

STB

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**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

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202 347-7170

October 21, 1997

BY HAND

Surface Transportation Board  
Office of the Secretary  
Case Control Unit  
**Attention: Finance Docket No. 33388**  
1925 K Street, N.W.  
Washington, D.C. 20423-0001

Re: Finance Docket No. 33388, *CSX Corporation and CSX Transportation, Inc. 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.*

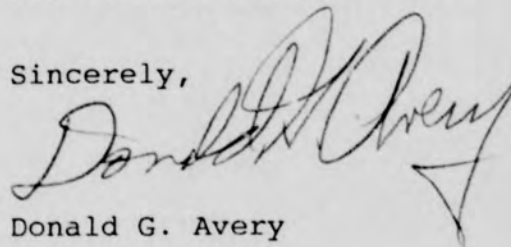
Dear Mr. Secretary:

Enclosed for filing in the captioned proceeding please find an original and twenty-five (25) copies of the "Comments of the 'West Virginia Association for Economic Development through the Joint Use of Conrail Tracks by Norfolk Southern and CSXT.'"

Also enclosed is a diskette with the enclosed filing in Wordperfect 5.1 form.

Thank you for your attention to this matter.

Sincerely,



Donald G. Avery

Encl.

cc: Judge Leventhal (w/o diskette)  
Applicants (w/o diskette)  
Parties of Record (w/o diskette)

WVED-2

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

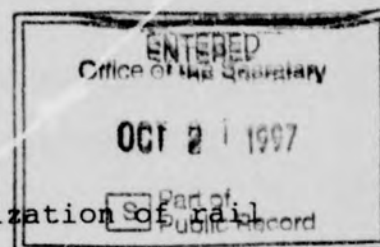


COMMENTS OF  
THE "WEST VIRGINIA ASSOCIATION FOR ECONOMIC DEVELOPMENT  
THROUGH THE JOINT USE OF CONRAIL TRACKS  
BY NORFOLK SOUTHERN AND CSXT"

Pursuant to Order No. 12 of the Surface Transportation Board ("Board" or "STB"), served in this docket on July 23, 1997, the "West Virginia Association for Economic Development through the Joint Use of Conrail Tracks by Norfolk Southern and CSXT" (hereinafter, "WVED"), hereby submits these, its comments on the proposed acquisition of control over Conrail by the CSX and Norfolk Southern railroads.

IDENTITY AND INTEREST

WVED is an informal, *ad hoc* organization of rail shippers and other interested parties in West Virginia with an interest in preserving and promoting viable, competitive rail service in the state following the proposed acquisition of Conrail by Norfolk Southern and CSXT.



Of particular concern to WVED members is the preservation of their ability to compete in national markets in light of the dual-carrier competitive rail service that their competitors in other key regions will suddenly enjoy as a result of the proposed transaction. In order to "even the playing field" and avoid such harmful distortions in secondary markets, WVED members respectfully request that the Board condition any approval of Norfolk Southern's and CSXT's takeover of Conrail on the Applicants' agreement to provide dual-carrier service to shippers on (or tributary to) Conrail's "West Virginia Secondary" line, in the same way as Applicants are willingly going to provide such competitive service to WVED members' competitors on the Monongahela and in New Jersey.

The members of WVED joining in support of these comments are:

American Electric Power Company - Mr. Ron Young  
Amherst Industries - Mr. Charles Jones  
Appalachian Timber Service, Inc. - Mr. Rick Gibson  
Appalachian Timber Service, Inc. - Mr. Dave Lane  
CAEZ WV - Ms. Terrell Ellis  
Charleston Steel - Mr. Michael Hamon  
Clay County Bank - Mr. Walter S. Legg, Jr.  
Eastern Leasing & Equipment, Inc. - Mr. Eric Meador  
Elkem Metals - Mr. Greg Samples  
Flexsys America LP - Mr. Jim Cochran  
Flexsys America LP - Mr. Rodney Booker  
FNG Industries, Inc. - Mr. Joe Fuqua  
Gauley Sales Company - Mr. Frank Hill  
Mr. Morgan Gibson  
Gould's Electric - Mr. Jerry Gould  
Northland Resources - Mr. Jim Bunn  
Pevler Coal Sales, Inc. - Mr. Mark Campbell  
Pittston Coal Company - Mr. Marc Merritt  
The Elk River Railroad, Inc. - Mr. Frank Jorgensen  
Thurmond/Glenn Jean Railroad - Mr. John Dragan  
Tyler Fuels - Mr. Dirk Johnson  
Union Carbide Corp. - Mr. H. M. Agee



Union Carbide Corp. - Mr. Mike Eastone  
Valley Brook Concrete & Supply - Mr. Howard Bechtle  
Vecellio & Grogan, Inc. - Mr. Leo A. Vecellio, Jr.  
WV Coal Association - Mr. Bill Rainey  
WV Mining & Reclamation Assoc. - Mr. Ben Greene

### COMMENTS

#### I. Introduction -- The West Virginia Secondary

Conrail's "West Virginia Secondary" ("WV-2") enters the State of West Virginia on the Ohio border at the West Virginia town of Point Pleasant, along the junction of the Kanawha River and the Ohio River. This rail line, which is Conrail's only significant line in West Virginia, continues for approximately 149 miles across three quarters of the state, and serves *inter alia* the State capital of Charleston.

Situated on or near the WV-2 are several industrial facilities, including most importantly chemical plants, that depend on rail service -- and specifically the WV-2 -- to move their raw materials in, and their products out. The chemical companies are especially dependent on economical and efficient rail service over the WV-2, as they compete with chemical plants in other regions, such as the State of New Jersey.

The WV-2 is also a vital transportation link for numerous coal mines located on or near it, and still other coal mines and industries are served by short line railroads that in turn connect to, and depend on, the WV-2 for rail access to the outside world. Additionally, one short line not presently connected to the WV-2 -- the "Elk River Railroad" (a member of WVED) -- recently won STB approval to construct a 30-mile exten-

sion of its lines to connect with a branch of the WV-2 near Charleston.

In short, although Conrail's overall "presence" in West Virginia is dwarfed by that of CSXT (and to a lesser extent, NS), its West Virginia Secondary serves the vital heart of the state and is pivotal to West Virginia's economic well-being and future.

## II. Unique Difficulties of Rail Service in West Virginia

West Virginia occupies a unique position of any state east of the Rockies as it relates to rail access due to its unique geography. West Virginia is the only state east of the Rockies that is designated as not officially having one square mile of what's known as flat land as is defined. Simply put, it is a mountainous and hilly state throughout. As a result of the enormous expense to build railroads through mountains, rail development in West Virginia in general has been limited to the few river valleys that are in state. The Kanawha and Gauley River valley is one of the primary rail corridor through the state.

Similar to the historic development of the interstate highway system, you will see that West Virginia was among the last of the states to have the interstate system completed due to the unique mountainous terrain of the state. It is also the only state in which 100% of all of its 55 counties are officially designated as being in the Appalachian region as identified by Congress for special economic development help. As part of a multi-decade long process of improving the economic climate of

Appalachia throughout the east, various road corridors have been identified to be built into this region. That process is still not completed due to the unique mountainous terrain of West Virginia. Basic infrastructure access through roadways, railways, and waterways are at the heart of economic development. Because of this unique geography, West Virginia has lagged in the area of economic development historically.<sup>1</sup> Through enormous efforts, including help on a national, state and local levels, West Virginia has improved its basic infrastructure and as a result has improved its economic standing. To now reduce competition in rail for West Virginia goes back to adding a burden on a state that can ill afford it.

### III. Industrial Growth and Rail Service

West Virginia is a net export state in rail shipments. That means that West Virginia ships more goods by rail out of state than it receives goods by rail in state. This is primarily because the #1 export by rail out of West Virginia is coal. You extract the coal and ship it to utilities for the generation of electricity and you do not ship back by rail any materials to help with that extraction process. Other industries such as chemical, automotive, and timber related industries ship in both

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<sup>1</sup>The Final Environmental Impact Statement (FEIS) produced by the Surface Transportation Board in Finance Docket #31989 and published in the Federal Register on August 16, 1996, as Decision I.D. #20310 concerns reconnecting to Conrail's "West Virginia secondary line" by The Elk River Railroad, Inc. (TERRI). Appendix A contains the section from that report on the Socio-Economic Setting.

directions since they can receive materials by rail, then add value through an industrial process, and then ship the value added goods by rail to other markets. The Kanawha River valley along Conrail's West Virginia secondary is the choice location for many of these industries.

#### IV. Competition facing WVED Members

The merger document already identifies approximately 4,000 miles of Conrail tracks that are to receive joint access by both Norfolk Southern and CSXT in this merger. This includes significant trackage in the State of New Jersey which competes heavily with the chemical industry located along the Kanawha River in West Virginia. In addition, it includes dual access by CSXT and Norfolk Southern to various coal fields in Pennsylvania that serve coal producers in southwestern Pennsylvania on the existing Conrail/Monongahela railway system. Currently, coal producers in southwestern Pennsylvania, along with chemical producers in New Jersey have single line access as do coal producers and chemical producers along the Conrail route in West Virginia. After the proposed merger these other markets will now have dual access while West Virginia producers will only retain single access. Thus, the competitive climate is being altered through a reduction in competition for the West Virginia producers.



V. Harm to WVED Members, and to the State of West Virginia, from Applicants' Proposal to Withhold Competitive Rail Service from West Virginia While Granting it to WVED Members' Competitors in Other States.

The Applicants' proposal contains over 4,000 miles of new dual carrier service on existing Conrail lines with particular emphasis in New Jersey and southwestern Pennsylvania that will harm the single carrier service area of Conrail in the state of West Virginia.

Even if Norfolk Southern rail rates in West Virginia are every bit as good as Conrail's existing rates in West Virginia, there would still be a competitive disadvantage as the dual carrier service areas would have the advantage of receiving improved rates along with improved service over that of a single carrier service line. West Virginia companies and industries face an increasing competitive disadvantage as captive rail shippers. The combination of the continued consolidation of Class 1 railroads only exasperates this problem. In this specific case, coal shippers will now face dual carrier competition from southwestern Pennsylvania and chemical producers will face dual carrier competition service from New Jersey as well as other industries from other newly created dual carrier areas. The inflexibility of having only a one railroad access and competing with other areas that have dual railroad access causes this area of West Virginia to carry a high risk for future economic expansion.

VI. Other Harm to West Virginia and WVED Members, from Proposed Conrail Takeover, that Can Only be Redressed through the Imposition of Dual-Carrier Service on the West Virginia Secondary

One only has to look at the difficulties that UP has experienced in the acquisition of C&W and SP in the west and recognize that the acquisition of Conrail by Norfolk Southern and CSXT in the east is far more complex than the straight-forward consolidation undertaken by UP. When you see the enormous service difficulties that have occurred in that western consolidation, there is understandable concern that Norfolk Southern and CSXT will be so caught up in their efforts to unravel Conrail and assimilate its severed parts into their respective systems that they will pay scant attention to maintaining and promoting service on single service lines such as the West Virginia secondary. They will regard these single service areas as "safe" since they will have captive service. Only the imposition of competitive service on the West Virginia secondary would at least give WVED members some leverage to get Norfolk Southern and/or CSXT to pay attention to their needs. The industries and shippers in the Kanawha valley represent thousands of jobs and contribute significantly to the areas economy. If the purchase of the Conrail properties is to be implemented fairly, then these companies in the Kanawha valley should receive the same kind of competitive service as other parts of the Conrail system will receive in other parts of the country.



VII. Dual Access Interchange vs Single Access Interchange and Advantage to the Applicants

Under the proposed merger, Norfolk Southern would acquire Conrail line between Columbus, Ohio to Cornelia, West Virginia. The West Virginia portion of this line is described in paragraph one of this document.

Under the proposed joint access, CSXT could access their existing line at Point Pleasant giving them a route to the northeast or west through the Huntington West Virginia Terminal. CSXT could also access this line at Gauley Bridge, which would give them access to Newport News coal facilities and other east and south markets through Virginia. Norfolk Southern would have access to their existing line at Deepwater, West Virginia, giving them access to their southern lines through Roanoke, Virginia, in addition to access beyond Columbus, Ohio. This makes the Conrail line, which bisects three quarters of West Virginia, a unique joint access line as CSXT can enter from either end, and Norfolk Southern can enter from either end. Norfolk Southern also has access to the Great Lakes facilities through Columbus, Ohio. Without joint trackage between CSXT and Norfolk Southern, this segment will be more competitively disadvantaged to the customers along this line.

There could also be advantages to both CSXT and Norfolk Southern in sharing the cost of maintenance and upkeep on this Conrail line. Thus, each railroad could lower their maintenance cost. Because of the competition of two railroads, you would have more industrial based economic development along this line.

This would in turn increase the tonnage and further reduce the operating cost per ton for commodities shipped.

There does exist on the southwest side of the Kanawha River an existing in service CSXT rail line, which might create the appearance of access to two railroads along the Kanawha River valley. The obvious flaw is that two competing railroads separated by a major river in between them no more provides competitive access than if they were hundreds of miles apart. Simply put, you cannot build spur tracks across a river in an affordable manner to allow true competitive service. Once a shipper has located on one side of the river or the other they are then captive to the one railroad that is on that particular side of the river.

#### CONCLUSION

WVED members do not oppose approval of Applicants' proposed takeover and carve-up of Conrail. WVED members do, however, urge the STB to consider carefully, the competitive distortions that will result from that transaction, if Applicants are allowed to increase dramatically the competitive options available for shippers in some states, while withholding such competitive service from other, less-fortunate states and shippers. Such discrimination will be particularly hard for West Virginia to bear, given that state's economic difficulties.

To ameliorate this anticompetitive situation, WVED respectfully requests that the Board, in approving the Applicants' proposal, condition that approval on Applicants' commit-

ment to extend competitive rail service to West Virginia shippers dependent on Conrail's West Virginia Secondary. Specifically, NS -- the Applicant proposing to take over that line -- should be required to grant CSXT shared use of the line similar to that the Applicants will enjoy in New Jersey and on the former Monongahela.

Respectfully submitted,

The West Virginia Association  
for Economic Development  
through the Joint Use of  
Conrail Tracks by Norfolk  
Southern and CSXT ("WVED")  
P.O. Box 149  
200 Greenbrier Road  
Summersville, WV 26651

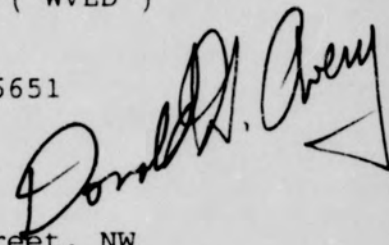
Of Counsel:

Slover & Loftus  
1224 17th Street, NW  
Washington, DC 20036

Dated: October 21, 1997

By: Donald G. Avery  
Slover & Loftus  
1224 Seventeenth Street, NW  
Washington, DC 20036  
(202) 347-7170

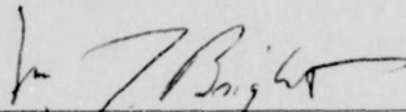
Attorney for WVED

A handwritten signature in dark ink, appearing to read "Donald G. Avery", is written over the typed name and address of the attorney. The signature is stylized and cursive.

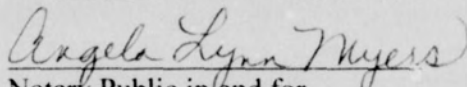
**Verification**

**STATE OF WEST VIRGINIA  
COUNTY OF NICHOLAS**

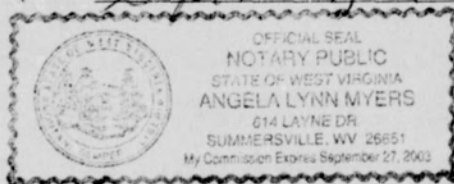
WILLIAM T. BRIGHT, being duly sworn, deposes and says that he has read the foregoing Comments, that the same are true as stated, and that he is authorized to make this attestation on behalf of WVED.

  
William T. Bright

Subscribed and sworn to before me  
this 20th day of October, 1997.

  
Notary Public in and for  
the State of West Virginia.

My Commission Expires: Sept. 27, 2003





## "APPENDIX A"

### CHAPTER 2.0 DESCRIPTION OF THE AFFECTED ENVIRONMENT

The purpose of this chapter is to give a brief overview of the existing environment in which the proposed action would occur. Environmental impacts of the proposed action, as well as permitting requirements, are discussed in Chapter 3.

#### 2.1 SOCIO-ECONOMIC SETTING

Clay and Kanawha Counties are part of a four-county regional planning and development body, the Region III Regional Intergovernmental Council.<sup>6</sup>

Terrain has greatly influenced the development pattern in the region. Consequently, development has resulted in a linear or corridor pattern utilizing the natural contours of the land. Development has settled primarily into the valley floors of the major rivers in the region. Historically, economic activity in the region has occurred in the various valleys formed by the Kanawha, Elk and Coal Rivers.

The project area is located in the Elk River Valley. This valley chiefly developed as a residential area adjacent to Charleston and the industry in the Kanawha River Valley. Nonresidential development in this area is limited largely to small neighborhood commercial centers and some industrial development in the form of an oil refinery. There are only two incorporated communities in the Valley--Clendenin and Clay. The Elk River Valley floor is generally narrower than that of the Kanawha Valley and, as a result, there is little level land to be found. The bulk of residential development has occurred on the adjacent ridge tops, with the Valley chiefly serving as the transportation corridor from these residential areas to Charleston and the Kanawha Valley.

In areas of low population density, the development which has occurred is to be found along the primary and secondary highways which follow the terraces of local streams. As a result, the settlement pattern has developed in a "finger-like" configuration.

The economy of Region III has undergone considerable dislocation over the 1980-90 decade. Once a major industrial/manufacturing center, particularly in the Kanawha Valley, the region found itself being transformed into a service/retail trade center at the close of the decade. The shift in jobs from higher paying manufacturing employment to minimum

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<sup>6</sup> The other two counties are Boone and Putnam.

wage service/retail jobs has tended to temper economic growth potential.

Coal is the major resource relevant to the regional economy. Oil and gas production also contributes to the employment of Clay and Kanawha Counties. Region III has long relied on manufacturing and mining as its two major employers, even though other types of employment were also important. Mining and manufacturing ranked high in terms of investments, raw material, high wages, and spin-off job creation.

In 1980 there were 12,720 mining jobs in the four-county region III; in 1989 there were only about 5,200 such jobs. Basic industries like those in manufacturing and mining have the greatest impact on creating other jobs in the area. A decline in basic industry has a ripple effect, causing a decline in other sectors of the regional economy.

Given the shortage of attractive wage employment, outmigration of younger workers occurs, with a long term negative impact on the potential expandability of the economy.

Between 1980-1990, the civilian labor force declined by 11.7% in Kanawha County and 12.2% in Clay County. The 1992 unemployment rate in Kanawha County was 8.7%, up from 6.0% in 1990. The 1992 unemployment rate in Clay County was 16.6%, up from 14.4% in 1990. The 1993 Region III Regional Development Plan Update states that Clay County remains the poorest county in the four-county region and that it has been designated a distressed county by the Appalachian Regional Commission.

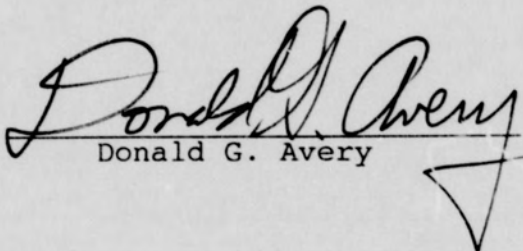
Clay County is the only county in the state in which all census tracts in the county have a poverty rate in excess of 35%. In December 1994 a five-county area of West Virginia, including all of Clay County, was designated by the federal government as an Enterprise Community (EC), one of only 30 such areas in the nation. This designation is accompanied by a \$4,000,000 Federal/state grant to fund projects which will contribute to breaking the cycle of poverty and fostering economic development in the EC area. The 30 EC's are also to receive preferential treatment on other types of grant and loan applications for the purpose of stimulating economic activity and reducing poverty.

The 1991 Regional Development Plan for Region III identifies the primary potential growth area of the region as the Kanawha River corridor and also an area in Putnam County known as Teays Valley. The Plan states that this growth area is the central core of the region and that it represents the major population center and is the point at which all major transportation arteries converge. The Plan states that Region III has very limited amounts of land suitable for intensive development, which it identifies as land with less than 8% slope. The growth area proposed in the Plan contains nearly all of the potential industrial sites in the Region.



Certificate of Service

I hereby certify that I have this 21st day of October, 1997, caused copies of the foregoing document to be served by hand upon counsel for Applicants, and by first-class mail upon Administrative Law Judge Leventhal and all other parties of record, as listed on the official service list issued by the Board in this proceeding.

  
Donald G. Avery

STB

FD

33388

10-21-97

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182902

## SLOVER &amp; LOFTUS

ATTORNEYS AT LAW

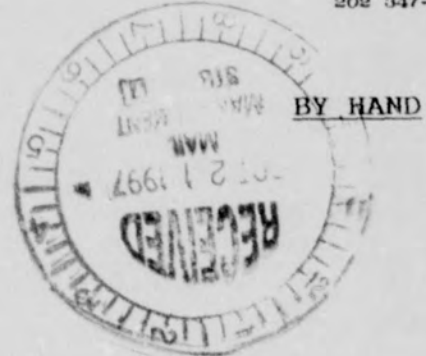
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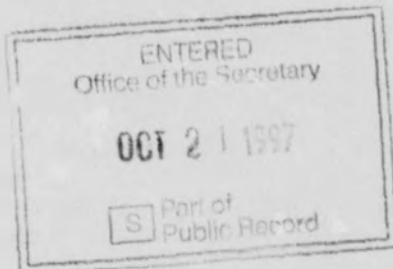
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Dear Mr. Secretary:

Enclosed for filing in the captioned proceeding please find an original and twenty-five (25) copies of the "Comments of the Elk River Railroad, Incorporated."

Also enclosed is a diskette with the enclosed filing in Wordperfect 5.1 form.

Thank you for your attention to this matter.



Sincerely,

*Donald G. Avery*  
Donald G. Avery

Encl.

cc: Judge Leventhal (w/o diskette)  
Applicants (w/o diskette)  
Parties of Record (w/o diskette)

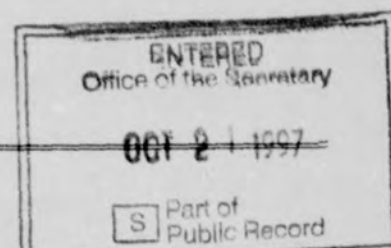


ELKR-2

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



COMMENTS OF  
THE ELK RIVER RAILROAD, INCORPORATED

Pursuant to Order No. 12 of the Surface Transportation Board ("Board" or "STB"), served in this docket on July 23, 1997, The Elk River Railroad, Incorporated ("TERRI") hereby submits these, its comments on the proposed acquisition of control over Conrail by the CSX and Norfolk Southern railroads.

IDENTITY AND INTEREST

TERRI is a Class III common carrier railroad subject to the jurisdiction of the Surface Transportation Board. Formed in 1989 with the purchase of a 61-mile branch line that CSXT was in the process of abandoning, and expanding in 1992 with the purchase of 18 miles of The Buffalo Creek & Gauley Railroad (BC&G) that interchange with TERRI. TERRI provides essential rail service to a two-county region of south-central West Virginia that is among the poorest areas in the entire country.

TERRI's primary traffic is low-sulfur bituminous coal; more than 300 million tons of mostly "compliance" coal are situated on or near TERRI's lines, and TERRI offers the only practicable rail access for the producers owning such reserves.

Today, TERRI's only connection to the nation's rail network is at Gilmer, West Virginia, where TERRI interchanges traffic with CSXT (former B&O). However, TERRI has received STB authorization to construct a 30-mile extension of its lines, to a connection with a Conrail line at Falling Rock, near Charleston, West Virginia, and is in the process of acquiring the necessary right of way to begin construction. Completion of that line extension -- and rehabilitation of the Conrail trackage to which it connects -- was expected to give TERRI's current and prospective customers direct access to the Kanawha River at Charleston, as well as to coal receivers located elsewhere on Conrail via Conrail's "West Virginia Secondary" (to which the Conrail line in question connects at Charleston). (A map showing TERRI's current line, as well as its planned extension to Falling Rock and associated Conrail lines, is attached as Appendix A.)

TERRI is a member of an informal, *ad hoc* group called the "West Virginia Association for Economic Development Through the Joint Use of Conrail Tracks by Norfolk Southern and CSXT" ("WVED"), which as the name implies is asking the Board to require NS to share use of Conrail's entire West Virginia Secondary with CSXT. TERRI fully supports the condition requested by WVED. As explained more fully below, however, TERRI is submit-

ting these separate comments in order to address an issue of particular importance to TERRI and its customers, *to-wit*, preserving the viability of its Falling Rock extension project. Rehabilitation of the short Conrail-owned branch line from Falling rock to Sanderson to Charleston, to which the Falling Rock extension will connect, is essential to the extension project's success, as is the establishment of reasonable arrangements that will permit TERRI-originated coal movements to access transloading docks on the river. Before the NS/CSX takeover proposal was announced, Conrail had evinced interest in selling that trackage to TERRI, which would have satisfied both requirements; the "standstill" arrangements currently in place have prevented consummation of such a sale, however, and NS, the putative acquirer of the West Virginia Secondary, has not indicated a similar interest in working with TERRI.

TERRI does not oppose the NS/CSX takeover of Conrail *per se*. TERRI does, however, ask that the Board condition its approval of that transaction on a commitment by NS to negotiate in good faith with TERRI with respect to TERRI's acquisition of the Conrail trackage between Falling Rock and Charleston, and with respect to reasonable interchange arrangements for traffic moving to or from points beyond that trackage, all in accordance with TERRI's pre-application discussions with Conrail.



## COMMENTS

### I. Introduction -- The Elk River Railroad

The Elk River Railroad, Incorporated ("TERRI") consists of 79 miles of track that interchanges with CSXT at Gilmer on the Braxton/Gilmer county line in West Virginia. This line travels in a southwestern direction to Gassaway in Braxton county where it continues along the Elk River valley towards Charleston, West Virginia. The line ends in Hartland in Clay county, just 5 miles past the town of Clay. At Clay, TERRI also has an 18 mile branch line formerly known as the Buffalo Creek & Gauley Railroad that runs to the town of Widen. The Final Environmental Impact Statement (FEIS) produced by the Surface Transportation Board in Finance Docket #31989 and published in the Federal Register on August 16, 1996, as Decision I.D. #20310 concerns reconnecting to Conrail's "West Virginia secondary line" by The Elk River Railroad, Inc. (TERRI).

### II. Harm to TERRI and to its Customers if NS Refuses to Cooperate on Falling Rock Extension as Conrail Would Have Done

On January 23, 1992, TERRI filed a petition with the former Interstate Commerce Commission (ICC or Commission), for an exemption under 49U.S.C.10505 from the prior approval requirement of 49 U.S.C.10901 to permit the construction and operation of a 29.8 mile rail line in Clay and Kanawha counties, West Virginia.

This was designated as Finance Docket #31989. Page ii of Section ES.1 of that STB report says,<sup>1</sup>

The proposed rail line would be located within the right-of-way (ROW) of an abandoned rail line, and would connect an existing TERRI line with an existing Consolidated Rail Corporation (Conrail) rail line. TERRI indicates that the principle perspective shippers over its proposed rail line conduct operations which now mine or in the future will mine low sulfur coal from reserves located along TERRI's existing line. The purpose of the proposed rail line is to provide the shippers an alternative means of transporting coal from those mines by providing them access to the Conrail line. On May 21, 1992, the ICC preliminarily concluded that TERRI's proposal met the standards of Section 10505 and conditionally granted this exemption petition, subject to the completion of the agency's environmental review process and further decision, making the exemption effective at that time, if appropriate, with whatever environmental conditions were found to be required.

On August 16, 1996, the STB issued its further decision in Finance Docket No. 31989, granting TERRI final approval to construct this line, subject only to certain specified environmental mitigation conditions that TERRI readily accepted.

Reconstructing this 30 mile segment would allow TERRI to connect to the existing Conrail line in West Virginia in the vicinity of Falling Rock and Blue Creek that goes for approximately 17.1 miles on into Charleston and a connection with Conrail's West Virginia Secondary line.

Initially, when we approached CSXT about acquiring this 30 mile abandoned rail line, they indicated that they did not

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<sup>1</sup>Appendix B contains the section from that report on the Socio-Economic Setting.

want to sell it and opposed our action. The parties then agreed to wait for a final determination by the STB. After the STB made its final decision in 1996, CSXT and TERRI then agreed upon a purchase price for this right-of-way and we are currently in the process of transferring each parcel of the right-of-way to TERRI.

Of course, our Falling Rock extension would be a "railroad to nowhere" if our traffic could not practicably continue its journey over the poorly-maintained Conrail branch line to which our extension will connect. Accordingly, we held discussions with Conrail early on regarding the status of that branch line in question, and regarding arrangements for our traffic's use of the line. In those discussions, Conrail expressed strong support for our extension project and the prospect of gaining additional coal traffic from our system. Conrail personnel even joined us in an on-site inspection of the lines to gauge more precisely just what rehabilitation work would be required to handle coal movements off our Falling Rock extension.

Our discussions covered the establishment of a rail-to-barge transloading facility on Conrail's line at the Kanawha River, as well as the idea of TERRI running shuttle train service over Conrail to that transloading facility, using TERRI locomotives and crews -- essentially, trackage rights.

In reliance on the spirit, tone, and substance of our discussions with Conrail, TERRI proceeded with its exemption application, including in particular the preparation of a complete and comprehensive Environmental Impact Statement covering

the construction and operation of our planned 30-mile extension. We have also proceeded with acquisition of the right-of-way from CSX (which had abandoned and pulled up a rail line along the same right-of-way several years earlier).

Unfortunately, Conrail's merger plans arose before we had finalized arrangements for use of its track, and Conrail now indicates that it cannot make assets sales or other long-term commitments that are not in the ordinary course of business.

The foregoing developments have given us cause for concern that Norfolk Southern, with its substantial reserves of marketable coal on its system, may be less interested in opening up new markets for TERRI-originated coal, and hence less eager to cooperate, than Conrail was. Certainly, Norfolk Southern has not evinced any support for our project to date.

If in fact Norfolk Southern, for whatever reason, refuses to negotiate reasonable arrangements for the movement of TERRI-originated coals to the river for transloading, or to markets beyond via the West Virginia Secondary, then all of our efforts and expenditures to progress our exemption request, including the time-consuming and expensive EIS process, will have been for naught. More importantly, TERRI's current and prospective customers will be deprived of the transportation options that our extension project is intended to give them.

#### CONCLUSION

As has been previously stated, TERRI does not oppose the Norfolk Southern/CSXT takeover of Conrail *per se*. TERRI

does, however, ask that the Board condition its approval of that transaction on the commitment by Norfolk Southern to one grant CSXT shared use of the West Virginia secondary for the reasons explained by WVED's comments and to negotiate in good faith with TERRI with respect to TERRI's acquisition of the Conrail trackage between Falling Rock, Sanderson and Charleston and with respect to reasonable interchange arrangements for traffic moving to or from points beyond that trackage, all in accordance with TERRI's pre-application discussions with Conrail.

Respectfully submitted,

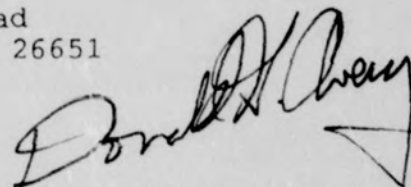
The Elk River Railroad,  
Incorporated  
P.O. Box 460  
300 Greenbrier Road  
Summersville, WV 26651

Of Counsel:

Slover & Loftus  
1224 17th Street, NW  
Washington, DC 20036

Dated: October 21, 1997

By: Donald G. Avery  
Slover & Loftus  
1224 Seventeenth Street, NW  
Washington, DC 20036  
(202) 347-7170



Attorney for the Elk River  
Railroad, Incorporated



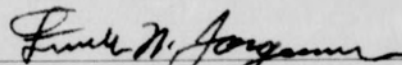
Verification

STATE OF WEST VIRGINIA )

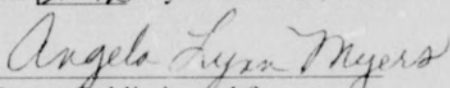
SS:

COUNTY OF NICHOLAS )

FRANK N. JORGENSEN, being duly sworn, deposes and says that he is president of The Elk River Railroad, Incorporated ("TERRI"), that he has read the foregoing Comments and the same are true as stated, and that he is authorized to make this attestation on behalf of TERRI.

  
Frank N. Jorgensen

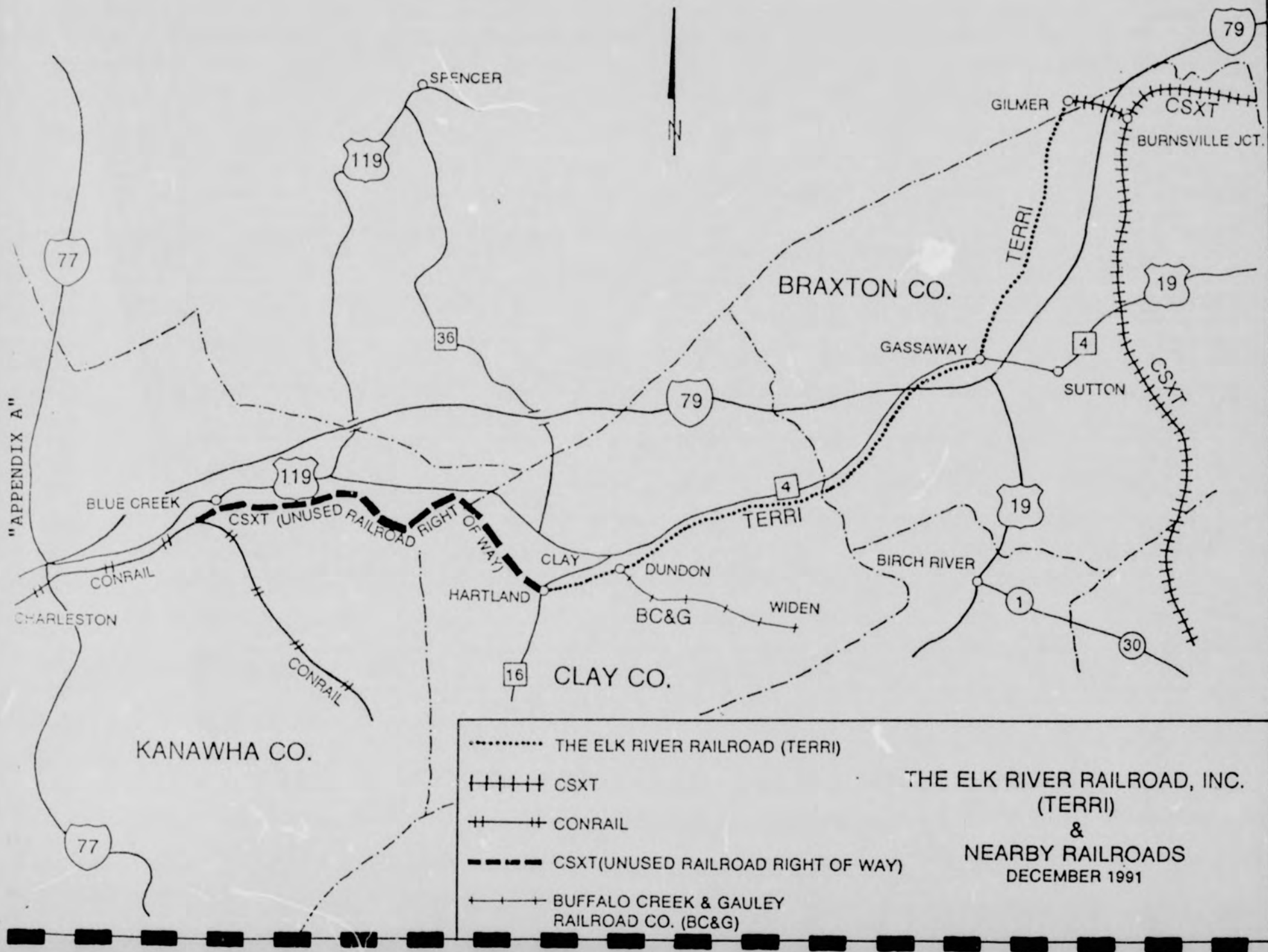
Subscribed and sworn to before me  
this 20th day of October, 1997.

  
Notary Public in and for  
the State of West Virginia.

My Commission Expires: Sept. 27, 2003







## "APPENDIX B"

### CHAPTER 2.0                      DESCRIPTION OF THE AFFECTED ENVIRONMENT

The purpose of this chapter is to give a brief overview of the existing environment in which the proposed action would occur. Environmental impacts of the proposed action, as well as permitting requirements, are discussed Chapter 3.

#### 2.1                      SOCIO-ECONOMIC                      SETTING

Clay and Kanawha Counties are part of a four-county regional planning and development body, the Region III Regional Intergovernmental Council.<sup>6</sup>

Terrain has greatly influenced the development pattern in the region. Consequently, development has resulted in a linear or corridor pattern utilizing the natural contours of the land. Development has settled primarily into the valley floors of the major rivers in the region. Historically, economic activity in the region has occurred in the various valleys formed by the Kanawha, Elk and Coal Rivers.

The project area is located in the Elk River Valley. This valley chiefly developed as a residential area adjacent to Charleston and the industry in the Kanawha River Valley. Nonresidential development in this area is limited largely to small neighborhood commercial centers and some industrial development in the form of an oil refinery. There are only two incorporated communities in the Valley--Clendenin and Clay. The Elk River Valley floor is generally narrower than that of the Kanawha Valley and, as a result, there is little level land to be found. The bulk of residential development has occurred on the adjacent ridge tops, with the Valley chiefly serving as the transportation corridor from these residential areas to Charleston and the Kanawha Valley.

In areas of low population density, the development which has occurred is to be found along the primary and secondary highways which follow the terraces of local streams. As a result, the settlement pattern has developed in a "finger-like" configuration.

The economy of Region III has undergone considerable dislocation over the 1980-90 decade. Once a major industrial/manufacturing center, particularly in the Kanawha Valley, the region found itself being transformed into a service/retail trade center at the close of the decade. The shift in jobs from higher paying manufacturing employment to minimum

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<sup>6</sup> The other two counties are Boone and Putnam.

wage service/retail jobs has tended to temper economic growth potential.

Coal is the major resource relevant to the regional economy. Oil and gas production also contributes to the employment of Clay and Kanawha Counties. Region III has long relied on manufacturing and mining as its two major employers, even though other types of employment were also important. Mining and manufacturing ranked high in terms of investments, raw material, high wages, and spin-off job creation.

In 1980 there were 12,720 mining jobs in the four-county region III; in 1989 there were only about 5,200 such jobs. Basic industries like those in manufacturing and mining have the greatest impact on creating other jobs in the area. A decline in basic industry has a ripple effect, causing a decline in other sectors of the regional economy.

Given the shortage of attractive wage employment, outmigration of younger workers occurs, with a long term negative impact on the potential expandability of the economy.

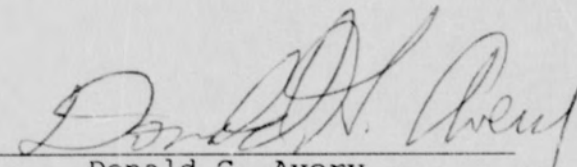
Between 1980-1990, the civilian labor force declined by 11.7% in Kanawha County and 12.2% in Clay County. The 1992 unemployment rate in Kanawha County was 8.7%, up from 6.0% in 1990. The 1992 unemployment rate in Clay County was 16.6%, up from 14.4% in 1990. The 1993 Region III Regional Development Plan Update states that Clay County remains the poorest county in the four-county region and that it has been designated a distressed county by the Appalachian Regional Commission.

Clay County is the only county in the state in which all census tracts in the county have a poverty rate in excess of 35%. In December 1994 a five-county area of West Virginia, including all of Clay County, was designated by the federal government as an Enterprise Community (EC), one of only 30 such areas in the nation. This designation is accompanied by a \$4,000,000 Federal/state grant to fund projects which will contribute to breaking the cycle of poverty and fostering economic development in the EC area. The 30 EC's are also to receive preferential treatment on other types of grant and loan applications for the purpose of stimulating economic activity and reducing poverty.

The 1991 Regional Development Plan for Region III identifies the primary potential growth area of the region as the Kanawha River corridor and also an area in Putnam County known as Teays Valley. The Plan states that this growth area is the central core of the region and that it represents the major population center and is the point at which all major transportation arteries converge. The Plan states that Region III has very limited amounts of land suitable for intensive development, which it identifies as land with less than 8% slope. The growth area proposed in the Plan contains nearly all of the potential industrial sites in the Region.

Certificate of Service

I hereby certify that I have this 21st day of October, 1997, caused copies of the foregoing document to be served by hand upon counsel for Applicants, and by first-class mail upon Administrative Law Judge Leventhal and all other parties of record, as listed on the official service list issued by the Board in this proceeding.

  
Donald G. Avery

STB

FD

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10-21-97

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182815  
ORIGINAL

BALL JANIK LLP  
ATTORNEYS

AA-4

1455 F STREET, NW, SUITE 225  
WASHINGTON, D.C. 20005

TELEPHONE 202-638-3307  
FACSIMILE 202-783-6947

Karl MORELL  
OF COUNSEL  
(202) 466-6533

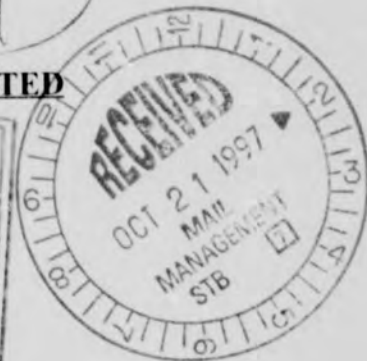
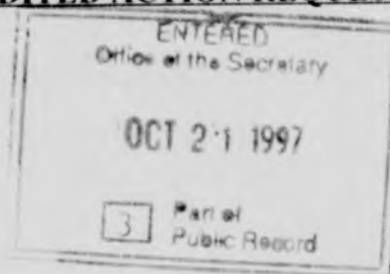
kmorell@bjllp.com

October 21, 1997

**BY HAND**

**EXPEDITED ACTION REQUESTED**

Honorable Vernon A. Williams  
Secretary  
Surface Transportation Board  
Suite 700  
1925 K Street, N.W.  
Washington, D.C. 20423-0001



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

Dear Secretary Williams:

The Ann Arbor Railroad (the "Ann Arbor") requests a two week extension to November 4, 1997, to file comments, requests for conditions and a responsive application that are currently due on October 21, 1997.

Ann Arbor has been negotiating with the Norfolk Southern Railway Company ("NS") and CSX Transportation, Inc. ("CSXT"), both referred to as "Applicants." To date negotiations have been unsuccessful, but they are ongoing. Ann Arbor is a Class III railroad with limited resources, both financial and personnel. Ann Arbor has dedicated its resources to negotiating a settlement with Applicants, and has been unable simultaneously to dedicate the resources necessary to prepare comments, requests for conditions, and a responsive application. Indeed, Ann Arbor believed that it would reach a settlement with Applicants in order to avoid the need to file. However, time has become the enemy, not the willingness of the parties to negotiate. Ann Arbor still believes that it can negotiate a settlement with Applicants, but in order to preserve its right to file comments, a request for conditions, and a responsive application, in the event that the Ann Arbor is overly

Honorable Vernon Williams  
October 21, 1997  
Page 2

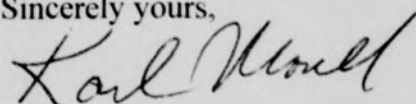
optimistic as to the ability of the parties to settle, Ann Arbor requests this two week extension.

Ann Arbor does not believe that this extension will harm Applicants. Applicants are involved in responding to Decision No. 44 by October 29, 1997, and will have until December 15, 1997 to respond to Ann Arbor. Indeed, Applicants will be busy with numerous other comments, requests for conditions and responsive applications, that the delay should not harm them. Moreover, Ann Arbor commits to respond to discovery within five days of the receipt of discovery and to make any witnesses available to Applicants after Ann Arbor's filing at any time or place convenient to Applicants.

By granting this extension, the Board will allow Ann Arbor the time needed to reach a settlement with CSXT and NS and avoid the need to file in response to the application, while at the same time preserving Ann Arbor's right to protect itself in the unlikely event that negotiations fail. Ann Arbor requests that the Board expeditiously grant this two week extension.

Enclosed are the original and 25 copies of this letter, and a diskette with file AA-4 in WordPerfect 5.1. Thank you for your assistance. If you have any questions, please call me.

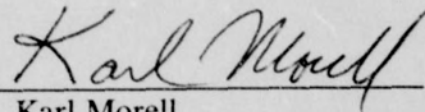
Sincerely yours,

A handwritten signature in cursive script, appearing to read "Karl Morell".

Karl Morell

**CERTIFICATE OF SERVICE**

I hereby certify that I have caused Ann Arbor Railroad's Request for an Extension of Time to be served by hand on applicants' representatives in this proceeding and by first class mail, postage pre-paid on all other parties of record in STB Finance Docket No. 33388.



---

Karl Morell

October 21, 1997

STB

FD

33388

10-21-97

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182806



Established 1983

Serving Atlantic, Cape May,  
Cumberland and Salem Counties

## SOUTH JERSEY TRANSPORTATION PLANNING ORGANIZATION

Richard E. Squires  
*Chairman*

John M. Lake, Jr.  
*Vice-Chairman*

Douglas H. Fisher  
*Sec'y/Treasurer*

Timothy G. Chelius, P.P.  
*Executive Director*



182806

Daniel Beyel  
Anthony Campanella  
Robert E. Jack  
Mark Videtto  
James Whelan  
William S. Beetle, NJDOT  
James A. Crawford, SJTA  
James Redeker, NJ Transit

### MEMORANDUM

**DATE:** October 14, 1997

**TO:** All Parties of Record

**FROM:** Timothy G. Chelius, Executive Director

**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



Enclosed please find South Jersey Transportation Planning Organization's Position and supporting Resolution 97709-19, unanimously approved by the SJTPO Policy Board on September 22, 1997, concerning the above matter.

TGC:mab

Enclosures



**BEFORE THE  
SURFACE TRANSPORTATION BOARD**

---

**Finance Docket No. 33388**

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

**Finance Docket No. 33388**

**SOUTH JERSEY TRANSPORTATION PLANNING ORGANIZATION**

---

**POSITION OF THE  
SOUTH JERSEY TRANSPORTATION PLANNING ORGANIZATION  
TO BE FILED ON OR BEFORE OCTOBER 21, 1997**

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As a Party of Record in this proceeding, the South Jersey Transportation Planning Organization, ("SJTPO") hereby submits this resolution adopted at its regular meeting of September 22, 1997.

The SJTPO is the Metropolitan Planning Organization for Atlantic, Cape May, Cumberland, and Salem Counties in Southern New Jersey, and has a vital interest in public actions that substantially affect transportation, land use, economic development, and the environment. The SJTPO solicited comments on this matter from local freight operators, business interests, and SJTPO's Citizens Advisory Committee. The following resolution represents the unanimous position of SJTPO's governing body, the SJTPO Policy Board.

## **SOUTH JERSEY TRANSPORTATION PLANNING ORGANIZATION**

### **RESOLUTION 9709-19: Submitting Testimony to the Surface Transportation Board on the Proposed Acquisition of Conrail**

**WHEREAS, the Norfolk Southern Railway Company (NS), CSX Transportation, Inc. (CSX), and the Consolidated Rail Corporation (Conrail) have filed a joint application before the Federal Surface Transportation Board (STB) seeking authorization for the acquisition of Conrail by NS and CSX and for the subsequent division of Conrail's assets; and**

**WHEREAS, this proposed \$10.3 billion transaction will have substantial impacts on the southern New Jersey region; and**

**WHEREAS, as the Metropolitan Planning Organization for southern New Jersey, SJTPO has a vital interest in public actions that substantially affect transportation, land use, economic development, and the environment; and**

**WHEREAS, SJTPO has filed with the STB as a Party of Record to submit testimony during the 120-day comment period beginning June 23; and**

**WHEREAS, the SJTPO Citizens Advisory Committee and Technical Advisory Committee have endorsed the position outlined below;**

**NOW THEREFORE BE IT RESOLVED, that SJTPO generally supports the proposed acquisition of Conrail by Norfolk Southern and CSX; and**

**BE IT FURTHER RESOLVED, that SJTPO supports the NJ Department of Transportation's principles guiding their evaluation of the filing, namely:**

- that there be full competitive access;
- that passenger operations are preserved;
- that competitive access is equally available for shortlines and should allow direct interchange where practical and feasible;
- that shippers have adequate access to a full range of transportation options; and
- that employment impacts are minimized.

**BE IT FURTHER RESOLVED, that SJTPO urges the STB and the railroads to consider the following points as conditions to the filing:**

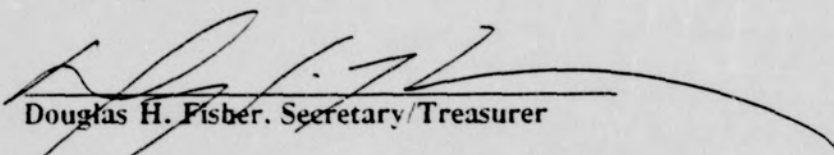
- that a public voice should be prescribed in the governance and maintenance of the Shared Assets Areas; and

- that operating rights for passenger rail operations and potential new starts should be protected, especially in the Camden-to-Millville corridor; and

BE IT FURTHER RESOLVED, that the Executive Director and SJTPO Counsel are authorized to file the appropriate documents with STB and that copies of this resolution be forwarded to the Commissioner of the New Jersey Department of Transportation; NJ Transit Executive Director; the respective Chairmen and Executive Directors of the Delaware Valley Regional Planning Commission (DVRPC) and North Jersey Transportation Authority (NJTPA); and SJTPO members of the New Jersey State Legislature.

Certification

I hereby certify that the foregoing is a correct and true copy of a resolution adopted by the Policy Board of the South Jersey Transportation Planning Organization at its meeting of September 22, 1997.



Douglas H. Fisher, Secretary/Treasurer

49709-19

STB FD 33388 10-21-97 D 182804



OHIO STEEL INDUSTRY ADVISORY COMMISSION / OHIO DEPARTMENT OF DEVELOPMENT  
P.O. Box 1001 COLUMBUS, OH 43266-1001 (614) 466-4551 FAX (614) 644-1789

**VIA OVERNIGHT EXPRESS DELIVERY**

October 20, 1997

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

Re: Finance Docket No. 33388

Dear Secretary Williams:

I enclose for filing an original and twenty-five (25) copies of a statement prepared on behalf of the Ohio Steel Industry Advisory Council, a party of record in the above proceeding, for several of its member steel companies. Also enclosed is a 3.5-inch disk containing the text of this filing in Microsoft Word for Windows 95, 7.0 version.

Copies of the enclosed statement and Certificate of Service are being served upon the Honorable Jacob Levanthal and counsel for the applicants. All other parties are being served via first-class mail, postage pre-paid.

Please date stamp the enclosed extra copy of this letter and return in the enclosed self-addressed envelope

Respectfully submitted,

Charles S. Hesse  
for the Ohio Steel Industry Advisory Council

Charles Hesse Associates  
8270 Stoney Brook Drive  
Chagrin Falls, OH 44023

Enclosures



D



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*

**CERTIFICATE OF SERVICE**

I hereby certify that on this 20th day of October, 1997, on behalf of the Ohio Steel Industry Advisory Council, a copy of the foregoing statement was served by first-class mail, postage prepaid, or Federal Express overnight delivery, upon:

Dennis G. Lyons, Esq.  
Arnold & Porter  
555 12<sup>th</sup> Street, N.W.  
Washington, D. C. 20004-1202

John M. Nannes  
Skadden, Arps, Slate, Meagher  
& Flom, L.L.P.  
1440 New York Avenue, N.W.  
Washington, D.C. 20005-2111

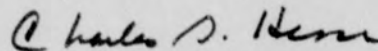
Paul A. Cunningham, Esq.  
Harkins Cunningham  
1300 19<sup>th</sup> Street, N.W., #600  
Washington, D.C. 20036

Richard A. Allen, Esq.  
Zuckert, Scoutt & Rasenberger, L.L.P.  
888 17<sup>th</sup> Street, N.W. #600  
Washington, D.C. 20006-3939

Samuel M. Sipe, Jr.  
Steptoe & Johnson, L.L.P.  
1330 Connecticut Avenue, N.W.  
Washington, D.C. 20036-1795

Hon. Jacob Levanthal  
Administrative Law Judge  
Federal Energy Regulatory Commission  
888 1<sup>st</sup> Street, N.E., #11F  
Washington, D.C. 20426

and upon all other parties of record appearing.



Charles S. Hesse  
President, Charles Hesse Associates  
8270 Stoney Brook Drive  
Chagrin Falls, OH 44023

Dated October 20, 1997



OHIO STEEL INDUSTRY ADVISORY COMMISSION / OHIO DEPARTMENT OF DEVELOPMENT  
P.O. Box 1001 COLUMBUS, OH 43266-1001 (614) 466-4551 FAX (614) 644-1789

182804



October 20, 1997

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  
Operating Leases/Agreements – Conrail Inc. and Consolidated Rail Corporation.

Dear Mr. Williams:

The Ohio Steel Industry Advisory Council which, in part, is composed of 10 steel companies that produce more than 95 per cent of all manufactured steel in the State of Ohio, hereby files this statement on behalf of several companies who have two major concerns with the proposed merger.

The first concern is the loss of competitive access from the Conrail line linking Ashtabula, Ohio to Warren, Ohio. Currently, WCI Steel, Inc., Warren, Ohio receives iron ore from Pinney Dock Company, Ashtabula, Ohio via a Conrail track running from Ashtabula to Warren via a turn at Latimer, Ohio.

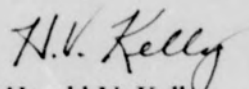
Under the proposed merger of Conrail, the Norfolk Southern will acquire the Conrail track described above. The Norfolk Southern has agreed to allow trackage rights to the CSXT over this track from Ashtabula to Youngstown, Ohio, but has denied them the right to make the turn at Latimer. As a result, Norfolk Southern has denied CSXT true competitive access to WCI Steel from Pinney Dock, Ashtabula.

The second concern regards the ability of the Wheeling & Lake Erie Railway Company to remain a viable interstate railroad providing full service, rail car supply and competitiveness to two steel producers in Canton and Massillon, Ohio. Both The Timken Company and Republic Engineered Steels, Inc., are currently served by Conrail and the Wheeling & Lake Erie Railway. Both railroads have been good suppliers and have generally provided timely and competitive service which has been critical to these steel companies.

With the proposed acquisition by Norfolk Southern of virtually all of the Conrail lines in eastern Ohio, W&LE's primary partner now becomes its principal competitor. Any action that might lead to the eventual demise of the W&LE would be detrimental to both The Timken Company and Republic. The Surface Transportation Board should ensure that the proposed merger and restructuring of the railroads maintain the long-term viability of the Wheeling & Lake Erie Railway Company. (Please note a letter to this effect from The Timken Company, attached).

Because steelmaking is heavily dependent on an efficient and reliable rail system for transporting raw materials and finished products, it is incumbent that the merger continue to provide competitive access and encourage price stability in both communities. A balance, competitive-freight rail system is critical to these companies and future economic development opportunities both in Ohio and the region. The Surface Transportation Board must ensure the viability of short line and/or regional carriers whose presence is often the life blood of those businesses which rely on local railroad service.

Sincerely,



Harold V. Kelly  
Co-Chair  
Ohio Steel Industry Advisory Council

Enclosures

cc: All parties of record

# TIMKEN

**Larry R. Brown**  
Vice President and General Counsel

**WORLDWIDE LEADER IN BEARINGS AND STEEL**

September 24, 1997



Office of the Secretary  
1997 Case Control Branch  
Attention: STB Finance Docket #33388  
U.S. Surface Transportation Board  
1925 K Street, N.W.  
Washington, D.C. 20424-0001

Dear Secretary:

The Timken Company prides itself in being an effective global competitor in our markets while maintaining our roots in Ohio. It is because of competition and the work ethic of our associates that we have been able to achieve the success and market leadership that we currently enjoy. Another important component of our success is the effective and competitive supplier network that we have established. It is our belief that Ohio's success in attracting and retaining leading manufacturers is directly related to the strong supplier base that exists here.

We have come to understand that a major element of our transportation supplier network is potentially threatened as a result of the Norfolk Southern/CSX Transportation acquisition/merger of Conrail. At The Timken Company, we rely and depend upon an efficient and reliable rail system for transporting the steel scrap that we use as our basic raw material and for shipping many of our steel products. We have been fortunate in having access to multiple rail carriers over the years and that competition has fostered efficiencies, price stability, and innovative solutions to problems. In this regard, the ability of the Wheeling & Lake Erie Railway to remain a viable interstate, regional railroad is closely tied to achieving competitive access to our facilities.

Norfolk Southern has been a partner and "friendly connection" with Wheeling & Lake Erie (W&LE) for purposes of traffic flows and market partnerships. Conrail has been the principal competing railroad, although the W&LE is a partner with them out of Canton, Ohio. Therefore, with Norfolk Southern's acquisition of virtually all of the Conrail lines in eastern Ohio and western Pennsylvania, W&LE's primary partner now becomes its principle competitor. This could prove fatal to W&LE as substantial revenues will be diverted from W&LE to the new merged systems. The end result could be the removal of an effective low-cost competitor.

**THE TIMKEN COMPANY**

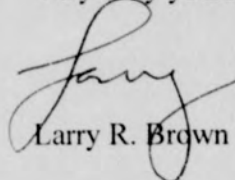
Mail Code: GNE-14  
1835 Dueber Avenue, S.W.  
P.O. Box 6928  
Canton, OH 44706-0928 U.S.A.

Telephone: (330) 471-4017  
Facsimile: (330) 471-4041

While a buyout through filing for "inclusion" with the Surface Transportation Board is an option, it still leaves numerous W&LE shippers, like The Timken Company, subject to captive or monopoly rail service after the purchase, unless other carriers are granted competitive access. The W&LE's approach has been to "redefine" the railroad by trying to negotiate access to new markets in order to compete for new traffic. Through competitive access to new markets, W&LE should be able to remain viable by recouping revenues that otherwise would be lost.

At The Timken Company, like many of Ohio's successful businesses, we have found that competition is not only healthy for customers, associates and shareholders, it also stimulates efficiencies, spurs development and fosters an attitude of continuous improvement. We urge you to act to preserve effective competition in Ohio's rail systems. The benefits of this competition are important to Ohio's consumers and workers, and they are critical to the ongoing health of Ohio's economy and manufacturing sector.

Very truly yours,



Larry R. Brown

kss/railroa3.lrb

cc: Thomas M. O'Leary, Executive Director  
Larry R. Parsons, President  
U.S. Representative Ralph Regula  
Governor George Voinovich

bcc: Charles Hesse  
Steven Paquette



STB

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GUERRIERI, EDMOND & CLAYMAN, P.C.

1331 F STREET, N.W.  
WASHINGTON, D.C. 20004

(202) 624-7400

FACSIMILE: (202) 624-7420



JOSEPH GUERRIERI, JR.  
JOHN A. EDMOND  
ROBERT S. CLAYMAN  
DEBRA L. WILLEN  
JEFFREY A. BARTOS  
ANNA L. FRANCIS\*  
ELISE B. STEINBERG  
ANDREA HOLLAND LARUE\*

\*NOT ADMITTED IN D.C.

October 21, 1997



**VIA HAND DELIVERY**

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

Re: CSX Corp., et al., Norfolk Southern Corp., et al.  
-- Control and Operating Leases/Agreements --  
Conrail Inc., et al., Finance Docket No. 33388

Dear Secretary Williams:

Enclosed for filing in the above-referenced proceeding, please find an original and 25 copies of the Comments of the International Association of Machinists and Aerospace Workers ("IAM"). Also enclosed is a 3.5" diskette containing the text of this filing in WordPerfect 6.0/6.1 format.

I have included an additional copy to be date-stamped and returned with our messenger.

Thank you for your attention to this matter.

Sincerely,

*Debra L. Willen*

Debra L. Willen  
Counsel for the IAM

DLW:mmw

cc: Allison Beck, Esq.  
Mark Filipovic  
Robert L. Reynolds

FILED  
the Secretary

OCT 21 1997

Part of  
Public Record

182800

FILED  
the Secretary

OCT 21 1997

BEFORE THE  
SURFACE TRANSPORTATION BOARD



FINANCE DOCKET NO. 33388

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

COMMENTS OF THE INTERNATIONAL ASSOCIATION OF MACHINISTS  
AND AEROSPACE WORKERS UPON RAILROAD CONTROL APPLICATION

The International Association of Machinists and Aerospace Workers ("IAM") hereby submits its Comments upon the control and operating leases/agreements application of CSX Corporation ("CSXC"), CSX Transportation, Inc. ("CSXT"), Norfolk Southern Corporation ("NSC"), Norfolk Southern Railway Co. ("NSR"), Conrail, Inc. ("CRR"), and Consolidated Rail Corporation ("CRC") (hereinafter collectively "the Applicants").<sup>1</sup>

The IAM strenuously opposes the proposed transaction. Specifically, the IAM opposes the Applicants' plan to abrogate the IAM's collective bargaining agreements with Conrail, under the guise that such action is necessary to effectuate the proposed transaction within the meaning of 49 U.S.C. § 11321(a). In

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

addition, the IAM opposes the merger on the grounds that it will have a deleterious impact upon railway safety. Accordingly, the IAM respectfully requests that the Surface Transportation Board ("STB" or "the Board") deny the pending application.

In the alternative, the IAM urges the STB to condition any approval of this transaction upon the imposition of the New York Dock and other applicable labor protective provisions. Moreover, issues regarding the modification or abrogation of existing labor agreements must first be the subject of negotiation and arbitration pursuant to Article I, Section 4 of the New York Dock conditions and are not properly before the Board at this time.

#### **FACTUAL BACKGROUND**

The IAM represents approximately 950 employees on the Conrail system, 700 employees on the NS system and 1,150 employees on the CSX system. These employees are in the machinists craft or class and perform, inter alia, overhaul of locomotives, running repairs, heavy car repair work and maintenance of way equipment repairs. The Applicants' Labor Impact Exhibit projects that 182 machinist jobs would be abolished and 173 machinist jobs would be transferred if the proposed transactions were approved. Applicants' Submission of 1995 Labor Impact Exhibit, CSX/NS-26, based on 1995 average head count, at 14.

In addition, the Applicants assert that implementation of their respective proposed Operating Plans would require the abrogation of IAM's collective bargaining agreements with Conrail. Both NS and CSX describe projected seniority, agreement and

territory changes deemed necessary under their respective Operating Plans in Appendices A to those Plans. Specifically, NS proposes that all IAM-represented employees on the Conrail routes and facilities allocated to NS under the transaction will thereafter be subject to the Norfolk & Western Railway Co. ("NW") collective bargaining agreement effective September 1, 1949. Application, Vol. 3B at 373-74. CSX also states that its collective bargaining agreements with the IAM will apply to the CSX shops where CSX and Conrail operations are consolidated and IAM's agreements with Conrail will be overridden. Application, Vol. 3A at 492, 503-04.

NS Vice President Labor Relations Robert S. Spenski, the NS official who sponsored the Labor Impact Exhibit and Appendix A to NS's Operating Plan, conceded in his deposition that he had never reviewed the Conrail collective bargaining agreements. Deposition of Robert S. Spenski and Kenneth R. Peifer (hereinafter "Spenski & Peifer Dep."), Tr. 176. CSX Vice President Labor Relations Kenneth R. Peifer testified that he "had an opportunity to just casually review some of the Conrail collective bargaining agreements." *Id.*, Tr. 175 (emphasis added). Neither carrier has conducted any studies to determine the costs of alleged inefficiencies that would result from continued application of those agreements. *Id.*, Tr. 88, 132, 139.

Although Mr. Spenski argued in defense of NS's plan that having "one set of rules" would be "more efficient" than having "two sets of rules" (*id.*, Tr. 132), he conceded that there currently are five collective bargaining agreements in effect on



the NS system applicable to the machinists craft or class. Id., Tr. 129-30. NS has not engaged in any negotiations with the IAM as to which IAM collective bargaining agreement should be applied to NS's portion of Conrail's routes, facilities and territories. Id., Tr. 132-33. Indeed, neither carrier has engaged in any implementing agreement negotiations. Id., Tr. 146.

#### **ARGUMENT**

**I. THE CARRIERS' SCHEME TO ABROGATE THE IAM'S COLLECTIVE BARGAINING AGREEMENTS WITH CONRAIL IS NOT "NECESSARY" TO EFFECTUATE THE TRANSACTION AND WOULD SIGNIFICANTLY INTERFERE WITH THE RIGHTS AND INTERESTS OF IAM-REPRESENTED EMPLOYEES.**

The proposed acquisition of control by CSX and NSC of Conrail and the division of the use and operation of Conrail's assets between them may be approved only if the proposed transaction is consistent with the public interest. 49 U.S.C. § 11324(c). In making its public interest determination, the STB is required to consider "the interest of rail carrier employees affected by the proposed transaction[.]" 49 U.S.C. § 11324(b)(4). As noted above, NS and CSX intend to abrogate the Conrail collective bargaining agreements without having undertaken more than a very cursory review of those agreements, if any, and without having engaged in a single negotiating session with the IAM regarding an implementing agreement. Such intentions are directly contrary to precedent and would have a severely adverse impact upon the employees whom the IAM represents.

Although the STB has authority pursuant to 49 U.S.C. § 11321(a) to override provisions of a collective bargaining

agreement in certain narrowly-prescribed instances, "it is clear that the [Board] may not modify a CBA [collective bargaining agreement] willy-nilly.... The [Interstate Commerce] Commission itself has stated that it may modify a collective bargaining agreement ... only as 'necessary' to effectuate a covered transaction." RLEA v. United States, 987 F.2d 806, 814 (D.C. Cir. 1993) (citation omitted). The Board has ruled that the "standard is whether the change is necessary to effect a public benefit of the transaction." Union Pacific Corp., et al. -- Control and Merger -- Southern Pacific Transp. Co., et al. (Arbitration Review), STB Finance Docket No. 32760 (Sub-No. 22), June 26, 1997. And the Court of Appeals for the D.C. Circuit has made clear that "the benefit cannot arise from the CBA modification itself; considered independently of the CBA, the transaction must yield enhanced efficiency, greater safety, or some other gain." ATDA v. ICC, 26 F.3d 1157, 1164 (D.C. Cir. 1994).

In other words, carriers cannot and should not be given blanket authority to override entire collective bargaining agreements negotiated by their employees' certified collective bargaining representatives for the mere sake of administrative convenience. "[P]arties to contracts should not easily be relieved of obligations voluntarily undertaken." CSX Corp. -- Control -- Chessie System, Inc. and Seaboard Coast Line Indus., Inc., 6 I.C.C. 2d 715, 749 (1990).

Presumably, NS and CSX had adequate time before seeking the Board's approval of the instant transaction to assess the benefits

and the costs of the transaction with full knowledge of Conrail's pre-existing legal obligations to its unionized employees. The Applicants should not be permitted to totally disregard those legal obligations for the sake of administrative efficiency. The Interstate Commerce Commission "'never indicated that an approved transaction can be utilized as a pretext for extinguishing or amending existing collective bargaining agreements.'" *Id.* at n. 30 (citation omitted). Yet that is precisely what the Applicants plan to do here. The IAM respectfully submits that the Board must not allow those plans to be realized.

**II. IMPLEMENTATION OF THE APPLICANTS' PROPOSED  
OPERATING PLANS WOULD HAVE A DELETERIOUS IMPACT  
UPON RAIL SAFETY.**

There is ample evidence that mergers of major rail carriers create significant new safety problems. Based upon the Applicant's proposed Operating Plans and the safety record of CSX, it is virtually certain that this dangerous pattern will be repeated here.

The U.S. Department of Transportation's Federal Railroad Administration ("FRA") has identified several specific areas of safety concern that have arisen following the Burlington Northern -- Santa Fe and Union Pacific - Southern Pacific mergers, including train control systems, training and quality control at dispatch centers, train inspections and identification of hazardous materials, and hours of service for train crews. FRA 17-97, Aug. 21, 1997.

In particular, Union Pacific ("UP") has experienced "a fundamental breakdown in the railroad's ability to effectively implement basic railroad operating procedures and practices essential to safe railroad operations." FRA 19-97, Sept. 10, 1997. Last summer, there were three collisions on the UP system, causing the death of seven individuals, including five railroad employees, and millions of dollars in property damage. Two additional collisions followed. Moreover, since the beginning of the year, four UP train service employees lost their lives in yard switching accidents. FRA Summary, Union Pacific Railroad Safety Assurance Assessment, Sept. 10, 1997.

As a result of these incidents, the FRA conducted a comprehensive safety inspection of UP in late August. The agency found several deficiencies resulting in significant safety hazards, including the following: ineffective crew utilization, causing crews to work longer hours with less off-duty time; inadequate supervision of employee performance; dispatching supervisors' unfamiliarity with the territories of the dispatchers they supervise; dispatcher fatigue; dispatching conflicts; failure to comply with operating rules; infrequency of safety job briefings; lack of employee training on new equipment; use of defective equipment on trains; locomotive defects; inconsistent drug testing of train crews; lack of proper familiarization trips for locomotive engineers; and widespread harassment and intimidation of employees to not report defects and injuries. Id.; FRA 19-97, Sept. 10, 1997.



Given the safety record of CSX, we can only expect the transaction proposed in the instant proceeding to have a similar impact upon public safety. Thus, a series of incidents this past summer led to a comprehensive FRA audit of the CSX system: a CSX collision in West Virginia that caused one fatality and other employee injuries; a 34-car derailment in Florida resulting in a leak of hazardous materials and evacuation of local citizens; a derailment of a CSX intermodal freight train that then side-swiped a passing Amtrak passenger train in Virginia; the fall of a truck trailer from a flat car in Maryland; and a side-swipe collision in Illinois that caused the derailment of a hazardous materials tank car, which then caught fire. FRA 25-97, Oct. 16, 1997.

Based upon its audit, the FRA presented an extremely critical report to CSX Chairman John Snow. Id.; Safety Assurance and Compliance Program Report for CSX Transportation, Inc., Executive Summary. The FRA found severe shortcomings in each of the functional areas of railroad operation. In the signals and train control area, FRA inspectors discovered poorly maintained pole lines, poor visibility of wayside signals and grade-crossing lights, incorrect and incomplete circuit plans, defective switches and insufficient training of signal employees. Id. at iv-v. Operational testing is insufficient; crew management inefficiencies result in extended duty days and inadequate rest periods; and employee injuries and rail equipment accidents are significantly under-reported. Id. at v-vi. In the hazardous materials area, FRA agents uncovered instances in which defective tank cars were moved,



hazardous cars were not properly placarded, and employees had not received sufficient training. Id. at vii. FRA track inspectors found overgrown vegetation, saturated subgrade and defective rails on main tracks. Id. at viii. Locomotive inspections are inadequate and infrequent, and there is a lack of quality control over outside contractors who load trailers and containers. Id. at ix. Finally, the FRA found serious deficiencies in CSX's safety culture. Train operations are emphasized over safety considerations, and employees who raise safety concerns face harassment and intimidation. Id. at ix-x.

The Applicants' own Operating Plans further indicate that the UP experience is likely to be repeated here. For example, the Applicants have touted their plans to centralize dispatcher supervision (Application, Vol. 3A at 504-05; Vol. 3B at 376-77), plans that make supervisor unfamiliarity with the territories of the dispatchers they supervise a greater likelihood. In addition, the Applicants intend to increase seniority districts for train crews, communications and signal employees and maintenance of way employees (Application, Vol. 3A at 486-88, 490-91, 493-94; Vol. 3B at 357-58, 365-372), which will mean that those employees will work more frequently in unfamiliar territory and have to travel greater distances. Reductions in maintenance of way employment and in the number of shopcraft employees who maintain and repair locomotives and cars, (Applicants' Submission of 1995 Labor Impact Exhibit, CSX/NS-26), without corresponding reductions in fleet

size, rail lines or traffic, is certain to create maintenance deficiencies and lead to the use of defective equipment.

Accordingly, the proposed transaction can be expected to have a deleterious effect upon public safety in general and the safety of rail labor in particular. For this reason also, the IAM opposes the instant application.

**III. IN THE EVENT THAT THE PENDING APPLICATION IS APPROVED, THE BOARD SHOULD IMPOSE THE NEW YORK DOCK PROTECTIVE CONDITIONS AND LEAVE TO THE ARTICLE I, SECTION 4 PROCESS ISSUES REGARDING THE CONTINUED APPLICABILITY OF CONRAIL COLLECTIVE BARGAINING AGREEMENTS.**

The Applicants have acknowledged that approval of the primary application is subject to the employee protective conditions set forth in New York Dock Railway--Control--Brooklyn Eastern District, 360 I.C.C. 60, aff'd sub nom. New York Dock Ry. v. United States, 609 F.2d 83 (2d Cir. 1979) and that related trackage rights, abandonments, and lease approvals are subject to the Norfolk and Western, Oregon Short Line and Mendocino Coast conditions. Application, Vol. 1 at 25; Joint Verified Statement of Kenneth R. Peifer and Robert S. Spenski at 6, contained in Vol. 3A at 525 and Vol. 3B at 498. The IAM respectfully requests that approval by the Board of the primary application be conditioned upon the standard New York Dock protections.

Moreover, it is well established that Article I, Section 4 of the New York Dock conditions sets forth the required procedure for reaching an implementing agreement to effect a subject transaction. Thus, although the Applicants have set forth in Appendices A to

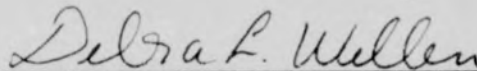
their Operating Plans projected changes in collective bargaining agreements, any such changes would be subject to collective bargaining and ultimately arbitration pursuant to Article I, Section 4. Indeed, the Interstate Commerce Commission "g[a]ve arbitrators the prime responsibility for achieving a balance between collective bargaining rights and consolidation efficiencies...." CSX Corp. -- Control -- Chessie System, Inc. and Seaboard Coast Line Indus., Inc., 6 I.C.C. 2d at n. 31.

Accordingly, prior to the parties' exhaustion of the Article I, Section 4 procedure, it would be premature for the Board to make any findings regarding the necessity of overriding any provisions of the Conrail collective bargaining agreements to effectuate this transaction.

#### CONCLUSION

For all these reasons, the IAM respectfully submits that the instant application should be denied. In the event that the application is approved, however, approval should be conditioned upon the New York Dock protective provisions.

Respectfully submitted,



Joseph Guerrieri, Jr.  
Debra L. Willen  
GUERRIERI, EDMOND & CLAYMAN, P.C.  
1331 F Street, N.W.  
Suite 400  
Washington, D.C. 20004  
(202) 624-7400

Counsel for the IAM

Date: October 21, 1997

**CERTIFICATE OF SERVICE**

I hereby certify that copies of the foregoing Comments of the International Association of Machinists and Aerospace Workers were served this 21st day of October, 1997, by first-class mail, postage pre-paid, upon all parties of record in this proceeding.

*Debra L. Willen*

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Debra L. Willen

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# CARLOS RODRIGUEZ & ASSOCIATES

CARLOS RODRIGUEZ\*\*  
HENRY P. GONZALEZ\*\*\*  
DANIEL W. LENEHAN III\*\*\*  
HELEN M. COUSINEAU\*\*+

ATTORNEYS & COUNSELORS AT LAW  
1710 RHODE ISLAND AVENUE, N.W.  
TENTH FLOOR  
WASHINGTON, D.C. 20036

TELEPHONE 202-293-3300  
FACSIMILE 202-293-3307

INTERNET HOMEPAGE  
www.tradecompass.com/rodriguez  
INTERNET E-MAIL  
hmc@intr.net

HELEN M. COUSINEAU

DONALD W. LEWIS  
CUSTOMS COUNSEL

TODD C. FINEBERG  
OF COUNSEL

- \* ALSO ADMITTED NEW JERSEY
- \*\* ADMITTED NEW YORK
- \*\*\* ALSO ADMITTED MASSACHUSETTS AND MARYLAND
- + NOT ADMITTED D.C.

October 21, 1997



## By Hand Delivery

Surface Transportation Board  
1925 K Street, N.W.  
7th Floor, Room 715  
Washington, DC 20006

ATTN: Paul Markoff

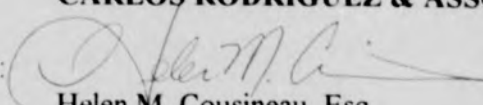
RE: *CSX Corporation and CSX Transportation, Inc., Norfolk Southern Corporation and Norfolk Southern Railway Company--Control and Operating Leases/Agreements--Conrail Inc., and Consolidated Rail Corporation, STB Finance Docket No. 33388; Comments of the New York/New Jersey Foreign Freight Forwarders & Brokers Association, submitted October 17, 1997*

Dear Mr. Markoff:

Further to our telephone conversation yesterday, we enclose herewith a diskette containing the following document in MS Word 6.0 format: **COMMENTS OF THE NEW YORK/NEW JERSEY FOREIGN FREIGHT FORWARDERS & BROKERS ASSOCIATION INC. REQUESTING THAT THE SURFACE TRANSPORTATION BOARD REQUIRE A DETAILED STATEMENT FROM CSX AND NORFOLK SOUTHERN ON THEIR PROPOSED MANAGEMENT PLAN FOR THE "SHARED ASSET AREA."** The aforementioned document was filed with the STB on Friday, October 17, 1997.

If you have any questions regarding the above, please contact either of the undersigned individuals at your convenience.

Very truly yours,  
**CARLOS RODRIGUEZ & ASSOCIATES**

By:   
Helen M. Cousineau, Esq.  
Carlos Rodriguez, Esq.

STB

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10-21-97

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300 Central Union Plaza

Toledo, OH 43602

October 20, 1997

P.O. Box 9508

Toledo, OH

43697-9508

419-241-9155

Fax 419-241-9116

VIA Overnight Priority Postage to the Surface Transportation Board  
VIA First Class Postage to other Parties of Record

Mr. Vernon Williams, Secretary  
Surface Transportation Board  
1925 K Street, Northwest  
Washington, D.C. 20423-001

SUBJECT: Filings 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

Chair:

Stephen J. Pauken

Mayor

City of Maumee

Dear Secretary Williams:

Vice-Chair:

James F. Carter

Commissioner

Wood County

Enclosed for filing are the original, twenty five copies, and a 3 1/2" computer disk with the filings in Wordperfect 6.1 format (can be read by Wordperfect for Windows 7.0) of three filings of the Toledo Metropolitan Area Council of Governments (TMACOG) in the above noted proceedings before the Surface Transportation Board. The first is a Request for Conditions in Docket 33388; the second is an Abandonment Protest in Docket AB-290 (Sub. no. 197X); and the third is a Request for Public Use Condition with regard to an Abandonment Exemption in Docket AB-290 (Sub. No. 196X). Also included is a certification of service of same to legal counsel of the three rail companies involved, Judge Leventhal, and other Parties of Record. Representing five counties in Northwest Ohio and as the Metropolitan Planning Organization for Transportation in the Toledo area our agency has a vital interest in the outcome of this proceeding.

2nd Vice-Chair:

Kathleen M. Steingraber

Trustee

Lake Township

Executive Director:

William L. Knight

Sincerely,

David R. Dysard, AICP  
Director of Transportation Planning


DRD:dfs

Enclosures



CERTIFICATE OF SERVICE

I, Donna F. Seeber, certify that on October 21, 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 three filings (TMAC-1; TMAC-2; TMAC-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 on all parties listed in the STB Finance Docket No. 33388.

  
Donna F. Seeber

Dated: October 20, 1997

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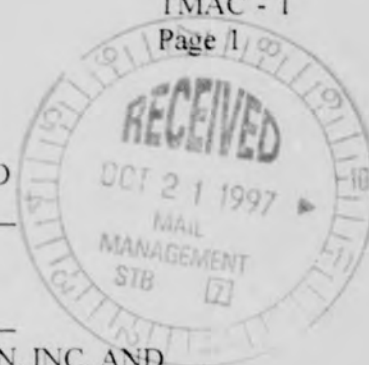
TMAC - 1

Page 1

BEFORE THE  
SURFACE TRANSPORTATION BOARD

FINANCE DOCKET NO. 33388

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



-----  
**-- REQUEST FOR CONDITIONS --**  
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These are statements and arguments were prepared by the Toledo Metropolitan Area Council of Governments (TMACOG) to request the imposition of certain conditions on applicants as a part of the Surface Transportation Board's (the Board) approval of the Control Application in this docket. They are submitted October 21, 1997 in accordance with the Board's decision six, served May 30, 1997.

Request and Preliminary Statement

TMACOG respectfully submits that certain conditions must be placed on the applicants as a part of the Board's approval of their control application to address anti-competitive aspects of the transaction for our region. These conditions seek to address certain parts of the acquisition of Conrail that substantially reduce transport alternatives available to shippers and lead to detrimental effects on the adequacy of transportation for the public in our region.

Specifically, TMACOG requests the Board to grant the Wheeling and Lake Erie Railroad (W&LE) access to Toledo. This would address the loss of a major rail carrier to the Toledo market, the loss of a competitive railroad connection for the Ann Arbor and CN into Ohio and markets south and east of Toledo, and several other negative aspects of the Conrail acquisition (see below). This would involve granting W&LE haulage and/or trackage rights from Bellevue, Ohio and other appropriate measures and conditions necessary to maintain W&LE as a viable third rail transport option for Toledo. W&LE concurs in this and we anticipate that they will request these rights as part of their submittal before the Board in these proceedings (WLE-4, Responsive Application). This is also supported by the Toledo-Lucas County Port Authority and the State of Ohio in their filings, TLCPA-4 and OAG-4, respectively.



Second, TMACOG requests the Board to maintain multiple rail options for direct competitive rail access to the Toledo Docks. This would address the impacts of CSX's proposal to acquire 100% of Lakefront Dock and Railroad Terminal Company (LD&RT) which results in a "2 to 1" anti-competitive situation at the Toledo Docks. This can be accomplished by granting haulage, trackage rights, or other appropriate conditions to allow access by other carriers. A first option would be granting rights into the docks to W&LE when they are granted rights from Bellevue into Toledo. A second option would be granting rights to NS. TMACOG believes that changing markets and conditions at the other docks on Lake Erie that NS has acquired may necessitate moves through Toledo even though they do not currently anticipate using these rights. Finally, Ann Arbor and CN could also be granted rights into the Docks (via the NS Toledo Pivot Bridge) but this would require other appropriate connections to markets south and east of Toledo for this to be viable.

Finally, TMACOG supports efforts to address rail conflicts created by the rail-rail at grade crossing of the CSX and NS (currently Conrail) main lines at Vickers in Northwood, Ohio. The delays created by this crossing negatively affect intra- and intermodal competition by making the region's rail system less efficient and negatively impact the highway system and quality of the human community. TMACOG advocates construction of a grade separation of the crossing (CSX over) and continues to be ready to facilitate cooperative efforts (including a private-public funding partnership) to build this separation.

Verified Statement  
of  
David R. Dysard

I. Introduction and Qualifications

My name is David R. Dysard. I am Director of Transportation Planning at the Toledo Metropolitan Area Council of Governments (TMACOG). I have held this position since 1991. My duties include guiding regional transportation planning efforts at TMACOG which is the designated Metropolitan Planning Organization (MPO) for transportation for the greater Toledo Metropolitan area. Prior to this I was Project Director in Transportation with TMACOG since 1986. Before that I worked with the New York State Department of Transportation from 1981 to 1986.

As the MPO for the Toledo area our vision is to involve "all transportation stakeholders in our region working together to achieve a sustainable and integrated intermodal transportation system to enhance our quality of life and our competitive position in a global economy." To achieve this we develop Regional Transportation Plans with a 20-year horizon, develop 5 year Transportation Improvement Programs that commit millions of dollars to transportation projects in the region, and coordinate activities to improve the transportation system.

Since beginning my employ with TMACOG my duties have included coordinating rail planning efforts. As one of the largest rail hubs in the eastern United States, Toledo has an extensive rail infrastructure. Our planning efforts have endeavored to capitalize on this unique asset and also address the impact this asset can have on our community. In 1984 TMACOG formed the Railroad Task Force, composed of representatives from railroads operating in the area, rail shippers, local governments, and area economic development agencies. We have prepared two subsequent Regional Transportation Plans (*Year 2010* and *Year 2025 Plans*) that have specifically included rail elements. We have completed multiple rail corridor studies leading to cooperative rail and community projects to build separations, close crossings and other activities to improve rail efficiency and enhance the community. We maintain a rail inventory for our area with location of rail facilities, number of trains, shippers, highway crossings and other information. Figure DRD-1 is an overview of rail facilities in the greater Toledo area with selected rail names and major shipper locations taken from the inventory.

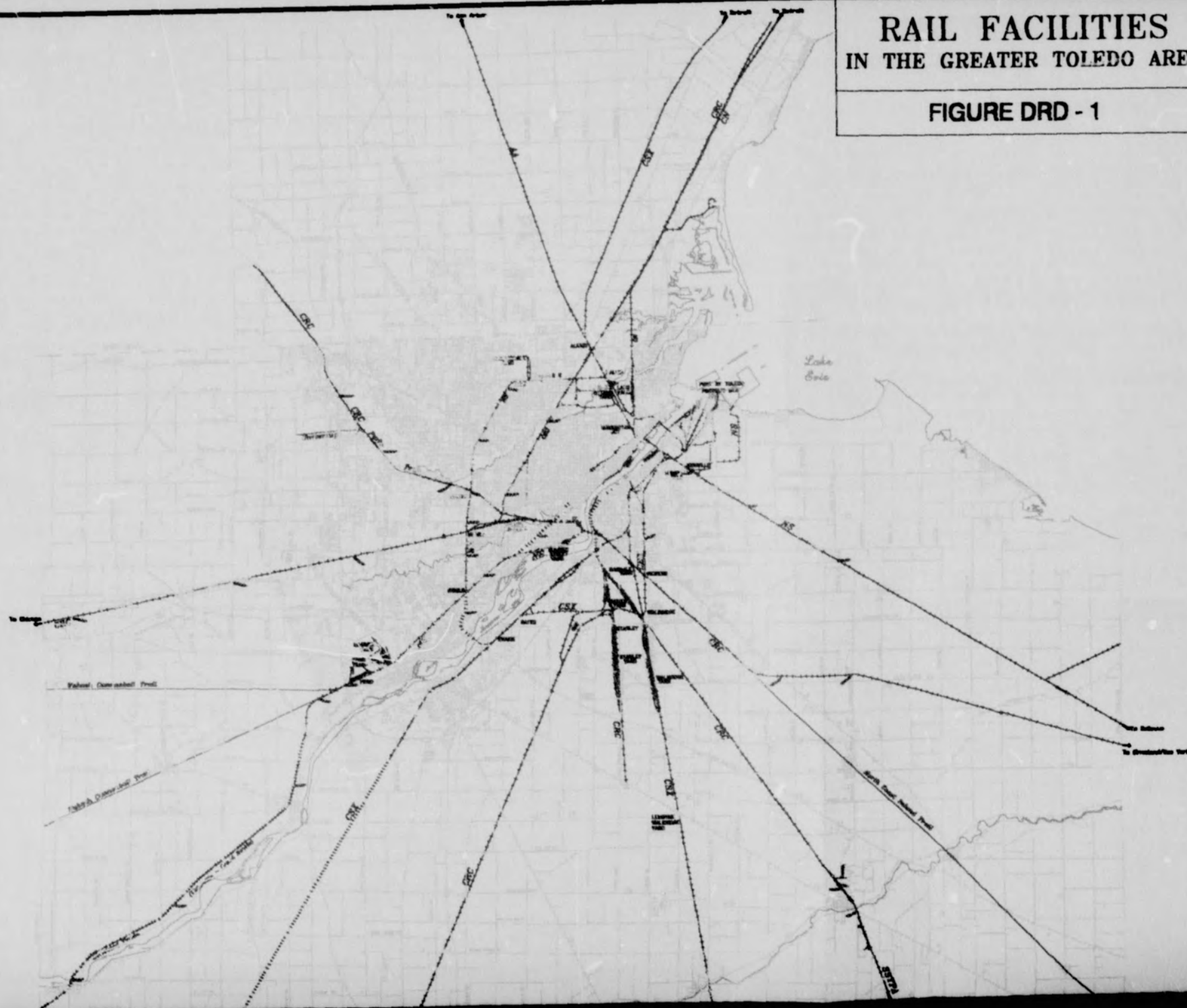
My comments provide background and expand on the position of TMACOG with regard to conditions requested on the approval of the control application by CSX and NS as expressed in our preliminary statement. The statement of William L. Knight, our executive director, documents the support of our organization for this position.

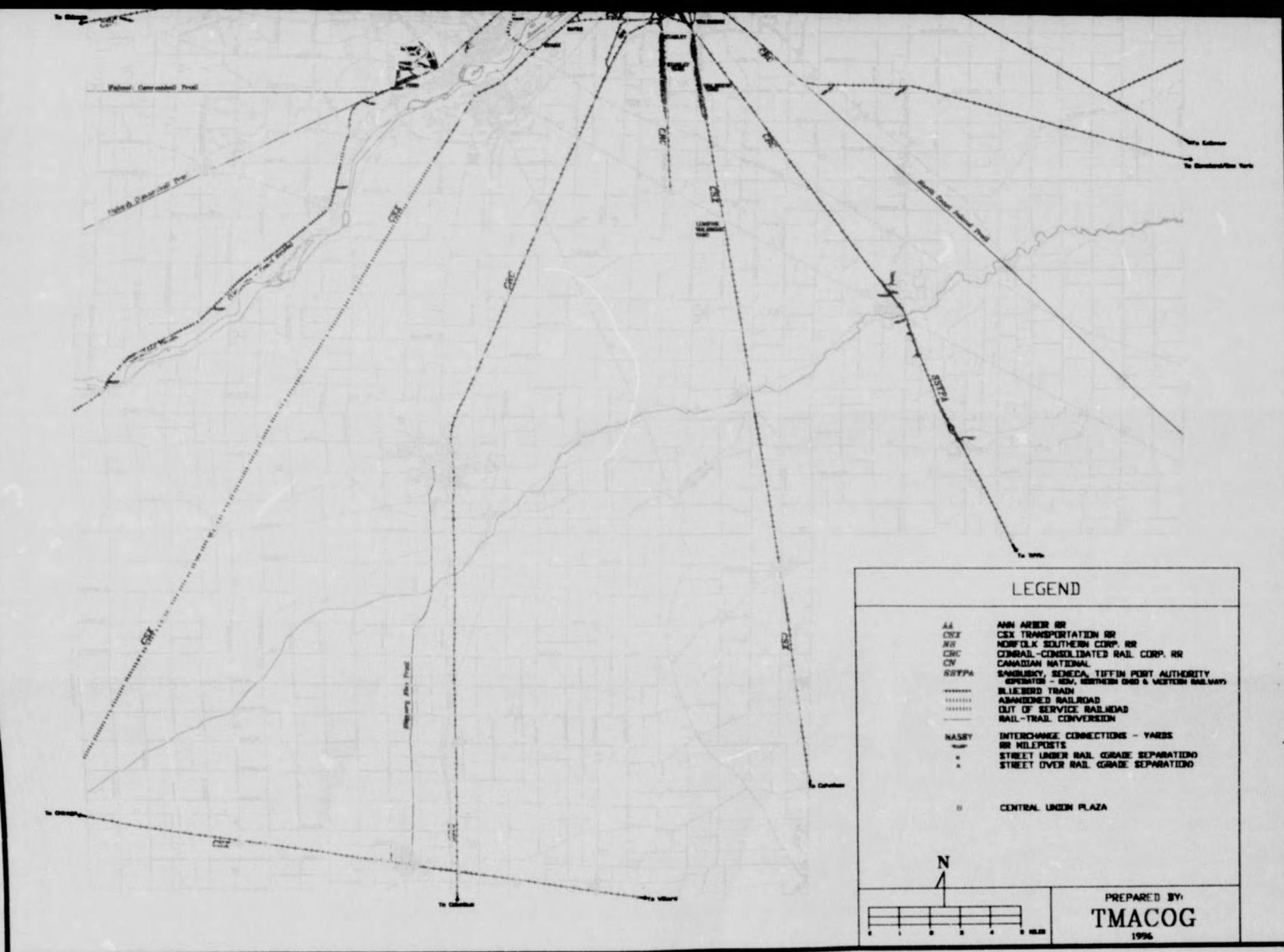
II. Argument and Background

As stated, TMACOG believes that certain conditions on approval of the control application are

# RAIL FACILITIES IN THE GREATER TOLEDO AREA

FIGURE DRD - 1







required to address anti-competitive aspects of the transaction. The conditions requested are designed solely to restore, as far as is possible, competition among rail carriers in our region and redress the probable harm to the public related to reduced rail competition resulting from the transaction as outlined by applicants in the control application.

1) TMACOG requests the Board to grant the Wheeling and Lake Erie Railroad (W&LE) access to Toledo. The acquisition of Conrail would eliminate one Class I carrier to the Toledo market and lose a competitive connection for the Ann Arbor and CN into Ohio and markets south and east of Toledo. A viable third rail carrier option with connections in all directions from Toledo could be established if W&LE were granted access from the southeast. This connection could be even more important if Ann Arbor is successful in its request before the Board for access west to Chicago. With appropriate access rights and other provisions a strong competitive force operating across northern Indiana, Michigan, Ohio and Pennsylvania through the Toledo market could be created. The current acquisition plan also reduces rail carriers to the Toledo Docks and creates a "2 to 1" situation for this important public facility. A viable second competitor could be maintained if W&LE is granted rights to Toledo and into the Toledo Docks.

Specifically, this request would involve granting W&LE full and complete access (via haulage and/or trackage rights or other appropriate mechanisms) through and from Bellevue, Ohio to, at a minimum, Ann Arbor's Ottawa Yard and CN's Lang Yard. Access is also requested to the Toledo Docks ( see (2) below) and to local shippers, as appropriate, so as to maintain W&LE as a viable rail transportation option for Toledo. We also support other requests by W&LE needed to keep the company a viable rail operation.

W&LE concurs in this and we anticipate that they will request these rights as part of their submittal before the Board in these proceedings (WLE-4, Responsive Application). The Toledo-Lucas County Port Authority and the State of Ohio in their filings, TLCPA-4 and OAG-4, respectively, also support this request.

2) CSX has proposed acquiring 100% control of the Lakefront Dock and Railroad Terminal Company (LD&RT). LD&RT is the terminal railroad company serving the Toledo Docks and includes a coal transfer facility and an iron ore transfer facility. Currently, CSX and Conrail each hold 50% interest in LD&RT and both have full access to the Dock facilities. CSX's proposal would result in a "2 to 1" reduction in rail carrier access to the Toledo Docks.

TMACOG requests the Board to maintain multiple rail options for direct competitive rail access to the Toledo Docks through granting of appropriate access rights for W&LE and failing that for NS or other area carriers. This can be accomplished by granting haulage, trackage rights, or other appropriate conditions to allow access by W&LE when they are granted rights into Toledo (see (1) above). Failing that, NS should be granted rights to the Docks. We believe that changing markets and conditions (e.g., the age of equipment, dredging limitations, community development desires in Sandusky, etc.) at the other docks on Lake Erie that NS has acquired may



necessitate coal movement through Toledo even though they do not currently anticipate using these rights. Ann Arbor and CN could be granted rights but these two carriers would require other appropriate connections to markets south and east of Toledo to be viable.

3) Finally, TMACOG supports efforts to address the conflicts created by the rail-rail at grade crossing of the CSX and NS(currently Conrail) main lines at Vickers in Northwood, Ohio. TMACOG has previously commissioned corridor and engineering feasibility studies of the crossing that suggest it is desirable and feasible to grade separate this crossing. A rail grade separation would greatly benefit CSX, especially with the increase in traffic north-south through this crossing, and NS, with high volumes of time sensitive traffic through the crossing. It would also improve the quality of the human environment and conservation of energy resources by eliminating a significant source of train delay and blocked highway crossings in our region. TMACOG continues to be ready to assist in efforts to address this problem that will only be further exacerbated by the acquisition.

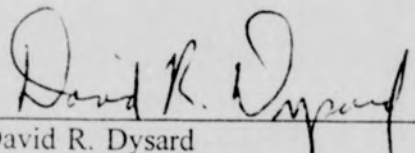
VERIFICATION

STATE OF OHIO

COUNTY OF LUCAS

I, DAVID R. DYSARD, verify under penalty of perjury that I am Director of Transportation Planning, and that I have read the foregoing statement and know the contents thereof, and that the same is true and correct to the best of my knowledge and belief.

Executed on October 20, 1997.

  
\_\_\_\_\_  
David R. Dysard

Verified Statement  
of  
William L. Knight

My name is William L. Knight and I am Executive Director of the Toledo Metropolitan Area Council of Governments (TMACOG), 300 Central Union Plaza, P.O. Box 9508, Toledo, Ohio 43697-9508. As Executive Director of TMACOG, I direct the many efforts of our agency to plan for the development of the area and coordinate cooperative intergovernmental action to solve problems of a regional scope. I have held this position since 1991. Prior to that I was Director of Transportation. My statement serves to provide information regarding our agency, documenting the group or public interest that TMACOG serves, and documenting support of the TMACOG Board of Trustees for this filing before the Surface Transportation Board.

TMACOG is a voluntary association of local governments composed of the counties; municipalities; townships; the Toledo-Lucas County Port Authority; the Toledo Area Regional Transit Authority; and other special districts and authorities; and school districts in Erie, Lucas, Ottawa, Sandusky and Wood Counties in Ohio, and Monroe County in Michigan. TMACOG is established under the provisions of Chapter 167 of the Ohio Revised Code and Michigan Public Act No. 7. TMACOG is responsible for planning and intergovernmental relations in several areas including transportation, water quality, air quality, energy, housing, regional development, federal grant review and comment, rural development, and urban revitalization. TMACOG has been designated by federal and state agencies in each of these categories.

TMACOG represents the interest of local units of government with regard to transportation, community development, and redevelopment issues of regional significance and provides planning expertise on these issues. Specifically, because of the significant implications of the proposed acquisition of Conrail and related rail transportation issues on the region, the Board of Trustees directed staff to develop an appropriate response to this issue working with and through a Board subcommittee known as the Railroad Task Force.

After much deliberation and several public forums on this issue Resolution 1997-39 (attached to this statement) was unanimously adopted by our Railroad Task Force on September 15, 1997 and our Board of Trustees on October 15, 1997. The resolution authorizes staff to present TMACOG's position before the Surface Transportation Board.

Our Request and Preliminary Statement along with the statement of David Dysard describes this position.

Attachment: Resolution 1997 - 39

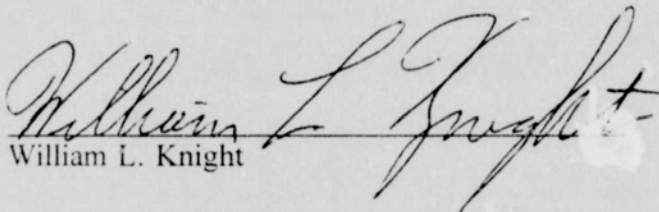
VERIFICATION

STATE OF OHIO

COUNTY OF LUCAS

I, WILLIAM L. KNIGHT, verify under penalty of perjury that I am Executive Director of TMACOG, and that I have read the foregoing statement and know the contents thereof, and that the same is true and correct to the best of my knowledge and belief.

Executed on October 20, 1997.

  
William L. Knight

**A RESOLUTION OF THE  
TOLEDO METROPOLITAN AREA COUNCIL OF GOVERNMENTS  
AUTHORIZING A SUBMITTAL TO THE SURFACE TRANSPORTATION BOARD  
RELATIVE TO THE ACQUISITION OF CONRAIL**

WHEREAS, the Board of Trustees of the Toledo Metropolitan Area Council of Governments is designated as the Metropolitan Planning Organization by the Governor of Ohio in cooperation with local elected officials and is authorized to carry out the continuing, comprehensive, and coordinated transportation planning process for the Toledo area; and

WHEREAS, the Norfolk Southern (NS) and CSX Corporations (CSX) have filed a railroad control application before the USDOT Surface Transportation Board (STB) seeking approval of their acquisition and division of the rail assets of the Consolidated Rail Corporation (Conrail); and,

WHEREAS, actions proposed in that control application relative to consolidating Conrail into the other rail companies will have significant impacts on the northwest Ohio area; and

WHEREAS, the TMACOG Railroad Task Force on September 18, and the Joint Transportation Committees on October 1, 1997 reviewed the proposed response and recommend its approval.

NOW, THEREFORE, BE IT RESOLVED THAT THE TOLEDO METROPOLITAN AREA COUNCIL OF GOVERNMENTS:

Section 1:

Endorses the attached "TMACOG Response to the NS/CSX Application to Acquire Conrail;"

Section 2:

Authorizes the Executive Director to make appropriate submittals before the U.S. Department of Transportation Surface Transportation Board (STB) to make known its position and request appropriate action on TMACOG's concerns with the proposed acquisition;

Section 3:

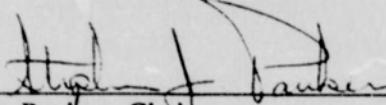
Requests the Surface Transportation Board to grant such relief and conditions as needed to address the concerns expressed by TMACOG;

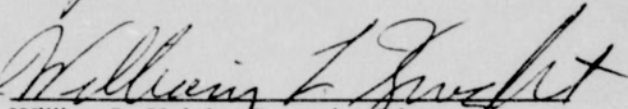
Section 4:

The Executive Director be and is hereby authorized to send a copy of this resolution to appropriate federal, state, and local officials to elicit their support of this position.

Adopted by the Board of Trustees on October 15, 1997.

Yea 16, Nay 0, Abstain 0 (Weighted)

  
Stepehn J. Pauken, Chair

  
William L. Knight, Executive Director



Toledo Metropolitan Area  
Council of Governments  
300 Central Union Plaza  
P.O. Box 9508  
Toledo, OH 43697-9508



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# YEAR 2025 <sup>182790</sup> REGIONAL TRANSPORTATION PLAN



## SUMMARY



TOLEDO

## PLANNING NOW FOR FUTURE TRANSPORTATION NEEDS

By 2025, Lucas and Wood County, Ohio, and southern Monroe County, Michigan expects to have 32,000 more homes and 72,000 more people in the workforce.

The region's transportation system will have to meet the daily needs of over 655,000 people traveling to work, school, shopping and leisure, and shipping products around the world.

To meet the future demands on our region's inter-modal transportation system, TMACOG formed the 2025 Plan Task Force and collaboratively researched, created and adopted the **Year 2025 Regional Transportation Plan**.



## PLAN GOALS AND OBJECTIVES

To measure and evaluate the success of the 2025 Plan, goals and objectives were developed by TMACOG's Transportation Committees. The following regional vision was a starting point:

*"We envision all transportation stakeholders in our region working together to achieve a sustainable and integrated inter-modal transportation system to enhance our quality of life and competitive position in the global economy."*

Out of this vision, the following goals were developed and used by the Task Force to identify problems, develop improvement proposals, and evaluate those proposals. Projects also had to meet air quality and funding constraints. Our Goals state that: "Our transportation system must:"

**Goal #1:** ... enhance our region's economic competitiveness in the global economy;

**Goal #2:** ... be an integrated, intermodal system;

**Goal #3:** ... be an environmentally sustainable system;

**Goal #4:** ... enhance our region's quality of life.

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## FUNDING: NOT ENOUGH RESOURCES FOR ALL OUR NEEDS

It is estimated that only \$2.5 billion in funding will be available for projects in the TMACOG area between 1996 and 2025.

This sounds like a great deal of money. However, the Plan allocates **80 percent** for operations, maintenance and short-range strategies primarily controlled by individual jurisdictions.



Remaining 20 percent (rounded to \$450 million by Task Force) is earmarked as "available funding" for major new projects. Originally, Task Force members and citizens and other stakeholders identified \$1.64 billion in needed projects.

## REGIONAL SUPPORT IS VITAL

The Year 2025 Regional Transportation Plan differs from previous plans because of:

- ... the need for true regionalism due to increased pressure on federal and state-level transportation funding resources;
- ... increased expectations that the Plan lead to action and regional cooperation;
- ... mandates for a realistic plan, not just a large wish list;
- ... mandates for integration of all transportation modes within the Plan.

These requirements make regional cooperation and support of utmost importance. The Plan's budget and timeline have been agreed to by major agencies and will ultimately implement the recommended projects.

So important are the 2025 Plan endorsements by many regional organizations and government entities. Decision makers were given opportunities to review and present concerns about the Plan's components. These endorsements set the stage for obtaining more funds for projects in the region and building Plan projects quicker.

## WHAT IS TMACOG?

TMACOG represents regionalism at its best. As a voluntary, non-profit association of local governments in northwest Ohio and southeast Michigan, TMACOG serves as a forum for assessing and acting on regional challenges. Most TMACOG efforts focus on:



- Networking for local government officials.
- Providing information and data.
- Partnership and issues facilitation.
- Transportation planning.
- Environmental resource planning.
- Water quality planning.
- Land use planning.

In the face of increasing globalization, TMACOG encourages members to transcend regional boundaries not as competitors but as partners. By working together, our region can enhance the quality of life and a strong regional economy.

Published September 1996  
 TMACOG  
 300 Central Union  
 P.O. Box 5240  
 Toledo, OH 43652-0400  
 419-241-9155; fax 419-241-9156

## 2025 PLAN TASK FORCE MEMBERS

Anthony Allion • *Wood County Engineer*

Dale Craig • *Craig Transportation*

Don Feller • *TMACOG Citizens Committee*

Robert Greenlese • *Toledo-Lucas County  
Port Authority*

William Herr • *Toledo Area Regional  
Transit Authority*

Thomas Hummer • *University of Toledo  
Community Technical College*

Judy Jones • *Toledo City Council*

Richard Kudner • *Maumee Valley  
Bicycle-Pedestrian Alliance*

David Leffler • *TMACOG Air Quality Task Force*

W. Michael Ligibel • *ODOT District 2*

John Loftus • *Toledo-Lucas County Port Authority*

Frank Nagy • *Monroe County Planning Commission*

Raymond Norris • *City of Toledo*

Mary Ellen Poturalski • *TMACOG Citizens Committee*

Billy Joe Smith • *Ohio Contractors Association*

Colleen Smith • *City of Bowling Green*

Patricia Squire • *TMACOG Regional Bikeway Committee*

Mark Van Loh • *Toledo-Lucas County Port Authority*

George Wilson • *Lucas County Engineer*

Donald Yerks • *Northwest Ohio Rail  
Passenger Task Force*

## THE C

In 1994, TMACOG outlined a plan for January 1996. The 2025 Plan Task Force was formed to develop the plan and ensure public participation.

Citizens and local transportation leaders identified problems and over 250 projects, policies, and issues.

The Task Force projects against the plan. Actually, some were assigned others were assigned based on the Plan.

Area residents drafted plan. After Transportation and the Board of 1996.

STB

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10-21-97

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182789

# AMERICAN TRUCKING ASSOCIATIONS



2200 Mill Road • Alexandria, VA 22314-4677

**Kenneth E. Siegel**  
Deputy General Counsel

Tel. (703) 838-1857  
Fax (703) 683-3226

October 21, 1997



VIA MESSENGER

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

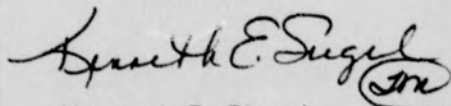
Re: Finance Docket No. 33388, CSX Corporation et al. —  
Control and Operating Leases/Agreements – Conrail  
Inc. and Consolidated Rail Corp.

Dear Mr. Williams:

Enclosed are a duly signed original and twenty-five copies of the  
Comments of the American Trucking Associations in the above captioned  
proceeding along with a 3.5 inch floppy diskette in Word format.

Please date stamp the File Copy of this pleading and return it with the  
messenger in the enclosed self-addressed envelope.

Sincerely yours,

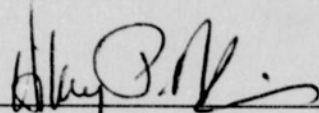


Kenneth E. Siegel  
Counsel for  
American Trucking Associations

Enclosures

## CERTIFICATE OF SERVICE

I hereby certify that a true copy of the foregoing COMMENTS OF THE AMERICAN TRUCKING ASSOCIATIONS was served this 21<sup>st</sup> day of October, 1997, by hand-delivery, or first-class mail in a properly addressed envelope with adequate postage thereon addressed to all known parties of record.

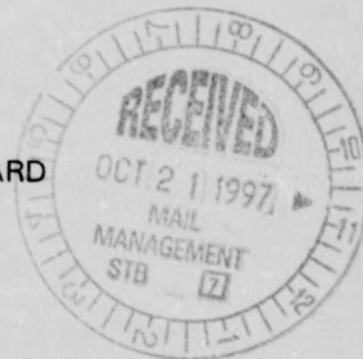
 <sup>En</sup>  
KENNETH E. SIEGEL <sub>KES</sub>  
Attorney for American  
Trucking Associations

182789

ATA-6

BEFORE THE  
SURFACE TRANSPORTATION BOARD

Finance Docket No. 33388



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

RAILROAD CONTROL APPLICATION

COMMENTS OF THE  
AMERICAN TRUCKING ASSOCIATIONS

---

KENNETH E. SIEGEL  
JAMES F. PETERSON  
2200 Mill Road  
Alexandria, VA 22314  
(703) 838-1857

Counsel for  
American Trucking  
Associations

October 21, 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

RAILROAD CONTROL APPLICATION

COMMENTS OF THE  
AMERICAN TRUCKING ASSOCIATIONS

---

**I. GENERAL**

The American Trucking Associations, (hereafter "ATA") files these comments in the above-captioned proceeding pursuant to the order of the Surface Transportation Board, served May 20, 1997 (Decision No. 6), setting forth the briefing and procedural schedule. The comments below express ATA's concerns in three general areas:

- Protection of the public interest in highway safety by requiring the acquiring rail carriers to better maintain the intermodal equipment which will be under their control.
- Need for better government oversight so as to ensure efficiency in operations by reducing the number of delays and defaults in rail intermodal operations arising from rail accidents occurring at rail/highway grade crossings and elsewhere.
- Protection of competition in intermodal operations in the territories affected by the acquisitions including: protection for independent motor carriers against discrimination in rates and services favoring rail-affiliated entities or others; and competitive access to the rail lines subject to this acquisition.

The Applicants have alleged both in their filings and in their public statements that a major benefit to the public which will be derived from this acquisition will be

the diversion of approximately 1,000,000 truck movements a year from the highways to rail, verified statements of Snow and Good, CSX/NS-18, pp. 317 & 334. As CSX CEO Snow notes in his verified statement, CSX/NS-18, p. 307, this proceeding has raised unprecedented interest within the trucking industry. Similar predictions with regard to other recent rail mergers have shown to be unjustified. In at least one recent merger the resulting demand for truck transportation arising from the failure of the merged rail carriers to provide safe and inefficient service has put a significant strain on shippers and motor carriers within the affected region. Applicants' claims however, raise both competitive and safety concerns for the trucking industry.

## **II. IDENTITY OF AMERICAN TRUCKING ASSOCIATIONS**

The American Trucking Associations (hereafter "ATA") is the national trade association for the trucking industry. With its 50 affiliated state associations plus the District of Columbia, 14 conferences, and over four thousand individual motor carrier members, ATA represents motor carriers of every size and type. ATA is concerned with this proceeding for several reasons: ATA members are major customers of Applicant's intermodal services; as users of the public highways, ATA members are effected when railroads put unsafe intermodal equipment on the highways and suffer with other highway users and the general public when rail operations (especially at highway crossings) are unsafe; and, as competitors with Applicants, ATA members have a right to protection from Applicants' current and potential unlawful anti-competitive practices.



### **III. INCREASED USE OF RAIL CONTROLLED HIGHWAY EQUIPMENT POSES A MAJOR SAFETY THREAT TO ALL HIGHWAY USERS**

Applicants assert that over one million highway movements will be diverted to intermodal service as a result of the proposed acquisition. For purposes of these comments, ATA will not dispute this unsubstantiated claim. But, the diversion of these movements from highway to intermodal does not mean that there will be fewer trucks on the road, rather they will merely be operating along different routes. The containers and intermodal trailers must still move between origin and destination points to the intermodal facility. The big differences will be that these vehicles will be operating over more congested highways in urban areas and in equipment that is owned and operated by railroads rather than motor carriers. These facts give rise to several serious safety concerns.

Of special concern is the fact that much of the equipment which will be utilized by the Applicants will be under the control of parties that are not currently subject to the federal motor vehicle safety regulations. We believe that unless compliance with the federal safety rules is imposed on the Applicants as a condition of approval of the acquisition, the public interest in safe highways and vehicles will be jeopardized.

Today, a motor carrier providing over-the-road service utilizes a vehicle either owned or leased to the motor carrier. The motor carrier has control of the equipment and the opportunity to inspect, repair and maintain it. In intermodal transportation, the motor carrier may provide the power equipment, but the railroad, steamship lines or their agents provide the trailer, or chassis and container. The motor carrier has no control over the maintenance and repair of this equipment and virtually no opportunity to inspect the railroad controlled equipment.

Federal motor vehicle safety rules currently place no responsibility on the railroad or other non-motor carrier owner or operator of intermodal highway equipment to maintain or otherwise comply with equipment safety rules. Unlike the motor carrier who is operating his own equipment, the party that tenders the equipment to motor carriers for highway use has no responsibility for the roadworthiness of its equipment. The railroad or its subcontractor<sup>1</sup> has control and possession of the equipment prior to its being tendered to a motor carrier for highway transportation. Since the equipment is stored and dispatched from the rail intermodal terminal, motor carriers do not have the opportunity or capability to maintain the roadworthiness of these vehicles.

While many intermodal vehicles are well-maintained, a recent survey of intermodal drivers found that the roadworthiness of tendered equipment is one of their most significant concerns. ATA Intermodal Conference, *1996 Intermodal Terminal Survey*, at 14.

Placing sole responsibility for the safety fitness or roadability of intermodal equipment on the motor carrier is an outmoded notion in this intermodal age in which most of the equipment is under the railroad's control prior to its actual operation on the highway.

The motor carrier -- or more precisely, the driver -- usually is not provided by the rail carrier or its contractor the ability or opportunity to do a full and adequate inspection of each piece of intermodal equipment. Thus, the driver has no ability to ensure the equipment's roadworthiness or compliance with the federal regulations

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<sup>1</sup> In many cases the railroad has contracted with a third party to manage its intermodal facility or fleet. Further, usually the equipment, while operated by the railroads, is owned by a party such as Trailer Train or other fleet equipment operator.

when accepting intermodal equipment at a railhead. Only the rail carrier, or its contractor, which controls and operates the facility and equipment has this opportunity.

The standard interchange agreement imposed on motor carriers by most equipment providers, including the Applicants in this proceeding, the Uniform Intermodal Interchange and Facilities Access Agreement ("UIIA"), specifically states that the "[p]rovider [the railroad or its agent] makes no express nor implied warranty as to the fitness of the equipment." See Attachment 1. Further, the typical equipment provider addendum to the UIIA requires the driver to warrant that the equipment is "roadworthy." See Attachment 2.

**Recommendations:** ATA requests that the Surface Transportation Board impose upon the Applicants a requirement to ensure the roadworthiness of all intermodal equipment prior to releasing the equipment to a motor carrier for highway use. The adoption of the proposed requirement should require the railroad or party operating the intermodal facility at which the equipment is stored and interchanged on behalf of the railroad to perform inspections and effect repairs. By imposing requirements on the Applicants for the intermodal equipment they tender or interchange to motor carriers, the federal government would be in a position to enforce the safety requirements on the equipment which will be used in these 1,000,000 diverted highway movements prior to being put on the highway.

It should be the responsibility of the party tendering intermodal equipment to a motor carrier for use on the highway to ensure that the equipment is both roadworthy and in compliance with all federal safety regulations. The Applicants have both the opportunity and the facilities to perform the inspection and needed repairs prior to releasing the equipment to a motor carrier for highway use.

The proposed requirement only recognizes the common sense notion that the party which is in control of the equipment prior to its highway use and which is in a position to adequately inspect and maintain the equipment should be responsible for performing these functions.

#### **IV. APPLICANTS SHOULD BE REQUIRED TO UPGRADE HIGHWAY GRADE CROSSINGS**

Accidents occurring at highway grade crossings are a major problem. Not only do they cost lives and property damage, but they also result in delays, not only on the rail line involved but the highway. Unsafe rail/highway grade crossings are the most dangerous places on the nation's highways; according to Federal Railroad Administration's *1995 Accident Bulletin*, 4,633 accidents occurred at crossings that year, causing 579 fatalities and 1,894 injuries.

The vast majority of rail/highway grade crossings in this country have only the most rudimentary warning systems. As of 1990, of the 176,572 public crossings, over 110,000 had no active warning systems (that is, no devices that indicated the approach of a train); nearly 75,000 had no advance warning devices of any kind; and at about 42,500 crossings, the crossbucks did not even meet uniform standards. At the nation's approximately 116,000 private crossings, which are not generally eligible for federal funds, conditions are undoubtedly far worse.

Trucks, because of their size and limited acceleration capacity, are particularly vulnerable at grade crossings. In fact, over 30 percent of accidents at grade crossings involve trucks, *id.*, and those accidents are the worst in terms of dollars per vehicle per accident.

An example of such an incident has recently occurred on the CSX lines involving an AMTRAK train. As reported by the *Washington Post*, (a copy of the article is attached as Attachment 3), in spite of reports to the railroad several hours before the train was scheduled to reach the crossing by both the truck driver involved and a patrolman, the CSX dispatcher failed to inform the AMTRAK train of a truck which was hung up on a rural crossing near Savannah, Georgia.

The FRA and NTSB acted quickly in the recent CSX/AMTRAK incident, requiring the CSX to post 800 telephone numbers at each crossing and to identify each crossing by number. These precautions are only a beginning of the steps that railroads should be required to take to avoid such incidents in the future. First, the 800 number and identifier requirement should be placed on all railroad crossings which are the subject to this proceeding. Second, the railroads must be required to improve the quality of all such crossings, with better grading, better markings, and more effective warning devices. Further, emergency communication devices should be required at all rural crossings. Having an 800 number posted at a crossing does no good if no phone or other communications device is available to transmit the warning to the rail dispatcher. Notably, the rail crossing in question was obtained by the CSX as the result of another merger and the railroad apparently failed to take any



action over the years to improve its condition. Neither CSX or NS should be allowed to so ignore rail and related highway safety issues following the acquisition and division of the thousand of miles of track and highway crossings on the Conrail line.

Finally, the Applicants have admitted that one effect of this transaction would be an increase in grade crossing accidents due to their projected increase in rail movements. See, CSX/NS-54, p. 25. However, instead of proposing additional safety measures to prevent these accidents, the Applicants simply maintain that this increase is acceptable because it will be offset by a decrease in motor carrier accidents – as a result of the diversion of trucks off the highways. However, even assuming this entirely speculative decrease in accidents occurred, Applicants should not be permitted to maintain unsafe rail crossings based on the logic that “on balance” fewer lives are lost.

**Recommendations:** As part of the acquisition of the existing Conrail right-of-ways and trackage, the acquiring railroads should be required to make a financial and operational commitment to improve or remove the many hazardous highway grade crossings along the Conrail lines or the acquisition should be delayed until the improvements have been made by Conrail. The burden of this expense should not be passed off on to local communities or highway users.

#### **V. APPLICANTS SHOULD BE PROHIBITED FROM BACK SOLICITATION AND OTHER ANTICOMPETITIVE PRACTICES**

It is ATA's understanding, based on reports from its members,<sup>2</sup> that the Norfolk Southern and possibly the other applicant railroads in this proceeding have initiated a practice of requiring motor carriers which are purchasing intermodal

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<sup>2</sup> Individual motor carriers have requested that their names not be revealed for fear of retaliation by the NS.

transportation, especially smaller motor carriers, to provide the supplier railroad with the name of the motor carrier's customers. If the name is not provided, the railroad refuses to accept the trailer or container offered by the motor carrier. Since the motor carrier usually has no other option and will have even fewer options after the completion of this acquisition with respect to the availability of rail service, it must comply with the railroad's unreasonable requirements.

There can be only one purpose for this requirement. It is to obtain the name of the motor carrier's customer for the purpose of back solicitation. In situations where the motor carrier has contracted with the consignor of the goods and is purchasing the intermodal service either at the consignor's request or for the operational convenience of the motor carrier, the motor carrier, not the consignor, is the party with privity of contract with the railroad and the party that is liable to the railroad for the freight charges. The forced disclosure of what would otherwise be treated by a motor carrier [or railroad] as a trade secret is both unethical and of questionable legality. See section 14908 of title 49 United States Code, which prohibits the solicitation of such information from a motor carrier.

**Recommendations:** ATA requests that the Board direct the Applicants to cease such practices as a condition of approval of the control application.

## **VI. APPLICANTS SHOULD BE PROHIBITED FROM DISCRIMINATING AGAINST MOTOR CARRIERS WITH RESPECT TO PRICES AND SERVICES.**

Railroads wholesale their intermodal services using a number of different marketing channels. The process by which railroads market their intermodal services are commonly referred to as "channels." The channels are distinct as to the party through which the service is sold, the service itself, and the ownership of the

equipment used. Motor carriers need protection from the railroads potential use of unfair service offerings and pricing practices which unreasonably favor one channel over another, i.e., discrimination. Such a practice would be contrary to "promot[ing] intermodal transportation," 49 U.S.C. § 13101(2)(K). For example, in the future NS may choose to favor or subsidize its Triple Crown subsidiary in competition with non-rail owned motor carrier intermodal users. CSX may similarly use its CSXI subsidiary to gain market share relative to non-affiliated motor carriers. As a result ATA urges the strengthening of traditional common carrier obligations in the railroad industry. This is necessary to offset the increasing consolidation of the rail industry.

**A. The Railroad Intermodal Business.** To the railroads, intermodal means moving freight in trailers or containers on railroad flat cars or double stack cars. Typically, the railroad moves the containers between terminals in major cities relying on its modal partners (motor carriers and steamship lines) to complete the freight movement from point of origin to ultimate destination. The Class I railroads offer services to compete in the domestic truckload, LTL, perishable, and parcel business. The services also compete for the inland movement of international cargo. The business is operationally complex in that, by definition, an intermodal shipment involves at least two modes of transportation. Intermodal motor carriers, railroads, and steamship lines all must mesh their operations in order to ensure that competitive service is provided to the shippers.

**B. Current Railroad Intermodal Marketing Channels.** Railroads are presently organized to wholesale virtually all intermodal services. Wholesale prices depend upon the volume commitment and whether or not the railroad must supply a service

commitment and/or the box (trailer or container). When companies, such as steamship lines and a few very large motor carriers, provide their own equipment, rates are additionally discounted.

Intermodal retailers serve the transportation community by replacing the railroad sales force and by taking the complexity out of the intermodal process for the benefit of the shipper. An intermodal retailer provides the shipper with a single bill for service and then arranges for the supporting railroad and drayage operations. IMC's buy the rail and drayage segments; motor carriers may provide the drayage segments with their own assets.

Second level wholesalers such as CSXI either retail the intermodal services directly or use the services of an IMC to retail the service. These "4<sup>th</sup> Parties" typically buy a train network and then sell space in the same way as the Class I's.

ATA's goal is to ensure the railroads provide motor carriers with viable intermodal services at a fair price. Through numerous mergers the number of Class I railroads providing intermodal service has been reduced, but up to this time the surviving Class I's have generally been open to using a wide range of market channels and the process of differentiation through market channel emphasis has become more subtle. Still, it has been only in the past decade that most railroads have been willing to provide competitive wholesale prices to truckload motor carriers.

Unfortunately, the potential exists for the few remaining Class I's to unreasonably favor one channel over another. The railroads have several motives to aggressively manage channels, some of which include:

- Their subsidiary company may be in direct competition with other channel partners, including motor carriers, for the traffic.
- Railroads may unreasonably favor one channel over another either to promote the use of railroad trailers or containers or, conversely, to avoid the investment in that equipment.
- The desire for "monopoly profits" may lead railroads to whipsaw their marketing channels in order to gain margin. This is particularly true as they work with different channels in competition for domestic truckload freight.
- The few remaining railroads could choose to mirror each other's market strategies, which if practiced in this context, could lead to the outright elimination of some market channels.

In addition to motive, railroads also have the unique power and opportunity to unreasonably discriminate as they set wholesale prices. At the present time, this power is largely unchecked.

In response to interrogatories by ATA, Applicants indicated that they have no policy with respect to in this matter and no plans to implement such a policy. They also indicated that they do not now favor one customer over another based on the identity of the customer. These statements appear to have been carefully crafted to avoid a commitment to refrain from unfair and unreasonable discriminatory channel management practices in the future. It would have been much more reassuring if they had simply stated that they would refrain from unfair and unreasonable channel management practices in the future.

In spite of the comments received in the discovery, it is clear that individual railroads do not manage all channels equally. They have retained some measure of the early practice of differentiating themselves by favoring particular channels. For example NS's Triple Crown is unique in that, as a railroad subsidiary, it only sells retail service. CSXI also has a unique commercial position. It not only manages CSX Corporation's intermodal operations on its own rail line, but it also buys



intermodal services from other railroads. With respect to other channel members, it has also been true that CSXI promoted its relationship with IMCs more actively than did Conrail.

While the joint application is silent on the issue of intermodal channel management a related issue, potential railroad discrimination against ports, was addressed. On page 251 of Thomas Finkbiner's Verified Statement, Mr. Finkbiner indicates that NS has "a long standing track record of not favoring one port over another and will take an evenhanded approach to providing rail service at all of the eastern ports. . . Norfolk Southern does not intend to establish service or rates that would artificially divert freight among ports." This statement contains a confirmation that intermodal rate and service discrimination is both possible and is a reasonable concern for members of the intermodal shipping community, including ATA members. The statements also provide to the ports a degree of commitment not to exercise that power to "artificially divert traffic." This level of commitment not to discriminate is not present in the context of NS and CSX's intermodal marketing channel partners.

**C. The Issue.** It has long been recognized that railroads provide services that are important to the "public interest." The STB process is a present day validation of the concept. Common carrier obligations and laws prohibiting discrimination have been the traditional response to the threat of improper behavior by carriers.

Clearly, the reduction in the number of competing railroads poses a potential competitive problem for the rail industries intermodal partners. While ATA has no desire to see the resumption of wholesale rate regulation, a degree of protection is

necessary to ensure that the public continues to receive the benefits of the diverse marketing channels now in place.

**Recommendations:** The Board should take steps to ensure that the Applicants practice neither channel management ("discrimination") or retaliation towards non-affiliated motor carriers or IMC's and that all motor carriers and IMC's are provided reasonable, non-discriminatory rates and services, including specifically prohibiting such practices as part of the condition for approval of the application.

## **VII. OPTIONS TO ENSURE COMPETITION AND SERVICE**

The Applicants describe this transaction as pro-competitive and that intensified competition between railroads is another of the principal public benefits justifying this transaction. ATA agrees that increased competition is desirable in the railroad industry. Yet we are concerned that the claims of increased competition will not be realized and that service will deteriorate. Furthermore, as one more Class I railroad disappears, we urge the STB to consider what this means for the future of the industry, including the possibility of further proposed mergers among the remaining carriers in the future.

The recent meltdown in rail freight service in the western United States demonstrates the importance of considering these questions at this early point in this proceeding. Aggressive steps must be taken to ensure that competition and service do not suffer, but in fact improve. Accordingly, we urge the STB to consider options which protect and enhance the competition.

The fundamental point which must be kept in focus is that this transaction means the elimination of yet another major competitor in the rail industry. The dismantling of Conrail continues the precipitous decline in the number of Class I

railroads. It further solidifies the hold of a just few parties on freight rail transportation in this country. The danger associated with this situation is now painfully obvious as the service collapse in the West continues.

**A. How to Enhance Competition:** The Applicants cite their proposed "Shared Asset Areas" as their prime example of the competitive gains resulting from this transaction. These Areas -- South Jersey/Philadelphia, North Jersey, and Detroit -- do provide options to shippers in these jurisdictions. However, the Applicants have failed to explain adequately why competitive gains should be limited to these few areas. If the public good is served by the Shared Asset Areas, as the Applicants claim, shouldn't every effort be made to expand them beyond these narrow zones?

Furthermore, the STB should consider conditions to be imposed on the acquisition that ensure that shortline and other smaller railroads are able to provide connecting service between the communities the shortlines serve and the connections with other Class I railroads.

We believe the STB should begin consideration of proposals for what is popularly known as "open" or competitive access." These proposals seek to inject competition into previously non-competitive areas of rail service. Essentially, railroads would be required to unbundle the operation of trains from the maintenance of track. This could take various forms, from simply guaranteeing trackage rights to carriers on a case-by-case or regional basis or by granting truly universal access to any carrier fit, willing and able to operate trains.

Deregulation in similar previously-regulated industries provides the models for such "open access" proposals. Congress and federal regulatory agencies have recognized that requiring traditional monopoly providers of service to open their facilities to competitors is in the public interest.

For example, "open access" in telecommunications means that telephone companies are required to provide interconnection to all telecommunications carriers that request it. The interconnection must be at least equal in type, quality and price to the interconnection that the telephone companies provide anyone else, including themselves. They must provide interconnection on an unbundled basis, they must provide access at any technically feasible point, they must provide access to their facilities and information, including databases and signaling, that are necessary to the transmission and routing of traffic. Telephone companies must afford competitors the ability to resell or share telephone company services and facilities. They must provide access to poles, ducts, conduits and rights of way.

Many of these principles can be applied to the railroad industry as well. Both telephone companies and railroads are common carriers, both have monopoly service areas, both engage in reciprocal switching, interconnection, and exchange of traffic. Historically, telephone companies and railroads have been regulated in similar ways. The Federal Communication Act of 1934 was based upon the Interstate Commerce Act of 1887. The FCC was modeled upon the ICC.

**Recommendations:** Accordingly, ATA urges the STB to ensure that the pro-competitive benefits are realized. Only by taking extra steps to protect and expand competition can the gains in service and pitfalls of monopoly be avoided. The idea of open access should be studied and implemented to ensure competition.

### **VIII. SUMMARY AND CONCLUSIONS**

The proposed acquisition and division of the Conrail system may provide as great a benefit to the shipping public as the Applicants assert or it may result in a worse service and safety disaster than industry and the public now face as a result of the ICC/Board's rush to approve the Union Pacific mergers and acquisitions. Which result is achieved will largely depend on the time and care that is taken by the Surface Transportation Board in reviewing the proceeding and determining what conditions should be imposed on the transaction, both prior to and subsequent to its approval.

ATA has expressed three major concerns in these comments:

- Protection of the public interest in highway safety by requiring the acquiring rail carriers to better maintain the intermodal equipment which will be under their control.
- Need for better government oversight so as to ensure efficiency in operations by reducing the number of delays and defaults in rail intermodal operations arising from rail accidents occurring at rail/highway grade crossings and elsewhere.
- Protection of competition in intermodal operations in the territories affected by the acquisitions including: protection for independent motor carriers against discrimination in rates and services favoring rail-affiliated entities or others; and competitive access to the rail lines subject to this acquisition.



It is ATA's hope that lessons have been learned from past mergers and the current actions of the Applicants with respect to their apparent lack of concern for highway safety and anticompetitive practices. ATA urges the Surface Transportation Board to impose on these Applicants the conditions which we have proposed above to correct existing problems and abuses in these areas and prevent against greater problems in the future.

Respectfully submitted,

AMERICAN TRUCKING ASSOCIATIONS

By: KENNETH E. SIEGEL  
JAMES PETERSON  
2200 Mill Road  
Alexandria, Virginia 22314  
(703) 838-1857

Counsel for  
American Trucking  
Associations, Inc.

Attachments

October 21, 1997

Developed By:

The Intermodal Interchange  
Executive Committee

Effective: February 1, 1996

**UNIFORM  
INTERMODAL  
INTERCHANGE  
AND  
FACILITIES ACCESS  
AGREEMENT  
(U I I A)**

Administered By:

The Intermodal Association of North America  
7501 Greenway Center Drive, Suite 720  
Greenbelt, Maryland 20770-3514

Phone: (301) 474-8700

Fax: (301) 982-3414 or (301)982-4815

Carrier will be responsible to Provider for the charges, as may be described in Provider's Addendum hereto, in the event Motor Carrier fails to remove Equipment during the free time provided in the Addendum.

## 2. Equipment Condition

- a. Equipment controlled by Provider shall have a valid FHWA inspection sticker. Provider will reinspect and recertify the Equipment, at Motor Carrier's request, if the existing inspection will expire during the Addendum free time period of the Motor Carrier's use.
- b. Motor Carrier will reinspect and recertify the Equipment if the existing inspection will expire prior to the Motor Carrier's return of the Equipment to the Provider.
- c. Motor Carrier will return the Equipment to the Provider in the same condition, reasonable Wear and Tear excepted.

- (1) In any disputes arising in connection with classification of Wear and Tear, the Association of American Railroads TOFC/COFC Interchange Rules, Sections B, G, and F, shall be the controlling document.

## 3. Receipts

- a. At the time of Interchange, the Parties or their agents shall execute an Equipment Interchange Receipt which shall describe the Equipment and any defects observable thereon at the time of Interchange. Each Party shall be entitled to make notations upon such EIR concerning the condition of the Equipment at the time of Interchange.
- b. Each Party shall receive a copy of the Equipment Interchange Receipt at the time of Interchange.

## 4. Restrictions Upon Equipment Use

Absent contrary Agreement between the Parties, Motor Carrier shall use the Equipment only for the purposes for which it was interchanged and shall promptly return it to the location at which it was received.

## 5. Condition of Equipment

### a. Lost, Stolen, or Destroyed Equipment

- (1) In the event the Equipment is lost, stolen from, badly damaged or destroyed by Motor Carrier, the method of settlement shall be the remaining usable life as reflected on the Equipment owner's or Provider's books.
- (2) In the event Motor Carrier is compelled to compensate Provider for loss or damage to Equipment due to the acts of third parties, Provider will assign to Motor Carrier its rights against such third party upon receiving payment in full from Motor Carrier.

### b. Damage to Equipment

- (1) Motor Carrier shall pay to Provider the reasonable and customary costs of the repair of damages done to Equipment during Motor Carrier's possession.
- (2) Where the reasonable and customary cost to repair exceeds the casualty loss value as determined in section III 5 a. (1) hereof, the Motor Carrier shall be obligated only for the lesser sum.

### c. Tires

- (1) Repair of damage to tires during Motor Carrier's possession is the sole responsibility of Motor Carrier.
- (2) Repair of tires unrelated to damage occurring during Motor Carrier's possession is the sole responsibility of the Provider.

### d. Disposal of Dunnage

Motor Carrier shall return Equipment with all dunnage, bracing, contaminants and debris removed and the floor swept.

## 6. WARRANTY

PROVIDER MAKES NO EXPRESS NOR IMPLIED WARRANTY AS TO THE FITNESS OF THE EQUIPMENT.

ADDENDUM TO THE UNIFORM INTERMODAL  
INTERCHANGE AND FACILITIES ACCESS AGREEMENT

This Addendum to the Uniform Intermodal Interchange and Facilities Access Agreement (UIIA) is made and entered into by and between THE ATCHISON, TOPEKA, AND SANTA FE RAILWAY COMPANY, a Delaware Corporation, and BURLINGTON NORTHERN RAILROAD COMPANY, a Delaware Corporation, hereinafter collectively referred to as "BNSF", and the undersigned motor carrier, hereinafter referred to as "Motor Carrier".

I. NOTIFICATION AND FREE TIME

A. Free Time Commences

See III. DESTINATION STORAGE, A. Free Time Commences.

B. Amount of Free Time

See III. DESTINATION STORAGE, B. Amount of Free Time

C. Weekends

Weekends are not considered free

D. Holidays

Holidays are not considered free

E. Unroadworthy Equipment

Equipment is considered roadworthy when the Motor Carrier has executed the standard Interchange Receipt and Inspection Report. In the event Motor Carrier and BNSF have signed a Checkpoint Bypass Letter of Agreement, a BNSF Express Lane Pass will be executed in lieu of an Interchange Receipt and Inspection Report. The parties shall be bound by the Terms and Conditions of the Interchange Receipt and Inspection Report, as well as the notations made, or the Checkpoint Bypass Letter of Agreement.

F. Interchange of Equipment

BNSF and Motor Carrier may be subscribers to the TOFC/COFC Interchange Rules adopted by the Association of American Railroads during part or all of the period this Addendum is in effect. In that event, where provisions in this Addendum conflict with any of the said Interchange Rules, the provisions of this Addendum shall prevail over such Interchange Rules and shall govern the relationship of the parties to this Addendum.

Motor Carrier shall be responsible for the safe and timely return of trailers to BNSF or until delivered to another rail carrier as specified in this Addendum, ordinary wear and tear excepted. Motor Carrier agrees not to interchange trailers obtained from BNSF with third parties, other than rail carriers.

Motor Carrier shall not interchange trailers, either loaded or empty, to another rail carrier when removed from El Paso, Phoenix or any terminal in California. If this occurs, Motor Carrier will be assessed a surcharge as set forth in Exhibit A to this Addendum.

Motor Carrier shall be responsible for the safe and timely return of containers and/or chassis to BNSF origin terminal and shall not interchange containers and/or chassis to another rail carrier or

## Amtrak Train Hits Truck Despite Alerts

By Don Phillips  
Washington Post Staff Writer

Despite more than 20 minutes' warning, railroad dispatchers yesterday failed to stop an Amtrak passenger train before it plowed into a truck blocking a rural crossing near Savannah, Ga., injuring 12 people, rail safety officials and police said. A dispatcher appears to have misunderstood the truck's location and shut down the wrong rail line.

A Garden City, Ga., patrolman and the truck driver each had reported the immobilized vehicle to a police dispatcher, who twice reported it to a dispatching center run by CSX Transportation Inc., which owns the track. The two had no choice but to stand back and watch the spectacular collision, which derailed two engines and 11 cars.

Within hours of the wreck, the Federal Railroad Administration announced that CSX had agreed to a series of safety initiatives, including a new rule requiring all trains on all lines to slow down and be prepared to stop whenever there is a report that a crossing collision is eminent. CSX also agreed to install signs at every one of the thousands of crossings on its lines giving a toll-free 800-number to call regarding possible problems, with each crossing identified by a number.

"CSX's stepping up and implementing it is a significant commitment," said Don Itzkoff, a deputy administrator for the FRA.

Marty Fiorentino, CSX's vice president for corporate communications and public relations, declined to discuss the wreck investigation but said CSX agreed to new FRA grade crossing procedures because "we wanted to take immediate action and go the extra mile to see this sort of thing doesn't happen again." Amtrak had no comment on the probe.

CSX has been under scrutiny by the National Transportation Safety Board and the FRA after several recent accidents, including a sideswipe between a freight train and an Amtrak train at Crystal City last month in which CSX employees ignored several warnings that a load was leaning.

Next Thursday FRA Administrator Joanne Molitoris is scheduled to deliver to CSX Chairman John Snow a report critical of CSX safety practices based on an inspection that followed those wrecks. The report will specifically mention numerous problems in the CSX dispatching center in Jacksonville, Fla., which controls the track on which the accident occurred and first got the call about the stalled truck, sources said.

The southbound Silver Star, a New York-to-Miami train that stopped in Washington on Wednesday afternoon, derailed after hitting the truck at high speed. A dozen people, including the two-person locomotive crew, were taken to hospitals, but their injuries were not life-threatening, local authorities said.

The incident began when a low-riding truck tried to cross the rail line and "hung up," with its midsection touching the rails. Garden City Police Chief Jeff Wood said the truck driver called police as soon as he realized he would not be able to free the truck.

Twenty-four minutes before the collision, a Garden City police dispatcher called CSX's dispatching center in Jacksonville, a huge, circular concrete bunker from which trains are dispatched electronically all over the system, from Canada to the Gulf of Mexico.

A patrolman arriving at the scene also called the Garden City police dispatcher, confirming the seriousness of the situation and suggesting another call to CSX. That call to CSX was made eight minutes before the collision.

Investigators do not know all the details of the foul-up, but sources said that in the first call to CSX the police dispatcher had trouble getting his message across, as he was transferred to various lines. The chief dispatcher was not available, so the call was transferred to the desk that handles Amtrak matters. That desk transferred the call to the dispatcher covering a line toward Charleston.

After finally reaching that person, the police dispatcher was told there were no trains nearby on the line.

FRA officials said the dispatcher ultimately halted operations on a portion of the line to Charleston in response to the calls, but it was the wrong one. The dispatcher was confused over which line the truck was blocking in part because two high-speed main-line CSX tracks from the north converge at Savannah, the officials said.

At the point of the collision, at Garden City, the two lines are no more than a quarter-mile apart. Passenger trains between New York and Florida use both lines, but the line where the accident occurred is a secondary line that has little freight traffic.

The road, Hawkinsville Road, crosses the secondary line and dead ends at the Charleston line. CSX inherited both lines by merger; the Charleston line from the Atlantic Coast Line Railroad and the other from the Seaboard Air Line Railroad.

Although the investigation is far from complete, FRA officials said the dispatcher then did not inform the dispatcher controlling the secondary line, which goes north via Columbia, S.C. Investigators will listen to recordings of phone and radio conversations to determine why no further action was taken.

According to sources, next Thursday's FRA inspection report will specifically criticize the dispatching center for a lack of relief dispatchers and clerical help, which has led to overwork.



STB

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LAW OFFICES

OBERMAYER REBMANN MAXWELL & HIPPEL LLP

ONE PENN CENTER - 19TH FLOOR  
1617 JOHN F. KENNEDY BOULEVARD  
PHILADELPHIA, PA 19103-1895

(215) 665-3000  
FAX (215) 655-3165

October 20, 1997



**VIA FEDERAL EXPRESS**

Honorable Vernon A. Williams  
Secretary  
Surface Transportation Board  
Suite 700  
1925 K. Street, N.W.  
Washington, D.C. 20423-0001

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

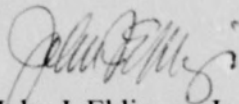
Dear Secretary Williams:

Enclosed for filing with the Board in the referenced proceeding, please find the original and twenty-five (25) copies of Comments and Request For Conditions of the Southeastern Pennsylvania Transportation Authority. In addition, the filing is submitted on a diskette formatted for WordPerfect 7.0.

Kindly date stamp the enclosed two additional copies of the Comments at the time of filing and return them in the enclosed envelope.

Thank you for your assistance in this matter. If you have any questions, please contact me at (215) 665-3082.

Very truly yours,



John J. Ehlinger, Jr.

Enclosures

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

182785

**BEFORE THE  
SURFACE TRANSPORTATION BOARD**

**STB FINANCE DOCKET NO. 33388**



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

**COMMENTS AND REQUEST FOR CONDITIONS OF THE  
SOUTHEASTERN PENNSYLVANIA TRANSPORTATION AUTHORITY**

**G. ROGER BOWERS**

General Counsel

**EUGENE N. CIPRIANI**

Assistant Deputy Counsel

Southeastern Pennsylvania Transportation  
Authority

1234 Market Street, Fifth Floor

Philadelphia, PA 19107-3780

**JOHN J. EHLINGER, JR.**

**THOMAS E. HANSON, JR.**

Obermayer Rebmann Maxwell & Hippel LLP

One Penn Center, 19th Floor

1617 John F. Kennedy Boulevard

Philadelphia, PA 19103

*Counsel for Southeastern Pennsylvania  
Transportation Authority*

Dated: October 20, 1997

**BEFORE THE  
SURFACE TRANSPORTATION BOARD**

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**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**

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**COMMENTS AND REQUEST FOR CONDITIONS OF THE  
SOUTHEASTERN PENNSYLVANIA TRANSPORTATION AUTHORITY**

The following Comments and Request for Conditions are filed by the Southeastern Pennsylvania Transportation Authority ("SEPTA") pursuant to Order No. 6 of the Surface Transportation Board (the "Board"), entered in the captioned proceedings relating to the primary application (the "Application") for approval of the acquisition of control (the "Proposed Transaction") of Consolidated Rail Corporation ("Conrail") by Applicants, CSX Corporation ("CSX") and Norfolk Southern Corporation ("NS") and affiliated parties (the "Applicants").

**I. BACKGROUND**

SEPTA operates an extensive integrated mass transportation system, consisting of trolley, motorbus, subway, elevated and regional commuter rail routes throughout the Philadelphia metropolitan area. SEPTA is a body corporate and politic which exercises the public powers of the Commonwealth of Pennsylvania as an agency and instrumentality thereof. SEPTA's commuter system is conducted pursuant to the Pennsylvania Public Transportation Law, Act 26 of 1991, as amended by Act 4 of 1994, 74 Pa. C.S.A. §§ 1701 et seq. SEPTA operates one of the oldest and most extensive commuter rail and transit systems in the country. It carries an average of 80,000 passengers per day on its Regional Rail Division alone, and



provides a significant and essential component of the daily movement of the population of Southeastern Pennsylvania.

SEPTA's regional rail system operates in close coordination with significant freight lines operated by Conrail in the densely populated Philadelphia area. A portion of SEPTA's regional rail system, involving two commuter lines, operates on trackage owned by Conrail, and Conrail's freight operations utilize all or portions of ten of SEPTA's commuter lines. SEPTA's operations on lines shared with Conrail have been a key component of SEPTA's passenger service.

SEPTA and Conrail have had a cordial and mutually advantageous working relationship for the past twenty (20) years. SEPTA and Conrail are parties to an Operating Agreement, dated April 4, 1977 (the "1977 Operating Agreement"), pursuant to which SEPTA undertook financial responsibility for the operation by Conrail of the commuter rail lines which Conrail acquired on April 1, 1976 from its predecessors, the Penn Central Transportation Company and the Reading Railroad.

On March 30, 1979, Conrail transferred to SEPTA the bulk of the commuter properties it had acquired from the bankrupt railroads and which were not essential to its freight operations. Conrail continued to operate these lines for the account of SEPTA pursuant to the 1977 Operating Agreement. Conrail also retained a "Freight Service Easement" over the transferred lines for the operation of local and long distance freight service to the extent required by applicable law, but the Freight Service Easement provided that it would terminate in the event of abandonment of freight service on such lines. At the same time, Conrail and SEPTA entered into their first Trackage Rights Agreement, dated March 30, 1979 (the "1979 Trackage Rights

Agreement"), which provided for the operational control and maintenance of the commuter lines which had been conveyed to SEPTA.

On December 31, 1982 (the "Transfer Date"), pursuant to the Northeast Rail Services Act of 1981, which relieved Conrail of any further obligation to operate commuter rail service, Conrail transferred to SEPTA most of its remaining commuter rail properties, retaining only those properties that were used primarily for freight service. Pursuant to a Transfer Agreement between Conrail and SEPTA, dated September 1, 1982 (the "Transfer Agreement"), Conrail guaranteed to SEPTA a perpetual, irrevocable, non-exclusive easement on Conrail's rail lines for the operation of commuter services, subject to the terms of a Trackage Rights Agreement, dated January 1, 1983 (the "1983 Trackage Rights Agreement"). In the Transfer Agreement, Conrail also agreed to grant to SEPTA at the request of SEPTA, at any time after the Transfer Date, trackage rights over Conrail's freight lines for the operation of commuter service which SEPTA was then legally authorized to conduct but which had not been conducted on the Transfer Date. The Transfer Agreement also retained for Conrail a perpetual, irrevocable easement for freight service on SEPTA's lines which did not interfere with SEPTA's commuter operations.

In 1990, Conrail and SEPTA executed a new comprehensive Trackage Rights Agreement, dated October 1, 1990 (the "1990 Trackage Rights Agreement" or "Agreement"), governing their overlapping freight and commuter operations. The 1990 Trackage Rights Agreement, a copy of which is appended to the accompanying Affidavit of Bernard Cohen, SEPTA's Assistant General Manager -- Strategic Business and Ridership Development (the "Cohen Affidavit"), covers such matters as dispatching, maintenance and construction, compensation, abandonment of service, dispute resolution, track rehabilitation, purchase rights

and labor rights. The 1990 Trackage Rights Agreement memorialized the operational and financial relationship, and the related customs and practices that had developed between SEPTA and Conrail over the preceding 15 years. It established clearly the relative rights and obligations of the parties in the region and was intended to provide a critical and long term measure of stability to a relationship which is inherently fraught with a myriad of difficulties associated with the conflicting imperatives of freight and commuter rail service in a congested and densely populated region.

The 1990 Trackage Rights Agreement remains in effect and continues to work well. It provides the basis for the daily coordination of over 500 SEPTA commuter trains with Conrail's significant freight operation in the Philadelphia area. Under the 1990 Trackage Rights Agreement and its predecessor agreements, Conrail and SEPTA have developed a workable relationship which is essential to the safe and efficient operation of both freight and commuter transit service in the Philadelphia region.

## **II. EFFECT OF THE PROPOSED CONTROL TRANSACTION**

SEPTA's principal concern with respect to the proposed acquisition of control of Conrail by CSX and NS is, of course, its effect on the operation of SEPTA's commuter rail system and other transit operations. While CSX and NS have indicated in their Application and related Operating Plan that they intend to assume and honor the terms of the 1990 Trackage Rights Agreement, the proposed change of control cannot reasonably be expected to be as free of difficulty as the Applicants would suggest. For one thing, SEPTA will no longer enjoy the benefit of its long and cooperative association with the single freight railroad in the region. Where there has existed a fair degree of certainty represented by its long course of dealing with Conrail, SEPTA now faces the inevitable uncertainty concerning the effect upon its ridership and

the public safety of the proposed transfer of control of Conrail to the two competing freight carriers, both of which have considerably less experience with commuter service than Conrail, and neither of which has any such experience in the Philadelphia area.

Secondly, SEPTA is concerned about the near and long term effect of the proposed change of control upon (i) increased freight traffic and changes in freight traffic patterns beyond those outlined in the Operating Plan; (ii) the critical dispatching function; (iii) operating and maintenance costs; (iv) public safety; and (v) SEPTA's ability to extend its transit operations within its service region in response to the evolving needs of its ridership. Each of these factors bears a significant relationship to SEPTA's ability to continue to meet the public transit needs of the region and the region's ability to address the related issues of congestion, economic development and environmental safety. Published reports of the massive and widespread operational problems encountered by the Union Pacific following its takeover of the Southern Pacific strongly suggest that despite careful planning and the best of intentions applicants face inevitable bumps in the road ahead. SEPTA is concerned that these bumps and any remedial steps taken to protect freight service not occur at the expense of its commuter rail and transit system and the region's public transportation interests.

Safety is a particular concern. The execution of the 1990 Trackage Rights Agreement followed a number of serious accidents occurring on SEPTA properties over which Conrail conducted freight operations. For this reason, specific provisions in the Agreement relating to dispatching and liability are considered by SEPTA to be of particular importance. For the most part, Conrail's safety record in the SEPTA service area has been good. However, the split up of Conrail's operations between two competing freight carriers, each less accustomed to

conducting operations in conjunction with public transit in the densely populated Northeast, raises additional concerns over the Proposed Transaction

SEPTA's concerns are heightened by the fear that either or both of CSX or NS might determine at some point following the change of control to terminate the 1990 Trackage Rights Agreement. The Agreement provides that it shall continue in effect beyond its initial term of five years (indeed, it continues in effect today), but may be terminated by either party upon six months prior written notice. In addition, certain of the initial dispatching provisions of the Agreement are subject to change upon sixty days notice. While each of CSX and NS has indicated its intention to honor the Agreement, and SEPTA's easements granted in connection to the 1979 and 1983 transfers of commuter properties would ensure its right to conduct commuter service over these lines, termination of the Agreement or substantial changes thereto would adversely affect the delicate and time honored balance of interests between the freight railroads and public transit to the detriment of the general public.

SEPTA has held discussions with representatives of CSX and NS, beginning in the summer, relating to the effect of the Proposed Transaction on its commuter operations and the concerns described above, but these discussions have not, to date, been successful. SEPTA has made a proposal to Conrail, CSX and NS, by letter dated October 1, 1997, a copy of which is appended to the Cohen Affidavit (the "SEPTA Proposal"), calling for a ten (10) year extension of the Trackage Rights Agreement and modest but, in SEPTA's view, essential refinements of the dispatching provisions of the Trackage Rights Agreement to enhance on-time performance over certain of Conrail lines over which SEPTA enjoys a perpetual easement under the 1982 Transfer Agreement. In addition, SEPTA seeks an agreement on the part of CSX and NS to negotiate the extension of SEPTA's transit service along Conrail's Harrisburg Line to Reading and on its



Morrisville Line to take into account the growing demand for commuter transit service in the Schuylkill Valley and extended portions of Bucks, Chester and Montgomery counties.

SEPTA has propounded Interrogatories and Request for Production of Documents upon CSX and NS seeking specific information, not available in the documents submitted in support of the Application, concerning local and through freight traffic which would affect particular commuter lines of SEPTA. This information may suggest additional matters for discussion with CSX and NS and some modification to the 1990 Trackage Rights Agreement relating to operational matters, although SEPTA would not expect to suggest wholesale changes to the Agreement.

SEPTA believes that its proposal represents the best means of preserving to the citizens of the Philadelphia region the considerable benefits of SEPTA's commuter system without undue cost to the Applicants. The case for a ten (10) year extension of the 1990 Trackage Rights Agreement seems compelling. Such an extension would maintain the status quo through the initial three (3) year process of integrating the Conrail lines into the CSX and NS system. It would also preserve the clearly delineated rights and obligations of the parties for the intermediate term thereafter, thus ensuring that predicted increases in freight traffic and changing traffic patterns would not erode the existing balance between public and private interests. Finally, and perhaps most importantly, it would ensure that in the event service disruptions and other operational problems arise in the integration process, SEPTA's ability to provide efficient commuter rail service would not also be disrupted.

SEPTA's Proposal also recognizes the public interest associated with the extension of transit service into areas not currently serviced by the commuter system, particularly the Schuylkill Valley area along Conrail's Harrisburg line and throughout parts of Chester,

Montgomery and Bucks counties along the Morrisville line. The incorporation of these lines into an extended Trackage Rights Agreement would ensure that SEPTA's plans for expansion into these areas could occur without disruption resulting from the Proposed Transaction.

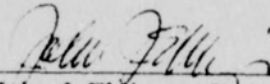
### **III. RELIEF REQUESTED**

In examining the Application under 49 U.S.C. §11324, the Board must consider among other things the impact of the Proposed Transaction on the adequacy of transportation to the public. 49 U.S.C. §11324(b)(1). Clearly, this includes public transportation and in SEPTA's view requires careful consideration of the public interest in preserving SEPTA's commuter service throughout the Philadelphia region. In addition, the environmental impact associated with the growth of freight traffic at the expense of public transportation in the densely populated region must also be assessed by the Board. In making such considerations, the Board may impose conditions upon its approval of the Application where such conditions are warranted in the public interest.

SEPTA will continue to negotiate with CSX, NS and Conrail in good faith in an effort to reach a satisfactory extension of the 1990 Trackage Rights Agreement on the terms set forth in the SEPTA Proposal. If, however, these discussions prove unsuccessful, SEPTA respectfully requests that approval of the Proposed Transaction be specifically conditioned upon a long term extension of not less than ten (10) years of the Trackage Rights Agreement containing the terms set forth in the SEPTA Proposal.

SEPTA respectfully reserves the right to supplement its Comments and Request for Conditions upon review of the information sought by its Interrogatories and Request for Production of Documents.

Respectfully submitted,



John J. Ehlinger, Jr.

Thomas E. Hanson, Jr.

Obermayer Rebmann Maxwell & Hippel LLP

One Penn Center, 19<sup>th</sup> Floor

1617 John F. Kennedy Boulevard

Philadelphia, PA 19103

G. Roger Bowers  
General Counsel  
Eugene N. Cipriani  
Assistant Deputy Counsel  
Southeastern Pennsylvania  
Transportation Authority  
1234 Market Street, Fifth Floor  
Philadelphia, PA 19107-3780

*Counsel for Southeastern Pennsylvania  
Transportation Authority*

**CERTIFICATE OF SERVICE**

I hereby certify that the foregoing, Comments and Request For Conditions of the Southeastern Pennsylvania Transportation Authority, was served upon the following, via first-class mail, postage prepaid on the 20th day of October, 1997:

David G. Abraham  
Suite 400 W  
76315 Wisconsin Avenue  
Bethesda, MD 20814

Nels Ackerson  
The Ackerson Group  
1275 Pennsylvania Ave., N.W., Suite 1100  
Washington, DC 20004-2404

Honorable George Allen  
Governor  
Commonwealth of Virginia  
State Capitol  
Richmond, VA 23219

Richard A. Allen  
Zuckert, Scoutt, Rasenberger  
888 17<sup>th</sup> Street, N.W., Suite 600  
Washington, D.C. 20006-3939

Charles E. Allenbaugh, Jr.  
East Ohio Stone Company  
2000 W. Besson Street  
Alliance, OH 44601

William D. Ankner, Ph.D.  
R.I. Dept. of Transportation  
Two Capital Hill  
Providence, RI 02903

Donald G. Avery  
Slover & Loftus  
1224 Seventeenth Street, N.W.  
Washington, D.C. 20036-3003

T. Scott Bannister  
T. Scott Bannister and Association  
1300 Des Moines Bldg.  
405 South Ave.  
Des Moines, IA 50309

J.R. Barbee  
General Chairperson UTU  
P.O. Box 9599  
Knoxville, TN 37940

Janice G. Barber  
The Burlington Northern and  
Santa Fe Railway Company  
3017 bLou Menk Drive  
Ft. Worth, TX 76131

Harry C. Barbin  
Barbin Lauffer & O'Connell  
608 Huntingdon Pike  
Rockledge, PA 19111

Honorable James A. Barcia  
U.S. House of Representatives  
Washington, D.C. 20515-2205

Norman H. Barthlow  
Detroit Edison  
2000 Second Avenue  
Detroit, MI 48222

Stephen L. Bassford  
L E Peabody & Associates, Inc.  
1501 Duke Street, Suite 200  
Alexandria, VA 22314-2401

Dinah Bear  
Executive Office of the President  
Council on Environmental Quality  
Washington, DC 20503



Honorable David M. Beasley  
Governor  
P.O. Box 11369  
Columbia, SC 29211

James L. Belcher  
Eastman Chemical Company  
P.O. Box 431  
Kingsport, TN 37662

Martin W. Bercovici  
Keller & Heckman  
1001 G Street, N.W., Suite 500 West  
Washington, D.C. 20001

David Berger  
Berger and Montague, PC  
1622 Locust Street  
Philadelphia, PA 19103-6305

Honorable Joseph R. Biden  
ATTN Rob Skomorucha  
844 King Street  
Wilmington, DE 19801

Honorable Joseph R. Biden  
US Senate  
Washington, DC 20510

Honorable Rod R. Blagovjevich  
U.S. House of Representatives  
Washington, DC 20515-1305

Honorable Thomas J. Bliley, Jr.  
US House of Representatives  
Washington, DC 20515

Thomas R. Bobak  
313 River Oaks Drive  
Calumet City, IL 60409

Charles D. Bolam  
United Transportation Union  
1400-20<sup>th</sup> Street  
Granite City, IL 62040

William A. Bon, General Counsel  
Brotherhood of Maintenance of Way Employees  
26555 Evergreen Road, Suite 200  
Southfield, MI 48076

Anthony Bottalico  
UTU  
420 Lexington Avenue  
Room 458-460  
New York, NY 10017

Thomas C. Brady  
Brady Brooks & O'Connell LLP  
41 Main Street  
Salamanca, NY 14779-0227

Honorable John Breaux  
US House of Representatives  
Washington DC 20515

Theresa M. Brennan  
Two North Ninth Street  
Allentown, PA 18101-1179

William T. Bright  
P.O. Box 149  
200 Greenbrier Road  
Summerville, WV 26651

Anita R. Brindza  
The One Fifteen Hundred Building  
11500 Franklin Blvd.  
Suite 104  
Cleveland, OH 44102

Honorable Sherod Brown  
US House of Representatives  
Washington, DC 20515

Stephen H. Brown  
Vorys Sater Seymour and Pease  
1828 L Street, N.W.  
Washington, DC 20036

Honorable Ed Bryant  
US House of Representatives  
Washington DC 20515

Christopher J. Burger  
Central Properties  
500 North Buckeye  
Kokomo, IN 46903

Honorable Richard Burr  
U.S. House of Representative  
Washington, DC 20515-3305

Ross B. Capon  
Nat'l Assoc. of Ruhoads Passenger  
100 Second Street, NE, STE 308  
Washington, DC 20002-3557

Eileen Cary  
City of Chicago, City Hall, Rm. 700  
Chicago, IL 60602

Hamilton C. Carmouche  
Corporation Counsel  
City of Gary  
401 Broadway, 4<sup>th</sup> Floor  
Gary, IN 46402

Richard C. Carpenter  
1 Selleck Street, Suite 210  
East Norwalk, CT 06855

A. Scott Cauger  
Niagara Mohawk Power Corp.  
300 Erie Blvd. West  
Syracuse, NY 13202

Charles M. Chadwick  
Maryland and Midland Railway, Inc.  
P.O. Box 1000  
Union Bridge, MD 21791

Honorable John H. Chafee  
United States Senate  
Washington, DC 20510-0001

Honorable Sachy Chamblis  
US House of Representatives  
Washington, DC 20515

Angelo J. Chick, Jr.  
Local Chairman  
P.O. Box 48398  
Old Goose Bay Road  
Redwood, WY 13679

Honorable Lawton Chiles  
Office of the Governor  
The Capitol  
Tallahassee, FL 32399-0001

Sylvia Chinn-Laiy  
Intergovernmental CO-O  
969 Copley Road  
Akron, OH 44320-2992

Nicole E. Clark  
Wachtell, Lipton, Rosen & Katz  
51 West 52<sup>nd</sup> Street  
New York, NY 10019-6150

Ray Clark  
Executive Office of the President  
Council on Environmental Quality  
Washington, DC 20503

Nicole E. Clark  
Wachtell, Lipton, Rosen & Katz  
51 West 52<sup>nd</sup> Street  
New York, NY 10019-6150

Paul D. Coleman  
Hoppel Mayer & Coleman  
1000 Connecticut Avenue, N.W., Suite 400  
Washington, DC 20036-5302

John F. Collins  
Collins, Collins & Kantor PC  
267 North St.  
Buffalo, NY 04201

Robert J. Cooper  
500 Water Street  
Jacksonville, FL 32202-4420

Michael Connelly  
City of East Amigo  
4525 Indianapolis Blvd.  
East Chicago, IN 46312

J. Doyle Corman  
Main Line Management Services, Inc.  
520 Fellowship Road  
STE A-105  
Mount Laurel, NJ 08054-3407

John J. Coscia  
DVRPC  
111 South Independence Mall East  
Philadelphia, PA 19106

Steve M. Coulter  
Exxon Company, USA  
P.O. Box 3272  
Houston, Tx 77253-3272

Jean M. Cunningham  
Slover & Loftus  
1224 Seventh Street, N.W.  
Washington, DC 20036

Paul A. Cunningham  
Harkins Cunningham  
1300 19<sup>th</sup> Street, N.W., Suite 600  
Washington, DC 20036

Hon. Alfonse D'Amato  
United States Senate  
111 W. Huron Street, Room 620  
Buffalo, NY 14202

Honorable Alfonse D'Amato  
United States Senate  
Washington DC 20510



William Dickerson  
US Environmental Protection Agency  
401 M Street, S.W.  
Washington, DC 20460

Nicholas J. DiMichael  
Donelan, Cleary, et al.  
1100 New York Avenue, N.W., Suite 750  
Washington, DC 20005-3934

Honorable John D. Dingell  
U.S. House of Representatives  
Washington, DC 20515

David W. Donley  
3361 Stafford Street  
Pittsburgh, PA 15204-1441

Paul M. Donovan  
LaRoe, Winn, et al.  
3506 Idaho Avenue, N.W.  
Washington, DC 20016

Kelvin J. Dowd  
Slover & Loftus  
1224 17<sup>th</sup> Street, N.W.  
Washington, DC 20036

Daniel Duff  
American Public Transit Assoc.  
1201 New York Avenue, N.W.  
Washington, DC 20005

John K. Dunleavy  
Assistant Attorney General  
133 State Street, State Administration Building  
Montpelier, VT 05633-5001

Donald W. DunLevy  
230 State Street  
PA AFL-CIO Bldg.  
2<sup>nd</sup> Floor  
Harrisburg, PA 17101-1138

Fay D. Duprius  
City Hall  
801 Plum Street, Room 214  
Cincinnati, OH 45202

David Dysard  
TMACOG  
P.O. Box 9508  
300 Central Union Plaza  
Toledo, OH 43697-9508

Gary A. Ebert  
City of Bay Village  
350 Dover Center Road  
Bay Village, OH 44140

Richard S. Edelman  
Highsaw Mahoney Clarke  
1050 Seventeenth Street, N.W., Suite 210  
Washington, DC 20036

Robert Edwards  
Eastern Transport and Logistics  
1109 Lanette Drive  
Cincinnati, OH 45230

Daniel R. Elliott, III  
United Transportation Union 14600 Detroit Avenue  
Cleveland, OH 44107

Terrell Ellis  
CAEZ WV  
P.O. Box 176  
Clay, WV 35043

Robert L. Evans  
OXY CHEM  
P.O. Box 809050  
Dallas TX 75380

Sara J. Fagnilli  
1250 Detroit Avenue  
Lakewood, OH 44107

Gerald W. Fauth, III  
G.W. Fauth & Associates, Inc.  
P.O. Box 2401  
116 South Royal Street  
Alexandria, VA 22314

Carl Feller  
DeKalb Agra Inc.  
P.O. Box 127  
4743 County Road 28  
Waterloo, IN 46793-0127

Michael P. Ferro  
Millennium Pehoctemicology, Inc.  
11500 North Lake Drive  
Cincinnati, OH 45249

Nathan R. Fenno  
Delaware Otsego Corporation  
1 Railroad Avenue  
Cooperstown, NY 13326

Edward J. Fishman  
Oppenheimer Wolff & Donnelly  
1020 Nineteenth St.  
N.W. STE 400  
Washington, DC 20036

J.D. Fitzgerald UTU  
400 E. Evergreen Blvd.  
STE 217  
Vancouver, WA 98660-3264

Stephen M. Fontaine  
Massachusetts Central Railroad Corp.  
One Wilbraham Street  
Palmer, MA 01069

Honorable Tillie K. Fowler  
U.S. House of Representatives  
Washington, DC 20515

Garland B. Garrett, Jr.  
NC Department of Transportation  
P.O. Box 25201  
Raleigh, NC 27611

Michael J. Garrigan  
BP Chemicals, Inc.  
4440 Wanensville CTR Rd.  
Cleveland, OH 44128

Richard A. Gavid  
16700 Gantry Lane, WO 104  
Tinley Park, IL 60477

Kirk Fordice, Governor  
State of Mississippi  
P.O. Box 139  
Jackson, MS 39205

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

Honorable John Glenn  
U.S. Senate  
ATTN: Anisa Bell  
200 N. High Street, S-600  
Columbus, OH 43215-2408

Andrew P. Goldstein  
McCarthy, Sweeney, et al.  
1750 Pennsylvania Avenue, N.W.  
Washington, DC 20006

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

Honorable Bob Graham  
United States Senate  
Washington, DC 20510

Edward D. Greenberg  
Galland, Kharasch, Morse & Garfinkle  
1054 Thirty-First Street, N.W.  
Washington, DC 20007-4492

Peter A. Greene  
Thompson Hine Flory  
1920 N. Street, N.W., Suite 800  
Washington, DC 20036

Robert E. Greenlese  
Toledo-Lucas County Port Authority  
1 Maritime Plaza, 7<sup>th</sup> Floor  
Toledo, OH 43604

Peter A. Gilbertson  
Regional RRS of America  
122 L St., N.W. STE 850  
Washington, DC 20001

Douglas S. Golden  
Suite 200  
533 Fellowship Road  
Mt. Laurel, NJ 08054

Donald F. Griffin  
Brotherhood of Maintenance of Way Employees  
400 N. Capitol Street, N.W., Suite 652  
Washington, D.C. 20001

John J. Grocki  
GRA, Inc.  
5 West Avenue, One Jenkintown Station  
Jenkintown, PA 19046

Vaughn R. Groves  
Pittston Coal Company  
P.O. Box 5100  
Lebanon, VA 24266

Joseph Guerrieri, Jr.  
Guerrieri, Edmond, et al.  
1331 F Street, N.W., 4<sup>th</sup> Floor  
Washington, DC 20004



David L. Hall  
Commonwealth Consulting Associates  
720 North Post Oak Road, Suite 330  
Houston, TX 77024

Hon. Lee N. Hamilton  
United States House of Representatives  
Washington, DC 20515

Michael P. Harmonis  
US Department of Justice  
325 7<sup>th</sup> Street, Suite 500  
Washington, DC 20530

James W. Harris  
The Metropolitan Planning Organization  
1 World Trade Center, Suite 82 East  
New York, NY 10048-0043

Nicole Harvey  
The Dow Chemical Company  
2020 Dow Center  
Midland, MI 48674

John D. Heffner, Esq.  
Rea, Cross & Auchincloss  
1920 N. Street, N.W., Suite 420  
Washington, DC 20036

R.J. Henefeld  
PPG Industries, Inc.  
One PPG Place  
Pittsburgh, PA 15272

G. W. Herkner, Jr.  
New Jersey Transit Rail Operations  
One Penn Plaza East  
Newark, NJ 07105

William P. Hernan, Jr.  
P.O. Box 180  
Hilliard, OH 43026

R.E. Hermann  
Atlantic City Electric Company  
6801 Black Horse Pike  
Egg Harbor Township, NJ 08234

Charles S. Hesse  
Charles Hesse Associates  
8270 Stoney Brook Drive  
Chagrin Falls, OH 44023

Lynn A. Hiser  
A.E. Staley Manufacturing Co.  
2200 E. Eldorado Street  
Decatur, IL 62525

Eric M. Hocky  
Gollatz, Griffin, Ewing  
213 West Miner Street  
West Chester, PA 19381-0796

J.T. Holland  
Eastern Shore Railroad, Inc.  
P.O. Box 312  
Cape Charles, VA 23310

James E. Howard  
90 Canal Street  
Boston, MA 02114

John Hoy  
P.O. Box 117  
Glen Burnie, MD 21060

Brad F. Huston  
Cyprus Amax Coal Sales Corp.  
400 Technecenter Drive, Suite 320  
Milford, OH 45150

Sheila Meck Hyde  
City Hall  
342 Central Avenue  
Dunkirk, NY 14048

Ernest J. Ierardi  
Nixon Hargrave Devans Doyle LLP  
P.O. Box 1051  
Clinton Square  
Rochester, NY 14603-1051

William P. Jackson, Jr.  
Jackson & Jessup, P.C.  
P.O. Box 1240  
3426 North Washington Blvd.  
Arlington, VA 22210

James R. Jacobs  
Jacobs Industries  
2 Quarry Lane  
Stony Ridge, OH 43463

Honorable Fob James  
Governor  
State of Alabama  
Montgomery, AL 36130

Doreen C. Johnson  
Ohio Attorney General's Office  
30 E. Broad Street  
16<sup>th</sup> Floor  
Columbus, OH 43215

Erika Z. Jones  
Mayer, Brown & Platt  
2000 Pennsylvania Avenue, N.W., Suite 6500  
Washington, DC 20006

Terrence D. Jones  
Keller & Heckman  
1001 G. Street, N.W., Suite 500 West  
Washington, DC 20001

Frank N. Jorgensen  
The Elk River Railroad, Inc.  
P.O. Box 460  
Summersville, WV 26651

Fritz R. Kahn  
1100 New York Avenue, N.W.  
Suite 750 West  
Washington, DC 20005-3934

Steven J. Kalich  
McCarthy, Sweeney & Harkaway  
1750 Pennsylvania Avenue, N.W.  
Washington, DC 20006-4502

Honorable Marcy Kaptur  
US House of Representatives  
Washington, DC 20515

Larry B. Karnes  
Transportation Building  
P.O. Box 30050  
425 West Ottawa  
Lansing, MI 48909

Richard E. Kerth  
Champion Intern'l Corp.  
101 Knightsbridge Drive  
Hamilton, OH 45020-0001

David D. King  
Beaufort and Morehead RR Co.  
P.O. Box 25201  
Raleigh, NC 27611-5201

David D. King  
Beaufort and Morehead Railroad Company  
P.O. Box 25201  
Raleigh, North Carolina 27611-5201

L. P. King, Jr.  
General Chairperson UTU  
145 Campbell Avenue, S.W., Suite 207  
Roanoke, VA 24011

Mitchell M. Kraus  
Transportation Communications Intern'l Union  
3 Research Place  
Rockville, MD 20850

Hon. Dennis J. Kucinich  
United States House of Representatives  
Washington, DC 20515

Paul H. Lamboley  
Oppenheimer Wolff & Donnelly  
1020 19th Street, N.W., Suite 400  
Washington, DC 20036

Hon. Steve Latourette  
United States House of Representatives  
Washington, DC 20515

J. Patrick Latz  
Heavy Lift Cargo System  
P.O. Box 51451  
Indianapolis, IN 46251-0451

Sherri Lehman  
Corn Refiners Association  
1701 Pennsylvania Avenue, N.W.  
Washington, DC 20006-5805

Hon. Jacob Leventhal  
Office of Hearings  
Federal Energy Regulatory Commission  
888 First Street, N.E., Suite 11F  
Washington, DC 20426

Hon. William O. Lipinski  
United States House of Representatives  
Washington, DC 20515

Thomas J. Litwiler  
Oppenheimer Wolff & Donnelly  
180 N. Stetson Avenue, 45th Floor  
Chicago, IL 60601

Edward Lloyd  
Rutgers Environmental Law Clinic  
15 Washington Street  
Newark, NJ 07102



C. Michael Loftus  
Slover & Loftus  
1224 Seventeenth Street, N.W.  
Washington, DC 20036

Dennis G. Lyons  
Arnold & Porter  
555 12th Street, N.W.  
Washington, DC 20004-1202

Gordon MacDougall  
1025 Connecticut Avenue, N.W., Suite 410  
Washington, DC 20036

Stephen A. Macisaac  
Prince William Deputy County Attorney  
One County Complex Court  
Prince William, VA 22192

Honorable Connie Mack  
United States Senate  
Washington, DC 20510-0904

Larry D. Macklin  
402 W. Washington Street, Room 256  
Indianapolis, IN 46204

William G. Mahoney  
Highsaw, Mahoney & Clarke  
1050 Seventeenth Street, N.W., Suite 210  
Washington, DC 20036

Ron Marquardt  
Local Union 1810 UMWA  
R.D. #2  
Rayland, OH 43943

Robert E. Martinez  
Virginia Secretary of Transportation  
P.O. Boxes 1475  
Richmond, VA 23218

John K. Maser, III, Esquire  
Donelan, Cleary, Wood & Maser, P.C.  
Suite 750  
1100 New York Avenue, N.W.  
Washington, DC 20005-3934

Theodore H. Matthews  
NJ Dept. of Transportation  
1035 Parkway Avenue, CN-600  
Trenton, NJ 08625

Michael Mattia  
Institute of Scrap Recycling Industries, Inc.  
1325 G Street, N.W.  
Washington, DC 20005

David J. Matty  
City of Rocky River  
21012 Hilliard Road  
Rocky River, OH 44116-3398

George W. Mayo, Jr.  
Hogan & Hartson  
555 Thirteenth Street, N.W.  
Washington, DC 20004-1161

Michael F. McBride  
LeBoeuf Lamb Greene & MacRae, LLP  
1875 Connecticut Avenue, N.W., Suite 1200  
Washington, DC 20009

Edward C. McCarthy  
Inland Steel Industries, Inc.  
30 West Monroe Street  
Chicago, IL 60603

Christopher C. McCracken  
Ulmer & Berne LLP  
1300 East Ninth Street, Suite 900  
Cleveland, OH 44114

Thomas F. McFarland, Jr.  
McFarland & Herman  
20 North Wacker Drive, Suite 1330  
Chicago, IL 60606-3101

James F. McGrail  
Commonwealth of Mass. Exec. Office of  
Transpt. & Const.  
10 Park Plaza, Room 3170  
Boston, MA 02116-3969

Francis G. McKenna  
Anderson & Pendleton  
1700 K Street, N.W., Suite 1107  
Washington, DC 20006

Honorable Michael McNulty  
US House of Representatives  
Washington, DC 20515-2210

H. Douglas Midkiff  
65 West Broad Street, Suite 101  
Rochester, NY 14614-2210

Hon. Barbara A. Mikulski  
United States Senate  
Washington, DC 20510

Clinton J. Miller, III, General Counsel  
United Transportation Union  
14600 Detroit Avenue  
Cleveland, OH 44107-4250

G. Paul Moates  
Sidley & Austin  
1722 I Street, N.W.  
Washington, DC 20006

C.V. Monin  
Brotherhood of Locomotive Engineers  
1370 Ontario Street  
Cleveland, OH 44113

Jeffrey R. Moreland  
The Burlington Northern and  
Santa Fe Railway Company  
1700 East Golf Road  
Schaumburg, IL 60173

Karl Morell  
Ball Janik & Novack  
1455 F Street, N.W., Suite 225  
Washington, DC 20005

Jeffrey O. Moreno  
Donelan Cleary Woo9d Maser  
1100 New York Avenue, N.W., Suite 750  
Washington, DC 20005-3934

Ian Muir  
Bunge Corporation  
P.O. Box 28500  
St. Louis, MO 63146

Andrew M. Muller, Jr.  
P.O. Box 218  
Port Clinton, PA 19549

William A. Mullins  
Troutman Sanders LLP  
1300 I Street, N.W., Suite 500 East  
Washington, DC 20005-3314

Robert E. Murray  
Ohio Valley Coal Company  
56854 Pleasant Ridge Road  
Alledonia, OH 43902

John R. Nadolny  
Boston & Maine Corp.  
Iron Horse Park  
No. Billerica, MA 01862

S.J. Nasca  
State Legislative Director, UTU  
35 Fuller Road, Suite 205  
Albany, NY 12205

Gerald Norton  
Harkins Cunningham  
1300 19th Street, N.W., Suite 600  
Washington, DC 20036

Sandra L. Nunn  
Frost & Jacobs LLP  
201 East Fifth Street  
Cincinnati, OH 45202

Peter Q. Nyce, Jr.  
US Department of the Army  
901 North Stuart Street  
Arlington, VA 22203

Keith G. O'Brien  
Rea, Cross and Auchincloss  
1920 N. Street, N.W., Suite 420  
Washington, DC 20036

D.J. O'Connell  
General Chairperson UTU  
410 Lancaster Avenue, Suite 5  
Haverford, PA 19041

Christopher C. O'Hara  
Brickfield Burchette & Ritts, PC  
1025 Thomas Jefferson Street, N.W., 8<sup>th</sup> Floor  
Washington, DC 20007

John L. Oberdorfer  
Patton Boggs LLP  
2550 M Street, N.W.  
Washington, DC 20037-1301

Thomas M. O'Leary  
Ohio Rail Development Commission  
50 W. Broad Street, 15<sup>th</sup> Floor  
Columbus, OH 43215

Byron D. Olsen  
Felhaber Larson Fenlon & Vogt PA  
601 Second Avenue South, 4200 First Bank Place  
Minneapolis, MN 55402-4302



William L. Osteen  
Associate General Counsel TVA  
400 West Summit Hill Drive  
Knoxville, TN 37902

L. John Osborn  
Sonnenschein Nath & Rosenthal  
1301 K Street, N.W. , Suite 600  
Washington, D.C. 20005

Monty L. Parker  
CMC Steel Group  
P.O. Box 911  
Seguin, TX 78156

Honorable Paul E. Patton  
Office of the Governor  
700 Capitol Avenue, Suite 100  
Frankfort, KY 40601

Lawrence Pepper, Jr.  
Gruccio Pepper  
817 East Landis Avenue  
Vineland, NJ 08360

F.R. Pickell  
General Chairperson UTU  
6797 North High Street, Suite 108  
Worthington, OH 43085

Patrick R. Plummer  
Guerrier, Edmond & Clayman, P.C.  
1331 F Street, N.W.  
Washington, DC 20004

Andrew R. Plump  
Zuckert, Scoutt, Rasenberger  
888 17<sup>th</sup> Street, N.W., Suite 600  
Washington, DC 20006-3939

Joseph R. Pomponio  
Federal Railroad Admin.  
400 7th Street, S.W., RCC-20  
Washington, DC 20590

Honorable Rob Portman  
US House of Representatives  
8044 Montgomery Road, Room 540  
Cincinnati, OH 45236

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

Honorable Deborah Pryce  
US House of Representatives  
500 South Front Street, Room 1130  
Columbus, OH 43215

Harold P. Quinn, Jr.  
Nat'l Mining Assoc.  
1130 17th Street, N.W.  
Washington, DC 20036

J.T. Reed  
General Chairperson UTU  
7785 Baymeadows Way, Suite 109  
Jacksonville, FL 32256

Honorable Ralph Regula  
US House of Representatives  
Washington, DC 20515

Hon. Thomas J. Ridge  
Governor, Commonwealth of Pennsylvania  
225 Main Capitol Building  
Harrisburg, PA 17120

Arvid E. Roach, II  
Covington & Burling  
P O Box 7566  
1201 Pennsylvania Avenue, N.W.  
Washington, DC 20044-7566

Hon. Charles Robb  
United States Senate  
Washington, DC 20510

James F. Roberts  
210 E. Lombard Street  
Baltimore, MD 21202

John M. Robinson  
9616 Old Spring Road  
Kennsington, MD 20895-3124

J. L. Rodgers  
General Chairman UTU  
480 Osceola Avenue  
Jacksonville, FL 32250

Edward J. Rodriguez  
P.O. Box 298  
67 Main Street  
Centerbrook, CT 06409

David Roloff  
Goldstein & Roloff  
526 Superior Avenue East, Suite 1440  
Cleveland, OH 44114

John J. Rosacker  
KS, Department of Transp.  
217 S.E. 4th Street, 2nd Floor  
Topeka, KS 66603

Charles M. Rosenberger  
CSX Transportation  
500 Water Street  
Jacksonville, FL 32202

Christine H. Rosso  
IL Assistant Attorney General  
100 W. Randolph Street, 13th Street  
Chicago, IL 60601

Hon. William V. Roth, Jr.  
United States Senate  
Washington, DC 20510-0001

R. E. Rowe  
General Chairperson UTU  
320 S. Main Street  
Plymouth, MI 48170

Honorable Bobby L. Rush  
US House of Representatives  
Washington DC 20515-9997

Thomas R. Rydman  
Indian Creek Railroad Company  
3905 W. 600 North  
Anderson, IN 46011

Honorable Rick Santorum  
US Senate  
Washington, DC 20510-3804

R K Sargent  
General Chairperson UTU  
1319 Chestnut St.  
Kenova, WV 25530

John L. Sarratt  
Kilpatrick, Stockton LLP  
4101 Lake Boone Trail  
Raleigh, NC 27607

Hon. Thomas Sawyer  
United States House of Representatives  
Washington, DC 20515

Hon. Thomas Sawyer  
United States House of Representatives  
P.O. Box 1463  
South Bend, IN 46624-1463

Scott M. Saylor  
North Carolina Railroad Company  
3200 Atlantic Avenue, Suite 110  
Raleigh, NC 27604

G. Craig Schelter  
Philadelphia Industrial Dev. Corp.  
1500 Market Street  
Philadelphia, PA 19102

Thomas E. Schick  
Chemical Manufacturers Association  
1300 Wilson Blvd.  
Arlington, VA 22209

Richard J Schiefelbein  
Woodharbor Associates  
7801 Woodharbor Drive  
Fort Worth, TX 76179

Frederick H. Schrank  
P.O. Box 778  
Dover, DE 19903

Randolph L. Seger  
McHale Cook & Welch, PC  
320 N. Meridian St., Suite 1100  
Indianapolis, IN 46204

Diane Seitz  
Central Hudson Gas & Electric Corp.  
284 South Avenue  
Poughkeepsie, NY 12601

Denise L. Sejna  
City of Hammond  
5925 Calumet Avenue  
Hammond, IN 46320

Anthony P. Semancik  
347 Madison Avenue  
New York, NY 10017-3706

Roger A. Serpe  
Indiana Harbor Belt railroad  
175 West Jackson Blvd., Suite 1460  
Chicago, IL 60604



James E. Shepherd  
Tuscola & Saginaw Bay  
P.O. Box 550  
Owosso, MI 48867-0550

Kevin M. Sheys  
Oppenheimer Wolff & Donnelly  
1020 Nineteenth Street, N.W.  
Suite 400  
Washington, DC 20036-6105

Arnold K. Shimelman  
Connecticut Assistant Attorney General  
P O Box 317546  
Newington, CT 06131

Mark H. Sidman  
Weiner, Brodsky, Sidman  
1350 New York Avenue, N.W., Suite 800  
Washington, DC 20005

Philip G. Sido  
Union Camp Corporation  
1600 Valley Road  
Wayne, NJ 07470

Kenneth E. Siegel  
American Trucking Association  
2200 Mill Road  
Alexandria, VA 22314-4677

Patrick B. Simmons  
NC Dept. of Transportation  
1 S. Wilmington St., Rm. 557  
Raleigh, NC 27611

William C. Sippel  
Oppenheimer Wolff & Donnelly  
1800 N. Stetson Avenue  
Two Prudential Plaza, 45<sup>th</sup> Floor  
Chicago, IL 60601

Richard G. Slattery  
Amtrak  
60 Massachusetts Ave., N.E.  
Washington, DC 20002

William L. Slover  
Slover & Loftus  
1224 17<sup>th</sup> Street, N.W.  
Washington, DC 20036-3003

Carl W. Smith  
Amvest Corporation  
One Boar's Place  
Charlottesville, VA 22905

Garret G. Smith Mobil Oil Corp.  
3225 Gallows Road, Room 8A903  
Fairfax, VA 22037-0001

Paul Samuel Smith  
US Dept. of Transportation  
400 Seventh St., S.W., Rm. 4102 C-30  
Washington, DC 20596

Honorable Robert F. Smith  
US House of Representatives  
Washington, DC 20515

John W. Snow  
701 East Byrd St.  
1500 Federal Reserve Building  
Richmond, VA 23219

Mike Spahis  
Fina Oil & Chemical Co.  
P.O. Box 2159  
Dallas, TX 75221

Honorable Arlen Specter  
US Senate  
Washington, DC 20510-3802

Charles A. Spitulnik  
Hopkins & Sutter  
888 16<sup>th</sup> St., N.W.  
Washington, DC 20006

Mary Gabrielle Sprague  
555 Twelfth St., N.W.  
Washington, DC 20004-1202

Eileen S. Stommes  
Agricultural Marketing Service, USDA  
P.O. Box 96456  
Washington, DC 20090-6456

Scott N. Stone  
Patton Boggs LLP  
2550 M Street, N.W., 7<sup>th</sup> Floor  
Washington, DC 20037-1346

Hon. Louis Stokes  
United States House of Representatives  
Washington, DC 20515

Hon. Ted Strickland  
United States House of Representatives  
Washington, DC 20515

D. G. Strunk, Jr.  
General Chairperson UTU  
817 Kilbourne Street  
Bellevue, OH 44811

K.D. Sturgis  
NC Dept. of Justice  
P.O. Box 629  
Raleigh, NC 27602

James F. Sullivan  
CT Dept. of Transp.  
P.O. Box 317546  
Newington, CT 06131

Daniel J. Sweeney  
McCarthy, Sweeney & Harkaway, P.C.  
1750 Pennsylvania Avenue, N.W., Suite 1105  
Washington, DC 20006

Robert G. Szabo  
V. Ness Feldman  
1050 Thomas Jefferson Street, N.W.  
Washington, DC 20007

J.E. Thomas  
Hercules Incorporated  
1313 North Market Street  
Wilmington, DE 19894

K. N. Thompson  
General Chairperson UTU  
11017-F Gravois Insutrial Plaza  
St. Louis, MO 63128

William R. Thompson  
City of Philadelphia Law Dept.  
1600 Arch Street, 10th Floor  
Phladelphia, PA 19103

Honorable Strom Thurmond  
United States Senate  
Washington, DC 20515

W. David Tidholm  
Hutcheson & Grundy  
1200 Smith St., #3300  
Houston TX 77002

Robert G. Torricelli  
District Office  
25 Main Street  
Hackensack, NJ 07601-7015

Hon. Robert G. Torricelli  
United States House of Representatives  
Washington, DC 20515

Hon. James Traficant  
United States House of Representatives  
Washington, DC 20515

Merrill L. Travis  
Illinois Dept. of Transp.  
2300 South Dirksen Parkway, Room 302  
Springfield, IL 62703-4555

Mayor Vincent M. Urbin  
150 Avon Belden Road  
Avon Lake, OH 44012

Stephen M. Uthoff  
Coniglio & Uthoff  
110 West Ocean Blvd., Suite C  
Long Beach, California 90802

J. William Van Dyke  
NJ Transportation Planning Authority  
One Newark Center, 17th Floor  
Newark, NJ 07102

William C. Van Slyke  
152 Washington Avenue  
Albany, NY 12210

Hon. Peter J. Vislosky  
United States House of Representatives  
Washington, DC 20515

John A. Vuono  
Vuono & Gray  
2310 Grant Building  
Pittsburgh, PA 15219

F. Ronalds Walker  
Citizens Gas & Coke Utility  
2020 N. Meridian Street  
Indianapolis, IN 46202

Jack A. Walter  
WCI Steel Inc.  
1040 Pine Avenue, E.E.  
Warren, Ohio 44483



Hon. John Warner  
United States House of Representatives  
Washington, DC 20515

Honorable John Warner  
United States Senate  
P.O. Box 8817  
235 Federal Building  
Abingdon, VA 24210-0887

James R. Weiss  
Preston, Gates, Ellis, et al.  
1735 New York Avenue, N.W., Suite 500  
Washington, DC 20006

Hugh H. Welsh  
Law Department, Suite 67E  
One World Trade Center  
New York, NY 10048-0202

Jay Westbrook  
City Hall, Room 216  
601 Lakeside Avenue, N.E.  
Cleveland, OH 44114

Hon. Bob Weygand  
United States House of Representatives  
Washington, DC 20515

Charles H. White, Jr.  
Galland, Kharasch & Garfinkle, P.C.  
1054 Thirty-First Street, N.W.  
Washington, DC 20007-4492

William W. Whitehurst, Jr.  
12421 Happy Hollow Road  
Cockeysville, MD 21030-1711

Henry M. Wick, Jr.  
Wick, Striff, et al.  
1450 Two Chatham Center  
Pittsburgh, PA 15219

Robert J. Will  
United Transportation Union  
4134 Grave Run Road  
Manchester, MD 21101

Debra L. Willen  
Guerrieri, Edmond & Clayman PC  
1331 F Street, N.W., 4<sup>th</sup> Floor  
Washington, DC 20004

Richard Wilson  
1126 8th Avenue, Suite 403  
Altoona, PA 16602

Robert A. Wimbish  
Rea, Cross & Auchincloss  
1920 N. Street, N.W., Suite 420  
Washington, DC 20036

C.D. Winebrenner  
General Chairperson UTU  
27801 Euclid Avenue, Room 200  
Euclid, OH 44132

John F. Wing  
Citizens Advisory Committee  
601 North Howard Street  
Baltimore, MD 21201

David L. Winstead  
P.O. Box 8755  
BWI  
Baltimore, MD 21240-0755

Hon. Bob Wise  
United States House of Representatives  
Washington, DC 20515

Sergeant W. Wise  
Livonia, Avon & Lakeville Railroad Corp.  
P.O. Box 190-B  
5769 Sweeteners Blvd.  
Lakeville, NY 14480

Timothy A. Wolfe  
Wyandot Dolomite, Inc.  
P.O. Box 99  
1794 CO Road #99  
Carey, OH 43316

Frederic L. Wood  
Donelan, Cleary, Wood and Maser  
1100 New York Avenue, N.W., Suite 750  
Washington, DC 20005-3934

E.C. Wright  
P.O. Box 2197 (PO 2007)  
Surface Transportation Department  
Houston, TX 77252

Edward Wytkind, Executive Director  
Larry I. Willis, Esquire  
Transportation Trades Department AFL-CIO  
1000 Vermont Avenue, Suite 900  
Washington, D.C. 20005

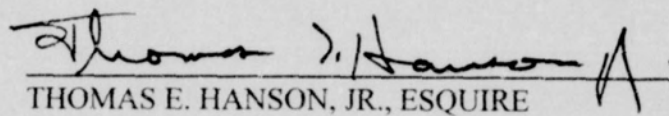
L. Pat Wynns  
Suite 210  
1050 - 17th Street, N.W.  
Washington, DC 20036-5503

R.L. Young  
American Electric Power  
P.O. Box 700  
Lancaster, OH 43130

Sheldon A. Zabel  
Schiff Hardin & Waite  
7200 Sears Tower  
Chicago, IL 60606

Scott M. Zimmerman  
Zuckert Scoutt & Rasenberger LLP  
888 Seventeenth Street, N.W.  
Washington, DC 20006

Walter E. Zulig, Jr.  
Metro-North Commuter Railroad Co.  
347 Madison Avenue  
New York, NY 10017-3706

  
THOMAS E. HANSON, JR., ESQUIRE

STB

FD

33388

10-21-97

D

182778

1/2



182778

LAW OFFICES

OBERMAYER REBMANN MAXWELL & HIPPEL LLP

ONE PENN CENTER - 19TH FLOOR  
1617 JOHN F. KENNEDY BOULEVARD  
PHILADELPHIA, PA 19103-1895

(215) 665-3000  
FAX (215) 665-3165

October 20, 1997



**VIA FEDERAL EXPRESS**

Honorable Vernon A. Williams  
Secretary  
Surface Transportation Board  
Suite 700  
1925 K. Street, N.W.  
Washington, D.C. 20423-0001

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

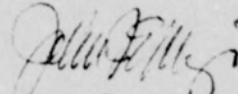
Dear Secretary Williams:

Enclosed for filing with the Board in the referenced proceeding, please find the original and twenty-five (25) copies of Comments and Request For Conditions of the Southeastern Pennsylvania Transportation Authority. In addition, the filing is submitted on a diskette formatted for WordPerfect 7.0.

Kindly date stamp the enclosed two additional copies of the Comments at the time of filing and return them in the enclosed envelope.

Thank you for your assistance in this matter. If you have any questions, please contact me at (215) 665-3082.

Very truly yours,



John J. Ehlinger, Jr.

Enclosures

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

BEFORE THE  
SURFACE TRANSPORTATION BOARD

STB FINANCE DOCKET NO. 33388



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

AFFIDAVIT IN SUPPORT OF COMMENTS  
AND REQUEST FOR CONDITIONS OF THE  
SOUTHEASTERN PENNSYLVANIA TRANSPORTATION AUTHORITY

I, BERNARD COHEN, hereby depose and state that:

1. I am currently the Assistant General Manager -- Strategic Business & Ridership Development for the Southeastern Pennsylvania Transportation Authority ("SEPTA") and I am submitting this Affidavit in support of SEPTA's Comments and Request for Conditions filed in these proceedings on October 21, 1997.
2. As the Assistant General Manager -- Strategic Business & Ridership Development, I am responsible for overseeing policy and planning for SEPTA, with the announced goal of increasing ridership. These duties include responsibility for the review and analysis by SEPTA of the primary application (the "Application") of CSX Corporation ("CSX"), Norfolk Southern Corporation ("NS") and affiliated entities (the "Applicants") for approval of the acquisition of control (the "Proposed Transaction") of Consolidated Rail Corporation ("Conrail") and the related Operating Plan filed by the Applicants (the "Operating Plan"). I am

generally familiar with the Application, the Operating Plan and the potential impact of the Proposed Transaction upon the commuter rail operations of SEPTA.

3. I have also participated in the preparation of the accompanying Comments and Request for Conditions submitted this day by SEPTA to the Surface Transportation Board relating to the Application. All factual statements set forth therein are true and correct and accurately describe SEPTA's transit operations and its position relating to the Proposed Transaction.

4. SEPTA operates an extensive integrated local mass transportation system, consisting of trolley, motorbus, subway, elevated and regional commuter rail routes primarily throughout the Philadelphia metropolitan area pursuant to the Pennsylvania Public Transportation Law, Act 26 of 1991, as amended by Act 4 of 1994, 74 Pa. C.S.A. §§ 1701 et seq. SEPTA is a body corporate and politic which exercises the public powers of the Commonwealth of Pennsylvania as an agency and instrumentality thereof, and has its executive offices at 1234 Market Street, Philadelphia, Pennsylvania 19107-3780. SEPTA operates one of the oldest and most extensive commuter rail and transit systems in the country. It carries an average of 80,000 passengers per day on its Regional Rail Division alone, and provides a significant and essential component of the daily movement of the population of Southeastern Pennsylvania.

5. SEPTA's regional rail system operates in close coordination with significant freight lines operated by Conrail in the densely populated Philadelphia area. A portion of SEPTA's regional rail system, involving two commuter lines, operates on trackage owned by

Conrail, and Conrail's freight operations utilize all or portions of ten of SEPTA's commuter lines. SEPTA's operations on lines shared with Conrail have been a key component of SEPTA's passenger service.

6. SEPTA's relationship with Conrail is governed by a comprehensive Trackage Rights Agreement, dated October 1, 1990 (the "1990 Trackage Rights Agreement" or "Agreement"). The 1990 Trackage Rights Agreement, a copy of which is attached hereto and marked Exhibit "A", covers such matters as dispatching, maintenance and construction, compensation, abandonment of service, dispute resolution, track rehabilitation, purchase rights and labor rights.

7. As stated in the accompanying Comments and Request for Conditions, SEPTA is concerned about the near and long term effect of the proposed change of control upon (i) increased freight traffic and changes in freight traffic patterns beyond those outlined in the Operating Plan; (ii) the critical dispatching function; (iii) operating and maintenance costs; (iv) public safety; and (v) SEPTA's ability to extend its transit operations within its service region in response to the evolving needs of its ridership. For these reasons, SEPTA has proposed a ten (10) year extension of the Trackage Rights Agreement and modest but, in SEPTA's view, essential refinements of the dispatching provisions of the Trackage Rights Agreement to enhance on-time performance over certain of Conrail lines over which SEPTA enjoys a perpetual easement under the 1982 Transfer Agreement. In addition, SEPTA seeks an agreement on the part of CSX and NS to negotiate the extension of SEPTA's transit service along Conrail's



Harrisburg Line to Reading and on its Morrisville Line to take into account the growing demand for commuter transit service in the Schuylkill Valley and extended portions of Bucks, Chester and Montgomery counties.

8. In addition, after a review by my staff of the Application and Operating Plan, we note that in the Operating Plan near term freight traffic volumes over jointly used territory are essentially to remain the same. However, issues associated with the routing of freight traffic destined for Lansdale, Conrail's base for serving customers on SEPTA's northern lines, and trackage rights which have been granted by Norfolk Southern to CSX for the routing of excess dimensional traffic destined to Northern New Jersey, which will impact SEPTA's present and future operations in Norristown, remain unresolved.

9. These proposals are outlined in my letter to Conrail, CSX and NS, dated October 1, 1997, which is attached hereto and marked Exhibit "B". SEPTA's Proposal states, in part:

"SEPTA seeks to have Conrail, CSXT and NS agree to a continuation of the existing Trackage Rights Agreement, dated as of October 1, 1990, for a period of ten (10) years commencing with the effective date of the Takeover in 1998 with no changes (except for dispatching as discussed below) to give all parties an orderly set of parameters to plan future operations. This agreement should include an automatic extension period for five (5) years unless one of the parties seeks to renegotiate the agreement."

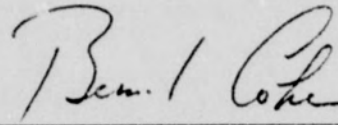
10. SEPTA has not reached a resolution of the issues raised by its Comments and Request for Conditions. It will continue to negotiate in good faith in an effort to reach an early agreement with CSX, NS and Conrail that would permit SEPTA to support the Application. If,

however, such an agreement cannot be achieved, SEPTA believes that the public interest requires that the Surface Transportation Board condition its approval of the Application upon the extension of the 1990 Trackage Rights Agreement for a period not less than ten (10) years from the effective date of the Proposed Transaction on the terms set forth in the SEPTA Proposal.

11. If called upon to do so, I will testify to the foregoing substantially as set forth above.

I, BERNARD COHEN, state under penalty of perjury that the foregoing is true and correct and that I am qualified and authorized to file this Affidavit in Support of the Southeastern Pennsylvania Transportation Authority's Comments and Request for Conditions.

Executed on October 20, 1997.

  
\_\_\_\_\_  
BERNARD COHEN



EXECUTION

TRACKAGE RIGHTS AGREEMENT

BETWEEN

SOUTHEASTERN PENNSYLVANIA  
TRANSPORTATION AUTHORITY

AND

CONSOLIDATED RAIL CORPORATION

EFFECTIVE DATE: October 1, 1990

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## TRACKAGE RIGHTS AGREEMENT

This Trackage Rights Agreement (Agreement), executed this \_\_\_\_\_ day of October, 1990, effective as of October 1, 1990, is made by and between Southeastern Pennsylvania Transportation Authority (SEPTA) and Consolidated Rail Corporation (Conrail).

NOW, THEREFORE, in consideration of the covenants, agreements, representations, and warranties contained herein, and intending to be legally bound, SEPTA and Conrail agree as follows:

### ARTICLE I

#### DEFINITIONS

##### Section 1.01 Definitions

- (a) "Conrail" shall mean the Consolidated Rail Corporation.
- (b) "Conrail Rail Properties" shall mean the rail properties identified in Exhibit 2 hereto, including additions and betterments thereto. Category A properties as identified in Exhibit 2 are those properties which are used solely by SEPTA for its passenger operations. Category B properties as identified in Exhibit 2 are those properties which are used jointly both by SEPTA for its passenger operation and by Conrail for its freight operations.



(c) "FRA" shall mean Federal Railroad Administration of the United States Department of Transportation.

(d) "SEPTA" shall mean the Southeastern Pennsylvania Transportation Authority.

(e) "SEPTA Rail Properties" shall mean the rail properties identified in Exhibit 1 hereto, including additions and betterments thereto. Category A properties as identified in Exhibit 1 are those used solely by Conrail for its freight operations. Category B properties as identified in Exhibit 1 are those properties which are used jointly both by Conrail for its freight operation and by SEPTA for its passenger operations.

(f) "Parties" shall mean Conrail and SEPTA collectively.

(g) "Owner" shall mean Conrail when referring to Conrail Rail Properties and shall mean SEPTA when referring to SEPTA Rail Properties.

(h) "Rail Properties" shall mean the SEPTA Rail Properties and Conrail Rail Properties as set forth in Exhibits 1 and 2 respectively.

(i) "Transfer Agreement" shall mean the Agreement between SEPTA and Conrail dated as of September 1, 1982, setting forth terms and conditions for the transfer of commuter rail service responsibilities and properties.

(j) "User" shall mean Conrail when referring to SEPTA Rail Properties and shall mean SEPTA when referring to Conrail Rail Properties.

ARTICLE II  
ACCESS TO RAIL PROPERTIES

Section 2.01 Access to SEPTA Rail Properties

(a) SEPTA hereby grants to Conrail, subject to the provisions of this Agreement, the right to enter upon and utilize tracks and related operating facilities located on SEPTA Rail Properties listed in Exhibit 1 for the purpose of performing Conrail's freight service and securing Conrail Rail Properties and equipment.

(b) SEPTA retains the right to utilize, or to permit any other carrier or carriers to utilize, the real property conveyed pursuant to the Transfer Agreement, and the stations, buildings and other facilities thereon, and replacements thereof, for the provision of common and contract carrier freight rail service, provided that such utilization does not interfere with the easement and trackage rights retained by Conrail, and provided further that this provision shall be of no force and effect to the extent that it shall have been determined by United States Department of Transportation, a regulatory body or a court, subject to a final judicial determination upon timely appeal from or challenge to any such determination that the freight service easement, as contemplated by the Final System Plan developed pursuant to the Regional Rail Reorganization Act of 1973, as amended, to be retained by Conrail was meant by the Final System Plan to be an exclusive freight service easement.

Section 2.02 Access to Conrail Rail Properties

(a) Conrail hereby grants to SEPTA, subject to the provisions of this Agreement, the right to enter upon and utilize tracks and related operating facilities located on Conrail Rail Properties listed in Exhibit 2 for the purpose of performing the SEPTA commuter rail service, as set forth in SEPTA's public timetables in effect on the effective date of this Agreement, adjusted by SEPTA from time to time, and securing SEPTA Rail Properties and equipment.

(b) Conrail retains its right to use, or permit another person or persons to use, Conrail Rail Properties for any rail purposes, provided that such utilization does not interfere with SEPTA's Trackage Rights.

Section 2.03 Changes in Use of Rail Properties

If there are changes in the scope or nature of services operated over SEPTA Rail Properties or Conrail Rail Properties, Exhibit 1 and Exhibit 2 shall be revised from time to time as the parties shall agree to reflect such changes.

ARTICLE III

MANAGEMENT AND OPERATIONS

Section 3.01 SEPTA Rail Properties

(a) SEPTA retains the right to establish the overall policies governing the management and operational control of all rail service over SEPTA Rail Properties, including, but not

limited to, the dispatching and control of all trains. SEPTA's right shall not be exercised in a manner which would unreasonably interfere with Conrail's Trackage Rights.

(b) The scheduling and movement of SEPTA passenger trains shall take preference over all other train scheduling and movement.

(c) Conrail's freight operating rights described in this Agreement are for the purpose of permitting Conrail to operate road and local freight trains, as well as switching movements, special trains, locomotives, and other on-track equipment. Conrail shall have access to all running, side, switching, public delivery (team), yard, and interchange tracks included in SEPTA Rail Properties necessary for the provision of this freight service, including the right to store equipment, provided that such access shall not unreasonably interfere with SEPTA's existing or planned uses.

(d) Conrail shall have the right to amend and increase the level of its freight service, provided, however, that the character, scheduling or extent of the freight service shall not unreasonably interfere with SEPTA's existing or planned uses of SEPTA Rail Properties.

(e) Conrail may perform special and emergency transportation services, provided that the operations will not unreasonably interfere with SEPTA's uses. Exhibit 3 indicates the clearances as of December 1, 1989 on SEPTA Rail Properties. SEPTA has and will promptly notify Conrail of any modifications of these clearances. If any restrictions on clearances imposed

by SEPTA after the effective date of this Agreement are more restrictive than the clearances set forth in Exhibit 3, and if such restrictions require alteration of SEPTA facilities in order to permit Conrail to move freight shipments, such alteration shall be at SEPTA's expense. If a freight shipment exceeds the clearances on Exhibit 3, and requires alteration of SEPTA's facilities, such alteration shall be at Conrail's expense.

"Facilities" as used in this Section 3.01(e) includes, but is not limited to, catenary wire, electric traction facilities and high level platforms located on SEPTA Rail Properties, including those properties listed on Exhibit 2, Category A.

(f) With prior notice to Conrail, (i) SEPTA reserves the right to operate special or emergency trains over Exhibit 1, Category A Properties subject to such reasonable operating restrictions as may be required by the conditions of the properties, and (ii) SEPTA reserves the right to operate high rail inspection trips over such properties.

#### Section 3.02 Conrail Rail Properties

(a) Conrail retains the right to establish the overall policies governing the management and operational control of all rail service over Conrail Rail Properties, including without limitation the dispatching and control of all trains, which right shall not be exercised in a manner which would unreasonably interfere with SEPTA's Trackage Rights.

(b) SEPTA shall exercise dispatching control of all trains on the Trenton Line (the former New York Short Line) from C.P.



Newtown Junction (M.P. 6.2) to Neshaminy (M.P. 21.1), and on the Trenton Line (the former New York Branch) from Neshaminy (M.P. 21.1) to Trent (M.P. 33.0), except that Conrail, on sixty (60) days written notice, may assume such dispatching control.

(c) Conrail shall operate the Trent Tower on the New York Branch at an annual cost of \$246,248, which cost shall be borne by SEPTA. Such annual cost shall be adjusted pursuant to Section 5.04. SEPTA may elect, on 60 days written notice, to eliminate service requiring use of the Tower, in which event SEPTA shall no longer be responsible for the costs thereof and, if necessary, will join Conrail in seeking regulatory approval for its elimination. If SEPTA elects to assume responsibility for operation of the Tower or the remote controlling of its operation, Conrail will use its best efforts to enable SEPTA to do so.

(d) The scheduling and movement of SEPTA passenger trains shall take preference over all freight train movements.

(e) SEPTA's passenger operating rights described in this Agreement are for the purpose of permitting SEPTA to operate passenger trains in revenue service, as well as special and emergency trains, locomotives, and cars in passenger revenue and nonrevenue service, and other on-track equipment. SEPTA shall have access to and use of all running, side, switching, interchange and yard tracks included in Conrail Rail Properties necessary for the provision of this passenger service, including the right to store equipment, provided that such access shall not unreasonably interfere with Conrail's Freight operations.

(f) SEPTA shall have the right to amend or increase the level of its passenger service, provided however, that the character, scheduling or extent of the passenger service shall not unreasonably interfere with Conrail's existing or planned uses of Conrail Rail Properties.

(g) The parties agree to remote control Conrail's Norris Tower in accordance with the terms and conditions of the Letter Agreements, dated June 1, June 11, June 21, and July 11, 1990, attached hereto as Exhibit 4. SEPTA shall reimburse Conrail as provided in Exhibit 4, which reimbursement, at SEPTA's option, may be paid from the Casualty Reserve Fund.

(h) SEPTA may perform special and emergency transportation services, provided that the operations will not unreasonably interfere with Conrail's uses. Exhibit 5 indicates the clearances as of December 1, 1989 on Conrail Rail Properties. Conrail has and will promptly notify SEPTA of any modifications of these clearances. If any restrictions on clearances imposed by Conrail after the effective date of this Agreement are more restrictive than the clearances set forth in Exhibit 5, and if such restrictions require alteration of Conrail facilities in order to permit SEPTA to operate passenger trains, such alteration shall be at Conrail's expense. If a passenger operation exceeds the clearances on Exhibit 5, and requires alteration of Conrail's facilities, such alteration shall be at SEPTA's expense. "Facilities", as used in this Section 3.02(h), includes, but is not limited to, catenary wire, electric traction facilities, and high level platforms located on Conrail Rail

Properties, including those properties listed on Exhibit 2, Category B.

(i) Should Conrail desire to relocate or alter, on a temporary or permanent basis, any facilities (as defined in Section 3.02(h)) existing on December 1, 1989 on Conrail Rail Properties, such relocation or alteration shall be at Conrail's expense and shall not unreasonably interfere with SEPTA's passenger operations.

(j) With prior notice to SEPTA, (i) Conrail reserves the right to operate special or emergency trains over Exhibit 2, Category A Properties subject to such reasonable operating restrictions as may be required by the conditions of the properties, and (ii) Conrail reserves the right to operate high rail inspection trips over such properties.

#### Section 3.03 General Provisions

(a) As used in this Agreement, whenever reference is made to the trains, locomotives, cars or equipment of, or in the account of, one of the parties hereto, such expression means the trains, locomotives, cars or equipment in the possession of or operated by one of the parties and includes such trains, locomotives, cars or equipment which are owned by, leased to, or the responsibility of such party. Whenever such locomotives, cars or equipment are owned or leased by one party to this Agreement and are in the possession or account of the other party to this Agreement, such locomotives, cars or equipment shall be considered those of the other party under this Agreement.

(b) User shall comply with the provisions of applicable Federal and State laws, regulations and rules respecting the operation, condition, inspection and safety of its trains, locomotives, cars and equipment while such trains, locomotives, cars and equipment are being operated over the Owner's Rail Properties. User shall indemnify, protect, defend, and save Owner and its officers, directors, agents, contractors and employees harmless from all fines, penalties, and liabilities imposed upon Owner under such laws, rules and regulations by any municipality, public authority or court having jurisdiction in the premises, when attributable to the failure of User, its officers, agents, contractors and employees to comply with its obligations in this regard.

(c) User in its use of the Rail Properties will comply in all respects with the operating rules and regulations of Owner, and, subject to the provisions of Sections 3.01(a) and 3.02(a), the movement of User's trains, locomotives, cars and equipment over the Rail Properties shall at all times be subject to the orders of the officials of Owner.

(d) User, at its cost and expense, shall make such arrangements with Owner as may be required to have all of User's employees who shall operate its trains, locomotives, cars and equipment over Owner's Rail Properties qualified for operation thereover.

(e) Owner shall have the right to perform drug and alcohol tests as provided under 49 CFR Part 219, Subparts C and D or, except for random testing, as provided in Owner's published

timetables or operating rules, at the User's expense, for the use of controlled substances as that term is defined in 49 CFR Part 219 and any other controlled substance for which the FRA has approved the User to test a User's employee or employees.

(f) In the event Owner conducts an investigation or hearing concerning the violation of any operating rule or practice of Owner by an employee or employees of User, User shall be notified in advance of any such investigation or hearing and such investigation or hearing may be attended by any official designated by User and shall be conducted in accordance with the collective bargaining agreements, if any, that pertain to said employee or employees.

(g) Owner shall have the right to exclude from the Rail Properties, for the length of time specified in a disciplinary proceeding, any employee of User other than an officer, determined by Owner, as the result of such investigation or hearing described above, to be in violation of Owner's rules, regulations, orders, practices or instructions issued by timetable or otherwise. User shall release, indemnify, defend and save harmless Owner and its officers, agents and employees from and against any and all claims and expenses resulting from such exclusion. For purposes of this paragraph, "officer" shall mean any employee of user not subject to a collective bargaining agreement.

(h) If by reason of any mechanical failure or for any other cause not resulting from an accident or derailment, a train or locomotive of User becomes stalled and unable to proceed under



its own power, or fails to maintain the speed required by Owner on the Rail Properties, or if, in emergencies, crippled or otherwise defective cars are separated from User's trains on the Rail Properties, Owner shall have the option of allowing the User to furnish motive power or such other assistance as may be necessary to haul, help or push such trains, locomotives or cars, or to properly move the disabled equipment off the Rail Properties or the Owner may perform the necessary functions.

User shall reimburse Owner for the full cost of rendering any such assistance as agreed upon from time to time by the parties.

(i) If it becomes necessary to make repairs to or adjust or transfer the lading of such crippled or defective cars in order to move them off the Rail Properties, such work, at the option of the Owner, shall be performed by the User or the Owner. User shall reimburse Owner for the cost of rendering any such assistance as agreed upon from time to time by the parties.

(j) Any changes in the facilities of the Rail Properties resulting from natural disasters or casualty occurrences, ordinary wear and tear excepted, shall be reported promptly by the User or the Owner to the other party. No repairs (except emergency repairs) shall be made as a result of such changes without advance notice to the other party.

(k) Conrail agrees that its freight trains operating on SEPTA Rail Properties listed in Exhibit 1, Category B or Conrail Rail Properties listed in Exhibit 2, Category B shall have sufficient motive power assigned to move at the designated track speeds so as not to delay SEPTA's passenger operations.

#### ARTICLE IV

#### MAINTENANCE AND CONSTRUCTION ON RAIL PROPERTIES

##### Section 4.01    Responsibility for Maintenance                   of SEPTA Rail Properties

(a) Except as set forth in Section 4.01(b), SEPTA shall retain the right to establish the overall policies governing routine and programmed maintenance, construction, reconstruction and alteration of all SEPTA Rail Properties, and implementation thereof. SEPTA's right shall not be exercised in a manner which would unreasonably interfere with Conrail's Trackage Rights.

(b) SEPTA hereby leases to Conrail for \$1.00, receipt of which is hereby acknowledged, during the term of this Agreement, the SEPTA Rail Properties listed in Category A of Exhibit 1. Conrail shall maintain or arrange for the maintenance of such properties at its sole cost and expense during the term of this Agreement. The aforesaid lease shall be for the sole purpose of permitting Conrail to conduct freight operations on such properties. SEPTA retains all rights which do not interfere with such operations.

(c) With respect to SEPTA Rail Properties listed in Category B of Exhibit 1, SEPTA shall have the responsibility to perform, or to arrange for the performance of, the maintenance, construction, reconstruction and alteration thereof, except for the facilities which Conrail is to maintain under Section 4.03 as of the effective date of this Agreement.

Section 4.02 Level of Maintenance of SEPTA Rail Properties

(a) With respect to SEPTA Rail Properties listed in Category A of Exhibit 1, Conrail shall determine the level of and requirements for maintenance as long as there is no SEPTA use of these facilities or until freight service thereon is discontinued by Conrail. With respect to SEPTA Rail Properties listed in Exhibit 1, Category B, SEPTA shall determine the level of and requirements for maintenance, construction, reconstruction or alteration and shall have the complete responsibility therefor, provided, that as long as Conrail provides rail service on any segment, the level of maintenance and utility on such segment shall not be less than Class 3 Track, as defined in the Track Safety Standards promulgated by the FRA (49 CFR Part 213.9).

(b)(1) With respect to derails and switchlocks on freight sidetracks on and adjacent to SEPTA Rail Properties listed in Category A of Exhibit 1, Conrail will maintain all required derails and switchlocks, and inspect such derails on a regular basis for proper mechanical functioning. If a derail or switchlock is found to be mechanically unsound, immediate

corrective action will be taken by Conrail at Conrail's expense to correct the condition, including, but not limited to moving the freight cars to a protected siding and placing the involved sidetrack out of service. Such sidetrack shall remain out of service until the condition is corrected.

(2) With respect to derails and switchlocks on freight sidetracks on and adjacent to SEPTA Rail Properties listed in Category B of Exhibit 1, SEPTA will, at Conrail's expense, maintain all required derails and switchlocks and inspect such derails on a regular basis for proper mechanical functioning. If a derail or switchlock is found to be mechanically unsound, immediate corrective action will be taken by SEPTA, at Conrail's expense, to correct the condition, including but not limited to notifying Conrail of the circumstances so that Conrail can, if necessary, move the cars to a protected siding, and the involved sidetrack will be taken out of service and remain out of service until the condition is corrected.

(c) Except as otherwise provided in this Agreement with respect to the Bethlehem Branch, in the event that SEPTA initiates passenger service or Conrail discontinues freight service on any SEPTA Rail Properties listed in Category A of Exhibit 1, and if it is determined that Conrail has not maintained these properties at, or brought them to, the level of maintenance as of January 1, 1983, SEPTA shall have the right to perform the necessary work and Conrail shall reimburse SEPTA for the cost thereof. If SEPTA desires to have the track restored to a level of maintenance greater than that which existed on

January 1, 1983, such incremental improvements shall be at its sole cost and expense.

Section 4.03    Construction, Reconstruction, Alteration  
                  and Maintenance of Solely Freight Facilities  
                  on SEPTA Rail Properties Listed on Exhibit 1

(a)    Solely Freight Facilities

(1)    Conrail, with the prior written approval of SEPTA, which approval shall not be unreasonably withheld, by itself or by contract, at its sole cost and expense, shall be responsible for the construction, reconstruction, alteration and maintenance of solely freight facilities beyond the clearance point of the switch of the operating track used by SEPTA trains on all SEPTA Rail Properties listed on Exhibit 1, Category B, and shall exercise such right in a manner which will not unreasonably interfere with SEPTA's operations.

(2)    SEPTA, by itself or by contract, shall be responsible for the construction, reconstruction, alteration and maintenance of solely freight facilities within the clearance point of the switch in the operating track used by SEPTA trains on all SEPTA Rail Properties listed on Exhibit 1, Category B, to the FRA Track Safety Standard for the track classification of said operating tracks, at Conrail's sole cost and expense. Except in case of an emergency, such work shall be performed by SEPTA only with Conrail's prior written consent.

(3)    Conrail, with the prior written approval of SEPTA,



which approval shall not be unreasonably withheld, at Conrail's sole cost and expense, may construct, reconstruct, alter or improve any main, yard, public delivery (team) track, or other solely freight facilities located on SEPTA Rail Properties necessary for freight operations, including without limitation increases in the weight of rail, changes in signal or communication facilities, and freight sidings, provided, however, that any increased expense resulting from these facilities shall be the sole responsibility of Conrail.

(4) All facilities constructed or reconstructed under subsection (3) above shall be the property of Conrail. At SEPTA's option, it may require Conrail, at Conrail's sole cost and expense, to remove facilities which are no longer likely to be used and restore the property to its preexisting condition.

(5) Any facilities that are solely freight related and are required to be replaced, removed, altered, or which are destroyed during normal maintenance, upgrading, or relocation of SEPTA facilities shall be replaced at SEPTA's sole cost and expense.

(b) Installation of Industrial Sidetracks

(1) Whenever Conrail plans to construct a new industrial sidetrack which will be connected with SEPTA Rail Properties or plans to alter or modify an existing sidetrack, engineering plans and drawings showing the

location and dimension of such sidetrack or sidetracks together with plans and drawings for any construction adjacent to or in support thereof shall be submitted in quadruplicate to SEPTA's Chief Engineer for review and approval.

(2) Approval of plans and specifications for sidetrack installation or modifications thereof which are consistent with SEPTA general specifications will be deemed to be approved by SEPTA unless SEPTA objects in writing thereto within 30 days from actual receipt of the plans and specifications by SEPTA's Chief Engineer.

(3) SEPTA authorizes Conrail to negotiate with industries located along or seeking to locate along the SEPTA Rail Properties and to contract with those industries for the installation, construction, maintenance, and removal of industrial sidetracks which are or will be connected to SEPTA Rail Properties. In the event Conrail seeks to install such industrial sidetracks which will be located in whole or in part on SEPTA Rail Properties, or enters into a new arrangement with respect to an existing sidetrack, Conrail shall arrange for the preparation and execution by industry of a Sidetrack Agreement in the form attached hereto as Exhibit 6. Except as otherwise provided in the Sidetrack Agreement, the liability apportionment provisions of Article VI of this Agreement shall govern the operation and maintenance of that portion of the sidetrack located on SEPTA property. For purposes of applying liability

apportionment provisions of Article VI to incidents occurring on or in connection with the operation of said sidetrack, the industry shall be deemed to be a Conrail Employee, as defined in Article VI.

(4) Construction, installation, repair or modification of freight sidetracks on Exhibit 1, Category B lines shall be performed in accordance with SEPTA approved plans, at Conrail's sole cost and expense, by SEPTA employees or contractors employed by SEPTA or by Conrail employees or contractors employed by Conrail, in accordance with the division of responsibility described in Section 4.03(a)(1) and (2). Construction, installation, repair or modification of freight sidetracks on Exhibit 1, Category A lines shall be performed in accordance with SEPTA approved plans by Conrail employees or contractors employed by Conrail at Conrail's sole cost and expense.

(5) When Conrail wishes any sidetrack facilities on Exhibit 1, Category B lines to be installed, upgraded or maintained, Conrail will notify SEPTA. Following SEPTA's approval of plans, SEPTA shall, within thirty (30) days, submit a force account estimate for work to be performed, materials to be procured, and a time payment schedule which, when approved by Conrail, will constitute an order to begin work. If it appears that the cost of such work will exceed the estimate, SEPTA will notify Conrail and request authority for such additional costs. Upon completion of work performed on behalf of Conrail by SEPTA, Conrail shall

promptly pay any authorized costs which exceed any advanced amount, provided, however, that SEPTA shall not be authorized or obligated to incur costs in excess of those approved in writing by Conrail. The unexpended balance of any advance payment shall be returned by SEPTA to Conrail promptly upon completion of work. SEPTA shall have the right to request Conrail or its contractor to perform the aforesaid work.

(6) Maintenance of industrial sidings and connections thereto on Exhibit 1, Category B lines shall be performed at Conrail's sole cost and expense by SEPTA employees or contractors or Conrail employees or contractors in accordance with the division of responsibility described in Section 4.03(a)(1) and (2). Maintenance of industrial sidings and connections thereto located on Exhibit 1, Category A lines shall be performed by Conrail employees or contractors at Conrail's sole cost and expense.

(7) Conrail and SEPTA agree that SEPTA may construct and use an additional switch connection on that portion of any Sidetrack located on SEPTA Rail Properties. In the event SEPTA elects to install such additional switch connection, the parties shall agree at the time of such installation regarding the apportionment of maintenance responsibilities and costs between the parties for the switches involved.

(8) SEPTA shall bear no portion of the cost or expense of, and shall have no responsibility with respect to, the

construction and maintenance of that portion of industrial sidetracks located off SEPTA Rail Properties.

(c) Retirement of Solely Freight Facilities

(1) In the event that any solely freight facility connected to SEPTA Rail Properties has ceased to be used for a period of twenty-four consecutive months, SEPTA shall have the right, upon ninety (90) days' written notice to Conrail and with its concurrence, which concurrence shall not be unreasonably withheld, to remove the connection and any other facilities or appurtenances connected therewith which are located upon the right-of-way, at SEPTA's cost and expense, provided however that removal of any such property that was installed after January 1, 1983 shall be at Conrail's cost and expense.

(2) In the event of removal of any solely freight facility, SEPTA shall be entitled to retain all materials installed prior to January 1, 1983. Conrail shall be entitled to the return of all track materials installed after January 1, 1983, removal of which shall be at Conrail's expense. SEPTA shall notify Conrail of such removal and shall place the material at a location where it is readily available for Conrail pick up.

(d) Airport High Speed Line

The provisions of this Section 4.03 shall apply to solely freight facilities and industrial sidetracks located on and connected with, or to be located on or connected



with, that line of railroad known as the Airport High Speed Line, as described in, and over which Conrail has trackage rights pursuant to, an agreement dated February 28, 1979, between Conrail and the City of Philadelphia. Under separate agreement between SEPTA and the City of Philadelphia, dated February 8, 1988, SEPTA manages that railroad line for the City.

Section 4.04    Responsibility for Maintenance  
of Conrail Rail Properties

(a) Conrail shall have the right to establish the overall policies governing maintenance, construction, reconstruction and alteration of all Conrail Rail Properties. Conrail's right shall not be exercised in a manner which would unreasonably interfere with SEPTA's Trackage Rights. Conrail shall have the responsibility to perform, or to arrange for the performance of, the routine and programmed maintenance, construction, reconstruction and alteration on Conrail Rail Properties as of the effective date of this Agreement, except as otherwise provided in this Section 4.04. With respect to the Conrail's Harrisburg Line between Norris and Wyomissing and its Bethlehem Branch between Hellertown and Bethlehem, Conrail shall notify SEPTA six months in advance of any alteration of track or facilities.

(b) Conrail hereby leases to SEPTA for \$1.00, receipt of which is hereby acknowledged, for a period of ninety-nine (99) years from the date of this Agreement, the Conrail Rail Properties listed in Category A of Exhibit 2, which lease shall survive any termination of this Agreement. This lease shall be

effective upon execution of this Agreement, unless otherwise provided herein. SEPTA shall maintain or arrange for the maintenance of such properties at its sole cost and expense during the period this lease remains in effect. The aforesaid lease shall be for the sole purpose of permitting SEPTA to conduct commuter passenger operations on such properties. Conrail retains all rights which do not interfere with such operations.

(c) SEPTA's separate signal and power cables located on catenaries or poles on or adjacent to Conrail owned or leased freight lines shall be maintained by SEPTA at SEPTA's expense.

(d) Subject to the other provisions of this Agreement including, but not limited to, Section 4.06(c), when it becomes necessary to shut off and/or ground electric traction power on a Conrail Rail Property in order to permit Conrail to perform track maintenance or conduct other activities on said Rail Properties, such shut off and grounding shall be done by SEPTA at its sole cost and expense.

Section 4.05    Level of Maintenance of Conrail  
Rail Properties Used Jointly

With respect to Conrail Rail Properties listed in Exhibit 2, Category B, Conrail shall determine the level of and requirements for maintenance, construction, reconstruction or alteration and shall have the complete responsibility therefor, provided, that as long as SEPTA operates commuter rail service on any segment, the level of maintenance and utility on such segment shall not be less than that required to maintain the train speeds set forth in SEPTA timetables in effect on April 1, 1990. These timetables

are attached hereto as Exhibit 8. If any track or signal deficiencies occur resulting in speed restrictions being placed on the Rail Facilities listed in Exhibit 2, Category B, Conrail will take prompt corrective action to return the track condition to that capable of maintaining the train speeds set forth in SEPTA timetables in effect on April 1, 1990.

Section 4.06    Construction, Reconstruction, Alteration  
                  and Maintenance of Solely Passenger  
                  Facilities on Conrail Rail Properties

(a) SEPTA, with the prior written approval of Conrail, which approval shall not be unreasonably withheld, and at SEPTA's sole cost and expense, may construct, reconstruct, alter or improve any solely passenger facility located on Conrail Rail Properties listed in Exhibit 2, Category B, necessary for passenger operations including but not limited to platforms, stations, electrification, signal or communication facility changes, and passenger sidings, provided that any expense for the maintenance of these facilities shall be the sole responsibility of SEPTA.

(b) All facilities constructed under subsection (a) above shall be the property of SEPTA. At Conrail's option, it may require SEPTA, at SEPTA's sole cost and expense, to promptly remove facilities which are no longer used and restore the property to its preexisting condition.

(c) Any facilities that are solely passenger related and are required to be replaced, removed, altered, or which are destroyed during normal maintenance, upgrading, or relocation of

Conrail facilities, shall be replaced at Conrail's sole cost and expense.

Section 4.07    Hazardous Materials Reporting  
Communication System

Conrail, at its sole cost and expense, shall maintain the existing hazardous materials reporting communication system connecting the Conrail System Operations with SEPTA facilities, including, but not limited to, the telephone line between the Conrail System Operations and SEPTA's Regional Rail Operations Center and the printout machine.

Section 4.08    Radio Communications

(a) Conrail shall supply SEPTA with all base and remote radio stations for the maintenance of a separate radio channel for the purpose of dispatching and communicating with Conrail's freight trains. All failures of this radio equipment must be reported promptly to Conrail and it will immediately replace the defective unit.

(b) SEPTA shall supply Conrail with all base and remote radio stations for the maintenance of a separate radio channel for the purpose of controlling and communicating with SEPTA's trains. All failures of the radio equipment must be reported promptly to SEPTA and it will immediately replace the defective unit.

(c) Either party may equip its locomotives or rolling stock with radios having the other party's road channel frequencies. Once such radio equipment has been installed by one party, said

party shall notify the other party of such communication capabilities.

Section 4.09    High Level Platforms

Should SEPTA desire to construct high level platforms on either a SEPTA or a Conrail Rail Property, Conrail will cooperate by reducing its standard clearances to whatever level is possible without causing a safety hazard or an unreasonable detriment to freight service, or a violation of existing governmental laws and regulations, provided, that if any resulting restrictions on clearances are more restrictive than the clearances set forth in Exhibit 3 or Exhibit 5, whichever is applicable, and if such restrictions require alteration or adjustment of such platforms in order to permit Conrail to move freight shipments, such alteration or adjustment shall be at SEPTA's expense, and, provided further, that SEPTA may install high-level platforms to within five feet, seven inches (5'7") of centerline of track on the Stoney Creek Branch between Elm Street and Kneeder and on the Doylestown Branch north of Fortuna between MP 1.5 and MP 10.13.



ARTICLE V  
COMPENSATION

Section 5.01 Definitions

- (a) Allowable Level. The Allowable Level shall be the maximum number of car miles that the User may operate on the particular segment in each calendar month without incurring car mile charges set forth in Section 5.02. Allowable Levels are specified in Exhibit 7.
- (b) Car. A car shall mean a locomotive, car, caboose, unit of self-propelled work equipment, whether or not loaded, whether or not carrying passengers or freight.
- (c) Car Miles. A car mile is defined as a car moved one mile.
- (d) Base Charge. Subject to Section 5.04 hereof, the Base Charge after July 1, 1990 will be forty one cents (\$.41) per car mile.

Section 5.02 Calculation and Payment

- (a) User will pay Owner an amount computed by multiplying the Base Charge by the number of car miles traveled on each segment in any calendar month in excess of such segment's Allowable Level.
- (b) Car mileage shall not be calculated or charged for trains operated by the User under contract to the Owner or over tracks maintained by the User.

(c) Bills will be calculated and submitted by the Owner to the User on a calendar month basis within sixty (60) days of the last calendar day of the service month being billed pursuant to this Article V or under any other provisions of this Agreement. All bills shall be accompanied by appropriate documentation and shall be paid within 30 days of receipt, provided, however, that both parties shall have the right to conduct post-payment audits of all bills, request explanation of any billed item, and review all documents underlying said billing. Any adjustment to a billing shall be promptly made by the billing party.

(d) SEPTA agrees that all car mile charge bills issued to Conrail for Conrail's use of SEPTA track between Ford Street and Kalb, Mile Posts 16.6 to 17.3 on SEPTA's Norristown Branch, for the period prior to the effective date of this Agreement, shall be withdrawn and cancelled by SEPTA.

#### Section 5.03 Records

Both parties shall maintain appropriate operating and accounting records which record the cars and mileage moved by the User on Owner's tracks. Either party shall have the right, during regular business hours and upon reasonable notice, to inspect, examine and audit all operating and accounting records and supporting documents of the other party, and all other books and records that relate to the performance of this Agreement. Nothing in this Agreement shall be construed as obligating either party to retain books or records beyond the period specified in regulations of the Interstate Commerce Commission.

Section 5.04 Revision of Charges

Beginning in July, 1991 and each July thereafter, the Base Charge and other charges as specified herein shall be increased or decreased on a cumulative basis by the same percentage by which the cost of labor and material, excluding fuel, as reflected in the Annual Indices of Charge-Out Prices and Wage Rates (1977=100), Series RCR, East included in "AAR Railroad Cost Recovery Index" and supplements thereto, issued by the Association of American Railroads (or, if said index ceases to be published, another generally recognized index), has increased or decreased in the preceding calendar year.

ARTICLE VI

LIABILITY APPORTIONMENT

Section 6.01 General

(a) Financial responsibility for liability for personal injury or property damage which may result from activities conducted hereunder shall be allocated as provided in this Article VI, provided, however, that this Article VI shall not apply to any such liability which may arise out of activities or events which occurred prior to the effective date of this Agreement. In no case will either party seek to recover loss of revenues from the other.

(b) For the purpose of this Article VI, the following terms shall have the meanings provided below:

"Conrail Employees," the employees and contractors of Conrail, and employees of such contractors. Conrail employees who are involved in Conrail's provision of services to SEPTA under this Agreement shall be regarded as Conrail Employees, and not as employees of SEPTA.

"SEPTA Employees," the employees and contractors of SEPTA, and employees of such contractors. SEPTA employees who are involved in SEPTA's provision of services to Conrail under this Agreement shall be regarded as SEPTA Employees and not as employees of Conrail.

"Person," any person, including, without limitation, passengers and third parties, as well as the parties and their respective employees, agents and contractors.

#### Section 6.02 Conrail Employees

Conrail shall defend, indemnify, and save harmless SEPTA and SEPTA Employees, irrespective of any negligence or fault of, or control by, SEPTA, or howsoever the same shall occur or be caused, from any and all liability, damage, or expense of any kind whatsoever, including reasonable attorneys' fees, arising out of injury to or death of any Conrail Employee, or arising out of loss of, damage to, or destruction of any property of any such Conrail Employee, provided that this Section 6.02 shall not apply in the case of an incident to which Section 6.05 is applicable.

#### Section 6.03 SEPTA Employees

SEPTA shall defend, indemnify, and save harmless Conrail and Conrail Employees, irrespective of any negligence or fault of, or control by, Conrail, or howsoever the same shall occur or be caused, from any and all liability, damage, or expense of any

kind whatsoever, including reasonable attorneys' fees, arising out of injury to or death of any SEPTA Employee, or arising out of loss of, damage to, or destruction of any property of any such SEPTA Employee, provided, however, that any obligation of SEPTA under this Section 6.03 to defend, indemnify and save harmless Conrail and Conrail Employees which arises out of injury to or death of, or loss, damage to, or destruction of any property of, any contractor of SEPTA or employee of such a contractor, with respect to damages arising from the same cause of action or transaction or occurrence or series of causes of action or transactions or occurrences shall not exceed \$250,000 with respect to any plaintiff or person, or \$1,000,000 in the aggregate, less any amounts paid directly by SEPTA to such plaintiffs or persons, and provided further, that this Section 6.03 shall not apply in the case of an incident to which Section 6.04 is applicable.

Section 6.04 Liabilities Arising From Hazardous Materials

(a) Except as otherwise provided in Section 6.05(c), Conrail shall defend, indemnify and save harmless SEPTA and SEPTA Employees, irrespective of any negligence or fault of, or control by, SEPTA, or howsoever the same shall occur or be caused, from any and all liability, damage, or expense of any kind whatsoever, including reasonable attorneys' fees, arising out of injury to or death of any Person, or arising out of loss of, damage to, or destruction of the property of SEPTA or any Person, resulting from the transportation or use of hazardous materials by Conrail



or Conrail Employees on SEPTA Rail Properties and Conrail Rail Properties listed in Exhibit 2, Category A.

(b) For the purposes of this Article VI, hazardous materials shall be deemed to include all materials listed by the United States Department of Transportation as a hazardous material in 49 CFR Part 172, as the same may be amended from time to time.

Section 6.05 Electric Traction Facilities

(a) In the event that electric power is restored to the electric traction wires directly over Track 3 between M.P. 21.6 and M.P. 26.9 on the Trenton Line, SEPTA shall defend, indemnify and save harmless Conrail and Conrail Employees, irrespective of any negligence or fault of Conrail or Conrail Employees, or howsoever the same shall occur or be caused, from any and all liability for injury or death of any Person or any loss, damage or destruction of the property of Conrail or any Person that arises from the presence of electric power on such electric traction wires.

(b) SEPTA shall defend, indemnify and save harmless Conrail and Conrail Employees, irrespective of any negligence or fault of Conrail or Conrail Employees, or howsoever the same shall occur or be caused, from any and all liability for injury or death of any Person or any loss, damage or destruction of the property of Conrail or any Person that arises from SEPTA's use, operation or maintenance of electric traction facilities leased from Conrail, as identified on Exhibit 2, Category A, provided, however, that SEPTA's indemnification liability under this Section 6.05(b) to

Conrail and Conrail Employees with respect to damages arising from the same cause of action or transaction or occurrence or series of causes of action or transactions or occurrences shall not exceed \$250,000 with respect to any plaintiff or person, or \$1,000,000 in the aggregate, less any amounts paid directly by SEPTA to such plaintiffs or persons.

(c) In the event that the amount of any indemnification liability of SEPTA (i) under Section 6.05(b) is limited by the proviso contained in that Section, or (ii) under Section 6.03 is limited by the first proviso contained in that Section, the amount of any liability and expense, including reasonable attorneys' fees, incurred by Conrail as a result of such limitation ("Unindemnified Expense") shall be applied as a credit against any indemnification liability of Conrail under Section 6.04 resulting from the transportation or use of hazardous materials after the event that caused Unindemnified Expense to be incurred by Conrail.

Section 6.06 Other Apportionment of Liability

Except as otherwise provided in this Article VI:

(a) Conrail shall defend, indemnify, and save harmless SEPTA and SEPTA Employees from all expenses, including reasonable attorneys' fees, arising out of injury to or death of any Person, or arising out of loss of, damage to, or destruction of any property of any Person, resulting from the negligence or fault of Conrail or Conrail Employees

and in the absence of negligence or fault of SEPTA or SEPTA Employees.

(b) SEPTA shall defend, indemnify and save harmless Conrail and Conrail Employees from all expenses, including reasonable attorneys' fees, arising out of injury to or death of any Person, or arising out of loss of, damage to, or destruction of any property of any Person, resulting from the negligence or fault of SEPTA or SEPTA Employees and in the absence of negligence or fault of Conrail or Conrail Employees.

(c) If liability, damage or expense of any kind whatsoever arises as a result of the negligence or fault of both parties, or their respective Employees (as defined herein), such amounts shall be apportioned between them on the same basis as would arise under applicable common law and statutory principles of law concerning tort liability, contribution and indemnification, provided, however, that insofar as this provision relates to the right to contribution of one party to another, and for no other purpose, and notwithstanding any contrary principle of law, the party against whom contribution is sought shall be responsible for the negligence or fault of its Employees (as defined in Section 6.01(b)), and provided further that SEPTA's liability for contribution and indemnification under this Section 6.06(c) with respect to damages arising from the same cause of action or transaction or occurrence or

series of causes of action or transactions or occurrences shall not exceed \$250,000 with respect to any plaintiff or person, less any amounts paid directly by SEPTA to such plaintiff or person, or \$1,000,000 in the aggregate, less any amounts paid directly by SEPTA to such plaintiffs or persons.

Section 6.07    Handling of Claims and Lawsuits

(a) When claims are filed or lawsuits brought involving conditions or circumstances under which the other party has agreed to indemnify the party receiving the claim or being sued, the indemnifying party shall, at its sole cost and expense, investigate and handle the claim and defend the lawsuit and save harmless the indemnified party against all costs and expenses thereof and pay all legitimate claims, settlements and final judgments.

(b) When claims are filed or lawsuits brought involving conditions or circumstances under which the parties have agreed to share the liability or there may be partial but not total indemnification of one party by the other, the Claim Departments of SEPTA and Conrail shall review the facts, confer and decide which party shall investigate and handle the claim and defend the lawsuit; otherwise, the party having the greater exposure shall investigate and handle the claim and defend the lawsuit. All costs of the investigation, negotiations and legal expenses shall

be apportioned in accordance with the responsibility of each party for the involved liability for payment of the settlement or judgment.

(c) The party receiving any claim or notice of suit against which the other party has agreed to indemnify it in whole or in part shall promptly advise the indemnifying party and provide all information which from time to time may be required.

(d) If neither Section 6.07(a) or (b) applies:

(1) In those instances involving claims or lawsuits filed by one or more SEPTA passengers, it is agreed that SEPTA will handle all claims and lawsuits involving its passengers and their property, keeping the Conrail Claims and Law Departments informed on all significant developments whenever it appears that Conrail liability could be involved, provided, however, that Conrail may, if its liability could be involved, participate in, or assume responsibility for, the handling of any such claim or defense of any or all lawsuits.

(2) If a claim or lawsuit for personal injury or property damage by a third party (non-passenger) results from the operation of either a SEPTA train or Conrail train (but not both), irrespective of the Rail Properties on which such train was operating, said claim or lawsuit shall be handled by the party whose train was involved in the accident. However, if a



claim or lawsuit for personal injury or property damage by a third party (non-passenger) results from a joint accident involving both a SEPTA train and a Conrail train, said claim shall be handled by the party on whose Rail Properties the accident occurred.

(e) Each party agrees that it will furnish the other with all available information in its possession relating to lawsuits and claims made for injury, death, loss, damage or destruction of property whenever requested by the party handling the claim or lawsuit. All expenses incurred in connection with providing such information shall be paid by the requesting party.

#### Section 6.08 Operations on Northeast Corridor Properties

As between the parties, the provisions of this Article VI shall govern with respect to liability arising from or asserted on account of operations by either party over Northeast Corridor properties of the National Railroad Passenger Corporation.

#### Section 6.09 Termination of Article VI

Any other provision of this Agreement to the contrary notwithstanding, either party may elect to terminate Article VI, by providing the other party with thirty (30) days written notice of such election, in the event that the provision contained in Section 221(1) of the Act of October 5, 1980, P.L. No. 142, 42 Pa. C.S.A. §8528, limiting damages arising from the same cause of action or transaction or occurrence or series of causes of action

or transactions or occurrences to \$250,000 with respect to any plaintiff or person, or \$1,000,000 in the aggregate, is amended or repealed or is determined by a final and authoritative judicial decision to be inapplicable to SEPTA. Termination of this Article VI shall be effective upon expiration of the 30 day notice period unless said notice provides for a later termination date. Following any such notice, the parties shall endeavor to agree upon a revised Article VI. Any termination of Article VI shall not apply to causes of action which arise, or transactions or occurrences which take place, prior to such termination, and shall not affect any other provision of this Agreement.

Section 6.10 Airport High Speed Line

The provisions of this Article VI shall apply to operations conducted by the parties over that line of railroad known as the Airport High Speed Line. For purposes of Section 6.04(a), rail properties owned by the City of Philadelphia which are utilized for the Airport High Speed Line shall be deemed to be SEPTA Rail Properties.

ARTICLE VII

CLEARING WRECKS

Section 7.01 Incidents on SEPTA Rail Properties

(a) (1) When, as a result of Conrail's sole use of SEPTA's Exhibit 1, Category A Rail Properties, rerailing, wrecking

service or wreck train service is required, Conrail shall perform or arrange to have performed such service at Conrail's sole cost and expense, including without limitation, removal of damaged equipment, repair and restoration of roadbed, track, signals, communication systems and all other right-of-way structures.

(2) In the event that SEPTA's use of these properties results in the need to clear wrecks, the provisions of Section 7.01(b)(2) shall apply.

(b) (1) When, as a result of Conrail's sole use of SEPTA Exhibit 1, Category B Rail Properties, Conrail equipment requires rerailling, wrecking service or wreck train service, SEPTA, with the cooperation, assistance, and advice of Conrail, shall have the option of requesting Conrail to perform such service, or performing such service by itself or by its contractor, at Conrail's sole cost and expense, including without limitation removal of damaged equipment, repair of damaged equipment, repair and restoration of roadbed, track, signals, communication systems and all other right-of-way structures. The aforesaid repairs and restoration will be undertaken by SEPTA and the extent of such repair and restoration shall be to the safe operating condition which existed immediately preceding the wreck.

(2) When, as a result of SEPTA's sole use of SEPTA's Exhibit 1, Category B Rail Properties, SEPTA equipment requires rerailling, wrecking service or wreck train service, SEPTA, with the cooperation, assistance and advice of

Conrail, shall have the option of requesting Conrail to perform such service at SEPTA's sole cost and expense or performing such service by itself or by its contractor, including without limitation removal of and restoration of roadbed, track, signals, communication systems, and all other right-of-way structures.

(3) When, as a result of SEPTA's and Conrail's joint use of SEPTA's Exhibit 1, Category B Rail Properties, rerailing, wrecking service or wreck train service is required, all costs, including without limitation liability costs, will be apportioned in accordance with the provisions of Article VI.

(c) All Conrail locomotives, cars, equipment, lading (including loss thereof) and salvage from any such wreck or derailment under the management or control of SEPTA shall remain the property of Conrail. Any SEPTA locomotives, cars, equipment, lading (including loss thereof) and salvage involved in such wreck or derailment shall remain the property of SEPTA.

#### Section 7.02 Incidents on Conrail Rail Properties

(a) (1) When, as a result of SEPTA's sole use of Conrail's Exhibit 2, Category A Rail Properties, rerailing, wrecking service or wreck train service is required, SEPTA shall perform or arrange to have performed such service at SEPTA's sole cost and expense, including without limitation, removal of damaged equipment, repair and restoration of roadbed,

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track, signals, communication systems and all other right-of-way structures.

(2) In the event that Conrail's use of these properties results in the need to clear wrecks, the provisions of Section 7.02(b)(2) shall apply.

(b) (1). When, as a result of SEPTA's sole use of Conrail Exhibit 2, Category B Rail Properties, SEPTA equipment requires rerailing, wrecking service, or wreck train service, Conrail promptly shall perform or arrange to have performed such service at SEPTA's sole cost and expense, including without limitation removal of damaged equipment, repair and restoration of roadbed, track, signals, communication systems and all other right-of-way structures. Such repair and restoration shall be to the safe operating condition existing immediately preceding the wreck.

(2) When, as a result of Conrail's sole use of Conrail's Exhibit 2, Category B Rail Properties, Conrail equipment requires rerailing, wrecking or wreck train service, Conrail shall perform such service at its sole cost and expense, including without limitation removal of and restoration of roadbed, track, signals, communication systems, and all other right-of-way structures.

3) When, as a result of SEPTA's and Conrail's joint use of Conrail's Exhibit 2, Category B Rail Properties, rerailing, wrecking service, or wreck train service is required, all costs, including without limitation liability



costs, will be determined in accordance with the provisions of Article VI.

(c) All SEPTA locomotives, cars, equipment, lading (including loss thereof) and salvage from any such wreck or derailment under the management or control of Conrail shall remain the property of SEPTA. Any Conrail locomotives, cars, equipment, lading (including loss thereof) and salvage involved in such wreck or derailment shall remain the property of Conrail.

## ARTICLE VIII

### TERM, TERMINATION, DEFAULT, ABANDONMENT

#### Section 8.01 Term

(a) This Agreement supersedes the existing Trackage Rights Agreement between the parties dated January 1, 1983, as amended. The effective date of this Agreement shall be October 1, 1990, and it shall continue in effect in accordance with the provisions of Section 8.01(b), subject to the approval of the SEPTA Board and any necessary approval by the Board of Directors of Conrail within sixty (60) days after the effective date. If such approvals are not obtained within such time period, this Agreement shall be void ab initio and the Trackage Rights Agreement effective as of January 1, 1983, as amended, shall be deemed to have remained in effect during such time period.

(b) Subject to Section 8.01(a), the initial term of this Agreement shall continue through September 30, 1995, and this Agreement shall continue in effect thereafter until terminated as

provided in the next sentence. If either party intends to terminate this Agreement on or after September 30, 1995, it shall provide the other party with six months written notice of such intention.

Section 8.02 Termination

Notwithstanding Section 8.01, either party may elect to terminate this Agreement if an Event of Default (as defined below) is not timely cured or satisfied following a Declaration of Default pursuant to Section 8.03 (b).

Section 8.03 Default

(a) Each of the following shall constitute an event of default (an "Event of Default") under this Agreement:

(1) The failure to pay in full any payment under Article V or any other provision of the Agreement when due; or

(2) The failure to observe any other covenant or obligation contained in this Agreement, which failure shall have continued for more than thirty (30) days after the other party shall have given written notice demanding performance thereof; or

(3) Any proceeding shall be commenced by or against either party which might result in any modification of the obligations of such party hereunder under any bankruptcy, insolvency or similar law, unless all of the obligations of such party under this Agreement shall have been duly assumed

by a trustee or successor to such party within sixty days after such proceeding shall have commenced.

(b) In the event an Event of Default shall have occurred and be continuing hereunder, the party not in default, upon written notice to the other party, may make a declaration of default (a "Declaration of Default") hereunder and exercise any or all of the following remedies:

(1) Terminate this Agreement by and upon sixty (60) days written notice to the party in default; and

(2) Pursue any other remedy at law or in equity in any court of competent jurisdiction.

(c) Failure of a party to make a Declaration of Default shall not be considered a waiver of any remedies available to it under this Agreement or otherwise. Nor shall an Event of Default be waived or satisfied by failure of a party to make a Declaration of Default with respect thereto.

#### Section 8.04 Abandonment of Conrail Freight Service

(a) Conrail may seek regulatory authority to abandon its freight operations over any of Conrail's or SEPTA's Rail Properties during the term of the Agreement. Conrail shall provide written notice to SEPTA of its intent to abandon prior to seeking such authority for the Rail Properties listed in Exhibit 1 and Exhibit 2 as well as those other Conrail rail properties located in Philadelphia, Montgomery, Berks, Bucks, Chester, Delaware, Lackawanna, Lehigh, and Northampton Counties.

(b) Within ninety (90) days of SEPTA's receipt of Conrail's written notice of its intent to abandon freight service over any Conrail rail property listed in paragraph (a) above, SEPTA shall notify Conrail whether or not it intends to purchase the Conrail Rail Property to be abandoned. If SEPTA indicates its intent to purchase the Conrail Rail Property, an Agreement of Sale shall be agreed upon and the transaction consummated within 180 days from the expiration date of the 90-day period.

(c) Should SEPTA not acquire such Conrail Rail Properties, SEPTA's trackage rights with respect to such Conrail Rail Properties shall continue and SEPTA may continue to operate its service thereon, in which case Conrail and SEPTA shall negotiate the terms and conditions related to SEPTA's continued use of the Conrail Rail Properties. If SEPTA elects to continue its service over said Conrail Rail Properties, it shall, unless the parties agree otherwise, assume full maintenance responsibilities for said Conrail Rail Properties from the effective date of such abandonment.

## ARTICLE IX

### DISPUTE RESOLUTION

#### Section 9.01 Resolution of Disputes Concerning Operations

(a) The parties hereto shall make every reasonable effort to settle any dispute arising out of this Agreement without resorting to arbitration or litigation. If the parties so agree, they may retain a disinterested person experienced in railroad



operations or an accountant or attorney, if appropriate, to render his or her objective advice and opinions, which shall be advisory only and not binding unless the parties agree in writing to be bound by his or her judgment in a particular instance.

(b) The following types of disputes arising out of this Agreement which have not been settled pursuant to Section 9.01(a) shall be settled by arbitration pursuant to Section 9.01(c):

(1) Disputes arising out of Section 3.01(f), Section 3.02(j), Section 3.03, Article IV, Article VII, Article X through Article XIII and Section 14.03; and

(2) Disputes regarding payments required to be made hereunder for operating rights, services or equipment provided by either party to the other;

provided, however, that this Section 9.01(b) and Section 9.01(c) shall not apply to disputes (i) involving third parties, (ii) to which Article VI applies, or (iii) which relate to the right to operate service. If there is any doubt as to whether Sections 9.01(b) and (c) require arbitration of a specific dispute, the doubt shall be resolved by a determination that these Sections do not apply and that arbitration is not required.

(c) Any controversy which is required to be arbitrated by Section 9.01(b) that cannot be resolved within thirty (30) calendar days (unless the parties agree in writing to another time period), shall be submitted to disinterested arbitrators, one of whom shall be appointed by Conrail and the other of whom shall be appointed by SEPTA, and the two arbitrators so chosen shall select a third arbitrator. The decisions of a majority of



the arbitrators shall be final and conclusive as to the dispute(s) between the parties hereto. In the event that the two appointed arbitrators shall be unable to agree upon a third arbitrator within thirty (30) days after the appointment of the second arbitrator, such third arbitrator shall be appointed, upon the application of either party hereto and upon reasonable notice to the other party, by the American Arbitration Association. If any arbitrator shall decline or fail to act, the party or persons by whom said arbitrator was chosen or appointed, as the case may be, shall act to appoint another arbitrator. Once all three arbitrators have been selected, the panel shall establish appropriate procedures for hearing the dispute and shall render a decision within 120 days from the date the third panel member was selected. During the pendency of such arbitration proceeding, the business, operations to be conducted, and compensation for service under this Agreement, to the extent that they are the subject of such controversy, shall continue to be transacted, used, and paid in the manner and form existing prior to the arising of such controversy, unless the arbitrators shall make a preliminary ruling to the contrary.

#### ARTICLE X

#### REGULATORY APPROVAL

##### Section 10.01 Regulatory Approval

Each party shall have the obligation to obtain all necessary

regulatory and other approvals for it to enter into this Agreement, any modification or amendment of this Agreement, or to comply with any of the provisions of this Agreement. The Owner shall be under no obligation to comply with any requested modification or amendment of this Agreement or to comply with any provision of this Agreement if it determines that such modification or amendment or proposed action under this Agreement requires the approval of any regulatory body, unless and until the User provides to the Owner sufficient evidence that such approval has been obtained or is not required.

## ARTICLE XI

### TRACK REHABILITATION

#### Section 11.01 Trenton Line Track Rehabilitation

Conrail agrees to rehabilitate Tracks 1 and 2, between M.P. 21.6 and M.P. 26.9 on the Trenton Line at a firm, fully installed price of \$3,458,081, which price is conditioned upon SEPTA providing Conrail with access to these tracks in accordance with the terms and conditions set forth in Exhibit 9. SEPTA shall not be required to provide rail, and Conrail will retain the rail that is picked up from the line. The specifications for said installation shall conform with Conrail's MW-4, and the scope of the work to be performed shall be as set forth in Exhibit 9. SEPTA shall reimburse Conrail for the costs of this project, as set forth above, from the Casualty Reserve Fund (Fund). The lease of this track to SEPTA, as specified in

Section 4.04 (b), shall be effective immediately upon completion of the rehabilitation work. SEPTA will assume responsibility for the maintenance of Tracks 1 and 2, including Neshaminy Interlocking, upon the effective date of the lease. Conrail and SEPTA agree to share the maintenance and replacement of jointly used bridges and culverts based on a percentage developed from the number of each party's tracks utilizing said common facility. Cable work required by SEPTA for Tracks 1 and 2 shall be performed by SEPTA with either its own or contract forces, and SEPTA shall utilize approximately \$2.2 million for such work from the Casualty Reserve Fund, provided however that any amount in excess of \$2.2 million shall require Conrail's specific approval. SEPTA agrees that the Fund shall maintain a balance that is equal to or in excess of 117 percent of the reasonable projected settlement values of the remaining claims and lawsuits covered by the Fund, which are those set forth on Exhibit 13. If the Fund's balance falls below this 117 percent level or would fall below said level by an expenditure for the work described above, Conrail shall have the right to deny any further withdrawal of monies from the Fund for said work. Exhibit 13 shall be revised from time to time as claims and lawsuits are settled or final judgments paid. SEPTA further agrees that it will indemnify and reimburse Conrail for any liability incurred by Conrail due to insufficient monies in the Fund to satisfy any liability resulting from the claims and lawsuits listed on Exhibit 13.

## ARTICLE XII

### LINE SALES

#### Section 12.01 Bethlehem Line

Conrail, within sixty days after execution of this Agreement, shall convey to SEPTA the Bethlehem Line right-of-way, including track, from M.P. 45.4 to M.P. 53.1 (a point 570 feet south of the south side of High Street in Hellertown) for consideration of \$1.00. The conveyance will include adjacent Conrail properties and all other improvements. Conrail will leave the track in place, and will have no further rehabilitation obligations on this line between M.P. 24.4 to 45.4. If SEPTA begins operations beyond M.P. 53.1, SEPTA shall be responsible for the cost of any modifications or improvement which may be necessary in order to avoid unreasonable interference with Conrail's freight operations. Conrail shall have the right to operate over this Line under the terms and conditions of this Agreement.

#### Section 12.02 Stoney Creek Branch

Conrail, within sixty days after execution of this Agreement, shall convey to SEPTA the 1.5 miles of Conrail's right-of-way from Dale to Kneedler, on Conrail's Stoney Creek Branch, for consideration of \$1.00. The conveyance will include adjacent Conrail properties and all improvements. Conrail shall reserve a perpetual (subject to termination upon abandonment of freight service), irrevocable and exclusive easement for freight

service which does not unreasonably interfere with commuter operations. Such easement shall be assignable for such purposes only to (1) successors in interest to Conrail, or (2) independent contractors or agents of Conrail which operate such freight service or any part thereof for the benefit of Conrail, provided, however, that notwithstanding any provision to the contrary herein, such easement shall be assignable for such purposes to any purchaser from Conrail of a material portion of Conrail's assets pertaining to freight service in SEPTA's commuter region or any portion thereof. Such reservation shall be reflected in the deeds transferring the right of way, and shall be made without payment of consideration from Conrail to SEPTA. The terms of the use by Conrail (including compensation therefor) of SEPTA's right of way pursuant to this reservation shall be in accordance with this Agreement or any successor trackage rights agreement.



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ARTICLE XIII  
RIGHTS OF FIRST REFUSAL

Section 13.01 Rights of First Refusal to Purchase  
Morrisville, Enola and Trenton Lines

Conrail grants to SEPTA, for the duration of this Trackage Rights Agreement, a right of first refusal to acquire by purchase the following Conrail rights of way:

- (a) Morrisville Line - between a point just west of CP King and Thorn, which shall include the properties located within the geographic areas identified as potential station sites in Exhibit 10 and the Conrail property in King of Prussia located between Henderson Road and the Schuylkill Expressway;
- (b) Enola Branch - between Park and the Chester - Lancaster county line;
- (c) Trenton Line - between Cheltenham and Berry, which shall include the properties located within the geographic areas identified as potential station sites in Exhibit 11;

including such improvements to the involved rights of way as may be described in the particular sale agreement. "Rights of way" includes the space required for all running tracks and passing sidings (whether or not such tracks or sidings were ever constructed or are still in place), but does not include adjacent properties or yards except as set forth in Exhibits 10 and 11, provided, however, that this Section 13.01 shall not apply to any property located within the geographic areas identified in Exhibits 10 and 11 that was sold or leased, or is the subject of

an agreement of sale or lease entered into, prior to the effective date of this agreement.

In the event Conrail enters into sale negotiations with a third party with respect to all or any portion of the above rights of way, Conrail shall give written notice thereof to SEPTA. If sale negotiations result in Conrail entering into a sale agreement (which shall be subject to this provision) for all or any portion of the above-described right-of-way, Conrail shall give notice to SEPTA and provide SEPTA with the terms and conditions of the sale agreement with the third party. Any property sold to SEPTA under this provision shall be subject to the same terms, conditions, reservations and exceptions as set forth in the proposed sale to a third party. SEPTA shall have 60 days after notice of the sale agreement to advise Conrail of its intent to exercise its right of first refusal, which notice shall be accompanied by a statement from SEPTA's General Manager indicating that a proposal has been submitted to the SEPTA Board seeking authority and funding, if necessary, to meet the terms and conditions of the sale of any rights-of-way properties to a third party. Thereafter, SEPTA shall have 45 days to consummate the purchase of the property. In the event SEPTA is unable to either make its election or consummate the purchase within the above specified time limits, SEPTA shall notify Conrail of this inability and, if SEPTA desires to preserve its right of first refusal, it shall tender Conrail a payment of 10% of the purchase price for an option to extend the right of first refusal for an additional period of time, not to exceed 90 days. The option

payment will be considered as part of the purchase price if SEPTA exercises its option; however, if the option is not exercised, Conrail shall retain the option payment as consideration for extending the right of first refusal. The foregoing right of first refusal shall not apply to any sale or lease of Conrail's Earnest Yard, or any portion thereof, to a corporation, partnership, company or individual that utilizes or will utilize rail service and will tender rail shipments to, or receive rail shipments from, Conrail.

#### ARTICLE XIV

#### GENERAL PROVISIONS

##### Section 14.01 Labor Rights

(a) The User agrees that its entrance upon and use of the Owner's properties is for its corporate purpose of providing service pursuant to appropriate authority and that such use does not create or continue any rights on the part of the User's employees or its contractors with respect to any other current or future use of the Owner's properties, including without limitation, maintenance, operation, rehabilitation, and improvement thereof by the Owner or Owner's contractors. The User shall indemnify, defend, and hold harmless the Owner and the Owner's contractors against any liability arising from any claims or employment rights, employment protection, including without

limitation rights or claims arising from the performance of any work for the User on the Owner's properties by the Owner or the Owner's contractors under this Agreement.

(b) Nothing contained in this Agreement shall require either party to perform any service or take any action which would violate any term or condition of any then current labor agreement between the respective parties and any organization representing any of their respective employees or applicable to the respective parties by reason of operation of law.

#### Section 14.02 Successors and Assigns

This Agreement shall inure to the benefit of and be binding upon the successors and assigns of the parties hereto.

#### Section 14.03 Force Majeure

(a) SEPTA will be excused from any nonfinancial obligations under this Agreement where nonperformance is occasioned by any event beyond its control. Performance shall be excused only so long as and to the extent that any such event shall prevent performance.

(b) Conrail will be excused from any nonfinancial obligations under this Agreement where nonperformance is occasioned by any event beyond its control. Performance shall be excused only so long as and to the extent that any such event shall prevent performance.



Section 14.04 Amendment

This Agreement may be amended only by an instrument in writing signed by the parties to this Agreement.

Section 14.05 Notices

(a) Any notices required in this Agreement shall be sent to the parties at the addresses listed below, unless either party shall inform the other party in writing of any change in that address:

Conrail: Consolidated Rail Corporation

Attention: Senior Vice President, Operations  
1740 Six Penn Center Plaza  
Philadelphia, PA 19103-2959

SEPTA: Southeastern Pennsylvania Transportation Authority

(i) Chief Operations Officer/General Manager  
714 Market Street  
Philadelphia, PA 19106-2385

(ii) Assistant General Manager, Railroad Division  
1515 Market Street  
Philadelphia, PA 19102

(b) All approvals and consents required under this Agreement shall be in writing, signed by a person designated in writing for such purposes.

(c) With respect to Sections 4.03(a)(1) and 4.06(a), notice and approval of maintenance may be evidenced respectively by submission and initialing of bulletin orders.

(d) Copies of notices by Conrail under Section 13.01 also shall be sent to SEPTA, Director of Real Estate, 714 Market Street, Philadelphia, PA 19106-2385.

Section 14.06 Effect of Execution and Performance

The parties do not, by reason of their execution of and the performance of their obligations under this Agreement, assume any other obligations or liabilities not imposed upon them by law.

Section 14.07 No Representation and Waivers

Except as expressly provided herein, the parties make no representations or warranties and waive no rights or remedies.

Section 14.08 Nondiscrimination

The parties shall comply with the terms and conditions contained in Exhibit 12.

Section 14.09 No Third Party Beneficiaries.

No provision of this Agreement is intended to or shall create any rights in any parties other than Conrail and SEPTA and their successors.

IN WITNESS WHEREOF, the parties hereto have executed this Agreement as of the day first above written.

WITNESS:

*Lucie S. Shiban*

WITNESS:

*Mary C. Donahue*  
SECRETARY

CONSOLIDATED RAIL CORPORATION

By: *J. A. Hasen*

SOUTHEASTERN PENNSYLVANIA  
TRANSPORTATION AUTHORITY

By: *Louis Gambaccini*





**VIA FAX TO:**

(757) 533-4884;  
(215) 994-3151;  
(904) 359-1248;  
(202) 783-5929;  
(215) 209-7152

AND U.S. MAIL

October 1, 1997

Mr. Bill Schafer  
Director, Strategic  
Planning Department  
Norfolk Southern Corp.  
Three Commercial Place  
Norfolk, VA 23510-9207

H. Craig Lewis, Esquire  
Regional Vice President  
Norfolk Southern Corp.  
37th Floor  
1717 Arch Street  
Philadelphia, PA 19103

Mr. J. Randall Evans  
CSX Transportation  
500 Water Street, J150  
Jacksonville, FL 32202

Mr. Paul H. Reistrup  
1331 Pennsylvania  
Avenue, N.W.  
Suite 560 -  
National Place  
Washington, D.C. 20004

R. Paul Carey  
General Manager - Contracts  
Consolidated Rail Corporation  
Two Commerce Square  
2001 Market Street  
P.O. Box 41416  
Philadelphia, PA 19101-1416

**RE: SEPTA Position on Continuing Operating Agreement**

Dear Messrs. Schafer, Lewis, Evans, Reistrup and Carey:

This is a useful time to summarize SEPTA's position with regard to the impact to SEPTA arising from the proposed takeover of Conrail by CSX Transportation (CSXT) and Norfolk Southern (NS) (the "Takeover").

SEPTA seeks to have Conrail, CSXT and NS agree to a continuation of the existing Trackage Rights Agreement, dated as of October 1, 1990, for a period of ten (10) years commencing with the effective date of the Takeover in 1998 with no changes (except for dispatching as

*Bill Schafer; H. Craig Lewis, Esquire, J. Randall Evans;  
Paul H. Reistrup and R. Paul Carey  
October 1, 1997  
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discussed below) to give all parties an orderly set of parameters to plan future operations. This agreement should also include an automatic extension period for five (5) years unless one of the parties seeks to renegotiate the agreement.

With respect to dispatching, one of SEPTA's main concerns is the on-time performance of its commuter passenger operations. It would be well to have SEPTA continue to dispatch train operations over the Trenton Line from Newtown Junction to West Trenton as has been done continuously since January 1, 1983 without problems to Conrail. It is important to note that the Newtown Junction to Cheltenham Junction and the Neshaminy to West Trenton portions of the above-cited property over which SEPTA trains currently run are subject to a perpetual easement in favor of SEPTA under the September 1, 1982 Transfer Agreement. Since SEPTA has been continuously dispatching trains since 1983 over property in which SEPTA has a property interest, the provision in the current Trackage Rights Agreement that gives Conrail (and presumably its successors) the right to take back dispatching operations on 60 days notice should be eliminated.

It is also important to the SEPTA Board and to the customers in this region that Conrail, CSXT and NS agree to seriously negotiate the extension of SEPTA service on the Harrisburg Line to Reading and on the Morrisville Line between Dale and Morrisville. Pursuant to the September 1, 1982 Transfer Agreement, SEPTA already has the right to operate commuter rail operations on these lines, subject only to an agreement on the use of such trackage rights. SEPTA believes this provision would survive the Takeover. The proposal by SEPTA to use a different mode of operation is one that is currently gaining favor around the nation because of the enormous cost savings of having a non-railroad mode of passenger operations.



Bill Schafer; H. Craig Lewis, Esquire, J. Randall Evans;  
Paul H. Reistrup and R. Paul Carey  
October 1, 1997  
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Finally, SEPTA has still not received a response to the issues raised in its July 22, 1997 letter to CSXT and NS. In particular, SEPTA awaits your comments about (1) the routing of freight traffic to serve the Lansdale Cluster; (2) possible impacts to SEPTA's R-6 Norristown Line operations due to trackage rights granted to CSXT by NS for freight traffic through Norristown; and (3) the volume of freight traffic expected to use Chester Secondary Line over which SEPTA's R-1 Airport Line operates.

SEPTA has sought in good faith to lay out legitimate and limited issues so that all parties could reach a reasonable agreement in the shortest period of time. We understand that you believe this to be the case, as well. What better way to show the Surface Transportation Board that CSXT and NS are seriously concerned about the impact of the takeover of commuter operations than to reach an early agreement which memorializes and extends the workable and mutually advantageous arrangements under which SEPTA and Conrail have interacted over the past 15 years?

I attach for your information two letters, dated September 29, 1997 from Senators Santorum and Specter, addressed to Chairman Goode and Chairman Snow supporting SEPTA's position.

We look forward to hearing from you by the end of next week so our negotiations can continue.

Very truly yours,

Bernard Cohen  
Assistant General Manager  
- Strategic Business and  
Ridership Development

cc: John K. Leary Jr.