
				Design	Complete
			Signal	Const	Complete
					Complete
Croxten	NJ	Expand and improve intermodal terminal Estimated Completion Date: 4Q99	Track	Design	Complete
				Grade/Pave	In progress
E-Rail	NJ	Expand and improve intermodal terminal Estimated Completion Date: 3Q99	Track	Design	In progress
Erie	PA	Erie Track Realign Project Estimated Completion Date: 4Q99		Grade/Pave	
			Track	Design	In progress
				Grading	
				Const	
			Signal	Design	
				Const	
Flemington	NJ	Construct 12,500 foot siding Estimated Completion Date: 1Q00	Track	Design	Project being defined.
				Grading	
				Const	
			Signal	Design	
				Const	
Hadley Jct (Ft Wayne)	IN	Double tracking Estimated Completion Date: 4Q99	Track	Design	Project being defined.
				Grading	
				Const	
			Signal	Design	
				Const	
Hagerstown Sec (Greencastle)	PA	Construct siding Estimated Completion Date: Complete	Track	Design	Complete
				Grading	Complete
				Const	Complete
			Signal	Design	Complete
				Const	Complete
					Complete
Hagerstown Sec	PA	Traffic Control Estimated Completion Date: 4Q99	Signal	Design	Project being defined.
				Const	
Harrisburg (Rutherford)	PA	Construct intermodal terminal Estimated Completion Date: 2Q01	Track	Design	In progress
				Grade/Pave	

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CONSTRUCTION AND OTHER CAPITAL PROJECTS

Location	State	Project	Dept	Phase	Status
Harrisburg - Reading	PA	Traffic Control System and remove pole line	Signal	Design	In progress
	PA	Estimated Completion Date: 4Q99		Const	
KID Tower - Cumberland Falls	KY	Extending double track 40,120 feet	Track	Design	Complete
	KY	Estimated Completion Date: 2Q99		Grading	In progress
				Const	
			Signal	Design	Complete
				Const	In progress
Knoxville - Chattanooga	TN	Double Stack Clearances	Track	Design	Complete
	TN	Estimated Completion Date: Complete		Const	Complete
			Bridge	Design	Complete
Marshfield	IN	Upgrade and extend siding 7,908 feet	Land		Complete
		Estimated Completion Date: Complete	Track	Design	Complete
				Grading	Complete
				Const	Complete
			Bridge	Design	Complete
				Const	Complete
			Signal	Design	Complete
				Const	Complete
Oak Harbor	OH	Construct track connection	Land		Complete
		Estimated Completion Date: Complete	Track	Design	Complete
				Grading	Complete
				Const	Complete
			Signal	Design	Complete
				Const	Complete
Pattensburg	NJ	Clearance-9 Bridges	Bridge	Design	In progress
		Estimated Completion Date: 1Q99		Const	In progress
Pattensburg	NJ	Siding Extensions	Track	Design	Complete
		Estimated Completion Date: Complete		Grading	Complete
				Const	Complete
			Signal	Design	Complete
				Const	Complete
Pattensburg	NJ	Tunnel Clearance	Bridge	Design	Complete
		Estimated Completion Date: 2Q99		Const	In progress
Philadelphia	PA	Construct crossover - Zoo	Track	Design	Project being defined.
		Estimated Completion Date: 4Q99		Grading	
				Const	
			Signal	Design	
				Const	
Piney Flats	TN	Extend siding 6,610 feet	Land		Complete
		Estimated Completion Date: Complete	Track	Design	Complete
				Grading	Complete
				Const	Complete
			Signal	Design	Complete
				Const	Complete
Port Reading	NJ	Chemical Coast Clearance Projects	Track	Design	In progress
		Estimated Completion Date: 4Q99		Const	
			Bridge	Design	In progress
				Const	

Surface Transportation Board Operational Monitoring Report

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CONSTRUCTION AND OTHER CAPITAL PROJECTS

Location	Project	Dept	Phase	Status
Rader	TN	Extend siding 5,189 feet Estimated Completion Date: Complete	Land	Complete
			Track	Design
			Grading	Complete
			Const	Complete
			Bridge	Design
			Const	Complete
			Signal	Design
Reading - Philadelphia	PA	Traffic Control System and remove pole line Estimated Completion Date: 2Q00	Design	In progress
			Const	
Riverton Jct - Roanoke	VA	Clearance projects Estimated Completion Date: Complete	Design	Complete
			Const	Complete
Sandusky (Bellevue)	OH	Construct Triple Crown Terminal Estimated Completion Date: 1Q99	Design	Complete
			Grade/Pave	Complete
			Building Const	In progress
Sidney	IL	Construct track connection Estimated Completion Date: Complete	Track	Design
			Grading	Complete
			Const	Complete
			Signal	Design
			Const	Complete
Sido	MO	Double tracking 36,458 track feet Estimated Completion Date: Complete	Track	Design
			Grading	Complete
			Const	Complete
			Bridge	Design
			Const	Complete
			Signal	Design
Sloan	IL	Extend siding 5,027 track feet Estimated Completion Date: Complete	Track	Design
			Grading	Complete
			Const	Complete
			Signal	Design
Southern Tier	NY	Southern Tier Rehabilitation Estimated Completion Date: 4Q99	Const	
			Design	In progress
			Const	
St Louis (Mitchell)	MO	Expand Mitchell Triple Crown Terminal Estimated Completion Date: 2Q99	Design	In progress
			Grade/Pave	
			Design Const	In progress
Toledo	OH	Intermodal Terminal Estimated Completion Date: 4Q99	Track	Design
Toledo	IL	Track Connection Estimated Completion Date: 2Q99	Grade/Pave	Project being defined.
			Design	Complete
			Grading	Complete
			Const	Complete
			Signal	Design
			Const	In progress

Surface Transportation Board Operational Monitoring Report
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CONSTRUCTION AND OTHER CAPITAL PROJECTS

Location	Project	Dept	Phase	Status
Vermillion	OH Track Connection	Land		Complete
	Estimated Completion Date: 1Q99	Track	Design	Complete
			Grading	Complete
			Const	Complete
		Signal	Design	Complete
			Const	In progress

Note: Bold print indicates changes from previous report. If status of project phase is blank, work on that part of the project has not yet begun.

Surface Transportation Board Operational Monitoring Report

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INFORMATION TECHNOLOGY

Systems Integration

The NS technology integration strategy calls for NS systems to be used on the Conrail properties that NS will operate. Some of the NS systems will be operational for the new area effective Closing Date, while others, particularly the transportation systems, will be integrated geographically over a period of several months after Closing Date.

There are two components that are required to implement this strategy. First, NS's systems group must ensure that our systems have the capacity to accommodate the operation of the new territory. Second, the Conrail systems group must modify existing Conrail systems so that they will become compatible with the NS systems upon Closing Date.

In order to prepare for the implementation of the new systems, each project must go through a planning stage and a development stage. The planning stage of the systems integration process involves the analysis and preparation of functional and technical specifications for the systems and the subsequent development stage involves the construction (coding), and testing of the systems.

There are three phases of testing through which our transportation and operations systems must undergo: unit, systems and integration. All of the operations systems have completed or are nearly finished with integration testing. The integration testing of the transportation systems is underway and will be complete in the Second Quarter of 1999. Once the new systems are implemented across all of the NS geography, use of the Conrail systems will be discontinued.

Note: Bold print indicates changes from previous report.

Surface Transportation Board Operational Monitoring Report

As of February 28, 1999

INFORMATION TECHNOLOGY

Systems and Personnel Training

Operating Area	Project	Status
TRANSPORTATION		
Car Management and Movement	Systems – Multiple projects	Development, Systems and integration testing Estimated completion date: 2Q99
Includes Thoroughbred Yard Enterprise System (TYES) and Central Yard Operations (CYO) System	Personnel Training	
	Prepare training materials for TYES and CYO	Complete
	Trainer orientation	In progress
	TYES training at Conrail locations	Estimated beginning date: 1Q99
Train Dispatching	Systems	Development complete; Currently in implementation Estimated Completion date: 2Q99
	Personnel Training	
	Prepare computer-based training materials for Norfolk Southern Train Information System (TIS) and Train System Accident Reporting System (TSAR).	Complete
	Train Conrail employees at Dearborn, Pittsburgh, and Mt. Laurel	Estimated beginning date: 1Q99
Locomotive Management	Systems	Development complete; Integration testing in progress Estimated completion date: 2Q99
	Personnel Training	
	Prepare training materials; conduct pilot sessions	Complete
	Trainer orientation	Estimated beginning date: 1Q99
	Train employees at 8 Conrail locations	Estimated completion date: 1Q99

Surface Transportation Board Operational Monitoring Report

As of February 28, 1999

INFORMATION TECHNOLOGY

Operating Area	Project	Status
OPERATIONS PERSONNEL		
Crew Management	Systems	Final stages of integration testing Estimated completion date: 2Q99
	Personnel Training	
	Prepare training materials	Complete
	Train Conrail employees	Estimated completion date: 1Q99
Train and Engine (T&E) Payroll	Personnel Training	
	Prepare training materials; conduct pilot sessions	Complete
	Train T&E crews	Estimated beginning date: 2Q99
Non-Train and Engine Payroll	Personnel Training	
	Prepare training materials; conduct pilot sessions	Complete
	Trainer orientation	In progress
	Train Conrail employees	Estimated completion date: 1Q99
CUSTOMER SERVICE		
Electronic Customer Connectivity	Systems	Development and testing Estimated completion date: 2Q99
	Personnel Training	
	Testing new systems	Estimated completion date: 1Q99
	Customer Coordination	
	Information to be distributed to customers	In progress
National Customer Service Center	Personnel Training	
	Prepare training materials	Complete
	Train employees in Pittsburgh and Atlanta	In progress

Note: Bold print indicates changes from previous report.

Surface Transportation Board Operational Monitoring Report

As of February 28, 1999

CUSTOMER SERVICE

Transition Process

Transition team members for NS have been selected and confirmed to work in Philadelphia in Customer Service for an undetermined period of time after split date. Space has been defined and equipment will be set up in the near future for this group to operate from.

Personnel

A transition team for Customer Service has been organized, staff selected, and will be functional after split date, in quarters located in Philadelphia, for an undetermined period of time. Additional training stations have been set up at three locations – Conway Yard (Pittsburgh), Elkhart, Indiana, and Columbus, Ohio – for training personnel involved in implementing new data systems on NS portions of Conrail. We have consummated a contract with an outside firm to supply 50 additional trainers, beginning November 30th, to assist in systems rollout. Supervisory positions have now all been filled for Data Quality and the Agency Operations Center. We also still expect to make offers to approximately 215 Conrail agreement personnel when implementing agreements have been consummated with TCU.

Customer Awareness

NS continues to host customer meetings to evaluate and provide feedback on the Company's planning processes and strategies.

The Customer Resource Guide has been completed and is in the process of being distributed. This guide will provide customers with all resources and information necessary for doing business with the new NS.

The Help Desk Directory, to be released at a later date, will also provide a way for customers and employees to easily obtain information about NS. This guide to services and benefits will list key phone numbers that will connect users to areas that may assist them in answering questions about NS. It will be available in three formats: a pocket guide for employees, a list for customers and an expanded version available for downloading from the internet.

Note: Bold print indicates changes from previous report.

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February 23, 1999

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The Honorable Vernon A. Williams
Secretary, Surface Transportation Board
Mercury Building, Room 700
1025 K Street, N.W.
Washington, D.C. 20423



Re: **Finance Docket No. 33388, CSX Corporation and CSX Transportation, Inc., Norfolk Southern Corporation and Norfolk Southern Railway Company -- Control and Operating Leases/Agreements -- Conrail Inc. and Consolidated Rail Corporation -- CSX-179**

Dear Secretary Williams:

As promised in my letter of February 22, 1999, filing CSX-179, I now enclose the manually signed original of the Verified Statement of David Houchin, which was submitted to the Board on February 22 only in "faxed" form.

Respectfully yours,

Dennis G. Lyons
Counsel for CSX Corporation
and CSX Transportation, Inc.

Enclosure
via hand delivery

BEFORE THE
SURFACE TRANSPORTATION BOARD

FINANCE DOCKET NO. 33388



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

VERIFIED STATEMENT OF
DAVID HOUCHIN

My name is David Houchin. I am employed by CSX Transportation, Inc. ("CSX"). My business address is 500 Water Street, Jacksonville, Florida 32202. I have worked for CSX since 1963. My present job title is Assistant Vice President - Joint Facilities. In my present position, I am responsible for negotiating joint agreements such as trackage rights, interchange, switching, etc. with other railroads. I am accordingly familiar with the operations of CSX, particular as they relate to joint facilities, interchange, trackage rights, switching, haulage arrangements and similar dealings with other railroads.

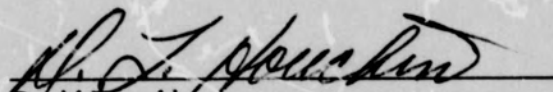
I have been asked to describe the possible connections between the B&P and other Class I railroads than CSX or Conrail. B&P has a direct connection with Norfolk Southern ("NS") at Buffalo Creek/CP Draw in Buffalo. Moreover, via its subsidiary, the

Allegheny and Eastern ("ALY"), B&P will have a direct connection with NS at Erie, PA, following the Split Date and the completion of NS's main line relocation project in Erie.

I have been asked to provide mileage data concerning rail movements in the Niagara Falls area. The distance by rail between the south end of the Oxy plant in Niagara Falls and the United States Customs at the east end of Suspension Bridge is approximately 5.5 miles, and the bridge is less than 0.5 miles across. From the south end of the Oxy plant in Niagara Falls to Conrail's Frontier Yard is approximately 28 miles by rail and from Oxy's plant to the Buffalo Creek Yard is approximately 27 miles by rail. From Buffalo Creek Yard via the B&P to New Castle, PA, the rail mileage is approximately 273 miles.

VERIFICATION

I, David Houchin, declare under penalty of perjury that the foregoing is true and correct to the best of my knowledge and belief. Further, I certify that I am qualified and authorized to file this statement. Executed on February 19, 1999.


David Houchin

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ZUCKERT SCOUTT & RASENBERGER, L.L.P.
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RICHARD A. ALLEN

DIRECT DIAL (202) 973-7502
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February 23, 1999

BY HAND

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

ENTERED
Office of the Secretary

FEB 23 1999

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

Dear Secretary Williams:

I enclose herewith an original and 25 copies of NS-76, Norfolk Southern's Report Pursuant to Decision No. 115 Regarding Access to IP&L's Stout Plant. A 3-1/2" computer disk of this document in Wordperfect 5.1 format, which is capable of being read by Wordperfect for Windows 7.0 is also enclosed.

Should you have any questions regarding this, please call.

Sincerely,

Richard A. Allen
Richard A. Allen

Counsel for Norfolk Southern
Corporation and Norfolk
Southern Railway Company

Enclosures

BEFORE THE
SURFACE TRANSPORTATION BOARD

Finance Docket No. 33388

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

**NORFOLK SOUTHERN'S REPORT PURSUANT TO DECISION NO. 115
REGARDING ACCESS TO IP&L's STOUT PLANT**

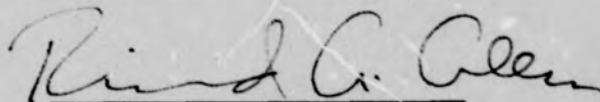
In Decision No. 115, the Board reaffirmed that its Decisions Nos. 89 and 96 were intended to enable Norfolk Southern Corporation and Norfolk Southern Railway Company (collectively "NS") directly to serve the Stout plant of the Indianapolis Power & Light Company ("IP&L") via trackage rights over Indiana Railroad ("INRD"), a subsidiary of CSX Corporation and CSX Transportation, Inc. (collectively, "CSX"). Decision No. 115 also ordered CSX, by February 18, 1999 to "procure the necessary trackage rights from INRD and [to] advise us in writing that such rights have been procured," and it ordered NS, by February 23, 1999 to "advise whether the necessary rights have or have not been procured."

As required by Decision No. 115, NS files this report to advise the Board that, as of this date, it has not yet procured the necessary trackage rights to serve the Stout plant. In CSX-178, filed on February 18, 1999, CSX stated that "[a] form of Trackage Rights Agreement is this day being sent to NS." NS has received the referenced "form of Trackage Rights Agreement" but has not yet had time to have it fully reviewed by all

appropriate persons. It is clear, however, that it contains a number of terms that differ from the standard in trackage rights agreement used by NS and CSX throughout this transaction. Furthermore, as CSX acknowledges in CSX-178, the form of agreement leaves undetermined the highly material term of trackage compensation. CSX says that "the initial consideration, subject to adjustment, per car mile for the exercise by NS of the trackage rights will be as agreed upon between INRD and NS, or in the event of a failure of them to agree, as determined by the Board upon application of either of them." CSX-178 at 2.

Until all terms of the trackage rights have been agreed to by the pertinent parties or established by the Board, NS cannot report that it has procured the necessary trackage rights. NS and CSX have agreed to meet to discuss the terms in the near future, and NS is hopeful that agreement on all terms will be reached. NS will submit a further report to the Board on the status of these matters on or before March 22, 1999.

Respectfully submitted,



JAMES C. BISHOP, JR.
WILLIAM C. WOGLDRIDGE
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(202) 298-8660

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

Dated: February 23, 1999

CERTIFICATE OF SERVICE

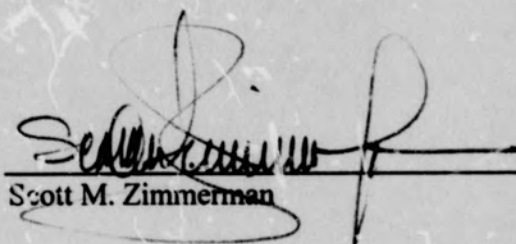
I hereby certify that on this 23d day of February, 1999, a copy of the foregoing "Norfolk Southern's Report Pursuant to Decision No. 115 Regarding Access to IP&L's Stout Plant" was served by first class mail, postage prepaid, or by more expeditious means, on the parties listed below:

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Scott M. Zimmerman

STB

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February 22, 1999

DENNIS G. LYONS
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NEW YORK
DENVER
LOS ANGELES
LONDON

The Honorable Vernon A. Williams
Secretary, Surface Transportation Board
Mercury Building, Room 700
1925 K Street, N.W.
Washington, D.C. 20423

ENTERED
Office of the Secretary

FEB 22 1999

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

Dear Secretary Williams:

Enclosed are an original and twenty-five (25) copies of CSX-179, "Response of CSX Corporation and CSX Transportation, Inc. to Petition of Occidental Chemical Corporation for Oversight and Modification of Remedial Condition." for filing in the above-referenced docket. Associated with this filing is a Verified Statement of Charles M. Rosenberger; the Rosenberger Verified Statement and its accompanying exhibits contain Highly Confidential information. The Highly Confidential Rosenberger Verified Statement and exhibits are enclosed in separate, sealed envelopes, appropriately labeled as to contents.

The Response contains an executed certificate of service; the Highly Confidential material has been served on outside counsel for the Petitioner and will on request be served on those outside counsel for other parties who have executed the appropriate undertaking under the Protective Order.

Please note that a 3.5-inch diskette containing a WordPerfect 5.1 formatted copy of CSX-179 and the accompanying Verified Statements of Ronald A. Dunn and David Houchin is enclosed. Also enclosed is a separate 3.5-inch diskette containing a WordPerfect 5.1 formatted copy of the text of the Rosenberger Verified Statement.

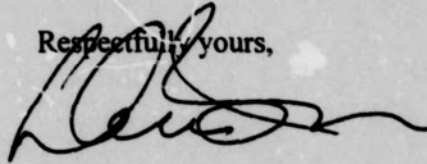
ARNOLD & PORTER

The Hon. Vernon A. Williams
February 22, 1995
Page 2

The Verification on the Houchin Verified Statement bears a signature submitted by facsimile. A physically signed copy of that Verified Statement will be submitted tomorrow.

Thank you for your assistance in this matter. Please contact me if you have any questions.

Respectfully yours,

A handwritten signature in dark ink, appearing to read "Dennis G. Lyons", written over the typed name.

Dennis G. Lyons
Counsel for CSX Corporation
and CSX Transportation, Inc.

Enclosures
via hand delivery

cc: All Parties of Record

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CSX-179

BEFORE THE
SURFACE TRANSPORTATION BOARD

FINANCE DOCKET NO. 33388



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

RESPONSE OF CSX CORPORATION AND
CSX TRANSPORTATION, INC. TO PETITION OF
OCCIDENTAL CHEMICAL CORPORATION FOR
OVERSIGHT AND MODIFICATION OF REMEDIAL CONDITION

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

February 22, 1999

ORIGINAL

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**BEFORE THE
SURFACE TRANSPORTATION BOARD**

FINANCE DOCKET NO. 33388

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

**RESPONSE OF CSX CORPORATION AND
CSX TRANSPORTATION, INC. TO PETITION OF
OCCIDENTAL CHEMICAL CORPORATION FOR
OVERSIGHT AND MODIFICATION OF REMEDIAL CONDITION**

INTRODUCTION AND SUMMARY

In a "Petition for Oversight and Modification of Remedial Condition" filed February 1, 1999 (undesignated), Occidental Chemical Corporation ("Oxy") seeks relief from the Board, apparently to some extent in its own right but also, apparently, on behalf of all other shippers similarly situated to it in the Niagara Falls, NY area, all of whom are currently physically served by rail only by Conrail.¹ The relief requested appears to be, for Oxy itself, the enforcement as if a commitment of part of a CSX letter of May 30, 1997 (the "May 30, 1997 Letter"), sent in the course of negotiations between CSX and

¹ We refer collectively to CSX Corporation and CSX Transportation, Inc., as "CSX" and to Consolidated Rail Corporation as "Conrail." Other abbreviations are identified when first used.

Oxy, containing language as to treating Oxy as if it were a "2-to-1" shipper. But the reality of what Oxy seeks not only for itself but for all of the Niagara Falls shippers is a major rewriting of the Board's carefully crafted Buffalo area conditions. It would be effected by deleting the words "for traffic using International Bridge and Suspension Bridge" in the Board's condition in Ordering Paragraph No. 37, Decision No. 89 at 178 ("Condition No. 37").² Condition No. 37, as thus changed, would apply the NITL Agreement's \$250 maximum reciprocal switching charge, and presumably the provisions for the creation and maintenance of reciprocal switching, not only to the line-haul movements to and from points in the Niagara Falls area using those bridges, but also to movements which did not and do not use International Bridge or Suspension Bridge — namely, movements to the South, over Buffalo.

The relief requested should not be granted. The record is clear that Oxy gave no consideration for the May 30, 1997 Letter and did not rely on it. Prior to the Board's Decision No. 89, Oxy and others made substantially the same arguments as Oxy does now throughout these lengthy proceedings, seeking the same result, as part of a coalition represented by its present counsel. A further letter by CSX to Oxy a month later, in June 1997, characterized what CSX had put on the table for Oxy as an "offer" — an offer which Oxy never accepted. Oxy never disputed that characterization as an "offer" during

² Like all conditions, Condition No. 37 was one which the Applicants, here CSX, were required to comply with in order to be authorized to consummate the Transaction covered by their Application.

the pendency of the Board's approval in Finance Docket No. 33388. The record demonstrates that what was transpiring was a negotiation of routes and rates between CSX and Oxy — a negotiation that never reached an agreement. See Part III under "Background," below.

Oxy and other Niagara Falls shippers and their supporters were familiar with the issues which Oxy brings forward now, and the group which represented their interests — the Erie-Niagara Rail Steering Committee ("ENRS") — raised those issues before the Board throughout this proceeding. The Board had before it the fact that the cancellation of reciprocal switching effected in the Winter of 1995-96 at Niagara Falls covered both movements to the West through the Ontario Peninsula and those to the South over Buffalo. That situation was well known to the area shippers, including Oxy, which rejected CSX's offer in favor of seeking a better result from the Board. The Board provided a substantial benefit to those shippers, and in its discretion determined to deal solely with the Ontario Peninsula movements over the two bridges. The Board accordingly determined to write Condition No. 37 the way it was written.

The Erie-Niagara interests chose not to file a Petition for Reconsideration of the Board's decision but determined to proceed immediately to seek judicial review in a Court of Appeals, indeed during the 10-day priority period provided for by 28 U.S.C. § 2112(a). See Erie-Niagara Rail Steering Committee v. Surface Transportation Board, 2d Cir., Docket No. 98-4285, filed July 31, 1998.

The Petition accordingly comes too late and concerns matters which should have been, and in fact were, raised in the case prior to Decision No. 89 — namely, the competitive alternatives available to Niagara Falls shippers for movements going over the bridges or through Buffalo. Finally, even if the Petition is considered on its merits, it does not establish any right to relief.

BACKGROUND

I. The Movements In Question

The particular movements to the South which Oxy has in mind for its requested enlargement of the Condition are apparent from the contracts which it has submitted. See Petition, Highly Confidential Appendix. They are limited to movements from Oxy's facilities in Niagara Falls, not westward over the bridges via the Ontario Peninsula (presumably in most cases for routing through Detroit or Port Huron to destinations in the United States), but southward to Buffalo and points beyond. The movements in question prior to the cancellations (which were effected as of April 1, 1996), involved switching movements by Conrail. After those cancellations, the movements involved a line-haul movement by Conrail. At Buffalo, the movements came to the Buffalo & Pittsburgh Railroad ("B&P"), which took them on a line haul to New Castle, PA, near the Ohio State Line. Finally, there was interchange at New Castle to destination points via CSX. The change effected by the cancellation of reciprocal switching was implemented

through a revision of the contracts with Oxy, to which Oxy, of course, agreed.³ There was evidence in the record of the case that the switching cancellations followed a change in the way in which CSX operated through the Ontario Peninsula (the part of Canada lying between Detroit (and the Detroit River) on the West and Niagara Falls (and the Niagara River) on the East), and at Niagara Falls, and that the cancellations affected both movements through the Ontario Peninsula and to the South over Buffalo. See McGee V.S., CSX/NS-177, Vol. 2A at 350-53.

While it appears that most of the contracts involving B&P handling from Buffalo to New Castle, PA, with interchange to CSX for haul to destination, were with Oxy, CSX' files indicate that there were other shippers in the Niagara Falls area who at some time in the period from 1994 to the present had similar arrangements involving the B&P and CSX (or reverse movements destined to industries in Niagara Falls). The names of those other shippers are set forth in the Rosenberger V.S. in the Highly Confidential Appendix hereto and copies of their contracts are appended to that Verified Statement. For Oxy and those shippers, any contracts after the cancellation of reciprocal switching provided for a Conrail line-haul movement from Niagara Falls to interchange with B&P at Buffalo (or vice versa on incoming movements to Niagara Falls). See the Highly Confidential Appendix hereto. The materials in the Oxy appendix and in ours indicate that the changes in the contracts to provide for a Conrail line-haul movement instead of

³ See Petition, Highly Confidential Appendix.

reciprocal switching took place well before the NS/CSX/Conrail transaction was agreed to, about half a year before even the bilateral CSX/Conrail acquisition was negotiated. Under the change in Oxy's contracts, Oxy still reached B&P in Buffalo, but did so through a Conrail line haul.

Oxy makes the same demand for all shippers in the Niagara area that it makes for itself, although there is no assertion that the other shippers were lulled by some communication from CSX. The relief requested is the provision of reciprocal switching for Norfolk Southern Railway Company ("NS") at Niagara Falls to serve the shippers there for movements southward over NS's routes from Buffalo to points beyond, subject to the NITL Settlement (Parts III.B and III.C), including the \$250 cap on switching, as expanded by the Board in Decision No. 89 at 54, 57. See CSX/NS-176 at 773.

We will demonstrate below that the claims that are made now could have been, should have been, and in fact were made during the pendency of this case's pre-decision phase, or at the latest by a timely Petition for Reconsideration; that Oxy was not lulled by CSX into silence in the case, and in fact was not silent; that in any event, no relief for Oxy or any other shipper is warranted beyond the extensive relief and concessions granted by the Board in Decision No. 89.

II. The History of Controversy About Reciprocal Switching in the Buffalo/Niagara Area in Finance Docket No. 33388

The major presentation made on behalf of the Buffalo/Niagara area shippers in this case was made by the Erie-Niagara Rail Steering Committee ("ENRS"), an *ad hoc* group, which filed, on October 21, 1997, "Comments, Evidence and Requests for Conditions," designated ENRS-6. That massive document stated that the membership of the ENRS group "is comprised of railroad shippers, economic and industrial development organizations, public transportation representatives, and county representatives." ENRS-6 at 2. Letters of support for the "Comments and Requested Conditions" were submitted as part of the filing by shippers, including one by Oxy; we will come to it shortly. A verified statement in support of ENRS was submitted by an officer of Olin Chlor-Alkali Products, which, like Oxy, operates a major commodity chemicals facility at Niagara Falls. In addition, a verified statement by an expert witness and many other verified statements by local officials and businesses were submitted, together with a narrative of some 47 pages. ENRS was represented by the highly experienced commerce counsel who are representing Oxy in its present Petition; those counsel also currently represent ENRS in its pending Petition for Review of the Board's Decision No. 89 in the United States Court of Appeals for the Second Circuit.

The "Comments, Evidence and Request for Conditions" filed by ENRS primarily sought the creation of a "Shared Assets Area" embracing two and one-half counties in the

Buffalo/Niagara area. It urged the theme that the creation of Shared Assets Areas elsewhere would cause competitive harm to the Buffalo/Niagara area. ENRS-6 at 39-45. Alternatively, it was urged that terminal trackage rights be established for all rail carriers throughout the entire area of two and one-half county area, or, as a third alternative, that open reciprocal switching to all present Conrail shippers and all future shippers (without regard to whether they at any time had the benefit of reciprocal switching) be established. *Id.* at 45-47. These broad requests for radical relief, of course, subsumed within them the relief now sought once more by Oxy — they sought reciprocal switching or direct access not in a particularized context but throughout the entire area of two and one-half counties proposed by the ENRS coalition. But attention was specifically given by ENRS to the reciprocal switching cancellations and their effect on movements South over Buffalo.

Space was devoted in ENRS-6 to arguing about then-recent cancellations or eliminations of reciprocal switching by Conrail. The ENRS narrative (at 29-30) urged, contrary to the undisputed record,⁴ that the April 1997 letter of agreement on a joint acquisition of Conrail by CSX and NS was an outgrowth of certain abortive negotiations that those two carriers had in 1995.⁵ Accordingly, ENRS urged that the clock be turned back to 1995 for the measurement of the amount of reciprocal switching that was

⁴ See CSX/NS-18, Vol. 1, at 309-10 (Snow V.S.); *id.* at 328 (Goodc V.S.).

⁵ Apparently, under that strange notion, the furious public bidding war for Conrail and related legal battles that CSX and NS engaged in from October 1996 through February 1997 were some sort of sham.

available to shippers at the time of the agreement upon the acquisition. ENRS's expert, Fauth, referred to the November 15, 1996, cancellation of reciprocal switching by Conrail and also to the 1995-96 termination of the availability of reciprocal switching at Niagara Falls. ENRS-6, Fauth V.S. at 29.

Interestingly enough, one of the major protesting parties as to the Conrail cancellations of reciprocal switching in this proceeding was — Oxy itself! And its presentation — which is not mentioned at all in the Petition — centered on movements South through Buffalo. Oxy submitted a letter dated October 17, 1997, which set forth its request that reciprocal switching be established so that Oxy's Niagara Falls plant could reach Buffalo to be served, after the Transaction, by NS, CN, CP and B&P. This request took the form of a letter which was included as part of the ENRS filing, ENRS-6. Oxy was clearly not "generally supporting" the Transaction, as its Petition (at 5) would have it, and it was not lulled into acquiescence, but was then seeking the very relief it is seeking in the Petition. A copy of the October 1997 Oxy letter, signed by Robert L. Evans, Oxy's Corporate Manager Rail Transportation, is attached as Attachment A hereto. Said the Oxy letter:

Before CSX Transportation pulled out of the Niagara Falls area, I believe in 1993, and Conrail canceled the reciprocal switching charge with CSX at Niagara Falls, we had some competitive rail competition between major Class I carriers. It's time for the STB to restore rail competition for Niagara Falls, NY. Niagara Falls is only 27 rail miles from Buffalo. The STB could order that CSX provide a reasonable charge from Niagara Falls to Buffalo to be absorbed by NS, CN, CPRS, and BPRR in their pricing. Those carriers should

show as serving Niagara Falls under reciprocal switching arrangement so direct contracts can be negotiated with them without CSX concurrence, which would restrict pricing freedom. Another alternative would be trackage rights between Buffalo and Niagara Falls for NS or others.

Oxy's submission thus focused on the effect of the reciprocal switching cancellations on movements to the South, over Buffalo. Oxy's 1997 filing made the same arguments as, and sought similar relief to, that now sought in its 1999 Petition. Oxy did not choose in 1997 to mention its existing contracts involving the B&P, but the argument was the same whether they were mentioned or not.

In response to the ENRS filing, CSX and NS⁶ filed a Rebuttal which opposed the ENRS urgings that a Shared Assets Area, or a two and one-half countywide terminal area, or general reciprocal switching regardless of history, be established. A brief response to the cancellation of switching charges was also made. Since the movements southward were to reach the B&P, which had a major part of the haul in the southern-routed movements, CSX assumed that the objection was to the Conrail cancellation insofar as it might affect movements to interchange with CSX via the bridges to move West through the Ontario Peninsula to Detroit or Port Huron and points, West or South, beyond. CSX accordingly replied in that fashion. See Rebuttal, CSX/NS-176, Vol. 1 at 65-66. The Rebuttal filing made the point that the "loss of

⁶ It should be noted that NS's Mr. Friedman's Verified Statement in the Petition carefully refrains from saying that a 2-to-1 situation is presented by Oxy's Petition.

reciprocal switching access to CSX" actually occurred in December 1995, when CSX's service arrangements relating to the Ontario Peninsula were changed.⁷ The Rebuttal did, moreover, describe the impacts of CSX's changes in operations on movements to the South over Buffalo (McGee V.S., CSX/NS-177, Vol. 2 at 350, 352-53) and the related cancellation of reciprocal switching by Conrail at Niagara Falls. *Id.* at 353.

ENRS filed a substantial brief and exhibits on February 23, 1998 (ENRS-19). Primarily, the brief made the same urgings as had the Comments, in favor of creation of a Shared Assets Area covering two and one-half counties, or a terminal trackage rights area, or general reciprocal switching without regard to history. But the reciprocal switching cancellations were not overlooked: Some suggestion was made (*id.* at 37) that the stated reason for the early 1996 cancellations was wrong, particularly as they might affect movements to the South. To be sure, most of the Brief's attention was given by ENRS to its more far-reaching and radical proposals, obviously as a strategic decision.

Following these submissions and oral argument, the Board rendered its Decision No. 89. That decision rejected the broader-scale proposals of the ENRS for the creation of a Shared Assets Area, a terminal trackage rights area, or the introduction of generalized reciprocal switching at all points. But the Board took numerous actions in that decision which improved the choices available to shippers in the area, going well

⁷ The Rebuttal also made the point that the change in the Winter of 1995-96 in CSX's service arrangements in the Ontario Peninsula had no relationship to the Transaction. *Id.* at 66.

beyond those which the Applicants themselves proposed.⁸ The NITL Agreement provisions for reciprocal switching were approved and were expanded by the Board so that they applied not only to requiring each of NS and CSX to provide reciprocal switching to the other where Conrail had provided it to either of them, but also to provide it to each other where either of them had provided it to Conrail, under the maintenance and price terms provided in Part III.C of the NITL Agreement. Decision No. 89 at 54, 57; see also *id.* at 86. Those arrangements created a dramatic reduction in switching fees where switching was available in the Buffalo/Niagara area. *Id.* at 86.

Contrary to ENRS's urgings, the Board found that the November 15, 1996, Conrail switching cancellations were not done in anticipation of the NS/CSX/Conrail Transaction and refused to take any action with respect to them. *Id.* at 86. The Board likewise did not find that the earlier Conrail switching cancellations at Niagara Falls on April 1, 1996 — when there was no agreement, even a unilateral CSX/Conrail agreement, for a rail combination — were Transaction-related. However, the Board determined that the line haul movements replacing the switching movements across the bridge from Niagara Falls to CSX's presence in the Ontario Peninsula should under the circumstances

⁸ In effect, the Transaction did supply the same competition that the original Final System Plan sought to provide in 1975. That plan allocated the historic Erie/Lackawanna lines to Chessie and the historic New York Central lines to Conrail. The Transaction allocated the historic Erie/Lackawanna lines — the Southern Tier lines — to NS and the historic NYC lines to CSX. Both sets of lines, of course, became part of Conrail in 1976 after Chessie was unable to participate in the Final System Plan.

be recharacterized as the functional equivalent of the preexisting switching movement access by CSX to the Niagara Falls shippers for movements across those bridges (*id.* at 86-87). This unprecedented reclassification aggressively improved, rather than simply maintained, the options that had been available to shippers at the time the Transaction — or even the earlier CSX/Conrail deal — was announced. It also had the consequence of reducing the rates for that access to \$250 per car.

The Board accordingly imposed the carefully crafted and measured Condition No. 37 (*id.* at 178) pinpointed at the movements across International Bridge and Suspension Bridge. No similar concession was granted with respect to movements to the South over Buffalo. This was despite Oxy's urgings in ENRS-6, the suggestions made in ENRS's brief, and the present or historic existence of a number of rail transportation contracts similar to the contracts now brought forward by Oxy involving its competitors and other neighbors in the Niagara Falls area.

III. The May 30, 1997 Letter and Oxy's Subsequent Actions

The May 30, 1997 Letter is the lynchpin of Oxy's Petition. However, the issue the Petition raises, quite clearly, is one which should have been, and was — by Oxy's own October 1997 submission as part of ENRS-6, and by other assertions in ENRS's presentation — raised in the body of the case. The excuse made on behalf of Oxy (which requests general action assisting other shippers as well as itself) is that Oxy was lulled by

the May 30, 1997 Letter into a soporific state and accordingly took no action in the case to protect its rights. Petition at 5, 9-11. The October 1997 Oxy filing belies that.

But that is not all. The attached Verified Statement of Ronald A. Dunn demonstrates that the May 30, 1997 Letter was but one step in a series of negotiations between CSX and Oxy that ultimately did not result in any agreement.

First came a letter from Oxy's Mr. Robert Evans, dated February 28, 1997, setting forth Oxy's wish list for improved access to alternative carriers for its Niagara Falls plant. The letter focused on movements over Buffalo. See Dunn V.S. Ex. A. Mr. Dunn did not answer that letter until May 14, 1997, when he wrote Mr. Evans advising him that Niagara Falls was not considered to be a two-to-one situation, and urging Mr. Evans to sign up for support of the CSX/NS/Conrail Transaction nonetheless. Dunn V.S. Ex. B.

At the end of that month, in an effort to get Mr. Evans' support, which obviously had not been forthcoming as a result of the May 14 letter, the May 30, 1997 Letter was sent. It was not a success, either. Within a few days after the May 30, 1997 Letter, Mr. Evans, the addressee of that letter, wrote back a letter of June 3, 1997, attached as Exhibit C to the Dunn V.S., raising questions as to what was meant by the May 30, 1997 Letter. This followed a meeting between Mr. Dunn and Mr. Evans in Mr. Evans' office, at which Mr. Evans had asked similar questions. Dunn V.S. at 2.

Mr. Evans' concerns were certainly understandable. After the generality that Oxy's plant would receive treatment "as a 2 to 1 point," which a few weeks before Mr. Evans had been told it was not, some qualifications immediately appeared in the May 30, 1997 Letter: *First*, access was to be granted only "via Buffalo"; and, *second*, the expression was made that "CSXT is glad we are able to afford OxyChem the competitive access at Niagara Falls you had in the past." What shape that would take was not explained in the May 30, 1997 Letter.

On June 30, 1997, Mr. Dunn replied to Mr. Evans' questions in the form of a letter. See Dunn V.S. Ex. D. This letter, which, like the February 28 and May 14 letters is not even referred to in the present Oxy Petition, indicated that what was being put on the table by CSX in the correspondence and dealings with Mr. Evans was an "offer." To that characterization as an "offer," there is no recorded protest by Mr. Evans. And it was plain that Mr. Evans never accepted CSX's offer. It is clear that what was going on was a negotiation over rates and routes. Mr. Evans wanted reciprocal switching, as his October 1997 letter, filed then with the Board, later made plain. Mr. Dunn's position was: "It is not reciprocal switching." It was to be participation "in the route from Niagara Falls to Buffalo." Dunn V.S. Ex. D. Obviously, the connotations were different, both commercially and legally. The parties did not agree on that, and there is no indication that they agreed on pricing.

As noted above, the dispute evidenced by the state of the negotiations was not just a private matter; Mr. Evans' dissatisfaction with the state of affairs was made public: On October 17, 1997, Mr. Evans sent a letter to one of the other supporters of the ENRS, saying that Oxy's "expressions of strong support [for the ENRS opposition] could be used in the filing with the Board." They were. The October 1997 Oxy letter expressed the request that CSX be required to provide a reasonable charge from Niagara Falls to Buffalo for interchange with NS, CN, CPRS and BPRR. That was, of course, what Mr. Evans had sought in the February 28, 1997 letter to CSX's Mr. Dunn (at \$400). Neither did the May 30, 1997 Letter nor the June 30, 1997 letter give Oxy that. Mr. Evans wanted more; he wanted what he had asked for in the February 28, 1997 letter, and he had other proposals in Oxy's submission in ENRS-6 as well: "Another alternative [according to the October 17 letter] would be trackage rights between Buffalo and Niagara Falls for NS or others."

The notion that the May 30, 1997 Letter satisfied Oxy and lulled it into silence is thus preposterous. Oxy was still seeking various forms of access to other carriers on movements south, including NS, in a vigorous manner, five months after the May 30, 1997 Letter. It did not view the exchange of correspondence that it had with CSX in the period from February through June of 1997 as giving or offering it what it wanted, and it still had substantially the same views of what it wanted as it had expressed in the February 28 letter. Its views were filed in this proceeding in October 1997. That

October 17, 1997 letter, included in ENRS's own filing, is never referred to in the Petition, despite the common authorship, and purpose, of the two filings.

The May 30, 1997 Letter was not a contract validated by consideration; Oxy did not support the Transaction, but rather joined ENRS in seeking burdensome conditions on it. Nor did Oxy rely on the May 30, 1997 Letter, as its October 1997 filing makes plain. The letter itself was vague and contradictory on its face. A "2-to-1" situation is presented when two carriers physically serve a shipper and head-to-head competition between them is ended by the acquisition of one by the other. See Part I under "Reasons for Denying the Petition," below. In situations where there is one carrier with physical access and others who may obtain access through reciprocal switching, the issue is as to the availability of reciprocal switching after the transaction and the terms on which it will be granted. Those are the issues which Oxy wanted clarified in its letter of June 3, 1997. It received a clarification of the "offer" which had been made in the May 30, 1997 Letter, but it did not like what it got, as clarified, and did not accept it. Oxy was still standing essentially on what it said it wanted in its February 28 letter on October 17, 1997, when it wrote its October 1997 letter for submission by ENRS in its filing. That filing followed a failed negotiation, of which the May 30, 1997 letter was simply a piece. The Board

should not enforce the May 30, 1997 Letter, and there is no basis for the Board to consider it a representation to the Board; it was not that in form or in substance.⁹

REASONS FOR DENYING THE PETITION

I. The Issues Raised in the Present Petition Could and Should Have Been Raised — and In Fact Were Raised — by Oxy or Other Shipper Interests, Such as the Erie-Niagara Rail Steering Committee — During the Scheduled Proceedings in the Case, or by Petition for Reconsideration of the Board's Decision No. 89

The Petition does not properly invoke the Board's oversight authority. The Petition does not assert any relationship to the Applicants' implementation of the Transaction authorized by the Board, any relationship to any operational problems in that implementation, or any changes in circumstances that occurred since the Board acted on a very full record in its Decision No. 89, served July 23, 1998. Indeed, the major part of the implementation of the Transaction — the "Split" of Conrail's routes and assets — has not yet occurred. The Petition seeks modification of a condition, to be sure, but the modification is not sought on the basis of subsequent practical experience but, like the

⁹ The assertion (Petition at 8) that Ordering Paragraph No. 19, Decision No. 89 at 176, adds something to the case is, for similar reasons, beside the mark. That condition reads: "Applicants must adhere to all of the representations they made during the course of this proceeding, whether or not such representations are specifically referenced in this decision." Even if we assume that "the course of this proceeding" refers not only to what was said on the record of the proceeding, but extends to statements made to customers by sales personnel of the Applicants, the agreement gets Oxy nowhere. The record shows that Dunn was making an offer, not a representation. The October 17, 1997 letter from Oxy, filed with the Board with Oxy's consent, and the rest of the record make it plain that Oxy did not believe that it had any assurance with respect to the relief which it now seeks.

rest of the Petition, involves facts that existed at the time of the proceedings in the case and that were well known to Oxy and to other shippers in the Niagara Falls area. The Petition does not involve newly-discovered evidence — the contracts appended to the Petition were Oxy's own contracts, entered into over the years, starting in the early 1990s. Oxy knew what was in its own contracts. It knew of the 1996 amendment and Conrail's appearance "in the route"; Oxy signed that amendment, as it did the rest of the contracts appended to its Petition. So did the other Niagara Falls shippers who had at any time similar contracts which gave them access to B&P at Buffalo. The suggestion of a "stealth" cancellation of reciprocal switching for movements going South (Pet. at 9-10) is preposterous. The McGee V.S. filed by the Applicants on December 15, 1997, described the matter fully. CSX/NS-177, Vol. 2A, at 352-53. Indeed, ENRS presented the "old" and the "cancellation" tariffs in its February 1998 Brief. ENRS-19 at the end of the attachments. The Petition is thus a classic untimely Petition for Reconsideration; it is almost six months late.

At the least, the Petition should have been filed as a Petition for Reconsideration, on or before August 12, 1998. See 49 C.F.R. § 1115.3. As such, it would even scarcely have passed muster: It seeks to bring forth additional evidence, but even with a timely Petition for Reconsideration, "an explanation must be given why it [the evidence] was not previously adduced." *Id.* at § 1115.3(c). Oxy's contracts were well known to it, and the contracts with other Niagara shippers were well known to them, and they could have,

through the ENRS, brought them forward during the course of the case. But this is not even a Petition for Reconsideration, but a Petition seeking, on the basis of old evidence, to modify an existing condition so as to make it more burdensome on one of the Applicants.¹⁰

As developed above in Part III of the "Background," above, there was no "lulling" of Oxy into silence. Its October 1997 letter supporting the ENRS opposition outlined a position and argument very similar to the argument it makes in the Petition. The letter clearly suggested to ENRS that some sort of argument for increased access on movements South from Niagara Falls through Buffalo could be cobbled together and presented to the Board. References to this were in fact made by ENRS, as noted in Part II of "Background," above, but the basic theory of the ENRS presentation was a "go for broke" theory, in an attempt to obtain a Shared Assets Area or other radical relief, which would have enforced reciprocal switching or even greater access throughout a two-and-a-half county area of which Niagara Falls was only a part, without reference to any historical practice at all.

Oxy's October 17, 1997 letter states a willingness on Oxy's part to cooperate with ENRS. But even if it did not, there were other Niagara Falls shippers who had at various

¹⁰ Oxy adds an extra element to its dilatoriness in making a request for relief in February 1999 with respect to an issue which it had perceived in October 1997 by urging that the Board give its request expedited consideration.

times similar contracts for access to B&P at Buffalo who could have made similar arguments, and who could have presented their own case or could have presented it through the ENRS. See the Highly Confidential Appendix hereto. The present Petition would have been grievously flawed as a Petition for Reconsideration, and now it is beyond the pale. After weighing the conditions imposed on the Transaction relating to CSX — including a number which were most unusual if not unprecedented¹¹ — CSX chose to consummate the Transaction and has now done so by refraining from seeking judicial review of the conditions imposed by the July 23, 1998 decision, and by assuming joint control of Conrail.

The Board's procedural rules have important purposes in the orderly management of proceedings and of real-world transactions. Petitions for Rehearing are circumscribed as to subject matter — “new evidence,” “changed circumstances” or “material error” — and as to time, to 20 days after service of the decision. 49 C.F.R. § 1115.3(b), (e). This permits the applicants to see what is proposed in the petitions before consummating the transaction. It is not fair to add additional conditions which do not reflect changed circumstances or newly-developed evidence on an applicant in the fashion sought by the Petition. This would be true even if they had some merit, which Part II, below, will demonstrate they do not have.

¹¹ See, e.g., Ordering Paragraph No. 28, Decision No. 89 at 177.

The Oxy Petition, which is directed to the Transaction as proposed in the Application, amounts to an untimely Petition for Reconsideration of matters which were before the Board when Decision No. 89 was served. But obviously Oxy is not without its remedies under the governing statute and the Board's reservation of oversight jurisdiction if, as implemented, it develops that the Transaction has adverse effects on Oxy which warrant relief. The Board's action with respect to movements across the Ontario Peninsula, with its geographic excellence for movements to the Midwest, has given Oxy and other shippers new commercial opportunities and bargaining leverage. The statutory provisions concerning the regulation of rates and routes and the Board's oversight powers give Oxy and other shippers legal rights and negotiating leverage as well. Our point is that the Board's oversight powers are not intended for use to serve as a substitute for a Petition for Reconsideration of issues that were available, and were brought before the Board, during the Board's consideration of the Application. If, in the light of Oxy's — or any other shipper's — experience under the implementation of the Split of Conrail, a situation warranting the Board's attention is presented, the Board will have powers to deal with it.

II. Neither Oxy Nor the Other Niagara Shippers Are Entitled to Any Relief

The Petition seeks to treat the situation it claims to have recently discovered, but which Oxy was fully knowledgeable about on October 17, 1997, as a "2-to-1" situation

where, inevitably, under the Board's and its predecessor's precedents, a remedy must be fashioned by substituting a second carrier in the place of one of the two carriers who are involved in the rail combination. But the Board's "2-to-1" precedents routinely apply to cases where two railroads are capable of providing direct, physical access to a particular point, generally through ownership of separate access tracks.¹² The Board employs other remedies and methods to protect competition that is provided through reciprocal switching.

The general rubric under which the maintenance of competition following a rail combination that has, prior to the combination, been supplied through reciprocal switching, has been not the "two to one" rule but the rules and constraints on the cancellation of reciprocal switching. That constraint may be provided in appropriate cases either under the Board's Intramodal Competition Rules¹³ or under merger conditions requiring the maintenance of reciprocal switching. The latter technique was

¹² In the *UP/SP* case, *Union Pacific Corp. et al. — Control and Merger — Southern Pacific Rail Corp. et al.*, Finance Docket No. 32760, Decision No. 44 served Aug. 12, 1996 ("*UP/SP*"), "2-to-1 shippers" were defined as those "who would otherwise go from two directly serving carriers to one." *Id.* at 103. The protection of "build out" and similar opportunities is a subset of this; it provides a replacement for the possibility of establishing a competitive connection to a nearby carrier, but what it maintains is the historic possibility of a physical connection. See *UP/S/P* AT 123-24. To be sure, in solving the 2-to-1 points, the applicants in that case proposed a solution which both resolved the direct-served "2-to-1" shippers issues and also those of the shippers who were directly served by one applicant carrier which performed reciprocal switching for the other applicant carrier. *Id.* at 121.

¹³ 49 C.F.R. Part 1144. See also *Midtec Paper Corp. v. Chicago & Northwestern Transp. Co.*, 3 I.C.C.2d 171 (1986).

employed in the UP/SP case and, in the present case, through the NITL Settlement and its expansion by the Board. See Decision No. 89 at 54, 57.

There are two major aspects of the expanded NITL Settlement applicable here. In Part III.B of the NITL Settlement (CSX/NS-176, Vol. 1 at 773), NS and CSX undertook to keep reciprocal switching open for ten years after the Closing Date ("Day One") at "any point at which Conrail now provides reciprocal switching." At the points mentioned in Part III.B where NS and CSX are both involved (and, under the Board's enlargement, wherever CSX or NS provided reciprocal switching to Conrail), Part III.C of the NITL Settlement provides that the reciprocal switching fee between NS and CSX, with a few exceptions not pertinent here, will be \$250 (substantially less than the historical Conrail switching fees) and that, subject to a cost-index formula, that fee level will be maintained for five years. *Id.* The Board commented favorably on those arrangements in its analysis of competition in the Buffalo/Niagara area. Decision No. 89 at 58.

These provisions protect, and in the present case through the switching charge reduction even increased, the competition that was available immediately prior to a transaction. In this case, the Board's decision to change the line-haul movements from Niagara Falls over the two bridges into the Ontario Peninsula to a reciprocal switch movement, was not to solve a "two to one" or to restore competition removed by the Transaction, but to replicate a movement alternative that last existed over a year before the Transaction was agreed to. Shippers in the Niagara area who could be served by the

CSX route through the Ontario Peninsula — which is the most direct and expeditious route to Detroit and points beyond — had, until the Winter of 1995-96, two alternatives (subject, as is always the case, to destination access): a movement on Conrail, which directly served them, or a short movement, by switch on Conrail to the bridge to CSX and by CSX across the Ontario Peninsula to Detroit and points beyond.¹⁴ Thus, there were two routes involving service by Class I carriers available to those shippers.

As a result of the Transaction, CSX will succeed to Conrail's presence in the Niagara Falls area in major part. But the Board, viewing the short Conrail line-haul movement across the bridge to the Ontario Peninsula as the functional equivalent of the switching movement which had been in effect until the Winter of 1995/96, ordered that that movement be considered a switching movement for the purposes of the expanded NITL Settlement. Decision No. 89 at 86-87, 178. As a result, CSX must establish reciprocal switching for NS movements over those bridges akin to what had been once available to CSX. The shippers thus have the same opportunities that they had before, to use one or the other of two Class I rail carriers, one through direct at-plant service and the other via a short switching movement.¹⁵

¹⁴ For the history, see Decision No. 89 at 86-87.

¹⁵ Numerous other conditions were imposed in Decision No. 89 for the benefit of Buffalo/Niagara area shippers. See Decision No. 89 at 88, 178 (Ordering Paragraph Nos. 32, 33, 34, 35, 38).

The situation described in the Petition is not similar. The post-1995 Conrail movement at the start of the route is in its characteristics a true line-haul movement. It is considerably longer than the movements to Suspension Bridge to the Ontario Peninsula (the bridge used for switching deliveries involving CSX through December 1995),¹⁶ a movement of about 28 miles to Frontier Yard for interchange with B&P as opposed to about 6 miles across Suspension Bridge. See Houchin V.S. at 2. Thus, the factors which led the Board to treat the replacement "line haul" movements across the two bridges into Canada as switching movements are not present here.

What the shippers in the Niagara Falls area who were interested in movements to the South had at the end of 1996, before the CSX/NS/Conrail Transaction was agreed to in April 1997, was a long haul on Conrail or, where Conrail was agreeable — which presumably would be a function of the price and/or whether Conrail served the destination or what other interchange points were possible if it did not — a contractual short-haul movement on Conrail to the B&P at Buffalo.¹⁷ That situation is not a 2-to-1 situation and does not implicate the reciprocal switching provisions of the expanded NITL Agreement. There is no basis for, nor legitimate purpose of, reclassifying the Conrail line-haul movement to Buffalo as a switching movement. The cancellation of

¹⁶ See Decision No. 89 at 87.

¹⁷ CSX is not B&P's only Class I connection. B&P has a connection with NS at Buffalo which, of course, would not give B&P a long haul. However, B&P could reach a direct connection with NS via E&P's Allegheny and Eastern ("ALY") subsidiary at Erie, PA. as a result of the NS mainline relocation project at Erie. See Houchin V.S. at 1-2.

reciprocal switching clearly did not occur in contemplation of a change in control of Conrail; the Board did not so find, despite ENRS's urgings. Even the approaches that led to the October 1996 bilateral CSX/Conrail agreement did not take place until earlier in the Fall of 1996. CSX/NS-18 at 309-10 (Snow V.S); Snow Deposition, Sept. 18, 1997, at 219.

The Board properly limits its remedies in control proceedings to ameliorating competitive harm caused by the proposed transaction, not to using those proceedings as a means to drastically change the transaction proposed by the applicants. That is particularly so when additional conditions are proposed after the consummation of the transaction, when the applicants have already proceeded on the basis of the Board's conditions as written. Here, the Board fully considered the record before crafting the precise terms of Condition No. 37. The reclassification of line-haul movements as switching movements effected in this case is, we believe, a new endeavor by the Board, and it should be approached with caution. Such reclassification of line-haul movements as switching movements by the Board, in a context where there are agreements to maintain switching movements, could lead to the same counterproductive effects as the old DT&I conditions, conditions requiring the maintenance of all routings which preexisted a transaction, which the Board's predecessor clearly rejected, acting to remove such conditions already imposed and declining to impose them any further. See Traffic Protective Conditions, 366 I.C.C. 112, *aff'd in relevant part sub nom. Detroit, Toledo &*

Ironton R.R. v. United States, 725 F.2d 47 (6th Cir. 1984). See also, e.g., Seaboard Air Line R.R. — Merge; — Atlantic Coast Line R.R., Finance Docket No. 21215 (Sub-No. 5) at 15-16 (served Mar. 27, 1995); CSX Corp. — Control — Chessie Sys., Inc. and Seaboard Coast Line Indus., 363 I.C.C. 521, 578-79 (1980), *aff'd sub nom. Brotherhood of Maintenance of Way Employees v. ICC*, 698 F.2d 315 (7th Cir. 1983); Norfolk & W. Ry. — Control — Detroit, T. & I. R.R., 360 I.C.C. 498, 527 (1979), *aff'd in part and rev'd in part sub nom. Norfolk & W. Ry. v. United States*, 639 F.2d 1096 (4th Cir. 1981).

CSX believes that the Board should be particularly sensitive against changing a routing — by retrospectively declaring it a “switching movement” — when the routing exists only as part of a rail transportation contract. To do so would be to establish the discredited DT&I conditions on a new and higher level of application. The only basis on which the present routing appears to have existed — Conrail from origination point to Buffalo, B&P from Buffalo to New Castle, PA, and CSX to destination — apparently was under rail transportation contracts with Oxy and with one or more other Niagara Falls shippers. For the Board to take the view that some sort of “2-to-1” situation can be created by an originating carrier through a contract is to create a very dangerous precedent, and one that could discourage innovative rail transportation contracts.

The Board has made extensive separate provisions in Decision No. 89 for shippers having rail transportation contracts. To the extent those contracts of Oxy or any other Niagara Falls shippers are in force and effect on the Split Date, the shippers will be

protected as to their contractual rights by Section 2.2(c) of the Transaction Agreement. The typical rail transportation contract has an antiassignment clause. Such a shipper may, if it wishes, cancel the contract 180 days after the Split Date or elect to keep it in force, under the Board's condition in Ordering Paragraph No. 10, Decision No. 89 at 175. Those provisions supplement the increased access that the shippers will have to movements through the Ontario Peninsula and the reduced charge for access to such movements. They are augmented by the Board's approval and expansion of the NITL Settlement, with its protections for reciprocal switching and its lowering of many reciprocal switching charges, particularly helpful in the Erie-Niagara area, as well as a panoply of other conditions expressly pointed at the Erie-Niagara area. See note 15, above.

No case has been made for changing the conditions crafted by the Board, including the specific parameters of the application of Condition No. 37.

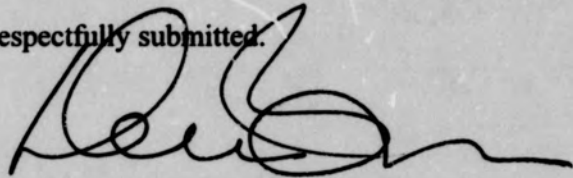
CONCLUSION

The Oxy Petition, filed by counsel also representing ENRS, is obviously the Petition for Reconsideration which ENRS could have filed last Summer but which it chose not to, in its haste to go to the Court of Appeals for the Second Circuit. Even if it had been filed as a Petition for Reconsideration, it furnishes no basis for rewriting the conditions imposed by the Board or expanding the extensive remedies and concessions to

the Erie-Niagara area shippers provided for by the NITL Settlement and by the Board's own actions in Decision No. 89.

For the reasons stated, the Petition should be denied.

Respectfully submitted.



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Paul R. Hitchcock
CSX TRANSPORTATION, INC.
One James Center
500 Water Street
Speed Code J-120
Jacksonville, FL 32202
(904) 359-3100

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

February 22, 1999

**Letter of October 17, 1997 from
Robert L. Evans, Corporate Manager Rail Transportation,
Occidental Chemical Corporation, to the
Erie County Industrial Development Agency,
submitted to the Board by the
Erie-Niagara Rail Steering Committee
in ENRS-6, October 21, 1997**

OxyChemResponsible Care
A Public Commitment

VIA FACSIMILE # (716) 856-6754

October 17, 1997

Dr. Ronald Coan, Executive Director
Erie County Industrial Development Agency
Liberty Building
424 Main Street, Suite 300
Buffalo, New York 14202

Dear Dr. Coan:

Enclosed is a copy of Antonio G. Orbegoso's comments for Occidental Chemical Corporation in Finance Docket No. 33398. Since OxyChem is a party of record and has submitted a direct response to the Board, I do not believe it would be proper for me to submit another verified statement to the Board for inclusion in your filing.

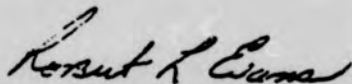
We strongly agree with the efforts of the Erie-Niagara Rail Steering Committee (ENRS) to secure competitive rail-to-rail alternatives for the Niagara Falls area.

Before CSX Transportation pulled out of the Niagara Falls area, I believe in 1996, and Conrail canceled the reciprocal switching charge with CSX at Niagara Falls, we had some competitive rail competition between major Class I carriers. It's time for the STB to restore rail competition for Niagara Falls, NY. Niagara Falls is only 27 rail miles from Buffalo. The STB could order that CSX provide a reasonable charge from Niagara Falls to Buffalo to be absorbed by NS, CN, CPRS, and BPRR in their pricing. Those carriers should show as serving Niagara Falls under reciprocal switching arrangement so direct contracts can be negotiated with them without CSX concurrence, which would restrict pricing freedom. Another alternative would be trackage rights between Buffalo and Niagara Falls for NS or others.

If you can use our expressions of strong support for ENRS in some manner in your filing, please do so.

We appreciate your efforts on behalf of Occidental and other area shippers.

Sincerely,



Robert L. Evans
Corporate Manager Rail Transportation

RLE/mrl

enclosures



Occidental Chemical Corporation
Corporate Office
Occidental Tower, 5005 LBJ Freeway
P.O. Box 809050, Dallas, TX 75380-9050
972/404-3800

**Verified Statement of
RONALD A. DUNN**

BEFORE THE
SURFACE TRANSPORTATION BOARD

FINANCE DOCKET NO. 33388

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

**VERIFIED STATEMENT OF
RONALD A. DUNN**

My name is Ronald A. Dunn. I am employed as a national sales representative by CSX Transportation, Inc. ("CSXT"), and have been so employed since 1996. My offices are located at 4100 Alpha Road, Suite 800, Dallas, Texas 75244.

I am the Ronald A. Dunn who sent Mr. Robert L. Evans of Occidental Chemicals Corporation ("Oxy") the letter of May 30, 1997, which I understand has been submitted to the STB in a recent filing by Oxy.

There are a number of other letters which seem to me to be pertinent, which I do not understand that Oxy has furnished to the STB.

First, on February 28, 1997, Mr. Robert Evans, the Corporation Manager Rail Transportation of Oxy, sent me a letter which is attached hereto as Exhibit A.

I responded to Mr. Evans on May 14, 1997, with a letter which is attached hereto as Exhibit B. That letter told Mr. Evans that "Niagara Falls will not be treated as a 2 to 1 point under the terms of the acquisition. Your current carrier at Niagara Falls is CR and in the future your carrier will be CSXT." Those were, of course, the existing sole carrier that served the Oxy Niagara Falls facility and the carrier that would replace it under the Conrail transaction.

Thereafter, in an effort to obtain Mr. Evans' support and that of Oxy for the transaction, I sent the May 30, 1997 letter, which I understand has been presented to the STB by Oxy.

Following the mailing of the May 30, 1997 letter, I called on Mr. Evans at his office in Dallas a few days later. As I recall the meeting, Mr. Evans had a number of questions about just what the letter meant and just what Oxy was being offered.

After the meeting, I received a letter dated June 3, 1997, from Mr. Evans, a copy of which is attached hereto as Exhibit C. It too raised a number of questions as to what was being offered to Oxy, similar to what was said at the meeting.


After the meeting on June 3, I wrote another letter on June 30, 1997, to Mr. Evans in an effort to win Oxy's support and answer his questions. I believed that what we were in the process of putting on the table for Mr. Evans and Oxy was an "offer" for Oxy to accept by supporting the Conrail transaction. Thus, in my June 30, 1997 letter, a copy of which is attached as Exhibit D, referred to our proposition as an "offer." There never was

any acceptance of that offer by Mr. Evans or otherwise by Oxy, to the best of my knowledge.


VERIFICATION

I, Ronald A. Dunn, declare under penalty of perjury that the foregoing is true and correct. Further, I certify that I am qualified and authorized to file this statement.

Executed on February 17, 1999.



Ronald A. Dunn

OxyChem[®]Responsible Care[®]
A Public Commitment 

February 28, 1997

Mr. Ron A. Durn
National Account Manager
CSX Transportation
4100 Alpha Road, Suite 800
Dallas TX 75244

Dear Ron:

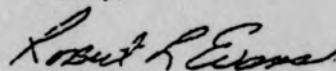
We understand CSXT intends to file with the Surface Transportation Board in March an application to merge with Conrail. Norfolk Southern has met with us explaining their similar intention to merge with Conrail.

There are certainly concerns about maintaining competitive service for our plants and for our customers. Attached is a list showing the Occidental Chemical plants served by Conrail, CSXT, and NS. We are reviewing the rail service and competitive factors of these plants as well as analyzing our rail movements involving CR and CSXT and also CR and NS. We will then develop our plan of support on the applications.

For either a CSXT or NS plan to merge with Conrail, we must have competitive service available for our plants at Niagara Falls NY. Niagara Falls could be promoted as a two to one location since CSXT in recent years has gradually reduced their ability to serve Niagara Falls (Suspension Bridge) by selling off the line above the lakes serving Suspension Bridge and also the line to the south (now BPRR).

We need to know what the CSXT position is on providing competitive service to Niagara Falls. Will CSXT provide reciprocal switching for our plant on Buffalo Avenue and agree to publishing a per car charge of about \$400 per car from Niagara Falls to interchange with all carriers at Buffalo NY? Please advise soon so we may take this into consideration in our decision on which application to support.

Sincerely,



Robert L. Evans
Corporation Manager Rail Transportation



Occidental Chemical Corporation
Corporate Office
Occidental Tower, 5005 LBJ Freeway
P.O. Box 809050, Dallas, TX 75380-9050
972/404-3800

May 14, 1997

Mr. Robert L. Evans
Occidental Chemical Corporation
5005 LBJ Freeway
Dallas, TX 75244

Dear Bob:

This letter serves as response to your letter dated February 28, 1997 regarding the CSXNS/CR acquisition. First, Niagara Falls will not be treated as a 2 to 1 point under the terms of the acquisition. Your current carrier at Niagara Falls is CR and in the future your carrier will be CSXT. Enclosed you will find CSXT's response to the list of the points of concern you have outlined related to the CR acquisition. In addition, you will also find enclosed a complete set of maps which should assist you in developing your position on the CR acquisition.

As we have discussed, CSXT and NS are jointly seeking your support of the acquisition in the form of a verified statement. This letter follows the John Anderson letter you should have received on May 8th which reinforces our desire to receive all support statements and letters by June 2, 1997.

Please contact me as soon as possible with any questions you may have or if you need any assistance in writing a letter.

Sincerely,

Ronald A. Dunn
National Account Manager

OxyChem[®]Responsible Care
A Public Commitment

June 3, 1997

Mr. Ronald Dunn
CSX Transportation
13465 Midway Road
Dallas, Texas 75244

Dear Ron:

Thank you for your letter of May 30, 1997 regarding the Niagara Falls, N.Y. switching situation. I do have a few questions and comments.

1. The Buffalo gateway, as I understand it, will be open to switching for at least 25 years per the current contract agreement. Please confirm.
2. How long will the \$390 switching charge remain constant?
3. How will the existing contract be handled involving our plants at Stevens, N.J., Jersey City, N.J. and Niagara Falls, N.Y.? Jersey City and Stevens are served only by Conrail today. Who inherits the current long-term contracts, Norfolk Southern or CSX?
4. I assume the \$390 rate from Niagara Falls will be established as a receptacle switch charge or as a haulage agreement so that the Norfolk Southern routing applies direct from Niagara Falls.

Very truly yours,

OCCIDENTAL CHEMICAL CORPORATION

Robert L. Evans, Corporate Manager
Commercial Transportation

RLE/sct



Occidental Chemical Corporation
Corporate Office
Occidental Tower, 5005 LBJ Freeway
P.O. Box 809050, Dallas, TX 75380-9050
972/404-3800

June 30, 1997

Mr. Robert L. Evans
Occidental Chemical Corporation
5005 LBJ Freeway
Dallas, TX 75244

Dear Bob:

This letter serves as a response to your letter dated June 3, 1997 regarding the CSX/NS/CR acquisition.

1. Our offer for Niagara falls is to provide linehaul service at \$390 to NS at Buffalo. It is not reciprocal switching. Our share of any through rates established would be \$390. The rate will be valid for 25 years, subject to escalation at RCAF.

2. Will remain constant for 25 years except as adjusted by RCAF unadjusted.

3. The Niagara falls contract will be inherited by CSX. New Jersey points in the shared commercial area are not clear yet. We should have this sorted out in a few weeks.

4. CSX will be in the route from Niagara Falls to Buffalo. We want to be in the route so that the traffic shows up in our management reporting systems and we know what we are handling with OXY.

Let me know if you have more questions.

Sincerely,

Ronald / [Signature]
National Account Manager

**Verified Statement of
DAVID HOUCHIN**

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

FINANCE DOCKET NO. 33388

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

**VERIFIED STATEMENT OF
DAVID HOUCHIN**

My name is David Houchin. I am employed by CSX Transportation, Inc.

("CSX") My business address is 500 Water Street, Jacksonville, Florida 32202. I have worked for CSX since 1963. My present job title is Assistant Vice President - Joint Facilities. In my present position, I am responsible for negotiating joint agreements such as trackage rights, interchange, switching, etc. with other railroads. I am accordingly familiar with the operations of CSX, particular as they relate to joint facilities, interchange, trackage rights, switching, haulage arrangements and similar dealings with other railroads.

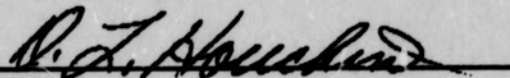
I have been asked to describe the possible connections between the B&P and other Class I railroads than CSX or Conrail. B&P has a direct connection with Norfolk Southern ("NS") at Buffalo Creek/CP Draw in Buffalo. Moreover, via its subsidiary, the

Allegheny and Eastern ("ALY"), B&P will have a direct connection with NS at Erie, PA, following the Split Date and the completion of NS's main line relocation project in Erie.

I have been asked to provide mileage data concerning rail movements in the Niagara Falls area. The distance by rail between the south end of the Oxy plant in Niagara Falls and the United States Customs at the east end of Suspension Bridge is approximately 5.5 miles, and the bridge is less than 0.5 miles across. From the south end of the Oxy plant in Niagara Falls to Conrail's Frontier Yard is approximately 28 miles by rail and from Oxy's plant to the Buffalo Creek Yard is approximately 27 miles by rail. From Buffalo Creek Yard via the B&P to New Castle, PA, the rail mileage is approximately 273 miles.

VERIFICATION

I, David Houchin, declare under penalty of perjury that the foregoing is true and correct to the best of my knowledge and belief. Further, I certify that I am qualified and authorized to file this statement. Executed on February 19 1999.


David Houchin

CERTIFICATE OF SERVICE

I, Dennis G. Lyons, certify that on February 22, 1999, I have caused to be served a true and correct copy of the foregoing CSX-179, "Response of CSX Corporation and CSX Transportation, Inc. to Petition of Occidental Chemical Corporation for Oversight and Modification of Remedial Condition," to all parties on the Service List in Finance Docket No. 33388, by first-class mail, postage prepaid, or by more expeditious means.

As filed, the Petition was accompanied by a Verified Statement of Charles M. Rosenberger, which, and the exhibits to which, are Highly Confidential. Copies of that Highly Confidential Verified Statement and its Highly Confidential exhibits have been served on the Petitioner's outside counsel but have not been served on other parties. Those documents are available to outside counsel for such parties who have signed the "Highly Confidential" undertaking under the Protective Order in Finance Docket No. 33388. Requests for such copies should be made by letter or facsimile (202-942-5999) to the undersigned; all such requests should include a representation that counsel is eligible to execute, and has executed, the Highly Confidential undertaking under the Protective Order.



Dennis G. Lyons
ARNOLD & PORTER
555 Twelfth Street, N.W.
Washington, D.C. 20004-1202

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

STB

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ARNOLD & PORTER555 TWELFTH STREET, N.W.
WASHINGTON, D.C. 20004-1206(202) 942-5000
FACSIMILE: (202) 942-5999NEW YORK
DENVER
LOS ANGELES
LONDONDENNIS G. LYONS
(202) 942-5858

February 18, 1999

The Honorable Vernon A. Williams
Secretary, Surface Transportation Board
Mercury Building, Room 700
1925 K Street, N.W.
Washington, D.C. 20423



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

Dear Secretary Williams:

Enclosed are an original and twenty-five (25) copies of CSX-178, "Statement on Behalf of CSX Corporation and CSX Transportation, Inc. As Required By Decision No. 115 of the Board," for filing in the above-referenced docket.

Please note that a 3.5-inch diskette containing a WordPerfect 5.1 formatted copy of the filing is also enclosed.

Kindly date stamp the enclosed additional copies of this letter and the enclosure at the time of filing and return them to our messenger.

Thank you for your assistance in this matter. Please contact me if you have any questions.

ENTERED
Office of the Secretary

FEB 19 1999

Part of
Public Record

Respectfully yours,

Dennis G. Lyons
Counsel for CSX Corporation
and CSX Transportation, Inc.

Enclosures
via hand delivery

cc: All Parties Listed on the
Certificate of Service

193422

CSX-178

ENTERED
Office of the Secretary

FEB 19 1999

Part of
Public Record

BEFORE THE
SURFACE TRANSPORTATION BOARD

FINANCE DOCKET NO. 33388



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

STATEMENT ON BEHALF OF
CSX CORPORATION AND CSX TRANSPORTATION, INC.
AS REQUIRED BY DECISION NO. 115 OF THE BOARD

This statement is made and filed by CSX Corporation and CSX Transportation, Inc. (collectively, "CSX") pursuant to Ordering Paragraph No. 1 of the Board's Decision No. 115, served on February 8, 1999. Terms defined in that Decision are used herein in their defined senses.

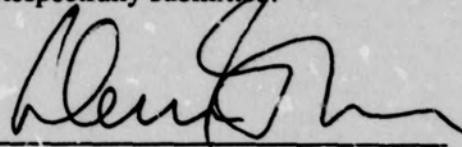
CSX hereby advises the Board that the Board of Directors of INRD has this day granted NS trackage rights on INRD which comply with the terms of Decision No. 89 at pp. 151, 117 and 177 (Ordering Paragraph No. 23) and Decision No. 96 at 26 (Ordering Paragraph No. 8) (as modified by Decision No. 115). A form of Trackage Rights Agreement is this day being sent to NS. (The interchange with respect to the exercise of

such trackage rights between ISRR and NS will be accomplished in Crawford Yard, as contemplated by Decision No. 115.)

CSX further advises the Board that the initial consideration, subject to adjustment, per car mile for the exercise by NS of the trackage rights will be as agreed upon between INRD and NS, or in the event of a failure of them to agree, as determined by the Board upon application by either of them.

CSX further advises the Board that it believes that the Board's comment, in the third paragraph on page 4 of Decision No. 115, that under certain circumstances if the ISRR/NS movement into Stout proves to be "problematic," ISRR and NS "may choose to negotiate a mutually beneficial agreement through which ISRR operates as NS' agent for movements into that plant" is inconsistent with the Board's earlier decisions in this case and the Board's precedents, is unsupported by the record, and if implemented is likely to produce consequences unintended by the Board. Accordingly, CSX will file a petition for reconsideration and/or clarification with respect to that aspect of Decision No. 115. Such petition will be filed pursuant to 49 C.F.R. § 1115.3, within twenty days after the service of Decision No. 115, that is to say, on or before March 1, 1999 (February 28, 1999 being a Sunday).

Respectfully submitted.



Dennis G. Lyons
ARNOLD & PORTER
555 Twelfth Street, N.W.
Washington, D.C. 20004-1202
(202) 942-5000

Samuel M. Sipe, Jr.
David H. Coburn
STEPTOE & JOHNSON LLP
1330 Connecticut Ave., N.W.
Washington, D.C. 20036-1795
(202) 429-3000

Mark G. Aron
Peter J. Shultz
CSX CORPORATION
One James Center
901 East Cary Street
Richmond, VA 23129
(804) 782-1400

P. Michael Giftos
Paul R. Hitchcock
CSX TRANSPORTATION, INC.
One James Center
500 Water Street
Speed Code J-120
Jacksonville, FL 32202
(904) 359-3100

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

February 18, 1999

CERTIFICATE OF SERVICE

I, Dennis G. Lyons, certify that on February 18, 1999, I have caused to be served a true and correct copy of the foregoing "Statement on Behalf of CSX Corporation and CSX Transportation, Inc. As Required by Decision No. 115 of the Board," to the following parties, by first-class mail, postage prepaid, or by more expeditious means:

Richard A. Allen, Esq.
Patricia Bruce, Esq.
ZUCKERT, SCOUTT & RASENBERGER
888 17th Street, N.W., Suite 600
Washington, D.C. 20006-3939
Counsel to NS

Karl Morell, Esq.
Irene Ridgewood, Esq.
BALL JANIK LLP
1455 F Street, N.W., Suite 225
Washington, D.C. 20005
Counsel to ISRR

Michael F. McBride, Esq.
Brenda Durham, Esq.
LEBOEUF, LAMB, GREEN & MACRAE, L.L.P.
1875 Connecticut Avenue, N.W., Suite 1200
Washington, D.C. 20009-5728
Counsel to IP&L

Jonathan M. Broder, Esq.
CONSOLIDATED RAIL CORPORATION
Two Commerce Square
2001 Market Street
Philadelphia, PA 19101-1416

Michael P. Harmonis, Esq.
Transportation, Energy and
Agriculture Section
U.S. Department of Justice
Antitrust Division
325 7th Street, N.W., Suite 500
Washington, D.C. 20530

A handwritten signature in black ink, appearing to read "Dennis G. Lyons", written over a horizontal line.

DENNIS G. LYONS

STB

FD

33388

2-17-99

D

193408

193408



Norfolk Southern Corporation
1500 K Street, N.W., Suite 375
Washington, D.C. 20005
202 383-4100
202 383-4425 (Direct)
202 383-4011 (Fax)



Bruno Maestri
Assistant Vice President
Public Affairs

February 17, 1999

By Hand Delivery - Original and 25 Copies

The Honorable Vernon A. Williams
Secretary
Surface Transportation Board
Suite 700
1925 K Street, NW
Washington, DC 20425-0001

ENTERED
Office of the Secretary

FEB 18 1999

Part of
Public Record



Re: Finance Docket No. 33388: CSX Corporation and CSX Transportation, Inc. and Norfolk Southern Corporation and Norfolk Southern Railway Corporation -- Control and Acquisition of Conrail, Inc. and Consolidated Rail Corporation

Subject: Norfolk Southern Rail Corridor Safety Agreement with Ohio Rail Development Corporation and Public Utilities Corporation of Ohio

Dear Secretary Williams:

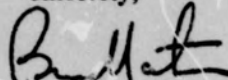
Norfolk Southern has entered into a Rail Corridor Safety Agreement with the Ohio Rail Development Corporation ("ORDC") and the Public Utilities Commission of Ohio ("PUCO") which provides for, *inter alia*, a schedule for the provision of grade crossing safety improvements and a cost-sharing agreement whereby Norfolk Southern shall participate in four corridor-based projects to enhance public safety at public highway-railroad grade crossing locations in Ohio. A copy of the Rail Corridor Safety Agreement (the "Agreement"), dated February 10, 1999, is enclosed.

Among the grade crossing safety improvements addressed in the Agreement are crossing upgrades for the grade crossing locations identified by the Surface Transportation Board (the "Board") in Condition 8(A) of Appendix Q to the Board's Decision No. 89 in the above-referenced docket for Norfolk Southern rail line segments N-071, N-073, N-079 and N-083. The Board identified a total of nine public highway/ rail at-grade crossings on those Norfolk Southern rail line segments that were determined to warrant crossing upgrades. Norfolk Southern has already completed the required grade crossing upgrade to flashing lights at the Galion-Marseilles public highway/ rail at-grade crossing in Marion, Ohio (FRA ID 481546M; rail segment N-073); certification of the completion of this upgrade was included in Norfolk Southern's quarterly certification report on Condition 8(A) submitted to the Board on November 19, 1998. The required grade crossing upgrades for the remaining eight public highway/ rail at-grade crossings are each provided for in the Agreement.

Secretary Vernon A. Williams
February 17, 1999
Page 2

As indicated in the recitals in the Agreement, ORDC and PICO concur that the Agreement satisfies Norfolk Southern's obligations created under Conditions 8(A) and 8(B) of Appendix Q of Decision No. 89 with respect to the provision of grade crossing safety upgrades in Ohio. In accordance with Condition 8(A), Norfolk Southern will include the grade crossing upgrades for the eight Norfolk Southern grade crossing locations in Ohio in its quarterly certification reports to the Board upon their completion.

Sincerely,



Bruno Maestri

cc: Ms. Elaine K. Kaiser

RAILROAD CORRIDOR **SAFETY AGREEMENT**

This Railroad Corridor Safety Agreement (Agreement) is entered into by and among Norfolk Southern Railway Company (NSR), the Ohio Rail Development Commission (ORDC) and the Public Utilities Commission of Ohio (PUCO) and is intended to facilitate the grade crossing safety improvements outlined herein.

RECITALS

WHEREAS, many of Ohio's public grade crossings are currently equipped only with crossbuck signage or with flashing warning lights;

WHEREAS, the PUCO has statutory authority to regulate to promote the welfare and safety of railroad employees and the traveling public pursuant to Ohio Revised Code 4905.04;

WHEREAS, the PUCO is responsible for evaluating public highway-railroad grade crossings to determine the need for installation and/or upgrade of active warning devices, and apportioning the costs thereof, pursuant to Ohio Revised Code 4907.471;

WHEREAS, the Federal Aid Highway Safety Act of 1973 and the Transportation Equity Act for the 21st Century, and subsequent amendments thereto, provide funding for the cost of safety upgrades to eliminate hazards at public grade crossings, which funding is jointly administered by the PUCO and ORDC pursuant to Ohio Revised Code Section 4907.476;

WHEREAS, the parties hereto propose to facilitate the improvements identified in this Agreement in accordance with the Federal Aid Policy Guide (FAPG) and applicable provisions of Title 23 of the United States Code pursuant to the terms hereof;

WHEREAS, CSX Corporation and CSX Transportation, Inc., Norfolk Southern Corporation, and Norfolk Southern Railway Company jointly filed before the Surface Transportation Board in Finance Docket No. 33388 an application to gain control and operation of Conrail's rail transportation system (the STB case) and have been granted approval by order of the STB dated July 20, 1998;

WHEREAS, NSR, PUCO, and the ORDC jointly recognize that NSR's obligations under this Agreement are intended to address the obligations created under conditions 8(A) and 8(B) of Appendix Q of the STB's July 20, 1998 order;

WHEREAS, NSR has identified four rail corridors (the Corridors) that will require expansion of the existing transportation system to accommodate a redistrib-

bution and, in some cases, a greater volume of train traffic that is expected to result from the STB case;

WHEREAS, NSR, PUCO, and the ORDC jointly desire to address heightened grade crossing safety concerns along the Corridor routes as a result of expected changes in operations;

WHEREAS, NSR, PUCO, and the ORDC wish to jointly share in the costs of enhancing public safety at Corridor grade crossings;

WHEREAS, this Agreement is the product of extensive negotiations by and among NSR, PUCO, and the ORDC to promote grade crossing safety within Ohio;

NOW THEREFORE, NSR, PUCO, and the ORDC agree as follows:

I. CORRIDOR CROSSINGS

A. Determination of Four Key Corridors

The Corridor public highway-railroad grade crossing locations subject to this agreement are those identified on Schedule A (Lakewood), Schedule B (Lake-Ashtabula), Schedule C (Columbus-Bellevue), and Schedule D (Bellevue-Oak Harbor) attached hereto. This list may be modified by written agreement of the parties. Corridor crossings listed on the Schedules will be identified for installation or modernization of active warning devices in the form of crossing gates and flashing lights to provide appropriate warning of approaching train traffic for the traveling public. PUCO/ORDC agree to compensate NSR for the cost of installing such active warning devices pursuant to the terms of this Agreement.

Additionally, PUCO/ORDC and NSR have identified crossings, listed on Schedule E, that require further study to determine the feasibility of their closure to vehicular traffic. PUCO/ORDC agree to work with NSR, and the affected local communities to explore the closure option. In the event that closure agreements cannot be negotiated with the local communities, PUCO/ORDC shall undertake an engineering analysis to determine if installation of lights and gates are appropriate at these locations. If PUCO/ORDC determines such installations are appropriate, NSR agrees to participate under the terms provided in this Agreement.

B. Remaining Crossings Addressed under Appendix O, Condition 8(A) for Ohio

The Surface Transportation Board identified four additional public highway-railroad grade crossing locations in Ohio that they determined warranted safety mitigation. These particular crossings are not included in the Schedules of Crossings (A through E) referenced in Section I-A above. These crossings will be handled as follows:

<u>Crossing Name, City</u>	<u>FRA ID</u>	<u>Rail Line</u>	<u>Action</u>
Hopley, Bucyrus	481561P	N-073	Circuitry will be evaluated and an assessment of potential use of median barriers or four quadrant gates conducted; this will be handled in conjunction with and on the same cost basis ("actual cost") as locations on the Columbus to Bellevue Corridor (Schedule C) identified in Section I-A, above.
Kilbourne, Bellevue	473668W	N-079	Circuitry will be evaluated and an assessment of potential use of median barriers or four quadrant gates conducted; this will be handled in conjunction with and on the same cost basis ("actual cost") as locations on the Bellevue to Oak Harbor Corridor (Schedule D) identified in Section I-A, above.
Bradshar, Sandusky	481659T	N-085	Lights and gates to be installed after evaluation and approval by PUCO/ORDC; allocation of cost is as described in Section II-A, below.
Skadden, Sandusky	481660M	N-085	Lights and gates to be installed after evaluation and approval by PUCO/ORDC; allocation of cost is as described in Section II-A, below.

The completion date for these locations shall be August 22, 1999 as provided by the terms of the STB Order.

II. COSTS OF GRADE CROSSING SAFETY UPGRADES

A. Costs

PUCO/ORDC and NSR agree that the Federal Accident Prediction Formula utilized by the PUCO to prioritize public grade crossings for federally-funded safety upgrades, constitutes an appropriate mechanism, for purposes of this Agreement, upon which to allocate the costs, as between NSR and PUCO/ORDC, of all safety upgrades identified on Schedules A, C and D, and for those crossings identified in Section I-B, above. All costs incurred to construct and complete installation of active warning devices at the grade crossings identified on Schedules A, C and D, whether the overall cost of such upgrades is made with reference to the previously-negotiated "Lump Sum" agreement or with regard to actual costs of the upgrades, shall be allocated as follows:

Lakewood Corridor:		
	NSR	18%
	PUCO/ORDC	82%
Columbus-Bellevue:		
	NSR	13%
	PUCO/ORDC	87%
Bellevue-Oak Harbor:		
	NSR	67%
	PUCO/ORDC	33%

The cost of crossings identified on Schedule B have been specifically federally-funded under the Transportation Equity Act for the 21st Century, and shall not be subject to cost allocation as between NSR and PUCO/ORDC. They shall, however, be subject to terms of the Lump Sum Agreement.

The costs of crossings identified in Section I-B, above, shall be allocated as follows:

Hopley, Bucyrus:

NSR	13%
PUCO/ORDC	87%

Kilbourne, Bellevue:

NSR	67%
PUCO/ORDC	33%

Bradshar and Skadden,
Sandusky:

NSR	0%
PUCO/ORDC	100%

PUCO/ORDC and NSR agree that, for purposes of calculating total reimbursement amounts, all Corridor crossings shall be divided into those subject to the "Lump Sum Agreement" No. 9028, executed June 30, 1998, and those crossings subject to actual cost reimbursements provided for in Master Agreement No. 2851, executed September 15, 1975, and designated in Schedules A, B, C and D. In accordance with the Lump Sum Agreement, PUCO/ORDC and NSR agree that the total price for each Lump Sum crossing safety improvement shall be \$77,800 for single track signal territory crossings with constant warning time circuitry, and \$94,400 for double track signal territory crossings with constant warning time circuitry. The parties acknowledge and agree that all costs of preliminary engineering are included in this amount.

PUCO/ORDC and NSR agree that the crossings identified as "Actual Cost" represent locations with special characteristics requiring greater design and/or installation costs. Such special characteristics may include, by way of example, locations in close proximity to another grade crossing such that warning device signal circuits overlap, track cross-overs, a controlled track switch, or an interlocker. Reimbursement to NSR for "Actual Cost" crossings shall reflect the actual cost of work performed. Schedules A, C and D crossings shall also be subject to the cost allocation between the parties as delineated above. All expenses related to curbing and sidewalks in the City of Lakewood, shall be billed to PUCO and reimbursed with state funds provided by PUCO.

B. Billing

NSR may bill ORDC monthly or periodically for materials and work completed. Progressive invoices may be submitted for work performed during the previous month or period showing the portion of the Lump Sum amount that is due the Railroad. NSR shall be paid the agreed upon price for each improvement upon

final acceptance by the ORDC of work performed on that improvement. A final bill shall be submitted to ORDC within ninety (90) days after completion of improvement. Upon completion of installation of warning device improvements and inspection of same by NSR, NSR shall promptly activate the warning devices for public use. NSR shall provide written notification to PUCO of the date(s) on which the Railroad inspected the warning devices and placed them into public service. A project shall be deemed completed when the grade crossing safety improvement is activated for use by the public. ORDC shall pay all invoices within thirty (30) days after receipt of a proper invoice.

C. Completion

In establishing a schedule for completion of the four Corridor projects, the parties have considered the impact upon local communities of changing traffic patterns, system acquisition-related construction activities in Ohio, anticipated schedules of rail traffic growth along each corridor and the construction deadline requirements of Section 8A of the STB Order dated July 20, 1998, authorizing the acquisition of Conrail.

Based upon these factors, the parties agree that NSR shall initiate and complete the work specified under this agreement no later than the following:

Lakewood Corridor:

Start Date	March 1, 1999
Completion Date	September 30, 1999

Lake-Ashtabula Corridor (State Line):

Start Date	May 1, 1999
Completion Date	January 31, 2000

Bellevue-Oak Harbor:

Start Date	May 1, 1999
Completion Date	July 31, 2000

Columbus-Bellevue:

Start Date	May 1, 1999
Completion Date	August 22, 2000

III. RECORDKEEPING REQUIREMENTS

NSR shall make all records, plans, correspondence and other materials associated with any safety improvement performed under this Agreement, including without limitation any documents, papers or other materials pertaining to the Railroad's costs of performing the safety improvements, available for examination and reproduction by authorized representatives of the U.S. Government, the State of

Ohio and/or their agents. All project records shall be maintained by the Railroad for three years after final acceptance of the project or three years after the resolution of any disputes that may arise as part of any project.

IV. TERMINATION

Any renewal of this Agreement is subject to the determination by PUCO/ORDC that sufficient funds and the authority to spend funds have been provided by the Ohio General Assembly to ORDC for the purposes of this agreement and to the certification of funds by the Office of Budget and Management as required by the Ohio Revised Code, Section 126.07. If PUCO/ORDC determines that sufficient funds have not been appropriated for the purposes of this Stipulation, or if the Office of Budget and Management fails to certify the availability of funds, this Railroad Corridor Safety Agreement will be terminated.

V. OHIO ETHICS LAW REQUIREMENTS

NSR represents that it is not now in violation of Ohio Revised Code 102.04 as that section is applicable to NSR and its participation in this Agreement.

VI. EQUAL EMPLOYMENT OPPORTUNITY

Pursuant to Ohio Revised Code Section 125.11, NSR agrees that it shall not discriminate, by reason of race, color, religion, sex, age, disability, national origin, or ancestry against any citizen of this state in the employment of any person qualified and available to perform the work contemplated under this Agreement. NSR further agrees that it shall not, in any manner, discriminate against, intimidate, or retaliate against any employee hired for the performance of work under this Agreement on account of race, color, religion, sex, age, disability, national origin or ancestry. NSR represents that it has a written affirmative action program, and that NSR shall include in any subcontract for work under this Agreement provisions binding the subcontractor to the obligations imposed in the preceding two sentences.

VII. DRUG FREE WORKPLACE

NSR agrees to comply with all applicable statutes and federal laws regarding a drug-free workplace. In the event that work pursuant to this Agreement will be performed on state property, NSR certifies that it will use its best efforts to assure that its employees, while working on state property, will not purchase, transfer, use or possess illegal drugs or alcohol or abuse prescription drugs in any way.

VIII. HOLD HARMLESS PROVISION

NSR covenants and agrees to indemnify and hold, the PUCO/ORDC and their agents and employees harmless from and against any loss, claim, cause of action, damages, liability (including, within limitation, strict or absolute liability in tort or by statute imposed), charge, cost or expense (including, without limitation, counsel fees to the extent permitted by law), predicated on personal injury or death, or loss of or damage to property, and arising from work negligently performed pursuant to this Agreement. In case any action involving any work covered by this Agreement is brought by or against any party or parties, said party or parties shall promptly notify the other party or parties of such action.

This Agreement does not represent any admission of liability on the part of any party hereto. If the PUCO rejects all or any part of this Agreement, any party may, in writing which shall be submitted within fifteen (15) days of the PUCO's order, elect to withdraw its consent to this Agreement, in which event this Railroad Corridor Safety Agreement shall be deemed a nullity, and shall not constitute any part of the record in this proceeding.

IX. CONSTRUCTION

This Railroad Corridor Safety Agreement shall be governed in all respects by the laws of the state of Ohio.

X. REPRESENTATIONS AND WARRANTIES

A. NSR represents and warrants that:

- (1) it has full power and authority to enter into this Agreement and to carry out its obligations hereunder; and,
- (2) that all representations made in this Agreement are true and accurate.

B. PUCO/ORDC represents and warrants that it has full power and authority to enter into and fully perform its obligations under this Agreement.

The undersigned respectfully join in recommending that the PUCO issue an Order approving and adopting this Agreement in accordance with the terms set forth herein.

This Railroad Corridor Safety Agreement may be executed in one or more counterparts, each of which shall be deemed to be a duplicate original, but all of which taken together shall be deemed to constitute a single Agreement. This Agreement shall become effective upon its adoption by the PUCO.

**NORFOLK SOUTHERN RAILWAY
COMPANY**

By _____

(PRINT NAME)

Title _____

Date _____

**PUBLIC UTILITIES COMMISSION
OF OHIO**

By _____

(PRINT NAME)

Title _____

Date _____

OHIO RAIL DEVELOPMENT COMMISSION

By _____

(PRINT NAME)

Title _____

Date _____

This Railroad Corridor Safety Agreement may be executed in one or more counterparts, each of which shall be deemed to be a duplicate original, but all of which taken together shall be deemed to constitute a single Agreement. This Agreement shall become effective upon its adoption by the PUCO.

NORFOLK SOUTHERN RAILWAY
COMPANY

By Bauno Mastri

BAUNO MASTRI

(PRINT NAME)

Title AVP - Public Affairs

Date 2-10-99

PUBLIC UTILITIES COMMISSION
OF OHIO

By _____

(PRINT NAME)

Title _____

Date _____

OHIO RAIL DEVELOPMENT COMMISSION

By _____

(PRINT NAME)

Title _____

Date _____

This Railroad Corridor Safety Agreement may be executed in one or more counterparts, each of which shall be deemed to be a duplicate original, but all of which taken together shall be deemed to constitute a single Agreement. This Agreement shall become effective upon its adoption by the PUCO.

**NORFOLK SOUTHERN RAILWAY
COMPANY**

By _____

(PRINT NAME)

Title _____

Date _____

**PUBLIC UTILITIES COMMISSION
OF OHIO**By Alfred P. CagleALFRED P. AGLER

(PRINT NAME)

Title DIR. TRANS. DEPT.Date 2/10/99**OHIO RAIL DEVELOPMENT COMMISSION**By Thomas M. O'LearyThomas M. O'Leary

(PRINT NAME)

Title Executive DirectorDate 2-10-99

Schedule A
Lakewood Corridor

Crossing	County	City	Street Name	Cost Factor
472188G	Cuyahoga	Cleveland	West 111 Street	(Lump Sum)
472190H	Cuyahoga	Cleveland	West 114 Street	(Lump Sum)
472191P	Cuyahoga	Cleveland	West 116 Street	(Lump Sum)
472195S	Cuyahoga	Lakewood	Fry Avenue	(Lump Sum)
472196Y	Cuyahoga	Lakewood	Beach Avenue	(Lump Sum)
472198M	Cuyahoga	Lakewood	Thorsau Avenue	(At Cost)
472199U	Cuyahoga	Lakewood	Nicholson Avenue	(Lump Sum)
472202A	Cuyahoga	Lakewood	Manor Park	(At Cost)
472203G	Cuyahoga	Lakewood	Marlowe Avenue	(Lump Sum)
472205V	Cuyahoga	Lakewood	St. Charles Avenue	(At Cost)
472208R	Cuyahoga	Lakewood	Gladys Avenue	(At Cost)
472210S	Cuyahoga	Lakewood	Lakeland Avenue	(Lump Sum)
472211Y	Cuyahoga	Lakewood	Summit Avenue	(Lump Sum)
472212F	Cuyahoga	Lakewood	Brockley Avenue	(At Cost)
472213M	Cuyahoga	Lakewood	Cranford Avenue	(Lump Sum)
472214U	Cuyahoga	Lakewood	Westlake Avenue	(At Cost)
472215B	Cuyahoga	Lakewood	Hall Avenue	(Lump Sum)
472216H	Cuyahoga	Lakewood	Ethel Avenue	(Lump Sum)
472218W	Cuyahoga	Lakewood	Bonnieview Avenue	(Lump Sum)
472219D	Cuyahoga	Lakewood	Granger Avenue	(Lump Sum)
472230D	Cuyahoga	Lakewood	Webb Road	(At Cost)

Schedule B
Lake-Ashtabula Corridor

Crossing	County	City	Street Name	Cost Factor
471951A	Ashtabula	Conneaut	Thompson Road	(At Cost)
471952G	Ashtabula	Conneaut	Woodworth Road	(At Cost)
471980K	Ashtabula	Ashtabula	Dwight Avenue	(At Cost)
471988B	Ashtabula	Ashtabula	Jefferson Avenue	(At Cost)
471991X	Ashtabula	Ashtabula	Samuel Avenue	(Lump Sum)
471993L	Ashtabula	Ashtabula	Sanborn Road	(At Cost)
471993V	Ashtabula	Saybrook	Depot Road	(Lump Sum)
472001J	Ashtabula	Saybrook	Brown Road	(Lump Sum)
472006N	Ashtabula	Geneva	Eagle Avenue	(At Cost)
472078E	Lake	Perry	Main Street	(At Cost)
472027L	Lake	Perry	Maple Street	(At Cost)
472031B	Lake	Painesville	Park Road	(At Cost)
472033P	Lake	Painesville	Riverside Drive	(Lump Sum)
472051M	Lake	Mentor	Maple Street	(At Cost)
472080L	Lake	Willoughby	Church Street	(Lump Sum)
472070S	Lake	Wickliffe	Depot Road	(At Cost)

Schedule C
Columbus-Bellevue Corridor

Crossing	County	City	Street Name	Cost Factor
481487M	Delaware	Delaware	Peachblow Road	(Lump Sum)
481503U	Delaware	Delaware	Perry Road	(Lump Sum)
481515N	Marion	Waldo	Prospect-Mt. Vernon Road	(Lump Sum)
481518J	Marion	Waldo	Kingle Road	(Lump Sum)
481522Y	Marion	Waldo	Newman-Cardington Road	(Lump Sum)
481547U	Marion	Marion	Tobias Road	(Lump Sum)
481548B	Marion	Marion	Moral Kirkpatrick	(Lump Sum)
481550C	Marion	Marion	County Line Road	(At Cost)
481572C	Crawford	Bucyrus	Andrews	(Lump Sum)
481575X	Crawford	Bucyrus	Brandywine	(Lump Sum)
481592N	Crawford	Chatfield	Crawford-Seneca County Line Road	(Lump Sum)
481604F	Seneca	Attica	Township Road 88	(Lump Sum)
481610J	Seneca	Bellevue	Township Road 104	(At Cost)
481614L	Seneca	Bellevue	State Route 4	(At Cost)
481626F	Seneca	Bellevue	Township Road 178	(Lump Sum)

Schedule D
Bellevue-Oak Harbor Corridor

Crossing	County	City	Street Name	Cost Factor
473663M	Huron	Bellevue	Monroe Street	(At Cost)
473671E	Sandusky	Bellevue	Copp Road	(At Cost)
473672L	Sandusky	Bellevue	Portland Road	(Lump Sum)
473673T	Sandusky	Bellevue	Riddle Road	(Lump Sum)
473678C	Sandusky	Clyde	Dogtown Road	(Lump Sum)
473684F	Sandusky	Clyde	Duane Street	(At Cost)
473686U	Sandusky	Clyde	Maple Street	(At Cost)
473688H	Sandusky	Clyde	Vine Street	(At Cost)
473688A	Sandusky	Clyde	Woodland Avenue	(Lump Sum)
473697G	Sandusky	Clyde	Spauld Road	(Lump Sum)
473698N	Sandusky	Fremont	Clepp Road	(Lump Sum)
473702B	Sandusky	Fremont	Sprang Road	(Lump Sum)
473703H	Sandusky	Fremont	State Route 19	(At Cost)
473707K	Sandusky	Fremont	Buchanan Road	(At Cost)
473716J	Sandusky	Fremont	North Street	(Lump Sum)
473726P	Sandusky	Fremont	Fangboner Road	(Lump Sum)
473720D	Sandusky	Fremont	Bookdown Road	(Lump Sum)
473731L	Sandusky	Fremont	State Route 19	(Lump Sum)
473734G	Sandusky	Oak Harbor	Overmyer Road	(Lump Sum)
473745U	Ottawa	Oak Harbor	Bloom Road	(At Cost)
473747H	Ottawa	Oak Harbor	Elmore Eastern Road	(Lump Sum)
473750R	Ottawa	Oak Harbor	Cullmun Road	(Lump Sum)
473752E	Ottawa	Oak Harbor	Portage River Road	(At Cost)
473757N	Ottawa	Oak Harbor	Ottawa Street	(At Cost)
473761D	Ottawa	Oak Harbor	Washington Street	(Lump Sum)
473765F	Ottawa	Oak Harbor	Toussaint Portage Road N.	(At Cost)
918963D	Ottawa	Oak Harbor	Toussaint Portage Road	(Lump Sum)

Schedule E
Crossings in Closure Study

Crossing	County	City	Street Name
473867P	Sandusky	Bellevue	York Street
473879J	Sandusky	Clyde	Thurn Road
473881K	Sandusky	Clyde	Durwald Drive
473883Y	Sandusky	Clyde	East Street
473891R	Sandusky	Clyde	Nelson Street
473758V	Ottawa	Oak Harbor	Oak Street
473760W	Ottawa	Oak Harbor	Walnut Street

STB

FD

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2-17-99

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193402

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THOMAS M. AUCHINCLOSS ENTERED
LEO C. FRANEY Office of the Secretary
JOHN D. HEFFNER
KEITH J. O'BRIEN
BRYCE REA, JR.
BRIAN L. TROIANO
ROBERT A. WIMBISH

FEB 17 1999

Part of
Public Record

February 17, 1999



Honorable Vernon A. Williams
Secretary
Surface Transportation Board
1945 K Street, NW
Room 711
Washington, DC 20423-0001

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

Request for 45 Day Extension for Completion
of Negotiations for Grade Crossing Improvement

Dear Secretary Williams:

The State of Ohio by and through the Ohio Attorney General, Ohio Rail Development Commission and the Public Utilities Commission of Ohio hereby requests an additional 45 days extension of the time for completion of negotiations between applicants and Ohio regarding highway/rail at grade crossing improvements as provided for in Environmental Condition 8(B). See Decision no. 89, slip op. at 389. Pursuant to a previous request the Board extended the time for completion of negotiations to February 18, 1999. See Decision No. 108 served December 17, 1998.

Since issuance of Decision No. 89 and the extension provided for in Decision No. 108 the State of Ohio has worked diligently with applicants and responsible representatives of affected Ohio communities in focusing on grade crossing improvement objectives in corridors that will be affected by the forthcoming division of Conrail routes. As a result of these continuing efforts, Ohio has concluded comprehensive corridor arrangements with Norfolk Southern Railway Company (NS) including cost sharing arrangements and mutual commitments that will assure that all relevant Ohio highway/NS rail at grade crossings identified in Condition 8A will receive safety improvements which will meet or surpass changes recommended by SEA. Similarly, Ohio

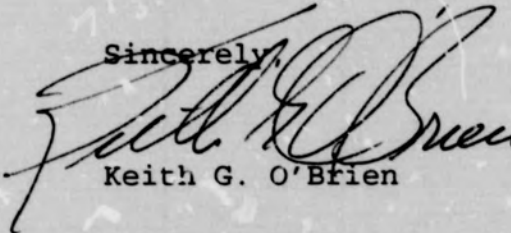
Honorable Vernon A. Williams
February 17, 1999
Page Two

has reached comprehensive agreements in principal with CSX Transportation, Inc. (CSX) that will assure that all relevant Ohio highway/CSX rail at grade crossings identified in Condition 8A will receive safety improvements which will meet or surpass changes recommended by SEA.

Ohio requests an additional extension of 45 days which is needed to formalize arrangements with CSX and to provide the Board with a comprehensive report of the constructive results that have been achieved through cooperation between applicants and Ohio in the interest of all concerned.

We are authorized to represent that applicants concur in this request.

Sincerely,

A handwritten signature in dark ink, appearing to read "Keith G. O'Brien", is written over the word "Sincerely,".

Keith G. O'Brien

cc: Richard Allen, Esq.
Dennis C. Lyons, Esq.
Ms. Elaine K. Kaiser

STB

FD

33388

2-5-99

D

193257

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JOHN H. BROADLEY

February 5, 1999

Honorable Vernon Williams
Secretary
Surface Transportation Board
Suite 700
1925 K Street NW
Washington, D.C. 20423

ENTERED
Office of the Secretary

FEB 05 1999

Part of
Public Record

Re: Finance Docket No. 33388, CSX Corporation et al. -- Control and
Operating Leases/Agreements -- Conrail, Inc. and Consolidated Rail
Corporation



Dear Mr. Williams:

Inadvertently, the two attachments referenced in the letter we sent to the Board today in connection with the captioned proceeding were not attached to the copies sent to the Board. I have enclosed a replacement original *with* attachments and a set of 25 copies of the letter *with* the attachments.

I have also sent new copies of the letter *with* the attachments to counsel listed below.

Yours very truly,

John Broadley

cc: Chairman Linda Morgan
Vice-Chairman Clyburn
Louis Mackall, Esq. (STB)
Frederick Birkholz, Esq. (CSX)
Richard A. Allen, Esq. (NS)
Karl Morell, Esq. (ISRK)
Michael McBride, Esq. (IP&L)

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JOHN H. BROADLEY

(202) 639-6010

February 5, 1999



Honorable Vernon A. Williams
Secretary, Surface Transportation Board
1925 K Street, N.W.
Suite 700
Washington, DC 20423

Re: Finance Docket No. 33388, CSX Corporation et al. -- Control and
Operating Leases/Agreements -- Conrail, Inc. and Consolidated Rail
Corporation

Dear Mr. Williams:

We have received a copy of the "**Motion to Strike Unauthorized Pleading of The Indiana Rail Road Company, And Request That The Board Do So Without Awaiting Replies To The Motion**" which Indianapolis Power & Light ("IP&L") filed on February 3. Besides being unique in contemporary jurisprudence, that motion is both unnecessary and unwarranted.¹

The subject of IP&L's motion -- our letter to you on behalf of The Indiana Rail Road Company ("INRD"), dated February 3, 1999 -- is not a pleading. As IP&L has emphasized, INRD is not a party to the captioned proceeding, a point INRD made *at length* in its letter. Nor does INRD's letter request any relief or oppose any party's request for relief. It is not a "pleading" within the meaning of F.R.Civ.P. 7(a) nor a motion or petition under F.R.Civ.P. 7(b) and the Board's comparable rules. It is simply a letter advising the Board of INRD's views on a matter of importance to INRD that has been raised with the Board by letters from Norfolk Southern and others. Such communications are clearly contemplated by 49 C.F.R. § 1102.2,

¹ The procedures proposed by IP&L clearly went out of fashion with the ratification of the Fifth Amendment, if not earlier.

which acknowledges communications volunteered by persons who are not a party, and which prohibits those communications only if they are *ex parte*. Indeed, the Board undoubtedly receives similar communications from many interested non-parties. Moreover, in view of 49 U.S.C. 11324(f), our letter would not be improper in this proceeding even if it were *ex parte*, which it clearly is not.

Similarly, there is no basis for IP&L's insistence that INRD's February 3 letter is "unauthorized." IP&L Mot. at 2. IP&L has identified no law or regulation that prohibits submission of such a letter or that requires the Board to strike it. The only regulation referenced in IP&L's motion is 49 C.F.R. § 1104.4 -- a rule relating to attestation and verification, plainly inapplicable here.² IP&L has offered no authority whatsoever for its broad claim that non-parties "ha[ve] no right to make any submission to the Board." IP&L Mot. at 1. That is not, and never has been, the law.

Moreover, granting IP&L's motion would not "protect the record in these proceedings" from any threat posed by INRD's February 3 letter. IP&L makes the plainly wrong assertion that:

... INRD has previously conducted itself as a party, notwithstanding Decision No. 93. It filed a petition for review of Decision No. 96, notwithstanding Decision No. 93.

* * *

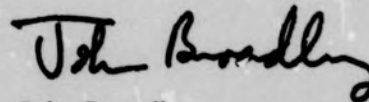
It is therefore critical to protect the record in these proceedings for the Board to strike INRD's letter, *or INRD will again pretend to have been a party to these proceedings*, file another Petition for Review, and rely on the arguments in its letter. ...

Counsel for IP&L is well aware that in its petition for review of Decision No. 96 INRD made clear to the court that INRD had *not* been a party to the proceedings before the Board, and was relying for standing on the exception to the party aggrieved requirements of 28 U.S.C. 2344 that had been sustained by the Fifth Circuit in Wales Transportation, Inc. v. Interstate Commerce Commission, 728 F.2d 774 (5th Cir. 1984). Indeed, counsel for IP&L was served with INRD's Second Circuit Form C-A in which INRD outlined *in detail* the nature of its claim for standing to seek judicial review as a non-party to the administrative proceeding. A copy of INRD's Form C-A for No. 98-4387 is attached. Moreover, in its brief in opposition to IP&L's motion to dismiss for lack of standing, INRD again outlined *in detail* the basis for its claim that the party aggrieved requirement did not apply where the Board had clearly acted in excess of its power. A copy of INRD's brief in opposition to IP&L's motion to dismiss is attached hereto.

² While 49 CFR 1104.4 is technically inapplicable, counsel for INRD represents without reservation that the letter complies with its requirements.

Finally, INPLD is totally unable to understand how its letter can "cause any delay in this proceeding. . . ." INRD does not believe the Board has jurisdiction under 49 U.S.C. 11321 et seq. to enter the type of order that NS is requesting, and if the Board enters such an order INPLD will take such actions as are necessary and proper under the law and the Constitution to protect its interests. If the Board decides that an ancillary proceeding under 49 U.S.C. 11102(a) is necessary for Norfolk Southern to secure the type of open access rights to INRD's line and Stout Plant that it has asked for, INRD is confident that the Board will commence an appropriate proceeding and direct NS to serve a proper complaint on INRD. INRD's letter simply offers its views on matters that have *already* been put before the Board by parties. IP&L's undoubtedly sincere wish to prevent the Board from hearing those views is an insufficient basis for the Board to strike INRD's letter.

Yours very truly,



John Broadley

cc: Chairman Linda Morgan
Vice-Chairman Clyburn
Louis Mackall, Esq. (STB)
Frederick Birkholz, Esq. (CSX)
Richard A. Allen, Esq. (NS)
Karl Morell, Esq. (FRR)
Michael McBride, Esq. (IP&L)

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JOHN H. BROADLEY

(202)639-6010

January 5, 1999

Clerk
United States Court of Appeals
for the Second Circuit
United States Court House
40 Foley Square
New York, New York 10007

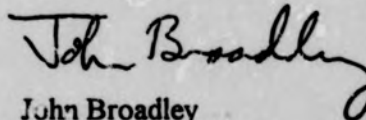
Re: No. 98-4387, The Indiana Rail Road Company v. Surface
Transportation Board and United States of America.

Dear Sir/Madam:

Enclosed please find an original and one copy of Second Circuit Form C-A for the captioned case which has been transferred from the United States Court of Appeals for the District of Columbia Circuit pursuant to 28 U.S.C. 2112.

As required by the local rules, I have served a copy to counsel for the Surface Transportation Board and counsel for the United States listed on the enclosed Form C-A. While it does not appear from the docket sheet I have received that the motions of Indianapolis Power & Light and of Norfolk Southern Corporation to intervene filed on December 22, 1998 have been granted, I have also served copies of Form C-A on counsel for those movants and on counsel for CSX Corporation and CSX Transportation, Inc.

Yours very truly,



John Broadley

Enclosure

cc: Counsel as indicated

UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

☐ APPLICATION FOR ENFORCEMENT☒ PETITION FOR REVIEW

PRE-ARGUMENT STATEMENT

SEE NOTICE ON REVERSE. PLEASE TYPE OR PRINT. ATTACH ADDITIONAL PAGES IF NECESSARY.

NAME OF AGENCY: SURFACE TRANSPORTATION BOARD AGENCY DOCKET NO.: F.D. 33388TITLE IN FULL: THE INDIANA RAIL ROAD COMPANY V. SURFACE TRANSPORTATION BOARD AND UNITED STATES OF AMERICAORDER NUMBER: 96
APPROXIMATE NO. OF PAGES IN RECORD: 10,000
JURISDICTION OF COURT OF APPEALS: 28 USC 2342DATE ENTERED: 10/19/99
NO. OF EXHIBITS: _____
USCA _____HAS THIS MATTER BEEN BEFORE THIS COURT PREVIOUSLY? ☐ Yes ☒ No IF YES, STATE:

CASE NAME: _____ CITATION: _____ DOCKET NO.: _____

ATTORNEY(S) FOR PETITIONER(S): JOHN BROADLEY, JENNER & BLOCK, 12TH FLOOR,
601 12TH ST. NW, WASHINGTON, DC 20005 202/639-6
NAME ADDRESS TELEPHONEATTORNEYS FOR RESPONDENT(S): LOUIS MACKALL, SURFACE TRANSPORTATION BOARD,
1925 K. STREET NW, WASHINGTON, DC 20423
NAME ADDRESS TELEPHONEAPPEAL TAKEN: ☒ AS OF RIGHT ☐ BY DISCRETION (SPECIFY STATUTES UNDER WHICH APPEAL IS TAKEN): 28 USC 2344
PETITIONER/APPLICANT IS ☐ AGENCY ☐ OTHER PARTY ☒ NON-PARTY. SPECIFY STANDING: SEE ATTACHEDFACTS UPON WHICH VENUE IS BASED: 28 USC 2112(a)(5)

NATURE OF ORDER ON WHICH REVIEW OR ENFORCEMENT IS SOUGHT:

☒ ADMINISTRATIVE REGULATION/RULEMAKING☐ BENEFITS REVIEW☐ UNFAIR LABOR PRACTICE:☐ ROUTES:

____ COMMUNICATIONS

____ COMMERCE

____ OTHER: (SPECIFY) RAILROAD MERGER PROCEEDING.

____ HEALTH & SAFETY

____ IMMIGRATION

____ TARIFFS

____ EMPLOYER

____ UNION

CONCISE DESCRIPTION OF PROCEEDINGS BELOW AND ORDER TO BE REVIEWED OR ENFORCED (NOTE THOSE PARTS OF THE ORDER FROM WHICH RELIEF IS SOUGHT): SEE ATTACHED

ISSUES PROPOSED TO BE RAISED ON PETITION OR APPLICATION:

RELIEF SOUGHT: ULTRA VIRES NATURE OF AGENCY ACTION
DENIAL OF DUE PROCESS

TO YOUR KNOWLEDGE, IS THERE ANY CASE NOW PENDING OR ABOUT TO BE BROUGHT BEFORE THIS COURT OR ANY OTHER COURT OR ADMINISTRATIVE AGENCY WHICH:

(A) ARISES FROM SUBSTANTIALLY THE SAME CASE OR CONTROVERSY AS THIS APPEAL? ☒ YES ☐ NO(B) INVOLVES AN ISSUE SUBSTANTIALLY THE SAME, SIMILAR, OR RELATED TO AN ISSUE IN THIS APPEAL? ☐ YES ☒ NO

(IF YES, STATE WHETHER "A" OR "B" OR BOTH AND PROVIDE:

DOCKET: 99-4285 CASE NAME: ERIE-NIAGARA RAIL V. SURFACE TRANS BOARD
COURT OR AGENCY: SURFACE TRANS BOARD CITATION: SEE SAME NUMBER: F.D. 33388
CASE

FOR PETITIONER OR APPLICANT:

THE INDIANA RAIL ROAD COMPANY, JOHN BROADLEY, JENNER & BLOCK
(PRINT) NAME OF PETITIONER NAME OF COUNSEL OF RECORD TELEPHONE 202/639-6011
1/5/99 DATE SIGNATURE OF COUNSEL OF RECORD John Broadley

Representing Respondent United States of America

John Fonte
United States Department of Justice
Antitrust Division
601 D Street NW
Washington, D.C. 20530
Tel. 202/514-2435

Standing of The Indiana Rail Road Company

In Order No. 96 issued in Finance Docket No. 33388, the Surface Transportation Board prohibited The Indiana Rail Road Company from charging Norfolk Southern Corporation (or its railroad subsidiary Norfolk Southern Railway Company) a switching fee for Norfolk Southern's use of certain property owned by The Indiana Rail Road Company. The Indiana Rail Road Company was not a party to F.D. 33388 before the Surface Transportation Board. The Surface Transportation Board has no power to issue an order binding non-parties to a merger proceeding before it under 49 U.S.C. 11321 et seq. A person against which such an *ultra vires* order is issued has standing to seek judicial review. See e.g. Edward Hines Yellow Pine Trustees v. United States, 263 U.S. 143, 147-48 (1923); Wales Transportation, Inc. v. Interstate Commerce Commission, 728 F.2d. 774, 776 n.1 (5th Cir. 1984); Schwartz v. Alleghany Corp., 282 F. Supp. 161, 163 (S.D.N.Y 1968).

Concise Description of Proceedings Below and Order to Be Reviewed

Finance Docket No. 33388 is a proceeding under 49 U.S.C. 11321 et seq. brought by CSX Corporation and its affiliated rail carrier CSX Transportation, Inc. ("CSX") and Norfolk Southern Corporation and its affiliated rail carrier Norfolk Southern Railway Company ("NS"), to approve the acquisition of Consolidated Rail Corporation by CSX and NS.

In Order No. 96 issued in that proceeding the Surface Transportation Board prohibited The Indiana Rail Road Company from charging NS a switching fee for movement of NS trains over approximately two miles of the line of The Indiana Rail Road. See Order No. 96, ordering paragraph no. 8, at p. 26. The Indiana Rail Road Company was not a party to the proceeding and the Surface Transportation Board has no power under 49 U.S.C. 11321 et seq. to compel or

prohibit actions by non-parties to the proceeding, including the prohibition involved in this case.

CERTIFICATE OF SERVICE

I hereby certify that on this 5th of January, 1999, I caused to be served a copy of the foregoing letter and attached Form C-A on counsel listed below by depositing a copy thereof, postage pre-paid, in the United States mails addressed to such counsel.

Surface Transportation Board

Louis Mackall, Esq.
Surface Transportation Board
Office of General Counsel
1925 K Street, N.W., Ste. 600
Washington, DC 20423-0001
202-565-1566

United States of America

John Fonte, Esq.
U.S. Dept of Justice
Antitrust Division
601 D Street, N.W.
Washington, DC 20530
202-514-2435

CSX Corporation and
CSX Transportation, Inc.

Bruce R. Kelly, Esq.
Arnold & Porter
399 Park Avenue
New York, NY 10022
212-715-1000

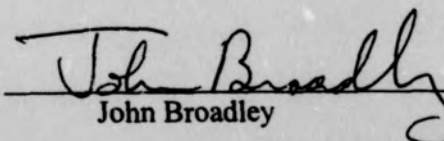
Norfolk Southern Corporation and
and Norfolk Southern Railway Co.

Richard Allison Allen, Esq.
Zuckert, Scoutt & Rasenberger
888 - 17th Street, N.W.
Washington, DC 20006
202-298-8660

Indianapolis Power & Light Co.

Michael F. McBride, Esq.
LeBoeuf, Lamb, Greene & MacRae
1875 Connecticut Avenue, N.W.
Washington, DC 20009-5728
202-986-8000

Dated: January 5, 1999


John Broadley

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JOHN H. BROADLEY

(202)639-6010

January 7, 1999

Carolyn Clark Campbell
Clerk, United States Court of Appeals
for the Second Circuit
United States Court House
40 Foley Square
New York, NY 10007

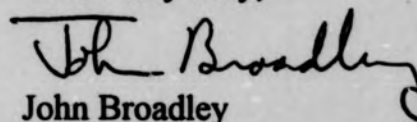
Re: Case No. 98-4387, The Indiana Rail Road Company v.
Surface Transportation Board (Consolidated with Case No.
98-4285, Erie-Niagara Rail Steering Committee v. Surface
Transportation Board)

Dear Ms. Campbell:

Enclosed for filing in the captioned proceeding, please find an original and four copies of the OPPOSITION OF THE INDIANA RAIL ROAD COMPANY TO MOTION OF INDIANAPOLIS POWER & LIGHT COMPANY TO DISMISS CASE NO. 98-4387. There is also enclosed an original and four copies of a Corporate Disclosure Statement pursuant to FRAP 26.1 for The Indiana Rail Road Company.

I have also enclosed an additional copy of each document which I would appreciate your file stamping and returning in the enclosed envelope.

Yours very truly,


John Broadley

Enclosures

IN THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

ERIE-NIAGARA RAIL)	Nos. 98-4285 (L); 98-4336 (Con);
)	98-4354 (Con); 98-4356 (Con);
v.)	98-4358 (Con); 98-4362 (Con);
)	98-4367 (Con); 98-4375 (Con);
SURFACE TRANSPORTATION BOARD)	98-4385 (Con); 98-4387 (Con)

OPPOSITION OF THE INDIANA RAIL ROAD COMPANY TO
MOTION OF INDIANAPOLIS POWER & LIGHT COMPANY
TO DISMISS CASE NO. 98-4387

INTRODUCTION

The Indiana Rail Road Company ("INRD") respectfully submits this opposition to the motion of Indianapolis Power & Light Company ("IPL") to dismiss INRD's petition for review of Decision No. 96 of the Surface Transportation Board ("STB" or "Board") in CSX Corporation and CSX Transportation, Inc., Norfolk Southern Corporation and Norfolk Southern Railway Company -- Control and Operating Leases/Agreements -- Conrail, Inc. and Consolidated Rail Corporation, STB Finance Docket No. 33388.

IPL's motion is premised on the fact that INRD was not a party to the Board proceeding in which Decision No. 96 was issued. Ordinarily, INRD's lack of party status would preclude its seeking judicial review. In Decision No. 96, however, the Board took the extraordinary step of issuing an order that prohibited INRD, **non-party** to that proceeding, from imposing a charge for certain uses the Board contemplated Norfolk Southern

would make of INRD's facilities and services. The Board took this extraordinary step notwithstanding the well settled rule that its authority under the merger provisions of the Interstate Commerce Act does not extend to the compulsory inclusion of non-consenting railroads in mergers. See e.g. St. Joe Paper Co. v. Atlantic Coast Line R. Co., 347 U.S. 298, 305 (1954) ("Congress has consistently and insistently denied the Interstate Commerce Commission the power to take the initiative in getting one railroad to turn over its properties to another railroad in return for assorted securities of the latter")¹

Because INRD is challenging the Board's authority to issue the order in question, an exception to the general standing rule applies, and INRD's lack of party status does not bar it

¹Congress has given the Board authority to require one railroad to switch cars for another (moving the cars from a point of interchange between the two railroads to an industry on the "switching" railroad's line (49 U.S.C. 11102(c)), and authority to require one railroad to grant limited rights allow another railroad to move its trains over the first railroad's lines (49 U.S.C. 11102(a)). As the Supreme Court held in the St. Joe Paper Co. case, however, the Board has no authority under the merger provisions of the Interstate Commerce Act to force a non-consenting carrier to participate in a merger. Where carriers seeking Board approval for a merger wish to force access to the lines of a non-participating and non-consenting carrier as part of their merger transaction, they must file ancillary proceedings with the Board under section 49 U.S.C. 11102 seeking authority to do so. Norfolk Southern has not sought such ancillary relief under section 11102 and the Board has not purported to grant relief under that section. Relief under either section 11102(a) or section 11102(c) is conditional on the award of appropriate compensation.

from seeking review of Decision No. 96. IPL's motion should therefore be denied.

ARGUMENT

The general rule under the Hobbs Act, 28 U.S.C. § 2344, that non-parties to the underlying proceeding may not challenge an agency's order is subject to an exception when an order is challenged as exceeding the Board's authority. See, e.g., Edward Hines Yellow Pine Trustees v. United States, 263 U.S. 143, 147-48 (1923); Wales Transportation, Inc. v. ICC, 728 F.2d 774, 776 n.1 (5th Cir. 1984); Schwartz v. Alleghany Corp., 282 F. Supp. 161, 163 (S.D.N.Y. 1968).

Some history is required to explain this exception to the general rule. Between 1913 and 1975, orders of the Interstate Commerce Commission ("ICC") were reviewed by three-judge district courts pursuant to the Urgent Deficiencies Act of 1913, with direct appeal as of right to the Supreme Court. See H. R. Rep. No. 1569, 93rd Cong., 2d Sess. 2 (1974), reprinted in 1974 U.S.C.C.A.N. 7025, 7026 [hereinafter "House Rep."]. Under the Urgent Deficiencies Act, non-parties to an agency proceeding were not barred from seeking review, so long as they had an interest that was adversely affected by the agency's order. See, e.g., Skinner & Eddy Corp. v. United States, 249 U.S. 557, 563-64 (1919); ICC v. Diffenbaugh, 222 U.S. 42, 49 (1911); Breswick & Co. v. Briggs, 130 F. Supp. 953, 956 (S.D.N.Y. 1955).

In the early 1970s Congress determined that the procedures for review of ICC orders should be reformed. The requirement of a three-judge district court put too great a burden on the lower courts, direct review as of right put too great a burden on the Supreme Court, and other procedural faults, such as the lack of a time limit for filing petitions for review, made the Urgent Deficiencies Act too unwieldy an instrument for judicial review of ICC orders. See House Rep. at 2-5. Congress therefore enacted legislation aimed at procedural reform, providing for review in the courts of appeals pursuant to the Hobbs Act, with Supreme Court review conditioned on a grant of certiorari. See Act of January 2, 1975, Pub. L. No. 93-584, 88 Stat. 1917 (codified in scattered sections of 18 U.S.C.). The statute also instituted more convenient rules relating to venue, time limitations, and the filing of the administrative record. See id.

In making these procedural improvements, however, Congress gave no indication that it intended to curtail the existing ability of non-parties to petition for review of ICC orders. See generally House Rep. Thus, the right of non-parties to challenge orders of the ICC -- at least insofar as the challenge is to the ICC's authority -- survived the 1975 legislation and has been recognized in post-1975 cases. See Wales, 728 F.2d at 776 n.1; American Trucking Associations, Inc.

v. ICC, 673 F.2d 82, 85 n.4 (5th Cir. 1982). As the ICC's successor, the STB is likewise subject to challenges to its authority by non-parties to the underlying proceeding by means of a petition for review.

In the context of the railroad industry allowing a non-party to seek judicial review when the Board has reached beyond its lawful authority makes a great deal of practical sense. The alternative to permitting appellate review when the Board has overreached its authority as it has done in this case, is for the affected carrier to refuse to comply with the order and to test the Board's order in a civil action brought by the Board under 49 U.S.C. 11702, or by the Attorney General under 49 U.S.C. 11703, or by a private person under 49 U.S.C. 11704.

Such an approach presents serious risks to the carrier -- the consequences if it is wrong could be severe, including the imposition of civil penalties (49 U.S.C. 11901) and criminal penalties (49 U.S.C. 11906). This alternative also could present serious risks of disrupting the orderly operation of the integrated national rail network which depends upon a very high degree of inter-railroad coordination which in turn depends upon compliance with a complex and pervasive regulatory structure. Forcing persons such as INRD adversely affected by a Board order issued in a proceeding to which they are not parties to impose such risks on themselves and on the rail network is was not the

type of reform Congress contemplated when it revised the judicial review provisions applicable to decisions of the Interstate Commerce Commission.

INRD attacks Decision No. 96 as exceeding the Board's authority. INRD contends that the Board exceeded its authority by prohibiting INRD, a non-party to the proceeding, from imposing switching charges for Norfolk Southern's use of INRD's facilities and services. See Decision No. 96 at 14 n.35 (attached as Exhibit 1). Although the Board has the authority under 49 U.S.C. § 11324(c) to impose requirements on CSX as a condition of CSX's acquisition of Conrail, as outlined above, it does not have the authority to impose requirements on INRD. INRD's challenge falls within the exception noted in Wales, and its petition for review is therefore proper notwithstanding its lack of party status before the agency.

Respectfully submitted,

THE INDIANA RAIL ROAD COMPANY

By:

John Broadley
One of their attorneys

John Broadley
Thomas D. Amrine
JENNER & BLOCK
601 13th Street, N.W.
12th Floor
Washington, D.C. 20005
202-639-6000

Dated: January 8, 1999

STB

FD

33388

1-28-99

D

193168



Fred R. Birkholz*
Senior Counsel

*Admitted in Iowa, Missouri,
Kentucky and Maryland.
Florida: Authorized House Counsel.
Active in Kentucky, Maryland
and Florida.

193158
ENTERED
Office of the Secretary

JAN 28 1999

Part of
Public Record

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Speed Code J-150
Jacksonville, FL 32202
Fax (904) 359-7518
Telephone (904) 359-3100
Write its direct telephone line:

(904) 359-1191



January 19, 1999

Via Fax: 202-565-9004
and U. S. Mail

The Honorable Vernon A. Williams
Secretary, Surface Transportation Board
Mercury Building, Room 700
1925 K Street, N.W.
Washington, DC 20423

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

Dear Mr. Williams:

In Decision No. 111 decided December 22, 1998, the Board
extended until January 19, 1999 the time for Applicants, ISRR and
IP&L to negotiate a mutually satisfactory solution to the
milepost 6 interchange issue referred to in Decision 89.

CSXT hereby reports to the Board that CSXT, NS and ISRR have
agreed that the NS/ISRR interchange for coal trains to IP&L's
Stout Plant will occur at Crawford Yard. In addition CSXT and NS
have agreed on the trackage rights necessary for NS to operate
from Crawford Yard to the connection with the INRD track serving
the Stout Plant. CSXT has been informed that the INRD has had
discussions with NS, but has not yet reached agreement with NS
regarding NS access to the Stout Plant. The Board will recall
that INRD, a carrier in which CSX has a majority, but less than
100 per cent stock interest, has filed a Petition for Review of
the Board's decision in this matter.

As to coal trains to/from the IP&L Perry K Plant, CSXT and
ISRR have agreed that the interchange will occur at Crawford
Yard.

Very truly yours,

Fred R. Birkholz
Fred R. Birkholz

The Honorable Vernon A. Williams
January 19, 1999
Page 2

cc (via fax and U. S. Mail):
Richard Allen, Norfolk Southern (202-342-1608)
Michael McBride, IP&L (202-986-8143)
Karl Morell, ISRR (202-783-6947)
John Broadley, INRD (202-639-6066)

s:staffnegh\Fred\Williams19Jan99

STB FD

33388

1-20-99

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193090

183070

ARNOLD & PORTER

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WASHINGTON, D.C. 20004-1205

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DENNIS G. LYONS
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ENTERED
Office of the Secretary

January 20, 1999



NEW YORK
DENVER
LOS ANGELES
LONDON

JAN 20 1999

Part of
The Honorable Vernon A. Williams
Secretary, Surface Transportation Board
Mercury Building, Room 700
1925 K Street, N.W.
Washington, DC 20423

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On January 19, 1999, Jacksonville, Florida counsel for CSXT transmitted a report to the Board by facsimile. A copy of that report is attached hereto. CSXT has been informed that facsimile transmissions are not acceptable in this proceeding. Accordingly CSXT hereby again files the required report through the undersigned.

CSXT hereby reports to the Board that CSXT, NS and ISRR have agreed that the NS/ISRR interchange for coal trains to IP&L's Stout Plant will occur at Crawford Yard. In addition CSXT and NS have agreed on the trackage rights necessary for NS to operate from Crawford Yard to the connection with the INRD track serving the Stout Plant. CSXT has been informed that the INRD has had discussions with NS, but has not yet reached agreement with NS regarding NS access to the Stout Plant. The Board will recall that INRD, a carrier in which CSX has a majority, but less than 100 per cent stock interest, has filed a Petition for Review of the Board's decision in this matter.

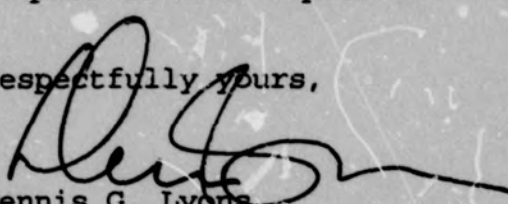
ARNOLD & PORTER

Hon. Vernon A. Williams
January 20, 1999
Page 2

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Twenty-five additional copies of this report are enclosed herewith.

Respectfully yours,



Dennis G. Lyons
Counsel for CSX Transportation, Inc.

Enclosures
via hand delivery

cc w/enclosure:

Richard A. Allen, Esq. (Norfolk Southern)
Michael McBride, Esq. (IP&L)
Karl Morell, Esq. (ISRR)
John Broadley, Esq. (INRD)



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January 19, 1999

Via Fax: 202-565-9004
and U. S. Mail

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January 20, 1999

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NEW YORK
DENVER
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The Honorable Vernon A. Williams
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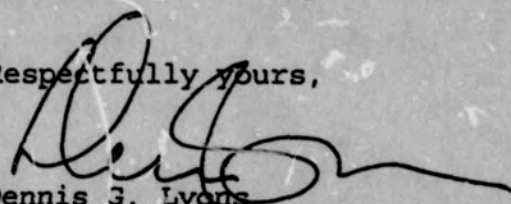
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Dennis G. Lyons
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cc w/enclosure:
Richard A. Allen, Esq. (Norfolk Southern)
Michael McBride, Esq. (IP&L)
Karl Morell, Esq. (ISRR)
John Broadley, Esq. (INRD)



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Senior Counsel

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*Admitted in Iowa, Missouri,
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the Board's decision in this matter.

As to coal trains to/from the IP&L Perry K Plant, CSXT and
ISRR have agreed that the interchange will occur at Crawford
Yard.

Very truly yours,

Fred R. Birkholz
Fred R. Birkholz

STB

FD

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ARNOLD & PORTER

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

MARY GABRIELLE SPRAGUE
(202) 942-5773

ENTERED
Office of the Secretary

(202) 942-5000
FACSIMILE: (202) 942-5000

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January 20, 1999



BY HAND DELIVERY - Original and 25 Copies

The Honorable Vernon A. Williams
Secretary, Surface Transportation Board
Mercury Building, Room 700
1925 K Street, N.W.
Washington, D.C. 20423

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

Dear Secretary Williams:

Enclosed is the Settlement Agreement Between the Four City Consortium and CSX Transportation, Inc., dated October 26, 1998. CSX and the Four City Consortium request that the Board adopt the terms of this Agreement as a condition of the Board's approval of the Conrail Transaction. Specifically, CSX and the Four City Consortium request that the Board amend Decision No. 89 by adding this Agreement to the list of Negotiated Agreements entered into by CSX set forth in Decision No. 89 at Appendix Q, Environmental Condition 51 (page 420). This Agreement supersedes Environmental Conditions 21(a)-(h), which apply only to CSX.

Environmental Condition 21(i) of Decision No. 89, as amended by Decision No. 96, applies to both CSX and NS. CSX and the Four City Consortium request that the Board amend Condition 21(i) as follows to reflect the terms of the Agreement:

The Applicants shall attend regularly scheduled meetings with representatives of the Four City Consortium for 3 years following the effective date of the Board's final decision. Representatives of the Indiana Harbor Belt railroad shall also be invited. These meetings would provide a forum for assessing traffic delay, emergency response, and driver compliance with railway grade crossing warning systems through improved education and enforcement. At each meeting, NS shall provide a status report on average train traffic volumes and speeds on rail line segment N-469. CSX shall provide the information

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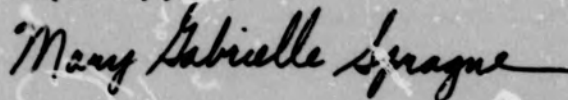
The Honorable Vernon A. Williams
January 10, 1999
Page 2

specified in its Negotiated Agreement with the Four City Consortium, dated October 26, 1998. Applicants shall report on the progress of operational and capital improvements required by the Board to address highway/rail at-grade crossing safety and delay issues in the Four City Consortium area.

This Settlement Agreement is submitted to the Board with the concurrence of the Four City Consortium, as noted below.

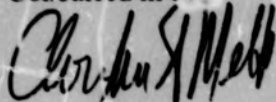
Thank you for your assistance in this matter. Please contact me (202-942-5773) or Christopher A. Mills (202-347-7170) if you have any questions.

Respectfully yours,



Mary Gabrielle Sprague
Counsel for CSX Corporation and
CSX Transportation, Inc.

Concurred in by



Christopher A. Mills
Slover & Loftus
Counsel for the Four City Consortium

Enclosure

cc: Elaine K. Kaiser

Finance Docket No. 33388
Settlement Agreement Between
the Four City Consortium and CSX Transportation, Inc.

The following is a Settlement Agreement between the Cities of East Chicago, Hammond, Gary, and Whiting, Indiana (the "Four City Consortium") and CSX Transportation, Inc. ("CSX"). It is understood that by ratifying this proposal, the parties' remaining differences over the terms and conditions of CSX operations will be resolved and the Four City Consortium will not undertake a judicial appeal of Finance Docket No. 33388. The Agreement would not, however, limit the Four City Consortium's right to petition the Board for relief during the imposed five (5) year oversight period governing the proceeding should it determine such action is necessary based upon events occurring after the execution of the Agreement.

Promptly upon execution of this Agreement, the parties will notify the Surface Transportation Board of the Settlement; the parties will provide it with a copy of this Agreement; and, the parties will request that the Board adopt its terms as a condition under its Decision approving the Conrail application.

Preamble: In the Surface Transportation Board Finance Docket 33388, Decision 80, Condition 21, the Board ordered the following mitigation measures among others to be undertaken by CSX to alleviate Acquisition-related highway/rail at-grade crossing traffic delay and safety concerns in East Chicago, Hammond, Gary, and Whiting, Indiana through operational improvements and safety measures as follows:

- a) CSX shall upgrade the highway/rail at-grade crossing signal warning systems with constant warning time circuits to reduce crossing blockage time and the likelihood of motorists driving around the gate at the highway/rail at-grade crossings listed below on the Pine Junction to Barr Yard rail line segment and the Tolleston to Clark Junction rail line segment.
- Sheffield Avenue
 - Hohman Avenue
 - Calumet Avenue
 - Columbia Avenue
 - Indianapolis Boulevard
 - Railroad Avenue
 - Kennedy Avenue
 - 5th Avenue (U.S. 20)

- b) CSX shall make Operation Lifesaver programs available to schools and other community organizations in the vicinity of the Pine Junction to Barr Yard rail line segment, Tolleston to Clark Junction rail line segment, and the Tolleston to Hobart portion of the Warsaw to Tolleston rail line segment.
- c) CSX shall upgrade the track structure and signal systems to allow 40 mph train operations, consistent with safe operating practices, between Pine Junction and Barr Yard.
- d) CSX shall install temporary notification signs or message boards consistent with Condition No. 1(B) at least 30 days before initiating new train traffic between the Tolleston and Clark Junction rail line segment and the Hobart to Tolleston portion of the Warsaw to Tolleston rail line segment. CSX shall certify to the Board that it has complied with this condition before increasing traffic on these rail line segments.
- e) CSX shall improve coordination between Pine Junction and Barr Yard at Indiana Harbor Belt Railroad interlockings where CSX rail lines cross or join, to reduce railroad congestion and blockage at highway/rail at-grade crossings to the extent practicable.
- f) CSX shall reroute train traffic as much as practicable from the Pine Junction to Barr Yard rail line segment to other rail lines in the area.
- g) CSX shall instruct its train crews not to stop trains in positions where they would block major highway/rail at-grade crossings identified by the Four City Consortium on the Pine Junction to Barr Yard rail line segment whenever practicable and consistent with safe operating practices.
- h) CSX shall work with the Four City Consortium to better coordinate train movements and emergency response. If practicable, CSX shall install a train location system by interconnecting the grade crossing warning devices to nearby traffic signals and provide a display in the local emergency response center showing the position of the grade crossing warning signals.
- i) Applicants shall attend regularly scheduled meetings with representatives of the Four City Consortium for 3 years following the effective date of the Board's final decision. Representatives of the

Indiana Harbor Belt Railroad shall also be invited. These meetings would provide a forum for assessing traffic delay, emergency response, and driver compliance with railway grade crossing warning systems through improved education and enforcement.

I. **STB Ordered Mitigation.** The parties agree to abide by all requirements outlined in the Surface Transportation Finance Docket 33388, Decision 89, as clarified in Decision 96, except to the extent that CSX and the Four City Consortium agree to modify the requirements.

II. **The Former Pennsylvania Railroad ("PRR") line between Hobart and Clarke Junction.**

A. CSX Railroad Safety Fund for Gary. CSX agrees to dedicate \$50,000 in a Railroad Safety Fund to be used for safety upgrades on the former Pennsylvania Railroad line between Hobart and Clarke Junction. The fund could be used for crossing protection upgrades, median barriers, rubberized crossings, or other safety related activities. The City of Gary shall determine how the money is spent although the funds will stay at CSX and any work will be done either by CSX or contractors working for CSX. Any upgrades relating to types of at grade warning protection devices need to first be approved by the Indiana Department of Transportation. All projects must be consistent with generally approved railroad operating practices and federal and state regulations.

III. **The Baltimore, Ohio, and Chicago Terminal Railroad ("BOCT") line between Pine Junction and Calumet Park.**

A. CSX Railroad Safety Fund for East Chicago. CSX agrees to dedicate \$50,000 in a Railroad Safety Fund to be used for safety upgrades on the Baltimore, Ohio and Chicago Terminal Railroad line between Pine Junction and Calumet Park. The fund could be used for crossing protection upgrades, median barriers, rubberized crossings, or other safety related activities. The City of East Chicago shall determine how the money is spent although the funds will stay at CSX and any work will be done either by CSX or contractors working for CSX. Any upgrades relating to the types of at-grade warning protection devices need to first be approved by the Indiana Department of Transportation. All projects must be consistent with generally approved railroad operating practices and federal and state

regulations.

- B. Hammond At-Grade Crossings. To the extent practicable and consistent with safe operating practices, CSX will ensure that its trains are operated in a fashion such that the following existing at-grade highway/rail crossings on the line are not blocked by stopped trains.

- Sheffield Avenue;
- Honnman Avenue;
- Calumet Avenue; and
- Columbia Avenue.

C. Average Daily Number of Trains

1. The CSX revised operating plan states that approximately 31.7 trains are expected to move over the LOCT line on a daily average. The parties understand that Condition 50 of the Surface Transportation Board's Decision 89, gives the parties the ability to petition the Board for relief for five years from the Board's final decision if there is a material change in the facts or circumstances (including the average daily number of trains if the Board determines that there is a material increase) upon which the Board relied in making its decision.
2. CSX agrees to cooperate with the Four City Consortium to reroute train traffic as much as practicable from the Pine Junction to Barr Yard line to the IHB line or other rail lines in the area. This shall include working with the IHB and other entities to secure necessary public funding for the cost of rehabilitating and upgrading the IHB elevated line and appropriate connections for use in the movement of through trains between Willow Creek and Calumet Park.

- D. Railroad Avenue Easement. CSX will cooperate with the City of East Chicago in developing a grade-separated truck route over the line at Railroad Avenue, including conveying to the City an appropriate easement and a monetary contribution toward the project in the amount of seven and one-half percent (7.5%) of total project costs to facilitate construction of the grade separation. The total contribution from CSX will not exceed \$187,500. In consideration of this monetary contribution, the rail crossing at Railroad Avenue will be closed upon completion of the grade separation project. CSX will

consider a higher percentage contribution in exchange for additional grade crossing closures in the City.

IV. Whiting Park. To the extent practicable and consistent with safe operating practices, CSX will ensure that its trains are operated in a fashion such that the existing at-grade highway/rail crossings at the entrance and exit to Whiting Park at 117th Street and White Oak Avenue and 119th Street and Front Avenue are not blocked simultaneously by stopped trains.

V. Review of Gary At-Grade Crossings. CSX will cooperate with the City of Gary and provide reasonable and appropriate expertise and assistance in conducting a city wide review of all CSX highway/rail at-grade crossings. This review will determine whether operational and/or structural improvements/closures are necessary to help promote highway safety and provide for the orderly, predictable, and safe movement of all vehicular, rail, and pedestrian traffic.

VI. Monthly Reports.

A. As specified in Finance Docket No. 33388, CSX shall provide the Four City Consortium with reports on a monthly basis providing the information described by the Board in Decision No. 96 pertaining to condition 21(i). However, the parties have mutually agreed to not have CSX report average train speeds and have also agreed to limit the reporting requirements on train traffic volumes to the following information:

Throughout the Board's five (5) year oversight period in Finance Docket No. 33388, CSX shall report, on a daily average basis (calculated monthly), the number of trains per day operated in both (and separately in each) direction over the following rail line segments:

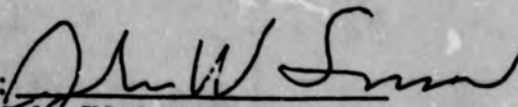
- The Pine Junction-to-State Line Tower portion of the Pine Junction-to-Barr Yard line segment (C-023);
- Tolleston-to-Clarke Junction rail line (C-024); And
- The Tolleston-to-Hobart portion of the Warsaw-to-Tolleston line segment (C-026).

B. The parties understand that the Board's condition 21(i) provides for different conditions than those agreed to in section VI (A) of this

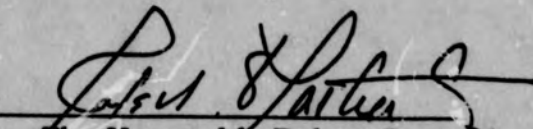
agreement. As part of this settlement agreement, the parties will advise the Board of their acceptance of this modified reporting format in lieu of that provided in Decision No. 96. The parties Agreement does not affect reporting requirements imposed on Norfolk Southern Railroad under condition 21(i).

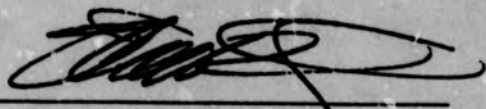
In witness whereof, the parties have caused this agreement to be executed by their duly authorized representatives on this date, October 26, 1998.

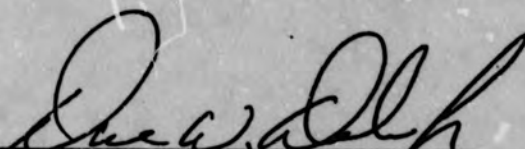
CSX Transportation

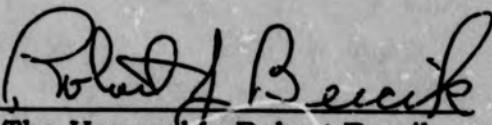
By: 
John W. Snow
Chairman, CEO, and President, CSX Corporation

The Four Cities Consortium

By: 
The Honorable Robert Pastrek
Mayor, City of East Chicago, Indiana

By: 
The Honorable Scott King
Mayor, City of Gary, Indiana

By: 
The Honorable Duane Dedelow
Mayor, City of Hammond, Indiana

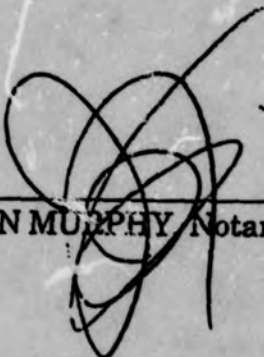
By: 
The Honorable Robert Bercik
Mayor, City of Whiting, Indiana

STATE OF INDIANA)
)
COUNTY OF LAKE)

VERIFICATION

I, J. Justin Murphy, a Notary Public in and for the above-mentioned state and county, hereby declare that on the 26th day of October, 1998, John W. Snow, Chairman, CEO, and President of CSX Corporation, The Honorable Robert Pastrick, Mayor of the City of East Chicago, Indiana, The Honorable Scott King, Mayor of the City of Gary, Indiana, and The Honorable Robert Bercik, Mayor of the City of Whiting, Indiana, personally appeared before me and executed the foregoing Settlement Agreement between CSX Corporation and the Four Cities Consortium.

I further verify that The Honorable Duane Dedelow, Mayor of the City of Hammond, Indiana, did also appear before me and execute in my presence the Settlement Agreement between CSX Corporation and the Four Cities Consortium on the 28th day of October, 1998.



J. JUSTIN MURPHY, Notary Public

My Commission Expires: November 13, 2001

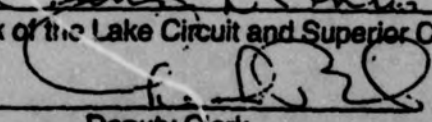
My County of Residence: Lake

CERTIFICATION OF CLERK

As legal custodian I hereby certify that the above and foregoing is a true and complete copy of the original on file with this office in the cause stated thereon.

Witness my hand and the seal of the court this
28 day of October 1998.

Clerk of the Lake Circuit and Superior Courts

By: 
Deputy Clerk

STB FD

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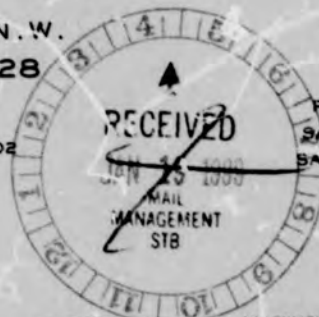
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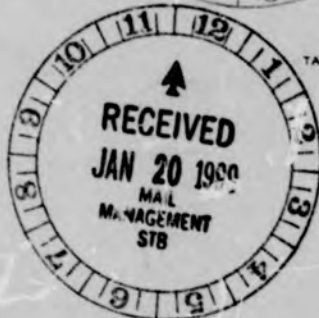
TELEX: 440274 FACSIMILE: (202) 986-8102

WRITER'S DIRECT DIAL:
(202) 986-8050

January 19, 1999



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MULTINATIONAL PARTNERSHIP)
SAO PAULO
IN ASSOCIATION WITH
TAVARES, FERREIRO, ADVOGADOS



D

VIA HAND DELIVERY

The Honorable Vernon A. Williams
Secretary, Surface Transportation Board
1925 K Street, N.W., 7th Floor
Washington, D.C. 20423

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

Dear Secretary Williams:

Indianapolis Power & Light Company ("IPL") hereby responds to the Board's orders, in Decision Nos. 96 and 111, that IPL, NS, CSX, and Indiana Southern Railroad Company ("ISRR") meet and attempt to agree on the circumstances pertaining to the transportation of ISRR-origin coal to IPL's Stout Plant. IPL has met with NS and talked to ISRR. However, CSX has not included IPL in meetings it has held to resolve this matter, but has included its 89-percent owned subsidiary, The Indiana Rail Road ("INRD"), in those meetings, even though CSX controls INRD (Decision No. 96 at 2) and even though the Board made clear that IPL was to be part of such discussions.

As of the time this letter is being submitted, IPL understands the parties' positions to be as represented herein. However, it is possible that positions may change and yet IPL would be unaware of that change, and thus could not reflect the change in this simultaneous filing. Given that uncertainty, IPL intends to file a motion to clarify or modify Decision Nos. 89 and 96, and to raise in that motion the matters left open in Decision Nos. 96 and 111, as promptly as possible after it is certain of the other parties' positions.

IPL's position, and its understanding of the other parties' positions, are as follows:

1. The parties now agree that Crawford Yard, and not Milepost 6.0, is the appropriate place to interchange ISRR-origin trains destined for the Stout Plant, if interchange is necessary. This is not surprising, because despite CSX's litigation position after IPL sought clarification of Decision No. 87 (which was deferred in part in Decision No. 96), **CSX earlier admitted that Crawford Yard was the appropriate interchange point for ISRR-origin trains.** See CSX-152, filed June 1, 1998 (joint offer of CSX and INRD to quote IPL a rate for ISRR-origin coal, to be interchanged at Crawford Yard). However, the mere agreement to interchange at Crawford Yard does not resolve this problem, for several reasons.

2. For one thing, CSX insists that the "interchange" it will permit at Crawford Yard will be "headlight to headlight." NS and ISRR have both informed IPL that CSX's insistence on such a train "meet" will be very inefficient.

3. Moreover, NS has now informed IPL that it cannot efficiently or effectively compete with The Indiana Rail Road Company, CSX's 89-percent-owned subsidiary, for ISRR-origin coal deliveries to the Stout Plant. This is because NS would have to send locomotives and a crew from Lafayette or Muncie -- a one-way distance of at least 60 miles -- to haul IPL's train less than 10 miles. At the present time, as the Board knows, Conrail performs this service, and is able to do so relatively efficiently and effectively because of its physical presence in Indianapolis. As a result of the transaction between CSX and NS that the Board has approved, after the Conrail "split" NS will not have a presence closer than 60 miles from Indianapolis, and thus the proposed arrangement to have NS interchange ISRR-origin coal cannot be workable, **according to what both NS and ISRR have told IPL.** NS would travel over 120 roundtrip miles with crew and engines to move IPL's empty and loaded trains less than 20 roundtrip miles. This is contrary to the Board's intention in providing this relief to IPL, for as the Board said in Decision No. 96 (at 14): "It was our intent in imposing relief at the Stout plant . . . to ensure efficient and competitive service, including service from coal origins on ISRR." Accordingly, as to interchange for coal deliveries from southern Indiana (e.g., ISRR), **the Board should make clear that NS shall assign those rights to ISRR to carry out the Board's intent,** while allowing NS to retain the rights should IPL in the future seek to bring coal to the Stout Plant from the western or eastern states (where NS could act as a long-haul carrier and has confirmed to IPL that it would have sufficient economic incentive to participate in the transportation). NS has told IPL it is reluctant to ask the Board for such clarification, but had no objection to IPL doing so.

4. A serious situation has also developed with INRD. Despite the fact that CSX told the Board that it "accepts the Board's conditions as set forth in Ordering Paragraph #25 of Decision No. 89" (CSX-163 at 3 n.1, filed August 27, 1998), INRD apparently told NS and CSX, at a meeting to which IPL and ISRR were not invited despite the Board's orders, that it would not sign any trackage rights agreement to allow any other railroad to come over its tracks, notwithstanding the Board's orders, on the ground that it is not a party to this proceeding! Moreover, in the Second Circuit, where INRD is attempting to be allowed to seek review of Decision No. 96, despite the fact that it was not a party to this proceeding, INRD actually has asserted, in response to IPL's motion to dismiss, that, if it were not to be a party, it might have to defy the Board's orders and risk contempt in order to challenge them. "Opposition of The Indiana Rail Road Company to Motion of Indianapolis Power & Light Company to Dismiss Case No. 98-4387," served January 7, 1999 (at 5-6). The Board has ample authority to require INRD, through CSX or directly, to compel INRD to comply with its orders, notwithstanding INRD's non-party status. Southern Pac. Trans. Co. v. ICC, 736 F.2d 703, 722-24 (D.C. Cir. 1984); 49 U.S.C. § 11102. INRD's contumacious behavior must not be countenanced.

5. Lastly, in Decision No. 111 the Board invited IPL to re-raise its related concern that Conrail Tariff No. 4611 (governing ISRR-origin coal) has an expiration date in February 1999, although the "split date" is now set for March 1, 1999. (There are reports that the "split date" may be again postponed which, if true, further increases IPL's need for relief on the tariff issue.) IPL is entitled to a rate for ISRR-origin coal, and among the reasons this is a pressing issue is because CSX (and INRD) have created obstacles to a resolution of the matter of direct access by a competing carrier to the Stout Plant, notwithstanding CSX's concession (in CSX-163 at 3 n.1) that it "accepts the Board's conditions" concerning that direct access. IPL is not to blame for this impasse, for it cannot compel (a) CSX to be reasonable about interchange at the Crawford Yard, (b) NS to have a presence in Indianapolis, or (c) INRD to do what the Board ordered be done. Accordingly, IPL hereby requests that the Board promptly order Conrail to eliminate the expiration date in Conrail Tariff No. 4611. In that fashion, IPL would have enough time to negotiate a new rate with ISRR (and perhaps NS, if it remains the delivering carrier to Stout) while it has in place a rate in common carrier service (to which it unquestionably is entitled).

Also, IPL would ask the Board to consider promptly inviting all involved parties to an informal meeting with one or more members of the Board, or before an Administrative Law

The Honorable Vernon A. Williams
January 19, 1999
Page 4

Judge designated for these purposes, to determine whether the Board's good offices might expedite the resolution of these issues, so that IPL, like all other shippers who were entitled to relief in this proceeding, has time to negotiate its necessary transportation arrangements without delay or disruption. Such an approach is consistent with the Board's preference for private-sector solutions, a preference that IPL shares with the Board.

IPL appreciates the Board's attention to these matters, and regrets the necessity to further involve the Board in them. (We are only serving the counsel listed below, as we did with our December 18, 1998 letter, because this is only a local issue.)

Respectfully submitted,

Michael F. McBride

Michael F. McBride
Brenda Durham

Attorney for Indianapolis Power & Light
Company

cc: Richard A. Allen, Esq.
George A. Aspatore, Esq.
Fred E. Birkholz, Esq.
Dennis G. Lyons, Esq.
Karl Morell, Esq.

**UNITED STATES OF AMERICA
DEPARTMENT OF TRANSPORTATION
SURFACE TRANSPORTATION BOARD**

Finance Docket No. 33388

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

AFFIDAVIT OF MICHAEL A. WEAVER

1. My name is Michael A. Weaver. I am Manager of the Fuel Supply Organization of Indianapolis Power & Light Company ("IPL"), headquartered in Indianapolis, Indiana. I am the same Michael A. Weaver that testified in IP&L-3 at Exhibit 1, Supplemental Comments, Evidence, and Request for Conditions of Indianapolis Power & Light Company and in ISRR-9, the Rebuttal of Indiana Southern Railroad, Inc. ("ISRR") in this proceeding. In the interests of brevity, I refer the Board to those filings. I have a Doctorate in Jurisprudence as well as Masters Degrees in Mining Engineering and Business Administration.

BACKGROUND

2. After Decision No. 89, IPL timely petitioned the Board for clarification or modification of the new interchange that was to be created at Milepost ("MP 6.0") explaining that there is no interchange point at MP 6.0, nor could one occur there. (The Justice Department was simply incorrect, because ISRR's ownership interest changes at MP 6.0. IPL and ISRR illustrated the interchange on the "schematic" diagrams accompanying Witness

Crowley's testimony in IPL-3 and ISRR-9.) We explained that ISRR-origin trains historically interchanged with Conrail at the Crawford Yard or "Transfer" Yard. See IPL-15 at 2. As the Board is aware, ISRR also petitioned the Board with regard to the MP 6.0 issue. See ISRR-11.

3. Thereafter, in Decision No. 96, the Board required NS, CSX, ISRR, and IPL to negotiate a mutually satisfactory solution to the MP 6.0 interchange problem and report to it by December 18, 1998. See Decision No. 96 at 14 and 26. (The Board's order in Decision No. 93 was not limited to only a determination of the appropriate interchange point, but also appropriately called for a solution to "any related problems that may be necessarily incidental to a MP 6.0 interchange problem." Id. at 26.) In granting relief to IPL, the Board further explained that "it was [its] intent in imposing relief at the Stout plant, including an interchange at milepost 6, to ensure efficient and competitive service, including service from coal origins on ISRR." Decision No. 96 at 14.

4. On December 12, 1998, IPL reported to the Board that it had not had any discussions with CSX despite IPL's communications to CSX. In Decision No. 111, the Board extended the negotiation period to January 19, 1999.

SUBSEQUENT EVENTS

5. On January 6, 1999, IPL's counsel sent a letter to counsel for CSX, NS, and ISRR informing them that IPL had not yet received a proposal from any of them concerning MP 6.0 issues. In that letter, we requested that the counsel inform their respective clients that IPL wished to resolve the matter expeditiously and was willing to meet with their clients as soon as possible.

6. On January 7, 1999, Mr. John Moon, Manager Corporate Development for NS, met with IPL to discuss service to the Stout Plant. Mr. Moon told IPL that in order for NS to serve IPL's Stout Plant, NS would have to bring its locomotives and crews from Muncie or

Lafayette, Indiana (a one-way distance of at least 60 miles) in order to interchange with ISRR-origin coal and move the coal train less than 10 miles. Mr. Moon explained that while it was operationally possible for NS to send a crew and locomotives such a long distance to serve IPL, NS would necessarily incur significant costs in doing so which would be much higher than Conrail now incurs with a local crew and engines. As a result, Mr. Moon informed IPL that although NS was willing to quote IPL a rate for ISRR-origin coal to the Stout Plant, it would not be able to quote a rate equal to or even close to the existing Conrail rate to the Stout Plant. NS admitted that it would not be able to effectively compete with INRD for transportation of ISRR-origin coal to the Stout Plant.

7. IPL also later learned from Mr. Moon (after he met with CSX and its 89-percent owned subsidiary INRD the next day on January 8, 1999) that CSX finally agreed that the appropriate interchange point is the Crawford Yard. (This is consistent with an offer made to IPL by CSX and INRD on April 21, 1998 (CSX-152) which stated that interchange would occur at the **Crawford Yard** for ISRR-origin coal, but not with CSX-165, where CSX argued that Crawford Yard would not be an efficient interchange point.) However, we were also told that any interchange at Crawford Yard would have to be "headlight to headlight." NS and ISRR have both told us that a "headlight to headlight" interchange would be very inefficient and unnecessary. CSX has not communicated with IPL that it has agreed to interchange traffic at Crawford Yard.

8. IPL was also informed by NS that, during NS' January 8, 1999 meeting with CSX and INRD, INRD stated that, notwithstanding the Board's orders granting NS trackage rights in this proceeding, INRD would not allow another railroad to use its line and that it would not sign any agreement granting trackage rights into the Stout Plant. Unfortunately, this may be correct, because it is consistent with IPL's last meeting with Mr. John Rickoff, Senior Vice President

Marketing and Sales from INRD, in which they made it clear that INRD would fight the Board's decision granting direct access into the Stout Plant. INRD has even suggested to the Second Circuit, where its petition for review of Decision No. 96 is pending, that IPL's motion to dismiss that petition should not be granted, because under those circumstances INRD might have to defy the Board's Order so as to be able to challenge it.

9. Apart from INRD's intransigence about another railroad's use of its line or its refusal to enter into a trackage rights agreement, which IPL understands the Board has the authority to order, it is evident that NS cannot serve the Stout Plant efficiently or competitively, from 60 miles away, for ISRR-origin coal movements from the south. (NS did say, and IPL takes it at its word, that NS could serve IPL efficiently for western or eastern coal movements over its own lines and using trackage rights over CSX, because in those instances NS would participate in a substantial part of the movement as a line-haul carrier and not experience 120 miles of "dead-heading" and possible loss of crews due to time constraints.)

10. The key to NS's inability to provide "efficient" and "competitive" service is that it does not and foreseeably will not have a presence in Indianapolis, unlike Conrail or ISRR. A local presence is necessary to maintain the service level of efficiency and competition. However, if the Board were to allow NS to assign the trackage rights it was provided by the Board insofar as they pertain to ISRR-origin coal or other coal from the south, the Board's intent could be achieved. IPL believes that NS should retain its rights for direct access to the Stout Plant for coal originating from the western or eastern states in order to preserve a similar degree of competition which existed prior to the Conrail acquisition.

11. Moreover, the Board in its wisdom in Decision No. 96 at 15, noted that rail rates to IPL's Perry K Plant could be effectively constrained by the threat of trucking coal from the

Stout Plant to Perry K. However, this is possible only if the Board retains effective competition at the Stout Plant.

12. IPL informed the Board in its December 18, 1998 letter that Conrail Tariff No. 4611 presently controls the transportation of delivery of ISRR-origin coal to the Stout Plant and will expire in February 1999. At that time, IPL requested that the Board remove the expiration date of the current tariff pending resolution of the matters concerning transportation of coal to the Stout Plant. This was to assure the continuation of service until this matter is resolved. In Decision No. 111, the Board provided that IPL could again seek relief on Conrail Tariff No. 4611 if the issues affecting this movement have not been resolved by January 19, 1999. Decision No. 111 at 1. Clearly, these issues are not resolved. IPL again requests that relief. The Board has the authority to ensure that IPL retain continuity of service for ISRR-origin coal until such time that the Board's Order can be implemented, and for a reasonable time thereafter to allow IPL to negotiate a new rate with the delivering carrier for ISRR-origin coal, whoever that may be. In light of the history of this issue, the refusal of CSX and INRD to implement the Board's Order, CSX's efforts to make IPL's alternative arrangements inefficient, and NS's conclusion that it cannot efficiently serve IPL, I believe this request to be reasonable. The elimination of the expiration date of the Conrail Tariff No. 4611 is therefore critical to the continuity of efficient and effective transportation service to IPL's Stout Plant.

FURTHER AFFIANT SAITH NOT.

Michael A. Weaver
Michael A. Weaver

Subscribed and sworn to before me
this 19 day of January, 1999.

Marilyn A. Hall
Notary Public Marilyn A. Hall

My Commission expires April 4, 2000
County of Residence: Morgan

STB

FD

33388

1-20-99

K

COUNTY

Historic
Preservation
Trust
of Lancaster County



Sehner-Ellicott-von Hess House
123 North Prince Street
Lancaster, Pennsylvania 17605
717-291-5861

CERTIFIED MAIL - RETURN RECEIPT REQUESTED

January 6, 1999

Office of the Secretary
Case Control Unit
Finance Docket No. 33388
Surface Transportation Board
1925 K. Street, NW
Washington, D.C. 20423-0001

ENVIRONMENTAL
DOCUMENT



ATTN: Elaine K. Kaiser, Environmental Project Director

SUBJECT: Freedom of Information Act Request for Draft Memorandum of Agreement -
Section 106 Compliance - Adverse Effect on Historic and Cultural Resources
re: CONRAIL's Enola Branch of the Low Grade Line, Lancaster County, PA

Dear Ms. Kaiser:

I understand that your office is reviewing a draft MOA for the subject property, which was sent to you recently by the Pennsylvania SHPO. I wrote to you on January 30, 1998, informing you that the Historic Preservation Trust of Lancaster County was an intervener in a case related to the subject property, which was then before Pennsylvania Commonwealth Court. The plaintiffs in that case have since asked the PA Supreme Court to hear an appeal of the Commonwealth Court decision. That request is pending.

Your office acknowledged my letter, recognizing the Trust as an "interested person" relative to the EIS for the proposed acquisition of CONRAIL by Norfolk Southern Railroad and CSX Railroad.

Also in my January 30, 1998 correspondence, I asked that you consider the Historic Preservation Trust of Lancaster County an "interested person" for purposes of the section 106 process in any administrative action relative to the subject property. I have been notified by Joyce Nettke, attorney for the plaintiff in this case, Friends of the Atglen-Susquehanna Trail, that she has received from your office a copy of the draft MOA. I have not received notification from your office relative to the MOA. Please send me a copy of the draft MOA so that I may comment as an interested person.

On January 12, 1998, I asked the Advisory Council on Historic Preservation and, by correspondence copies, the Keeper of the National Register of Historic Places, for a final determination of eligibility of the historic resource which is the subject of the draft MOA. In April, 1994, the PA SHPO determined that the entire property which makes up the former railroad right of way is eligible for listing in the National Register of Historic Places, a determination which the SHPO reversed on January 27, 1998 by limiting the eligibility determination to the small number of bridges. I filed an administrative complaint with the PA SHPO as a result of this latest "limited" determination on March 25, 1998. There remains a disagreement about the nature and scope of the historic resource between the interested persons in the case on one side, and the SHPO and Conrail on the other.

This disagreement has never been settled by ACHP or the Keeper, as requested. In a recent conversation with Ms. Charlene Dwinn Vaughn of the Advisory Council on Historic Preservation, I was told that your office had not responded to the ACHP's request for information on this case. Has your office begun consultation with the Advisory Council in this case?

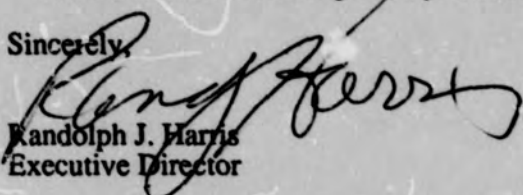
January 4, 1998

It is my understanding that the draft MOA you are reviewing considers only certain bridges along the former railroad line as eligible for National Register listing, and therefore the proposed mitigation measures are limited to those structures. This unresolved dispute about resource eligibility prohibits you from finalizing your review and approval of the draft MOA in its present form.

I request that since I gave proper notification to you regarding my status as an interested person, that if I receive a copy of the draft MOA, my review and comment period should not be limited to the normal 30 day period to which other interested persons are subject.

I look forward to hearing from you. Please call if I can answer any questions on this matter.

Sincerely,



Randolph J. Harris
Executive Director

cc: Joyce Nettie, FAST

Alan Musselman, President, Historic Preservation Trust

Brenda Barrett, Director, Bureau for Historic Preservation, PHMC

Brent Glass, PHMC

Charlene Dwinn Vaughn, ACHP

Carol Shull, Keeper of the National Register, NPS

Enclosures: HFT letter of January 12, 1998 to Ms. Vaughn, ACHP

HPT letter of January 30, 1998 to Elaine Kaiser, STB

HPT letter of March 25, 1998 to Dr. Brent Glass, PA SHPO

Historic
Preservation
Trust
of Lancaster County



Sehner-Ellicott-von Hess House
123 North Prince Street
Lancaster, Pennsylvania 17603
717-291-5861

COPY

January 12, 1998

Ms. Charlene Dwin Vaughn
Advisory Council on Historic Preservation
1100 Pennsylvania Avenue
Suite 809
Washington, D.C. 20004



Dear Ms. Vaughn:

SUBJECT: Request for Determination of Eligibility
Adverse Effect on Historic and Cultural Resources
Atglen-Susquehanna Branch A.K.A. Enola Low Grade Line
Formerly of the Pennsylvania Railroad, ca 1903
Lancaster and Chester County, PA
PA SHPO ER No. 89-1632-042-B
Conrail File No. MPAC-486
Pennsylvania Public Utility Commission PUC Docket No. A-00111016
Surface Transportation Board (Formerly ICC) Docket No. AB-167
(Sub-No. 1095X)

I am requesting that your office review the enclosed correspondence pursuant to CFR 800(6)(e), regarding public requests to the Council. The Historic Preservation Trust of Lancaster County is an interested person in this case, as I interpret the referenced regulations. The Trust objects to the methods being employed by Consolidated Rail Corporation, an applicant before the U.S. Surface Transportation Board, relative to the Section 106 process.

The enclosed correspondence clearly shows that the SHPO (Pennsylvania Historical and Museum Commission) revised its evaluation of the subject resource in 1994, making it more inclusive and comprehensive than an earlier 1989 analysis and evaluation. The revised evaluation was based on more extensive information made available to SHPO through site work, research, and planning analysis, performed by a qualified professional.

The applicant before the federal agency official, however, has refused to acknowledge the revised SHPO opinion that the entire railroad line, inclusive of all of the property that had been purchased, developed and, in essence, organized at about the turn of the 20th Century for use by the Pennsylvania Railroad, is eligible in total for listing in the National Register of Historic Places. Rather, Conrail has proceeded in this case, based on the 1989 determination by SHPO that only certain railroad bridges or crossings are eligible for the National Register.

COPY

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Ms. Charlene Dwin Vaughn

January 12, 1998

Conrail's involvement with the Section 106 process has been limited only to those structures identified as eligible in the early evaluations and correspondence with SHPO, and for which SHPO has made a finding of adverse effect. Please also note the enclosed October 17, 1994 letter from SHPO to Conrail, which states, in part, that Conrail should notify your office of the finding of adverse effect of "contributing structures" to the resource and to begin the consultation process. We understand that the your office to date has not been officially notified in this case.

Given these issues, I believe there is an apparent conflict or discrepancy about the scope and definition of the resource in this case. Therefore, I am requesting that your office notify the agency official and also seek a determination of eligibility regarding the resource from the Keeper of the National Register of Historic Places in the National Park Service.

Thank you for your attention to this matter. Please contact me if you have any questions.

Sincerely,

Randolph J. Harris
Executive Director

Enclosures

cc: Alan Musselman, Historic Preservation Trust

Note: copies of this letter hand-delivered to David C. Eaton, representing Conrail, and Kurt Carr, representing PHMC on January 13, 1998 at a meeting at PHMC regarding Section 106 compliance. Copies also received by the following who attended the same meeting: Julie Nettke of FAST and FAST counsel, Joyce Nettke, John Paylor and Rudy Husband of Conrail, Michael Ranck, counsel to HPT, Susan Shearer of Preservation Pennsylvania, and David DeKok, reporter, Harrisburg Patriot-News.

Historic
Preservation
Trust
of Lancaster County



Sehner-Elliott-Hess House
123 North Prince Street
Lancaster, Pennsylvania 17603
717-291-5861

COPY

January 30, 1998

Office of the Secretary
Case Control Unit
Finance Docket No. 33388
Surface Transportation Board
1925 K. Street, NW
Washington, D.C. 20423-0001

ATTN: Elaine K. Kaiser
Environmental Project Director
Environmental Filing



SUBJECT: EIS for Proposed Acquisition of CONRAIL by
Norfolk Southern Railroad and CSX Railroad
Section 106 Compliance re: CONRAIL's Enola Branch of the Low Grade Line,
Lancaster County, PA

Dear Ms. Kaiser:

Please be advised that the Historic Preservation Trust of Lancaster County is an intervenor in the suit, *FAST v. PA Public Utility Commission*, in the Commonwealth Court of Pennsylvania, No. 3003 C.D. 1997, which deals with CONRAIL's abandonment of its property in Lancaster County, PA, the former Enola Branch of the Low Grade Line of the Pennsylvania Railroad.

The Trust is also an "interested person," for purposes of the Section 106 process, in an administrative action relative to this property, which has been determined eligible, in total, for listing in the National Register of Historic Places by the PA SHPO in April, 1994.

Please consider the Trust an interested person, pursuant to Section 106 and 36 CFR Part 800, in the subject case before STB. This correspondence is to notify you of our interest in seeking compliance with the Section 106 process, and the protection of the historic and cultural resource, relative to the pending historic preservation condition placed by STB on its abandonment action regarding the subject property.

On January 12, 1998, I wrote to the Advisory Council on Historic Preservation, seeking a determination by the Keeper of the National Register of the eligibility for NR listing of the subject resource. There is an apparent conflict among the parties involved in this administration action as to the scope and content of the historic resource. Enclosed is my letter to the Advisory Council. Please also see the enclosed letter from the Curator of Transportation of the National Museum of American History, who attests to the significance of the subject railroad property.

Thank you for the opportunity to comment on this action, which will affect a resource of major historic and cultural significance. Please call if I can answer any questions on this matter.

Sincerely,

Randolph J. Harris
Executive Director

cc: Joyce Nettke
Alan Musselman
Brenda Barret

Enclosures: (including required 10 copies)

Historic
Preservation
Trust
of Lancaster County



Sehner-Ellicott-von Hess House
123 North Prince Street
Lancaster, Pennsylvania 17603
717-291-5861

COPY

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EXECUTIVE DIRECTOR
Randolph J. Harris

OFFICE MANAGER
Nancy J. Haubert

E-mail:
preservtrust@redrose.net
Internet Address:
<http://lancaster.net/~community/preservation/100faqdex.htm>

March 25, 1998

Dr. Brent Glass
Executive Director
PHMC
P.O. Box 1026
Harrisburg, PA 17108-1026

Dear Dr. Glass:

SUBJECT: Administrative Complaint - Section 106 Process
Conrail Abandonment of the Enola Branch of the former PA Railroad
Low Grade Line, Lancaster and Chester Counties, PA.
ER 89-1632-042-U

The Historic Preservation Trust is deeply concerned about the apparent lack of compliance by your staff regarding PHMC's responsibilities under Section 106 of the National Historic Preservation Act, the Act's implementing regulations at 36 CFR Part 800, and the Pennsylvania History Code, 37 Pa.C.S.

At issue are recent actions by your office relative to PHMC's statutory responsibility in the case of the abandonment of the former Enola Branch of the Pennsylvania Railroad's Low Grade Line by Consolidated Rail Corporation in Lancaster County and Chester County, PA. This railroad right of way abandonment case is a federal undertaking before the U.S. Surface Transportation Board and it is a Commonwealth action before the Pennsylvania Public Utility Commission.

Pending resolution of this complaint, and pending agreement by all interested persons of the definition and scope of the resource in question, as discussed below, we request that the consultation process be suspended in this case.

Our complaint centers on two points:

1. lack of compliance with the public involvement requirements of the federal regulation, and,
2. lack of compliance with Sections 508 and 510 of the History Code, in light of the case pending in Commonwealth Court (FAST v PUC No. 3003 C.D.1997).

We contend the PHMC has not complied with the public involvement provisions of the Section 106 process by:

- failing to respond to HPT's written requests seeking status as "interested person" and status as signator to a Memorandum of Agreement (MOA), both requests pursuant to the Regulation. (Please see footnote below). Also, HPT has not been given courtesy copies of relevant correspondence generated by your office to Conrail, as part of the Section 106 consultation process.

- negotiating the terms of a Memorandum of Agreement, and by directing your staff to develop mitigation measures, both without consultation with HPT, an organization which your staff apparently has recognized as an "interested person" in this case, pursuant to the Regulation. (see footnote below).



March 25, 1998

Dr. Brent Glass

Page 2

Similarly, it is our understanding that PHMC has not notified the Friends of the Atglen-Susquehanna Trail, FAST, of its individual request for "interested person" or MOA signator status.

HPT and FAST (a Lancaster County-based, non-profit trail development organization) both have demonstrated long-standing involvement in efforts to preserve the subject railroad right of way as an historically-interpreted hiking and biking trail. Therefore, the organizations should be considered "interested persons" and signators to a MOA, pursuant to the Regulation.

Attached are copies of the correspondence for which HPT has not received a reply or acknowledgement of receipt. They are summarized as follows:

- three letters, dated November 25, 1997, from HPT Executive Director Randolph Harris (i.e., to you, to David C. Eaton, counsel for Conrail, and to the Advisory Council on Historic Preservation) requesting that HPT be considered an "interested person" in this undertaking, as defined by the Regulation. In the same correspondence, HPT requested that it be considered a signer of a Memorandum of Agreement, should an MOA be drafted in connection with this case, since this undertaking is expected to have an adverse effect on a resource of national historic significance.

1. FOOTNOTE: While PHMC has not responded in writing to HPT's request for interested person status, that status apparently has been recognized by your staff. Through a separate request to your office, HPT was given a copy of a letter, dated December 3, 1997, from Mr. Kurt Carr of your staff to Mr. David Eaton of Conrail, which contains a vague reference to "two parties that have asked for "interested person" status in consultation for this project." The parties are not named in the letter but we presume them to be HPT and FAST. The copy of the PHMC letter to Conrail which we obtained did not include the attached correspondence by the un-named "interested persons."

- A January 12, 1998 letter Mr. Harris sent to Ms. Charlene Dwin Vaughn of the Advisory Council on Historic Preservation. This letter was sent pursuant to the regulation which recognizes public involvement in the Section 106 process when a conflict exists as to the identification of a historic resource and findings of effect on the resource by a federal undertaking. On January 13, 1998, at a meeting at your office regarding this case, Mr. Harris presented copies of this letter to Mr. David C. Eaton, counsel to Conrail, and to Mr. Kurt Carr of your staff.

In his January 12 letter to the Advisory Council, Mr. Harris describes the reluctance on the part of Conrail to accept the February 24, 1994 determination of your office that the entire property which makes up the former Low Grade Line in Chester and Lancaster Counties is eligible for listing in the National Register of Historic Places. Conrail continues to maintain that the historic resource at issue is limited to only some of the bridges determined in 1989 by PHMC as being individually eligible for National Register listing. The HPT letter of January 12 also requests that the Advisory Council intercede in this case, and that its staff contact both the STB and the Keeper of the National Register of Historic Places, in order to make a final determination on the National Register eligibility of the resource involved in this undertaking.

This letter to the Advisory Council should have provided PHMC with sufficient notice that there is a conflict concerning resource identification and finding of effect. This request to the Advisory Council, and, by extension, to the Keeper of the National Register of Historic Places, should have been sufficient grounds not to proceed with the consultation process until all parties agreed to the exact nature of the resource in question. In fact, at the January 13, 1998 meeting at your office, FAST and HPT, (both groups were represented by legal counsel), and with concurrence by a representative of Preservation Pennsylvania, Inc., stated repeatedly that no suggestions for mitigation as part of the consultation process could be offered pending a determination of the definition of the resource. Without agreement on the definition of the resource, none of the interested persons can offer meaningful suggestions as to how to mitigate an adverse effect on the resource.

These statements can be verified in the transcript of the meeting provided to your office by Mr. Eaton.

March 25, 1998

Dr. Brent Glass

Page 3

We have obtained through separate request a copy of Mr. Carr's letter of January 27, 1998 to Mr. Eaton which discusses terms of a proposed MOA. HPT did not receive a courtesy copy of this letter, and was therefore eliminated from consultation.

Review by PHMC Inconsistent With the Statute

More importantly, we find Mr. Carr's letter to be in blatant disregard for PHMC's statutory responsibility under the National Historic Preservation Act, and the Section 106 process. In his letter, Mr. Carr states that PHMC has determined that it will "adhere to our previous request" (presumed to be the 1989 determination of eligibility) and not consider the entire subject property as the historic resource in question, even though PHMC made a more inclusive determination in 1994 through the collection of more information about the significance of the resource. Rather, Mr. Carr gives Conrail direction that consultation should be limited to only the five railroad bridges which were the subject of the 1989 determination of eligibility. Further, Mr. Carr instructs Conrail about mitigation measures that are wholly inappropriate at this point in the process. Mr. Carr instructs Conrail to document the five bridges "to State Level Recordation Standards" and to contact the Railroad Museum of Pennsylvania to discuss the development of an interpretive display about the Low Grade line; i.e., because some of the bridges will be demolished, "the Enola Low Grade Line as a linear resource" will be lost and, therefore, this "significant resource" should be recorded for the public.

Not only does this PHMC directive subvert the public involvement process mandated by federal statute, it also ignores the potential for meaningful compliance with the History Code that may result from the pending case before Commonwealth Court. The opportunity for a more preservation-focused decision by PUC, if this case is remanded to PUC as requested by the appellant, could be precluded by PHMC's January 27 directives to Conrail.

It is in this inter-relationship of the court action and the Section 106 process that we believe your office is not complying with Sections 508 and 510 of the History Code. These sections provide for interagency cooperation and PHMC review, respectively. This is especially troubling since PHMC has gone on record in the PUC case as stating that the statutory responsibilities of PennDOT and PUC under the History Code have not been met regarding the abandonment of the railroad property.

Finally, we believe your staff is setting a dangerous precedent in requiring a "State level," or limited level of documentation for this nationally significant historic resource, as a mitigation against its expected demolition. Your office should require no less documentation than that which would be required by the Historic American Engineering Record of the National Park Service. Further, it also sets a dangerous precedent to ask an applicant to explore additional mitigation steps in the form of an interpretive display when the resource has not been defined and all interested persons and/or MOA signators have not discussed mitigation measures.

Again, we request that your office immediately suspend the attempts your staff has made at consultation in this case. Thank you for your attention to this matter.

Sincerely,

Alan Musselman
President

John A. Jarvis
Past President

Michael H. Kanck, Esq.
Board Member

Randolph J. Harris
Executive Director

Enclosures

cc: Janet S. Klein, Board Chair, PHMC
David Eaton, Esq.
Joyce Nettke, FAST
Hon. Terry Kauffmann
Brenda Barrett, PHMC
Kurt Carr, PHMC
Caroline Boyce, Preservation Pennsylvania
Charlene Dwin Vaughn, Advisory Council on Historic Preservation
Carol D. Shull, Keeper of the National Register, National Park Service