

STB

FD-33388

ID-182200

9-26-97

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BEFORE THE
SURFACE TRANSPORTATION BOARD

STB Finance Docket No. 33388

*CSX Corporation and CSX Transportation, Inc.
Norfolk Southern Corporation And Norfolk Railway Company
—Control And Operating Leases/Agreements—
Conrail Inc. And Consolidated Rail Corporation*

CERTIFICATE OF SERVICE OF
INLAND STEEL INDUSTRIES, INC.

In accordance with Decision No. 27, served September 8, 1997, in the above-captioned matter, Inland Steel Industries, Inc. hereby certifies that it has served on Mr. Robert J. Cooper copies of all filings it has submitted so far in this proceeding by first-class mail, postage prepaid, this 26th day of September, 1997.

Respectfully submitted,

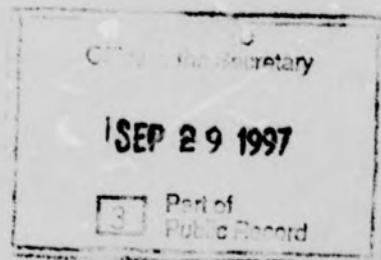
Edward C. McCarthy

Edward C. McCarthy, Esq.
Assistant General Counsel
Inland Steel Industries, Inc.
311 West Monroe St.
Chicago, IL 60603
312-899-3148

September 26, 1997



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FD-33388

ID-182205

9-26-97

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BEFORE THE
SURFACE TRANSPORTATION BOARD

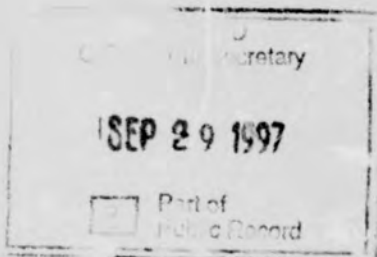
Finance Docket No. 33388

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 --
TRANSFER OF RAILROAD LINE FROM NORFOLK SOUTHERN RAILWAY COMPANY TO
CSX TRANSPORTATION, INC.

**CERTIFICATE OF SERVICE OF THE
NOTICE OF INTENT OF
THE CITY OF CINCINNATI TO
PARTICIPATE IN PROCEEDING**

I hereby certify that on this 22nd day of September, 1997 a copy of the Notice
of intent of the City of Cincinnati to Participate in Proceedings was served by first
class mail, postage prepaid upon:

Robert J. Cooper
United Transportation Union
General Committee of Adjustment, G0-348
1238 Cass Road
Maumee, OH 43537



W. Peter Heile
Fay D. Dupuis *W. Peter Heile, Deputy*
City Solicitor
City of Cincinnati
Room 214, City Hall
801 Plum Street
Cincinnati, Ohio 45202
513-352-3334

Dated: September 22nd, 1997

STB

FD-33388

ID-182207

9-26-97

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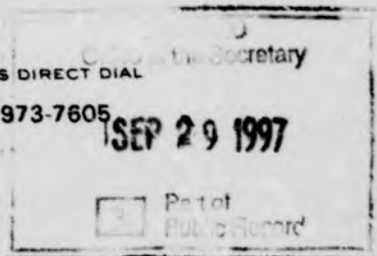
HARKINS CUNNINGHAM

ATTORNEYS AT LAW
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September 26, 1997

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Mr. Vernon A. Williams, Secretary
Surface Transportation Board
Case Control Unit
ATTN: STB Finance Docket No. 3388
1925 K Street, N.W.
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

Dear Mr. Williams:

Enclosed please find CSX/NS-85 (Applicants' Reply to Appeal of Atlantic City Electric Company, American Electric Power, Delmarva Power & Light Company, Indianapolis Power & Light Company, and the Ohio Valley Coal Company from the September 19, 1997 Order of the Presiding Judge) to be filed in the above-referenced docket.

Accompanying this letter are 25 copies of CSX/NS-81, as well as a formatted WordPerfect diskette.

Thank you for your assistance in this matter. Please contact me (202-973-7605) if you have any questions.

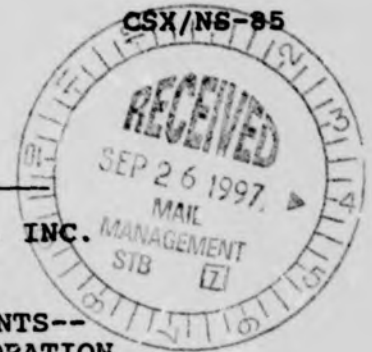
Sincerely,

Gerald P. Norton

Enclosures

BEFORE THE
SURFACE TRANSPORTATION BOARD

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

APPLICANTS' REPLY TO APPEAL OF ATLANTIC CITY
ELECTRIC COMPANY, AMERICAN ELECTRIC POWER, DELMARVA
POWER & LIGHT COMPANY, INDIANAPOLIS POWER & LIGHT
COMPANY, AND THE OHIO VALLEY COAL COMPANY FROM
THE SEPTEMBER 19, 1997 ORDER OF THE PRESIDING JUDGE

Applicants¹ hereby reply to the appeal of Atlantic City Electric Company, American Electric Power, Delmarva Power & Light Company, Indianapolis Power Light Company, and the Ohio Valley Coal Company (collectively "ACE Utilities") (ACE, et al.-14), from the September 19, 1997, Order of the Presiding Administrative Law Judge ("ALJ") insofar as it denies the motion of ACE Utilities to compel Applicants to produce all of the "masking factors" they used in reporting revenue as part of the Board's Waybill Sample program since 1978.

BACKGROUND AND SUMMARY

Applicants have already addressed the pertinent background in their appeal from the same ALJ ruling insofar as it

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

required them to produce certain masking factor information relating to shipments to ACE Utilities for certain of the years since 1978 (CSX/NS-81).² We incorporate that discussion by reference. Here, we show that the ALJ did not commit reversible error in denying ACE Utilities' motion.

The forced disclosures sought by ACE Utilities would go a long way toward reversing the long commitment of Congress, the ICC, and this Board to the value of private contracts between railroads and their customers. Central to the acknowledged success of contracting is the certainty that they are private and unregulated. This request, if granted, would begin the short, steep descent into destroying that certainty. And, for the immediate future -- it would put at risk competitively sensitive, highly confidential, deregulated rates in contracts between all shippers and rail carriers, and the masking factors used to protect them. It would thus seriously harm an important element of the Board's efforts to gather useful transportation data and protect the security of statutorily protected shipper-railroad contract rate and revenue data, without producing any offsetting value in the instant proceeding.³

²ACE Utilities' reply to that appeal (ACE et al.-15) makes essentially the same contentions as their appeal.

³It is noteworthy that when FERC made a proposal threatening the confidentiality of rates in contracts between utilities and railroads it was opposed (successfully) by not only the ICC and railroads but utilities, including members of ACE Utilities group. E.g., FERC Docket No. RM94-5-000, Comments of ICC (p. 2: lack of confidentiality "might influence the outcomes of contract negotiations, and ultimately discourage railroads and shippers from entering into contracts in contravention of the objectives

To secure production of highly confidential information, a party must make a persuasive showing of both need and substantial relevance to a significant issue in this proceeding. ACE Utilities have failed to make either showing. None of what they request is needed to resolve this proceeding and none is relevant to any legitimate issue in this proceeding. They are recycling the same arguments rejected by the Board in denying their closely related requests for discovery of highly confidential contract rate information. They are in substance asking the Board to reconsider Decision No. 17, without providing any sufficient reason for the Board to do so. For these reasons, and as more fully explained below, Applicants respectfully urge that the Board reject ACE Utilities' appeal.

THE GOVERNING STANDARD

ACE Utilities totally fail to address the standard governing the decision from which they appeal, which was clearly set forth in Decision No. 34 (at 2 n.9):

We note that the standard against which the relevance of commercially sensitive information should be judged may be well higher than the standard against which the relevance of less sensitive information should be judged. Disclosure of extraordinarily sensitive information should not be required without a careful balancing of the seeking party's need for the information, and its ability to generate comparable information from other sources, against the likelihood of harm to the disclosing party.

of the Staggers Act"); comments of American Electric Power Co. (p. 2: "need for confidentiality must be seen as increasing, rather than decreasing, in light of the more market-oriented and competition-oriented regulatory framework being imposed on electric utility companies").

Thus, they do not and cannot demonstrate that the ALJ committed a "clear error of judgment." 49 C.F.R. § 1115.1(c).

CONFIDENTIALITY AND THE PUBLIC INTEREST

ACE Utilities do not dispute that Waybill Sample masking factors are extraordinarily confidential, nor that the information about contract rates thus masked is also highly confidential.⁴ Nor can they dispute that requiring Applicants to produce the masking factor information at issue inevitably creates long-term risks about the future of contracting and immediate risks about the security and confidentiality of existing contract data. Finally, ACE Utilities do not disagree that there is an important public interest served by the Waybill Sample program that warrants maintaining strict confidentiality concerning the masking factors. None of this need be put at risk if the requested data continued to be kept entirely confidential.

ACE Utilities' only defense on this important issue is to note the existence of the protective order (ACE, et al.-14 at 5). But this ignores the fact that the governing standard set forth in Decision No. 34 applies despite the existence of that protective order, thus recognizing the out-of-the ordinary risks created by granting such a request. The Board thereby recognizes what ACE Utilities refuse to: that the best protection for

⁴Confidential information about shipper-railroad rate contracts are protected by 49 U.S.C. § 11904 against disclosure of information that may be used to the detriment of the shipper (or consignee) or would disclose a shipper's business transactions to its competitors. Thus, the statute reflects particular concern about disclosure of shipper's rates to other shippers.

highly confidential information is that it not be put in harm's way at all through forced disclosure in discovery.

THE FAILURE TO SHOW RELEVANCE

ACE Utilities' attempt to show that the masking factor information they seek is relevant rests upon erroneous premises concerning the prior decisions in this proceeding and reargument of the matters those decisions resolved.

ACE Utilities rely heavily on the proposition that, in the ALJ ruling summarized in Decision No. 11, the ALJ held that traffic tape revenue/rate information about shippers other than the ACE Utilities was relevant, but did not require it to be produced because the relevance was outweighed by the manifest burdens of searching files (ACE, et al.-14 at 3). While that may have been one rationale for the ALJ's ruling on two of the document requests, which called for massive file searches and document production, there was no comparable burden rationale for his ruling on the third request, which sought each Applicant's 100% traffic tapes since 1978. There, lack of relevance was the governing objection (9/17 Tr. 26-27).⁵ The ALJ's ruling on that request essentially confirmed that traffic data as to shippers other than the ACE Utilities themselves were not sufficiently relevant. The Board affirmed that ruling in Decision No. 17. ACE Utilities are bound by it here.

⁵Counsel for ACE Utilities conceded that the present request sought the same confidential rate data that he would have obtained if the ALJ had found the prior request for traffic tapes relevant (9/17 Tr. 26-27).

ACE Utilities seize upon the Board's reference in Decision No. 17 to the "marginal relevance" of the information that they sought (ACE, et al.-14 at 3). However, the Board did not conclude that the information was actually relevant; in context, it was merely indicating that any slight relevance it might have was insufficient to warrant production. Id. at 2. That remains the case. Moreover, in its subsequent Decision No. 32 the Board plainly stated that, in Decision No. 17, it had not affirmed that the requested information was relevant, because that issue was not before it. Decision No. 32 at 2.

ACE Utilities further suggest that the masking factors are needed in connection with their proposed analyses relating to the "one lump" theory (ACE, et al.-14 at 6). However, Decision No. 17 has rejected that argument too, and there is neither merit nor timeliness in ACE Utilities' contention that that decision was "incorrect" (ACE, et al.-14 at 4). There, the Board pointed out that ACE Utilities themselves had the best evidence on this issue and that information about rates to other shippers is insufficiently relevant to warrant production (Decision No. 17 at 3). ACE Utilities have provided no reason for the Board to reconsider that ruling.

ACE Utilities at one point suggested that all masking factors are needed to conduct an historical study of Applicants' rate practices over the years encompassing their past mergers, to shed light on how CSX and NS will proceed if the Board approves

the instant transaction (ACE, et al.-14 at 5).⁶ Again, in Decision No. 17 the Board rejected that argument in connection with ACE Utilities' request for traffic tapes for shippers other than themselves. If its rationale was insufficient to require production of the traffic tapes, it is a fortiori insufficient to require disclosure of the masking factors relating to the information on those tapes.⁷

Apparently acknowledging this fact, ACE Utilities' retrenched at the hearing before the ALJ, saying they were only interested in the masking factors with respect to coal shippers (9/17 Tr. 50). But this limitation again misses the point; it does not alter the fundamental lack of relevance of the information sought.

Finally, because ACE Utilities cannot show a substantial need for masking factors as to the time periods for which they obtained traffic data, because they have the actual

⁶This statement of relevance does not explain why the ACE Utilities request covers Conrail, whose rate practices over the past two decades will be of largely academic interest if the Application is granted.

⁷As to ACE Utilities' historical approach in general, the Board recently indicated that an analogous inquiry into the Applicants' practices following their past mergers did not warrant discovery. Decision No. 31. Indeed, ACE Utilities say that the issue here is whether an asserted acquisition premium paid by CSX and NS will lead them to raise their rates to ACE Utilities and other shippers (ACE, et al.-14 at 9), but they do not suggest that this was a factor in the past mergers so as to make them an apt basis for such a comparison. In any event, in Decision No. 17 the Board specifically ruled that the broader information ACE Utilities sought as to rates to other shippers would not "in any way aid our resolution of" issues raised by CSX's and NS's obligations to finance the transaction. Decision No. 17 at 3.

data, they focus on the so-called "missing years" in their "time line" of coal rates since 1978. But these are the very years for which the ALJ held in his July 16, ruling which the Board affirmed, that ACE Utilities had not shown sufficient relevance.⁸

In short ACE Utilities cannot show that the information requested is relevant.

THE FAILURE TO DEMONSTRATE NEED

Beyond the requirement of substantial relevance is the requirement that ACE Utilities demonstrate a sufficient need for the information requested. Again, they have made no such showing. The governing standards for the Board's decision as to approval have been frequently stated.⁹ Parties in this and other control proceedings can and regularly do conduct studies using the Waybill Sample (without disclosure of the masking factors) and the 100% traffic tape data which have been provided here. Studies based on such data are routinely relied upon in control proceedings.

In addition, ACE Utilities can conduct studies and prepare evidence based on the extensive information available to them and their consultants independent of this proceeding, or on

⁸The ALJ allowed discovery as to certain years based on ACE Utilities' own contention that they wanted to compare the particular railroad's rate practices before or after a merger. Even if it were valid, that rationale does not make relevant the rates of other railroads that did not engage in mergers during those same periods.

⁹E.g., STB Finance Docket No. 32760, Union Pac. Corp., -- Control and Merger -- Southern Pac. Corp., Slip Op. at 98-100 (served Aug. 12, 1996) (quoted in CSX/NS-81 at 12).

the voluminous discovery in this proceeding. To date there have been nearly 1600 discovery requests -- many of them from the ACE Utilities -- resulting in production of over 16,000 pages of documents as well as data tapes, and extensive depositions of 35 witnesses.

One of the needs asserted by ACE Utilities was the ability to check "discrepancies" between the waybill sample data and the 100% traffic tape data. They claimed that their consultants had identified one such discrepancy (ACE, et al.-14 at 7; ACE, et al.-15 at 3), but totally failed to explain how obtaining the masking factors would resolve that discrepancy.

ACE Utilities also fail in this regard to assert that the "need" to clear up such "discrepancies" could not be met by any other, less intrusive means. Especially in view of the exceptional sensitivity of the information sought here, it was appropriate to require ACE Utilities to identify such a possible discrepancy, ask Applicants about it, and seek ways to resolve it that are less troublesome.

Finally, ACE Utilities now offer a variation of the "discrepancy" rationale with a new argument they did not make to the ALJ, and which, in any event, is without merit. The new argument is evidently that the masking factors are "needed" because rebates and allowances are often not known at the time of the movement and hence not reflected in the waybills that underlie the 100% traffic data and the Waybill Sample. While this fact may limit -- and has always limited -- the accuracy of

waybill-based revenue data in some circumstances, it is not an argument for unmasking those data. Nor has it previously been proffered as one.

More importantly, there can be no such issue as to movements to ACE Utilities because they know their own rates, rebates and allowances. The "problem" arises only if ACE Utilities seek discovery to determine the rates of other coal shippers, which they were not allowed to do in Decision No. 17 and, Applicants submit, ought not be allowed to do now. Thus, ACE Utilities have not shown a "need" that warrants disclosure of highly confidential masking factors.

CONCLUSION

ACE Utilities asserts that the Board should consider "all possibly relevant evidence" (ACE, et al.-14 at 10). But the issue here is whether certain highly confidential information is so plainly relevant, and so plainly necessary, that it must be said the ALJ committed a "clear error of judgment" in denying its disclosure. ACE Utilities have not come close to making that showing.

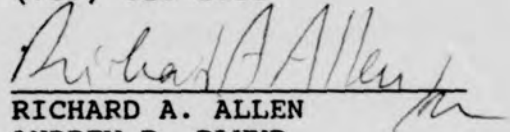
The problem with ACE Utilities' discovery program is not that Applicants are raising unwarranted objections or "obstructions" (they are not), and not that the ALJ or the Board has improperly curtailed such discovery (they have not). It is that the program is fundamentally misconceived. ACE Utilities seek to use the Board's discovery process for purposes not integral to this proceeding and not warranting the forced

disclosure of huge amounts of the most highly confidential railroad information they seek.

In sum, ACE Utilities have failed to make a sufficient case for the discovery that the ALJ denied to them. Nor have they demonstrated that the ALJ made a clear error of judgment in denying doing so.

Respectfully submitted,

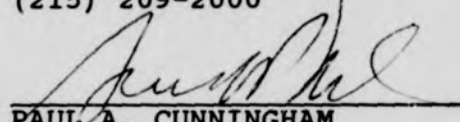
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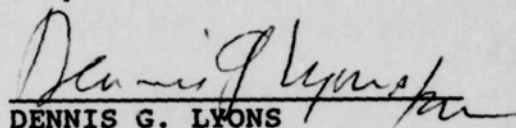
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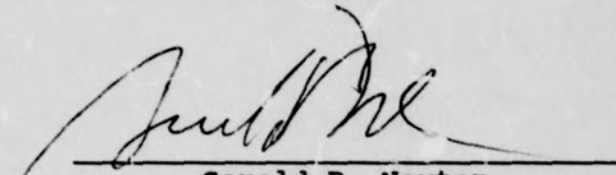
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1330 Connecticut Avenue, N.W.
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(202) 429-3000

Counsel for CSX Corporation
and CSX Transportation, Inc.

September 26, 1997

CERTIFICATE OF SERVICE

I, Gerald P. Norton, certify that, on this 26th day of September, 1997, I caused a copy of the foregoing document to be served by hand and/or facsimile on Michael F. McBride, counsel for Atlantic City Electric Company, Delmarva Power & Light Company, and The Ohio Valley Coal Company, at LeBoeuf, Lamb, Greene & MacRae L.L.P., 1875 Connecticut Avenue, N.W., Washington, D.C. 20009, and by first class mail, postage prepaid, on all parties appearing on the restricted service list established pursuant to paragraph 3 of the Discovery Guidelines in Finance Docket No. 33388.


Gerald P. Norton

STB

FD-33388

ID-182191

9-25-97

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ARNOLD & PORTER

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DENNIS G. LYONS
(202) 942-5858

NEW YORK
DENVER
LOS ANGELES
LONDON

September 25, 1997

BY HAND

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



Re: Certification of Service Pursuant to
Decision No. 27 in Finance Docket No. 33388

Dear Secretary Williams:

On behalf of the Applicants in the above-referenced proceeding, pursuant to Decision No. 27, enclosed please find an original and 10 copies of Applicants' "Certificate of Service Pursuant to Decision No. 27 in Finance Docket No. 33388."

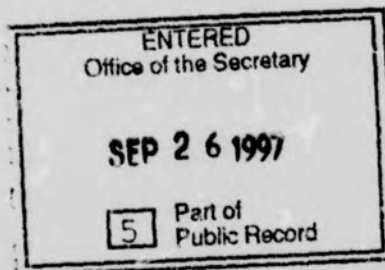
Please contact myself ((202) 942-5858) or Michael Friedman ((202) 942-5179) if you have any questions.

Kindly date stamp the enclosed additional copy of this letter at the time of filing and return it to our messenger.

Very truly yours,

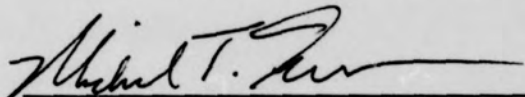
Dennis G. Lyons
ARNOLD & PORTER
Counsel for CSX Corporation
and CSX Transportation, Inc.

Enclosures



CERTIFICATE OF SERVICE
PURSUANT TO DECISION NO. 27 IN FINANCE DOCKET NO. 33388

I, Michael T. Friedman, certify that on September 25, 1997, I caused to be served by first class mail on Robert J. Cooper, General Chairperson, United Transportation Union, a true and correct copy of all filings previously submitted by CSX Corporation, CSX Transportation, Inc., Norfolk Southern Corporation, Norfolk Southern Railway Company, Conrail Inc. and Consolidated Rail Corporation ("Applicants") in the above-referenced proceeding.



Michael T. Friedman
Arnold & Porter
555 - 12th Street, N.W.
Washington, DC 20004-1202
(202) 942-5179

On behalf of Applicants

Dated: September 25, 1997



STB

FD-33388

ID-182175

9-24-97

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182175

CITY OF DUNKIRK
DEPARTMENT OF LAW
CITY HALL, DUNKIRK, N.Y. 14048
(716) 366-0452
FAX (716) 366-2049



SHEILA MECK HYDE
CITY ATTORNEY

September 19, 1997

Hon. Vernon A. Williams, Secretary
Case Control Branch
ATTN: STB Finance Docket No. 33388
Surface Transportation Board
1925 K Street NW
Washington, D.C. 20423-0001

Re: **CSX CORPORATION AND CSX TRANSPORTATION, INC.
NORFOLK SOUTHERN CORPORATION AND
NORFOLK SOUTHERN RAILWAY COMPANY
--CONTROL AND OPERATING LEASES/AGREEMENTS--
CONRAIL INC. AND CONSOLIDATED RAIL CORPORATION
Finance Docket No. 33388
Decision No. 27 dated September 8, 1997**

Dear Secretary Williams:

Pursuant to Decision No. 27 in the above-entitled matter, enclosed please find the original and ten (10) copies of the Certificate of Service of Notice of Intent to Participate by the City of Dunkirk, New York showing that this filing was served by mail on the following:

Robert J. Cooper, General Chairperson,
United Transportation Union
General Committee of Adjustment, GO-348,
1238 Cass Road, Maumee, OH 43537

who was listed as an additional party of record in this Decision.

Very truly yours,

Sheila Meck Hyde
Sheila Meck Hyde
City Attorney

SEP 25 1997

Part of
Public Record
SMH:v
Enc.

BEFORE THE
SURFACE TRANSPORTATION BOARD



=====

FINANCE DOCKET NO. 33388

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

=====

CERTIFICATE OF SERVICE

=====

I hereby certify that, pursuant to the provisions of Decision No. 27, dated September 8, 1997, and received on September 11, 1997, in the above-captioned case, a copy of the attached **Notice of Intent to Participate** was served on PARTY OF RECORD Robert J. Cooper, General Chairperson, United Transportation Union, General Committee of Adjustment, GO-348, 1238 Cass Road, Maumee, OH 43537, identified in Decision No. 27, via first class mail, postage prepaid, on this 19th day of September, 1997.

Respectfully submitted,

Sheila Meck Hyde, Esq.
Attorney for the City of Dunkirk
City Hall
342 Central Avenue
Dunkirk, New York 14048
Phone: 716-366-9866
Fax: 716-366-2049

Dated: September 19, 1997.

**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**

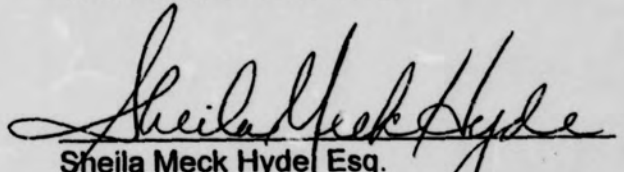
NOTICE OF INTENT TO PARTICIPATE

Please take notice that The City of Dunkirk intends to actively participate in this proceeding. The following should be added to the service list in this proceeding:

Margaret A. Wuerstle,
Mayor
City Hall
342 Central Avenue
Dunkirk, New York 14048

Sheila Meck Hyde, Esq.
City Attorney
City Hall
342 Central Avenue
Dunkirk, New York 14048

Dated: July 25, 1997.


Sheila Meck Hyde, Esq.
Attorney for the City of Dunkirk
City Hall
342 Central Avenue
Dunkirk, New York 14048
Phone: 716-366-9866
Fax: 716-366-2049

CERTIFICATE OF SERVICE

I hereby certify that on this 25th day of July, 1997, copies of the foregoing **NOTICE OF INTENT TO PARTICIPATE** were served by first class mail, postage prepaid, in accordance with the rules of the Surface Transportation Board on the following persons specified in Decision No. 2, and upon the parties shown on the attached list:

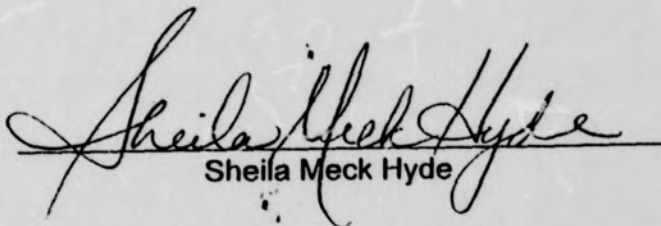
Administrative Law Judge Jacob Leventhal
Federal Energy Regulatory Commission
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Washington, DC 20426

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Washington, DC 20036

Dated: July 25, 1997.


Sheila Meck Hyde

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

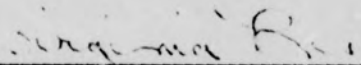
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CERTIFICATE OF SERVICE

=====

I hereby certify that, pursuant to the provisions of Decision No. 21, served August 19, 1997 in the above-captioned case, a copy of the attached **Notice of Intent to Participate** was served on all parties of record identified in Decision 21, other than those already served on the 25th day of July, 1997, via first class mail, postage prepaid, on this 29th day of August, 1997.

Respectfully submitted,



Virginia Lis, Secretary to
Sheila Meck Hyde, Esq.
Attorney for the City of Dunkirk
City Hall
342 Central Avenue
Dunkirk, New York 14048
Phone: 716-366-9866
Fax: 716-366-2049

Dated: August 29, 1997.

STB

FD-33388

ID-182113

9-23-97

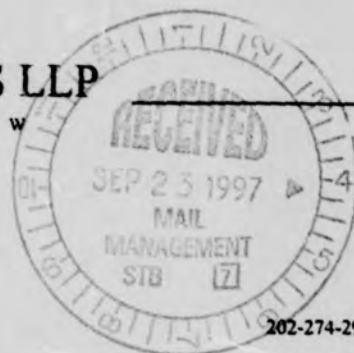
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~~CONFIDENTIAL~~
~~Not Available for Public Inspection~~
Sandra L. Brown
in this filing sent
to Washington, D.C. and copy is in the
U.S. Department of Transportation
~~CONFIDENTIAL~~

September 23, 1997

D

The Honorable Vernon A. Williams
Secretary
Surface Transportation Board
1925 K Street, NW
Room 711
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 for filing in the above captioned docket are the original and twenty-five copies of the Petition of New York State Electric & Gas for an Extension of Time to File an Appeal to the September 18, 1997 Order of Administrative Law Judge Leventhal (NYSEG-11). Due to the Highly Confidential designation of the attached Discovery Conference pages, Exhibit A is only being served on Judge Leventhal, the Board and parties on the Highly Confidential Service List.

Also enclosed is 3.5-inch diskette containing the text of the pleading, without exhibits. Please date stamp the enclosed extra copy of the pleading and return it to the messenger for our files.

Sincerely yours,

Sandra L. Brown
Attorney for New York State Electric & Gas

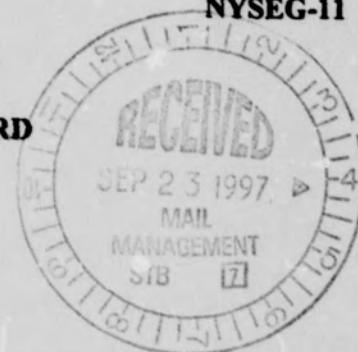
Enclosures

cc The Honorable Jacob Leventhal
Paul A. Cunningham, Esq.
Richard A. Allen, Esq.
Dennis G. Lyons, Esq.

SEP 24 1997

**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**

PETITION FOR EXTENSION OF TIME TO FILE CROSS-APPEAL

**WILLIAM A. MULLINS
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ATTORNEYS FOR NEW YORK STATE ELECTRIC AND GAS

September 23, 1997

**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**

PETITION FOR EXTENSION OF TIME TO FILE CROSS-APPEAL

New York State Electric & Gas (NYSEG) hereby files this Petition for Extension of Time To File Cross-Appeal in the event that CSX¹ files an Appeal today with the Surface Transportation Board ("Board") of Judge Leventhal's September 18, 1997 order. NYSEG requests a one day extension of the 3 working day deadline to file an Appeal as established under the Procedural Schedule in Decision No. 6 of this proceeding. Therefore, NYSEG requests an extension until September 24, 1997 to file a Cross-Appeal of Judge Leventhal's September 18, 1997 order if CSX files an Appeal on September 23, 1997. NYSEG's Appeal and request for affirmative relief would be necessary only in the event that CSX first appeals Judge Leventhal's order. Therefore, NYSEG's petition is reasonable and serves the interest of efficient and economical handling of this proceeding.

On September 18, 1997, Judge Leventhal issued an order for the production of certain documents that were requested in NYSEG's First Set of Discovery, which were propounded to Applicants on August 13, 1997. A series of negotiations, both during and outside of several

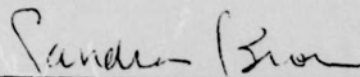
¹ During discussions between counsel for NS and NYSEG on September 22, 1997, NS stated that they would not be seeking an Appeal of Judge Leventhal's decision on this issue. Therefore, NS will not be referred to in this petition. CSX has neither confirmed nor denied whether they will be filing an Appeal.

discovery conferences, over proposed limitations of the requested discovery have occurred between the parties since the beginning of August. On September 18, 1997, Judge Leventhal ordered that CSX produce documents responsive to Requests No. 1-5.² See Tr. Sept. 18, 1997 at p. 64-65, relevant portions attached as Exhibit A. The effect of Judge Leventhal's ruling was to make both sides live up to certain parts of an agreement, which occurred outside of a discovery conference and which both sides subsequently disputed parts of that agreement, thereby necessitating the September 18 discovery conference. See Tr. Sept. 18, 1997 at 67.

In Judge Leventhal's order, CSX was, in effect, being ordered to "live up" to their part of the agreement and NYSEG was being ordered to "live up" to its part of the agreement, even though as part of the agreement NYSEG had voluntarily agreed to more severe redactions than what Judge Leventhal had ordered for other similar requests by NYSEG. See Tr. p. 65. Therefore, if CSX files an Appeal of Judge Leventhal's ruling which forced CSX to abide by its side of the agreement, then NYSEG will seek affirmative relief from Judge Leventhal's order which forced NYSEG to live up to its side of the agreement. Because NYSEG only wishes to appeal if CSX decides to go back on its side of the bargained for agreement, which, in effect, is what CSX would be doing by appealing Judge Leventhal's September 18 ruling, an extension of time for which NYSEG would be required to file an appeal of Judge Leventhal's September 18 ruling is necessary. Furthermore, NYSEG's minimal request for one additional day is reasonable.

² NYSEG has not recited Requests No. 1-5 here since they would add little to this Petition. However, in the event that NYSEG files a Cross-Appeal, the Requests will be provided along with further detail on how NYSEG agreed to limit the breadth and scope of the requests and how Judge Leventhal came to eventually adopt NYSEG's suggested limitations.

Respectfully Submitted, this 23rd day of September, 1997.



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ATTORNEYS FOR NEW YORK STATE
ELECTRIC AND GAS

CERTIFICATE OF SERVICE

I hereby certify that a true copy of the "Petition For Extension Of Time To File Cross-Appeal" (NYSEG-11) was served this 23rd day of September, 1997, by facsimile transmission to Applicants' representatives, and to Judge Leventhal and by first-class mail, postage prepaid to all parties of record in STP Finance Docket No. 33388.

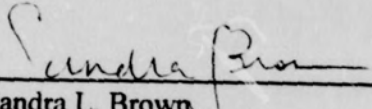

Sandra L. Brown
Attorney for New York State Electric & Gas

EXHIBIT A
HIGHLY CONFIDENTIAL
REDACTED

STB

FD-33388

ID-182104

9-23-97

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2104

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September 19, 1997

HARRY C. BARBIN
 JOHN W. LAUFFER
 GEORGE P. O'CONNELL
 WILLIAM M. O'CONNELL, III

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

**RE: CSX Corporation And CSX Transportation, Inc.
 Norfolk Southern Corporation And Norfolk
 Southern Railway Company -- Control And Operating
 Leases/Agreements -- Conrail Inc. And Consolidated
 Rail Corporation
 Certificate of Service of Paul J. Engelhart, et al.
 Finance Docket No. 33388**

Dear Secretary Williams:

We are filing with the letter an original and 10 copies of a Certificate of Service pursuant to Decision No. 27 in Finance Docket No. 33388, with respect to the service of documents filed upon Robert J. Cooper, General Chairperson, United Transportation Union.

Please date stamp the additional copy of this letter at the time of filing and return it to us.

Very truly yours,

BARBIN, LAUFFER & O'CONNELL

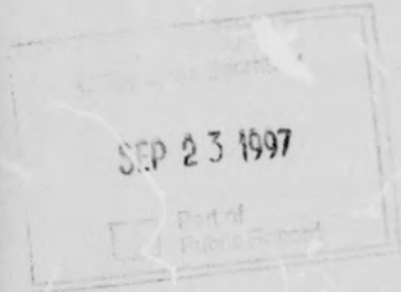
Harry C. Barbin

SEP 23 1997

HCB:kac
 Enclosures
 cc: The Honorable Jacob Leventhal

182,000

RETR-5



**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/ACREEMENTS --
CONRAIL INC. AND CONSOLIDATED RAIL CORPORATION**

**CERTIFICATE OF SERVICE OF
PAUL J. ENGELHART, ET AL.**

Harry C. Barbin, Esquire
BARBIN, LAUFFER & O'CONNELL
608 Huntingdon Pike
Rockledge, PA 19046
(215) 379-3015

Counsel for Paul J. Engelhart,
et al.

Dated: September 19, 1997

BEFORE THE
SURFACE TRANSPORTATION BOARD

Finance Docket No. 33388

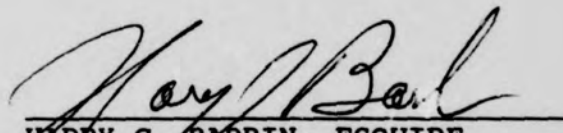
CSX CORPORATION AND CSX TRANSPORTATION, INC.,
NORFOLK SOUTHERN CORPORATION AND
NORFOLK SOUTHERN RAILWAY COMPANY
-- CONTROL AND OPERATING LEASES/AGREEMENTS --
CONRAIL INC. AND CONSOLIDATED RAIL CORPORATION



CERTIFICATE OF SERVICE OF
PAUL J. ENGELHART, ET AL.

I, HARRY C. BARBIN, ESQUIRE, hereby certify that, on the 19th day of September, 1997, a copy of all documents previously filed with the Surface Transportation Board ("STB") on behalf of Paul J. Engelhart, et al., were served by first class mail, postage prepaid, upon Robert J. Cooper in accordance with STB Decision No. 27.

I hereby certify that, on this 19th day of September, 1997, a copy of this Certificate of Service (RETR-5) was also served by first class mail, postage prepaid, upon Administrative Law Judge Jacob Leventhal.


HARRY C. BARBIN, ESQUIRE

Dated: September 19, 1997

STB

FD-33388

ID-182160

9-23-97

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192860

ACE, et al.-15

Expedited Consideration Requested

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 ATLANTIC CITY ELECTRIC COMPANY,
AMERICAN ELECTRIC POWER, DELMARVA POWER & LIGHT COMPANY,
INDIANAPOLIS POWER & LIGHT COMPANY, AND
THE OHIO VALLEY COAL COMPANY TO APPEAL OF APPLICANTS (CSX/NS-81)



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Power & Light Company, and
The Ohio Valley Coal Company

September 23, 1997

REPLY OF ATLANTIC CITY ELECTRIC COMPANY,
AMERICAN ELECTRIC POWER, DELMARVA POWER & LIGHT COMPANY,
INDIANAPOLIS POWER & LIGHT COMPANY, AND
THE OHIO VALLEY COAL COMPANY TO APPEAL OF APPLICANTS (CSX/NS-81)

INTRODUCTION AND SUMMARY

Applicants' latest appeal attempting to prevent ACE, et al. ("Movants") from developing relevant evidence to present the Board on October 21 -- an expedited schedule adopted at Applicants' request -- must also be denied. Movants are attempting to develop a study of Applicants' ratemaking practices, which by definition requires them to have access to Applicants' rates and underlying information concerning Applicants' ratesetting practices. Not only are Movants seeking information from the Waybill Samples about themselves, but they also are entitled to use the Waybill Samples to evaluate Applicants' ratesetting practices for all shippers, especially shippers of coal, in order to present the Board with the most reliable evidence about Applicants' ratesetting practices. That is what this entire discovery struggle has been about.

Movants require the revenue masking factors to determine information pertinent to their own rates, to analyze discrepancies between information Applicants have previously provided and the Waybill Samples, and to resolve other data

discrepancies that arise because of rebates or credits that alter the reported rates or revenues. Because Movants also intend to use the revenue masking factors to analyze the rates of others, which Applicants conceded was within Movants' rights of the original Discovery Conference on July 16, 1997 (Tr. 106-07) (copy attached), they must have the masking factors to determine those rates. Since Applicants CSX and Conrail used 1995 Waybill Samples to develop the Application, the Board could hardly deny Movants the right to use the same data, whether about themselves or about other shippers.

Given the extraordinary hurdle any Appellant faces in appealing a discovery order (e.g., Decision No. 17 at 2), Applicants have not come close to carrying their burden. The Protective Order is entirely adequate to protect them from any alleged harm, let alone any alleged harm to the confidentiality of the Waybill Sample "program". This appeal is just a replay of Applicants' last appeal about commercially sensitive information, which the Board properly denied in Decision No. 32. The Board's stay of Judge Leventhal's September 19, 1997 ruling should promptly be dissolved and their appeal denied.

Argument

1. The Board has previously determined that ACE, et al. are entitled to discovery from Applicants for various years. See Decision No. 17, affirming Decision No. 11. Judge Leventhal has now ordered production of the "revenue masking factors" for the same years that he previously determined that discovery was appropriate, and thus by definition the information sought is relevant or could lead to relevant information.

2. Applicants' experts have advised the undersigned that they need the "revenue masking factors" for at least two reasons. First, there is at least one discrepancy on the Waybill Sample which the masking factors will help eliminate, and there could well be others (the analysis is now ongoing). Second, and of greater importance, the revenues on the Waybill Samples are or may be adjusted for credits, rebates, and the like, and thus comparing known rates to the masked revenues on the Waybill Samples would not produce the masking factors after all, contrary to the undersigned's stated understanding at the Discovery Conference on September 17 and 19, 1997. See September 22 Appeal at 7-8 & Exhibits A and B. Thus, the masking factors cannot necessarily be deduced by Movants' consultants, as Applicants

claim, but rather need to be provided to analyze the Waybill Samples.

3. As Movants explained in their September 23 Appeal (ACE, et al.-14), the revenue masking factors sought are needed to present "timelines" of rate data over a period of years, to support an expert analysis of Applicant' ratemaking practices. Clearly, such an analysis is at least as relevant for the years Applicants were ordered to produce data previously as for the years they were not.

4. Contrary to Applicants' claims (CSX/NS-81 at 3-6), the Board's procedures do not preclude release of the revenue masking factors applied to Waybill Samples filed with it, but rather provide that "evidence found to be sensitive may be provided to counsel or other independent representatives for other parties subject to the usual and customary protective order issued by the [Board] or appropriate authorized official." 49 C.F.R. § 1244.8 (b)(4)(iv).

5. Applicants' concerns are a replay of their concerns about release of commercially sensitive information, which the Board found to be unwarranted in Decision Nos. 32 and 34 because of the Protective Order in effect in this proceeding.

Once again, Applicants seek to apply a double standard, one for themselves and the other to shippers.

6. The statute, 49 U.S.C. § 11904, does not bar the release of shipper-specific information. Compare Applicants' September 22, 1997 Appeal at 13-14 & n.14. Applicants themselves have relied on that very statute to allow themselves to exchange shipper-specific information. See Decision Nos. 1 and 4. It would now stand the statute on its head to bar shippers from obtaining shipper-specific information, after the carriers (who sometimes compete) have had access to it under the Protective Order.

7. Movants also intend to analyze the Waybill Samples for destinations of Movants other than those served by Conrail and for other shippers, as is Movants' right. Although Applicants imply something improper about such a study (Appeal at 11-12), such a study is clearly relevant or could lead to relevant information, and should be produced for that reason as well. How Applicants set others' rates may well show how they will adjust Movants' rates to pay for the Conrail acquisition.

8. Lastly, Applicants criticize Movants for commencing discovery of the revenue masking factors after they

commenced their earlier discovery requests. But it was only after production of most of Applicants' responses to Movants' earlier discovery requests which (as the Board discussed in Decision No. 32, were delayed due to earlier objections and improper redactions by Applicants) that Applicants' consultants concluded that a Waybill Sample study would be necessary in addition to evidence developed using their original approach (which was, unfortunately, limited by Judge Leventhal, thus necessitating a supplemental approach). The Applicants, the architects of all of the previous discovery objections, obstructions, and delays in this saga, are in no position now to rely on that history to deny Movants their right to do an intelligible Waybill Sample analysis. Without the masking factors, and thus without the actual revenues, such an analysis will be difficult at best.

CONCLUSION

Applicants' latest appeal should be denied.

Respectfully submitted,

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Michael F. McBride

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Brenda Durham

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Attorneys for Atlantic City

Electric Company, American

Electric Power, Delmarva Power

& Light Company, Indianapolis

Power & Light Company, and

The Ohio Valley Coal Company

Dated: September 23, 1997

1 think they're relevant. We'd consider it in the
2 interest of compromise.

3 But beyond 1995, it is simply
4 extraordinarily overbroad and burdensome to produce
5 and, we submit, neither relevant to anything Mr.
6 McBride legitimately wants or really needed by him.
7 It would take, as we've stated in our papers, we would
8 estimate some 1,000 man-hours to compile all these
9 tapes and provide them and clean them up, as it were,
10 in a way that made them producible.

11 They provide traffic information that is
12 certainly reflected in the Board's way bill sample,
13 which Mr. McBride has full access to. He could go
14 back and get the way bill sample back to 1978 and get
15 a sampling of all these movements that way.

16 But we see no basis for his request for
17 our 100 percent traffic tapes going back to 1978 or
18 even for the period that you've limited, which I guess
19 is what, maybe eight or ten years?

20 To go back and compile those tapes in a
21 way that were useful or producible would take an
22 enormous amount of time, and the marginal probative

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
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WASHINGTON, D.C. 20005-3701

1 value of those, we submit, is far outweighed by the
2 burden that would be imposed.

3 JUDGE LEVENTHAL: Mr. McBride.

4 MR. McBRIDE: Thank you, Your Honor.

5 First of all, let me say that the way bill
6 sample has two major problems with it, and again I'll
7 explain this the best I can, but Mr. Crowley is the
8 expert.

9 First of all, it's a sample. It's a one
10 percent sample, and what happens is that if you go and
11 only look at one out of 100 records, oftentimes
12 there's absolutely nothing in a key segment of the
13 data that needs to be analyzed. I mean like pulling
14 one volume of F.3rd off out of every 100, or F.2nd,
15 and if you didn't find any cases about the First
16 Amendment, the sampling technique would lead you to
17 the conclusion that there isn't a First Amendment.

18 But obviously that isn't so. So you have
19 to deal with the problem of a sample.

20 Mr. Crowley has been through this on a
21 number of occasions. We've discussed it before, and
22 if you come up with a null set, then you're right back

NEAL R. GROSS

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WASHINGTON, D.C. 20005-3701

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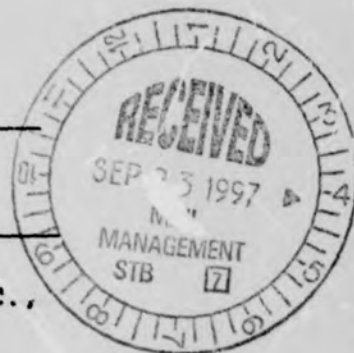
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BEFORE THE
SURFACE TRANSPORTATION BOARD

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

D

CERTIFICATE OF SERVICE

I hereby certify that I have served this 23rd day of September, 1997, a copy of the foregoing "Appeal of Atlantic City Electric Company, American Electric Power, Delmarva Power & Light Company, Indianapolis Power & Light Company, and The Ohio Valley Coal Company from the September 19, 1997 Order of the Presiding Judge Restricting Discovery, and Motion for Expedited Consideration" (ACE, et al.-14) and "Reply of Atlantic City Electric Company, American Electric Power, Delmarva Power & Light Company, Indianapolis Power & Light Company, and The Ohio Valley Coal Company to Appeal of Applicants (CSX/NS-81)" (ACE, et al.-15) by first-class mail, postage prepaid, or by more expeditious means, upon each of the following persons on the Restricted Service List:

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SEP 25 1997	
5	Part of Public Record

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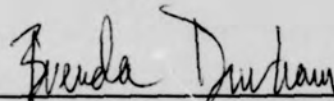
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Brenda Durham

STB

FD-33388

ID-182077

9-22-97

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182077



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OFFICE OF THE ATTORNEY GENERAL
TRANSPORTATION DIVISION
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Public Record

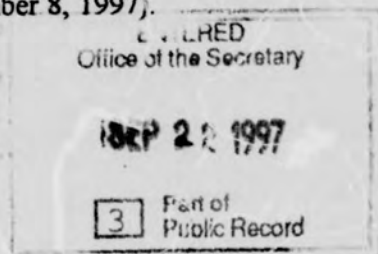
September 15, 1997

Honorable Vernon A. Williams, Secretary
Surface Transportation Board (Case Control Unit)
1925 K Street, N.W.
Washington, D.C. 20423-0001

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

Dear Mr. Williams:

Enclosed for filing in the above matter are the original and 10 copies of a certificate of service stating that the State of Vermont's previous filing in this matter (a June 16, 1997 document entitled "State of Vermont's Notice of Intent to Participate") has been served on Robert J. Cooper, a Party of Record, as directed in the Board's Decision No. 27 (decided September 8, 1997).



Sincerely,

John K. Dunleavy
Assistant Attorney General

jkd/bem
Enclosures
cc: Mr. Robert J. Cooper

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FD-33388

ID-182078

9-22-97

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Honorable Vernon A. Williams
Secretary, Case Control Branch
Surface Transportation Board
1925 K Street, N.W., Room 700
Washington, D.C. 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 -- Transfer of Railroad Line by Norfolk Southern Railway Company to CSX Transportation, Inc.

Dear Secretary Williams:

Enclosed you will find an original and 10 copies of the Certificate of Service required by STB Decision No. 27 in the above-styled case.

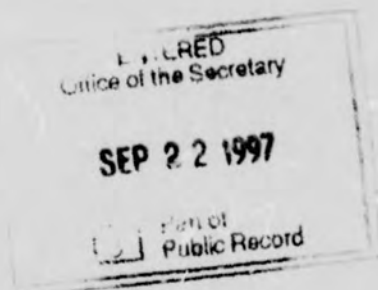
Sincerely,

FROST & JACOBS LLP

By *Sandra L. Nunn*
Sandra L. Nunn

SLN/mrm
Enclosures

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SORT - 3

BEFORE THE
SURFACE TRANSPORTATION BOARD



Finance Docket No. 33388

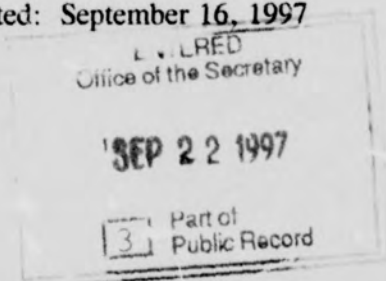
CSX CORPORATION AND CSX TRANSPORTATION, INC., NORFOLK SOUTHERN
CORPORATION AND NORFOLK SOUTHERN RAILWAY COMPANY
CONTROL AND OPERATING LEASES/AGREEMENTS
CONRAIL, INC. AND CONSOLIDATED RAIL CORPORATION
TRANSFER OF RAILROAD LINE BY NORFOLK SOUTHERN RAILWAY COMPANY
TO CSX TRANSPORTATION, INC.

CERTIFICATE OF SERVICE OF
SOUTHWEST OHIO REGIONAL TRANSIT AUTHORITY

Sandra L. Nunn
Charles E. Schroer
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2500 PNC Center
201 East Fifth Street
Cincinnati, Ohio 45202
(513) 651-6800

Counsel for Southwest Ohio
Regional Transit Authority

Dated: September 16, 1997



BEFORE THE
SURFACE TRANSPORTATION BOARD

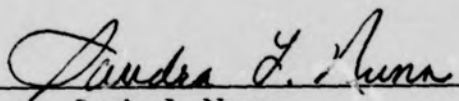
Finance Docket No. 33388

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
TRANSFER OF RAILROAD LINE BY NORFOLK SOUTHERN RAILWAY COMPANY
TO CSX TRANSPORTATION, INC.

**CERTIFICATE OF SERVICE OF
SOUTHWEST OHIO REGIONAL TRANSIT AUTHORITY**

I hereby certify that, on this 16th day of September, 1997, a copy of all documents previously filed with the Surface Transportation Board ("STB") on behalf of Southwest Ohio Regional Transit Authority, namely SORT-1 and SORT-2, were served by first class mail, postage prepaid, upon Robert J. Cooper in accordance with STB Decision No. 27.

I hereby certify that, on this 16th day of September, 1997, a copy of this Certificate of Service (SORT-3) was served by first class mail, postage prepaid, upon Administrative Law Judge Jacob Leventhal and all persons designated as a "Party of Record" on the service list attached to STB Decision No. 21, as modified by STB Decision No. 27.


Sandra L. Nunn

Dated: September 16, 1997

STB

FD-33388

ID-181812

9-10-97

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181812

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

Re: CSX Corporation And CSX Transportation, Inc., Norfolk
Southern Corporation And Norfolk Southern Railway
Company -- Control And Operating Leases/Agreements --
Conrail, Inc. And Consolidated Rail Corporation
Finance Docket No. 33388
Motion for Leave to Serve Parties of Record Late

Dear Secretary Williams:

We are filing with this letter the following:

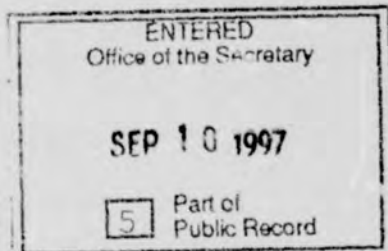
1. An original and 25 copies of the Motion for Leave to
Serve Parties of Record Late, with attached Certificate of Service
for this Motion.

2. An original and 10 copies of a Certificate of Service
pursuant to Decision No. 21 in Finance Docket No. 33388, with
respect to the service of the Notice of Intent to Participate In
Proceedings by participants of the Supplemental Pension Plan of
Consolidated Rail Corporation, together with a copy of the letter
to all the Parties of Record, with attached Notice of Intent to
Participate in Proceedings by participants of the Supplemental
Pension Plan of Consolidated Rail Corporation.

Please date stamp the additional copy of this letter at the
time of filing and return it to us.

Very truly yours,

BARBIN, LAUFFER & O'CONNELL



Harry C. Barbin
Harry C. Barbin

HCB:lpt

Enclosures

cc: The Honorable Jacob Leventhal
All Parties of Record

181812

BEFORE THE
SURFACE TRANSPORTATION BOARD

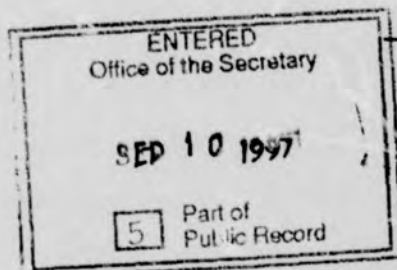
Finance Docket No. 33388



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
OF
NOTICE OF INTENT TO PARTICIPATE IN PROCEEDINGS
BY PARTICIPANTS OF THE SUPPLEMENTAL PENSION PLAN
OF CONSOLIDATED RAIL CORPORATION

The undersigned hereby certifies that on September 9, 1997, he served the Notice of Intent to Participate in Proceedings by Participants of the Supplemental Pension Plan of Consolidated Rail Corporation by Causing copies of the same to be mailed by first class mail, postage prepaid, to Administrative Law Judge Jacob Leventhal, Federal Energy Regulatory Commission, 888 First Street, N.E., Suite 11F, Washington, D.C. 20416, and to all designated Parties of Record on the Service List.



Harry C. Barbin
Harry C. Barbin, Esquire
Barbin, Lauffer & O'Connell
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(215) 379-3015

STB

FD-33388

ID-181814

9-10-97

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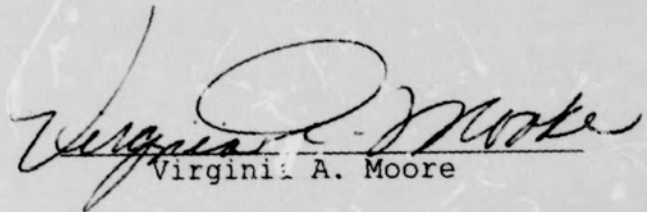
181814

ORIGINAL

CERTIFICATE OF SERVICE

I, Virginia A. Moore, hereby certify that a copy of the foregoing Notice of Intent To Participate of G. Paul Moates was served on this date, first-class mail postage prepared, on the following:

Robert J. Cooper, General Chairperson
United Transportation Union
General Committee of Adjustment, GO-348
1238 Cass Road
Maumee, OH 43537


Virginia A. Moore

DATED: September 10, 1997



STB

FD-33388

ID-181816

9-10-97

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18/8/6

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September 10, 1997

BY HAND DELIVERY

The Honorable Vernon A. Williams
Secretary
Surface Transportation Board
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 please find an original and 25 copies of
CSX/NS-73 (Applicants' Reply to New York State Electric and Gas
Petition for Clarification of Decision No. 1).

Kindly date stamp the enclosed additional copy of this
document at the time of filing and return it to our messenger.

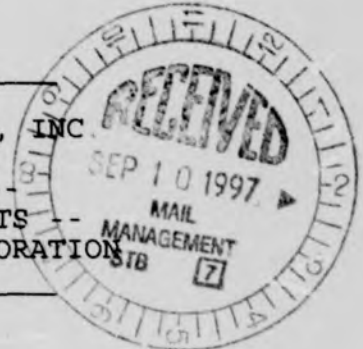
Respectfully yours,

David H. Coburn

DHC:dlhc
Enclosures

BEFORE THE
SURFACE TRANSPORTATION BOARD

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

APPLICANTS' REPLY TO
NEW YORK STATE ELECTRIC AND GAS
PETITION FOR CLARIFICATION OF DECISION NO. 1

Applicants¹ hereby reply to New York State Electric & Gas's ("NYSEG") September 5, 1997 Petition for Clarification of the Protective Order issued in Decision No. 1. In that Petition, NYSEG claims that Applicants have engaged in a "common practice" of redacting information from documents designated as "Highly Confidential" under the Protective Order, with the result that they are "permanently crippling legitimate discovery efforts." (NYSEG Pet. at 1, 2) NYSEG seeks clarification that the Protective Order issued in Decision No. 1 does not permit any redactions, other than for a recognized privilege, from documents provided to outside counsel and outside consultants who have signed the Highly Confidential undertaking attached to the

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

Protective Order.

NYSEG's Petition is entirely without merit and does not warrant Board action. To the extent that NYSEG suggests that Applicants have been redacting information they have been ordered to produce, it is flatly wrong. There had been no prior requests for, or rulings addressing, the obligation to produce the particular information redacted. Therefore, it was perfectly appropriate and timely for Applicants to protect, through redactions, highly sensitive information that was not even the subject of any specific requests when such information was found in some of the documents that turned up in document searches that commenced after requests were narrowed by ALJ ruling. By this procedure, the ALJ was allowed an opportunity to engage in the necessary balancing of the competing interests of confidentiality and potential relevance of particular information.

To the extent that NYSEG suggests that information has been redacted from documents produced in response to discovery as a matter of routine, it is grossly in error. CSX and NS have in fact not redacted any information from documents produced to NYSEG.² While Conrail has redacted information from a relatively small number of the hundreds of pages of documents produced by Conrail to NYSEG, that redacted information relates to Conrail's internal management costs and thus falls into a

² As per agreement with NYSEG, CSX and NS shortly will be producing to that party documents that have been redacted to protect the name of the shipper and certain contract terms from disclosure.

category of redactions that the Board is now considering in connection with Applicants' pending appeal (CSX/NS-70) from the recent decisions of the Presiding Administrative Law Judge on redaction issues (including Decision No. 26, served September 5, 1997).

Moreover, the issues raised by the Petition are more appropriately addressed in the context of specific disputes over specific documents or categories of documents. By that means, the Presiding Administrative Law Judge can consider the matters in dispute and issue an initial ruling. Board involvement, if at all, would then appropriately be limited to addressing an appeal in the context of specific parties and documents, such as the appeal currently before it.

BACKGROUND

NYSEG's Petition would lead one to believe that Applicants are redacting vast amounts of information that NYSEG had specifically requested and that had been the subject of an ALJ order requiring Applicants to produce documents. Nothing could be further from the truth. Apart from a very small number of redactions based on claims of privilege (which NYSEG does not challenge as inappropriate) and a small number of redactions designed to protect the identity of shippers or confidential contract terms from documents subject to special confidentiality provisions, the only redactions that Applicants have made from documents produced to NYSEG are those that are the subject of the

pending appeal from Decision No. 26, i.e., redactions designed to protect internal cost data and other commercially sensitive data in settings where such data could be used to the commercial disadvantage of Applicants in pending or future negotiations with shippers.³

Applicants have responded to some 1,000 discovery requests filed by dozens of parties. Yet, no more than a small fraction of the thousands of pages of documents produced by Applicants (the depository now holds almost 53,000 pages of documents) have had information redacted from them. Moreover, until his September 5 orders, now stayed, the ALJ had not ordered production of any of the redacted information.⁴

As noted above, none of the CSX or NS documents produced to NYSEG has been redacted (and the identity of the

³ NS has produced, in response to a discovery request propounded by a party other than NYSEG, a redacted memorandum of understanding between NS and Pennsylvania Power & Light. The MOU was not strictly responsive to the discovery request, but NS nevertheless produced the MOU in a spirit of full cooperation. The redacted material did not include responsive material and the party to whom it was produced has not challenged the redaction. Redaction was appropriate because the matters redacted were not responsive and the document involved a confidential undertaking with a utility not a party to this proceeding.

⁴ The redactions that prompted the September 5 rulings were made in documents produced in response to discovery requests propounded by several utilities, other than NYSEG. These Utilities are Atlantic City Electric, Delmarva Power & Light, Indianapolis Power & Light and American Electric Power (collectively, the "ACE Utilities"). NYSEG (which filed "me-too" requests with respect to the ACE Utilities' requests, and which also filed its own requests) has complained to the ALJ about redactions in documents produced to the ACE Utilities, but that issue will be resolved in the Board's decision on appeal from Decision No. 26 and from the ALJ's September 5 oral ruling.

shipper's name and selected non-responsive data will be redacted from documents that will shortly be produced by these Applicants to NYSEG with NYSEG's agreement). The redacted CSX documents attached to NYSEG's Petition were not produced in response to NYSEG's own discovery, but rather were produced in response to discovery sought by the ACE Utilities, and are the subject of the Applicants' pending appeal.

As to Conrail, that Applicant has produced over 400 pages of documents to NYSEG, and redactions have been made on only about 20 of these pages. All of these few redactions relate to cost information of precisely the same sort that is now under review by the Board in the pending appeal from Decision No. 26. That cost data was not specifically requested in any of NYSEG's discovery requests, but was contained in documents otherwise responsive to NYSEG requests. As fully explained by Applicants in their pending appeal (CSX/NS-70), this cost data is highly sensitive and could be used to Conrail's detriment in negotiations with utilities. Indeed, NYSEG has retained as its outside consultants one of the same firms that has been retained by the ACE Utilities. That firm regularly counsels utilities in rate negotiations and thus production of this data to that utility would raise the same issues that are addressed in the pending appeal of Decision No. 26. Further, Conrail's internal costs are not relevant to NYSEG's interests in this case and NYSEG has not to date even presented an argument as to why it would need to know Conrail's internal costs in order to prepare

whatever comments it might choose to file in this proceeding. (NYSEG should be supportive of the proposed acquisition of control of Conrail. Should the Board approve the acquisition, NYSEG, which today is served exclusively by Conrail, will receive competitive service from both CSX and from NS, with NS serving three of its plants and CSX serving a fourth.)

NYSEG's Petition quotes various objections raised by Applicants in response to NYSEG's First Discovery Requests (NYSEG-3). Certain of those requests were extraordinarily broad and would have required Applicants to reveal commercially sensitive coal contract data (e.g., NYSEG Request No. 1 would have required the production of "all contracts between or among any of the Applicants for delivery of coal to any shipper whereby the amount of coal delivered exceeded or is expected to exceed 100,000 tons per year."). Each of Applicants' quoted objections to these requests has now been resolved either by ruling of the ALJ (who sustained many of Applicants' objections) or by agreement between Applicants and NYSEG narrowing the requests.

The issue of redactions was raised by NYSEG at an August 28 discovery conference before the ALJ on the scope of the NYSEG requests, but it was agreed that resolution of any redaction issue would await the production of documents by Applicants to NYSEG. Although the few redacted documents included in the production to NYSEG raise the same issues raised by the pending appeal to Decision No. 26, NYSEG has chosen to burden the Board with a broad-brush Petition for Clarification

that raises no new issues.

REPLY ARGUMENT

The Petition for Clarification should be denied for several reasons.

1. NYSEG's suggestions to the contrary notwithstanding, by redacting certain information Applicants have not disregarded the ALJ's orders to produce documents. The issue raised by the ACE Utilities' requests (and "me-too" requests filed by NYSEG) and by the Applicants' initial objections to them related to the relevance, scope and burden of the requests -- whether the Applicants had to search for and produce a vast array of documents relating to bids made to their coal shippers over a 20 year period.

At a July 16 hearing, the ALJ held that only a much more limited universe of such documents had sufficiently potential relevance to warrant a search for and production of documents. Neither in the ACE Utility requests, nor in the July 16 hearing before Judge Leventhal with respect to them, was attention paid, let alone any rulings offered with respect to, all of the various particular problems that could be presented by particular documents or particular information therein. Until the ALJ ruled, neither the ACE Utilities nor Applicants knew what documents, if any, would have to be produced. Therefore, there could have been no discussion at that time about redaction and Applicants had not had an opportunity to review responsive documents or to recognize that documents concerning bids might

contain information about costs. It was, in fact, information about bids that the ACE Utilities, and NYSEG in its me-too requests, have sought; these parties never requested information about costs.

Quite obviously, therefore, the ALJ could not have made, and did not make, any rulings on these issues, let alone the necessary balancing rulings required to determine whether particular highly confidential cost information had to be produced. Indeed, the ALJ repeatedly noted that confidentiality issues were not being addressed in his ruling. July 16 Tr. at 93-95.

Against this background, Applicants reasonably understood that cost data were not implicated in the Judge's rulings, and that if there were legitimate specific issues (cost or other) raised by particular confidential information contained in particular documents, the opportunity to obtain further rulings was available. Indeed, the ALJ ruled on August 20, 1997 that certain confidential "market information" was properly redacted from the same responses to the ACE Utilities on the grounds of insufficient relevance. Aug. 20 Tr. 32-42.⁵

Given that cost data were not addressed in the requests of the ACE Utilities or in the NYSEG requests, and given the sensitivity of this data with respect to current and future contract negotiations with NYSEG and other utilities (during

⁵ The ALJ also sanctioned certain redactions referred to by NYSEG at p. 2, fn. 3.

which the risk of misuse of this data exists by virtue of the fact that NYSEG's outside consultant in this proceeding also advises utilities in such negotiations), Applicants' approach was entirely reasonable and proper under the circumstances.

2. No clarification of the Protective Order is needed for the simple reason that there is no issue warranting such clarification. By its forthcoming decision in response to the Applicants' appeal from Decision No. 26, the Board will presumably resolve the one redaction issue of concern to NYSEG, namely, whether Conrail's internal cost data -- which is of no relevance to any legitimate concerns of NYSEG, but which is extremely sensitive and thus should not be available to outside consultants for NYSEG in contract negotiations -- can be redacted by Conrail from otherwise responsive documents.

3. Action by the Board to "clarify" the application of its Protective Order to a subject matter neither raised in the document request nor addressed by the ALJ's ruling seems premature at best. Such matters are more appropriately addressed on a case-by-case basis by the ALJ, at least in the first instance. In that way, the ALJ or Board (on appeal from the ALJ) can consider the redactions at issue in the context of specific documents or categories of documents and specific claims of relevance. This is precisely the manner in which the issue has been addressed in connection with the redaction dispute concerning the ACE Utilities, and it is the most appropriate manner in which to handle these types of fact-specific discovery

issues. Decision No. 1 authorizes the ALJ "to entertain and rule upon all disputes concerning discovery in this proceeding." Dec. No. 1 at 2. NYSEG's Petition for "clarification" involves what is essentially a discovery dispute that should first be raised with the ALJ if it is not fully addressed by the Board's forthcoming decision on the Applicants' pending appeal.

4. NYSEG argues that in redacting documents Applicants "appear to misunderstand the purpose of the Protective Order." (NYSEG Petition at 7). With all due respect, Applicants perfectly understand the scope and limits of the Protective Order that they proposed to the Board at the outset of this proceeding. As their pending appeal from Decision No. 26 demonstrates, Applicants submit that the Protective Order cannot offer sufficient protection in extraordinary circumstances of the type at issue in that appeal (or with respect to the redacted Conrail documents produced to NYSEG), namely, circumstances where the outside counsel or consultants for a party also advise that party in commercial negotiations with Applicants and thus should not have access to data that could inadvertently be used to the detriment of the railroads in such negotiations.

5. The situation raised by the redactions of concern to NYSEG is distinguishable from that which was the subject of a staff decision in a case cited by NYSEG, Indiana & Ohio Railway Company -- Acquisition Exemption -- Lines of the Grand Trunk Western Railroad Inc., Finance Docket No. 33180 (served April 10, 1997). There, the party seeking access to confidential data was

a union with no direct commercial interest in the data that was redacted. Here, disclosure of such data to persons who advise utilities in rate negotiations with Applicants could do commercial harm that the Protective Order cannot address.

6. NYSEG's arguments about long delays resulting from discovery disputes over redacted documents are grossly distorted. The ALJ has ruled expeditiously on redaction issues brought before him; in no case has any such issue been pending for anything approaching 45 to 60 days. If NYSEG's counsel is feeling the pressure of the October 21 deadline for submission of comments, they cannot blame Applicants for that pressure. NYSEG did not serve its first round of discovery in this case until August 13, almost two months after the Application was filed. The Applicants timely answered those of its requests that were not objectionable and their objections to the remaining requests have now all been resolved.

CONCLUSION

For all of the above reasons, NYSEG's Petition for Clarification should be denied. If, however, the Board determines to act on NYSEG's request for "clarification," Applicants respectfully submit that it should, for the reasons discussed above and in Applicants' Appeal (CSX/NS-70) not

preclude redaction of the railroads' extraordinarily sensitive cost information under the circumstances posed here.

Respectfully submitted,

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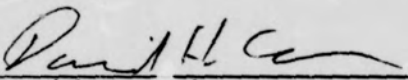
Counsel for Conrail Inc. and

CERTIFICATE OF SERVICE

I, David H. Coburn, certify that on September 10, 1997, I have caused to be served by first-class mail, postage prepaid, or by more expeditious means, a true and correct copy of the foregoing CSX/NS-73, Applicants' Reply to New York State Electric and Gas Petition for Clarification of Decision No. 1, on all parties that have appeared in STB Finance Docket No. 33388 and by hand delivery on the following:

The Honorable Jacob Leventhal
Administrative Law Judge
Federal Energy Commission
Office of Hearings
825 North Capitol Street, N.E.
Washington, D.C. 20426

William A. Mullins, Esq.
Sandra Brown, Esq.
Troutman, Sanders, LLP
1300 I Street, N.W.
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David H. Coburn

Dated: September 10, 1997

STB

FD-33388

ID-181815

9-10-97

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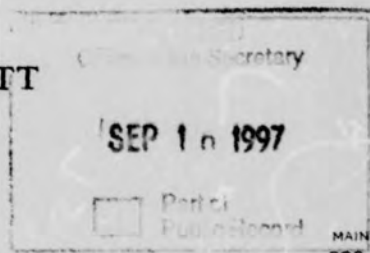
18/8/5

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WRITER'S DIRECT DIAL:
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202-463-2000
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202-861-0473

September 10, 1997

D



VIA HAND DELIVERY

Honorable Vernon A. Williams
Secretary
Surface Transportation Board
1925 K Street NW
Washington, DC 20423

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

Dear Secretary Williams:

Pursuant to Decision No. 27 in the above-referenced proceeding, enclosed please find an original and ten (10) copies of the Certificate of Service of The Burlington Northern and Santa Fe Railway Company.

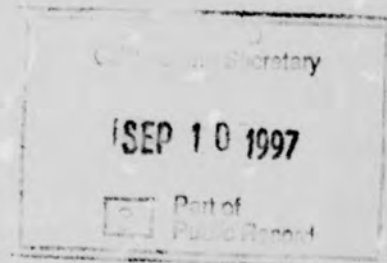
I would appreciate it if you would date-stamp the enclosed extra copy of the Certificate of Service and return it to the messenger for our files. If you have any questions, please contact me at (202) 778-0630. Thank you.

Sincerely,

Adrian L. Steel Jr.

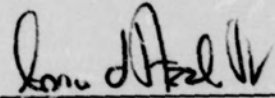
Enclosures

cc: Robert J. Cooper, General Chairperson



CERTIFICATE OF SERVICE

I hereby certify that a copy of all filings in Finance Docket No. 33388 submitted by The Burlington Northern and Santa Fe Railway Company prior to the service date of Board Decision No. 27 have been served this 10th day of September, 1997, by first-class mail, postage prepaid on Robert J. Cooper, Party of Record to the address set forth in Board Decision No. 27.



Adrian L. Steel, Jr.



STB

FD-33388

ID-181742

9-8-97

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181742



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 OPERATION LEASES/AGREEMENTS-
CONRAIL INC AND CONSOLIDATED RAIL CORPORATION

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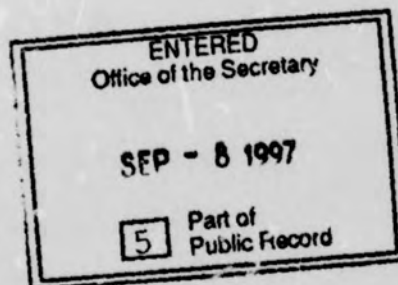
CERTIFICATE OF SERVICE

Now comes Party of Record, City of Lakewood, Ohio, and certifies that a copy of its Notice of Intent to Participate, the only filing submitted to date, has been served upon all other Parties of Record and upon the Honorable Jacob Leventhal on this 5th day of September, 1997.

Respectfully submitted,

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FD-33388

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September 8, 1997

BY HAND

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

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

Dear Secretary Williams:

Enclosed for filing is an original and twenty five copies of CSX/NS-72, Applicants' Reply to Motion of the Port Authority of New York and New Jersey for Modification of the Protective Order. Also enclosed is a 3½" computer disk containing the filing in WordPerfect 5.1 format, which is capable of being read by WordPerfect for Windows 7.0.

Please call me if you have any questions.

Very truly yours,

Drew A. Harker
Drew A. Harker

Enclosures

SEP 8 1997

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/ACREEMENT --
CONRAIL INC. AND CONSOLIDATED RAIL CORPORATION

APPLICANTS' REPLY TO MOTION
OF THE PORT AUTHORITY OF NEW YORK
AND NEW JERSEY FOR MODIFICATION
OF THE PROTECTIVE ORDER

Applicants, CSX, NS and Conrail¹ respectfully oppose the motion of the Port Authority of New York and New Jersey ("NYNJ") to modify the protective order to permit NYNJ's Deputy General Counsel to have access to materials designated "Highly Confidential" by parties to this proceeding. NYNJ makes no showing that the purposes of the protective order's access restriction are inapplicable to NYNJ, and fails to demonstrate a sufficient need for the modification. On that basis, the Board should deny NYNJ's motion.

¹ CSX Corporation and CSX Transportation, Inc. are referred to collectively as "CSX". Norfolk Southern Corporation and Norfolk Southern Railway Company are referred to collectively as "NS". Conrail Inc. and Consolidated Railway Corporation are referred to collectively as "Conrail."

The governing protective order, issued in Decision No. 1, served April 16, 1997, and subsequently modified in Decision No. 4, served May 2, 1997, is based on protective orders issued in several recent proceedings.² The relevant section provides:

8. Information and documents designated or stamped as "HIGHLY CONFIDENTIAL" may not be disclosed in any way, directly or indirectly, to an employee of a party to these Proceedings, or to any other person or entity except to an outside counsel or outside consultant to a party to these Proceedings, or to an employee of such outside counsel or outside consultant, who, before receiving access to such information or documents, has been given and has read a copy of this Protective Order and has agreed to be bound by its terms by signing a confidentiality undertaking substantially in the form set forth at Exhibit B to this Order.

Decision No. 1, slip op. at 4. NYNJ asks the Board to modify the protective order to permit its in-house counsel access to materials designated Highly Confidential on the grounds that: (1) NYNJ is an agency of two state governments and so there is no risk of commercial harm to the Applicants if information is disclosed to NYNJ; and (2) NYNJ's Deputy General Counsel needs access to highly confidential information in order to assist NYNJ in formulating positions in this proceeding.

As an initial matter, in addition to the fact that the purposes of the protective order's restricted access provisions apply squarely to NYNJ as discussed below, there has been no showing whatsoever of any need to grant this relief. NYNJ, unlike the United Transportation

² See, e.g., Finance Docket No. 32760, Union Pacific Corporation, Union Pacific Railroad Company, and Missouri Pacific Railroad Company -- Control and Merger -- Southern Pacific Rail Corporation, Southern Pacific Transportation Company, St. Louis Southwestern Railway Company, SPCSL Corp., and The Denver and Rio Grande Western Railroad Company ("UP/SP"), Decision No. 2, served September 1, 1995; Finance Docket No. 32549, Burlington Northern Inc. and Burlington Northern Railroad Company -- Control and Merger -- Santa Fe Pacific Corporation and The Atchison, Topeka and Santa Fe Railway Company (BN/Santa Fe), Decision served July 15, 1994). The protective orders in those proceedings were based, in turn, on orders governing prior merger proceedings.

Union ("UTU") and the Transportation Communications International Union ("TCU"), the only two cases in which the protective order in this proceeding has been modified to permit access to "highly confidential" material to in-house counsel, is represented by outside counsel, who has signed the undertakings in the protective order and already has access to Highly Confidential material. NYNJ's outside counsel has been active in this proceeding; he has served written discovery on each of the Applicants, has participated in 5 depositions to date, and has noticed his intent to participate in 14 additional depositions. Thus, NYNJ cannot claim that its ability to fully participate in the proceeding is prejudiced in any manner by limiting access to highly confidential material to NYNJ outside counsel. In all of the other cases of which Applicants are aware, access to highly confidential information has been granted to in-house counsel only when the party has not been represented by outside counsel. See BN/Santa Fe, Decision Nos. 12 and 33, served March 13, 1995 and June 20, 1995, respectively; and CSX/NS, Decision Nos. 15 and 22, served August 1, 1997 and August 21, 1997, respectively.³

Moreover, while NYNJ's motion does not describe the nature of its interest in this proceeding, an understanding of such interest clearly leads to denial of the motion. While NYNJ describes itself as a "bi-state agency of the states of New York and New Jersey," Motion at 2, it receives no tax revenue from any governmental entity. Rather, it is self-supporting, dependent

³ It should not be inferred from Applicants' opposition to the NYNJ motion that Applicants question whether NYNJ's inside counsel intends in good faith to comply with the dictates of the protective order. Instead, Applicants wish to reduce the risk of inadvertent disclosure of confidential information and to mitigate against the possibility that knowledge gained through this proceeding will be used, intentionally or otherwise, in commercial dealings in the future. See e.g., FTC v. Exxon Corp., 636 F.2d 1336, 1350 (D.C. Cir. 1980) ("[I]t is very difficult for the human mind to compartmentalize and selectively suppress information once learned, no matter how well-intentioned the effort may be to do so.").

on revenue from tolls, fees, and rents. In other words, its revenues depend, at least in part, on the amount of traffic that utilizes its facilities.

As to rail traffic, NYNJ takes the position that ports such as NYNJ compete with one another to attract waterborne intermodal traffic to their respective ports. Throughout the discovery phase of the proceeding, NYNJ has been very candid that its interest in participating in this proceeding has been driven, in part, by its desire to protect its competitive position vis-a-vis other east coast ports. Thus, its quasi-governmental status does not immunize NYNJ from the competitive pressures of the marketplace. On that basis, NYNJ has a competitive interest in this proceeding, not dissimilar to that of any shipper or railroad party participating in the proceeding. This competitive interest distinguishes NYNJ from the UTU and the TCU, which as noted above are the only parties for which access to highly confidential material has been granted to in-house counsel. Decision Nos. 15 and 22, served August 1, 1997 and August 21, 1997, respectively.

Information, including traffic volume, identity of shippers, and the rates paid by shippers, has already been produced by the Applicants. This information would be of substantial relevance to the competitive interests of NYNJ. However, NYNJ should not have access to such information because other port authorities -- direct competitors of NYNJ -- and other parties which use NYNJ facilities have an "expectation that proprietary data about their businesses in the possession of the primary applicants or produced in subsequent phases of discovery, and also contained among the highly confidential materials at issue here, will not be disclosed to [NYNJ]." BN/Santa Fe, 1995 WL 256997 (I.C.C.), served May 3, 1995, at *2-3; see also UP/SP, 1995 WL 628781 (I.C.C.), served October 27, 1995, at *5.

While the Applicants do not compete with NYNJ in providing rail transportation services, they do compete with respect to other transportation related services, such as intermodal terminal services. The Applicants also compete for alternative transportation options available to waterborne traffic calling on NYNJ. How such traffic is handled once it is portside or indeed, how it is routed to NYNJ (e.g., Transcontinental railroad versus Suez Canal), can be affected by the policies adopted by NYNJ or its negotiations with Applicants' competitors. The need to maintain the confidentiality of Applicants' proprietary information under those circumstances is obvious.

The Applicants also engage in commercial dealings with NYNJ which includes, among other things, arm's-length business relationships. For example, as the principal rail carrier servicing the Port of New York, Conrail has negotiated with NYNJ numerous diverse projects affecting transportation services in the Port District. These projects have included improvements to the rail infrastructure of the Port District and Conrail's service to Expressrail, an intermodal railroad freight terminal owned and developed by NYNJ. Conrail, in conducting such negotiations, routinely relies on its own confidential, commercial and proprietary information, the disclosure of which would surely adversely affect such arm's-length negotiations to the same extent as shipper or rail competitor access. Furthermore, Conrail, with respect to such projects, is often competing with other transportation providers for limited public funding. Conrail and the other Applicants should not be put at a disadvantage with respect to such negotiations. Clearly, disclosure to NYNJ's in-house counsel of highly confidential information poses a risk of such an unfair result. See, BN/Santa Fe, 1995 WL 256997 (I.C.C.), served May 3, 1995, at *1 (in-house counsel access to highly confidential information denied because requesting party

had "arms-length business relationships" with Applicants which could be adversely affected in future if access granted).

As discussed above, the protective order governing this proceeding is not new or unique. It is based on protective orders entered in similar proceedings under 49 U.S.C. § 11323 and its predecessor statutes. In every case with which Applicants are familiar, the Board and its predecessor, the Interstate Commerce Commission ("Commission"), have denied requests similar to that made in the NYNJ Motion when the requesting party had some kind of competitive interest in the proceeding. See, e.g., UP/SP, Decision No. 2 (request of Kansas City Southern Railway Company); UP/SP, Decision No. 7, served October 27, 1995 (request of National Industrial Transportation League); id. (request of Western Resources, Inc.); BN/Santa Fe, Decision No. 21, served May 3, 1994 (requests of Phillips Petroleum Company and Western Resources, Inc., both of which were represented by both in-house and outside counsel). These decisions provide ample basis for denying NYNJ's motion.

For the foregoing reasons, Applicants respectfully request that the Board deny NYNJ's

Motion For Modification of the Protective Order.

Respectfully submitted,

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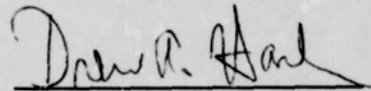
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Counsel for Conrail Inc. and
Consolidated Rail Corporation

CERTIFICATE OF SERVICE

I, Drew A. Harker, certify that on September 8, 1997 I have caused to be served by first class mail, postage prepaid, or by more expeditious means, a true and correct copy of the foregoing CSX/NS-72, Applicants' Reply To Motion Of The Port Of New York And New Jersey For Modification Of The Protective Order, on all parties that have appeared in STB Finance Docket No. 33388 and by hand delivery on the following:

The Honorable Jacob Leventhal
Administrative Law Judge
Federal Energy Regulatory Commission
888 First Street, N.E.
Washington, D.C. 20426



Drew A. Harker

Dated: September 8, 1997

STB

FD-33388

ID-181771

9-8-97

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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

**NOTICE OF THE VILLAGE OF RIDGEFIELD PARK, NEW JERSEY,
OF INTENTION TO PARTICIPATE IN PROCEEDINGS**

Please note the intention of the Village of Ridgefield Park, New Jersey, to participate and make the Village of Ridgefield Park, New Jersey a party of record in these proceedings. For purposes of the service of documents, please send documents to the undersigned at the following address:

Durkin & Boggia, Esqs.
Centennial House
71 Mt. Vernon Street
P.O. Box 378
Ridgefield Park, New Jersey 07660

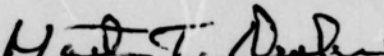
Respectfully,

Martin T. Durkin, Esq.

Dated: September 5, 1997

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on September 5, 1997, he served the within Notice of the Village of Ridgefield Park, New Jersey of Intention to Participate in Proceedings and the Motion to Late File said Notice by causing copies of both documents to be mailed by first class mail, postage prepaid, to Administrative Law Judge Jacob Leventhal, Federal Energy Regulatory Commission, 888 First Street, N.E., Suite 11F, Washington, D.C. 20426, and to all designated parties of record on the annexed Service List.


Martin T. Durkin, Esq.

FINANCE DOCKET NO. 33388

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THOMAS F MEEHAN
WILLIAM J MCILPATRICK

MEMBER OF CONGRESS
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PARTY OF RECORD
NORMAN H. BARTHELOW
DETROIT EDISON
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Represents: DETROIT EDISON COMPANY

PARTY OF RECORD
DONAH BEAR
EXECUTIVE OFFICE OF THE PRESIDENT
COUNCIL ON ENVIRONMENTAL QUALITY
WASHINGTON DC 20503 US

GOVERNOR
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GOVERNOR
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PARTY OF RECORD
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EASTMAN CHEMICAL COMPANY
PO BOX 431
KINGSPORT TN 37662 US

Represents: EASTMAN CHEMICAL CO

PARTY OF RECORD
MARTIN W. BERCOVICI
KELLER & HECKMAN
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Represents: ARCO CHEMICAL COMPANY
EIGHTY-FOUR MINING COMPANY
SOCIETY OF PLASTICS INDUSTRY

PARTY OF RECORD
DAVID BERGER
BERGER AND MONTAGUE, P. C.
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Represents: A HERB KEREKESCH AND GEORGE
DONAHUE

MEMBER OF CONGRESS
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MEMBER OF CONGRESS
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FINANCE DOCKET NO. 33388

MEMBER OF CONGRESS
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Represents: VILLAGE OF RIVERDALE

PARTY OF RECORD
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UNITED TRANSPORTATION UNION
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Represents: UNITED TRANSPORTATION
UNION-GENERAL COMMITTEE OF ADJUSTMENT

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COMMITTEE OF ADJUSTMENT GO-332

PARTY OF RECORD
THOMAS C. BRADY
BRADY BROOKS & O'CONNELL LLP
41 MAIN STREET
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Represents: SOUTHERN TIER WEST REGIONAL PLANNING
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MEMBER OF CONGRESS
HON. JOHN BREAUX
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PARTY OF RECORD
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DEVELOPMENT THROUGH THE JOINT USE OF CONRAIL
TRACKS BY NORFOLK SOUTHERN AND CSX

PARTY OF RECORD
ANITA R. BRINZA
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1828 L STREET N.W.
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LABOR COUNCIL CONRAIL NO

MEMBER OF CONGRESS
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MEMBER OF CONGRESS
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PARTY OF RECORD
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PARTY OF RECORD
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Represents: BROTHERHOOD OF LOCOMOTIVE
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FINANCE DOCKET NO 33388

PARTY OF RECORD
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PARTY OF RECORD
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Represents:

PARTY OF RECORD
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Represents: DELAWARE RIVER PORT AUTHORITY
PHILADELPHIA REGIONAL PORT AUTHORITY
SOUTH JERSEY PORT CORPORATION
THE PORT OF PHILADELPHIA AND CAMDEN INC

PARTY OF RECORD
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Represents: CONRAIL GENERAL COMMITTEE OF
ADJUSTMENT
NEW YORK STATE LEGISLATIVE BOARD
R W GODWIN GENERAL CHAIRMAN

PARTY OF RECORD
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Represents: CITY OF EAST CHICAGO INDIANA

PARTY OF RECORD
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Represents: UNITED TRANSPORTATION UNION GENERAL
COMMITTEE OF ADJUSTMENT 348

PARTY OF RECORD
J DOYLE CORMAN
MAIN LINE MGMT SERVICES INC
520 FELLOWSHIP ROAD STE A-105
MOUNT LAUREL NJ 08054-3407 US

Represents:

PARTY OF RECORD
JOHN J COSCIA, EXECUTIVE DIRECTOR
DVRPC
111 SOUTH INDEPENDENCE MALL EAST
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Represents: DELAWARE VALLEY REGIONAL PLANNING
COMMISSION

PARTY OF RECORD
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EXXON COMPANY USA
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Represents: EXXON CHEMICALS AMERICAS
EXXON COMPANY U S A

PARTY OF RECORD
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Represents:

PARTY OF RECORD
PAUL A. CUNNINGHAM
HARRIS CUNNINGHAM
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Represents: CONRAIL INC
CONSOLIDATED RAIL CORPORATION

MEMBER OF CONGRESS
HONORABLE ALFONSE D'AMATO
UNITED STATES SENATE
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MEMBER OF CONGRESS
HONORABLE ALFONSE D'AMATO
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PARTY OF RECORD
IRWIN L. DAVIS
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Represents: METROPOLITAN DEVELOPMENT
ASSOCIATION OF SYRACUSE & CENTRAL
NEW YORK INC

PARTY OF RECORD
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MDCO CONSULTANTS, INC.
407 SOUTH DEARBORN, SUITE 1145
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Represents: MDCO CONSULTANTS INC

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Represents: LOUISVILLE & INDIANA RAILROAD
COMPANY

PARTY OF RECORD
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Represents: ANKER ENERGY CORPORATION
BUFFALO COAL CO., INC.
EVERGREEN MINING COMPANY
MARYLAND COAL ASSOCIATION
METTICKI COAL CORPORATION
FUS COALS INC
TRI-STATE COAL ASSOCIATION
VENTURE COAL SALES
WEST VIRGINIA COALS, INC.

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PARTY OF RECORD
DAVID W. DONELY
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Represents: WEIRTON STEEL CORPORATION

FINANCE DOCKET NO. 33388

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Representative: CONSUMERS ENERGY COMPANY
GPU GENERATION INC

PARTY OF RECORD
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ZONE OF WEST VIRGINIA

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DEKALB AGRA INC
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Representative: DEKALB AGRA INC

PARTY OF RECORD
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MILLENNIUM PETROCHEMICALS, INC.
11500 NORTHLAKE DRIVE
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Representative: MILLENNIUM PETROCHEMICALS INC F/K/A
QUANTUM CHEMICAL CORPORATION

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TRANSPORTATION
NEW JERSEY TRANSIT CORPORATION
NORTHERN VIRGINIA TRANSPORTATION
COMMISSION-POTOMAC AND
RAPPAHANNOCK TRANSPORTATION COMMISSION

FINANCE DOCKET NO. 33388

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ONE WILBRAHAM STREET
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CORPORATION

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PARTY OF RECORD
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BP CHEMICALS INC
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Represents BP AMERICA INC

PARTY OF RECORD
RICHARD A GAVREL
16700 GENTRY LANE NO 104
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PARTY OF RECORD
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Represents REGIONAL RAILROADS OF AMERICA'S

PARTY OF RECORD
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BALL JANIK LLP
1435 F STREET NW SUITE 225
WASHINGTON DC 20005 US

Represents APL LAND TRANSPORT SERVICES
DELAWARE VALLEY RAILWAY COMPANY INC
HURON AND EASTERN RAILWAY COMPANY INC
RAILAMERICA INC
SAGINAW VALLEY RAILWAY COMPANY INC

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COMMITTEE

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Represents ARCHER DANIELS MIDLAND CO
NATIONAL GRAIN AND FEED ASSOCIATION

PARTY OF RECORD
JOHN GORDON
NATIONAL LIME & STONE COMPANY
P O BOX 120
FINDLAY OH 43140 US

Represents NATIONAL LIME & STONE COMPANY

MEMBER OF CONGRESS
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UNITED STATE SENATE
WASHINGTON DC 20510 US

PARTY OF RECORD
HOWARD D GARDENBERG
GALLAND, KHARASCH, MORSE & GARFINKLE
1034 THIRTY-FIRST STREET NW
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Represents PROVIDENCE AND WORCESTER RAILROAD
COMPANY
STEEL WAREHOUSE CO INC
THE INTERNATIONAL PAPER COMPANY

PARTY OF RECORD
PETER A. GREENE
THOMPSON HINE FLORY
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Represents BAY STATE MILLING COMPANY
BELVIDERE & DELAWARE RIVER RAILWAY
BLACK RIVER & WESTERN RAILROAD
EAST PENN RAILWAY INC
LANCASTER NORTHERN RAILWAY

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

Represents TOLEDO-LUCAS COUNTY PORT AUTHORITY
TOLEDO-LUCAS COUNTY PORT AUTHORITY

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BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYEES
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PARTY OF RECORD
JOHN J GROCKI
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115 WEST AV ONE JENKINTOWN STA
JENKINTOWN PA 19046 US

Represents GRA INCORPORATED

FINANCE DOCKET NO 33388

PARTY OF RECORD
VAUGHN R GROVES
PITTSBURGH COAL COMPANY
PO BOX 5100
LEBANON VA 24266 US

Represents: PITTSBURGH COAL COMPANY

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GUERRIERI, EDMOND, ET. AL
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COMMONWEALTH CONSULTING ASSOCIATES
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Represents: SHELL CHEMICAL COMPANY
SHELL OIL COMPANY

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UNITED STATES HOUSE OF REPRESENTATIVES
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Represents: U.S. DEPARTMENT OF JUSTICE

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THE DOW CHEMICAL COMPANY
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Represents: EMPIRE STATE PASSENGER ASSOCIATION
FORT CRANDELL PAPER COMPANY
NEW YORK CROSS HARBOR RAILROAD TERMINAL
CORPORATION
WABASH & WESTERN RAILWAY CO D/B/A MICHIGAN
SOUTHERN RAILROAD

PARTY OF RECORD
R. J. HENEFELD
PPG INDUSTRIES INC.
ONE PPG PLACE
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Represents: PPG INDUSTRIES INC.

PARTY OF RECORD
WILLIAM E. HERMAN JR. GENERAL CHAIRMAN
P.O. BOX 110
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PARTY OF RECORD
CHARLES S. HESSE, PRESIDENT
CHARLES HESSE ASSOCIATES
1270 STONEY BROOK DRIVE
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Represents: OHIO STEEL INDUSTRY ADVISORY COUNCIL

PARTY OF RECORD
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213 WEST MINER STREET
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BETHLEHEM STEEL CORPORATION ET AL
BUFFALO & PITTSBURGH RAILROAD, INC.
PITTSBURGH & SHAWMUT RAILROAD INC.
READING BLUE MOUNTAIN & NORTHERN RAILROAD
COMPANY
ROCHESTER & SOUTHERN RAILROAD INC.
THE NEW YORK SUSQUEHANNA AND WESTERN
RAILWAY CORPORATION

PARTY OF RECORD
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EASTERN SHORE RAILROAD INC
P.O. BOX 312
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Represents: EASTERN SHORE RAILROAD INC

PARTY OF RECORD
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Represents: COALITION OF NORTHEASTERN GOVERNORS
MASSACHUSETTS CENTRAL RAILROAD CORPORATION

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PARTY OF RECORD
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PARTY OF RECORD
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CORPORATION

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FINANCE DOCKET NO. 33388

PARTY OF RECORD
JAMES R JACOBS
JACOBS INDUSTRIES
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RAILWAY COMPANY

PARTY OF RECORD
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TRANSPORTATION INTERMEDIARIES ASSOCIATION

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Represents: FOX VALLEY & WESTERN LTD
ILLINOIS CENTRAL RAILROAD COMPANY CHICAGO
CENTRAL & PACIFIC
RAILROAD COMPANY AND CEDAR RIVER RAILROAD
COMPANY
R J CORMAN PARTIES
R J CORMAN RAILROAD COMPANIES
SAULT STE MARIE BRIDGE COMPANY
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RAILROAD COMPANY
TRANSTAR INC
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WISCONSIN CENTRAL LTD
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PITTSBURGH PA 15219 US

Represents: NATIONAL STEEL CORPORATION

PARTY OF RECORD
FRONALDS WALKER
CITIZENS GAS & COKE UTILITY
2020 N MERIDIAN STREET
INDIANAPOLIS IN 46202 US

Represents: CITIZENS GAS & COKE UTILITY

PARTY OF RECORD
JACK A. WALTER
WCI STEEL INC
1040 PINE AVENUE S E
WARREN OH 44483 US

Represents: WCI STEEL INC

MEMBER OF CONGRESS
HONORABLE JOHN WARNER
UNITED STATES SENATE
WASHINGTON DC 20510 US

MEMBER OF CONGRESS
HONORABLE JOHN WARNER
UNITED STATES SENATE
P O BOX 8817
235 FEDERAL BUILDING
ARLINGTON VA 22210-0887 US

PARTY OF RECORD
JAMES R. WEISS
PRESTON GATES ELLIS ET AL
1733 NEW YORK AVENUE NW SUITE 500
WASHINGTON DC 20006 US

Represents: MARYLAND DEPARTMENT OF
TRANSPORTATION

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

PARTY OF RECORD
LAY WESTBROOK
CITY HALL RM 216
601 LAKESIDE AV NE
CLEVELAND OH 44114 US

Represents: CITY OF CLEVELAND OHIO

MEMBER OF CONGRESS
HONORABLE BOB WEYLAND
U S HOUSE OF REPRESENTATIVES
WASHINGTON DC 20515 US

PARTY OF RECORD
CHARLES H. WHITE, JR.
GALLAND, KHARASCH & GARFINKLE, P. C.
1034 THIRTY-FIRST STREET NW
WASHINGTON DC 20007-4492 US

Represents: STARK DEVELOPMENT BOARD INC
WHEELING & LAKE ERIE RAILWAY COMPANY

PARTY OF RECORD
WILLIAM W. JR. WHITEHURST
W. W. WHITEHURST & ASSOCIATES, INC
12421 HAPPY HOLLOW ROAD
COCKEYSVILLE MD 21030 US

Represents: W W WHITEHURST & ASSOCIATES INC

PARTY OF RECORD
HENRY M. WICK, JR.
WICK, STREIFF, ET AL
1450 TWO CHATHAM CENTER
PITTSBURGH PA 15219 US

Represents: U S CLAY PRODUCERS TRAFFIC
ASSOCIATION INC

PARTY OF RECORD
ROBERT J. WILL
UNITED TRANSPORTATION UNION
4134 GRAVE RUN RD
MANCHESTER MD 21102 US

PARTY OF RECORD
RICHARD R. WILSON
1126 EIGHT AV STE 403
ALTOONA PA 16602 US

Represents: ASHLAND RAILROAD COMPANY
DURHAM TRANSPORT INC
JUNIATA VALLEY RAILROAD COMPANY
LYCOMING VALLEY RAILROAD COMPANY
MITTANY & BALD EAGLE RAILROAD COMPANY
NORTH SHORE RAILROAD COMPANY
NORTHWEST PENNSYLVANIA RAIL AUTHORITY
OHIO RAIL CORPORATION
RICHARD D. ROBEY
SHAMOKIN VALLEY RAILROAD COMPANY
SOUTHWESTERN PENNSYLVANIA REGIONAL PLANNING
COMMISSION
STURBRIDGE RAILROAD COMPANY
TRANSPORTATION COMMITTEE PENNSYLVANIA HOUSE
OF REPRESENTATIVES
WELLESBORO & CORNING RAILROAD COMPANY

PARTY OF RECORD
ROBERT A. WIMBISH, ESQ.
REA, CROSS & AUCHINCLOSS
1920 N STREET NW SUITE 420
WASHINGTON DC 20036 US

Represents: CONNECTICUT CENTRAL RAILROAD

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

Represents: UNITED TRANSPORTATION UNION GENERAL
COMMITTEE OF ADJUSTMENT GO-651

PARTY OF RECORD
JOHN F. WING CHAIRMAN
CITIZENS ADVISORY COMMITTEE
601 NORTH HOWARD STREET
BALTIMORE MD 21201 US

Represents: CITIZENS ADVISORY COMMITTEE

FINANCE DOCKET NO. 33388

MEMBER OF CONGRESS
HONORABLE BOB WISE
U S HOUSE OF REPRESENTATIVES
WASHINGTON DC 20510 US

PARTY OF RECORD
SERGEANT W WISE
LIVONIA AVON & LAKEVILLE RAILROAD CORPORATION
P O BOX 190-B
5769 SWEETENERS BLVD
LAKEVILLE NY 14480 US

~~Representative~~ LIVONIA AVON & LAKEVILLE RAILROAD
CORPORATION

PARTY OF RECORD
TIMOTHY A WOLFE
WYANDOT DOLOMITE INC
P O BOX 99 1794 CO RD #99
CAREY OH 43316 US

~~Representative~~ WYANDOT DOLOMITE INC

PARTY OF RECORD
FREDERIC L. WOOD
DONELAN, CLEARY, WOOD & MAYER, P. C.
1100 NEW YORK AVE NW STE 750
WASHINGTON DC 20005-3934 US

~~Representative~~ NATIONAL INDUSTRIAL TRANSPORTATION
LEAGUE

PARTY OF RECORD
E C WRIGHT
RAIL TRANSPORTATION PROCUREMENT MANAGER
1007 MARKET STREET, DUPONT BLDG 3100
WILMINGTON DE 19898 US

~~Representative~~ E I DU PONT DE NEMOURS AND COMPANY

PARTY OF RECORD
L PAT WYNNS
SUITE 210
1050 - 17TH STREET N W
WASHINGTON DC 20036-5503 US

PARTY OF RECORD
EDWARD WYTKIND, EXECUTIVE DIRECTOR
TRANSP TRADES DEPT AFL-CIO
400 N CAPITOL ST SW STE 861
WASHINGTON DC 20001 US

~~Representative~~ TRANSPORTATION TRADES DEPARTMENT
AFL-CIO

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

~~Representative~~ NORTHERN INDIANA PUBLIC SERVICE
COMPANY

PARTY OF RECORD
SCOTT M ZIMMERMAN
ZUCKERT SCOUTT & RASENBERGER L L P
888 SEVENTEENTH STREET NW
WASHINGTON DC 20006 US

PARTY OF RECORD
WALTER E ZULLIG JR SPECIAL COUNSEL
METRO-NORTH COMMUTER RAILROAD COMPANY
347 MADISON AVE
NEW YORK NY 10017-3706 US

~~Representative~~ METRO-NORTH COMMUTER RAILROAD
COMPANY

STB

FD-33388

ID-181772

9-8-97

D

181772

Law Offices

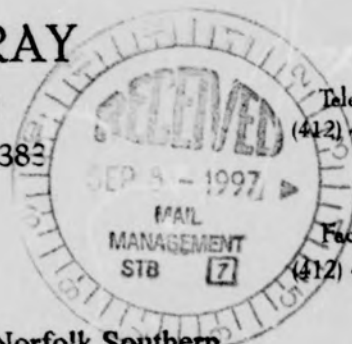
VUONO & GRAY

2310 Grant Building

Pittsburgh, PA 15219-2383

August 29, 1997

John A. Vuono
William A. Gray
Mark T. Vuono*
Richard R. Wilson
Dennis J. Kusturiss
Christine M. Doll
Louise R. Schrage
*Also Admitted in Florida



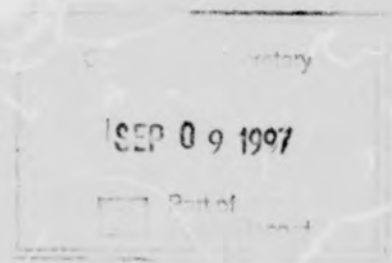
Telephone
(412) 471-1800

Facsimile
(412) 471-4477

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

D

Honorable Vernon A. Williams, Secretary
Surface Transportation Board
Case Control Unit
ATTN: STB Finance Docket No. 33388
1925 K Street, N.W.
Washington, DC 20423-0001



Dear Secretary Williams:

In accordance with Decision No. 21 served on August 19, 1997 in connection with the above proceeding, we enclose for filing the original and ten (10) copies of the Certificate of Service submitted in behalf of National Steel Corporation.

Respectfully submitted,

VUONO & GRAY, LLC

John A. Vuono

CW/5037

Enclosures

cc: Administrative Law Judge Jacob Leventhal
All Parties of Record on the Decision No. 21 Service List
National Steel Corporation

BEFORE THE
SURFACE TRANSPORTATION BOARD



FINANCE DOCKET NO. 33388

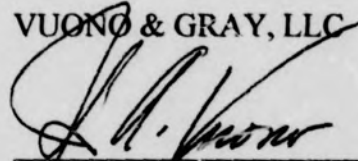
CSX CORPORATION AND CSX TRANSPORTATION, INC.
NORFOLK SOUTHERN CORPORATION AND
NORFOLK SOUTHERN RAILWAY COMPANY
--CONTROL AND OPERATING LEASE/AGREEMENTS--
CONRAIL, INC. AND CONSOLIDATED RAIL CORPORATION

CERTIFICATE OF SERVICE

I hereby certify that, pursuant to the provisions of Decision No. 21, served August 19, 1997 in connection with the above proceeding, a copy of the attached Notice of Intent to participate which is the only filing submitted so far in behalf of National Steel Corporation was served on all parties of record identified in Decision No. 21, other than those parties previously served, by first class mail, postage prepaid, on this 29th day of August, 1997.

Respectfully submitted,

VUONO & GRAY, LLC



John A. Vuono, Esq.

VUONO & GRAY, LLC
2310 Grant Building
Pittsburgh, PA 15219
(412) 471-1800
(412) 471-4477 (Facsimile)

Law Offices

VUONO & GRAY

John A. Vuono
William A. Gray
Mark T. Vuono*
Richard R. Wilson
Dennis J. Kusturisa
Christine M. Dolfi
Louise R. Schrage
*Also Admitted in Florida

2310 Grant Building
Pittsburgh, PA 15219-2383

August 4, 1997

Telephone
(412) 471-1800

Facsimile
(412) 471-4477

C
O
P
Y

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

Surface Transportation Board
Office of the Secretary
Case Control Unit
ATTN: STB Finance Docket No. 33388
1925 K Street, N.W.
Washington, DC 20423-0001

FEDERAL EXPRESS

Gentlemen:

We hereby submit for filing the original and twenty-five (25) copies of this Notice of Intent to participate in the above proceeding as a party of record in behalf of:

National Steel Corporation
4100 Edison Lakes Parkway
Mishawaka, IN 46545-3440

We ask that our name be included in the Board's service list so that we will receive copies of all orders, notices, pleadings, etc.

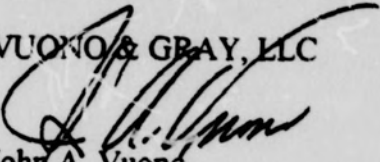
This will confirm that a copy of this Notice has been simultaneously mailed to the parties shown on the attached list.

Page Two
August 4, 1997

As required by the Board, we are enclosing a 3.5 inch IBM-compatible floppy disk containing an electronic copy of this document. The material is written in WordPerfect 6.1 for windows which is convertible to WordPerfect 7.0.

Sincerely yours,

VUONO & GRAY, LLC


John A. Vuono

CW/4843

Enclosure

cc: National Steel Corporation

C
O
P
Y

STB

FD-33388

ID-181773

9-8-97

D

18773

Before the
SURFACE TRANSPORTATION BOARD
Washington, DC



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*

D

CERTIFICATE OF SERVICE

In accordance with the Board's Decision No. 21, the undersigned certifies that all pleadings previously filed with the Board in the above-captioned matter have been served on the parties of record shown on the service list by first-class mail, postage prepaid, and in accordance with the Board's Rules of Procedure

David W. Donley
Attorney for Weirton Steel Corporation
3361 Stafford Street
Pittsburgh PA 15204

Dated August 29, 1997

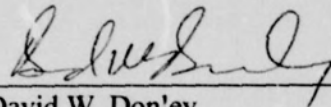
Before the
SURFACE TRANSPORTATION BOARD
Washington, DC

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 certify that a copy of the foregoing Certificate of Service has been served on
the parties of record shown on the service list by first-class mail, postage prepaid, and in
accordance with the Board's Rules of Procedure



David W. Donley
Attorney for Weirton Steel Corporation
3361 Stafford Street
Pittsburgh PA 15204

Dated August 29, 1997

STB

FD-33388

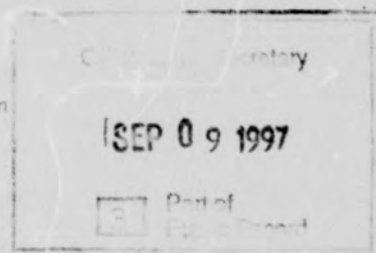
ID-181775

9-8-97

D

181775
Knightsbridge Drive
Hamilton, Ohio 45020
513 868-4974, Fax: 513 868-5778

Richard E. Kerth
Transportation/Distribution Manager—Commerce, Regulatory Affairs
and Organizational Improvement
Corporate Transportation/Distribution



September 2, 1997

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

re: Finance Docket No. 33388 CSX Corporation, et. al; Norfolk Southern
Corporation et al: -- Control & Operating Leases / Agreements -- Conrail,
Inc. and Consolidated Rail Corporation

Dear Secretary Williams:

Pursuant to Decision No. 21 in the above referenced proceeding, enclosed please find the
original and ten copies of the Certificate of Service of Champion International
Corporation for filing in this matter.

Sincerely,

A handwritten signature in cursive script, appearing to read 'Richard E. Kerth'.
Richard E. Kerth

cc: Administrative Law Judge Jacob Leventhal
Office of Hearings
Federal Energy Regulatory Commission
888 - 1st St. N.E., Suite 11F
Washington, D.C. 20426

CIC-2

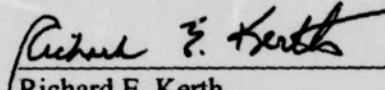
CERTIFICATE OF SERVICE

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

I hereby certify that on the 28th day of August, 1997, I served copies of the comments of
Champion International Corporation, identified by the acronym "CIC-1", by first class mail,
postage prepaid, on all Parties of Record, as ordered by the Surface Transportation Board in
Decision No. 21 dated August 19, 1997.

Respectfully submitted,



Richard E. Kerth

Transportation Manager - Commerce,
Regulatory Affairs & Organizational
Improvement

CHAMPION INTERNATIONAL CORPORATION
101 Knightsbridge Drive
Hamilton, OH 45020
(513) 868-4974 Fax: (513) 868-5778

September 2, 1997

STB

FD-33388

ID-181774

9-8-97

D

181774

SLOVER & LOFTUS

ATTORNEYS AT LAW

1224 SEVENTEENTH STREET, N. W.

WASHINGTON, D. C. 20036

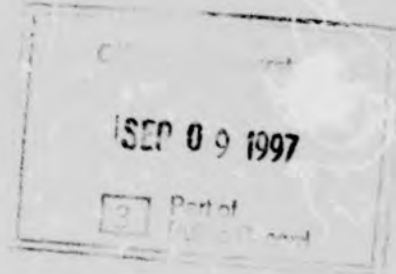
WILLIAM L. SLOVER
C. MICHAEL LOFTUS
DONALD G. AVERY
JOHN H. LE SEUR
KELVIN J. DOWD
ROBERT D. ROSENBERG
CHRISTOPHER A. MILLS
FRANK J. PERGOLIZZI
ANDREW B. KOLESAR III



September 8, 1997

BY HAND DELIVERY

The Honorable Vernon A. Williams
Secretary
Surface Transportation Board
ATTN: STB Finance Docket 33388
1925 K Street, N.W.
Washington, D.C. 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

Dear Secretary Williams:

Enclosed for filing in the captioned proceeding please find an original and twenty-five (25) copies of "Reply in Opposition to Petitions for Clarification or Waiver (AA-2/CSO-2)" for the National Railroad Passenger Corporation ("AMTRAK") (NRPC-06).

Also enclosed is a diskette containing this document in Wordperfect 5.1 form (convertible into Wordperfect 7.0).

We have included an extra copy of this reply and the attached certificate of service. Kindly indicate receipt by time-stamping this copy and returning it with our messenger. Thank you for your attention to this matter.

Sincerely,

Donald G. Avery
An Attorney for the National
Railroad Passenger Corporation

cc: The Honorable Jacob Leventhal
All Parties of Record

BEFORE THE
SURFACE TRANSPORTATION BOARD



CSX CORPORATION AND CSX)
TRANSPORTATION, INC. AND)
NORFOLK SOUTHERN RAILWAY COMPANY)
COMPANY -- CONTROL AND OPERATING)
LEASES/AGREEMENTS -- CONRAIL AND)
CONSOLIDATED RAIL CORPORATION --)
TRANSFER OF RAILROAD LINE BY)
NORFOLK SOUTHERN RAILWAY COMPANY)
TO CSX TRANSPORTATION, INC.)

Finance Docket No. 33388

NATIONAL RAILROAD PASSENGER CORPORATION'S
REPLY IN OPPOSITION TO PETITIONS FOR CLARIFICATION OR WAIVER
(AA-2/CSO-2)

The National Railroad Passenger Corporation ("AMTRAK") hereby responds to the Petitions for Clarification or Waiver of the Board's rules, filed on August 22, 1997 by the Ann Arbor Railroad ("AARR") (AA-2) and Connecticut Southern Railroad, Inc. ("CSRR") (CSO-2).¹

For the reasons set forth below, Amtrak urges the Board to deny the Petitioners'² requests insofar as they would relieve Petitioners of their obligation, under 49 CFR §1180.8(a), to provide specific operating plan information regarding their

¹ On September 2, 1997, Amtrak served notice to the Board and Parties of Record (NRPC-05) of its intent to file this reply on or before Monday, September 8.

² "Petitioners" as referenced herein refers to both AARR and CSRR. AMTRAK addresses both petitions jointly in this reply, since, for purposes of this reply, each Petitioner has requested identical waiver requests.

proposed operations over railroad line segments owned by Amtrak and used for passenger service.

On August 22, 1997, Petitioners filed in this proceeding their Descriptions of Anticipated Responsive Applications, and filed accompanying Petitions for Clarification or Waiver. AARR states that it anticipates requesting "trackage rights over one of three rail lines approximately 275 to 325 miles in length;" one of those lines is Conrail's³ Ann Arbor to Chicago line that is scheduled to be acquired by NS under the proposed merger Application. For its part, CSRR anticipates requesting "trackage rights over a rail line totalling approximately 75 miles in length" and requests local trackage rights over Conrail's line from New Haven, Connecticut to Fresh Pond Junction, New York, which is to be acquired by CSX under the proposed merger Application. Each Petitioner requests that its "application be considered a minor transaction or, alternatively, that the Board waive certain regulatory provisions otherwise applicable to significant transactions", including the requirements under 49 C.F.R. § 1180.8(a) that responsive applications must contain a summary of planned operational changes over the lines proposed for joint operations, including impacts on commuter or other passenger services, and information on proposed patterns of service, anticipated equipment requirements, density charts, etc.

³ As used herein, "Conrail" refers to both Conrail Inc. and Consolidated Rail Corporation; "NS" refers to both Norfolk Southern Corporation and Norfolk Southern Railway Company; and "CSX" refers to both CSX Corporation and CSX Transportation, Inc.

AMTRAK is affected by these petitions because it is the owner of portions of each of the railroad lines over which Petitioners may seek trackage rights. AARR's proposed trackage rights request includes the AMTRAK-owned line between New Rochelle (MP 15.5) and Pelham Bay, New York (MP 18.9) (the "Hell Gate Line"), which is part of the Boston-to-Washington Northeast Corridor, and a portion of CSRR's trackage rights request includes the Amtrak-owned line between Kalamazoo, Michigan and Porter, Indiana, a distance of 96 miles ("the Michigan Line"). Both railroad lines are predominantly used for passenger service.

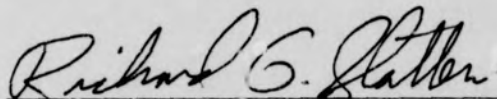
AMTRAK opposes Petitioners' requests that the Board waive the requirements of 49 C.F.R. § 1180.8(a), requiring responsive applications to include an analysis of operational impacts on passenger services. In order for AMTRAK to determine whether the requested trackage rights will interfere with its passenger operations, it is imperative that Petitioners include such operational information in their responsive applications. AMTRAK notes that the Hell Gate Line is part of its New York-to-Boston route that is presently being upgraded for high speed (up to 150 miles per hour) passenger service, and that it plans to initiate 100 miles per hour service over a substantial portion of the Michigan line next year. Changes in existing freight operations on those segments could disrupt AMTRAK service and operations, including the planned high-speed service operations.

While AMTRAK opposes Petitioners' § 1180.8(a) waiver requests, we note that under § 1180.8(c), if the Petitioners'

transactions are considered *minor* transactions, as Petitioners requested in the alternative, Petitioners will still be required to submit limited information regarding impacts on passenger service. AMTRAK suggests that if the Board deems the Petitioners' responsive applications to be minor transactions, it should direct Petitioners to produce sufficient operational data to permit a determination of whether the resulting operations would adversely affect AMTRAK's present and planned high speed operations.

For all of the above reasons, the Board should deny Petitioners' § 1180.8(a) waiver requests, and should order Petitioners to produce the necessary operational data with respect to their proposed operations on Amtrak-owned lines.

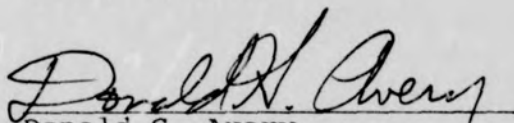
Respectfully submitted,


Richard G. Slattery
NATIONAL RAILROAD PASSENGER CORPORATION
60 Massachusetts Avenue, NE
Washington, DC 20002
(202) 906-3987

OF COUNSEL:

Slover & Loftus
1224 Seventeenth St., NW
Washington, DC 20036

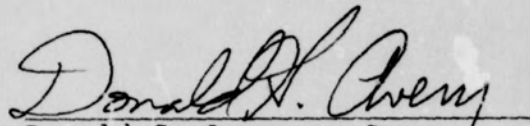
Date: September 8, 1997


Donald G. Avery
Frank J. Pergolizzi
SLOVER & LOFTUS
1224 Seventeenth Street, NW
Washington, DC 20036
(202) 347-7170

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing Response were served this 8th day of September, 1997, by first-class mail, postage pre-paid, upon all Parties of Record in this Proceeding, and upon:

The Honorable Jacob Leventhal
Federal Energy Regulatory Commission
888 First Street, N.E.
Suite 11F
Washington, D.C. 20426


Donald G. Avery

STB

FD-33388

ID-181794

9-8-97

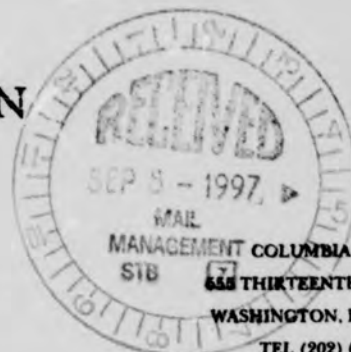
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181794

HOGAN & HARTSON
LLP

GEORGE W. MAYO, JR.
PARTNER
DIRECT DIAL (202) 637-5679

September 8, 1997



TEL (202) 637-5600
FAX (202) 637-5910

BY HAND DELIVERY

The Honorable Vernon A. Williams
Secretary, Surface Transportation Board
Case Control 5
ATTN: STB Finance Docket No. 33388
Surface Transportation Board
1925 K Street, N.W.
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

Dear Secretary Williams:

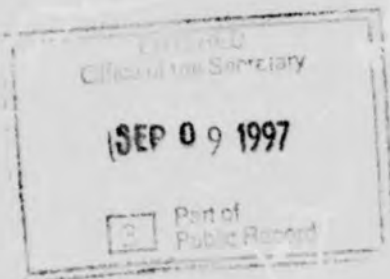
Enclosed for filing in the above-referenced docket are
an original and twenty-five copies of Canadian Pacific Parties'
Reply in Opposition to Applicants' Motion to Accept Late Filed
Reply. Also enclosed is a 3.5-inch diskette, formatted for
WordPerfect 5.x for Windows, which can be converted to
WordPerfect 7.0, containing the pleading.

Thank you for your assistance.

Sincerely,

George W. Mayo, Jr.

George W. Mayo, Jr. *jms*
Attorney for Canadian Pacific
Railway Company, Delaware and
Hudson Railway Company, Inc.,
Soo Line Railroad Company, and
St. Lawrence & Hudson Railway
Company Limited



GWM:jms

BRUSSELS LONDON MOSCOW PARIS* PRAGUE WARSAW

BALTIMORE, MD BETHESDA, MD COLORADO SPRINGS, CO DENVER, CO McLEAN, VA

\\DC - 66673/1 - 0377213.08

*Affiliated Office

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

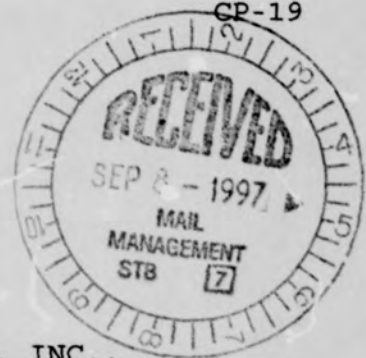
CANADIAN PACIFIC PARTIES' REPLY
IN OPPOSITION TO APPLICANTS'
MOTION TO ACCEPT LATE FILED REPLY

MARCELLA M. SZEL
Vice President-Legal Services
CANADIAN PACIFIC RAILWAY COMPANY
Suite 500, Gulf Canada Square
401 Ninth Avenue, S.W.
Calgary, Alberta T2P 4Z4
CANADA
(403) 218-7474

GEORGE W. MAYO, JR.
ERIC VON SALZEN
THOMAS B. LEARY
HOGAN & HARTSON L.L.P.
555 Thirteenth Street, N.W.
Washington, D.C. 20004-1109
(202) 637-5600

Attorneys for Canadian Pacific
Railway Company, Delaware and
Hudson Railway Company, Inc.,
Soo Line Railroad Company, and
St. Lawrence & Hudson Railway
Company Limited

September 8, 1997



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



CANADIAN PACIFIC PARTIES' REPLY
IN OPPOSITION TO APPLICANTS'
MOTION TO ACCEPT LATE FILED REPLY

The Canadian Pacific Parties 1/ oppose Applicants' 2/
Motion To Accept Late Filed Reply (CSX/NS-62) on grounds that the
reply in question -- which challenges certain of CP's requests
for waiver or clarification of the Board's Railroad Consolidation
Procedures as they may relate to the responsive application D&H
contemplates filing in this proceeding -- (1) was seven days out

1/ The Canadian Pacific Parties refers to the Canadian Pacific
Railway Company ("CPR"), Delaware and Hudson Railway Company,
Inc. ("D&H"), Soo Line Railway Company ("Soo"), and St. Lawrence
and Hudson Railway Company Ltd. (collectively "CP").

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

of time (not one day as Applicants assert), and (2) is not permitted under the Board's Rules.

If Applicants had a right to reply to CP's petition for waiver/modification (CP-11, filed on Friday, August 22), that reply should have been filed not later than Wednesday, August 27. The Board has made it unquestionably clear that "any reply to any motion" -- "whether that motion is or is not styled as a 'motion'" -- must be filed within three working days of the motion's filing date. Decision No. 13, slip op. at 1 (served Jul. 25, 1997) (emphasis in original); see Decision No. 12, slip op. at 21 (served Jul. 23, 1997). Applicants' reply, without explanation, was tardy not by a single day, but by seven days. Given Applicants' failure to adhere to "the expedited schedule that governs this proceeding" (Decision No. 13, slip op. at 1 (served Jul. 25, 1997)), their motion for leave to file out of time should be denied. 3/

Moreover, the reply Applicants' seek to file is not permitted under the Board's Rules, which make clear that except

3/ It should be noted that CP received Applicant's September 3 motion and the accompanying reply by mail on September 4, having been given no earlier notice that Applicant's intended to challenge CP's petition for waiver/clarification.

in limited circumstances not relevant here, "[n]o replies to a petition for waiver will be permitted." 49 C.F.R.

§ 1180.4(f)(3). When a respondent party replied to certain of their own requests for waiver or clarification of the Board's Railroad Consolidation Procedures, Applicants argued that the reply should be stricken as not permitted under the Board's Rules. 4/ And yet Applicants are quick simply to ignore those Rules when to do so serves their purposes, as the submission of their tardy reply does here. Accordingly, apart from the fact that Applicant's reply was filed out of time, it should also be rejected because the Board's Rules specifically prohibit its filing. As explained below, Applicants' have offered absolutely no reason why the Board should make an exception to this prohibition.

Applicants' reply challenges two aspects of CP's clarification/waiver petition: (1) the request that D&H should be considered the only "applicant" -- from among the Canadian Pacific Parties -- under the Board's Rules; and (2) the request

4/ Applicants' Motion To Strike NYNJ-3, The Port Authority's Reply to Petition for Waiver or Clarification of Railroad Consolidation Procedures, and Related Relief (CSX/NS-13).

that, in light of the relief to be sought under D&H's anticipated responsive application, D&H should only have to satisfy the evidentiary requirements for a "minor" transaction. CP fully justified each request in its clarification/waiver petition, and Applicants have offered no valid reason why CP's requests should not be granted.

D&H as Only Applicant. As for CP's request that D&H be considered the only "applicant" (as defined under 49 C.F.R. § 1180.3), that request is entirely appropriate in light of the fact that D&H alone is the only Canadian Pacific Party that will be seeking relief in this proceeding. The rights to be sought under D&H's responsive application -- reciprocal switching rights, elimination of restrictions in existing D&H trackage rights over Conrail lines, and trackage rights on both the East and West sides of the Hudson River between New York and Albany -- will only be utilized by D&H and not by any of the other Canadian Pacific Parties.

D&H is a distinct corporate entity, having only been acquired (out of bankruptcy) by CPR in 1991. See Canadian Pacific Limited, et al. -- Purchase and Trackage Rights --

Delaware & Hudson Ry., 7 I.C.C. 95 (1990). Unlike the other part's of the CP system, 5/ D&H's operating territory is entirely encompassed within Conrail's operating territory; indeed, when Conrail was created, D&H was used by the United States Railway Association to provide a modicum of competition to Conrail. Id. at 99, 114-15. D&H is threatened with extinction by the proposed transaction, and it is this threat which underlies the responsive application that D&H will be filing.

In the past, the Board 6/ has granted waiver/clarification requests similar to that sought by CP here. For example, in the UP/SP proceeding, the Board agreed that the corporate parent of the Texas Mexican Railway Company ("Tex Mex") need not join in its responsive application as an applicant, and that Kansas City Southern Industries, Inc., owner of 49 % of the parent's stock, also need not so join. Finance Docket No. 32760, Union Pacific Corp., et al. -- Control and Merger -- Southern

5/ The remaining parts of CP's system are in Canada or on the western periphery of the Conrail system, and therefore will not be as directly impacted by Applicant's proposed transaction as D&H.

6/ References to the Board include its predecessor, the Interstate Commerce Commission.

Pacific Rail Corp., et al. ("UP/SP"), Decision No. 14 at 2-3 (served Feb. 15, 1996). Indeed, on many occasions in the past, the Board has permitted individual Canadian Pacific Parties to be an applicant in a railroad consolidation proceeding without requiring that other of the Canadian Pacific Parties be joined as applicants. See, e.g., Finance Docket No. 31700, Canadian Pacific Limited, et al. -- Purchase and Trackage Rights -- Delaware & Hudson Ry., slip op., 1990 WL 288313, *1-2 (I.C.C. decided June 27, 1990) (Soo not required to be an applicant); Finance Docket No. 31505, Rio Grande Industries, Inc., et al. -- Purchase and Related Trackage Rights -- Soo Line R.R., slip op., 1989 WL 239196, *2 (I.C.C. decided Aug. 9, 1989) (CPR, CPR's parent company, and Soo's parent company not required to be applicants).

CP is not asking that D&H's carrier affiliates be excluded entirely from the proceeding; each of these affiliates will be an "applicant carrier" and all information required of applicant carriers under the Board's Rules will be made available. Moreover, since they will all be parties to the proceeding, discovery (to the extent relevant) will be available from all of the Canadian Pacific Parties.

In these circumstances, there is no justification for Applicants' opposition to CP's request that D&H serve as the only applicant in connection with its responsive application, and that request should be granted.

D&H Responsive Application as Minor Transaction.

Applicants resist CP's showing that the D&H responsive application should be considered a minor transaction, arguing that the relief to be sought by D&H cannot meet the minor transaction test under 49 C.F.R. § 1180.2(b)(1) and (2). That regulation defines a minor transaction as one either (i) "clearly . . . not hav[ing] any anticompetitive effects" or (ii) in which "any anticompetitive effects . . . [are] clearly outweighed by the transaction's anticipated contribution to the public interest in meeting significant transportation needs." Applicants' argument is simply not credible given that D&H's responsive application will seek relief limited to the service territory in which it already operates, and it will add competitive service to that which Applicants propose to provide. Interestingly, under Applicants' analysis, it is supposedly procompetitive for NS and CSX to introduce their independent operations into territory previously largely dominated by Conrail, but when D&H proposes to compete with NS and CSX, this is anticompetitive.

The relief sought by D&H is quite limited in scope. The reciprocal switching rights are in terminal areas -- the North Jersey Shared Assets Area, the South Jersey/Philadelphia Shared Assets Area, the Buffalo-Niagara Frontier terminal area, and the Baltimore area -- through which D&H already operates (D&H currently has limited reciprocal switching rights in Buffalo, and once had such rights in the Philadelphia terminal area ^{7/}). The trackage rights restrictions which D&H will seek to have removed relate to lines over which D&H currently operates, and would simply make those operations more competitive and service more efficient. The trackage rights D&H will seek between New York and Albany, on both the East and West sides of the Hudson, are between points that D&H currently serves, albeit with less efficient routings, and would involve only one train a day each way on both lines.

Applicants are seeking to achieve "the perverse effect of designating the more procompetitive applications [like that of D&H] as significant rather than minor," and thus impose on D&H the concomitant burden of supplying all the additional

^{7/} See Consolidated Rail Corp. v. ICC, 43 F 3d 1528 (1995).

information required for a significant transaction; whereas the Board, in its 1993 amendment of the definition of "significant transaction" was committed to achieving just the opposite result. Ex Parte No. 282 (Sub-No. 17), Railroad Consolidation Procedures: Definition of, and Requirements Applicable to, "Significant" Transactions, slip op., 1992 WL 193629, *3 (I.C.C. served Aug. 7, 1992); see id., slip op., 1993 WL 483613 (I.C.C. served Dec. 30, 1993). Adhering to the intentions it announced in adopting this amendment, the Board has since repeatedly ruled that responsive applications like that proposed by D&H here constitute a minor transaction. 8/

Applicants have failed to advance any reasonable grounds to support their claim that the contemplated D&H responsive application involves a significant transaction; plainly, that application constitutes a minor transaction, and the Board should so rule.

8/ See, e.g., UP/SP, Decision No. 13 (served Feb. 15, 1996) (ruling that various responsive applications -- proposing trackage rights (relating to as much as 375 miles of track), interchange rights, and access rights -- all constituted minor transactions); id., Decision No. 14 (served Feb. 15, 1996) (ruling that Tex Mex responsive application for trackage rights between Corpus Christi and Beaumont, TX, constituted a minor transaction).

Conclusion

For the reasons set forth above, Applicants motion, and the relief sought in the accompanying pleading, should be denied.

Respectfully submitted,

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Soo Line Railroad Company, and
St. Lawrence & Hudson Railway
Company Limited

September 8, 1997

CERTIFICATE OF SERVICE

I hereby certify that on this 8th day of September, 1997, I served by the means indicated below a copy of the foregoing Canadian Pacific Parties' Reply In Opposition To Applicants' Motion To Accept Late Filed Reply:

The Honorable Jacob Leventhal
Administrative Law Judge
Federal Energy Regulatory Commission
888 First Street, NE, Suite 11F
Washington, DC 20426
(by hand)

Counsel for Applicants
(by hand (to counsel in District of Columbia) or
first-class mail (to counsel outside District of
Columbia))

Counsel for parties of record
(by first-class mail)

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September 8, 1997



BY HAND DELIVERY

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

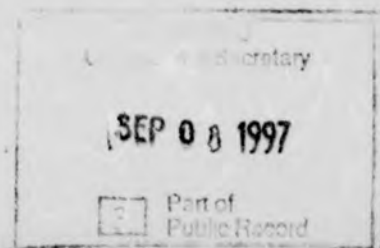
Re: Finance Docket No. 33388, CSX Corporation and
CSX Transportation, Inc., Norfolk Southern
Corporation and Norfolk Southern Railway
Company -- Control and Operating Leases/
Agreements -- Conrail Inc. and Consolidated
Rail Corporation

Dear Secretary Williams:

Enclosed please find CSX/NS-70 (Applicants' Appeal from the Decisions of Presiding Administrative Law Judge Concerning Production of Internal Costs and Other Commercially Sensitive Data) to be filed in the above-referenced docket. This appeal also embraces a request that the Board stay ALJ Leventhal's decisions at issue beyond September 12 at 5:00 p.m. unless the Board has acted on this appeal by that time. The ALJ has stayed his decisions through that date and time.

Accompanying this letter are 25 copies of CSX/NS-70, as well as a formatted WorkPerfect diskette.

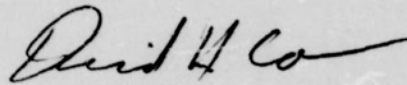
Thank you for your assistance in this matter. Please contact me (202/429-8063) or Chris Datz of Arnold & Porter (202/942-5249) if you have any questions.



The Honorable Vernon A. Williams
September 8, 1997
Page 2

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

Respectfully yours,

A handwritten signature in dark ink, appearing to read "David H. Coburn", with a stylized flourish at the end.

David H. Coburn

DHC:dlhc
Enclosures

EXPEDITED ACTION REQUESTED

BEFORE THE
SURFACE TRANSPORTATION BOARD



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

**APPLICANTS' APPEAL FROM DECISIONS OF
 PRESIDING ADMINISTRATIVE LAW JUDGE
 CONCERNING PRODUCTION OF INTERNAL COSTS
 AND OTHER COMMERCIALY SENSITIVE DATA¹**

Applicants² submit this joint brief in support of their appeal from two decisions of Presiding Administrative Law Judge Leventhal ("ALJ") requiring them to produce, in response to broad discovery requests of various utilities, two categories of commercially sensitive proprietary information.³ Applicants submit that these data are not relevant to any legitimate issue

¹ This Appeal embraces a request to continue the stay of the orders under appeal beyond September 12 at 5 p.m., through which time the Presiding Administrative Law Judge stayed his own decisions, pending a ruling on this Appeal.

² Applicants are CSX Corporation and CSX Transportation, Inc. ("CSX"), Norfolk Southern Corporation and Norfolk Southern Railway Company ("NS") and Conrail Inc. and Consolidated Rail Corporation ("Conrail").

³ The decisions from which this appeal is taken are Decision No. 26, issued September 5, 1997 and an oral ruling of the ALJ at a September 5 discovery conference. Relevant pages from the transcript of that conference are attached.

in this control proceeding, and that the production of these data to persons who serve as outside advisors to these utilities in contract negotiations with the Applicants will result in competitive harm to Applicants that cannot be avoided under the terms of the Protective Order in this proceeding.⁴ Whatever purpose might be served by disclosure of this information can be served by reliance instead on Uniform Rail Costing System data, which is readily available to the ACE Utilities and their consultants.

The information at issue consists of (1) internal rail management cost information relating to rates offered to these utilities or considered during the course of negotiations with these utilities and (2) internally considered rate proposals, and internal market analyses relating to such proposals, that CSX, NS or Conrail developed in the course of previous or current contract negotiations with these same utilities, which includes documents that relate to bids that were in fact not offered to the utilities. Information falling into these two categories has

⁴ The jointly represented utilities that are actively seeking production of this information are American Electric Power, Atlantic City Electric Company, Delmarva Power and Light Company ("Delmarva"), and Indianapolis Power and Light Company (hereafter collectively the "ACE Utilities.") Two other utilities, Niagara Mohawk Power Corporation ("NIMO") and New York State Electric and Gas ("NYSEG") have filed "me-too" discovery requests to aid in the "study" being conducted by the consultants for the ACE Utilities. Counsel for NIMO has not challenged any of the redactions. Counsel for NYSEG filed a petition with the Board on September 5, 1997 asking for a clarification of the protective order governing this proceeding with regard to redactions. Applicants intend to respond to that petition. The Ohio Valley Coal Company, represented by the same counsel as the ACE Utilities, is a party to the discovery at issue, but none of the relevant data relates to that coal mine.

been redacted from relatively few of the voluminous documents produced by Applicants in response to broad discovery requests propounded by the ACE Utilities, including the requests that were the subject of the ACE Utilities' appeal addressed in Decision No. 17, served August 1, 1997. Because of the extraordinary commercial sensitivity of the information at issue and its lack of relevance to issues properly before the Board, and because of the regular involvement of counsel and consultants to the ACE Utilities in ongoing or future rate negotiations with the Applicants, the ALJ erred in failing to hold that redaction was appropriate.

BACKGROUND

The information at issue here was not explicitly the subject of any discovery request propounded by the ACE Utilities. Rather, it was located by Applicants during the course of their search for documents responsive to broadly worded requests of the ACE Utilities for (1) documents related to bids made to these utilities or (2) all documents addressing these particular utilities. The former of these requests was the subject of a July 18, 1997 ruling of the ALJ, affirmed by Decision No. 17 insofar as the ALJ denied in part what the ACE Utilities had requested. There, characterizing the ACE Utility discovery requests as "essentially asking for all documents concerning virtually all shipments of coal, and concerning all negotiations concerning rates for shipment of coal for the last 20 years" (Decision No. 17 at 1) as "extremely broad" and of "marginal relevance" to the issues properly raised in this case (Id. at 2),

the Board affirmed the ALJ's ruling limiting the discovery requests to information concerning the particular movements of the ACE Utilities and to information relating to traffic handled between January 1, 1995 and the first half of 1997, as well as certain earlier years.

The Applicants have produced thousands of unredacted pages of documents to the ACE Utilities in response to their requests. The unredacted documents that they have produced reflect, among other categories of information, information about the rates actually charged to each utility, rates actually proposed to each utility during the course of negotiation, and volumes of coal actually transported or proposed to be transported to each utility. In addition, Applicants have produced traffic data tapes to the ACE Utilities, and are in the process of producing additional tapes.

In the course of its review of documents, CSX identified documents, several of which are at issue here, that contained highly sensitive internal management cost information, the disclosure of which to counsel and consultants for the ACE Utilities would result in a risk of substantial commercial harm to CSX. NS and Conrail similarly identified such internal management cost data in documents that they reviewed.

The Applicants also identified information reflecting rate proposals that they have, during the course of previous or on-going negotiations with the ACE Utilities, considered offering for the transportation of coal to these utilities, but in many cases chose not to offer in such negotiations. These same

documents generally contain internal analyses, including internal cost analyses, of the implications of such considered rates. In some cases, these documents are relatively current (dating from as recently as June 1997) and were prepared in connection with on-going negotiations. In other cases, the documents are somewhat older (although few date back to prior to January 1995), but nonetheless would be of significant commercial value to the utilities, with which the railroads negotiate on a regular basis, year after year. A sampling of documents from both categories, including redacted and unredacted versions of these documents, is being submitted under seal and under separate cover for the benefit of the Board in its deliberations on this appeal.⁵

Applicants determined that disclosure of this strategic negotiating information, and their internal cost data, to persons who advise the ACE Utilities in rail contract negotiations would risk seriously undermining the ability of each of the Applicants to negotiate an arms-length bargain with the utilities. To release such data to advisors for utilities with which Applicants regularly bargain would effectively give away sensitive information that no rational negotiator of commercial contracts would want disclosed to persons on the other side of the

⁵ Redacted copies of these same documents are also being supplied to the attorneys for the ACE Utilities. Among these documents are CSX 26 HC 000157 and 000158, on which counsel for ACE Utilities relied at the September 5 hearing before the ALJ as examples of inappropriate redactions. These June 9 and June 16, 1997 documents were prepared with respect to very recent negotiations. They well demonstrate the type of cost and other information to which advisors to the ACE Utilities in those very negotiations should not have access.

bargaining table, and thus seriously compromise the ability of the railroads to successfully pursue their objectives in such negotiations.

Significantly, the outside counsel and consultants for the ACE Utilities in this proceeding -- the persons who would obtain this commercially sensitive information -- acknowledge that they also regularly advise the ACE Utilities in rate negotiations with the Applicants. Thus, disclosure to these persons, even within the framework of a Protective Order that limits disclosure to outside counsel and consultants, could result in commercial harm to the Applicants because the information, once known to these persons for purposes of this case, cannot be "unknown" by them when they wear the hats of advisors in rate negotiations. In accordance with the practice followed in other Board proceedings (as well as in civil litigation generally), and in recognition of the fact that this data is not relevant to this control proceeding, Applicants therefore redacted the commercially sensitive information from copies of the documents produced to these representatives of ACE Utilities.⁶

⁶ In redacting certain commercially sensitive information from the documents at issue, Applicants did precisely what the instructions to ACE Utilities' own discovery requests told them to do: "If any of the requested documents cannot be produced in full, you are requested to produce them to the fullest extent possible, specifying clearly the reasons for your inability to produce the remainder and stating whatever information, knowledge, or belief you have concerning the unproduced portion." Atlantic City Electric Company, et al.'s First Set of Interrogatories and First Set of Requests for Production of Documents to CSX, Instruction No. 5.

(continued...)

Counsel for the ACE Utilities argued before the ALJ that Applicants should be ordered to produce the unredacted versions of those documents on the basis of the vague assertion, made at oral argument and in their August 28 brief submitted to the ALJ, that the data is required for counsel and consultants for these utilities to determine whether the "one-lump theory" -- the well-established principle of rail pricing in bottleneck settings -- applies to the transportation provided by the Applicant railroads to these utilities.⁷ The ACE Utilities press this argument even though (1) only one of these utilities, Delmarva, "would confront any semblance of an acquisition-related vertical competition issue," as the Board found in Decision No. 17 at p. 2, fn. 4 and (2) the information at issue would not assist even that one utility to rebut the one-lump theory, i.e., to challenge what the Board described in Decision No. 17 as "a

⁶ (...continued)

Applicants' approach has helped facilitate the timely completion of the discovery process. The alternative to redacting portions of documents as to which Applicants believe disclosure should not be required (while producing the remainder of the document) would be to withhold the entire document pending a resolution of Applicants' objections.

⁷ In addition, counsel for the ACE Utilities has claimed in oral argument before the ALJ that Decision No. 17 recognizes that the need for this data goes far beyond the need to rebut the one-lump theory -- that instead it goes to an examination of how CSX and NS determine what rates to charge utilities. Counsel for ACE Utilities, however, have yet to explain the relevance of such an inquiry to the determination of issues in a control proceeding. As the Board noted in Decision No. 17, "We will address any issues of increased market power in our final decision in this proceeding We are not convinced, however, that the material that ACE seeks would in any way aid our resolution of those issues."

basic principle of economics, that firms will generally attempt to maximize their profits." Dec. No. 17 at 3.

The issues relating to the redaction of the cost data were orally argued before the ALJ on August 20, 1997, and subsequently briefed, before the ALJ. In Decision No 26 (served Sept. 5) the ALJ held that the redaction of the cost data was improper because, he concluded, it negated the usefulness to ACE Utilities of the documents produced in response to his July 18 decision narrowing the ACE Utilities demands. In so ruling, the ALJ erroneously assumed that the Board "ruled upon the relevance of the disputed documents" in Decision No. 17. Dec. No. 26 at 3. The ALJ also held that the Protective Order "should suffice to allay Applicants' concerns." Id. at 3.

Further, at a discovery hearing held on September 5, 1997, the ALJ relied on the same rationale to rule that the Applicants are required to disclose information concerning rates and related market analyses of rates and proposals that, in many cases, were not even placed on the negotiating table. See attached excerpts of Transcript of September 5 hearing ("Tr") at 73.

At the request of the Applicants, these two rulings were stayed by the ALJ pending the Board's determination of this appeal. However, the ALJ agreed to such a stay only through 5 p.m. on September 12, at which time Applicants will be required to turn over unredacted copies of the documents at issue absent a ruling from the Board relieving them of that requirement. See

Tr. at 73-75.⁸ Applicants accordingly urge the Board to act on this appeal prior to that time.

However, should the Board not find it possible to act by September 12, Applicants request that the Board extend the stay imposed by the ALJ until it has had an opportunity to consider this matter and issue a decision. Failure to do so could result in irreparable harm to Applicants for there is no way to "unring the bell." Once the unredacted documents are disclosed, the information will be known to the very persons that, as Applicants address further below, should not be entitled to see them for the reasons discussed further below.

ARGUMENT

The Decisions of the ALJ should be reversed because they reflect "a clear error of judgment." 49 C.F.R. 1115.1(c). The ALJ was required to balance the extraordinary commercial sensitivity of the information, and the fact that it could be used to the detriment of the Applicants in pending or future negotiations were it disclosed to the outside advisors for the ACE Utilities, against the absence of any legitimate basis for finding the information relevant to this proceeding. He failed to do so.

In requiring production of the data, he failed to recognize that the likelihood of commercial harm far outweighs

⁸ The ALJ also required expedited briefing of this matter before the Board. The brief for the ACE Utilities must be filed by 2 p.m. on September 9. Tr. at 73-75.

the claimed relevance of the documents to the four ACE Utilities, three of which do not even have any vertical competition claims that would implicate the one-lump theory on which the Utilities have essentially relied in arguing relevance. The ALJ also erred in assuming that the relatively few documents at issue are relevant and in concluding that the Board had found that they are relevant in Decision No. 17. Further, even if the data sought holds even a modicum of relevance in the present control proceeding, and the Applicants do not concede that it does, the ALJ failed to weigh that relevance against the risk of commercial harm from producing that information.

Moreover, in relying on the Protective Order, the ALJ failed to recognize that that Order does not provide sufficient protection against the risks inherent in a setting where outside counsel and consultants have a continuing role for their clients in the commercial negotiation of contracts with the Applicants, a role that places them in the position of being the functional equivalent of in-house advisors.

A. The Information At Issue is
Extraordinarily Sensitive

If Applicants are required to provide the type of redacted internal management cost information, and negotiating strategy information at issue here, they would be subjected to significant risks of harm in their commercial relationships with the ACE Utilities. Internal cost analyses and calculations are among the most sensitive and proprietary information that railroads maintain, and such information plays a role in the

railroads' negotiations with shippers (including the ACE Utilities) over rates and other terms of service. Moreover, it is not disputed here that the same counsel and consultants for the ACE Utilities in these control proceedings actively participate in, and advise about, counselling shippers (including the ACE Utilities) with respect to rate matters, and in fact they frequently participate in the actual rate negotiations themselves. In short, it would be difficult to postulate a more troublesome -- and in the circumstances of this case, inappropriate -- situation in which to force the disclosure of such highly confidential and commercially sensitive information.⁹

B. In These Circumstances, A Balancing of Commercial Harm Against Relevance is Required

Disclosure of commercially sensitive information should not be required without a careful balancing of the need (if any) for the information -- and the ability of the ACE Utilities to generate comparable information from other sources -- against the likelihood of competitive harm to Applicants. See, e.g., Notice of Exemption -- Issuance of Securities and Assumption of Liabilities -- Illinois Central Railroad Company, Finance Docket No. 31468 (served June 14, 1989), pet. for review denied sub nom. ICG Concerned Workers Assn. v. United States, No. 88-1764 (D.C.

⁹ To reiterate, the redacted documents constitute a relatively small number out of thousands of pages that were produced in their entirety, and no document was withheld in its entirety. The ALJ's suggestion in Decision No. 26 that the effect of these redactions was to result in "ephemeral compliance" is wide of the mark, particularly in view of the lack of relevance of what was redacted, as discussed next.

Cir., February 14, 1992) (sensitive commercial data should not be disclosed absent "some modicum of a showing of specific need or purpose"); Buffalo & Pittsburgh Railroad, Inc. -- Exemption -- Acquisition and Operation of Lines in New York and Pennsylvania, Finance Docket No. 31117 (served Nov. 7, 1988) (parties seeking "sensitive commercial information" must be specific about why such information is needed; in the absence of a specific showing the request for such data "would constitute the type of 'fishing expedition' we have refused to countenance.>").¹⁰ In fact, it is precisely such a general "dragnet" into a railroad's business that the Board precluded in Decision No. 17:

Under these circumstances, we are extremely reluctant to authorize the broad discovery of commercially sensitive information that petitioners propose. Trailways Lines, Inc. v. ICC, 766 F.2d 1537, 1546 (D.C. Cir. 1985) ("... the Commission was simply not required to allow a dragnet, expensive exercise of discovery into [applicant's] business when that discovery was seen by the agency as most unlikely to affect its decision.") Decision No. 17 at 3.

Examination of the commercial harm/relevance balancing factors demonstrates that disclosure should not be ordered in this case. First, it merits reiterating that the ACE Utilities never propounded a discovery request that explicitly seeks cost

¹⁰ See also In re Remington Arms Co., Inc., 952 F.2d 1029, 1032 (7th Cir. 1991) (even if "the party seeking discovery shows both relevance and need, the court must weigh the injury that disclosure might cause...against the moving party's need for the information." [citation omitted]); Stabilis v. Haynsworth, Baldwin, Johnson & Greaves, P.A., 144 F.R.D. 258, 266 (E.D. Pa. 1992) (there is a "heightened standard of relevance for discovery of confidential information"); Empire of Carolina, Inc. v. Mackle, 108 F.R.D. 323 (S.D. Fla. 1985).

data or data on rate proposals that were never made. The information at issue here is instead parts of documents responsive to more sweeping requests for nearly all of the information that the railroads retain concerning each of the Utilities. Thus, any claims of the ACE Utilities that the information at issue here is important to their case should be viewed with a large dose of skepticism -- if the information were so important, one might expect that they would have expressly asked for it.

Further, the ACE Utilities have failed to show any need for the redacted information, much less a showing of sufficient need to overcome their burden of demonstrating why information of such extraordinary sensitivity should be produced to them. As the Board recognized in Decision No. 17, three of the four ACE Utilities will not experience any vertical competition issues resulting from the Acquisition. The redacted information relative to these ACE Utilities is plainly not relevant to any one-lump theory issue. Further, an amorphous claim of need to examine how CSX and NS set their rates -- although of obvious interest to those who advise utilities in rate negotiations -- is not sufficient absent some connection with an identifiable competitive harm arising from the transaction. Thus, the information requested falls outside of the relevance arguments presented by the ACE Utilities.

The ALJ, however, failed to recognize that as to these utilities, there was not even a colorable claim of relevance to balance against the likelihood of prejudice to Applicants that

would result from disclosure of sensitive cost and other information in Applicants' files. Indeed, the ALJ's written decision appears to rely on the mistaken proposition that Decision No. 17 constituted a Board determination that everything contained in any of the documents responsive to ACE Utility discovery requests is relevant. Applicants submit that the ALJ has misread Decision No. 17 by failing to give appropriate weight to the Board's recognition there that the material at issue might be relevant only "[t]o the extent that [the utilities] are 'bottleneck' shippers," which the Board agreed was the case only with one of the four ACE Utilities, Delmarva. Moreover, the Board did not address or consider any particular documents or categories of data in Decision No. 17; the issues raised here were not considered that decision on the ACE Utilities' appeal because Applicants had not yet undertaken their search for responsive documents and discovered the highly sensitive materials at issue.

As to Delmarva -- the one utility that the Board recognized "would confront any semblance of an acquisition-related vertical competition issue" -- that utility does not need the information at issue to challenge the applicability of the one-lump theory to its traffic. The information that it would need to challenge that theory is already in its hands, namely, the rates it was charged and the demand for the transportation services provided to it. The one-lump theory posits that the bottleneck carrier charges a price that fully exploits the customers' demand. Decision No. 17 at 3; Western Resources v.

Surface Transportation Board, 109 F.3d 782, 787 (D.C. Cir. 1997).

To test the validity of the one-lump theory, Delmarva needs only information about price (which it has) and its own demand (which it uniquely has). It is simply not necessary for Delmarva to have access to information reflecting sensitive, proprietary internal cost data, or to rate proposals that the railroads have, during the course of previous or on-going negotiations, considered offering, but ultimately chose not to offer in such negotiations, or to internal market analyses reflecting the consideration of proposals made, received or contemplated but never communicated. In fact, the ACE Utilities have cited no precedent for the unusual proposition that any of the information at issue here is relevant to either rebut the one-lump theory or to a competitive harm arising from a transaction.¹¹ Such data was in fact never even sought by any of the numerous utilities that extensively litigated vertical competition issues in the Burlington Northern/Santa Fe merger proceeding.¹²

¹¹ The Board should not permit the examination of a rail carrier's proprietary cost data and negotiating strategy simply because it seeks approval to control another carrier. The ACE Utilities have not even described a theory of competitive harm which would support a request for the data at issue.

¹² The ACE Utilities cite the Western Resources case for the proposition that cost data is relevant. Nothing in that case, or the underlying Board decision in the BN/Santa Fe merger case, stands for the proposition that internal cost data is essential to the ability of a utility to rebut the one-lump theory. Further, as the Board held in Decision No. 17, the shipper evidence presented in the BN/Santa Fe merger proceeding to rebut the theory "was rejected because it was unpersuasive in light of other evidence that better explained the carriers' actions in that case, which were fully consistent with the one-lump theory," not because the shippers there did not seek or present the type of data that the ACE Utilities now seek. Dec. No. 17 at 2.

Delmarva already knows whether or not it has a basis for arguing that Conrail misjudged Delmarva's willingness to pay by charging too little so that NS (which would serve the Delmarva facilities as the sole destination carrier if the Application is approved) could raise Delmarva's rates. Delmarva knows the price it paid and its own demand requirements. Further, it was specifically acknowledged in a July 14 Motion to Compel filed with the ALJ in this proceeding by the ACE Utilities that Delmarva has information showing "Delmarva has been able to use competition between CSX and Norfolk Southern to lower the price for transporting its coal . . . [and] has reaped the benefit of this competition among origin carriers." Motion to Compel at 9-10. Particularly in view of the fact that Delmarva already has the information that would allow it to meet the first leg of the test needed to rebut the one-lump theory -- evidence showing that it has received the benefits of origin competition -- it certainly does not need access to the commercially sensitive cost and other information at issue here to make its case.¹³

The ACE Utilities conveniently ignore the fact that only Delmarva can claim to face a bottleneck situation. If Delmarva desires to test the applicability of the "one-lump" theory to its shipments, and if it seeks information concerning

¹³ Further, Delmarva cannot plausibly argue, and has not argued, that the data at issue here is relevant to the second leg of the test for rebuttal of the one-lump theory, namely, that the acquisition would eliminate the benefits of the origin competition it claims to enjoy. The information at issue is not even remotely related to this second element of the rebuttal test.

the relative profit margins of the "bottleneck" and "upstream" carriers on particular movements, it already has access to such information in the form with which the Board is familiar. The Board has promulgated the Uniform Rail Costing System ("URCS") as the appropriate methodology for regulatory costing. Accordingly, if any form of cost analysis is used it should be URCS, not internal cost data of the carriers. The ACE Utilities' consultants not only have ready access to URCS, they are extremely familiar with the methodology and use it on a regular and ongoing basis both for purposes of counselling clients and in rate and control litigation before the Board. Given the extreme sensitivity of the internal management cost information as to which the ACE Utilities seek disclosure -- information which the Board itself has recently held not to be relevant or discoverable even in rate cases -- and the ability of Delmarva to prepare testimony exploring the applicability of the "one-lump" theory to their shipments without it, there is no proper basis for ordering the production of the unredacted versions of the documents at issue.

In denying shipper discovery requests for access to internal railroad costing systems in two separate cases within the past several months, the Board has made clear that it has neither the inclination nor the resources to engage in the complex manipulations of internal cost systems that would be necessary to make them compatible with an URCS-based format. Potomac Electric Power Co. v. CSX Transportation, Inc., Docket No. 41989 (served May 27, 1997), at 3; Arizona Public Service Co.

and PacifiCorp v. The Atchison, Topeka and Santa Fe Ry. Co..

Docket No. 41185 (served July 29, 1997), at 4. Moreover, if the ACE Utilities were to offer arguments about the profitability of particular movements to their facilities as determined by an Applicant's internal cost system, it is inevitable that interminable disagreements about the nature and validity of such a system's divergences from URCS would result.¹⁴ Thus, parties are to apply the URCS methodology, not the internal costing systems of the carriers, for purposes of analyzing the carriers' costs in connection with particular moves.

The ACE Utilities argue that URCS has relevance only to maximum reasonable rate cases. That is simply not true. In a Decision served on September 20, 1989, in Ex Parte No. 431 (Sub-No. 3.), the ICC adopted URCS for all regulatory costing purposes. In adopting URCS, the ICC explicitly cited the areas of its jurisdiction, and the corresponding sections of the Interstate Commerce Act, in which "[t]he submission of cost evidence is needed for ... regulatory purposes," including "Mergers and Consolidations (49 U.S.C. 11341-11351)." Adoption of the Uniform Railroad Costing System As A General Purpose

¹⁴ Applicants of course use their internal rail costing systems for management purposes, as well as in connection with ratemaking. As the Board recognized in Potomac Electric Power and Arizona Public Service Commission, however, this fact does not make such systems relevant for regulatory purposes. Further, it is not how Applicants determine what rates to offer that is relevant in terms of one-lump analysis, but rather the actual level of those rates in relation to demand. As noted, Delmarva already has that latter information and the one-lump theory is not even pertinent to the other ACE Utilities in the context of this case.

Costing System For All Regulatory Purposes, 5 I.C.C. 2d 894
(1989), at 1 (fn. 2).¹⁵

The importance of requiring use of the non-proprietary and readily available URCS methodology to calculate costs for purposes of determining profit margins on "bottleneck" movements, rather than forcing disclosure of Applicants' own highly confidential internal management cost information, is heightened in this case by the identity of the counsel and consultants for the ACE Utilities. Information regarding CSX's and NS's internal costing systems would be an invaluable tool to any party negotiating a transportation rate with the railroad, whether for particular movements to the facilities of the ACE Utilities or for any other movements. But because these utilities engage in such rate negotiations, and their counsel and consultants routinely participate in such negotiations both for these parties and for other rail shippers, disclosure of the redacted information would place Applicants at a risk of competitive disadvantage in many future negotiations, and could confer an

¹⁵ The ACE Utilities attempted in their August 28 brief to the ALJ to blur the propriety of using URCS to analyze the costs, and accordingly the profitability, to traffic involving a bottleneck carrier by emphasizing that maximum reasonable rate cases deal with "the costs of a Hypothetical, stand-alone railroad" (ACE Brief at 7, emphasis in original). The fact that the Board uses URCS in measuring actual operating costs in stand-alone cost analysis argues for its use in other contexts, not against it. The ACE Utilities miss the point by failing to recognize the fact that the Board mandates the use of URCS in rate cases for determining railroad costs, and it has expressly found on two occasions in recent months that internal railroad costs are irrelevant and need not be disclosed in rate cases.

unfair advantage on the shippers which retain these counsel and/or consultants.

In concluding without extended analysis that the information at issue here is relevant, the ALJ failed to appropriately consider the above factors. His decisions do not reflect the required balancing of the claims of purported relevance against the clear likelihood of commercial harm to the interests of the Applicants. The ALJ evidently concluded that the Board had determined that the documents in question and the information in them is relevant for all purposes and therefore did not properly balance relevance against the clear risk of harm. Further, for the reasons addressed next, he failed to properly consider the limits of the Protective Order in this case in the circumstances presented here.

C. The Protective Order Does Not Offer
Sufficient Protection From Competitive Harm Here

The fact that the outside counsel and consultants for the ACE Utilities here are also actively involved (or in such a posture to become so involved) in rate negotiations is a critical point. As Judge Easterbrook has written for the Seventh Circuit: "When counsel act as the negotiators, they become business agents for the [clients], and there is little difference between providing information to the president of a [client] and providing it to the [client's] lawyer-agent." Ball Memorial Hospital, Inc. et al v. Mutual Hospital Insurance, Inc., 784 F.2d 1325, 1346 (7th Cir. 1986). The very purpose of the

Protective Order entered into this case is to shield this specific kind of extremely sensitive information from use or misuse by shippers and their advisors. This category of information which the ACE Utilities are seeking must be carved out and given special treatment.

To the rejoinder that there is a protective order in place in these proceedings that would guard against possible misuse of Applicants' highly confidential and commercially sensitive information, three observations must be made. First, the agency itself has recognized that protective orders may not always constitute a sufficient safeguard for avoiding the potential misuse of confidential information. The Board's predecessor on several occasions explicitly denied discovery requests because of confidentiality concerns, notwithstanding the actual or possible use of a protective order. See, e.g., Notice of Exemption -- Issuance of Securities & Assumption of Liabilities -- Illinois Central R.R. Co., Finance Docket No. 31468 (served June 14, 1989); Buffalo & Pittsburgh R.R., Inc. -- Exemption -- Acquisition & Operation of Lines in New York & Pennsylvania, Finance Docket 31116 (served November 7, 1988), at 2; Bituminous Coal -- Hiawatha, UT to Moapa, NV, Docket No. 30738 (served October 26, 1984), at 4, 7 (rejecting discovery requests for confidential and commercially sensitive cost information in the absence of a showing of need for the data).

Second, even assuming the best of intentions, protective orders do not constitute a panacea for all appropriate concerns about confidentiality, particularly in circumstances

where the same counsel and consultants who represent the parties in the consolidation proceedings also represent them in connection with the precise types of rate negotiations in which the redacted information is likely to be of the greatest significance commercially. The Board's predecessor, the Interstate Commerce Commission, explicitly acknowledged the seriousness of this concern in declining to order production of information sought in discovery in a rate case in which a protective order was in place, and which involved the same cost consultants representing the ACE Utilities here. In that case, the ICC emphasized: "We recognize that the universe of consultants, rail carriers, and attorneys in this area of economic regulation is comparatively small, and that the disclosure of proprietary information may ultimately work to the disclosing party's competitive disadvantage." McCarty Farms, Inc., et al. v. Burlington Northern Inc., ICC Docket No. 37809 (Decision served February 13, 1995) (involving the unwillingness of the same consultants serving the ACE Utilities here to produce what they perceived to be highly sensitive commercial information used in contract negotiations to the railroad defendant).

Similarly, in denying a recent motion by another utility to modify the protective order in these proceedings in order to allow the use of confidential information produced in discovery in a separate, unrelated rate case (against CSX), the Board stated that "...we cannot help but note that this issue would not even have arisen but for PEPCO's use of the same lawyers in both cases, a situation that calls for extreme care in the use of this

confidential information." See Decision No. 18 herein, served on August 5, 1997, at 4 (emphasis added).

Third, Applicants' concerns with respect to highly confidential internal management cost information have less to do with the possible intentional unauthorized disclosure of such information than with its unauthorized, or even inadvertent or unconscious, use. The former can presumably be monitored and detected under the terms of the Protective Order in this case, and appropriate sanctions can be sought for violations. However, no order can cause an individual to forget what he or she has learned, or to erect impenetrable "Chinese Walls" within their minds. Rather having learned from highly confidential information how any of the Applicants determines costs for purposes of negotiating rates, an individual cannot realistically be expected not to bring that information to bear (even if unconsciously) in subsequent rate negotiations.

This fundamental point has been explicitly recognized by a number of tribunals which have been confronted with the problem, but was not properly taken into account by the ALJ. For example, the United States Customs Court denied access to confidential documents in an International Trade Commission case to in-house counsel¹⁶ of an Intervenor corporation, expressing

¹⁶ Not surprisingly, many cases which grapple with the problem of the inadequacy of protective orders for especially sensitive and confidential business information deal with the issue of whether in-house counsel should be denied access because of their close identification with their employer's business interests. Because as the Seventh Circuit recognized in Ball Memorial Hospital counsel who act as negotiators become business agents of
(continued...)

its view that by such denial it "intended to avoid placing them under the unnatural and unremitting strain of having to exercise constant self-censorship in their normal working relations."

Atlantic Sugar, Ltd., et al. v. United States, et al., 85 Cust.Ct. 133 (1980). See also United States Steel Corp. v. United States, 569 F.Supp. 870, 872 (1983) ("...in the Court's judgment, it is humanly impossible to control the inadvertent disclosure of some of this information in any prolonged working relationship.") Similarly, in a decision affirming the District Court's denial of access to confidential information in a Federal Trade Commission proceeding to in-house counsel, the D.C. Circuit cited approvingly the argument of the FTC that "it is very difficult for the human mind to compartmentalize and selectively suppress information once learned, no matter how well-intentioned the effort may be to do so." Federal Trade Comm'n v. Exxon Corporation, 636 F.2d 1336, 1350 (D.C. Cir. 1980). And in yet another case affirming an order barring in-house counsel from reviewing confidential documents in a copyright infringement case, the Ninth Circuit observed the nature of the problem of suppressing knowledge garnered through review of sensitive information under the terms of a protective order: "The magistrate expressly credited in-house counsel's integrity and good faith. The magistrate had to consider, however, not only whether the documents could be locked up in cabinets, but also

¹⁶ (...continued)

the client, there is no analytical reason to distinguish the applicability of such cases to the outside counsel and consultants for the ACE Utilities in these proceedings.

whether [in-house counsel] could lock-up trade secrets in his mind, safe from inadvertent disclosure to his employer once he had read them." Brown Bag Software v. Symantec Corp., 960 F.2d 1465, 1471 (9th Cir. 1992).

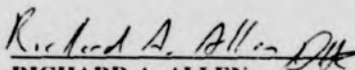
CONCLUSION

The risks of inadvertent or unconscious use of the redacted internal management cost information, and the other competitively sensitive data at issue here, are too great to require disclosure, particularly in view of the absence of any legitimate demonstration of why the information is needed. This is, after all, a control proceeding and not a rate case; the inquiry here is whether the transaction is consistent with the public interest, not the reasonableness of rates negotiated between Applicants and the ACE Utilities.

For these reasons, Applicants respectfully request that the Board reverse the decisions of the ALJ ordering production of the unredacted versions of the documents at issue and stay the ALJ's decision beyond September 12 should no decision on this appeal be forthcoming by 5 p.m. on that date.

Respectfully submitted,

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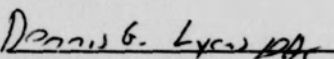

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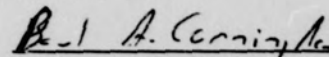
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Excerpts from September 5, 1997

Hearing Transcript

UNITED STATES OF AMERICA

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SURFACE TRANSPORTATION BOARD

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ORAL ARGUMENT

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 --
TRANSFER OF RAILROAD LINE BY
NORFOLK SOUTHERN RAILWAY COMPANY
TO CSX TRANSPORTATION, INC.

Finance Docket
No. 33388

Friday,
September 5, 1997

Washington, D.C.

The above-entitled matter came on for a
oral argument in Hearing Room 3 of the Federal
Energy Regulatory Commission, 888 First Street, N.E.
at 9:30 a.m.

BEFORE: THE HONORABLE JACOB LEVENTHAL
Administrative Law Judge

NEAL R. GROSS

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WASHINGTON, D.C. 20005-3701

1 here. So why don't we just leave that one over to the
2 side.

3 JUDGE LEVENTHAL: All right. Very well.
4 All right. I have heard all argument parties wish to
5 make.

6 I am going to find that the material that
7 we are arguing about, the redactions that we were
8 arguing about this morning -- let me give this back to
9 you before I forget. That the redactions we have been
10 arguing about this morning I find fall into the same
11 category as those that I have ruled upon in my
12 decision which I assume will be issued today.

13 I am going to further limit the applicants
14 in their appeal in that they have until Monday to
15 appeal from this order together -- from this ruling
16 that I am making this morning together with the ruling
17 that I have made on the redactions that I have
18 previously ruled upon.

19 Mr. McBride may have whatever time he
20 likes to respond to the appeal, but the stay that I am
21 giving will expire -- I am going to stay the
22 production of the redacted material that I have

1 ordered furnished to Mr. McBride until close of
2 business on Friday, September 20?

3 MR. McBRIDE: Twelfth.

4 JUDGE LEVENTHAL: September -- I never was
5 good at math. My wife is a mathematician, but I'm
6 not. To close of business on Friday, September 12.

7 I think we have to have one more thing.
8 I think you have to get your answer in promptly. If
9 you want the stay to expire on Friday, you have to get
10 your answer to whatever they file on Monday in
11 promptly. Is Tuesday too short a time for you?

12 MR. McBRIDE: You see, we do have a
13 deposition scheduled that day. But I will try to
14 abide by this.

15 I wonder if Your Honor would modify
16 something just ever so slightly. Make them file their
17 appeal by 2:00 on Monday. I can try to get mine
18 filed, my reply filed by 2:00 on Tuesday. One of the
19 reasons I am asking for this is in addition to a
20 deposition, I am supposed to be on an airplane to go
21 meet with a client on Tuesday evening. So I am going
22 to try to get this done in a day and having somebody

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1 else do the deposition. But if they will have it in
2 my hands as well as filed by 2:00 on Monday, we'll try
3 to follow the reply by 2:00 on Tuesday.

4 JUDGE LEVENTHAL: All right. So ordered.
5 All right. Then you have -- my order is clear? My
6 ruling is clear and you have a stay until close of
7 business on Friday.

8 MR. McBRIDE: Would you say 5:00, Your
9 Honor, just to --

10 JUDGE LEVENTHAL: I assume 5:00 is close
11 of business. It is close of business here at the
12 Commission.

13 MR. COBURN: Your Honor, just one other
14 thing. We will commit to calling the Secretary of the
15 Board today and alerting him to the briefs that are
16 about to befall the Board, and to the fact that the
17 stay would expire on Friday, in the hopes that the
18 Board would rule by Friday.

19 JUDGE LEVENTHAL: All right. That is
20 reasonable.

21 MR. McBRIDE: Oh sure. They can inform
22 the Secretary. That's fine. I gather that what Your

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CERTIFICATE OF SERVICE

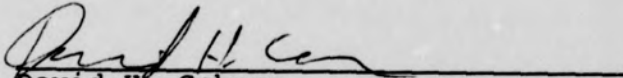
I, David H. Coburn, certify that on September 8, 1997, I have caused to be served by first-class mail, postage prepaid, or by more expeditious means, a true and correct copy of the foregoing CSX/NS-70, Applicants' Appeal, on all parties that have appeared in STB Finance Docket No. 33388 and by hand delivery on the following:

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Dated: September 8, 1997

STB

FD-33388

ID-181794

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September 8, 1997

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BY HAND DELIVERY

The Honorable Vernon A. Williams
Secretary, Surface Transportation Board
Case Control Branch
ATTN: STB Finance Docket No. 33388
Surface Transportation Board
1925 K Street, N.W.
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

Dear Secretary Williams:

Enclosed for filing in the above-referenced docket are
an original and twenty-five copies of Canadian Pacific Parties'
Reply in Opposition to Applicants' Motion to Accept Late Filed
Reply. Also enclosed is a 3.5-inch diskette, formatted for
WordPerfect 5.x for Windows, which can be converted to
WordPerfect 7.0, containing the pleading.

Thank you for your assistance.

Sincerely,

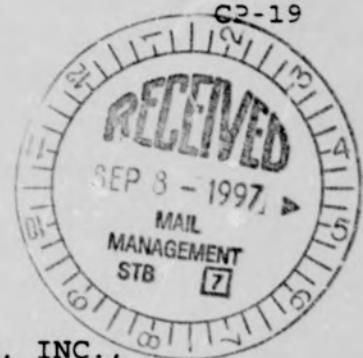
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Hudson Railway Company, Inc.,
Soo Line Railroad Company, and
St. Lawrence & Hudson Railway
Company Limited

GWM:jms

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

CANADIAN PACIFIC PARTIES' REPLY
IN OPPOSITION TO APPLICANTS'
MOTION TO ACCEPT LATE FILED REPLY

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September 8, 1997

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

CANADIAN PACIFIC PARTIES' REPLY
IN OPPOSITION TO APPLICANTS'
MOTION TO ACCEPT LATE FILED REPLY

The Canadian Pacific Parties 1/ oppose Applicants' 2/
Motion To Accept Late Filed Reply (CSX/NS-62) on grounds that the
reply in question -- which challenges certain of CP's requests
for waiver or clarification of the Board's Railroad Consolidation
Procedures as they may relate to the responsive application D&H
contemplates filing in this proceeding -- (1) was seven days out

1/ The Canadian Pacific Parties refers to the Canadian Pacific
Railway Company ("CPR"), Delaware and Hudson Railway Company,
Inc. ("D&H"), Soo Line Railway Company ("Soo"), and St. Lawrence
and Hudson Railway Company Ltd. (collectively "CP").

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

of time (not one day as Applicants assert), and (2) is not permitted under the Board's Rules.

If Applicants had a right to reply to CP's petition for waiver/modification (CP-11, filed on Friday, August 22), that reply should have been filed not later than Wednesday, August 27. The Board has made it unquestionably clear that "any reply to any motion" -- "whether that motion is or is not styled as a 'motion'" -- must be filed within three working days of the motion's filing date. Decision No. 13, slip op. at 1 (served Jul. 25, 1997) (emphasis in original); see Decision No. 12, slip op. at 21 (served Jul. 23, 1997). Applicants' reply, without explanation, was tardy not by a single day, but by seven days. Given Applicants' failure to adhere to "the expedited schedule that governs this proceeding" (Decision No. 13, slip op. at 1 (served Jul. 25, 1997)), their motion for leave to file out of time should be denied. 3/

Moreover, the reply Applicants' seek to file is not permitted under the Board's Rules, which make clear that except

3/ It should be noted that CP received Applicant's September 3 motion and the accompanying reply by mail on September 4, having been given no earlier notice that Applicant's intended to challenge CP's petition for waiver/clarification.

in limited circumstances not relevant here, "[n]o replies to a petition for waiver will be permitted." 49 C.F.R.

§ 1180.4(f)(3). When a respondent party replied to certain of their own requests for waiver or clarification of the Board's Railroad Consolidation Procedures, Applicants argued that the reply should be stricken as not permitted under the Board's Rules. 4/ And yet Applicants are quick simply to ignore those Rules when to do so serves their purposes, as the submission of their tardy reply does here. Accordingly, apart from the fact that Applicant's reply was filed out of time, it should also be rejected because the Board's Rules specifically prohibit its filing. As explained below, Applicants' have offered absolutely no reason why the Board should make an exception to this prohibition.

Applicants' reply challenges two aspects of CP's clarification/waiver petition: (1) the request that D&H should be considered the only "applicant" -- from among the Canadian Pacific Parties -- under the Board's Rules; and (2) the request

4/ Applicants' Motion To Strike NYNJ-3, The Port Authority's Reply to Petition for Waiver or Clarification of Railroad Consolidation Procedures, and Related Relief (CSX/NS-13).

that, in light of the relief to be sought under D&H's anticipated responsive application, D&H should only have to satisfy the evidentiary requirements for a "minor" transaction. CP fully justified each request in its clarification/waiver petition, and Applicants have offered no valid reason why CP's requests should not be granted.

D&H as Only Applicant. As for CP's request that D&H be considered the only "applicant" (as defined under 49 C.F.R. § 1180.3), that request is entirely appropriate in light of the fact that D&H alone is the only Canadian Pacific Party that will be seeking relief in this proceeding. The rights to be sought under D&H's responsive application -- reciprocal switching rights, elimination of restrictions in existing D&H trackage rights over Conrail lines, and trackage rights on both the East and West sides of the Hudson River between New York and Albany -- will only be utilized by D&H and not by any of the other Canadian Pacific Parties.

D&H is a distinct corporate entity, having only been acquired (out of bankruptcy) by CPR in 1991. See Canadian Pacific Limited, et al. -- Purchase and Trackage Rights --

Delaware & Hudson Ry., 7 I.C.C. 95 (1990). Unlike the other part's of the CP system, 5/ D&H's operating territory is entirely encompassed within Conrail's operating territory; indeed, when Conrail was created, D&H was used by the United States Railway Association to provide a modicum of competition to Conrail. Id. at 99, 114-15. D&H is threatened with extinction by the proposed transaction, and it is this threat which underlies the responsive application that D&H will be filing.

In the past, the Board 6/ has granted waiver/clarification requests similar to that sought by CP here. For example, in the UP/SP proceeding, the Board agreed that the corporate parent of the Texas Mexican Railway Company ("Tex Mex") need not join in its responsive application as an applicant, and that Kansas City Southern Industries, Inc., owner of 49 % of the parent's stock, also need not so join. Finance Docket No. 32760, Union Pacific Corp., et al. - Control and Merger - Southern

5/ The remaining parts of CP's system are in Canada or on the western periphery of the Conrail system, and therefore will not be as directly impacted by Applicant's proposed transaction as D&H.

6/ References to the Board include its predecessor, the Interstate Commerce Commission.

Pacific Rail Corp., et al. ("UP/SP"), Decision No. 14 at 2-3 (served Feb. 15, 1996). Indeed, on many occasions in the past, the Board has permitted individual Canadian Pacific Parties to be an applicant in a railroad consolidation proceeding without requiring that other of the Canadian Pacific Parties be joined as applicants. See, e.g., Finance Docket No. 31700, Canadian Pacific Limited, et al. -- Purchase and Trackage Rights -- Delaware & Hudson Ry., slip op., 1990 WL 288313, *1-2 (I.C.C. decided June 27, 1990) (Soo not required to be an applicant); Finance Docket No. 31505, Rio Grande Industries, Inc., et al. -- Purchase and Related Trackage Rights -- Soo Line R.R., slip op., 1989 WL 239196, *2 (I.C.C. decided Aug. 9, 1989) (CPR, CPR's parent company, and Soo's parent company not required to be applicants).

CP is not asking that D&H's carrier affiliates be excluded entirely from the proceeding; each of these affiliates will be an "applicant carrier" and all information required of applicant carriers under the Board's Rules will be made available. Moreover, since they will all be parties to the proceeding, discovery (to the extent relevant) will be available from all of the Canadian Pacific Parties.

In these circumstances, there is no justification for Applicants' opposition to CP's request that D&H serve as the only applicant in connection with its responsive application, and that request should be granted.

D&H Responsive Application as Minor Transaction.

Applicants resist CP's showing that the D&H responsive application should be considered a minor transaction, arguing that the relief to be sought by D&H cannot meet the minor transaction test under 49 C.F.R. § 1180.2(b)(1) and (2). That regulation defines a minor transaction as one either (i) "clearly . . . not hav[ing] any anticompetitive effects" or (ii) in which "any anticompetitive effects . . . [are] clearly outweighed by the transaction's anticipated contribution to the public interest in meeting significant transportation needs." Applicants' argument is simply not credible given that D&H's responsive application will seek relief limited to the service territory in which it already operates, and it will add competitive service to that which Applicants propose to provide. Interestingly, under Applicants' analysis, it is supposedly procompetitive for NS and CSX to introduce their independent operations into territory previously largely dominated by Conrail, but when D&H proposes to compete with NS and CSX, this is anticompetitive.

The relief sought by D&H is quite limited in scope. The reciprocal switching rights are in terminal areas -- the North Jersey Shared Assets Area, the South Jersey/Philadelphia Shared Assets Area, the Buffalo-Niagara Frontier terminal area, and the Baltimore area -- through which D&H already operates (D&H currently has limited reciprocal switching rights in Buffalo, and once had such rights in the Philadelphia terminal area 7/). The trackage rights restrictions which D&H will seek to have removed relate to lines over which D&H currently operates, and would simply make those operations more competitive and service more efficient. The trackage rights D&H will seek between New York and Albany, on both the East and West sides of the Hudson, are between points that D&H currently serves, albeit with less efficient routings, and would involve only one train a day each way on both lines.

Applicants are seeking to achieve "the perverse effect of designating the more procompetitive applications [like that of D&H] as significant rather than minor," and thus impose on D&H the concomitant burden of supplying all the additional

7/ See Consolidated Rail Corp. v. ICC, 43 F.3d 1528 (1995).

information required for a significant transaction; whereas the Board, in its 1993 amendment of the definition of "significant transaction" was committed to achieving just the opposite result. Ex Parte No. 282 (Sub-No. 17), Railroad Consolidation Procedures: Definition of, and Requirements Applicable to, "Significant" Transactions, slip op., 1992 WL 193629, *3 (I.C.C. served Aug. 7, 1992); see id., slip op., 1993 WL 483613 (I.C.C. served Dec. 30, 1993). Adhering to the intentions it announced in adopting this amendment, the Board has since repeatedly ruled that responsive applications like that proposed by D&H here constitute a minor transaction. 8/

Applicants have failed to advance any reasonable grounds to support their claim that the contemplated D&H responsive application involves a significant transaction; plainly, that application constitutes a minor transaction, and the Board should so rule.

8/ See, e.g., UP/SP, Decision No. 13 (served Feb. 15, 1996) (ruling that various responsive applications -- proposing trackage rights (relating to as much as 375 miles of track), interchange rights, and access rights -- all constituted minor transactions); id., Decision No. 14 (served Feb. 15, 1996) (ruling that Tex Mex responsive application for trackage rights between Corpus Christi and Beaumont, TX, constituted a minor transaction).

Conclusion

For the reasons set forth above, Applicants motion, and the relief sought in the accompanying pleading, should be denied.

Respectfully submitted,

George W. Mayo, Jr. *gm*

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Attorneys for Canadian Pacific
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St. Lawrence & Hudson Railway
Company Limited

September 8, 1997

CERTIFICATE OF SERVICE

I hereby certify that on this 8th day of September, 1997, I served by the means indicated below a copy of the foregoing Canadian Pacific Parties' Reply In Opposition To Applicants' Motion To Accept Late Filed Reply:

The Honorable Jacob Leventhal
Administrative Law Judge
Federal Energy Regulatory Commission
888 First Street, NE, Suite 11F
Washington, DC 20426
(by hand)

Counsel for Applicants
(by hand (to counsel in District of Columbia) or
first-class mail (to counsel outside District of
Columbia))

Counsel for parties of record
(by first-class mail)

George W. Mayo, Jr.
George W. Mayo, Jr. *for*

STB

FD-33388

ID-181767

9-8-97

D

D

181767

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/AGREEMENT --
CONRAIL INC. AND CONSOLIDATED RAIL CORPORATION

APPLICANTS' REPLY TO MOTION
OF THE PORT AUTHORITY OF NEW YORK
AND NEW JERSEY FOR MODIFICATION
OF THE PROTECTIVE ORDER

Applicants, CSX, NS and Conrail¹ respectfully oppose the motion of the Port Authority of New York and New Jersey ("NYNJ") to modify the protective order to permit NYNJ's Deputy General Counsel to have access to materials designated "Highly Confidential" by parties to this proceeding. NYNJ makes no showing that the purposes of the protective order's access restriction are inapplicable to NYNJ, and fails to demonstrate a sufficient need for the modification. On that basis, the Board should deny NYNJ's motion.

¹ CSX Corporation and CSX Transportation, Inc. are referred to collectively as "CSX". Norfolk Southern Corporation and Norfolk Southern Railway Company are referred to collectively as "NS". Conrail Inc. and Consolidated Railway Corporation are referred to collectively as "Conrail."

The governing protective order, issued in Decision No. 1, served April 16, 1997, and subsequently modified in Decision No. 4, served May 2, 1997, is based on protective orders issued in several recent proceedings.² The relevant section provides:

8. Information and documents designated or stamped as "HIGHLY CONFIDENTIAL" may not be disclosed in any way, directly or indirectly, to an employee of a party to these Proceedings, or to any other person or entity except to an outside counsel or outside consultant to a party to these Proceedings, or to an employee of such outside counsel or outside consultant, who, before receiving access to such information or documents, has been given and has read a copy of this Protective Order and has agreed to be bound by its terms by signing a confidentiality undertaking substantially in the form set forth at Exhibit B to this Order.

Decision No. 1, slip op. at 4. NYNJ asks the Board to modify the protective order to permit its in-house counsel access to materials designated Highly Confidential on the grounds that: (1) NYNJ is an agency of two state governments and so there is no risk of commercial harm to the Applicants if information is disclosed to NYNJ; and (2) NYNJ's Deputy General Counsel needs access to highly confidential information in order to assist NYNJ in formulating positions in this proceeding.

As an initial matter, in addition to the fact that the purposes of the protective order's restricted access provisions apply squarely to NYNJ as discussed below, there has been no showing whatsoever of any need to grant this relief. NYNJ, unlike the United Transportation

² See, e.g., Finance Docket No. 32760, Union Pacific Corporation, Union Pacific Railroad Company, and Missouri Pacific Railroad Company -- Control and Merger -- Southern Pacific Rail Corporation, Southern Pacific Transportation Company, St. Louis Southwestern Railway Company, SPCSL Corp., and The Denver and Rio Grande Western Railroad Company ("UP/SP"), Decision No. 2, served September 1, 1995; Finance Docket No. 32549, Burlington Northern Inc. and Burlington Northern Railroad Company -- Control and Merger -- Santa Fe Pacific Corporation and The Atchison, Topeka and Santa Fe Railway Company (BN/Santa Fe), Decision served July 15, 1994). The protective orders in those proceedings were based, in turn, on orders governing prior merger proceedings.

Union ("UTU") and the Transportation Communications International Union ("TCU"), the only two cases in which the protective order in this proceeding has been modified to permit access to "highly confidential" material to in-house counsel, is represented by outside counsel, who has signed the undertakings in the protective order and already has access to Highly Confidential material. NYNJ's outside counsel has been active in this proceeding; he has served written discovery on each of the Applicants, has participated in 5 depositions to date, and has noticed his intent to participate in 14 additional depositions. Thus, NYNJ cannot claim that its ability to fully participate in the proceeding is prejudiced in any manner by limiting access to highly confidential material to NYNJ outside counsel. In all of the other cases of which Applicants are aware, access to highly confidential information has been granted to in-house counsel only when the party has not been represented by outside counsel. See BN/Santa Fe, Decision Nos. 12 and 33, served March 13, 1995 and June 20, 1995, respectively; and CSX/NS, Decision Nos. 15 and 22, served August 1, 1997 and August 21, 1997, respectively.³

Moreover, while NYNJ's motion does not describe the nature of its interest in this proceeding, an understanding of such interest clearly leads to denial of the motion. While NYNJ describes itself as a "bi-state agency of the states of New York and New Jersey," Motion at 2, it receives no tax revenue from any governmental entity. Rather, it is self-supporting, dependent

³ It should not be inferred from Applicants' opposition to the NYNJ motion that Applicants question whether NYNJ's inside counsel intends in good faith to comply with the dictates of the protective order. Instead, Applicants wish to reduce the risk of inadvertent disclosure of confidential information and to mitigate against the possibility that knowledge gained through this proceeding will be used, intentionally or otherwise, in commercial dealings in the future. See e.g., FTC v. Exxon Corp., 636 F.2d 1336, 1350 (D.C. Cir. 1980) ("[I]t is very difficult for the human mind to compartmentalize and selectively suppress information once learned, no matter how well-intentioned the effort may be to do so.").

on revenue from tolls, fees, and rents. In other words, its revenues depend, at least in part, on the amount of traffic that utilizes its facilities.

As to rail traffic, NYNJ takes the position that ports such as NYNJ compete with one another to attract waterborne intermodal traffic to their respective ports. Throughout the discovery phase of the proceeding, NYNJ has been very candid that its interest in participating in this proceeding has been driven, in part, by its desire to protect its competitive position vis-a-vis other east coast ports. Thus, its quasi-governmental status does not immunize NYNJ from the competitive pressures of the marketplace. On that basis, NYNJ has a competitive interest in this proceeding, not dissimilar to that of any shipper or railroad party participating in the proceeding. This competitive interest distinguishes NYNJ from the UTU and the TCU, which as noted above are the only parties for which access to highly confidential material has been granted to in-house counsel. Decision Nos. 15 and 22, served August 1, 1997 and August 21, 1997, respectively.

Information, including traffic volume, identity of shippers, and the rates paid by shippers, has already been produced by the Applicants. This information would be of substantial relevance to the competitive interests of NYNJ. However, NYNJ should not have access to such information because other port authorities -- direct competitors of NYNJ -- and other parties which use NYNJ facilities have an "expectation that proprietary data about their businesses in the possession of the primary applicants or produced in subsequent phases of discovery, and also contained among the highly confidential materials at issue here, will not be disclosed to [NYNJ]." BN/Santa Fe, 1995 WL 256997 (I.C.C.), served May 3, 1995, at *2-3; see also UP/SP, 1995 WL 628781 (I.C.C.), served October 27, 1995, at *5.

While the Applicants do not compete with NYNJ in providing rail transportation services, they do compete with respect to other transportation related services, such as intermodal terminal services. The Applicants also compete for alternative transportation options available to waterborne traffic calling on NYNJ. How such traffic is handled once it is portside or indeed, how it is routed to NYNJ (e.g., Transcontinental railroad versus Suez Canal), can be affected by the policies adopted by NYNJ or its negotiations with Applicants' competitors. The need to maintain the confidentiality of Applicants' proprietary information under those circumstances is obvious.

The Applicants also engage in commercial dealings with NYNJ which includes, among other things, arm's-length business relationships. For example, as the principal rail carrier servicing the Port of New York, Conrail has negotiated with NYNJ numerous diverse projects affecting transportation services in the Port District. These projects have included improvements to the rail infrastructure of the Port District and Conrail's service to Expressrail, an intermodal railroad freight terminal owned and developed by NYNJ. Conrail, in conducting such negotiations, routinely relies on its own confidential, commercial and proprietary information, the disclosure of which would surely adversely affect such arm's-length negotiations to the same extent as shipper or rail competitor access. Furthermore, Conrail, with respect to such projects, is often competing with other transportation providers for limited public funding. Conrail and the other Applicants should not be put at a disadvantage with respect to such negotiations. Clearly, disclosure to NYNJ's in-house counsel of highly confidential information poses a risk of such an unfair result. See, BN/Santa Fe, 1995 WL 256997 (I.C.C.), served May 3, 1995, at *1 (in-house counsel access to highly confidential information denied because requesting party

had "arms-length business relationships" with Applicants which could be adversely affected in future if access granted).

As discussed above, the protective order governing this proceeding is not new or unique. It is based on protective orders entered in similar proceedings under 49 U.S.C. § 11323 and its predecessor statutes. In every case with which Applicants are familiar, the Board and its predecessor, the Interstate Commerce Commission ("Commission"), have denied requests similar to that made in the NYNJ Motion when the requesting party had some kind of competitive interest in the proceeding. See, e.g., UP/SP, Decision No. 2 (request of Kansas City Southern Railway Company); UP/SP, Decision No. 7, served October 27, 1995 (request of National Industrial Transportation League); id. (request of Western Resources, Inc.); BN/Santa Fe, Decision No. 21, served May 3, 1994 (requests of Phillips Petroleum Company and Western Resources, Inc., both of which were represented by both in-house and outside counsel). These decisions provide ample basis for denying NYNJ's motion.

For the foregoing reasons, Applicants respectfully request that the Board deny NYNJ's Motion For Modification of the Protective Order.

Respectfully submitted,

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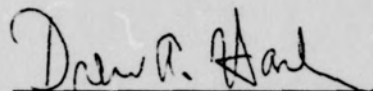
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Counsel for Conrail Inc. and
Consolidated Rail Corporation

CERTIFICATE OF SERVICE

I, Drew A. Harker, certify that on September 8, 1997 I have caused to be served by first class mail, postage prepaid, or by more expeditious means, a true and correct copy of the foregoing CSX/NS-72, Applicants' Reply To Motion Of The Port Of New York And New Jersey For Modification Of The Protective Order, on all parties that have appeared in STB Finance Docket No. 33388 and by hand delivery on the following:

The Honorable Jacob Leventhal
Administrative Law Judge
Federal Energy Regulatory Commission
888 First Street, N.E.
Washington, D.C. 20426


Drew A. Harker

Dated: September 8, 1997

STB

FD-33388

ID-181660

9-2-97

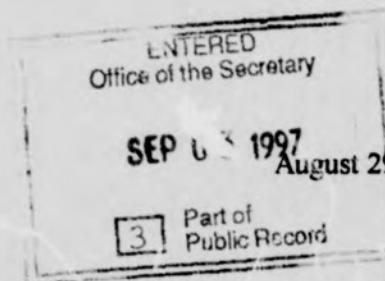
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VIA FEDERAL EXPRESS

Mr. Vernon A. Williams
Secretary
Surface Transportation Board
1225 K Street, N.W., Room 700
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

Dear Secretary Williams:

Pursuant to Decision No. 21, served on August 19, 1997, I hereby certify that on August 28, 1997, the prior pleadings of Livonia, Avon & Lakeville Railroad Corporation were served by first class mail, postage prepaid, on all parties of record herein under cover of the attached letter.

Ten copies of this certificate, with attachment, are enclosed for filing at the Board. Please feel free to contact me should any questions arise regarding this matter. Thank you for your assistance.

Respectfully submitted,

Thomas J. Litwiler

TJL:tl

Attachment

cc: ALJ Jacob Leventhal, FERC

OPPENHEIMER WOLFF & DONNELLY

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Thomas J. Litwiler
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August 28, 1997

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Minneapolis

New York

Paris

Saint Paul

Washington, D.C.

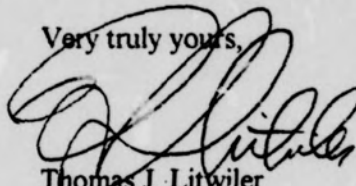
To All Parties of Record

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 Sir/Madam:

Pursuant to Decision No. 21 served by the Surface Transportation Board on August 19, 1997, enclosed please find copies of all filings made by **Livonia, Avon & Lakeville Railroad Corporation** in the above-captioned proceeding prior to the receipt of Decision No. 21.

Very truly yours,



Thomas J. Litwiler

TJL:tl

Enclosures

cc: ✓ Mr. Vernon A. Williams, STB
ALJ Jacob Leventhal, FERC

STB

FD-33388

ID-181663

9-2-97

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18163

F. Ronalds Walker
Associate Counsel

ENTERED
Office of the Secretary
SEP 03 1997
3 Part of Public Record

Phone: 927-4750 Fax: 927-4549
E-Mail: admfrw@cgu.com

August 29, 1997



Honorable Vernon A. Williams
Secretary
Surface Transportation Board
1925 K Street, NW
Washington, DC 20423-0001

Re: CSX Corporation and CSX Transportation, Inc.
Norfolk Southern Corporation and
Norfolk Southern Railway Company
Control and Operating Leases/Agreements
Conrail Inc. And Consolidated Rail Corporation
Decision No. 21
Decided: August 19, 1997

Dear Mr. Williams:

Pursuant to the above, please find copies of Citizens Gas & Coke Utility's Notice of Intent to Participate, Certificate of Service and Party of Record filings. These records can also be found on the enclosed 3 1/2" diskette in the WordPerfect 6.1 format.

Please contact the undersigned if you have any questions regarding this matter.

ENTERED
Office of the Secretary
SEP 03 1997
3 Part of Public Record

Respectfully submitted,

F. Ronalds Walker

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Office of the Secretary
SEP 03 1997
3 Part of Public Record

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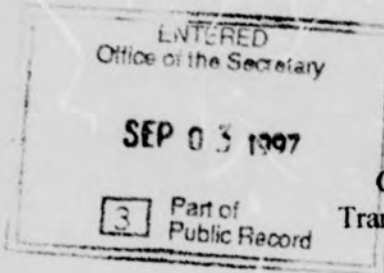
Enclosures

181663

Before The
SURFACE TRANSPORTATION BOARD
Washington, D.C.



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 --
Transfer of Line By Norfolk Southern Railway Company
To CSX Transportation Inc.

NOTICE OF INTENT TO PARTICIPATE

Please enter the appearance of the undersigned counsel on behalf of Citizens Gas & Coke Utility, which intends to participate and become a party of record in this proceeding. Pursuant to 49 C.F.R. § 1104.12, service of all documents filed in this proceeding should be made upon the undersigned.

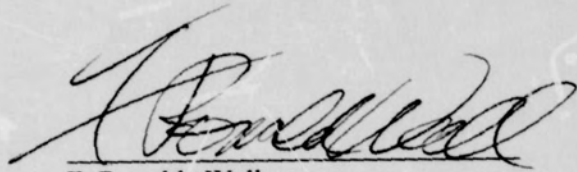
Date: August 29, 1997

Respectfully submitted,

F. Ronalds Walker
Associate Counsel
Citizens Gas & Coke Utility
2020 N. Meridian Street
Indianapolis, Indiana 46202-1393
(317) 927-4750

CERTIFICATE OF SERVICE

I hereby certify that on August 29, 1997, a copy of the foregoing Citizens Gas & Coke Utility Notice of Intent To Participate was served by first-class, U.S. mail, postage prepaid upon the following as listed in Exhibit A.

A handwritten signature in dark ink, appearing to read 'F. Ronalds Walker', is written over a horizontal line.

F. Ronalds Walker
Associate Counsel
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EXHIBIT A

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August 26, 1997

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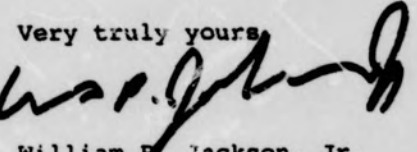
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Re: CSX Corporation and CSX
Transportation, Inc., Norfolk
Southern Corporation and Norfolk
Southern Railway Company--
Control and Operating
Leases/Agreements--- Conrail Inc.
and Consolidated Rail Corp.
STB Finance Docket No. 23388

Dear Mr. Williams:

Attached are the original and ten copies of a certificate of service attesting to the fact that service of the Notice of Intent to Participate filed by A. T. Massey Coal Company, Inc., et al., in the above proceeding has been made in accordance with Surface Transportation Board Decision No. 21, served August 19, 1997.

Very truly yours,

William F. Jackson, Jr.

WPJ/jmb

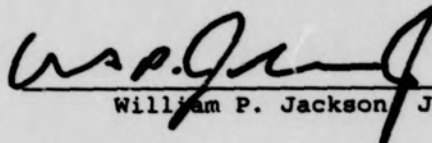
cc: James L. Gardner, Esquire

CERTIFICATE OF SERVICE

I, William P. Jackson, Jr., do hereby certify that on this 25th day of August, 1997, a copy of all pleadings heretofore filed on behalf of the following named entities has been served on each party of record in Finance Docket No. 33388, in accordance with the requirements of Decision No. 21 therein, served August 19, 1997:

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Elk Run Coal Company, Inc.
Goals Coal Company
Green Valley Coal Company
Hillsboro Coal Company
Independence Coal Company,
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Knox Creek Coal Corporation
Long Fork Coal Company
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Martin County Coal Corporation
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Peerless Eagle Coal Co.
Performance Coal Company
Rawl Sales & Processing Co.
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Stone Mining Company
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United Coal Company
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