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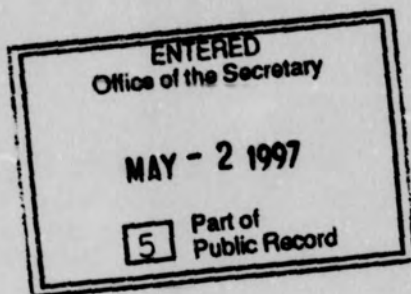
BEFORE THE
SURFACE TRANSPORTATION BOARD

Finance Docket No. 33388

*CSX Corp. et al — Control and Operating
Leases/Agreements — Conrail Inc. et al.*



COMMENTS OF
THE NATIONAL INDUSTRIAL TRANSPORTATION LEAGUE
ON PROPOSED PROCEDURAL SCHEDULE



The National Industrial
Transportation League
1700 North Moore Street
Suite 1900
Arlington, VA 22209

By: Nicholas J. DiMichael
Frederic L. Wood
Donelan, Cleary, Wood & Maser, P.C.
1100 New York Avenue, NW, Suite 750
Washington, DC 20005-3934
Tel. (202) 371-9500

Dated: May 1, 1997
Due Date: May 1, 1997

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SURFACE TRANSPORTATION BOARD

Finance Docket No. 33388

*CSX Corp. et al — Control and Operating
Leases/Agreements — Conrail Inc. et al.*



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THE NATIONAL INDUSTRIAL TRANSPORTATION LEAGUE
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Pursuant to Decision No. 2 in this proceeding (served April 21, 1997), 62 Fed Reg. 19390, The National Industrial Transportation League (the League) hereby comments on the procedural schedule proposed to the Board for adoption by the Applicants in this proceeding.¹ The National Industrial Transportation League *strongly* believes that the highly compressed schedule proposed by the Applicants should *not* be adopted in this proceeding. The schedule proposed by the League is set out in Attachment A.

ARGUMENT

The procedural schedule proposed by the Applicants would deprive the League and other parties of a fair opportunity to participate in this important proceeding. It would also deprive the Board of an opportunity to receive and consider a fully-developed record on the important issues that are involved. To require interested parties, including the League, to expend the very substantial

¹ The Applicants have proposed a schedule based largely on the schedule adopted by the Interstate Commerce Commission in Finance Docket No. 32760, *Union Pacific Corp. et al — Control and Merger — Southern Pacific Rail Corp. et al.* ("UP/SP"). See CSX/NS-4.

resources necessary to analyze this major railroad control transaction, under the time constraints proposed by the Applicants, would be highly prejudicial and unfair. It would deprive the League, and other representatives of the shipping public, of a fair opportunity, under the circumstances of this proceeding, both to review and analyze the voluminous and detailed evidence to be submitted in support of and in opposition to the application; any related abandonment applications to be filed by the Applicants; and the inconsistent applications that may be filed by other rail carriers and/or shippers.

Most importantly, this proposed schedule will foreclose an adequate opportunity to develop and present evidence on whether or not this transaction, as proposed by the Applicants, can be found to satisfy the statutory standard of being "consistent with the public interest." 49 U.S.C. §11324(c). The application and implementation of that standard is highly dependent on the factual circumstances of each case. *Detroit, T. & I. R. Co. v. U.S.*, 725 F.2d 47, 51 (6th Cir. 1984). Therefore, the Board must not overlook its obligation to permit the development of a record of these circumstances by conducting a fair and adequate "public hearing," as required by the provisions of both the Interstate Transportation Act and the Administrative Procedure Act. 49 U.S.C. §11324(a), and 5 U.S.C. §551 *et seq.*

The fundamental error underlying the Applicant's proposed procedural schedule is its belief that it will enable the Board to determine, in accordance with the requirements of law, that the transaction at issue is one that will meet the public interest standards of the Interstate Transportation Act. 49 U.S.C. §11324(b)(1) and (c). The authority to make that determination is given by Congress to the Board. But in accordance with fundamental notions of due process and fair procedures, the Board has an obligation to adopt a procedural schedule that allows *all* of the parties to have an adequate opportunity to participate in this proceeding. That determination must be made with appropriate recognition of the due process

requirements embodied in the requirement of the Act for a public hearing on this application.

With all due respect, the League believes that the Board should not again become so caught up in the perceived need to convince the world that it can handle a major rail merger expeditiously, that it blinds itself to the fact that the hasty procedures that have been proposed for a matter of this significance are *not* fair procedures. They are not fair to the parties, but most importantly, such haste is not fair to the Board itself, because a headlong rush to decision may deprive the Board of the opportunity to receive meaningful evidence and argument from the affected parties on the significant issues raised by this proposed rail merger. The Board should not adopt procedures in this proceeding that prevent it from carefully and correctly discharging its statutory obligation to determine where the public interest lies. The statutory requirement for public hearings in a rail merger proceeding reflects a recognition by Congress that decisions on such transactions are far too important to be based on summary procedures.

The principal area of concern for the League is the time provided in the schedule for parties other than the Applicants to conduct discovery, prepare for and conduct depositions and prepare written evidence. The Applicants propose that this time period be 120 days after the filing of the primary application. Decision 2 at 4. This is the same time established by the Board in the procedural schedules adopted for the now-dismissed separate merger proceedings proposed by CSX and NS. Fin. Dkt. No. 33220, *CSX Corp. et al. — Control and Merger — Conrail Inc. et al.*, Decision 8 (served Jan. 30, 1997) and Fin. Dkt. No. 33286, *Norfolk Southern Corp. et al. — Control and Merger — Conrail Inc. et al.*, Decision 4 (served Jan. 30, 1997).² Maintenance of this 120-day period is essential, as the Board

² For the convenience of the Board and the parties, a comparison of the various adopted and proposed procedural schedules discussed in these comments is in Attachment B.

implicitly recognized in the prior proceedings, by declining to adopt the 75-day period it had first proposed. But beyond that initial period, there must also be adequate periods for developing a record related to the application, as well as any inconsistent or responsive applications. Finally, parties should have adequate time to prepare briefs to the Board summarizing the record and addressing the issues.

The League is also sympathetic with the Board's need (in an era of declining resources) to have adequate time for consideration of the record in preparing its decision, after a fully and carefully developed record for decision has been developed. The Board should not allow its role in this proceeding to be reduced to "rubber-stamping" the Applicants' merger application without carefully considering, on the basis of an adequate record, the public interest issues that it raises.

This control transaction involves all three remaining major carriers in the eastern United States and could involve troubling competitive issues in several major regions of the country. In that light, the Board must provide itself with a schedule that allows for adequate time period for development of both the record and its decision.

If approved as proposed, this transactions will result in the existence of only two major rail systems in the eastern third of the United States. The new statute explicitly requires the Board to consider imposing pro-competitive conditions in the form of "the divestiture of parallel tracks or requiring the granting of trackage rights and access to other facilities." 49 U.S.C. §11324(c). Moreover, the Board will need to consider whether to impose the kind of broad-based competitive conditions imposed in the recent *UP/SP* decision in order to replicate the direct and indirect competition that might be lost if the proposed transaction is approved. *UP/SP*, Decision 44 at 106 and 146.

There are thus issues raised by this transaction that implicate the Board's carefully established policies governing railroad consolidations, which focuses on, among other things, the potential harm that the transaction may cause to the public, and the conditions, if any, that are necessary to ameliorate such harm without eliminating the public benefits. 49 C.F.R. §1180.1(c)(2) and (d). Those issues *cannot* be adequately addressed with regard to a transaction of this magnitude without a careful and thorough review of the Applicants' evidence, and an adequate opportunity for other parties to respond to that evidence, both by developing their own evidence and by testing the probative value of Applicants' supporting evidence.

Furthermore, the Applicants can be expected to file thousands of pages of evidence and supporting materials when they file their primary application and the related abandonment applications on or before July 10, 1997. In addition, under the proposed procedures, a document depository to be established by Applicants will contain numerous file cabinets full of supporting work papers and materials that must be reviewed, catalogued and analyzed in order to understand the evidence submitted by Applicants. Discovery is likely to be even more extensive and time-consuming than in either the BN/SF or the UP/SP proceedings. Any schedule, whether it is the summary one proposed by the Applicants, or any other, depends for its ultimate success, as in any proceeding of this complexity and importance, on the fair and adequate opportunity for parties to obtain necessary and appropriate discovery.

The Board's rail merger regulations explicitly encourage public participation in the process of considering a rail merger. 49 C.F.R. §1180.1(h). If that invitation is not to become a hollow one, the Board must adopt a more reasonable schedule than the one proposed by Applicants.

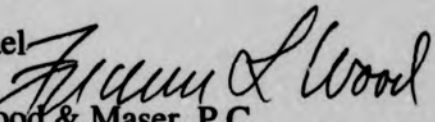
It should also be kept in mind that the Applicants will have had several months to prepare their primary application and supporting evidence. A corresponding amount of time is essential for the responsive evidence to be prepared. Thus, the League urges the Board *not* to adopt the schedule the Applicants proposed, but to adopt the schedule attached to these comments. That schedule provides sufficient time for conduct of discovery after each round of evidentiary submission and allows a reasonable time for the preparation of the appropriate responsive evidence. It also provides the Board with adequate time to review the record and reach a reasoned decision.

CONCLUSION

In light of the foregoing considerations, the Board should not adopt the procedural schedule proposed by Applicants. It should modify the schedule proposed by the Applicants in accordance with the suggested schedule in Attachment A. The League strongly but respectfully urges the Board to recognize the need for careful and balanced development of a record for decision on this important proceeding and to adopt the schedule proposed in Attachment A hereto.

Respectfully submitted,

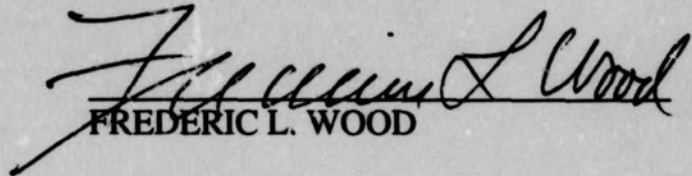
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1700 North Moore Street
Suite 1900
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By: Nicholas J. DiMichael
Frederic L. Wood 
Donelan, Cleary, Wood & Maser, P.C.
1100 New York Avenue, NW, Suite 750
Washington, DC 20005-3934
Tel. (202) 371-9500

Dated: May 1, 1997
Due Date: May 1, 1997

CERTIFICATE OF SERVICE

I hereby certify that I have this 1st day of May, 1997, served a copy of the foregoing comments upon counsel of record for the Applicants both by first-class mail and by telecopy, and upon all other parties of record, by first-class mail, postage prepaid, in accordance with the Board's Rules of Practice.


FREDERIC L. WOOD

ATTACHMENT A

F-30	Preliminary Environmental Report provided to Section of Environmental Analysis
F	Primary application and related applications filed.
F+30	Board notice of acceptance of primary application and related applications served and published in Federal Register, including notice of any transaction-related abandonment proposals
F+45	Notification of intent to participate in proceeding due, including notice of intent to participate in abandonment proceedings
F+60	Description of anticipated inconsistent and responsive applications due.; petitions for waiver or clarification due with respect to such applications.
F+120	Inconsistent and responsive applications due. All comments and protests, requests for conditions and any other opposition evidence and arguments due (and supporting evidence) due. Comments and supporting evidence by U.S. Department of Transportation and Department of Justice due. Opposition submissions, requests for public use conditions and Trails Act requests due for all transaction-related abandonment proposals
F+135	Notice of acceptance (if required) of inconsistent and responsive applications served and published in the Federal Register.
F+150	Response to inconsistent and responsive applications due. Response to comments, protests, requested conditions and other opposition to primary applications due. Rebuttal in support of primary applications due and related applications due. Rebuttal [and] responses to requests for public use and Trails Act conditions for transaction-related abandonments due
F+175	Rebuttal in support of inconsistent and responsive applications due.
F+205	Briefs due, all parties (not to exceed 50 pages), except that CSX and NS may file separate briefs, each not to exceed 50 pages..
F+230	Oral argument (at Board's discretion).
F+235	Voting conference.
F+280	Date for service of final decision.

Notes: Immediately upon each evidentiary filing, the filing party will place all documents relevant to the filing (other than documents that are privileged or otherwise protected from discovery) in a depository open to all parties, and will make its witnesses available for discovery depositions. Access to documents

subject to protective order will be appropriately restricted. Parties seeking discovery depositions may proceed by agreement. Relevant excerpts of transcripts will be received in lieu of cross-examination at the hearing, unless cross-examination is needed to resolve material issues of disputed fact. Discovery on responsive applications will begin immediately upon their filing. The Administrative Law Judge assigned to this proceeding will have the authority initially to resolve any discovery disputes.

COMPARISON OF PROCEDURAL SCHEDULES

ITEM	UP/SP (Decision #6)	CSX Dec. No. 8 NS Dec. No. 4	Applicants' Proposed	NITL Proposed
Preliminary Environmental Report provided to Section of Environmental Analysis		F-30	F-30	F-30
Primary application (including the Environmental Report) and related applications filed.	F	F	F	F
Board notice of acceptance of primary application and related applications [petitions, and notices] published in the <i>Federal Register</i> , including notice of any transaction-related abandonment proposals.	F+30	F+30	F+30	F+30
Notification of intent to participate in proceeding due, including notice of intent to participate in abandonment proceedings.	F+45	F+45	F+45	F+45
Description of anticipated inconsistent and responsive applications due; petitions for waiver or clarification due with respect to such applications.	F+60	F+60	F+60	F+60
Inconsistent and responsive applications due. All comments, protests, requests for conditions, and any other opposition evidence and arguments due. Comments by U.S. Department of Justice (DOJ) and U.S. Department of Transportation (DOT) due. Opposition submissions, requests for public use conditions, and Trails Act requests due for all transaction-related abandonment proposals.	F+120	F+120	F+120	F+120
Notice of acceptance (if required) of inconsistent and responsive applications published in the <i>Federal Register</i> .	F+135	F+150	F+135	F+135

ITEM	UP/SP (Decision #6)	CSX/NS (Decision No. __)	Applicants Proposed	NITL Proposed
Response to inconsistent and responsive applications due. Response to comments, protests, requested conditions, and other opposition due. Rebuttal in support of primary application and related applications due. Rebuttal [and] responses to requests for public use and Trails Act conditions for transaction-related abandonment's due.	F+150	F+180	F+150	F+150
Rebuttal in support of inconsistent and responsive applications due.	F+165	F+225	F+165	F+175
Briefs due, all parties (not to exceed 50 pages), except that CSX and NS may file separate briefs, each not to exceed 50 pages.	F+185	F+260	F+185	F+205
Oral argument (at Board's discretion).	F+215	F+300	F+200	F+230
Voting conference.	F+217	F+305	F+205	F+235
Date of service of final decision	F+255	F+365	F+255	F+280

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SONNENSCHN NATH & ROSENTHAL

CHICAGO
LOS ANGELES
NEW YORK
SAN FRANCISCO
ST LOUIS

1301 K STREET N.W.
SUITE 600, EAST TOWER
WASHINGTON, D.C. 20005

May 1, 1997



(202) 408-6400
FACSIMILE
(202) 408-6399

DIRECT LINE
(202) 408-6351

By Hand

Hon. Vernon A. Williams, Secretary
Surface Transportation Board
1925 K Street, N.W., Room 714
Washington, D.C. 20423-0001

Re: Finance Docket No. 33388, CSX and Norfolk Southern -- Control and Lease -- Conrail

Dear Secretary Williams:

On behalf of Canadian National Railway Company, enclosed are the signed original and 25 copies of its Comments On Proposed Procedural Schedule (CN-6). For your convenience, a 3.5-inch floppy diskette in Wordperfect 5.1 is enclosed.

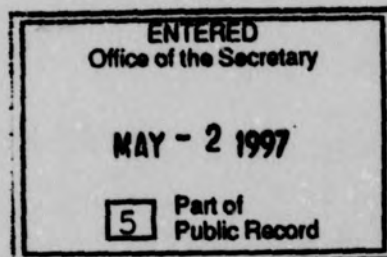
Kindly stamp the enclosed additional copy of this letter at the time of filing and return it to our messenger.

Sincerely yours,

L. John Osborn

Enclosures

cc: Director David M. Konschnik
Administrative Law Judge Leventhal
Counsel for all parties



BEFORE THE
SURFACE TRANSPORTATION BOARD

Finance Docket No. 33388



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

CANADIAN NATIONAL RAILWAY COMPANY'S
COMMENTS ON PROPOSED PROCEDURAL SCHEDULE

Jean Pierre Ouellet
Chief Legal Officer and Corporate
Secretary
Canadian National Railway Company
935 de La Gauchetiere Street West
16th Floor
Montreal, Quebec
H3B 2M9
(514) 399-2100

L. John Osborn
Douglas E. Rosenthal
Amber C. Haskett
Sonnenschein Nath & Rosenthal
1301 K Street, N.W.
Suite 600 East
Washington, D.C. 20005
(202) 408-6351

Attorneys for:
CANADIAN NATIONAL RAILWAY COMPANY

Dated: May 1, 1997

BEFORE THE
SURFACE TRANSPORTATION BOARD

Finance Docket No. 33388

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

CANADIAN NATIONAL RAILWAY COMPANY'S
COMMENTS ON PROPOSED PROCEDURAL SCHEDULE

Canadian National Railway Company ("CN") hereby provides the following comments on the procedural schedule proposed by the Joint Applicants¹ in CSX/NS-4, to which the Board invited comments in Decision No. 2, served April 21, 1997.

For the reasons set forth below, the 255-day schedule proposed by applicants is unduly short, and should not be adopted. The Board should retain the 365-day procedural schedule earlier adopted for the separate proposals to acquire Conrail in CSX/Conrail² and

¹ As used herein, unless the context indicates otherwise, "CSX" includes CSX Corporation and CSX Transportation, Inc., "NS" includes Norfolk Southern Corporation and Norfolk Southern Railway Company, and "Conrail" includes Conrail, Inc. and Consolidated Rail Corporation. CSX, NS and Conrail are collectively referred to as "Joint Applicants."

² See Finance Docket No. 33220, CSX Corporation and CSX Transportation, Inc. -- Control and Merger -- Conrail, Inc. and Consolidated Rail Corporation, Decision No. 8, served January 30, 1997 (unprinted) ("CSX/Conrail").

NS/Conrail.³ A 365-day schedule constitutes the minimum amount of time needed to conduct proceedings on a transaction as unique and complex as that presented in the instant case, which involves the proposed purchase and break-up of the largest railroad in the Northeast by its only other large railroad competitors in the East. The Joint Applicants, moreover, have advanced no valid reasons why more expedited treatment is needed.

A. The "Front End" of the Proposed Schedule Is Appropriate, and Should Not Be Shortened or Altered

As a preliminary matter, there should be no controversy as to the "front end" of the schedule proposed by Joint Applicants, which is identical to the procedural schedules earlier adopted by the Board in CSX/Conrail and NS/Conrail. When the Board adopted those schedules, it received and considered extensive comments on the issue of whether opposition evidence and requests for conditions should be due on day F + 120, at the same time as inconsistent and responsive applications. This issue had two facets. The first concerned the undue burden that would result if opposition evidence and requests for conditions were required to be filed sooner than day F + 120. The second, as noted by CSX and NS themselves, concerned the impracticality of having separate due dates, and the distinct advantages of having a "consolidated" due date at F + 120 for all opposition evidence, requests for conditions, and responsive (including inconsistent) applications. The Board wisely adopted this approach.

³ See Finance Docket No. 33286, Norfolk Southern Corporation and Norfolk Southern Railway Company -- Control -- Conrail, Inc. and Consolidated Rail Corporation, Decision No. 4, served January 30, 1997 (unprinted) ("NS/Conrail").

In their petition now seeking the adoption of a 255-day schedule, the Joint Applicants properly urge that the Board not alter the "front end" of the schedule previously adopted. CSX/NS-4 at 6-7. They recognize that those deadlines "reflect the well-considered, unanimous preferences" of all interested parties.

In short, there is no controversy regarding the "front end" of the schedule through F + 120, the Board should adhere to the approach followed in its earlier decisions.

B. The "Back End" of the 255-Day Schedule Proposed by Joint Applicants Is Unduly Truncated, and the Board Should Retain the 365-Day Schedule Earlier Adopted

The Joint Applicants' proposal for the "back end" of the schedule is onerous, unrealistic, and seeks expedition at the expense of full, thoughtful consideration of the issues raised by the proposed transaction. The application in this case will seek approval of the largest merger in the history of the railroad industry. The setting is the East -- and, to a large extent, the Northeast -- where no major railroad merger has occurred for many years. In a very real sense, the instant proceedings will constitute the resumption -- after a more than two-decade hiatus -- of a restructuring process that began in the 1970s. In its earlier phase, this restructuring process involved massive bankruptcies, extreme disruptions in rail service, and an unusually high level of governmental participation in the form of special legislation, the expenditure of substantial federal funds, and governmental ownership of Conrail. In order to decide the instant case, it will be necessary and appropriate to consider not only the current competitive environment, but also the unique circumstances and policy considerations that led to the creation of Conrail. A 365-day schedule is the minimum amount of time that the Board should allow for these purposes.

Indeed, the Board itself previously recognized the appropriateness of a 365-day schedule for deciding any merger involving Conrail. As the agency stated: "In summary, the procedural schedule we adopt here consisting of a 365-day time period is both fair to all of the parties and allows us sufficient time to resolve the unique issues that we anticipate will arise in connection with any merger proposal involving Conrail." See CSX/Conrail, Decision No. 8 at 8, and NS/Conrail, Decision No. 4 at 8 (emphasis added).⁴

The accelerated, 255-day schedule now proposed by Joint Applicants is based on a faulty premise. Joint Applicants argue that the 365-day schedule early adopted by the Board was based entirely on the likelihood that a major inconsistent application would be filed. They say that "the situation of the two other major rail carriers in the Eastern United States filing inconsistent and hostile application [sic] to acquire all or substantially all of Conrail in the same docket is no longer presented, and adjustments tailored to that situation are not required." CSX/NS-4 at 4-5. There are two significant flaws in this argument.

The first is an assumption that the existing 365-day schedule would have proven adequate to allow proper consideration of competing, inconsistent applications to acquire Conrail. Would have been possible, within just the 60-day period between F + 120 and F + 180, to have completed all the steps required to address not just "garden variety" responsive applications, but also a separate and inconsistent proposal to acquire Conrail?⁵ While we will

⁴ The Board also stated that the schedule must allow more time than otherwise might be needed "[b]ecause there has not been a major merger in the East since the early 1980s" See CSX/Conrail, Decision No. 3 at 7, and NS/Conrail, Decision No. 1 at 5.

⁵ These steps necessarily would have included the completion all document discovery on such applications, the conduct all depositions, analysis of the responsive and inconsistent applications, and preparation of all opposition evidence and/or applications responsive to the

never know for sure, it is far from clear that the 365-day schedule would have permitted proper consideration of such an inconsistent application.

In any event, even if it is assumed that the 365-day schedule somehow would have accommodated an inconsistent application to acquire Conrail, it does not follow that the absence of such an inconsistent application now justifies a shorter schedule. The current proposal itself involves unique issues of enormous importance -- a fact that Joint Applicants seek to downplay. But Joint Applicants, in a moment of candor, do acknowledge that this case will have some of the attributes and complexities of a case involving competing, inconsistent applications, stating:

This case . . . involves the extension of two separate and competing railroads into the territory now served by Conrail. It also involves separate, competing operating and marketing plans for those two railroads. The process thus has many of the aspects of separate applications by the two carriers.

CSX/NS-4 at 8. In other words, the two largest rail carriers in the East are proposing to acquire and divide their only significant rail competitor through a series of collaborative transactions that might be regarded as two mergers. This, combined with the fact that no significant railroad mergers have been consummated in the East for many years, is more than sufficient to justify a 365-day schedule.

inconsistent application. In this regard, the Board has observed that, since descriptions of inconsistent and responsive applications were to be filed on F + 60, parties would have "in effect" 120 days to prepare their responses due on Day F + 180. CSX/Conrail, Decision No. 8 at 7, and NS/Conrail, Decision No. 4 at 7. With all due respect, even though the F + 60 description is of some value, it is no substitute for having an inconsistent or responsive application in hand, together with the necessary discovery. Also, during the period between F + 60 and F + 120, parties necessarily are occupied with other matters -- such as responding to the primary application.

Joint Applicants also overlook the possibility that, notwithstanding the absence of an inconsistent application to acquire Conrail, this case may well involve one or more responsive applications that will require thorough consideration. CN, for its part, is highly concerned with the shortfall in rail competition that would result from the current CSX/NS proposal, and CN is likely to seek affirmative relief through a responsive application. Other parties may also seek relief that would require the filing of responsive applications. Under the schedule proposed by Joint Applicants, all discovery with respect to such responsive applications would need to be completed, and all evidence in response to such applications would need to be filed, in a period of just 30 days. Rebuttal then would be due just 15 days later, with briefs following by just another 20 days. This is simply too tight a schedule for a case as significant as the break-up of Conrail.

Another serious deficiency in the 255-day schedule proposed by Joint Applicants is that it would rob the Board itself of the time needed for careful deliberation of the important issues presented. It must be assumed that the Board's members will be unlikely to know how they will resolve these issues until briefs are filed, and perhaps until they hear oral argument. The 365-day schedule itself will allow just 45 days from the filing of briefs to the voting conference, but the proposed 255-day schedule would cut this critical period to just 20 days, making it difficult or even impossible for the members to digest the huge record before casting their votes. It would be unwise to adopt such a shortened schedule in so important a case, particularly when a new member is likely to join the Board in the near future -- perhaps even after the primary application is filed. Obviously, the shortened schedule also would make it extremely difficult for the agency's staff to prepare a thorough decision.

Joint Applicants seek to justify the proposed 255-day schedule by alluding to the UPSP proceeding. As the Board has recognized, however, the transaction proposed in that case involved rail lines in the West, where other mergers recently had been proposed and implemented. Indeed, the proposal in UPSP was largely a response to the merger recently approved in BNSF, and expedited treatment in UPSP could be justified not only by the very fresh merger experience in the West but also by the concern that, without a prompt decision, the proposed UPSP system might fall behind its competitor BNSF. An additional factor that logically could have influenced the schedule in UPSP was concern about the viability of SP. Such factors are missing in this case. The CSX/NS proposal to acquire and divide Conrail is not made in response to any other recent merger, and Conrail is secure as an independent carrier.⁶

This brings us to the Joint Applicants' purported justification for more expedited treatment than that already afforded by a 365-day schedule. In essence, they seek to justify an accelerated schedule by relying on their own decision to pay for Conrail's stock "up front," and to use a voting trust or trusts to complete the transaction even before filing an application with this Board. As a related matter, they express concern that, during the period of uncertainty pending Board consideration of the transaction (exacerbated by their own election to use voting trusts), there may be "attrition" of Conrail's management. CSX/NS-4 at 5-6.

⁶ Joint Applicants also seem to suggest that the instant case will be simpler than UPSP. They say that UPSP involved "serious competitive issues," and then go on to claim: "The transaction contemplated here will not present such [serious competitive] issues. On the contrary, it is clear that this transaction will significantly enhance rail competition in the Eastern United States." CSX/NS-4 at 4. This self-serving comment should be wholly discounted. It must be presumed that a merger of this historic proportion will raise "serious competitive issues," and CN intends to demonstrate the presence of such issues.

Joint Applicants' own determination to make an expenditure of over \$10 billion without awaiting formal Board review of their proposal should not and cannot justify greater expedition of the case than otherwise would be warranted.

CN is well aware that the Board has expedited its handling of major merger cases in recent years, and now regards the deadlines imposed by the statute as an "outside limit" that can be beaten in most cases.⁷ But it is significant that the current 15-month schedule allowed by the statute represents a substantial shortening of the time permitted for deciding railroad merger cases from that allowed in prior years, and already reflects the progress the Board and its predecessor agency have made in accelerating the merger process. Joint Applicants nevertheless are asking the Board, in deciding the largest merger in the history of the industry, to use just over one-half of the 15-months allowed under the newly-shortened statutory schedule. It is reasonable to ask: if all, or at least a substantial portion, of the recently-enacted 15-month schedule is not used for a case as significant as the break-up of Conrail, what meaning does it have? Certainly, deciding the instant case on a 365-day schedule, and thereby consuming less than 80% of the time now allowed under the statute, would constitute a very efficient and commendable performance by the agency charged with reconciling all of the conflicting interests presented in a case of this magnitude.⁸

⁷ As the Board stated in UPSP, "[O]ur interpretation of the 15-month schedule set out in section 11325(b) is that it provides an outside limit on how long the Board may take to resolve a major merger proceeding, and is not necessarily an endorsement of a longer schedule." Finance Docket No. 32760, Union Pacific Corp. -- Control and Merger -- Southern Pacific Rail Corp., Decision No. 10 at 4, served Jan. 26, 1996 (unprinted).

⁸ It should not be overlooked that the Board already has accommodated Joint Applicants by waiving the 3-month pre-filing notice requirement. Decision No. 2, served April 21, 1997.

**C. If CSX and NS Are Permitted to File Separate Briefs, the Page Limit For
Other Parties Should be 75 Pages**

Joint Applicants propose that CSX and NS be permitted to file separate briefs, each subject to the 50-page limit imposed on other parties. (They are silent as to whether Conrail would join in both such briefs, though it must be assumed that Conrail would not file separately.) The justification offered for allowing separate CSX and NS briefs is that they are "separate and competing railroads" and will have "separate, competing operating and marketing plans." CSX/NS-4 at 8.

Given the unique circumstances of this case, and the fact that CSX and NS must remain competitors (whether or not the proposed transaction is approved), there is some logic to the request for separate briefs. However, it would be unfair to other parties if this request were granted without some further adjustment. CSX and NS each would have up to 50 pages to address such matters as their "separate, competing operating and marketing plans," but other parties would have only 50 pages to address all aspects of the case, including the separate plans of both CSX and NS.

If this CSX/NS request is to be granted, a reasonable and fair compromise would be to limit CSX and NS to 50 pages each, but to allow other parties to file briefs of up to 75 pages. With this adjustment, other parties would not be unduly constricted in their efforts to address the issues raised by the separate CSX and NS plans to implement this proposed joint acquisition of a major competitor.

STB

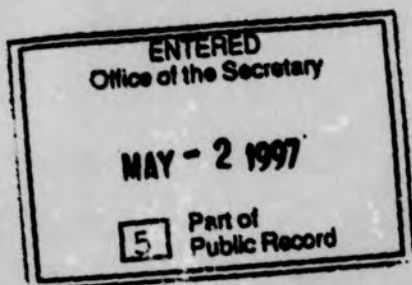
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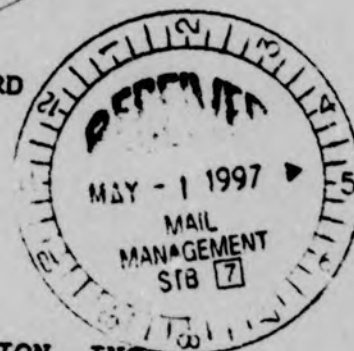
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BEFORE THE
SURFACE TRANSPORTATION BOARD

FINANCE DOCKET NO. 33388



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

NOTICE OF INTENT TO PARTICIPATE OF
PENNSYLVANIA POWER & LIGHT COMPANY AND
COMMENTS ON PROPOSED PROCEDURAL SCHEDULE

In its Decision No. 2 served April 21, 1997, in this proceeding, the Board set May 1, 1997 as the deadline for comments by interested persons other than the applicants on the 255-day procedural schedule proposed by the applicants.

Pennsylvania Power & Light Company ("PP&L") supports the applicants' proposed procedural schedule. PP&L notes that this schedule provides the same 120-day period for the preparation and filing of shipper comments that the Board previously adopted in Finance Docket Nos. 33220 and 33286, which have now been superseded by this proceeding.

PP&L also hereby notifies the Board and all known interested parties of its intent to participate in this proceeding. PP&L previously filed a notice of intent to participate in Finance Docket Nos. 33220 and 33286, and has adopted the same designation

for its filings in this proceeding that it previously used in those dockets. In addition, copies of this filing are being served not only on counsel for the applicants, but also on all known parties to Finance Dockets No. 33388, 33220 and 33286. Further PP&L filings will be served only on parties to this proceeding.

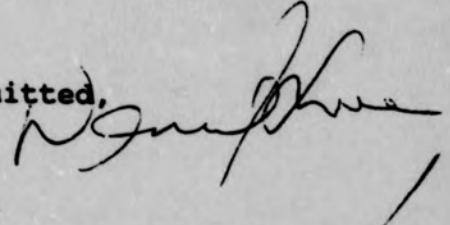
It is requested that the following counsel for PP&L be added to the service list in this proceeding.

Theresa M. Brennan
Counsel
Pennsylvania Power & Light Co.
Two North Ninth Street
Allentown, PA 18101-1179
(610) 774-4000

Daniel J. Sweeney
John M. Cutler, Jr.
McCarthy, Sweeney
& Harkaway, P.C.
1750 Pennsylvania Avenue, N.W.
Washington, DC 20006
(202) 393-5710

PP&L intends to participate in this proceeding as a party of record.

Respectfully submitted,



Daniel J. Sweeney
John M. Cutler, Jr.
McCarthy, Sweeney & Harkaway, P.C.
1750 Pennsylvania Avenue, N.W.
Washington, DC 20006
(202) 393-5710

Attorneys for
Pennsylvania Power & Light Company

Dated: May 1, 1997

CERTIFICATE OF SERVICE

I hereby certify that I have this 1st day of May, 1997, caused the foregoing document to be served by first-class mail on counsel for the applicants and on the FERC Administrative Law Judge assigned to handle discovery matters, as indicated below. Copies have also been served by first-class mail on all known parties to this proceeding and to Finance Docket Nos. 33220 and 33286.

Richard A. Allen
James A. Calderwood
Zuckert, Scoutt &
Rasenberger, LLP
888 17th Street, N.W., #600
Washington, D.C. 20006

Dennis G. Lyons
Richard L. Rosen
Arnold & Porter
555 12th Street, N.W.
Washington, D.C. 20004

Paul A. Cunningham
Robert M. Jenkins, III
Harkins Cunningham
1300 19th Street, N.W., #600
Washington, D.C. 20036

John M. Nannes
Scot B. Hutchins
Skadden, Arps, Slate,
Meagher & Flom, LLP
1440 New York Avenue, N.W.
Washington, D.C. 20005

Mark G. Aron
Peter J. Shudtz
CSX Corporation
One James Center
902 East Cary Street
Richmond, VA 23129

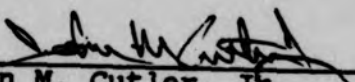
James L. Howe, III
George A. Aspatore
Norfolk Southern Corporation
Three Commercial Place
Norfolk, VA 23510

P. Michael Giftos
Paul R. Hitchcock
CSX Transportation, Inc.
500 Water Street
Jacksonville, FL 32202

Constance L. Abrams
Consolidated Rail Corporation
Two Commerce Square
2001 Market Street
Philadelphia, PA 19103

Samuel M. Sipe, Jr.
Timothy M. Walsh
Steptoe & Johnson, LLP
1330 Connecticut Avenue, N.W.
Washington, D.C. 20036

The Honorable Jacob Leventhal
Administrative Law Judge
Federal Energy Regulatory Comm'n
Suite 11F
888 First Street, N.E.
Washington, D.C. 20426


John M. Cutler, Jr.

STB

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5-1-97

D

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LEBOEUF, LAMB, GREENE & MACRAE
L.L.P.

A LIMITED LIABILITY PARTNERSHIP INCLUDING PROFESSIONAL CORPORATIONS

NEW YORK
WASHINGTON
ALBANY
BOSTON
DENVER
HARRISBURG
HARTFORD
JACKSONVILLE

1875 CONNECTICUT AVENUE, N.W.
WASHINGTON, DC 20009-5728

(202) 986-8000

TELEX: 440274 FACSIMILE: (202) 986-8102

WRITER'S DIRECT DIAL:

(202) 986-8050

May 1, 1997



LOS ANGELES
NEWARK
PITTSBURGH
PORTLAND, OR
SALT LAKE CITY
SAN FRANCISCO
BRUSSELS
MOSCOW
ALMATY
LONDON
(A LONDON-BASED
MULTINATIONAL PARTNERSHIP)

VIA HAND DELIVERY

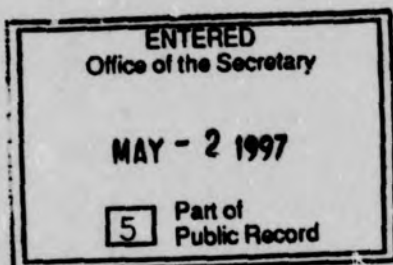
Mr. Vernon A. Williams, Secretary
Surface Transportation Board
1925 K Street, N.W., Seventh Floor
Washington, DC 20423-0001

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

Dear Secretary Williams:

Enclosed are the original and 25 copies of "Comments on Applicants' Proposed Procedural Schedule of American Electric Power Service Corporation, Atlantic City Electric Company, Delmarva Power & Light Company, Indianapolis Power & Light Company, and The Ohio Valley Coal Company," for filing in the above-referenced proceeding. Also enclosed is a 3.5" diskette containing the filing in Wordperfect format.

Please date stamp and return the enclosed five additional copies via our messenger.



Enclosure

cc (w/encl.): Paul A. Cunningham, Esq.
Dennis G. Lyons, Esq.
Richard A. Allen, Esq.
All Other Parties on Service List

Very truly yours,

Michael F. McBride

Michael F. McBride

Linda K. Breggin

Brenda Durham

Attorneys for American Electric Power Service Corporation, Atlantic City Electric Company, Delmarva Power & Light Company, Indianapolis Power & Light Company, and The Ohio Valley Coal Company

179551

BEFORE THE
SURFACE TRANSPORTATION BOARD

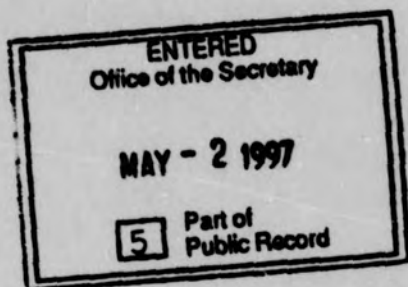
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FINANCE DOCKET NO. 33388



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

**COMMENTS ON APPLICANTS' PROPOSED PROCEDURAL
SCHEDULE OF AMERICAN ELECTRIC POWER SERVICE CORPORATION,
ATLANTIC CITY ELECTRIC COMPANY,
DELMARVA POWER & LIGHT COMPANY,
INDIANAPOLIS POWER & LIGHT COMPANY, AND
THE OHIO VALLEY COAL COMPANY**



Michael F. McBride
Linda K. Breggin
Brenda Durham
LeBoeuf, Lamb, Greene & MacRae, L.L.P.
1875 Connecticut Avenue, N.W., Suite 1200
Washington, DC 20009-5728
(202) 986-8000

Attorneys for American Electric Power Service
Corporation, Atlantic City Electric Company,
Delmarva Power & Light Company, Indianapolis
Power & Light Company, and The Ohio Valley
Coal Company

Dated: May 1, 1997

Introduction and Summary

American Electric Power Service Corporation, Atlantic City Electric Company, Delmarva Power & Light Company, Indianapolis Power & Light Company, and The Ohio Valley Coal Company hereby comment on Applicants' proposed procedural schedule. Because of the fact that there are three Applicants, three operating plans to review, and hundreds or thousands of essential details that are not yet known and will not be known before the Application is filed (or for months thereafter), the Board must not expedite this proceeding. The facts already known demonstrate that it is the most complex -- and certainly the most far-reaching -- rail acquisition or merger proceedings in the 110-year history of this agency and its predecessor.

The only reasons argued for expediting the proceeding are (1) the staggering amount of money now being spent for Conrail's stock, both the timing and the size of which are entirely unnecessary at this time and should not limit the Board's authority or discretion in this proceeding, and (2) the claim that the transaction is in the public interest. But that claim, which is not yet supported by any evidence, may be wrong because of the acquisition premium being paid for Conrail, and is not supported by the outcome of recent rail mergers. The BN-SF merger is not proceeding well (see Attachment 1, The Wall Street Journal, "Burlington Northern Struggles to Get Merger on Track," page B4, April 22, 1997), the UP-CNW merger was a disaster for at least several months because of UP's admitted, precipitous cost-cutting, and the UP-SP merger has caused rate increases and has not produced effective competition from BN-SF under the trackage rights it was awarded (see BN-SF's April 1, 1997 quarterly report in Finance Docket No. 32760). Thus, if "past is prologue," the Board should take the entire amount of time available to it under the statute -- 15-16 months -- and not rush this

proceeding under the assumption that it, too, will be in the public interest. It is simply too important to be rushed and it may well not be in the public interest.

Specific Comments

1. Although Applicants propose 120 days for responsive comments, evidence, inconsistent applications, and the like, that period was not sufficient for shippers to be thorough in the UP-SP proceeding. To be sure, parties met the 120-day deadline, but that is not the issue. The parties will always file on the date provided, even though their filings may be incomplete, inadequate, or (certainly) rushed. But the Board should know that, during the 120-day period in UP-SP, there were as many as 4-5 depositions per day, and counsel, of course, have other pressing obligations. Neither counsel nor their clients have the luxury of telling this Board or other tribunals that other matters must be put on hold, or at least "in the back seat," while this proceeding is being conducted. The Board, of course, also has other responsibilities, and should understand the concern. But, since the discovery process proceeds largely out of view of the Board, it may not understand the extreme hardship it imposed on parties in the UP-SP proceeding, and the same hardship is likely here. Briefs, or opposing briefs, on discovery or other issues, often had to be prepared overnight, or in a day or two, to maintain the schedule while accommodating the various rights of the parties. That is simply too hurried. More time would avoid such obvious problems.

Accordingly, 180 days would be a more appropriate responsive period.

2. The time periods for responses and replies to inconsistent or responsive applications should also be lengthened. While the Board may not at first appreciate the interest that non-carriers have in such matters, in fact the testimony of shippers or shipper experts may be sought when they are supportive of, or consistent with, the position of the carrier. That was the case in UP-SP. At the same time, shipper witnesses were being deposed for rebuttal by the

Applicants there, while discovery was demanded of shippers concerning their comments and evidence. The net effect is that, if extremely short deadlines are proposed, as Applicants have proposed here, shippers, their witnesses, and their counsel are subject to absurd obligations in order to meet the schedule. For that reason, the Board should relax those deadlines, or at least inform Applicants that their advocacy of such short deadlines must be accompanied by a denial of discovery by Applicants of those filing comments or evidence in response to the Application. Applicants should not be allowed to have it both ways.

3. The deadline for filing briefs should be extended as well. Preparing a brief, perhaps for multiple parties, in the time period proposed will be extremely difficult. The result may, perversely, be longer or more briefs, because of the difficulty in coordination. As Thomas Jefferson once said, "I didn't have time to write you a short letter, so I wrote you a long one." A longer time for writing briefs may allow disparate parties to coordinate or file joint briefs.

4. A proposal to conduct oral argument 15 days after submission of briefs is a transparent demonstration of Applicants' view that the positions of most parties to this proceeding do not matter. Otherwise, their proposal that CSX and NS each be allowed to file a brief, plus the high probability that briefs from the Departments of Justice, Transportation, and perhaps Agriculture will be filed, all of which are obviously important to the Board, means that the multitude of other briefs will be paid little, if any, attention during the proposed 15-day period between submission of briefs and oral argument. The Board should not leave the impression that the briefs of other parties matter little, if at all. To avoid that impression, it should provide a longer period than in UP-SP, not a shorter one, between briefs and oral argument. Forty-five days would be appropriate. Also, the opponents of UP and SP in the UP-SP proceeding used the time between submission of briefs and oral argument to attempt to

coordinate their presentations and the time allotted to them, which the Board encouraged and which was successful. It is necessary to allow enough time for such parties to meet, debate the appropriate order and time(s) of such presentations, and consult with their clients and one another for such an effort to succeed. Additional time accommodates that need as well, and serves the Board's interests.

4. For all those reasons, the Board should not set a schedule similar to that proposed by Applicants, and should instead adopt a 15- to 16-month schedule to accommodate the needs of all interested parties and send the "message" that it is interested in receiving the views of all such parties. The schedule proposed by Applicants sends the opposite message.

5. Finally, the Board granted Applicants' petition for a waiver of the 3-month notice obligation before receiving pleadings from some of the undersigned parties and CURE which raised the most important issue in the proceeding -- the extremely high price paid for Conrail as a result of the bidding war that occurred between CSX and NS. Applicants' reply to the undersigned's pleading stated that the issue could better be dealt with in the context of the Application. That is wrong; the money will have been spent by that time. Thus, the Board must now take action to prevent the money from being spent, and thus create difficult choices for it later. But, if the Board does not act now, as it should, it should in the alternative inform Applicants that they are proceeding at their own risk, and that the Board will not hear from them later if they seek to recover the acquisition premium paid for Conrail from existing shippers on CSX, Conrail, or NS, or if they wish to object to a condition protecting shippers from paying rate increases because of the acquisition premium.

If the Board does what it should and tells Applicants now to renegotiate the price they have agreed to pay for Conrail, that is a reason for proceeding slowly and only after Applicants report on their renegotiation efforts. If, in the alternative, the Board adopts

Applicants' view that the acquisition price should be an issue after the Application is filed, that is the most important reason why the Board should adopt a schedule that uses the full amount of time allowed under the statute. The unprecedented amount of the acquisition premium is too important not to give it the Board's full attention. We are certain that the Board would not say now to shippers that they are "too early," and then later -- after the money is spent -- say "you're too late." The best solution is to act now, or inform Applicants that the Board is concerned about this issue, which would certainly induce them to consider negotiating a lower price.

Conclusion

The Board should adopt a schedule in this proceeding that takes advantage of the time allowed under the statute to it, in view of the fact that there will be three operating plans involved, in view of the other complexities associated with Applicants' complex agreements, and finally, in view of the fact that this transaction is approximately twice the size (\$10 plus billion) of the UP-SP transaction (which in turn was the largest rail merger or acquisition proceeding until that time), and thus is the most significant railroad regulatory proceeding in 110 years. It is clear that, the larger the dollars involved, the larger the interests and concerns

of those who provide the capital -- the shippers. Therefore, the schedule should be set to accommodate the shippers, more so than the Applicants.

Respectfully submitted,

Michael F. McBride

Michael F. McBride

Linda K. Breggin

Brenda Durham

LeBoeuf, Lamb, Greene & MacRae, L.L.P.

1875 Connecticut Avenue, N.W.

Suite 1200

Washington, DC 20009-5728

(202) 986-8000

Attorneys for American Electric Power Service
Corporation, Atlantic City Electric Company,
Delmarva Power & Light Company, Indianapolis
Power & Light Company, and The Ohio Valley
Coal Company

CORPORATE FOCUS

Burlington Northern Struggles to Get Merger on Track

Locomotive Shortage, Culture Clash Cause Problems in Forming Rail Giant

By DANIEL MACHALARA

Staff Reporter of THE WALL STREET JOURNAL
SPARKS, Nev. — In the middle of a freight yard here, engineer Melvin Jones is operating a three-locomotive train that has enough power to pull 100 freight cars across the country. Instead, it leaves the yard with two cars — and only one has freight on board.

"That's one heavy car," jokes Mr. Jones, who is operating the train for Burlington Northern Santa Fe Corp.

But while the railroad has too many locomotives on Mr. Jones's train, it has too few engines elsewhere on the 31,000-mile system created from the 1995 takeover of Santa Fe Pacific Corp. by Burlington Northern. Instead of creating a Western powerhouse railroad ideally suited to provide fast service, the new system has been erratic and surprisingly slow, forcing some customers to wait days for shipments beyond their scheduled delivery dates.

The result: The \$4 billion acquisition, the largest in history when it was completed, is becoming one of the industry's most disappointing. And today the Fort Worth, Texas, company is expected to report that its first-quarter earnings fell 20% below net income of \$187 million, or \$1.21 a share, a year earlier.

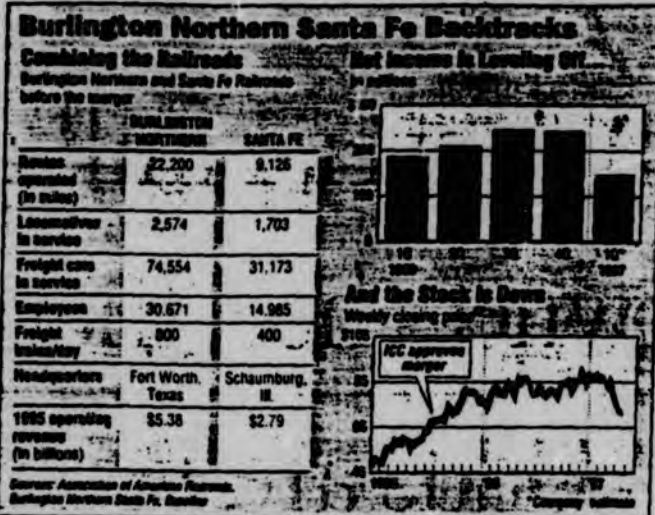
Lowering Second-Quarter Forecasts

Analysts, who were alerted to the likely 20% drop by the company last month, are already lowering forecasts for the second quarter. "I don't think anyone thought it would have gotten this bad," says James Higgins of Donaldson, Luftkin & Jenrette. "They did well for a couple of quarters. But they hit a substantial downdraft."

To be sure, the railroad has suffered from a horrendous winter that literally buried some trains under snow. But analysts say the company's woes are a good example of how railroad combinations can be so much more difficult than those in most other industries. There are the logistical nightmares of coordinating 105,000 freight cars, unexpected corporate cultural gaps, and a whole series of regulatory requirements.

"It's not like putting toy train sets together," James Valentine, an analyst at Salomon Brothers, says of the Burlington Northern-Santa Fe combination. "It involves tens of thousands of people over tens of thousands of miles with different corporate cultures."

To some degree, railroads have become victims of their own merger mania. The U.S. industry has gone from 40 carriers in 1950 to just five major railroads today. And the number will get smaller this spring



after the planned \$10.3 billion carve-up of Conrail Inc. by CSX Corp. and Norfolk Southern Corp.

Today's Burlington Northern Santa Fe is itself the product of 330 railroads acquired over 147 years. That has left some employees with divided loyalties. "We have people that have more allegiance to the Great Northern [Railroad, acquired in 1970] than the Burlington Northern," says Robert Krebs, chairman, president and chief executive officer.

But while the combination brought together two very different railroads, proponents of the deal thought they could fit well together. Burlington Northern's strength is in coal and grain-hauling, while Santa Fe specializes in speedy shipment of a wide variety of containerized goods.

Selected to lead the combined railroad was 54-year-old Mr. Krebs, a darling of rail investors for his cost-cutting savvy and grasp of railroad operating details. The combined railroads' stock price soared from \$65 a share in July 1995 to \$82 that November, based largely on company estimates of merger savings. (Yesterday, the stock fell \$1.625 to close at \$70.875 in New York Stock Exchange composite trading.)

And for a year, the hopes of merger benefits seem realized. Helped by sharp reductions in management overhead, net income rose 21% in 1996, the combined company's first full year, to \$289 million, or

\$5.70 a share, on revenue of \$2.19 billion. "The first year you get all these front-end benefits," says Steve Lewins, a Gruntal & Co. analyst. "You have all the quick fixes."

Bad Weather Hurts Service

But signs of trouble started occurring this past winter, which Mr. Krebs describes as the worst in the company's history. The route from Chicago to Seattle was closed repeatedly, sometimes for days at a time, by blizzards, flooding and mudslides. In January, freight trains in North Dakota were buried in drifts as high as 30 feet over the tops of the railcars, and a mudslide north of Seattle knocked a train into Puget Sound.

Some say the company may have made the weather problems worse by cutting some operations too quickly to produce merger savings. Burlington Northern shut down locomotive repair shops at Springfield, Mo., Galesburg, Ill., and Denver, leaving it short of facilities to fix locomotives. Mr. Krebs believes there were enough facilities even after the closings.

A further complication involves the 1996 acquisition of Union Pacific Corp. and Southern Pacific Rail Corp., under which Burlington Northern won the right from federal regulators to provide competing freight service along nearly 4,000 miles of Union Pacific track. Even though the com-

peting service often draws little business, as Mr. Jones's two-car train illustrates, the agreement is forcing Burlington Northern to divert locomotives that could be more profitably used elsewhere.

On some days in January, as many as 65 of its freight trains waited at terminals for locomotives — six times more than normal. While service reliability has started to climb back, it is still far short of performance goals.

But there have been other problems. Although Burlington bought Santa Fe, it was Santa Fe's Mr. Krebs who took over as CEO. Of 72 top executives of the former Burlington Northern, all but 10 departed. James Isenberg, who was in charge of locomotives, left when the new outfit offered to make him a shift supervisor. Mr. Krebs "came in with his agenda and his people, and the BN people saw the handwriting on the wall," says Mr. Isenberg.

Mr. Krebs says that many of the executives decided to leave because of rich severance packages and that he filled their positions with other, equally competent Burlington Northern veterans.

Still, tensions have mounted because of different management styles. While Mr. Krebs likes to get involved in all kinds of decision-making, the old Burlington Northern managed by consensus and delegated authority to managers in the field. The two also couldn't be much further apart in operating styles, with Santa Fe regularly assigning far more locomotive power to its freight trains than Burlington Northern to get them to their destination faster.

Turning Things Around

Despite the setbacks, Mr. Krebs says he believes the company can turn things around in the second half of this year, when a \$300 million computer system is installed in July to combine operations. The company is still operating as two separate railroads.

The company also is completing a \$35 million expansion of its largest yard, the Argentine Yard in Kansas City, Kan., which should double the number of freight cars that are handled there. And it plans to spend \$240 million on 188 additional locomotives.

Some analysts doubt big improvements will come that quickly. They don't think the differences can be worked out that soon, or that computers alone will coordinate the massive routes. "Rob Krebs thought he could combine the Burlington Northern and the Santa Fe in two years," Mr. Lewins says. "but I believe it will take no less than four or five years to do it."

BEFORE THE
SURFACE TRANSPORTATION BOARD

FINANCE DOCKET NO. 33388

CERTIFICATE OF SERVICE

I hereby certify that I have served this 1st day of May, 1997, a copy of the foregoing Comments by first-class mail, postage prepaid, or by more expeditious means, upon each of the following parties or record:

Mr. Vernon A. Williams, Secretary
Surface Transportation Board
Mercury Building
1925 K Street, N.W.
Washington, DC 20423
Via Hand Delivery

Dennis G. Lyons, Esq.
Arnold & Porter
555 Twelfth Street, N.W.
Washington, DC 20004-1202
Via Hand Delivery

David M. Konschnik, Director
Office of Proceedings
Surface Transportation Board
Mercury Building
1925 K Street, N.W.
Washington, DC 20423

Mark G. Aron, Esq.
Peter J. Schudtz, Esq.
CSX Corporation
One James Center
902 East Cary Street
Richmond, VA 23129

William G. Mahoney, Esq.
Richard S. Edelman, Esq.
Melissa Kirgis, Esq.
Higsaw, Mahoney & Clarke, P.A.
1050 Seventeenth Street, N.W., Suite 210
Washington, DC 20036

Ronald A. Lane, Esq.
Myles L. Tobin, Esq.
Law Department
Illinois Central Railroad Company
455 North Cityfront Plaza Drive
Chicago, IL 60611-5504

Donald F. Griffin, Esq.
Assistant General Counsel
Brotherhood of Maintenance of Ways
Employees
400 N. Capitol Street, N.W., Suite 852
Washington, DC 20001-1511

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

Timothy T. O'Toole, Esq.
Constance L. Abrams, Esq.
Consolidated Rail Corporation
Two Commerce Square
2001 Market Street
Philadelphia, PA 19103

Paul A. Cunningham, Esq.
Harkins Cunningham
1300 Nineteenth Street, N.W.
Suite 600
Washington, DC 20036
Via Hand Delivery
P. Michael Giftos, Esq.
Paul R. Hitchcock, Esq.
CSX Transportation, Inc.
500 Water Street
Speed Code J-120
Jacksonville, FL 32202

William C. Sippel, Esq.
Oppenheimer Wolff & Donnelly
Two Prudential Plaza
180 North Stetson Avenue, 45th Floor
Chicago, IL 60601-6710

Martin W. Bercovici, Esq.
Keller and Heckman, L.L.P.
1001 G Street, N.W.
Suite 500 West
Washington, DC 20001

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

Mr. Ronald L. Young
Managing Director - Transportation
American Electric Power Service
Corporation
Fuel Supply Department
One Memorial Drive
P.O. Box 700
Lancaster, OH 43130-0700

Mr. James L. Parks
Manager, Fuel Supply
Delmarva Power & Light Company
P.O. Box 6066
Newark, DE 19714-6066

Richard A. Allen, Esq.
James A. Calderwood, Esq.
Andrew R. Plump, Esq.
John V. Edwards, Esq.
Zuckert, Scoutt & Rasenberger, L.L.P.
888 Seventeenth Street, N.W.
Washington, DC 20006-3939
Via Hand Delivery

L. John Osborn, Esq.
Sonnenschein Nath & Rosenthal
1301 K Street, N.W.
Suite 600 East Tower
Washington, DC 20005
Via Hand Delivery

Janice G. Barber, Esq.
Michael E. Roper, Esq.
Burlington Northern Santa Fe Corporation
3800 Continental Plaza
777 Main Street
Ft. Worth, TX 76102-5384

Mr. G.W. Herkner, Jr., Director
Rail Contract Administration
NJ Transit Rail Operations
One Penn Plaza East
Newark, NJ 07105-2246

Mr. Paul D. DeMariano
President and Chief Executive Officer
The Port of Philadelphia & Camden, Inc.
3460 North Delaware, Suite 200
Philadelphia, PA 19134

Clinton J. Miller, III, Esq.
General Counsel
Daniel R. Elliott, III, Asst. General
Counsel
United Transportation Union
14600 Detroit Avenue
Cleveland, OH 44107-4250

C. Michael Loftus, Esq.
Robert D. Rosenberg, Esq.
Christopher a. Mills, Esq.
Donald G. Avery, Esq.
Kelvin J. Dowd, Esq.
Frank J. Pergolizzi, Esq.
Slover & Loftus
1224 Seventeenth Street, N.W.
Washington, DC 20036

Mr. Jeffrey R. Moreland
Mr. Richard E. Weicher
Burlington Northern Santa Fe Corporation
1700 East Gold Road
Schaumburg, IL 60173

Erika Z. Jones, Esq.
Adrian L. Steel, Jr., Esq.
Roy T. Englert, Jr., Esq.
Kathryn A. Kusske, Esq.
Mayer, Brown & Platt
2000 Pennsylvania Avenue, N.W.
Washington, DC 20006

Mr. Dean R. Kleckner
President
American Farm Bureau Federation
600 Maryland Avenue, S.W., Suite 800
Washington, DC 20024

Neal M. Mayer, Esq.
Paul D. Coleman, Esq.
Hoppel, Mayer & Coleman
1000 Connecticut Avenue, N.W.
Suite 400
Washington, DC 20036

Mr. Robert F. Hagan
State Representative
64th House District
Ohio House of Representatives
562 Madera Avenue
Youngstown, OH 44504

Mitchell M. Kraus, Esq., General Counsel
Larry R. Pruden, Asst. General Counsel
Transportation Communications
International Union
3 Research Place
Rockville, MD 20850

Mr. John Livingood
201 Glencolter Court
Serverna Park, MD 21146

Mr. Patrick C. Hendricks
Iowa State Legislative Director
United Transportation Union
317 East 5th Street, Suite 11
Des Moines, IA 50309

Stephen M. Carpmann, Esq.
General Attorney
The Detroit Edison Company
2000 Second Street
Detroit, MO 48226

James C. Bishop, Jr., Esq.
William C. Wooldridge, Esq.
James L. Howe, III, Esq.
Robert J. Conney, Esq.
George A. Aspatore, Esq.
Norfolk Southern Corporation
Three Commercial Place
Norfolk, VA 23510-2191

Nicole Clark, Esq.
Wachtell, Lipton, Rosen & Katz
51 West 52nd Street
New York, NY 10019-6150

Mr. William W. Whitehurst, Jr.
Economic Consultant
W.W. Whitehurst & Associates, Inc.
12421 Happy Hollow Road
Cockeysville, MD 21030

Secretary David L. Winstead
Maryland Department of Transportation
P.O. Box 8755
BWI Airport, MD 21240

Samuel M. Sipe, Jr., Esq.
Timothy M. Walsh, Esq.
David H. Corburn, Esq.
Steptoe & Johnson, L.L.P.
1330 Connecticut Avenue, N.W.
Washington, DC 20036
Via Hand Delivery

Ms. Alison Shipman
National Corn Growers Association
122 C Street, N.W.
Washington, DC 20001

Nancy McFadden, Esq.
General Counsel
Paul Smith, Esq.
Senior Trial Attorney
Office of General Counsel
U.S. Department of Transportation
Office of the Secretary of Transportation
400 Seventh Street, S.W.
Washington, DC 20590

Ms. Gabriel Calvo
The Ackerson Group
1275 Pennsylvania Avenue, N.W.
Washington, DC 20004

Ms. Missy Cassidy
Maryland Department of Transportation
P.O. Box 8755
BWI Airport, DM 21240-0755

John M. Cutler, Jr., Esq.
McCarthy, Sweeney & Harkaway, P.C.
1750 Pennsylvania Avenue, N.W.
Suite 1105
Washington, DC 20006

Mr. Gerald W. Fauth, III
G.W. Fauth & Associates, Inc.
P.O. Box 2401
Alexandria, VA 22301

Joseph Guerrieri, Jr., Esq.
Guerrieri, Edmond & Clayman, P.C.
1331 F Street N.W., Suite 400
Washington, DC 20004

Thomas Leary, Esq.
Hogan & Hartson, L.L.P.
Columbia Square
555 Thirteenth Street, N.W.
Washington, DC 20004-1109

George Mayo, Jr., Esq.
Hogan & Hartson, L.L.P.
Columbia Square
555 13th Street, N.W.
Washington, DC 20004-1109

Christopher C. O'Hara, Esq.
Brickfield, Burchette & Ritts, P.C.
1025 Thomas Jefferson Street, N.W.
8th Floor
Washington, DC 20007

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

Nicholas DiMichael, Esq.
Frederic L. Wood, Esq.
Donelan, Cleary, Wood & Maser, P.C.
1100 New York Avenue, N.W.
Suite 750
Washington, DC 20005-3934

Mr. John Gallagher
Fieldston Publications, Inc.
1800 Massachusetts Avenue, N.W.
Suite 500
Washington, DC 20036

Ms. Maureen Healy, Director
Federal Environmental and
Transportation Issues
The Society of the Plastics Industry, Inc.
1275 K Street, N.W., Suite 400
Washington, DC 20005

Mr. Charles M. Chadwick
Chairman and Chief Executive Officer
Maryland Midland Railway, Inc.
P.O. Box 1000
Union Bridge, MD 21791-0568

John J. Sullivan, Esq.
Associate General Counsel
Potomac Electric Power Company
1900 Pennsylvania Avenue, N.W.
Washington, DC 20068

Jean Pierre Ouellet, Esq.
Chief Legal Officer and Corporate
Secretary
Canadian National Railway Company
935 de La Gauchetiere Street West
16th Floor
Montreal, Quebec
CANADA H3B 2M9

Thomas Schick, Esq.
Assistant General Counsel
Chemical Manufacturers Association
1300 Wilson Boulevard
Arlington, VA 22209

Mr. Thomas Schmitz
The Fieldston Company, Inc.
1800 Massachusetts Avenue, N.W.
Suite 500
Washington, DC 20036-1613

Richard G. Slattery, Esq.
National Railroad Passenger Corporation
60 Massachusetts Avenue, N.E.
Washington, DC 20002

Marcella Szel, Esq.
Vice President - Legal Service
Canadian Pacific Railway Company
Gulf Canada Square, Suite 500
Calgary, Alberta
CANADA T2P 4Z4

Debra Willen, Esq.
Guerrieri, Edmond & Clayman, P.C.
1331 F Street, N.W., Suite 400
Washington, DC 20004

Mr. Edward Wytkind, Executive Director
Larry Willis, Esq.
Transportation Trades Department, AFL-
CIO
400 N. Capitol Street, N.W., Suite 861
Washington, DC 20002

Roger W. Fones, Chief
Transportation, Energy & Agriculture
Section, Antitrust Division
U.S. Department of Justice
325 Seventh Street, N.W., Suite 500
Washington, DC 20530

Mr. Jon Scholl
Director of Public Policy
Illinois Agricultural Association
1701 N. Towanda Avenue
P.O. Box 2901
Bloomington, IL 61702-2901

Robert Szabo, Esq.
Van Ness Feldman, P.C.
1050 Thomas Jefferson Street, N.W.
Seventh Floor
Washington, DC 20007

Eric Von Salzen, Esq.
Hogan & Hartson, L.L.P.
Columbia Square
555 Thirteenth Street, N.W.
Washington, DC 20004-1109

Premarmer Notification Office
Bureau of Competition
Federal Trade Commission
Sixth & Pennsylvania Avenue, N.W.
Room 303
Washington, DC 20530

Mr. William Wright
Public Utilities Commission of Ohio
Borden Building, 7th Floor
Columbus, OH 43216

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

John K. Maser III, Esq.
Jeffrey O. Moreno, Esq.
Karyn A. Booth, Esq.
Donelan, Cleary, Wood & Maser, P.C.
1100 New York Avenue, N.W., Suite 750
Washington, DC 20005-3934

Mr. Michael Matti
Director, Risk Management
Institute of Scrap Recycling Industries, Inc.
1325 G Street, N.W.
Washington, DC 20005

Charles A. Spitulnik, Esq.
Alicia M. Serfaty, Esq.
Hopkins & Sutter
888 16th Street, N.W.
Washington, DC 20006

Ms. Doreen C. Johnson
Chief, Antitrust Section
Ohio Attorney General's Office
State Office Tower
30 E. Broad Street - 16th Floor
Columbus, OH 43215-3428

William A. Mullins, Esq.
Troutman Sanders, L.L.P.
1300 I Street, N.W.
Suite 500 East
Washington, DC 20005
Via Hand Delivery

Nathan R. Fenno, Esq.
Vice President & General Counsel
Delaware Otsego Corporation
One Railroad Avenue
Cooperstown, NY 13326

Richard J. Schiefelbein
Woodharbor Associates
7801 Woodharbor Drive
Ft. Worth, TX 76179

Kevin M. Sheys, Esq.
Edward J. Fishman, Esq.
Oppenheimer Wolff & Donnelly
1020 Nineteenth Street, N.W., Suite 400
Washington, DC 20036

Eric M. Hocky, Esq.
Gollatz, Griffin & Ewing, P.C.
213 West Miner Street
P.O. Box 796
West Chester, PA 19381-0796

Mr. Robert K. Dreiling
The Kansas City Southern Railway
Company
114 West 11th Street
Kansas City, MO 64105

Mr. George R. Arnold
Member
Madison County Conservation
Alliance, Inc.
1306 St. Louis Street
Edwardsville, IL 62025

William P. Quinn, Esq.
Gollatz, Griffin & Ewing, P.C.
213 West Miner Street
P.O. Box 796
West Chester, PA 19381-0796

John M. Nannes, Esq.
Scot B. Hutchins, Esq.
Skadden, Arps, Slate, Meager
& Flom, L.L.P.
1440 New York Avenue, N.W.
Washington, DC 20005-2111

Mr. Donald Knight
Vice President - Fuel Supply
Indianapolis Power & Light Company
25 Monument Circle
P. O. Box 1595
Indianapolis, IN 46206-1595

David Barnard, Esq.
Indianapolis Power & Light Company
25 Monument Circle
P. O. Box 1595
Indianapolis, IN 46206-1595

Mr. Charles Linderman
Director, Fossil Fuels and Renewable
Programs
Edison Electric Institute
701 Pennsylvania Avenue, N.W.
Washington, DC 20004-2696

Mr. Donald J. Casey
Director, Regulatory Programs
The Fertilizer Institute
501 Second Street, N.E.
Washington, DC 20002

Charles L. Young, Esq.
Senior Attorney
Office of the General Counsel
Tennessee Valley Authority
400 West Summit Hill Drive
Knoxville, TN 37902

Mr. Robert Herman
Manager of Fuels
Atlantic City Electric Company
6801 Black Horse Pike
Egg Harbor, NJ 08234

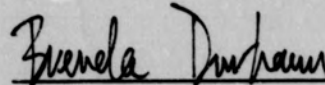
Daniel Mecklenborg, Esq.
Vice President and General Counsel
Ingram Barge Company
400 Harding Road
Nashville, TN 37205-2990

Mr. Robert E. Murray
President
The Ohio Valley Coal Company
29525 Chagrin Boulevard, Suite 111
Pepper Pike, OH 44122

Heidi Edens, Esq.
General Counsel
Providence and Worcester Railroad
Company
75 Hammond Street
Worcester, MA 01610

Marcella M. Szel, Esq.
Vice President - Legal Services
Canadian Pacific Railway Company
Suite 500, Gulf Canada Square
401 Ninth Avenue, S.W.
Calgary, Alberta T2P 4Z4
CANADA

Edward D. Greenberg, Esq.
Galland, Kharasch & Garfinkle, P.C.
Canal Square
1054 31st Street, N.W.
Washington, DC 20007


Brenda Durham

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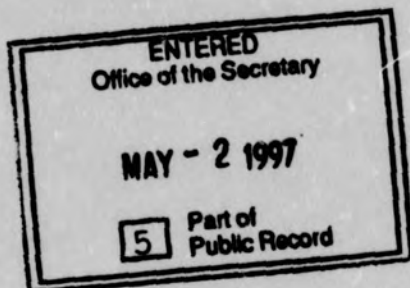
BEFORE THE
SURFACE TRANSPORTATION BOARD



FINANCE DOCKET NO. 33388

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

**COMMENTS OF
CONSUMERS UNITED FOR RAIL EQUITY
ON THE PROPOSED PROCEDURAL SCHEDULE**



Mr. Robert G. Szabo
Van Ness Feldman, P.C.
1050 Thomas Jefferson Street, NW
Seventh Floor
Washington, D.C. 20007
(202) 298-1920

Executive Director and Counsel
Consumers United for Rail Equity

May 1, 1997

BEFORE THE
SURFACE TRANSPORTATION BOARD

FINANCE DOCKET NO. 33388



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

**COMMENTS OF
CONSUMERS UNITED FOR RAIL EQUITY
ON THE PROPOSED PROCEDURAL SCHEDULE**

CONSUMERS UNITED FOR RAIL EQUITY (C.U.R.E.) objects to the procedural schedule proposed by CSX, Norfolk Southern and Conrail (Applicants) on April 10, 1997 and published by the Surface Transportation Board (Board) in its April 21 notice. Notice of Prefiling Notification and Request for Comments, 62 Fed. Reg. 19,390 (1997).

CONSUMERS UNITED FOR RAIL EQUITY (C.U.R.E.) is an organization of captive rail shippers that transport coal for use in electricity generation. The members of C.U.R.E. are public power generators, rural electric cooperatives, investor-owned electric utilities and their national trade associations. A list of current C.U.R.E. members is attached to this statement.

I. INTRODUCTION

On April 10, 1997, the Applicants filed a notice of intent to submit an application for the acquisition of control of Conrail. The Applicants also filed a petition to establish a procedural schedule for the proceeding on the application. In their proposed procedural schedule, the Applicants seek a final decision 255 days from the filing of the primary application. Applicants also propose allowing 120 days for comments opposing the application.

Given the importance of this matter, the procedural schedule for decision on the application should allow as much time for decision as is allowed by statute and regulation. The Applicants' proposed procedural schedule would require a final decision 7½ months sooner than the maximum time allowed by the ICC Termination Act and 110 days sooner than the final schedule adopted by the Board in the prior CSX/Conrail and NS/Conrail dockets.^{1/}

As C.U.R.E. has argued previously, the procedural schedule adopted in this proceeding should provide the Board the maximum amount of decision time allowed by statute in order to ensure that all groups have sufficient time to study and comment fully on the proposal.^{2/} At the very least, the Board should adopt the final procedural schedule issued in the prior CSX/Conrail and NS/Conrail dockets.

^{1/} See STB Finance Docket No. 33220, Decision No. 8 (served Jan. 30, 1997); STB Finance Docket No. 33286, Decision No. 4 (served Jan. 30, 1997).

^{2/} C.U.R.E. filed comments on the Board's proposed procedural schedules in the CSX/Conrail and NS/Conrail Dockets.

C.U.R.E. supports the Applicants proposal to allow 120 days for comments opposing the merger. The 120 days for comments opposing the merger was adopted by the Board in its final procedural schedules issued in both the CSX/Conrail and NS/Conrail dockets and is supported by the Applicants. By providing adequate time for shipper comments, the Board will be better able to make a complete and informed decision that will best serve the public interest.

In adopting a procedural schedule that provides the Board maximum time to make a final decision and provides adequate opportunity for shipper comments, the Board will ensure that a reasoned and informed decision is made in this proceeding.

II. THE PROCEDURAL SCHEDULE SHOULD PROVIDE THE BOARD MAXIMUM TIME TO MAKE A DECISION

A. The Board Should Allow Themselves the Statutory Limit of 16 Months to Make a Decision

The Applicants' proposed procedural schedule provides 255 days (8½ months) for the Board to make a final decision in this proceeding. Under the ICC Termination Act, all evidentiary proceedings must be concluded within one year of publication of acceptance of the merger application, and the Board must issue a final decision within 90 days of concluding the evidentiary proceeding. 49 U.S.C. § 11325(b)(3). Therefore, the Board has a maximum of 16 months from the filing of the formal application in which to make a decision -- almost twice what the Applicants have proposed in this proceeding.

In C.U.R.E.'s previous filings, we urged the Board to provide themselves the maximum amount of time allowed by statute to make a final decision. We urge maximum time due to the importance and complexity of this proceeding that will have a tremendous impact on railroad shippers across a large portion of the Nation. C.U.R.E. again urges the Board to adopt a procedural schedule that provides the maximum amount of time allowed by statute for a final decision.

An apparent \$4 billion premium is being paid for Conrail by CSX and NS. Rail shippers are skeptical that \$4 billion worth of efficiencies and cost savings exist in the two proposed rail systems and are concerned that the premium will be recovered from shippers that are, or will be, captive to CSX or NS. Furthermore, shippers are concerned that the proposed Conrail acquisition will create new "bottleneck" situations that will decrease further rail-to-rail competition opportunities for shippers. This concern has been heightened by the Board's recent "bottleneck" decision.^{3/} The possibility of increasing rail rates and fewer competitive options arising from the sale of Conrail make this proceeding critical for rail shippers affected by the Applicants' proposal. For these reasons, each additional day available to shippers to analyze the implications of the Conrail acquisition and to negotiate pro-shipper agreements with the Applicants is

^{3/} See Central Power & Light Co. v. Southern Pacific Transportation Co., No. 41242; Pennsylvania Power & Light Co. v. Consolidated Rail Corp., No. 41295; MidAmerican Energy Co. v. Union Pacific Railroad Co., et al., No. 41626.

important. More time allowed for a final decision also will allow the Board to make a more balanced and informed decision.

Moreover, the details of the proposed CSX/NS acquisition of Conrail were not released until April 9, 1997. The argument that interested parties have known the fate of Conrail for six months is inaccurate. Shippers were aware of the CSX/Conrail and the NS/Conrail merger proposals. No details regarding a CSX/NS proposal to divide Conrail were available until April 9, 1997. Even now, many shippers are still analyzing the ramifications of the new CSX and NS rail systems. Regardless of the work already accomplished by CSX and NS, shippers have not had an adequate opportunity to study the CSX/NS proposal. Until the formal application is filed with the Board, shippers will be unable to analyze completely the impacts of the proposal on their individual companies. For shippers, the process is just beginning. Shippers, and the Board, will need every available day possible from the filing of the formal application to examine the CSX/NS application for the control of Conrail.

B. At the Very Least, the Board Should Adopt the Final Procedural Schedule Issued in the CSX/Conrail And NS/Conrail Dockets.

C.U.R.E. believes that if the Board is unwilling to provide the maximum amount of time allowed by statute, it should at the very least adopt a procedural schedule similar to the one adopted in the CSX/Conrail and NS/Conrail proceedings. Even though this proceeding is no less complex than the previous Conrail proceedings, the Applicants' proposed procedural schedule is 110 days shorter than

the final procedural schedules adopted by the Board in the CSX/Conrail and the NS/Conrail dockets. Both of those procedural schedules provided for a final decision in 365 days. As the Board stated in its decisions issuing the final procedural schedules in the previous Conrail merger proceedings:

a 365-day procedural schedule (which is 110 days more than applicants had proposed) will ensure that all parties are accorded due process and will allow [the Board] ample time to consider all issues affecting the public interest, and will also address cumulative impacts and crossover effects of prior mergers as appropriate. Further, [the Board] will consider the transaction in light of any settlement agreements that the applicants may reach with any parties, regardless of the complexity of the agreements.^{4/}

The concerns of the Board, which led to the final procedural schedules in the previous Conrail merger proceedings, remain valid with respect to this docket. The Board needs sufficient time to consider all issues affecting the public interest. Shippers require time to analyze the proposal and to negotiate agreements with the Applicants. As the Applicants said themselves:

This case, while involving a single, overall primary application and an agreed upon division of Conrail involves the extension of two separate and competing railroads into the territory now served by Conrail. It involves separate, competing operating and marketing plans for these two railroads. The process thus has many of the aspects of separate applications by the two carriers. Petition to Establish Procedural Schedule, STB Finance Docket No. 33388, CSX/NS-4, p. 8 (filed April 10, 1997).

^{4/} STB Finance Docket No. 33220, Decision No. 8, p. 4 (served Jan. 30, 1997); STB Finance Docket No. 33286, Decision No. 4, p. 4 (served Jan. 30, 1997).

Therefore, in order to ensure that all groups have enough time to study and comment fully on the proposed Conrail acquisition, C.U.R.E. believes that, at the very least, the Board should adopt the same procedural schedule it adopted in the previous Conrail merger proceedings.

III. C.U.R.E. SUPPORTS AT LEAST 120 DAYS FOR COMMENTS OPPOSING THE MERGER

The Applicants proposed procedural schedule provides 120 days for comments in opposition to the merger. C.U.R.E. argued to increase to 120 days the time available for opposition comments in the previous Conrail merger proceedings after the Board proposed reducing this period to 75 days.

C.U.R.E. supports providing at least 120 days for comments in opposition to the proposed acquisition of Conrail. A 120 day deadline reflects the preferences of the Applicants, the Board and many shippers who participated in the prior Conrail proceedings. The deadline remains appropriate in the current proceeding as well.

IV. CONCLUSION

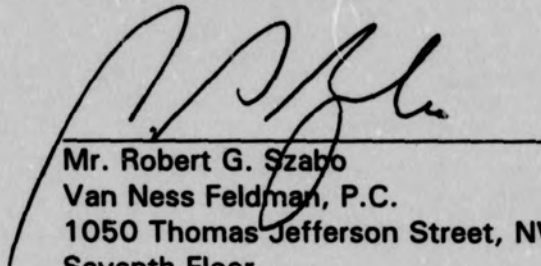
C.U.R.E. believes the procedural schedule submitted by the applicants does not provide adequate time for decision in this important matter. The Board should provide the maximum amount of time allowed by statute in order to ensure that all parties to the proceeding have an adequate opportunity to analyze and comment on the proceeding. Since the details of the CSX/NS proposal have become available

only in the past 30 days, shippers need as much time as possible to study the new proposal.

If the Board does not provide the maximum amount of time to make a final decision, it should at least adopt a procedural schedule identical to the final procedural schedules issued in the CSX/Conrail and NS/Conrail dockets. This proceeding is just as complicated as the previous Conrail merger proceedings and will require as much time to analyze.

Finally, C.U.R.E. supports the Applicants' proposal to provide 120 days for comments in opposition to the proposed division of Conrail. The deadline reflects the preferences of the Board, the Applicants, and many rail shippers and should be maintained.

Respectfully submitted,

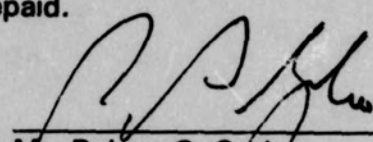


Mr. Robert G. Szabo
Van Ness Feldman, P.C.
1050 Thomas Jefferson Street, NW
Seventh Floor
Washington, D.C. 20007
(202) 298-1920

Executive Director and Counsel
Consumers United for Rail Equity

CERTIFICATE OF SERVICE

I hereby certify that on May 1, 1997, I served a true and correct copy of the foregoing Comments on the Proposed Procedural Schedule on counsel for all known parties by first-class mail, postage prepaid.



Mr. Robert G. Szabo
Van Ness Feldman, P.C.
1050 Thomas Jefferson Street, NW
Seventh Floor
Washington, D.C. 20007
(202) 298-1920

Executive Director and Counsel
Consumers United for Rail Equity

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BEFORE THE
SURFACE TRANSPORTATION BOARD

FINANCE DOCKET NO. 33388



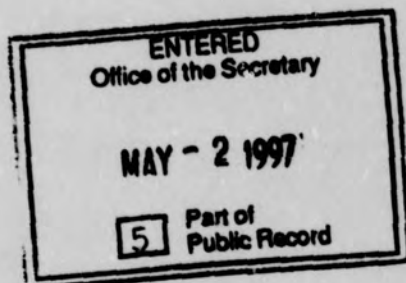
**CSX CORPORATION AND CSX TRANSPORTATION, INC.
NORFOLK SOUTHERN CORPORATION AND
NORFOLK SOUTHERN RAILWAY COMPANY
-- CONTROL AND OPERATING LEASES/AGREEMENTS --
CONRAIL INC. AND CONSOLIDATED RAIL CORPORATION --
TRANSFER OF RAILROAD LINE BY NORFOLK SOUTHERN
RAILWAY COMPANY TO CSX TRANSPORTATION, INC.**

**NOTICE OF APPEARANCE OF
CONSUMERS UNITED FOR RAIL EQUITY**

Mr. Robert G. Szabo
Van Ness Feldman, P.C.
1050 Thomas Jefferson Street, NW
Seventh Floor
Washington, D.C. 20007
(202) 298-1920

Executive Director and Counsel
Consumers United for Rail Equity

May 1, 1997



BEFORE THE
SURFACE TRANSPORTATION BOARD

FINANCE DOCKET NO. 33388

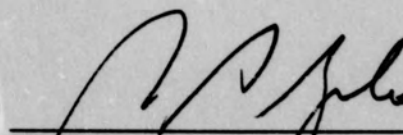


**CSX CORPORATION AND CSX TRANSPORTATION, INC.
NORFOLK SOUTHERN CORPORATION AND
NORFOLK SOUTHERN RAILWAY COMPANY
-- CONTROL AND OPERATING LEASES/AGREEMENTS --
CONRAIL INC. AND CONSOLIDATED RAIL CORPORATION --
TRANSFER OF RAILROAD LINE BY NORFOLK SOUTHERN
RAILWAY COMPANY TO CSX TRANSPORTATION, INC.**

**NOTICE OF APPEARANCE OF
CONSUMERS UNITED FOR RAIL EQUITY**

Please enter the appearance in this proceeding of the below-named attorney on behalf of the Consumers United for Rail Equity (C.U.R.E.). C.U.R.E. is an organization of captive rail shippers that transport coal for use in electricity generation. The members of C.U.R.E. are public power generators, rural electric cooperatives, investor-owned utilities and their national trade associations. C.U.R.E. intends to participate in this proceeding as parties of record. Accordingly, please place the named attorney, at the address provided, on the service list to receive all pleadings and decisions in this proceeding.

Respectfully submitted,

A handwritten signature in dark ink, appearing to read 'R. Szabo', is written over a horizontal line.

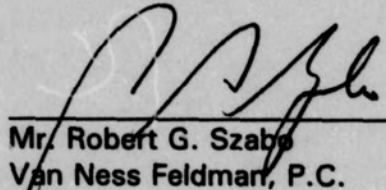
Mr. Robert G. Szabo
Van Ness Feldman, P.C.
1050 Thomas Jefferson Street, NW
Seventh Floor
Washington, D.C. 20007
(202) 298-1920

Executive Director and Counsel
Consumers United for Rail Equity

Dated: May 1, 1997

CERTIFICATE OF SERVICE

I hereby certify that on May 1, 1997, I served a true and correct copy of the foregoing Notice of Appearance on counsel for all known parties by first-class mail, postage prepaid.



Mr. Robert G. Szabo
Van Ness Feldman, P.C.
1050 Thomas Jefferson Street, NW
Seventh Floor
Washington, D.C. 20007
(202) 298-1920

Executive Director and Counsel
Consumers United for Rail Equity

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Maryland Department of Transportation
The Secretary's Office

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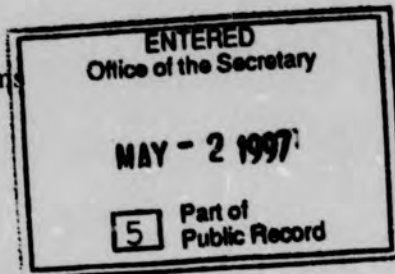
Parris N. Glendening
Governor

David L. Winstead
Secretary

John D. Porcari
Deputy Secretary

May 1, 1997

The Honorable Vernon A. Williams
Secretary
Surface Transportation Board
Mercury Building
Suite 700
1925 K Street, NW
Washington DC 20006



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

Dear Mr. Williams:

On April 11, 1997, the applicants in the above-referenced proceeding submitted, inter alia, their Notice of Intent to File Railroad Control Application (the "Notice") and Petition to Establish Procedural Schedule ("Petition") to the Surface Transportation Board ("Board"). This letter is to request that the Board place the Maryland Department of Transportation ("MDOT") and its outside counsel at the addresses indicated below on the list of parties of record prepared and issued under the provisions of 49 C.F.R. § 1180.4(a)(4). MDOT intends to participate in this proceeding as an active party. As such, in accordance with 49 C.F.R. § 1180.4(a)(2), the MDOT selects the acronym "MDOT-x" for identifying all documents and pleadings they submit.

Edward R.K. Hargadon, Esq.
Assistant Attorney General
Chief Counsel to the Department
Maryland Department of Transportation
P.O. Box 8755
BWI Airport, MD 21240

James R. Weiss, Esq.
Preston Gates Ellis &
Rouvelas Meeds LLP
1735 New York Avenue, NW
Suite 500
Washington, DC 20006-5209

Copies of this letter are being served on all persons presently on the Commission's service list, including the applicants' representatives identified in the notice of prefiling notification published in the Federal Register at 62 F.R. 19390 (April 21, 1997.)

My telephone number is (410) 865-1000

TTY For the Deaf: (410) 865-1342

Post Office Box 8755, Baltimore/Washington International Airport, Maryland 21240-0755

The Honorable Vernon A. Williams
Page Two

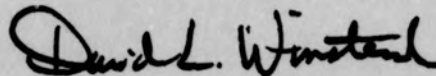
In addition, MDOT and the applicants are in discussions to confirm aspects of the proposed transaction that could resolve the concerns of the State of Maryland about the effects of the transaction on Maryland shippers and employees. These include:

- the nature and extent of competitive rail service to the Port of Baltimore and to other Northeast ports;
- infrastructure improvements that will preserve and enhance rail competition in the State; and issues pertaining to the preservation of jobs in the State.

The applicants have committed to providing the State within the next several weeks certain information that is pertinent to these issues to enable the State to make a timely determination of its position on the merits of the applications.

In anticipation that applicants will perform as promised, and after careful examination of the Petition, MDOT believes that it is in the interest of the citizens of Maryland and in the general public interest that the Board accept the expedited schedule that the applicants have proposed in the Petition.

Sincerely,

A handwritten signature in dark ink, appearing to read "David L. Winstead". The signature is fluid and cursive, with the first name "David" and last name "Winstead" clearly distinguishable.

David L. Winstead
Secretary

STB

FD

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4-21-97

D

179408

ZUCKERT, SCOUTT & RASENBERGER, L.L.P.

888 SEVENTEENTH STREET, N.W.
WASHINGTON, D.C. 20006-3939
TELEPHONE (202) 298-8660
FACSIMILES (202) 342-0683
(202) 342-1316

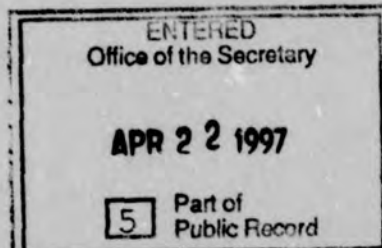
RICHARD A. ALLEN



April 21, 1997

Via Hand Delivery

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



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

Dear Secretary Williams:

Enclosed for filing is an original and twenty five copies of
three documents:

- 1) CSX/NS-5, Clarification of the Applicants' Notice of Intent to File Railroad Control Application;
- 2) CSX/NS-6, Petition for Leave to Reply to CN-5, Canadian National Railway Company's Response in Opposition to Petition for Waiver of Three-Month Notice Requirement, CN-5, Canadian National Railway Company's Response in Opposition to Petition for Protective Order, and Reply in Opposition to Petition for Waiver and to Petition for Protective Order of Atlantic City Electric Company, Delmarva Power & Light Company, Indianapolis Power & Light Company, and The Ohio Valley Coal Company; and
- 3) CSX/NS-7, Applicants' Consolidated Reply to CN-5, Canadian National Railway Company's Response in Opposition to Petition for Waiver of Three-Month Notice Requirement, CN-5, Canadian National Railway Company's Response in Opposition to Petition for Protective Order, and Reply in Opposition to Petition for Waiver and to Petition for Protective Order of Atlantic City Electric Company, Delmarva Power & Light Company,

The Honorable Vernon A. Williams
April 21, 1997
Page -2-

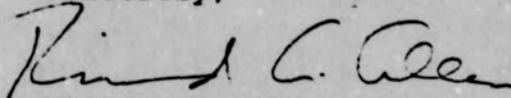
Indianapolis Power & Light Company, and The Ohio Valley
Coal Company.

Also enclosed is a 3 1/2" computer disk containing the filing in
Wordperfect 5.1 format, which is capable of being read by
Wordperfect for Windows 7.0.

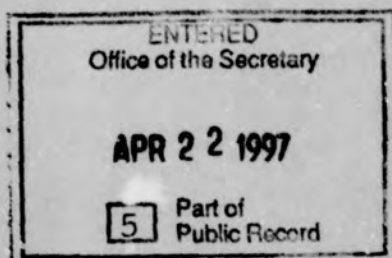
Applicants are serving this pleading, as they have served
all other pleadings in Finance Docket No. 33388, on all parties
that have made an appearance in any of Finance Docket No. 33220,
Finance Docket No. 33286, or Finance Docket No. 33388, and
Applicants will continue to do so until April 28, 1997. In light
of the Board's decision of April 17, 1997 discontinuing Finance
Docket Nos 33220 and 33286, beginning April 28, 1997, Applicants
will serve only persons who have made an appearance in Finance
Docket No. 33388.

Should you have any questions regarding this, please call.

Sincerely,


Richard A. Allen

Enclosure



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

APPLICANTS' CONSOLIDATED REPLY TO
CN-4, CANADIAN NATIONAL RAILWAY COMPANY'S RESPONSE
IN OPPOSITION TO PETITION FOR WAIVER
OF THREE-MONTH NOTICE REQUIREMENT,
CN-5, CANADIAN NATIONAL RAILWAY COMPANY'S
RESPONSE IN OPPOSITION TO PETITION
FOR PROTECTIVE ORDER, AND
REPLY IN OPPOSITION TO PETITION FOR
WAIVER AND TO PETITION FOR PROTECTIVE ORDER OF
ATLANTIC CITY ELECTRIC COMPANY, DELMARVA POWER & LIGHT COMPANY,
INDIANAPOLIS POWER & LIGHT COMPANY, AND
THE OHIO VALLEY COAL COMPANY

On April 10, 1997, CSX Corporation ("CSXC"), CSX Transportation, Inc. ("CSXT"),^{1/} Norfolk Southern Corporation ("NSC"), Norfolk Southern Railway Company ("NSRC")^{2/} and Conrail, Inc. ("CRI") and Consolidated Rail Corporation ("CRC")^{3/} filed a

^{1/} CSXC and CSXT are referred to collectively as "CSX."

^{2/} NSC and NSRC are referred to collectively as "NS."

notice of intent to file a railroad merger application for Board authorization under 49 U.S.C. §§ 11323-25 for a transaction that is more fully described in that Notice of Intent (CSX/NS-1) as clarified in the Clarification of Notice of Intent to File Railroad Control Application, (CSX/NS-5), filed April 21, 1997. On April 16, Canadian National Railway Company ("CN") filed CN-4, a Response in Opposition to Petition for Waiver of Three-Month Notice Requirement, and CN-5, a Response in Opposition to Petition for Protective Order.^{4/} Also on April 16, Atlantic City Electric Company, Delmarva Power & Light Company, Indianapolis Power & Light Company, and The Ohio Valley Coal Company (hereinafter referred to as the "ACE, et al.") filed an undesignated Reply in Opposition to Petition for Waiver and to Petition for Protective Order. The Applicants respond to each of these pleadings in this consolidated response.

Request for Waiver of the Three-Month Requirement

The Board's regulations at 49 C.F.R. § 1180.4(b)(1) generally require a three-month waiting period between pre-filing notification and the filing of a primary application. The

^{2/}(...continued)

^{3/} CRI and CRC are referred to collectively as "Conrail." CSX, NS and Conrail are referred to collectively as the "Applicants."

^{4/} CN also filed, in both Finance Docket Nos. 33220 and 33286, a Response in Opposition to Motions to Dismiss (CN-4). Because the Board has clarified that STB decisions discontinuing Finance Docket Nos. 33220 and 33286 will not impede the resolution of pending discovery disputes initially filed in those dockets, Applicants are not responding to CN-4 filed in those two dockets. See, the combined order issued in Finance Docket No. 33220, Decision No. 11, and Finance Docket No. 33286, Decision No. 7, served April 17, 1997.

Applicants, in CSX/NS-2 filed on April 10, 1997, requested waiver of that three-month notification period to permit them to file a primary application up to a month early.

Canadian National

CN questions the need to issue the requested waiver and alleges that granting the waiver would only cut into the time the Board, Applicants and other parties have to prepare for the filing of the primary application for the disposition of Conrail. The Board, Applicants and other parties, however, have been preparing for the filing of the primary application in the 5 1/2 months since CSX and NS first filed their notices of intent to file a railroad control application. See CSX/CR-1, Notice of Intent to File Railroad Control Application, STB Finance Docket No. 33220, filed October 18, 1996; and NS-1, Notice of Intent to File Railroad Control Application, STB Finance Docket No. 33286, filed November 6, 1996. CN in essence acknowledged this when it argued that its outstanding discovery requests against Conrail in Finance Docket Nos. 33220 and 33286 should be considered in Finance Docket No. 33388. CN's argument that it has not been, and will not be, permitted sufficient time to prepare for the filing of the primary application if the waiver is granted flies in the face of both the facts and its own arguments in support of consideration of its premature discovery requests.

CN ignores in its pleading Applicants' expressed concerns about the effects of keeping Conrail in a voting trust longer than necessary. Instead CN raises the specter of the impossible -- that Applicants could file a primary application next week -- and questions the need for "a complete and open-ended waiver." CN urges the Board to clarify its waiver to

preserve a minimal notice period of not less than two months to permit the Board and other interested parties to plan for the filing of the primary application. As stated in its petition for waiver, Applicants propose to submit the primary application approximately two months from the date of filing of their Notice of Intent, and the requested waiver seeks no more. This is reasonable in light of the prior notice the Board and other parties have had, the concerns of keeping Conrail in a voting trust longer than necessary, and the practical impossibility of submitting a primary application any sooner.

ACE, et al.

ACE, et al. argue that Applicants' proposal to pay \$115 in cash for the outstanding Conrail stock is not in the public interest. This argument is best examined in light of the primary application, not in the consideration of whether to grant waiver of the three-month waiting period prior to the filing of the primary application.

ACE, et al. urge the Board to advise CSX and NS to take the three-month period in an effort convince Conrail shareholders to take less than what has been promised them. This argument hardly warrants a reply. Denial of Applicants' waiver request would merely delay examination of the application and lengthen the time Conrail's future remains undetermined. The Applicants propose to reduce the three-month period in an effort to permit completion of examination of the transaction as quickly as possible, regardless of whether the STB grants or withholds its approval.

With respect to asserted concerns of ACE, et al. about service, Conrail in particular wishes to emphasize that it will continue to operate up to the time of the Board's decision independently and in full compliance with its common carrier duties and contract obligations.

Protective Order

The Applicants, in CSX/NS-3 filed on April 10, 1997, asked the Board to impose a Protective Order to permit Applicants to exchange information necessary to preparation of the primary application and to facilitate any necessary discovery at subsequent stages of this proceeding. The proposed protective order was modelled substantially on those entered by the Board or its predecessor, the Interstate Commerce Commission (the "Commission"), in recent control proceedings. The Board issued the protective order in Decision No. 1 on April 16, 1997.

CN asks the Board to invite comments from all parties prior to issuing a protective order because CN is concerned that CSX and NS are, and will continue to be, competitors, and that the Protective Order will not prevent CSX and NS from misusing Confidential Information. The Associate Power Companies express much the same concern. This is no different than past merger proceedings, despite any protestations to the contrary.

Substantially the same protective order issued in recent Board and Commission control proceedings has been issued in Finance Docket No. 33388. As in those recent Board and Commission control proceedings, the Board in this docket has the power to withhold its approval for a proposed transaction if it is not shown to be in the public interest, or to condition its approval in a manner that may be unacceptable to the Applicants. If this

happens, Paragraph 2 of the protective order issued in this docket is clear and fully addresses the expressed concerns: Confidential Information exchanged between CSX, NS and Conrail may be used "for the purpose of preparing for or participating in the Proceedings, but not for any other business, commercial, or other competitive purpose. . . ." The expressed concerns are groundless.

CN claims that the protective order contains no limitations on the persons in the respective applicants' companies entitled to receive Confidential Information. That is wrong. Only persons preparing for and participating in the proceeding may receive Confidential Information provided under the Protective Order, and only for the purpose of preparing for and participating in the proceeding. CSX and NS marketing personnel could not "freely exchange the most sensitive information as to prices and other terms on which transportation is provided" without violating the issued Protective Order and without causing injury to their respective companies.

Inasmuch as information exchanged under the Protective Order may only be used for the purpose of preparing and prosecuting the primary application, Applicants anticipate that most of that information will be exchanged between Conrail on the one hand and NS and CSX on the other, and that relatively little will be exchanged between NS and CSX. In any event, exchanges of information under protective orders are hardly uncommon; in any merger of competitors requiring regulatory approval, the applicants need to exchange information to prepare their application and the possibility always exists that the application may be denied and they will remain competitors, as NS and CSX will here.

The Applicants now are developing, as quickly as possible, the primary application which they will submit to the Board and interested third parties for review. Any prohibition on the exchange of Confidential Information necessary for that purpose, even for a period to permit to comment thereon, would delay that effort, extend unnecessarily the time in which Conrail's future is undetermined, and delay realization of the substantial public benefits of the transaction. The Protective Order issued in the proceeding is clear and unambiguous, and adequately addresses each of CN's and ACE, et al.'s concerns.^{5/}

^{5/} Applicants note that Paragraph 2 of the Protective Order contains a typographical error which was contained in the Petition for Protective Order. The phrase "then CSX and NS may respectively use Confidential Information obtained from Conrail pertinent to their respective operations under operating agreements with Conrail or operating agreements with Conrail in connection with such operations" should instead read "then CSX and NS may respectively use Confidential Information obtained from Conrail pertinent to their respective operations under operating agreements with Conrail or operating leases with Conrail in connection with such operations."

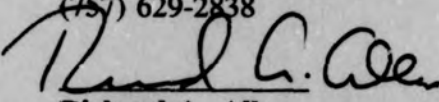
Conclusion

For the foregoing reasons, the relief requested in CN-4, CN-5 and the initial pleading of the Associate Power Companies should be denied.

Respectfully submitted,

James C. Bishop, Jr.
William C. Wooldridge
J. Gary Lane
James L. Howe III
Robert J. Cooney
George A. Aspatore
Norfolk Southern Corporation
Three Commercial Place
Norfolk, VA 23510-9241

(757) 629-2838

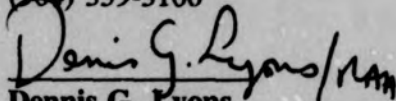

Richard A. Allen
James A. Calderwood
Andrew R. Plump
John V. Edwards
Zuckert, Scutt & Rasenberger, LLP
888 Seventeenth Street, N.W.
Suite 600
Washington, D.C. 20006-3939
(202) 298-8660

John M. Nannes
Scot B. Hutchins
Skadden, Arps, Slate, Meagher
& Flom LLP
1440 New York Ave., N.W.
Washington, D.C. 20005-2111
(202) 371-7400

Counsel for Norfolk Southern
Corporation and Norfolk Southern
Railway Company

Mark G. Aron
Peter J. Shudtz
CSX Corporation
One James Center
902 East Cary Street
Richmond, VA 23129
(804) 782-1400

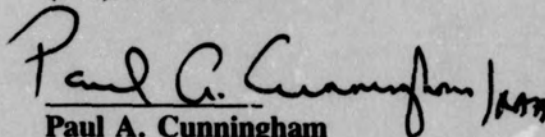
P. Michael Giftos
Paul R. Hitchcock
CSX Transportation, Inc.
500 Water Street
Speed Code J-120
Jacksonville, FL 32202
(904) 359-3100


Dennis G. Lyons
Richard L. Rosen
Paul T. Denis
Arnold & Porter
555 12th Street, N.W.
Washington, D.C. 20004-1202
(202) 942-5000

Samuel M. Sipe, Jr.
Timothy M. Walsh
Steptoe & Johnson LLP
1330 Connecticut Avenue
Washington, D.C. 20036-1795
(202) 429-3000

Counsel for CSX Corporation
and CSX Transportation, Inc.

Timothy T. O'Toole
Constance L. Abrams
Consolidated Rail Corporation
Two Commerce Square
2001 Market Street
Philadelphia, PA 19103
(215) 209-4000

A handwritten signature in dark ink, appearing to read "Paul A. Cunningham", followed by a date "1/19/97" written in a smaller, less distinct script.

Paul A. Cunningham
Harkins Cunningham
1300 Nineteenth Street, N.W.
Suite 600
Washington, D.C. 20036
(202) 973-7600

Counsel for Conrail Inc. and Consolidated
Rail Corporation

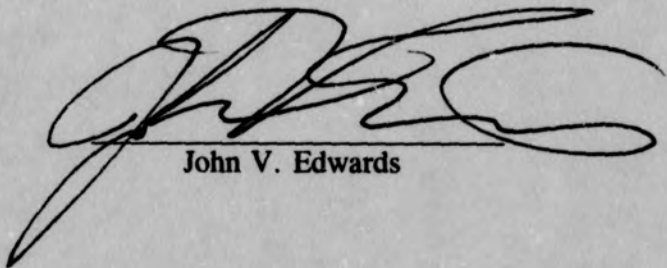
April 21, 1997

CERTIFICATE OF SERVICE

I, John V. Edwards, certify that on April 18, 1997 I have caused to be served a true and correct copy of the foregoing CSX/NS-7, Applicants' Consolidated Reply to CN-5, Canadian National Railway Company's Response in Opposition to Petition for Waiver of Three-Month Notice Requirement, CN-5, Canadian National Railway Company's Response in Opposition to Petition for Protective Order, and Reply in Opposition to Petition for Waiver and to Petition for Protective Order of Atlantic City Electric Company, Delmarva Power & Light Company, Indianapolis Power & Light Company, and The Ohio Valley Coal Company, on all parties that have appeared in Docket No. 33286, Finance Docket No. 33220 and Finance Docket No. 33388, by first class mail, postage prepaid, or by more expeditious means, and by hand delivery on the following:

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

Dated: April 21, 1997



John V. Edwards

STB

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4-21-97

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OPPENHEIMER WOLFF & DONNELLY

1020 Nineteenth Street N.W.
Suite 400
Washington, D.C. 20036-6105

(202) 293-6300
FAX (202) 293-6200

Direct Dial: 202-496-4906

April 21, 1997

VIA HAND DELIVERY

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

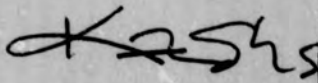
**Re: Finance Docket No. 33388, CSX Corporation and CSX Transportation, Inc.,
Norfolk Southern Corporation and Norfolk Southern Railway Company --
Control and Operating Leases/Agreements -- Conrail Inc. and Consolidated
Rail Corporation -- Transfer of Railroad Line by Norfolk Southern Railway
Company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

Dear Secretary Williams:

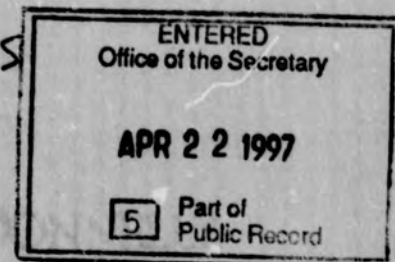
Enclosed you will find an original and 25 copies of the Notice of Appearance of Northern Virginia Transportation Commission and Potomac and Rappahannock Transportation Commission. Also enclosed is a 3.5 inch diskette containing the filing in WordPerfect 5.1.

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

Respectfully submitted,


Kevin M. Sheys

cc: All Parties on Certificate of Service

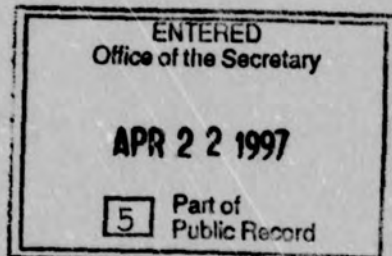


BEFORE THE
SURFACE TRANSPORTATION BOARD

Finance Docket No. 33388

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

NOTICE OF APPEARANCE OF
NORTHERN VIRGINIA TRANSPORTATION COMMISSION AND
POTOMAC AND RAPPAHANNOCK TRANSPORTATION COMMISSION



Stephen A. MacIsaac
Deputy County Attorney
Prince William County
One County Complex Court
Prince William, VA 22192
703-792-6620

Kevin M. Sheys
Edward J. Fishman
Oppenheimer Wolff & Donnelly
1020 Nineteenth Street, N.W.
Suite 400
Washington, D.C. 20036
202-293-6300

Counsel for Northern Virginia
Transportation Commission and
Potomac and Rappahannock
Transportation Commission

Dated: April 21, 1997



BEFORE THE
SURFACE TRANSPORTATION BOARD



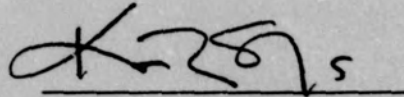
Finance Docket No. 33388

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

NOTICE OF APPEARANCE OF
NORTHERN VIRGINIA TRANSPORTATION COMMISSION AND
POTOMAC AND RAPPAHANNOCK TRANSPORTATION COMMISSION

Please enter the appearance in this proceeding of the below-named attorneys on behalf of Northern Virginia Transportation Commission and Potomac and Rappahannock Transportation Commission (the "Commissions"). The Commissions are political subdivisions of the Commonwealth of Virginia and co-owners of Virginia Railway Express. The Commissions intend to participate in this proceeding as parties of record. Accordingly, please place the named attorneys, at the addresses provided, on the service list to receive all pleadings and decisions in this proceeding.

Respectfully submitted,



Stephen A. MacIsaac
Deputy County Attorney
Prince William County
One County Complex Court
Prince William, VA 22192
703-792-6620

Kevin M. Sheys
Edward J. Fishman
Oppenheimer Wolff & Donnelly
1020 Nineteenth Street, N.W.
Suite 400
Washington, D.C. 20036
202-293-6300

Counsel for Northern Virginia
Transportation Commission and
Potomac and Rappahannock
Transportation Commission

Dated: April 21, 1997

CERTIFICATE OF SERVICE

I hereby certify that on this 21st day of April, 1997, a copy of the foregoing Notice of Appearance was served upon the following people by first class mail, postage prepaid:

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

Mark G. Aron
CSX Corporation
One James Center
901 East Cary Street
Richmond, VA 23219

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

Edward G. Banks, Jr.
Maryland & Delaware Railroad
106 Railroad Avenue
Federalsburg, MD 21632

Janice G. Barber
Burlington Northern Santa Fe Corporation
777 Main Street
3800 Continental Plaza
Ft. Worth, TX 76102-5384

Michael J. Bennane
House of Representatives
P.O. Box 30014
Lansing, MI 48909

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

Hon. Eric Bush
House of Representatives
State Capitol
Lansing, MI 48913

James A. Calderwood
Zuckert, Scoutt & Rasenberger, L.L.P.
888 17th Street, N.W., Suite 600
Washington, D.C. 20006-3939

Gabriel Calvo
The Ackerson Group
1275 Pennsylvania Avenue, N.W.
Washington, D.C. 20004

Missy Cassidy
Maryland Department of Transportation
P.O. Box 8755
Baltimore-Washington International Airport, MD 21240-0755

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

Nichole E. Clark
Wachtell, Lipton, Rosen & Katz
51 West 52nd Street
New York, NY 10019-6150

Steven A. Cohen
Wachtell Lipton & Katz
51 West 52nd Street
New York, NY 10019

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

Paul A. Cunningham
Harkins Cunningham
1300 19th Street, N.W., Suite 600
Washington, D.C. 20036

John M. Culter, Jr.
McCarthy Sweeney Harkaway
1750 Pennsylvania Avenue, N.W., Suite 1105
Washington, D.C. 20036

Hon. Alfonse D'Amato
ATTN: Peter Phipps
United States Senate
Washington, D.C. 20510

Paul D. DeMariano
The Port of Philadelphia & Camden, Inc.
3460 North Delaware, Suite 200
Philadelphia, PA 19134

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

Kelvin J. Dowd
Slover & Loftus
1224 17th Street, N.W.
Washington, D.C. 20036

Richard S. Edelman
Higsaw Mahoney Clarke
1050 Seventeenth Street, N.W., Suite 210
Washington, D.C. 20036

John V. Edwards, Esq.
Zuckert, Scoutt et al.
888 17th Street, N.W., Suite 600
Washington, D.C. 20006-3939

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

Roy T. Englert, Jr.
Mayer, Brown & Platt
2000 Pennsylvania Avenue, N.W., Suite 6500
Washington, D.C. 20006

Gerald W. Fauth, III
G.W. Fauth & Associates, Inc.
P.O. Box 2401
Alexandria, VA 22301

John Gallagher
Fieldston Publications, Inc.
1800 Massachusetts Avenue, N.W., Suite 500
Washington, D.C. 20036

Hon. Carl F. Gnodtke
House of Representatives
State Capitol
Lansing, MI 48913

Donald F. Griffin
400 N. Capitol Street, N.W., Suite 852
Washington, D.C. 20001

James M. Guinivan
Harkins Cunningham
1300 19th Street, N.W., Suite 600
Washington, D.C. 20036-1609

Hon. Robert F. Hagan
Ohio 64th House District
562 Madera Avenue
Youngstown, OH 44504

Patrick C. Hendericks
Iowa Legislative Director UTU
317 E 5th Street, Suite 11
Des Moines, IA 50309

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

Hon. Sandra J. Hill
House of Representatives
State Capitol
Lansing, MI 48913

James L. Howe III
Norfolk Southern Corporation
3 Commercial Place
Norfolk, VA 23510-2191

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

Hon. Wayne M. Jones
Ohio House of Representatives
Statehouse
Columbus, OH 43215

Dean R. Kleckner
223 Touhy Avenue
Park Ridge, IL 60068

Kathryn A. Kusske
Mayer, Brown & Platt
2000 Pennsylvania Avenue, N.W.
Washington, D.C. 20006

Hon. Jacob Leventhal
Administrative Law Judge
Ferc, Office of Hearings
888 First Street, N.E., Suite 11F
Washington, D.C. 20426

John M. Livingood
201 Glencolter Court
Severna Park, MD 21146

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

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

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

Neal M. Mayer
Hoppel Mayer & Coleman
1000 Connecticut Avenue, N.W., Suite 400
Washington, D.C. 20036

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

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

Jeffrey R. Moreland
Santa Fe Pacific Corporation, et al.
17 East Golf Road
Schaumburg, IL 60173

Christopher C. O'Hara
Brickfield Burchette & Ritts PC
1025 Thomas Jefferson Street, N.W., Eighth Floor
Washington, DC 20007

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

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

Jean Pierre Ouellet
Chief Legal Officer and Corporate Secretary
Canadian National Railway Company
935 de La Gauchetiere Street West
16th Floor
Montreal, Quebec H3B 2M9

David L. Petri
Distribution Services of America, Inc.
208 North Street
Foxboro, MA 02035

Andrew R. Plump
Zuckert, Scoutt, Rasenberger
888 17th Street, N.W., Suite 600
Washington, D.C. 20006-3939

Hon. Vincent "Joe" Porreca
State Representative
P.O. Box 30014
Capitol Building Room B-76
Lansing, MI 48909-7514

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

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

Michael E. Roper
Burlington Northern Santa Fe Corporation
777 Main Street, 3800 Continental Place
Ft. Worth, TX 76102

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

Thomas A. Schmitz
The Fieldston Co., Inc.
1800 Massachusetts Avenue, N.W., Suite 500
Washington, D.C. 20036

Jon Scholl
Illinois Agricultural Association
P.O. Box 2901
Bloomington, IL 61702

Edward M. Selfe
Bradley Arant Rose & White
P.O. Box 830709
2001 Park Place, Suite 1400
Birmingham, AL 35283-0709

Alison Shipman
National Corn Growers Association
122 C Street, N.W., Suite 510
Washington, D.C. 20001

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

Richard G. Slattery
Amtrak
60 Massachusetts Avenue, N.E.
Washington, D.C. 20002

Paul Samuel Smith
U.S. Department of Transportation
400 Seventh Street, S.W., Room 4102 C-30
Washington, D.C. 20590

Adrian L. Steel, Jr.
Mayer, Brown & Platt
2000 Pennsylvania Avenue, N.W., Suite 6500
Washington, D.C. 20006

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

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

Linda H. Trichel
Commercial National Bank
P.O. Box 21119
Shreveport, LA 71152

Richard E. Weicher
Burlington Northern Santa Fe Corporation
1700 East Golf Road, 6th Floor
Schaumburg, IL 60173

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

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

Debra L. Willen
Guerrieri, Edmond, et al.
1331 F Street, N.W., 4th Floor
Washington, D.C. 20004

Frederic L. Wood
Donelan, Cleary, et al.
1100 New York Avenue, N.W., Suite 750
Washington, D.C. 20005-3934

William L. Wright
Public Utilities Commission of Ohio
Borden Building, 7th Floor
180 East Broad Street
Columbus, OH 43215

Edward Wytkind, Executive Director
Transportation Trades Department AFL-CIO
400 N. Capitol Street, S.W., Suite 861
Washington, D.C. 20001

Constance L. Abrams
Consolidated Rail Corporation
2001 Market Street 16-A, Two Commerce Square
Philadelphia, PA 19101-1416

George R. Arnoid
M.C.C.A.
1306 St. Louis Street
Edwardsville, IL 62025-1906

William A. Bon
26555 Evergreen Road, Suite 200
Southfield, MI 48076

Charles H. Cochran
1200 New Hampshire Avenue, N.W.
Washington, D.C. 20036-6802

Paul T. Denis
Arnold & Porter
555 12th Street, N.W.
Washington, D.C. 20004-1202

P. Michael Giftos
CSX Transportation, Inc.
500 Water Street
Jacksonville, FL 32202

Paul R. Hitchcock
CSX Transportation
Law Department
500 Water Street SCJ-150
Jacksonville, FL 32202

Celia C. Lovell
Suite 375
1500 K Street, N.W.
Washington, D.C. 20005-1209

Susan T. Morita
555 12th Street, N.W.
Washington, D.C. 20004-1202

Frank J. Pergolizzi
Slover & Loftus
1224 Seventeenth Street, N.W.
Washington, D.C. 20036

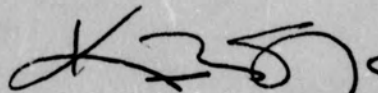
Richard L. Rosen
Arnold & Porter
555 12th Street, N.W.
Washington, D.C. 20004-1202

Peter J. Shudtz
CSX Corporation
901 E. Cary Street
One James Center
Richmond, VA 23119

Mary Gabrielle Sprague
555 Twelfth Street, N.W.
Washington, D.C. 20004-1202

Timothy M. Walsh
Steptoe & Johnson
1330 Connecticut Avenue, N.W.
Washington, D.C. 20036-1795

Bruce B. Wilson
Consolidated Rail Corporation
2001 Market Street
Philadelphia, PA 19101-1417



Kevin M. Sheys

STB

FD

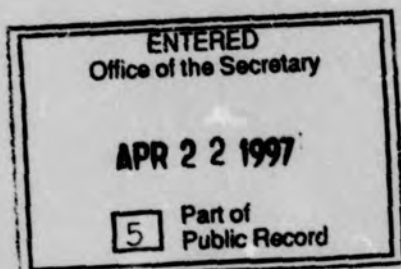
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BEFORE THE
SURFACE TRANSPORTATION BOARD

Finance Docket No. 33388



CSX Corporation and CSX Transportation, Inc.
Norfolk Southern Corp. and Norfolk
Southern Ry. Co.--Control and Operating
Leases/Agreements--Conrail Inc.
and Consolidated Rail Corporation
Transfer of Railroad Line by Norfolk
Southern Railway Company to CSX Transportation, Inc.

NOTICE OF APPEARANCE

Highsaw, Mahoney & Clarke, P.C. hereby enters its appearance in this proceeding on behalf of the Railway Labor Executives' Association and its affiliated organizations,¹ the Brotherhood of Maintenance of Way Employees and the International Brotherhood of Electrical Workers. For purposes of this proceeding, these organizations will be referred to as the "Allied Rail Unions" or "ARU". Service of filings in this case on the ARU should be provided to William G. Mahoney and Richard S. Edelman as counsel for the ARU and to William A. Bon and Donald F. Griffin for the Brotherhood of Maintenance of Way Employees.

¹ The RLEA affiliated organizations are: American Train Dispatchers Department/BLE; Brotherhood of Locomotive Engineers; Brotherhood of Railroad Signalmen; Hotel Employees and Restaurant Employees International Union; International Brotherhood of Boilermakers, Iron Ship Builders, Blacksmiths, Forgers and Helpers; International Brotherhood of Firemen & Oilers; and Sheet Metal Workers' International Association.


Respectfully submitted,

Of Counsel:

William A. Bon
General Counsel
Brotherhood of Maintenance of
Way Employes
26555 Evergreen Road
Suite 200
Southfield, MI 48076
(810) 948-1010

Donald F. Griffin, Esq.
Brotherhood of Maintenance of
Way Employes
400 North Capitol St., N.W.
Suite 852
Washington, D.C. 20001-1511
(202) 638-2135

Counsel for Brotherhood of
Maintenance of Way Employes



William G. Mahoney
Richard S. Edelman
L. Pat Wynns
HIGHS AW, MAHONEY & CLARKE, P.C.
1050 17th Street, N.W.
Suite 210
Washington, D.C. 20036
(202) 296-8500

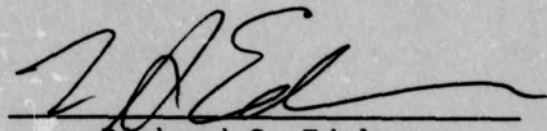
Counsel for Railway Labor
Executives Association and its,
affiliated organizations,
Brotherhood of Maintenance of
Way Employees, and Interna-
tional Brotherhood of
Electrical Workers

Dated: April 21, 1997

CERTIFICATE OF SERVICE

I hereby certify that I have caused to be served one copy of the foregoing Notice of Appearance, by first-class mail, postage prepaid, to the offices of the parties on the attached list which was derived from the service list in Finance Docket No. 33220.

Dated at Washington, D.C. this 21st day of April, 1997.


Richard S. Edelman

Richard A. Allen
ZUCKERT, SCOUTT ET AL.
888 17th Street, N.W.
Suite 600
Washington, D.C. 20006-3939 US

James A. Calderwood
ZUCKERT, SCOUTT & RASENBERGER, L.L.P.
888 17th Street, N.W.
Suite 600
Washington, D.C. 20006-3939 US

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

Paul A. Cunningham
HARKINS CUNNINGHAM
1300 19th Street, N.W.
Suite 600
Washington, D.C. 20036

John Edwards, Esq.
ZUCKERT, SCOUTT ET AL.
888 17th Street, N.W.
Suite 600
Washington, D.C. 20006-3939

Gerald W. Fauth, III
G. W. Fauth & Associates, Inc.
P. O. Box 2401
Alexandria, VA 22301 US

Honorable Robert F. Hagan
Ohio 64th House District
562 Madera Avenue
Youngstown, OH 44504 US

Erika Z. Jones
MAYER, BROWN & PLATT
2000 Pennsylvania Ave., N.W.
Suite 6500
Washington, D.C. 20006

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

Neal M. Mayer
HOPPEL MAYER & COLEMAN
1000 Connecticut Avenue, N.W.
Suite 400
Washington, D.C. 20036 US

Mark G. Aron
CSX Corporation
One James Center 901 East Cary Street
Richmond, VA 23219 US

Gabriel Calvo
The Ackerson Group
1275 Pennsylvania Avenue, N.W.
Washington, D.C. 20004 US

Nicole E. Clark
WACHTELL, LIPTON, ROSEN & KATZ
51 West 52nd Street
New York, NY 10019-6150 US

Paul D. Demariano
The Port of Philadelphia & Camden, Inc.
3460 North Delaware
Suite 200
Philadelphia, PA 19134 US

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

John Gallagher
Fieldston Publications, Inc.
1800 Massachusetts Avenue, N.W.
Suite 500
Washington, D.C. 20036 US

Patrick C. Hendricks
Iowa Legislative Director, UTU
317 East 5th Street
Suite 11
Des Moines, IA 50309 US

Dean R. Kleckner
223 Touhy Avenue
Park ridge, IL 60068 US

John M. Livingood
201 Glencolter Court
Severna Park, MD 21146 US

Jeffrey R. Moreland
Santa Fe Pacific Corp. *et al.*
1700 East Golf Road
Schaumburg, IL 60173 US

Janice G. Barber
Burlington Northern Railroad
3800 Continental Place
777 Main Street
Fort Worth, TX 76102 US

Missy Cassidy
Maryland Department of Transportation
P. O. Box 8755
Baltimore-Washington International
Airport, MD 21240-0755 US

Paul D. Coleman
HOPPEL MAYER & COLEMAN
1000 Connecticut Avenue, N.W.
Suite 400
Washington, D.C. 20036-5302 US

Robert K. Dreiling
THE KANSAS CITY SOUTHERN RAILWAY CO.
114 West 11th Street
Kansas City, MO 64105

Roy T. Englert, Jr.
MAYER, BROWN & PLATT
2000 Pennsylvania Ave., N.W.
Suite 6500
Washington, D.C. 20006

Donald F. Griffin
Brotherhood of Maintenance of Way Employees
400 North Capitol Street, N.W.
Suite 852
Washington, D.C. 20001 US

James L. Howe, III
Norfolk Southern Corporation
3 Commercial Place
Norfolk, VA 23510-2191 US

Kathryn Kusske
MAYER, BROWN & PLATT
2000 Pennsylvania Ave., N.W.
Suite 6500
Washington, D.C. 20006 US

Dennis G. Lyons
ARNOLD & ORTER
555 12th Street, N.W.
Washington, D.C. 20004-1202 US

William A. Mullins
TROUTMAN SANDERS, LLP
1300 I Street, N.W.
Suite 500 East
Washington, D.C. 20005

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

Andrew R. Plump
ZUCKERT, SCOUTT ET AL.
888 17th Street, N.W.
Suite 600
Washington, D.C. 20006-3939 US

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

Arvid E. Roach, II
COVINGTON & BURLING
1201 Pennsylvania Avenue, N.W.
P. O. Box 7566
Washington, D.C. 20044 US

Michael E. Roper
Burlington Northern Railroad
3800 Continental Place
777 Main Street
Fort Worth, TX 76102 US

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

Thomas A. Schmitz
The Fieldston Company, Inc.
1800 Massachusetts Avenue, N.W.
Suite 500
Washington, D.C. 20036-1613 US

Richard G. Slattery
Amtrak
600 Massachusetts Avenue, N.E.
Washington, D.C. 20002 US

Adrian L. Steel, Jr.
MAYER, BROWN & PLATT
2000 Pennsylvania Ave., N.W.
Suite 6500
Washington, D.C. 20006 US

Richard E. Weicher
Santa Fe Pacific Corporation, *et al.*
1700 East Golf Road
Schaumburg, IL 60173 US

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

William L. Wright
Public Utilities Commission of Ohio
Borden Building, 7th Floor
Floor 180 East Broad Street
Columbus, OH 43215 US

STB

FD

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D

179386

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**VanNess
Feldman**
ATTORNEYS AT LAW

A PROFESSIONAL CORPORATION
1050 Thomas Jefferson Street N.W.
Washington, D.C. 20007-3877
(202) 295-1800 Telephone
(202) 339-2416 Facsimile

Seattle, Washington
(206) 623-9372

April 18, 1997



VIA HAND DELIVERY

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

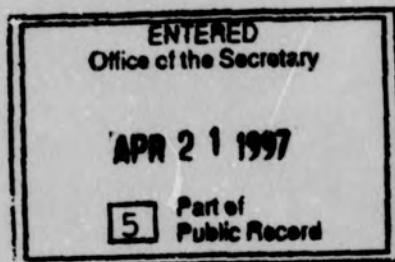
**Re: CSX Corp./Norfolk Southern Corp. -- Control and Operating
Leases/Agreements -- Conrail; Finance Docket No. 33388**

Dear Secretary Williams:

Enclosed are the original and 25 copies of "Reply in Opposition To Petition For Waiver" of the Consumers United for Rail Equity for filing in the above referenced proceeding. Also enclosed is a 3.5" diskette containing the filing in Wordperfect format.

Please date stamp and return the enclosed five additional copies via our messenger.

Very truly yours,



Robert G. Szabo

Executive Director and Counsel
Consumers United for Rail Equity

Enclosure

EXPEDITED CONSIDERATION REQUIRED

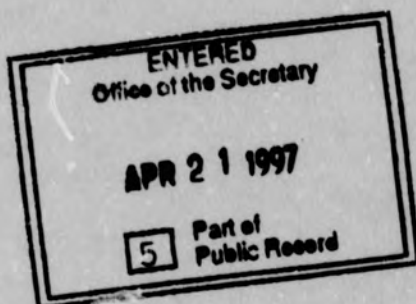
BEFORE THE
SURFACE TRANSPORTATION BOARD



FINANCE DOCKET NO.33388

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

**REPLY IN OPPOSITION TO PETITION FOR WAIVER
OF THE CONSUMERS UNITED FOR RAIL EQUITY**



Mr. Robert G. Szabo
Van Ness Feldman, P.C.
1050 Thomas Jefferson Street, NW
Seventh Floor
Washington, D.C. 20007
(202) 298-1920

Executive Director and Counsel
Consumers United for Rail Equity

April 18, 1997

Consumers United for Rail Equity ("C.U.R.E.") replies in opposition to the Petition for Waiver submitted by Norfolk Southern, Conrail, and CSX on April 10, 1997.

C.U.R.E. is an organization of captive rail shippers that transport coal for use in electricity generation. The members of C.U.R.E. are public power generators, rural electric cooperatives, investor-owned electric utilities and their national trade associations. A list of current members of C.U.R.E. is attached to this statement.

REPLY IN OPPOSITION TO PETITION FOR WAIVER

1. Given the importance of this proceeding and its impact on railroad shippers across a large portion of the Nation, C.U.R.E. does not believe it is in the public interest to shorten any of the Board's timing requirements, including the minimum three-month interval between the prefiling notification and the formal application.

2. C.U.R.E. believes that the CSX/Norfolk Southern proposal to divide Conrail ("proposed transaction") will have an enormous impact on railroad shippers in the eastern United States. There are significant issues involving rail rates and competition that are the subject of on-going discussions between railroads and shippers. In order to be informed properly regarding the impact of the proposed transaction on rail rates and competition, a considerable amount of study and preparation must be performed by shippers. Informed discussions and negotiations

between shippers and railroads can result in pro-shipper provisions being contained in the application filed by the railroads. Maximum time should be allowed for these ongoing discussions.

3. The Board surely realizes from media reports that shippers are very concerned about the likelihood that an enormous premium is being paid to acquire Conrail by both Norfolk Southern and CSX. C.U.R.E. members believe that the proposed transaction may include the largest acquisition premium of any railroad merger to date -- over \$4 billion. C.U.R.E. members are skeptical that \$4 billion worth of efficiencies and cost savings exist in the two proposed new rail systems, and fear that the \$4 billion premium will be paid by the shippers that are, or will be, captive to the two new railroads. Every additional day available to shippers to analyze this issue is important.

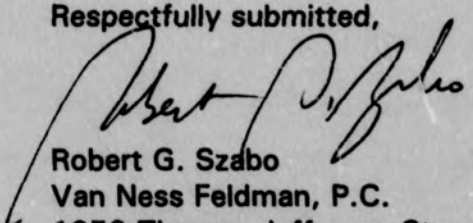
4. On December 31, 1996, the Board ruled that bottleneck carriers are not required to quote a rate over the bottleneck segment of a route and that the Board has no statutory authority to order the railroad to quote such a rate. Shippers are concerned that the proposed Conrail acquisition will create new bottleneck situations that will further decrease rail-to-rail competition opportunities for shippers. Every additional day available to shippers to analyze this possibility is important.

CONCLUSION

C.U.R.E. believes that the public interest requires that the Board provide the maximum time allowed by statute and regulation, both during the pre-application and post-application periods, for shippers to analyze the potential threats of the proposed acquisition and to negotiate protective agreements with their rail carriers.

The Board should deny the Petition for Waiver and follow its procedural rules requiring a three-month interval between prefiling notice and the formal application. There appears to be no element in the proposed transaction that requires an accelerated approach. A careful review of the potential anti-competitive effects of the proposed transaction during the maximum period of time allowed by statute and regulation, both prior to filing and after the filing, will serve the public interest.

Respectfully submitted,

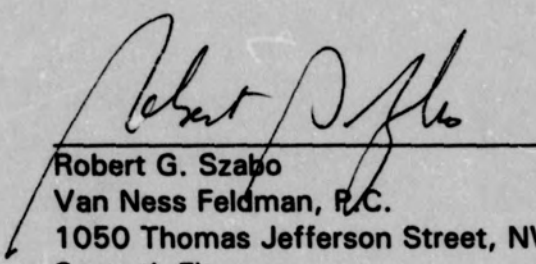


Robert G. Szabo
Van Ness Feldman, P.C.
1050 Thomas Jefferson Street, NW
Seventh Floor
Washington, D.C. 20007
(202) 298-1920

Executive Director and Counsel
Consumers United for Rail Equity

CERTIFICATE OF SERVICE

I, Robert G. Szabo, certify that on April 18, 1997, I have caused to be served a true and correct copy of the foregoing Reply in Opposition to Petition for Waiver, on all parties of record.



Robert G. Szabo
Van Ness Feldman, P.C.
1050 Thomas Jefferson Street, NW
Seventh Floor
Washington, D.C. 20007
(202) 298-1920

Consumers United for Rail Equity

Membership List

Algona Municipal Utilities

Algona, Iowa

Serving Iowa

American Electric Power

Service Corporation

Columbus, Ohio

Serving Michigan, Indiana, Ohio,

Kentucky, Virginia, West Virginia, Tennessee

American Public Power Association

Washington, D.C.

National trade association representing municipally-owned electric utilities, public utility districts, state and county-owned electric systems, and rural cooperatives

Arizona Electric Power Cooperative, Inc.

Benson, Arizona

Serving Arizona

Arkansas Electric Cooperative Corporation

Little Rock, Arkansas

Serving Arkansas

Baltimore Gas and Electric

Baltimore, Maryland

Serving Baltimore, Central Maryland

Carolina Power and Light Company

Raleigh, North Carolina

Serving North Carolina, South Carolina

Central and South West Corporation

Dallas, Texas

Serving Oklahoma, Louisiana, Texas, Arkansas

Dairyland Power Cooperative

La Crosse, Wisconsin

Serving Wisconsin

Detroit Edison

Detroit, Michigan

Serving Michigan

Edison Electric Institute

Washington, D.C.

National trade association representing investor-owned electric utility companies operating in the U.S.

Minnesota Power and Light Company

Duluth, Minnesota

Serving Minnesota

Municipal Electric Systems of Oklahoma

Oklahoma City, Oklahoma

Serving Oklahoma

National Rural Electric Cooperative Association

Washington, D.C.

National trade association representing

rural electric cooperative systems,

public power districts, and

public utility districts in 46 states

Nebraska Public Power District

Columbus, Nebraska

Serving Nebraska

Otter Tail Power Company

Fergus Falls, Minnesota

Serving Minnesota, North Dakota, South Dakota

Potomac Electric Power Company

Washington, D.C.

Serving District of Columbia, Maryland

Savannah Electric and Power Company

Savannah, Georgia

Serving Georgia

Southern Company Services

Atlanta, Georgia

Serving Alabama, Georgia, Florida, Mississippi

Southern Indiana Gas and Electric Company

Hammond, Indiana

Serving Indiana

Western Fuels Association

Washington, D.C.

Serving Great Plains, Rocky Mountain and Southwest states including North Dakota,

South Dakota, Wyoming, Montana,

Utah, Kansas, Colorado, New Mexico,

Minnesota, Louisiana

Wisconsin Power and Light Company

Madison, Wisconsin

Serving Wisconsin, Illinois

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LEBOEUF, LAMB, GREENE & MAGRA
L.L.P.

A LIMITED LIABILITY PARTNERSHIP INCLUDING PROFESSIONAL CORPORATION



NEW YORK
WASHINGTON
ALBANY
BOSTON
DENVER
HARRISBURG
HARTFORD
JACKSONVILLE

1875 CONNECTICUT AVENUE, N.W.
WASHINGTON, DC 20009-5728

(202) 986-8000

TELEX: 440274 FACSIMILE: (202) 986-8102

LOS ANGELES
NEWARK
PITTSBURGH
PORTLAND, OR
SALT LAKE CITY
SAN FRANCISCO
BRUSSELS
MOSCOW
ALMATY
LONDON
(A LONDON-BASED
MULTINATIONAL PARTNERSHIP)

WRITER'S DIRECT DIAL:

(202) 986-8213

April 16, 1997

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VIA HAND DELIVERY

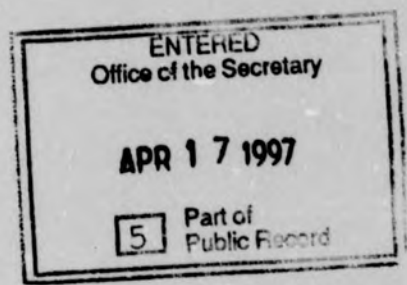
Mr. Vernon A. Williams, Secretary
Surface Transportation Board
1925 K Street, N.W., Seventh Floor
Washington, DC 20423-0001

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

Dear Secretary Williams:

Enclosed are the original and 25 copies of "Reply In Opposition To Petition For Waiver And To Petition For Protective Order of Atlantic City Electric Company, Delmarva Power & Light Company, Indianapolis Power & Light Company, and The Ohio Valley Coal Company," for filing in the above-referenced proceeding. Also enclosed is a 3.5" diskette containing the filing in Wordperfect format.

Please date stamp and return the enclosed five additional copies via our messenger.



Very truly yours,
Brenda Durham
Brenda Durham

Attorney for Atlantic City Electric Company,
Delmarva Power & Light Company,
Indianapolis Power & Light Company,
and The Ohio Valley Coal Company

Enclosure

cc: Paul A. Cunningham, Esq.
Dennis G. Lyons, Esq.
Richard A. Allen, Esq.
All Other Parties on Service List

EXPEDITED CONSIDERATION REQUIRED

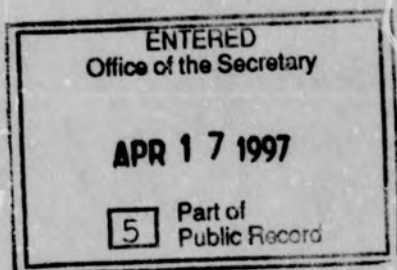
BEFORE THE
SURFACE TRANSPORTATION BOARD



FINANCE DOCKET NO. 33388

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

**REPLY IN OPPOSITION TO PETITION FOR WAIVER
AND TO PETITION FOR PROTECTIVE ORDER OF
ATLANTIC CITY ELECTRIC COMPANY,
DELMARVA POWER & LIGHT COMPANY,
INDIANAPOLIS POWER & LIGHT COMPANY, AND
THE OHIO VALLEY COAL COMPANY**



Michael F. McBride
Linda K. Breggin
Brenda Durham
LeBoeuf, Lamb, Greene & MacRae, L.L.P.
1875 Connecticut Avenue, N.W., Suite 1200
Washington, DC 20009-5728
(202) 986-8000

Attorneys for Atlantic City Electric
Company, Delmarva Power & Light
Company, Indianapolis Power & Light
Company, and The Ohio Valley Coal
Company

Atlantic City Electric Company, Delmarva Power & Light Company, Indianapolis Power & Light Company, and The Ohio Valley Coal Company ("collectively ACE, et al.") reply in opposition to the Petition for Waiver ("Waiver Petition") and to the Petition for Protective Order, dated April 10, 1997.

1. The Waiver Petition is premised on the notion that the proposed transaction is in the public interest. That may or may not be true -- ACE, et al. do not now have a position, because important aspects of the transaction are not yet known -- but Applicants' assertion to that effect is a mere assertion, unsupported by any evidence, since none has been submitted.

2. In contrast, one fact is the subject of official notice and is irrefutable: the proposed transaction includes the largest acquisition premium, by far, of any railroad merger or acquisition in history -- over \$4 billion. Unless the Board could now conclude that the \$4 billion acquisition premium will be paid for entirely by cost savings and new intermodal traffic (which is highly unlikely, and which Applicants have never claimed) the premium will be paid by existing shippers or Conrail, CSX, and NS. There is no other option. Thus, shippers are now at great risk because of the current purchase by CSX and NS of Conrail stock.

3. The Board must recognize that the structure of the transaction is already prejudicial to shippers, because NS and CSX are now purchasing the outstanding shares of Conrail for approximately \$45 per share over the market price in early October 1996. The purchase apparently will be complete by early June 1997, before the joint Application is filed. The Board will then be presented with a fait accompli -- the \$10 plus billion will have been spent, the stock will be held by Applicants (albeit in a voting trust, which does nothing to cure the overpayment problem), and the Board will have to wrestle with the problem of either (1) denying approval (thus leaving NS and CSX in a financially weakened position, which is not in

the public interest) or (2) approving the transaction either (a) with shipper protection from rate increases (likely producing the same result at (1)) or (b) without such protection for shippers (thus harming the shippers whom the Board is obliged to protect).¹ The best solution is, therefore, not to rush "pell mell" into a potentially harmful transaction, waiving important rules as we go, but rather to advise CSX and NS to use the available three months under the Board's rules time to go back to Conrail's shareholders, before most of Conrail's shares are purchased, and seek to reach agreement on a per-share price much closer to Conrail's book value (or market value before announcement of the CSX/Conrail initial agreement in October 1996).

4. At the same time, this situation is completely unlike the UP/SP merger proceeding, where the Board was driven by concerns about (1) SP's financial health and (2) its ability to compete with BN-SF and UP. No such issues arise in the East, and thus there is not need for expedition except the self-inflicted wound of a purchase price for Conrail that is far too high, by any reasonable standard. Customers of a regulated entity are never subjected to substantial acquisition premiums.

5. The Board should also make clear that it expects Conrail to perform its common-carrier and contractual duties without diminution during the pendency of this proceeding. The Board should not succumb to the self-inflicted damage that CSX and NS claim (Waiver Petition at 2, Schedule Petition at 5-6) will result if this proceeding is not expedited. Conrail initiated the effort to merge with, or be acquired by, another carrier, but it

¹ A recent statement by Professor Alfred E. Kahn and report by Professor Jerome Hass (Attachment 1) concludes that the allowance of acquisition premium in the regulatory regime introduces a "fatal circularity," resulting in rate increases which justify higher share prices which lead to further rate increases. Surely, some share price must be too high, and we submit that a premium of over \$4 billion or 65% of share value, is obviously too high. For example, surely the Board would have expressed its concern if NS and CSX had agreed to pay \$200 per share of Conrail stock.

did so in the face of legal obligations to serve the public, and must (as a still independent company) meet those obligations. The Board cannot permit any less.

6. Moreover, Applicants suggest that three months' notice of filing the joint Application is not necessary because this transaction has been the subject of informal notice for some time. But -- even now -- major elements of the transaction are still not clear, or can be changed by mutual agreement of NS and CSX. Thus, the public is not on notice of the transaction in the necessary detail even at this point.

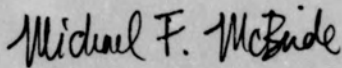
7. Finally, the Board should not grant the proposed Protective Order if it permits NS and CSX to exchange commercially sensitive information, since the predicate for this transaction is that CSX and NS will be competitors thereafter.

Conclusion

The Board should decline to waive its rules requiring three months' notice before filing. Instead, it should advise NS and CSX of its concern that the acquisition price of Conrail is far too high and may, therefore, be deleterious to the public interest, and that they should use the full three months now available before filing to negotiate a much lower acquisition price. Also, the Board should remind Conrail, as a still independent company, of its ongoing obligation to serve the public without diminution of service at today's levels.

Finally, the Board should not issue the proposed Protective Order if it permits CSX and NS to exchange commercially sensitive information, since they are and will remain competitors.

Respectfully submitted,

for 

Michael F. McBride
Linda K. Breggin
Brenda Durham
LeBoeuf, Lamb, Greene & MacRae, L.L.P.
1875 Connecticut Avenue, N.W.
Suite 1200
Washington, DC 20009-5728
(202) 986-8000

Attorneys for Atlantic City Electric
Company, Delmarva Power & Light
Company, Indianapolis Power & Light
Company, and The Ohio Valley Coal
Company

**NATIONAL ECONOMIC
RESEARCH ASSOCIATES**

308 NORTH CAYUGA STREET, ITHACA, NEW YORK 14850
TEL: 607.277.3007 FAX: 607.277.1581

nera
Consulting Economists

ATTACHMENT 1

STATEMENT OF PROFESSOR ALFRED E. KAHN

AND

REPORT OF PROFESSOR JEROME E. HASS

ON

RAILROAD REVENUE ADEQUACY STANDARDS

FEBRUARY 1997

STATEMENT OF PROFESSOR ALFRED E. KAHN¹ ON RAILROAD REVENUE ADEQUACY STANDARDS

The attached analysis by Professor Jerome E. Hass of the methods by which the Surface Transportation Board ("STB") determines whether individual railroads are or are not "revenue adequate" and of the results it produces demonstrate, incontestably in my view, that

- the method itself is totally discredited;
- its flaws are irremediable, and
- any attempt at this stage to devise an alternative method would not only be costly but would serve no useful purpose.

In these circumstances, it is my considered opinion that STB's entire exercise to determine the adequacy of railroad revenues should be abandoned.²

I. The method is discredited, quite simply, by the nonsensical results it produces. The core of the economic concept of revenue adequacy is as a test of the ability of a company to raise capital to undertake any and all economically justifiable investments. To this strictly economic criterion might arguably be attached the additional traditional regulatory condition that the company be able to raise that capital without diluting the equity of its existing shareholders.³

This criterion translates into the requirement that present holders as well as future purchasers of the company's stock must see a reasonable prospect that it will earn a return at least equivalent to the cost of capital on the totality of the net book value of its investments or assets.

¹ Robert Julius Thome Professor of Political Economy, Emeritus, Cornell University; Special Consultant, National Economic Research Associates, Inc.

² Insofar as the STB undertakes annual revenue adequacy reviews in order to meet the requirements of Section 205 of the Railroad Revitalization and Regulatory Reform Act of 1976, adoption of my recommendation would require legislative action.

³ See the demonstration in my *The Economics of Regulation* that a company may be able to raise capital for all efficient future investments, but only at the expense of such dilution, when it is either able or permitted by its regulators to earn (more precisely, because future investors expect it to be able to earn) something less than the cost of capital on the totality of its investments (Vol. 1, pp. 46-47).

There is a simple market measure of whether that requirement is or is not being met—namely, the relationship between the market value of the company's stock—the price that new purchasers are willing pay for it and at which existing shareholders willingly continue to hold it—and its net book value. If that ratio is equal to or greater than unity—that is, if the market value equals or exceeds net book value—that means that investors collectively expect earnings on invested capital to exceed the cost of capital.

In its revenue adequacy determination for 1995, the STB found that 8 of the 11 Class I railroads were "revenue inadequate." Here are the market to book ratios at the end of 1995 and 1996 for the six Class I railroads in the revenue inadequate group that are publicly traded:

<u>RAILROAD</u>	<u>1995 MARKET-TO-BOOK RATIO</u>	<u>1996 MARKET-TO-BOOK RATIO</u>
AT & SF	2.32 (a)	2.30 (a)
Burlington Northern	2.32 (a)	2.30 (a)
Conrail	2.13	2.81
CSX Transportation	2.26	1.88
Kansas City Southern	2.60	2.23
Southern Pacific	3.53	2.13(b)

(a) BN and AT&SF were merged during 1995; ratios are for BNSF.

(b) SP was merged in 1996 with UP; ratio for 1996 is UP ratio.

Observe that in every case the market/book ratio is well in excess of unity: the lowest ratio is 1.88, the average is 2.41 and the median 2.30

I find this comparison definitive. Clearly investors collectively expect the prices these companies can be expected to be able to charge and the volume of business they can be expected to attract will be far more than sufficient to produce a return in excess of the costs of capital—and are therefore willing to make capital available to them on terms that involve no dilution of existing shareholders' equity.⁴ While it could be argued that the observed deviations

⁴ The willingness of these railroads to plow back earnings rather than pay them out as dividends further corroborates this conclusion. Since they are not subject to an obligation to serve, it would be irrational for them to reinvest
(continued...)

between market prices and book values are to at least some extent attributable to non-railroad assets and operations. It is highly unlikely that these very high ratios can be entirely explained by those operations, as Professor Hass explains.

II. The force of this evidence is magnified by the consideration, also adduced by Professor Hass, that the net book value of the assets of these companies has been inflated as a result of acquisitions and/or mergers. Whenever and wherever the net book value of a company's stock or assets has served as the basis for determining its permissible return for regulatory purposes—as it is in the STB's revenue adequacy calculations—it is axiomatic that those book values must be based on the original cost of the assets. As the U.S. Supreme Court has recognized, to incorporate market-value-based write-ups in the rate base to which the allowable rate of return is applied in determining a regulated company's revenue requirements or entitlements—which in turn determine its allowable prices—is to introduce a fatal circularity into the process: allowable prices are set on the basis of the market value of assets which must be based in turn on the expected prices.

It would similarly eviscerate the regulatory process if the net book value that serves as the investment base in these revenue adequacy calculations were not the original cost of the assets when they were first constructed or acquired but the prices at which they were subsequently valued in or as the result of asset transfers, mergers or acquisitions. To permit rates (or calculations of revenue adequacy) to be based on the prices of those subsequent transfers would be to permit easy evasion of regulation: the assets could be transferred at prices inflated above net original cost and those inflated valuations would then automatically be translated into correspondingly inflated revenue or return targets for subsequent revenue adequacy calculations.

(...continued)

retained earnings in this way if they did not expect the investments to earn an adequate return. For 1995 and 1996, the average retention rates [for these "non-revenue-adequate" carriers?] were 80 and 76 percent, respectively, with the lowest being 65 percent (Conrail in 1996).

Yet, as Professor Hass points out, this is exactly what has happened in the present instance: the asset valuations entailed by the numerous mergers, acquisitions, consolidations and reorganizations of railroads since 1980 have found their way into the book values on the basis of which the revenue adequacy assessments have continued to be made—in a self-justifying cycle of upward valuations of assets and correspondingly increased net revenues required for revenue adequacy.

I emphasize that this flaw is in addition to the—already decisive—record of prevailing market to book ratios far in excess of unity: the ratios would presumably be even higher if the denominators reflected the true (depreciated) original acquisition costs of the companies' assets rather than the prices at which they have been transferred to other railroads or new surviving entities.

III. Not only would an archeological endeavor by the STB to redetermine the true original costs for the railroads (let alone remedy all the other deficiencies in the STB's methods that Professor Hass identifies) be somewhere between extremely difficult and impossible. The final decisive consideration is that it would serve no useful purpose. The continuing effort to assess revenue adequacy is a vestigial carryover from the era of thoroughgoing regulation of the railroads, public-utility-style. But the railroads have been deregulated for more than 16 years. With most rail traffic moving under contract or exempt from regulation, the only remaining regulation is of the rates they charge captive shippers. The ceiling applied by the agency in every major rate case during the past dozen years in fulfillment of that responsibility—stand-alone cost—makes no use of revenue adequacy determinations; and I am informed that there are no recommendations, by either shippers or carriers, that the stand-alone cost ceilings be modified either upward or downward on the basis of these determinations.

* * * * *

In sum, the present method of determining revenue adequacy produces results totally discredited by the ultimate test—the behavior of investors and financial markets; it incorporates a fatal circularity; and it serves no purpose such as might justify the forbidding effort to correct those defects. It is time to give the exercise the burial—decent or otherwise—that it has richly earned.

AN EVALUATION OF THE MEASUREMENT AND USE OF THE STB'S ANNUAL RAILROAD REVENUE ADEQUACY DETERMINATION

Jerome E. Hass¹

I. INTRODUCTION

Price regulation of commerce is called for in situations where workable competition (existing or potential) is deemed ineffective. Traditional regulation relied on the principle that regulation should emulate that which would occur in a competitive market—where prices are cost-based. Traditional regulation thus allows the regulated entity to charge prices that are no greater than the prudent costs incurred in providing the good or service in question.

An important element of the cost of service is the return allowed on invested capital. As articulated in the famous Supreme Court Hope and Bluefield cases, the return on invested capital must be sufficient to allow the regulated entity to attract and retain the capital necessary to provide adequate service. This gives rise to the measure called the cost of capital and the court mandate that a regulated entity must have revenues sufficient to cover not only operating costs but also allow the enterprise the fair opportunity to earn its cost of invested capital.

Under the Railroad Revitalization and Regulatory Reform Act of 1976, the Interstate Commerce Commission ("ICC") was charged with the responsibility to develop and promulgate railroad revenue adequacy standards. With the passage of the Staggers Rail Act of 1980, full regulation of railroad prices and service became history. But there are still selected situations which call for railroad regulation and it appears that findings regarding railroad revenue adequacy play an important role in some aspects of that regulation.² While Congress abolished the ICC at the end of 1995, its successor, the Surface Transportation Board ("STB" or "Board"), was given the responsibility of continuing to determine whether railroads are revenue adequate.

¹ Professor of Finance & Business Strategy, Johnson Graduate School of Management, Cornell University, and Special Consultant, National Economic Research Associates.

² It is apparently common for the railroads to refer to the fact that the majority of Class I railroads fail the STB's revenue adequacy test in cases where the Board has jurisdiction, both those involving possible rate reductions and other contexts (such as mergers and line crossings).

The purpose of this report is to examine the reasonableness of the measure used by the STB to determine railroad revenue adequacy. As demonstrated below, the measure used by the STB is fatally flawed and is clearly giving erroneous signals. Given that the flaws are not easily remedied, that the railroads are financially very healthy, and that there is no meaningful regulatory role for revenue adequacy determinations to play, it is time to abolish the requirement for this arcane and meaningless exercise.

II. MEASURING REVENUE ADEQUACY

The application of the principle of allowing a regulated entity the opportunity to earn the cost of capital on its invested capital appears to be straight-forward and gives rise to the notion of revenue adequacy. As practiced by the STB, revenue adequacy is the simple determination as to whether a railroad's most recent year's revenues produced operating income (revenues less operating costs) that resulted in earning a return on invested capital at least as great as its cost of capital. In making this comparison, the STB first determines the railroad industry's cost of capital (which it estimated to be 11.7 percent for 1995) and then compares the rates of return earned on invested capital by each of the Class I railroads to that cost of capital in order to judge whether these railroads are "revenue adequate," where a railroad's revenue is deemed adequate if its rate of return on average invested capital equals or exceeds the estimated cost of capital for the industry.

RETURN ON INVESTMENT. The STB's measure of the rate of return on invested capital is the ratio of after-tax income from railroad operations to capital invested in railroad assets (the average of railroad assets, including working capital, less accumulated deferred income taxes). The STB's measure of rate of return on invested capital, which it calls "Return on Investment" or "ROI," is seriously flawed for a number of reasons.

First, the numerator includes one-time "special charges" that can materially alter the reported ROI. The Association of American Railroads ("AAR") reported that during 1995 seven Class I railroads recorded special charges totaling \$1.742 billion on a pre-tax basis. *Analysis of Class I Railroads, 1995*, p. 4. On an after-tax basis (\$1.132 billion using a 35% tax

rate), the overall return on capital for the industry would increase from 7.7 to 10.3 percent if these special charges were not considered!³

Second, there are problems with the denominator of the STB's ROI measure because of the book accounting treatment of mergers in the industry. While major mergers, such as ATSF/BN and SP/UP get lots of attention, smaller scale acquisitions take place all the time (such as BN's acquisition of Washington Central, IC's purchase of CCP Holdings and KCS's acquisition of MidSouth Corporation and its purchase of 49 percent of the shares of Mexrail, which owns Tex-Mex). These acquisitions or mergers are usually made at premium prices over the book values of the underlying assets. To the extent that the intangible value paid is reflected in the subsequent value of railroad assets, the denominator of the STB's measure of return on investment no longer reflects depreciated original cost and the notion of earning a reasonable return on cost is lost.⁴

The flaw actually creates a problem with the numerator as well—because the intangible assets created by the acquisition are subsequently amortized, reducing the operating income (similar to depreciation expenses). Hence the overall effect of the accounting for acquisitions at prices in excess of book values is to increase the denominator and reduce the numerator of the ROI measure in subsequent years.⁵

³ In a recent STB filing regarding "bottleneck" issues, James N. Heller noted in his Verified Statement that the removal of these one-time charges in order to reflect more fundamental profitability resulted in the ROIs of individual railroads increasing from 0.4 percent to 61.1 percent. For example, the combined BNSF ROI would increase from 5.8 percent to 9.7 percent if the expenses of \$735 million associated with "merger, severance and asset charges" were removed from the numerator of the ROI calculation (on an after-tax basis).

⁴ The extent to which book values increase through this process is unknown. In 1994, UP and CNW reported Net Road and Equipment values of \$9.141 and \$1.413 billion, respectively, and \$10.55 billion in total. In 1995, after the acquisition was complete, the combined UP/CNW reported Net Road and Equipment of \$13.52 billion, for a composite increase of nearly \$3 billion in Net Road and Equipment. UP's acquisition of the 70 percent of CNW that it did not already own was for about \$1.2 billion, which was about \$1 billion more than its book value. The extent to which the \$1 billion is reflected in the \$3 billion increase is unclear. Heller (see fn. 3) reports that the acquisition of SF by BN resulted in a "write-up" of \$2.8 billion in SF's investment base and that UP's acquisition of SP will result in a write-up in 1996 of \$2.9 billion in SP's investment base.

⁵ There also appears to be another flaw in the STB's ROI measure. The STB bases the numerator of its return calculation on Net Railroad Operating Income, taken from Schedule 210 of Form R-1. Net Railroad Operating Income excludes both the income from the leasing of railroad assets and lease payments for leased railroad assets. Insofar as the leased railroad assets are included in the denominator of the ROI measure, the income

(continued...)

Third, ROI, like many short-term measures, also suffers from extreme swings as railroad operating margins change over time.⁶

COST OF CAPITAL. The cost of capital for the Class I railroads is determined by the STB as the weighted average of the costs of debt (in various forms), preferred equity, and common equity, where the weights are the market values of the various forms of capital. The STB's cost of capital measure also has several serious flaws.

First, the Board's analysis inappropriately mixes before-tax and after-tax costs of debt and equity, respectively; given the return on railroad investment is expressed on an after-tax basis, then the interest expense component of the weighted cost of capital should be adjusted to reflect the tax deductibility of interest as a matter of economic consistency.

Second, the weights used in the cost of capital estimation should be based on book values of debt, preferred and common equity, not market values; given that market values for the stocks of the railroads are substantially in excess of their book values, this mis-weighting results in a substantial overstatement of the cost of capital for the railroads⁷.

Third, the STB's estimate of the cost of equity is based on a constant dividend growth rate stock price model (sometimes called the "discounted cash flow" model); the growth component is set at 10.69 percent, a rate that is impossible to sustain in perpetuity; in an economy with an expected inflation rate of about 3 percent, a real growth rate of 7.7 percent would eventually result in the railroads overtaking the world.⁸

(...continued)

therefrom (and the lease expenses associated with those assets that helped produce operating income) should not be excluded.

⁶ For example, Southern Pacific's Net Revenues from Operations fell from \$224 million to a negative \$21 million from 1994 to 1995.

⁷ It is easy to get confused on this issue. Most finance textbooks advocate the calculation of the weighted cost of capital using market value weights, a prescription that is perfectly correct for a non-regulated entity seeking an estimate of its cost of capital as a hurdle rate for forward-looking investment decision-making. But in a regulated rate-setting context, the return is allowed on the historic cost of the net assets (rate base) and is set to earn the costs of debt and equity capital on the book values of the debt and equity.

⁸ The growth component was based on five-year earnings per share growth projections made by security analysts. While several studies have tested the reasonableness of such projections as indicators of investor expectations and found them to have explanatory power, regulatory agencies that face cost of capital problems on a repeated

(continued...)

Fourth, although insignificant in 1995 (only 1.2 percent of total capital), the cost of preferred stock was severely understated because the cost of Conrail's Series A ESOP convertible junior preferred (the dominant issue of preferred stock outstanding among the Class I railroads) was set at its market dividend yield of 3.03 percent; the stock is clearly selling on the basis of its conversion value and should be treated as common stock with common stock cost.

If these four changes are made to the cost of capital estimate, the result is a reduction in the weighted cost of capital from 11.7 percent (as reported in the STB's "Railroad Cost of Capital—1995," Ex Parte 523, June 5, 1996) to 10.3 percent. The latter is based on a cost of debt of 7.4 percent before tax (as per the STB), an income tax rate of 35 percent, a 12.5 percent cost of equity (STB's estimate was 13.4 percent) and a 29/71 debt-to-equity capital structure (based on book values as reported in *Analysis of Class I Railroads, 1995*, Association of American Railroads, lines 76, 78, 79, 80, 81, 82 and 97).⁹

Note that simply adjusting the ROI to exclude one-time ("special") charges and adjusting the cost of capital estimates, as discussed above, results in the industry ROI equaling the estimated industry cost of capital—implying that, without further adjustment for acquisition write-ups, the industry is revenue adequate.¹⁰

(...continued)

basis have expressed concerns about sole reliance on such short-term forecasts. See, e.g., Ozark Gas Transmission System, 68 FERC, ¶ 61,082, 61,107 (1994), wherein the Federal Energy Regulatory Commission found that "five year projections are not of themselves incorrect, but merely limited to too brief a time period to meet the requirement of the DCF model." Similarly, in Wyoming Interstate Company, Ltd., 69 FERC ¶ 61,259, 61,922 (1994), the Commission found that the "securities' analysts' projected growth rate for the next five years ... implicitly ignored any potential changes in the growth rate over the remaining life of the firm ... (and) is inherently inconsistent with the theory of the constant growth rate DCF model."

⁹ For the set of seven Class I railroads used by the STB to calculate the industry cost of capital, the debt-to-equity ratio based on market values was estimated to be 26/74; using a conservative 2:1 composite market-to-book ratio for these railroads, the book value debt-to-equity ratio would be 41/59 and the resultant after-tax weighted cost of capital would be 9.3 percent.

¹⁰ It should also be noted that the Board's methodology is flawed because it uses a company-specific after-tax return on investment measure that reflects the tax deductibility of interest on the specific company's debt with an industry average cost of capital. If all railroads had similar capital structures, such a comparison would be acceptable. But the utilization of debt varies substantially across Class I railroads: for example, at the end of 1995 Soo Line had a debt-to-equity ratio of 67/33 compared to CSX's 13/87; Grand Trunk Western's equity was
(continued...)

III. INTERPRETING REVENUE ADEQUACY

There is no meaningful relationship between the STB's measure of revenue adequacy and the financial well-being of the Class I railroads.

First, if investors expect that the prices of the regulated entity are or will be set so that the entity will not have the fair opportunity to earn its cost of capital, then the book value of its equity (as the residual capital suppliers) will exceed its market value.¹¹ In the case of the Class I railroads, at the end of 1995 market-to-book ratios for the 8 publicly-traded railroads ranged from 2.13 to 3.53 times and averaged 2.53 times.¹² This strongly suggests that investors expect the railroads to earn more than the cost of capital in the future.¹³

It should be noted that some of the divergence between market values and book values may be attributable to non-railroad assets which are carried on the books at cost but may be worth substantial sums if and when sold (such as real estate). For example, in testimony associated with its acquisition by Union Pacific, Southern Pacific Transportation Company indicated that it had a real estate portfolio worth about \$1 billion.¹⁴ This translates into about \$6.40 per share, so that the remaining market value of the railroad assets for SP at the end of 1995 was about \$17.60 per share, which was 2.59 times book value. Similarly, the market prices of these railroad companies also reflect non-rail activities. For example, railroad

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negative. Given substantial variations in debt utilization, the after-tax weighted average costs of capital for the Class I railroads is likely to differ substantially between railroads and using a composite average, even if calculated correctly, would be inappropriate.

¹¹ For example, if the book value of the regulated firm's stock is \$20 per share and the market expects the firm to earn 10 percent on its book value, then the market value of the shares will be \$16 if the market requires a return on 12.5 percent to adequately compensate for time value and risk.

¹² See the attached exhibit. The highest ratio was that of Southern Pacific, which was in the midst of a merger. The next-highest ratio was Illinois Central at 3.34 times. The ratios at the end of 1996 (when the high SP ratio is replaced by a high Conrail ratio) were, on average, somewhat less, but still well above 2 times. Weighted averages (using equity market values as weights) were only slightly less than simple averages.

¹³ This expectation could be achieved by decreases in operating costs as well as price increases. *Value Line* (September 20, 1996) reports that operating margins (the complement of operating costs) for the railroad industry (at the company level, which include non-rail activities) have increased from 22.6 percent in 1992 to 26.1 percent in 1995 and are predicted to get to 30.1 percent in the 1999-2001 time frame.

¹⁴ Deposition of Lawrence Yarberry, Chief Financial Officer for Southern Pacific, STB Finance Docket No. 32760.

operating revenues were only 46 percent of the total revenues of CSX for 1995. However, railroad activities accounted for 75 percent of CSX's assets and 79 percent of its total operating profits. Kansas City Southern Industries received a large fraction of its operating income from non-rail activities. But all the other Class I railroads were owned by companies that had virtually all (85 percent or more) of their assets and operating revenues associated with railroading activities. Thus, it appears that while non-railroading activities and assets could account for a portion of the observed differences between book and market values for companies that own Class I railroads, the very large differences between the observed ratios and unity cannot be explained on the basis of these non-rail activities.¹⁵

Second there is the objective evidence from the railroad companies themselves. If investments in railroad activities are not expected to earn at least the cost of capital, then these firms should not be retaining the earnings they generate for their shareholders but rather pay those earnings out as dividends so that shareholders can reinvest them elsewhere to make an adequate return. In 1995, all of the Class I railroads, with the exception of Union Pacific, retained (plowed back) more than 60 percent of their earnings; Union Pacific retained only 43 percent. Overall, the industry average was 73 percent for 1995 and 67 percent for 1996. This evidence supports the contention that the managements and boards of directors of these companies believed that the investment opportunities within the industry were financially attractive.

Third, the very title of the measure suggests that if an inadequacy is found, it is associated with revenues. This may not be the case. While there are clearly large year-to-year changes in the operating ratio (ratio of operating expenses to revenues) in the industry, there are strong pressures to decrease the ratio over time. Some railroads have ratios near or below 70 percent (Illinois Central and Norfolk Southern), while others struggle to get below 100 percent (Soo Line and GTW). When coupled with increases in capital turnover (more efficient use of

¹⁵ Non-rail activities and assets might pull the market-to-book ratios down. This would be the case if the non-rail activities were not very profitable. Such is likely the case at CSX: in 1995, the ratios of operating income to assets for rail and non-rail activities (barge, container shipping, and intermodal) were 8.7 and 6.9 percent, respectively.

capital), the result is an expectation of increasing returns to invested capital even without price increases:

$$\begin{aligned}\text{Return on Invested Capital} &= \text{Income/Revenues} \times \text{Revenues/Capital} \\ &= \text{Profit Margin} \times \text{Capital Turnover}\end{aligned}$$

During 1995, the Class I railroads operated at an after-tax profit margin of about 8.9 percent (13.7 percent before-tax at a 35 percent tax rate) and a capital turnover rate of 0.73.¹⁶ If the after-tax margins can be increased to, say, 11 percent and capital turnover improved to, say, 0.85, then the after-tax return on invested capital would increase from the 6.5 percent realized in 1995 to 9.35 percent. While these numbers are only illustrative, they do indicate how relatively small changes can produce dramatic effects, effects that could result in the industry being deemed more than revenue adequate without any increases in prices.¹⁷ The most recent *Value Line* (December 20, 1996) states that "[t]he railroads have done a good job of lowering their fixed costs over the past five years, and we think this trend will continue."

Fourth, there is a clear divergence between the notion that eight of the eleven Class I railroads were revenue inadequate in 1995 and the ability of these firms to raise cash and the willingness of others to pay substantially more than book value for acquisitions. It is generally believed that if the regulated entity does not have a fair opportunity to earn its cost of capital, then it will not be able to attract new capital or will be able to do so only at the expense of existing capital suppliers. But the railroads are active issuers of debt to finance equipment purchases, system improvements and acquisitions. Those which have debt rated by Moody's carry investment grades (with the exception of SPRR's senior note, rated Ba1) and their transportation trust certificates are often highly rated. Several railroads have either sold stock outright or used stock as currency in acquisitions over the past several years.¹⁸ *Value Line* rates

¹⁶ The AAR 1995 report indicates a before-tax profit margin of 13.58 percent for all Class I railroads.

¹⁷ The degree to which investors expect improvements can, perhaps, best be seen in the "synergies" predicted in recent acquisitions. For example, UP's acquisition price for the stock of SP was based on synergies in excess of \$750 million per year pre-tax. See *The Wall Street Journal*, December 1, 1995, page B10. The joint railroad revenues of Southern Pacific and Union Pacific in 1995 were \$9.54 billion, so that the synergies would increase the after-tax (at 35 percent) margin of the combined companies by 5.1 percent.

¹⁸ Even Southern Pacific, thought to be among the most financially weak of the Class I railroads, was able to sell stock substantially in excess of its book value in 1993 and 1994.

the financial strength of the seven Class I railroads it follows from moderate (B for KCS) to strong (A+ for NS). Standard & Poor's November 30, 1995 *Industry Survey* stated that "[a]lthough the industry is failing to earn its cost of capital as defined by the ICC, it is in fact a picture of health."

UP paid \$35 per share for CNW, which had a book value the year before the acquisition of \$7; BN paid \$20 per share for ATSF, which had a book value of \$6.67 per share the year before its acquisition; UP paid \$25 per share for SP, which had a book value of \$6.80 per share the year before its acquisition; and the bidding war for Conrail has pushed its price to \$110 per share, which had a book value of about \$32.83 share at the end of 1995.

Fifth, even if all the defects discussed above were corrected, the method of measuring revenue adequacy chosen by the Board is flawed. That is, the Board's measure could signal inadequacy in a given year while, at that time, the current revenues are entirely adequate in terms of providing a reasonable return on invested capital when judged in the proper context.

The best way to illustrate this point is to compare two alternative cost-of-service methodologies, both fully compensatory (i.e., although their price patterns are different over time, both sets of prices allow investors full recovery of their investment and a reasonable return thereon): depreciated original cost and trended original cost. Under the Depreciated Original Cost ("DOC") methodology, the rate base is the depreciated original cost of the net assets (assets at cost less accumulated depreciation) less accumulated deferred income taxes (consistent with Schedule 250) and the return on the equity-financed portion of the rate base is set in nominal terms (such as the 13.4 percent used by the STB). As accumulated depreciation increases over time and the rate base declines, the cost-based price of the service declines, other cost-of-service components held constant. Under the Trended Original Cost ("TOC") methodology, only the real portion of the return on equity is reflected in current rates; the inflation component of the return on equity is deferred until a later date. Hence the TOC rate base is greater than the DOC rate base by the accumulated deferred return balance.¹⁹ The TOC

¹⁹ See "Inflation and Rate of Return Regulation," Stewart C. Myers, A. Lawrence Kolbe, and William B. Tye, *Research in Transportation Economics*, Vol.2, pp. 83-119, 1985. The Federal Energy Regulatory Commission uses the Trended Original Cost methodology in its regulation of oil pipelines.

methodology produces pricing that start at a lower level than those under the DOC methodology, and these cost-based prices drift upward over time rather than downward, as they would under the DOC methodology. Hence, if a regulated entity were pricing its service using a TOC-based pricing scheme, in the early years of the life of the rate base (or, more generally, during the time when the firm is adding to its asset base), its revenues will appear "inadequate" when measured against those necessary under a DOC methodology.

The STB's methodology is effectively a DOC-based approach to cost of service. Yet, it is logical that the railroads should be using a TOC-based approach to pricing their services over time (so that prices tend to rise with inflation). Hence, it is entirely plausible that the test applied by the Board is yielding false-negative results: railroad revenues appear to be inadequate, but are factually adequate when judged according to the inter-temporal scheme under which they are being played out.

IV. CONCLUSIONS

The requirement that the STB shall annually determine the railroad revenue adequacy should be put to rest. The Board's measure of return on investment for each Class I railroad is fraught with short-comings and severely short-sighted; and the cost of capital estimate it uses as a benchmark against which to judge adequacy is severely flawed as well. Simple measures, such as market-to-book ratios, retention rates and debt ratings indicate that the railroads have a high degree of financial integrity and are expected to earn returns on the book value of equity well in excess of their cost of capital. They clearly have no difficulty in raising capital without causing any dilution for existing shareholders. Yet all but three of the eleven Class I railroads reviewed by the STB indicate revenue inadequacy. Given the fatal flaws in the STB's methodology and the potential misunderstandings that result from its publication, now is the time to remove the substantial burden on both the railroads and STB staff of making the filings and calculations necessary to produce this useless and potentially misleading statistical analysis.

ALFRED E. KAHN

BUSINESS ADDRESS:

National Economic Research Associates, Inc.
308 North Cayuga Street
Ithaca, New York 14850
Tel: (607) 277-3007
Fax: (607) 277-1581

Professor Kahn is the Robert Julius Thorne Professor of Political Economy, Emeritus, at Cornell University and a Special Consultant to NERA.

He has been Chairman of the New York Public Service Commission; Chairman of the Civil Aeronautics Board; and Advisor to the President (Carter) on Inflation and Chairman of the Council on Wage and Price Stability.

Professor Kahn received his Bachelor's and Master's degrees from New York University and a Doctorate in Economics from Yale University. Following service in the Army, he served as Chairman of the Department of Economics at Ripon College, Wisconsin. He moved to the Department of Economics at Cornell University, where he remained until he took leave to assume the Chairmanship of the New York Public Service Commission. During his tenure at Cornell, Professor Kahn served as Chairman of the Department of Economics, member of the Board of Trustees of the University and Dean of the College of Arts and Sciences.

Throughout his career, Professor Kahn has served on a variety of public and private boards and commissions including: the Attorney General's National Committee to Study the Antitrust Laws; the senior staff of the President's Council of Economic Advisors; the Economic Advisory Council of American Telephone & Telegraph Company; the National Academy of Sciences Advisory Review Committee on Sulfur Dioxide Emissions; the Environmental Advisory Committee of the Federal Energy Administration; the Public Advisory Board of the Electric Power Research Institute; the Board of Directors of the New York State Energy Research and Development Authority; the Executive Committee of the National Association of Regulatory Utility Commissioners; the National Commission for Review of Antitrust Laws and Procedures; the New York State Council on Fiscal and Economic Priorities; the Governor of New York's Fact-Finding Panel on Long Island Lighting Company's Nuclear Power Plant at Shoreham, L.I.; the Governor of New York's Advisory Committee on Public Power for Long Island; the National Governing Board of Common Cause; and, in 1990, as Chairman of the International Institute for Applied Systems Analysis Advisory Committee on Price Reform and Competition in the USSR.

He has also served as a court-appointed expert in *State of New York v. Kraft General Foods, Inc., et al.*, U.S. District Court, S.D.N.Y.; Advisor to New York Governor Carey on Telecommunications Policy; and as a consultant to the Attorneys General of New York, Pennsylvania and Illinois, the Ford Foundation, the National Commission on Food Marketing, Federal Trade Commission, Antitrust Division of the Department of Justice, the U.S. Department of Agriculture and the City of Denver on charging and financing of Stapleton Airport.

He has received L.L.D. honorary degrees from Colby College, Ripon College, Northwestern University, the University of Massachusetts and Colgate University, and an honorary D.H.L. from the State University of New York, Albany; he also received the Distinguished Transportation Research Award of the Transportation Board Forum, The Alumni Achievement Award of New York University, the award of the American Economic Association's Transportation and Public Utilities Group for Outstanding Contributions to Scholarship, The Henry Edward Salzberg Honorary Award from Syracuse University for Outstanding Achievement in the Field of Transportation, and the Burton Gordon Feldman Award for Distinguished Public Service from Brandeis University; and was elected to membership in the American Academy of Arts and Sciences and Vice President of the American Economic Association. He is a regular commentator on PBS's "The Nightly Business Report."

He has testified before many U.S. Senate and House Committees, the Federal Power Commission, the Federal Energy Regulatory Commission and numerous state regulatory bodies.

Professor Kahn's publications include *Great Britain in the World Economy*; *Fair Competition: The Law and Economics of Antitrust Policy* (co-authored); *Integration and Competition in the Petroleum Industry* (co-authored); and *The Economics of Regulation*. He has written numerous articles which have appeared in *The American Economic Review*, *The Quarterly Journal of Economics*, *The Journal of Political Economy*, *Harvard Law Review*, *Yale Journal on Regulation*, *Yale Law Journal*, *Fortune*, *The Antitrust Bulletin* and *The Economist*, among others.

EDUCATION:

YALE UNIVERSITY

Ph.D., Economics, 1942

UNIVERSITY OF MISSOURI

Graduate Study, 1937-1938

NEW YORK UNIVERSITY

M.A., Economics, 1937

A.B. (summa cum laude), Economics, 1936

EMPLOYMENT:

1961-1974 **NATIONAL ECONOMIC RESEARCH ASSOCIATES, INC.**

1980- Special Consultant

CORNELL UNIVERSITY

1947-1989 Assistant Professor; Associate Professor; Robert Julius Thorne Professor of Economics; Robert Julius Thorne Professor of Political Economy, Emeritus, 1989-; Chairman, Department of Economics; Dean, College of Arts and Sciences; on leave 1974-80.

NEW YORK UNIVERSITY SCHOOL OF LAW

Spring 1989 Visiting Meyer Professor of Law

UNITED STATES GOVERNMENT

1978-1980 Advisor on Inflation to President Carter

1978-1980 Chairman, Council on Wage and Price Stability

1977-1978 Chairman, Civil Aeronautics Board

1955-1957 Senior Staff, Council of Economic Advisors to the President

1943 U.S. Army, Private

1943 War Production Board

1942 Associate Economist, International Economics Unit, Bureau of Foreign and Domestic Commerce, Department of Commerce

1941-1942 Associate Economist, Antitrust Division, U.S. Department of Justice

NEW YORK STATE PUBLIC SERVICE COMMISSION

1974-1977 Chairman

BROOKINGS INSTITUTION

1940,

1950-1951 Staff Economist

RIPON COLLEGE

1945-1947 Assistant Professor, Chairman, Department of Economics

TWENTIETH CENTURY FUND

1944-1945	Research Economist
	COMMISSION ON PALESTINE SURVEYS
1943-1944	Economist
	UNIVERSITY OF MISSOURI
1937-1938	Teaching Assistant

CONSULTANCIES AND PROFESSIONAL ACTIVITIES:

1994-	American Airlines on code-sharing
1994-	Antitrust Division, U.S. Department of Justice, on the application of Ameritech for waivers of the interexchange restrictions in the AT&T Modified Final Judgment
1993-1994	Court-appointed expert in State of New York v. Kraft General Foods, Inc., et al., U.S. District Court, S.D.N.Y.
1992	New Zealand Telecom on the progress of competition in New Zealand telecommunications
1992	Rochester Telephone Company on corporate restructuring and deregulation
1992	Russian Government on economic reform
1991	British Mercury on terms of competition with British Telecom
1989	City of Denver on charging and financing of Stapleton Airport
1988-1990	Attorneys General, New York and Pennsylvania, on airline mergers
1985	Attorney General, State of Illinois, on Illinois Bell rates
1981-1984	City of Long Beach, California, the Coca-Cola Company and American Airlines on antitrust litigation
1981-	Economic commentary, Nightly Business Report (PBS)
1980-1982	Advisor to Governor Carey on Telecommunications Policy
1968	Ford Foundation
1966	National Commission on Food Marketing
1965, 1974	Federal Trade Commission
1963-1964	Antitrust Division, Department of Justice
1960-1961	U.S. Department of Agriculture
1957-1961	Boni Watkins, Jason & Co.

See also the list of testimony below.

MEMBERSHIPS:

1992-	Member, New York State Telecommunications Exchange
1992-93	Member, Ohio Blue Ribbon Panel on Telecommunications Regulation
1991-	Board of Editors, <i>Review of Industrial Organization</i>
1990-92	Chairman, International Institute for Applied Systems Analysis Advisory Committee on Price Reform and Competition in the USSR
1986	Governor Cuomo's Advisory Panel on public power for Long Island

1983-89	Governor Cuomo's Fact-finding Panel on Long Island Lighting Company's Nuclear Power Plant at Shoreham, L.I.
1983-90	New York State Council on Fiscal and Economic Priorities
1982-	<i>The American Heritage Dictionary</i> Usage Panel
1982-1985	Governing Board, Common Cause
1980-1986	Director, New York Airlines
1978-1979	National Commission for the Review of Antitrust Laws and Procedures
1975-1977	Project Committee, Electric Utility Rate Design Study, Electric Power Research Institute
1974-1975	National Academy of Science Review Commission on Sulfur Oxide Emissions
1974-1977	Public Advisory Board, Electric Power Research Institute
1974-1977	Environmental Advisory Committee, Federal Energy Administration
1974-1977	Executive Committee, National Association of Regulatory Utility Commissioners, and Chairman, Committee on Electric Energy
1968-1974	Economic Advisory Board, American Telephone & Telegraph Corporation
1965-1967	Economic Advisory Committee, U.S. Chamber of Commerce
1967-1969	Chairman, Tompkins County Economic Opportunity Corporation
1964-1969	Board of Trustees, Cornell University
1961-1964	Board of Editors, <i>American Economic Review</i>
1953-1955	Attorney General's National Committee to Study the Antitrust Laws

HONORS AND AWARDS:

May 1995	Wilbur Cross Medal for outstanding achievement, Yale University
Mar 1989	Burton Gordon Feldman Award for Distinguished Public Service, Gordon Public Policy Center, Brandeis University
Feb 1989	Distinguished Service Award, Public Utility Research Center, University of Florida
Nov 1988	International Film and TV Festival of New York, Bronze Medal presented to The Nightly Business Report/WPBT2 for Editorial/Opinion Series written by Alfred E. Kahn
Apr 1986	Harry E. Salzberg 1986 Honorary Medallion for outstanding achievement in the field of transportation
Oct 1984	Distinguished Transportation Research Award of the Transportation Research Forum
1981-1982	Vice President, American Economic Association
1978	Richard T. Ely lecturer, American Economic Association, 1978
1978	Rejection Scroll, International Association of Professional Bureaucrats
May 1985	State University of New York (Albany), DHL (Hon.)
May 1983	Colgate University, LL.D. (Hon.)
June 1982	Northwestern University, LL.D. (Hon.)
May 1980	Ripon College, LL.D. (Hon.)
May 1979	University of Massachusetts, LL.D. (Hon.)
May 1978	Colby College, LL.D. (Hon.)
1977-	Fellow of the American Academy of Arts and Sciences
1976	Distinguished Alumni Award, New York University

- 1976 American Economic Association, Section on Public Utilities and Transportation, citation for distinguished contributions
- 1954-1955 Fulbright Fellowship, Italy
- 1935- Phi Beta Kappa
- 1939-1940 Yale-Brookings Fellow

BOOKS:

The Economics of Regulation, 2 volumes, John Wiley, 1970 and 1971. Reprinted by The MIT Press, 1988, with a new "Introduction: A Postscript, Seventeen Years After," pp. xv-xxxvii.

Integration and Competition in the Petroleum Industry, (with Melvin G. DeChazeau), Petroleum Monograph Series, Volume 3 (Yale University Press, 1959). Reprinted in 1971.

Fair Competition: The Law and Economics of Antitrust Policy (with Joel B. Dirlam) (Cornell University Press, 1954). Reprinted by Greenwood Press, 1970.

Great Britain in the World Economy (Columbia University Press, 1946). Reprinted in 1968.

MAJOR ARTICLES:

"How to Treat the Costs of Shared Voice and Video Networks in a Post-regulatory Age," *Policy Analysis*, #264, November 27, 1996, Cato Institute.

"Competition and Stranded Cost Re-revisited," 36 *Natural Resources Journal* (1996) forthcoming.

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JEROME E. HASS

BUSINESS ADDRESSES:

National Economic Research Associates, Inc.
308 North Cayuga Street
Ithaca, New York 14850
(607) 277-3470

Johnson Graduate School of Management
Cornell University
522 Malott Hall
Ithaca, New York 14853
(607) 255-3901 (fax 254-4590)
e-mail: jeh27@cornell.edu

Jerome E. Hass is Professor of Finance and Business Strategy at Cornell University's Johnson Graduate School of Management. He received a B.A. degree from St. Mary's University, Winona, Minnesota, an M.B.A. from the University of Pennsylvania Wharton School, and a Ph.D. degree in Economics from Carnegie-Mellon University. At Cornell, he teaches graduate courses in corporate finance, security analysis and investment management, energy economics and regulation, and corporate strategy and policy. He is also a regular participant in Cornell's Executive Development program and various company-oriented management development courses.

Professor Hass has consulted and been an expert witness in many forums and consulting and projects involving rate-of-return and capital structure issues in oil pipelines, electric utilities and cable television; minority stockholder claims; closely held stock; natural resource property and lease valuations; cost-benefit analysis of regulatory alternatives; and the valuation of Alaska North Slope crude oil for royalty and tax purposes. Prior to his NERA affiliation, he consulted for numerous corporations and government agencies. He has testified in many state and federal regulatory and judicial systems as well as before both houses of Congress.

He was previously Chief, Division of Economic Studies, at the Federal Power Commission and was Special Assistant to James R. Schlesinger at the Executive Office of the President. He was Chairman of the U.S. Office of Technology Assessment's LNG Import Policy Advisory Board and special advisor to the Secretary and Deputy Secretary at the Department of Energy on the Alaska Natural Gas Transportation System. He was on the Government Accounting Office's review panel on alternatives to ANGTS.

He is co-author of *An Introduction to Managerial Finance and Financing the Energy Industry* as well as author of articles in *Management Science*, *Journal of Finance*, *Journal of Financial and Quantitative Analysis*, *Financial Analysts Journal*, *Water Resources Research*, *Public Utilities Fortnightly*, *Financial Executive*, *Energy Systems and Policy*, and the *National Tax Journal*.

JEROME E. HASS

BUSINESS ADDRESSES:

National Economic Research
Associates, Inc.
308 North Cayuga Street
Ithaca, New York 14850
(607) 277-3470

Johnson Graduate School
of Management
Cornell University
522 Malott Hall
Ithaca, New York 14853
(607) 255-3901
e-mail: jeh27@cornell.edu

Jerome E. Hass is Professor of Finance and Business Strategy at Cornell University's Johnson Graduate School of Management. He received a B.A. degree from St. Mary's University, Winona, Minnesota, an M.B.A. from the University of Pennsylvania Wharton School, and a Ph.D. degree in Economics from Carnegie-Mellon University. At Cornell, he teaches graduate courses in corporate finance, security analysis and investment management, energy economics and regulation, and corporate strategy and policy. He is also a regular participant in Cornell's Executive Development program and various company-oriented management development courses.

Professor Hass has consulted and been an expert witness in many forums and consulting and projects involving rate-of-return and capital structure issues in oil pipelines, electric utilities and cable television; minority stockholder claims; closely held stock; natural resource property and lease valuations; cost-benefit analysis of regulatory alternatives; and the valuation of Alaska North Slope crude oil for royalty and tax purposes. Prior to his NERA affiliation, he consulted for numerous corporations and government agencies. He has testified in many state and federal regulatory and judicial systems as well as before both houses of Congress.

He was previously Chief, Division of Economic Studies, at the Federal Power Commission and was Special Assistant to James R. Schlesinger at the Executive Office of the President. He was Chairman of the U.S. Office of Technology Assessment's LNG Import Policy Advisory Board and special advisor to the Secretary and Deputy Secretary at the Department of Energy on the Alaska Natural Gas Transportation System. He was on the Government Accounting Office's review panel on alternatives to ANGTS.

He is co-author of *An Introduction to Managerial Finance and Financing the Energy Industry* as well as author of articles in *Management Science*, *Journal of Finance*, *Journal of Financial and Quantitative Analysis*, *Financial Analysts Journal*, *Water Resources Research*, *Public Utilities Fortnightly*, *Financial Executive*, *Energy Systems and Policy*, and the *National Tax Journal*.

EDUCATION:

CARNEGIE-MELLON UNIVERSITY

Ph.D., Economics, 1969 Ford Foundation Doctoral Fellowship

UNIVERSITY OF PENNSYLVANIA WHARTON SCHOOL

M.B.A., Finance and Operations Research, 1964, with Distinction

ST. MARY'S COLLEGE, MINNESOTA

B.A., Mathematics, 1962, Cum Laude

EMPLOYMENT:

1983-	NATIONAL ECONOMIC RESEARCH ASSOCIATES, INC. Special Consultant
1977-	JOHNSON GRADUATE SCHOOL OF MANAGEMENT, CORNELL UNIVERSITY Professor of Finance and Business Strategy Clifford H. Whitcomb Faculty Fellow (1993-94) Mobil Corporation Scholar (1991)
1994-95	Director, Managerial Skills Program
1979-1982	Director, Public Program
1972-1977	Associate Professor
1969-1972	Assistant Professor
1967-1969	Lecturer
1978-1980	UNITED STATES GOVERNMENT Advisor to Secretary and Deputy Secretary, Department of Energy, on Alaska Natural Gas Transportation System (ANGTS)
1977	Special Assistant to James R. Schlesinger, Executive Office of the President (6 month leave from Cornell University)
1976-1977	Chief, Federal Power Commission, Division of Economic Studies (18 month leave from Cornell University)

ACADEMIC ACTIVITIES AND INTERESTS:

Professor Hass' fields of interest are energy and regulatory economics and policy, applied microeconomics, managerial and capital market finance, public financial management, security analysis and investment management, and business strategy and policy. He teaches courses in managerial finance, security analysis and investment management, energy and public policy, and business strategy and policy.

OTHER ACTIVITIES:

1996	Visiting Professor, Vienna Institute, Vienna Austria
1995-1996	Visiting Professor, KOC University, Istanbul, Turkey
1994-1995	Visiting Professor, University of Agriculture, Nitra, Slovakia
1993-1994	Visiting Professor, LETI-Lovanium MBA Program, Electro-Technical University, St. Petersburg (Russia)
1990-1995	Visiting Professor, International Management Institute-Kiev (Ukraine)
1990-present	Faculty Member, Graduate School of Business, Zurich (Switzerland)
1990	Visiting Professor, Katholieke Universiteit Leuven (Belgium)
1982-1983	Member, Government Accounting Office, Review Panel on Alternatives to ANGTS
1979-1980	Chairman, LNG Import Advisory Committee, U.S. Congress Office of Technology Assessment
1970-1992	Lecturer and Coordinator, Management Development Program, Corning Glass Works, Corning, New York
1968- present	Lecturer and Coordinator, Executive Development Program, Cornell University

CONTRIBUTIONS TO BOOKS:

Financing the Energy Industry, J.E. Hass, E.J. Mitchell and B.K. Stone, Ballinger, 1974.

An Introduction to Managerial Finance, H. Bierman, Jr. and J.E. Hass, W.W. Norton, 1973.

Matrix Algebra for Business and Economics, Searle and Hausman, Wiley, 1970.

PUBLISHED ARTICLES AND STUDIES:

"The Economics of Removing Asbestos From Buildings," *National Asbestos Council Journal*, Volume 5, No. 3 (Summer, 1987).

"Incentive Systems for Large-Scale Energy Projects," *Energy Systems and Policy*, Volume 8, No. 4 (1984).

"Equity Flotation Cost Adjustments in Cost of Service Pricing," *Public Utilities Fortnightly*, March 1, 1984 (with H. Bierman, Jr.).

"Investment Cut-off Rates and Dividend Policy," *Financial Management*, Winter 1983 (with H. Bierman, Jr.).

"Evaluation of Alternate Rate Structures for Philadelphia Gas Works," National Regulatory Research Institute, September 1978.

"An Analytical Model of Bond Risk Differentials," *Journal of Financial and Quantitative Analysis*, December 1975 (with H. Bierman, Jr.).

"Inflation, Equity, Efficiency and the Regulatory Pricing of Electricity," *Public Policy*, Summer 1975 (with H. Bierman, Jr.).

"How to Get Con Ed Out of the Capital Market Doghouse," *Financial Analysts Journal*, November-December 1974.

"Are High Cut-Off Rates a Fallacy?" *Financial Executive*, June 1973 (with H. Bierman, Jr.).

"Capital Budgeting Under Uncertainty: A Reformulation," *Journal of Finance*, March 1973 (with H. Bierman, Jr.).

"Modeling Problems and Problem Avoidance in Water Resources Management," *Water Resources Research*, June 1972.

"Closed Form Stock Price Models," *Journal of Financial and Quantitative Analysis*, June 1972 (with H. Bierman, Jr. and D.H. Downes).

"Decomposition Processes and Their Use in Joint Decision-Making," *Inter-Organizational Decision-Making*, M.F. Tuite, M. Radnor, and R.D. Chisholm, editors, Aldine Publishing Company, 1972.

"Normative Stock Price Models," *Journal of Financial and Quantitative Analysis*, December 1971 (with H. Bierman, Jr.).

"The Use and Misuse of the P/E Ratio in Acquisition and Merger Decisions," *Financial Executive*, October 1970 (with H. Bierman, Jr.).

"Optimal Taxing for the Abatement of Water Pollution," *Water Resources Research*, April 1970.

"Transfer Pricing in a Decentralized Firm," *Management Science*, February 1968.

"The Treatment of Tax-Exempt Securities of Life Insurance Company Income Taxation," *National Tax Journal*, December 1965 (with J. Bossons).

CONGRESSIONAL TESTIMONIES, PRESENTED PAPERS, AND MAJOR REPORTS:

"Annual Costs of North Slope Producing Facilities Associated With the Production of Natural Gas and Natural Gas Liquids Considered Crude Oil," National Economic Research Associates, Inc., January 1994.

"A Critical Appraisal of OTA's Pharmaceutical R&D: Costs, Risks and Rewards," National Economic Research Associates, Inc., May 1993.

"Net Realizations and Net Values of Alaska North Slope Crude Oil for Royalty Obligations," State of Alaska v. Amerada Hess et al, June 1990.

"Tanker Transportation Costs Used in Valuing Alaska North Slope Crude Oil Production for Royalty Obligations," State of Alaska v. Amerada Hess et al, June 1990.

"The Profitability and Pricing of Sabre Computer Reservation Services," submitted by American Airlines in Hearing before the Subcommittee on Aviation of the Committee on Commerce, Science, and Transportation, United States Senate, March 19, 1985.

"Efficiency, Fairness and ICC Railroad Revenue Adequacy," 25th Annual Meeting of the Transportation Research Forum, Boston, Mass., October 22, 1984.

"Incentive Regulation in the Electric Utility Industry," A Report to the Federal Energy Regulatory Commission, Washington, D.C., July 8, 1983 (with Dennis Goins, Michael Fischer, Ronald Ehrenberg and Robert Smiley).

"Major Issues in the President's Alaska Natural Gas Transportation System Waiver Package," Hearings before the House Subcommittee on Fossil Fuels of the Energy and Commerce Committee and House Subcommittee on Energy and the Environment of the Interior and Insular Affairs Committee, November 4, 1981.

"The ANGTS Primer," Office of the Federal Inspector of the Alaska Natural Gas Transportation System, Washington, D.C., June 1981.

"Risk, Return and the IROR Plan: A Report to the Federal Energy Regulatory Commission," Washington, D.C., March 1979.

"Remarks Before the Federal Energy Regulatory Commission on Rate of Return," Washington, D.C., December 8, 1978.

"Financing Supplemental Energy Projects," Annual Meeting of the Association of Petroleum Investment Analysts, Washington, D.C., March 2, 1978.

"New Directions for Energy Regulation," Conference on Regulation and Regulatory Reform, American Enterprise Institute, Washington, D.C., December 19, 1977 (with Richard L. Dunham).

"Responsible Regulation of Return on Equity," Finance Division Annual Meeting of the Edison Electric Institute, May 12, 1977, New York.

"Is There Any Place in Natural Gas Regulation for Economics?" Southwest Economic Association, Dallas, Texas, March 31, 1977.

"The Electric Utility Rate Reform and Regulation Improvement Act," Hearings before the Subcommittee on Energy and Power and the Committee on Interstate and Foreign Commerce, April 7, 1976.

"The Power Facilities Construction Act of 1975," Hearings before the Tax Expenditure Task Force of the U.S. House Budget Committee, February 24, 1976.

"Financing the Electric Utility Industry: The Real Solution," Electric Utility Financial Problems and Potential Solutions Workshop, Mitre Corporation (NSF), Washington, D.C., September 26, 1975.

"Future Capital Needs of the U.S. Energy Industry," Hearings before the Subcommittee on Government Regulation of the Select Committee on Small Business, United States Senate, August 7, 1974.

TESTIMONY BEFORE REGULATORY AGENCIES:

September, 1996	New York State Public Service Commission on behalf of Long Island Lighting Company regarding the Company's cost of equity capital (supplemental).
August, 1996	New York State Public Service Commission on behalf of Long Island Lighting Company regarding the Company's cost of equity capital.
April, 1996	State of Alaska, Department of Revenue, "Report of Professor Jerome E. Hass," regarding certain income tax issues (confidential).
February, 1996	State of Alaska, Department of Revenue, "Report of Professor Jerome E. Hass," regarding certain income tax issues (confidential).
January, 1996	Federal Energy Regulatory Commission on behalf of Refinery Holding Company, Chevron USA Products Company and the Estate of El Paso Refinery, L.P. regarding various tariff issues for Santa Fe Pipeline Partners (sur-surrebuttal).
December, 1995	Federal Energy Regulatory Commission on behalf of Liquid Energy Corporation and Enserch Processing Company regarding various tariff issues for Chevron Pipe Line Company (LPGS) (surrebuttal).
August, 1995	Federal Energy Regulatory Commission on behalf of Refinery Holding Company, Chevron USA Products Company and the Estate of El Paso Refinery, L.P. regarding various tariff issues for Santa Fe Pipeline Partners (rebuttal).
June, 1995	Federal Energy Regulatory Commission on behalf of Liquid Energy Corporation and Enserch Processing Company regarding various tariff issues for Chevron Pipe Line Company (LPGS).
June, 1995	Federal Energy Regulatory Commission on behalf of Refinery Holding Company regarding various tariff issues for Chevron Pipe Line Company (APS) (surrebuttal).

May, 1995	Federal Energy Regulatory Commission on behalf of Refinery Holding Company regarding various tariff issues for Chevron Pipe Line Company (APS) (supplemental).
March, 1995	Federal Energy Regulatory Commission on behalf of Refinery Holding Company regarding various tariff issues for Chevron Pipe Line Company (APS).
December, 1994	New Jersey Board of Public Utilities on behalf of Comcast (multiple) regarding the cost of capital.
November, 1994	Connecticut Department of Public Utility Control on behalf of Comcast Cablevision regarding the cost of capital (Affidavit).
November, 1994	New Jersey Board of Public Utilities on behalf of Garden State Cablevision regarding the cost of capital.
June, 1994	Federal Energy Regulatory Commission on behalf of Refinery Holding Company, Chevron USA Products Company and the Estate of El Paso Refinery, L.P. regarding various tariff issues for Santa Fe Pipeline Partners.
December, 1993	New York State Public Service Commission on behalf of Long Island Lighting Company regarding the cost of common equity.
December, 1992	New York State Public Service Commission on behalf of Long Island Lighting Company regarding the cost of common equity.
December, 1991	New York State Public Service Commission on behalf of Long Island Lighting Company regarding the cost of common equity.
January, 1991	New York State Public Service Commission on behalf of Multiple Intervenors regarding the cost of common equity and target cash interest coverage ratio for Rochester Gas & Electric.
February, 1990	Illinois Commerce Commission on behalf of Illinois Power Company regarding the cost of common equity and the proper capital structure to use in ratemaking.
February, 1990	New York State Public Service Commission on behalf of Multiple Intervenors regarding the cost of common equity and target cash interest coverage ratio for Rochester Gas & Electric.
November, 1989	New York State Public Service Commission on behalf of Multiple Intervenors regarding the cost of common equity and target cash interest coverage ratio for Central Hudson Gas & Electric Corporation.

October, 1989	Federal Energy Regulatory Commission on behalf of the State of Alaska regarding the proper capital structure and rates of return on debt and equity for the Endicott Pipeline Company.
April, 1989	Federal Energy Regulatory Commission on behalf of Air Transport Association of America regarding the profitability of Buckeye Pipe Line Company, L.P., and the ability of the Commission to rely upon market forces in place of active regulation.
October, 1988	New York State Public Service Commission on behalf of Multiple Intervenors regarding the cost of common equity and target cash interest coverage ratio for Central Hudson Gas & Electric Corporation.
March, 1988	Illinois Commerce Commission on behalf of Illinois Power Company regarding the cost of common equity.
June, 1987	South Dakota Public Utilities Commission on behalf of Otter Tail Power Company regarding the cost of common equity.
March, 1987	New York State Public Service Commission on behalf of Long Island Lighting Company regarding the cost of common equity to the company under different Shoreham and Nine Mile Point II status scenarios.
November, 1986	Minnesota Public Utilities Commission on behalf of Otter Tail Power Company regarding the cost of common equity.
November, 1986	Federal Energy Regulatory Commission on behalf of the State of Alaska regarding the proper capital structure and rates of return on debt and equity for the Kuparuk Transportation Company.
August, 1985	California Public Utilities Commission on behalf of Pacific Gas & Electric Company regarding the costs and benefits to customers from different interim tariffs for the Diablo Canyon plant.
February, 1985	New York State Public Service Commission on behalf of Long Island Lighting Company regarding the cost of common equity to the company under different Shoreham status scenarios.
January, 1985	Illinois Commerce Commission on behalf of Illinois Power Company regarding the cost of common equity and the effects on the costs of capital of phasing construction work-in-progress in rate base.
November, 1984	Maine Public Utilities Commission on behalf of Central Maine Power Company regarding the cost of common equity.
October, 1984	Arizona Corporation Commission on behalf of Arizona Public Service regarding an operating incentive system for the Company's base load units.

February, 1984	Arizona Corporation Commission on behalf of Arizona Public Service regarding the use of incentive systems for electric utilities.
January, 1984	New York State Public Service Commission on behalf of Long Island Lighting Company regarding the cost of common equity.
January, 1984	Federal Energy Regulatory Commission on behalf of the State of Alaska and the Department of Justice on the methodology of setting tariffs for the Trans-Alaska Oil Pipeline.
December, 1983	Department of Public Utility Control on behalf of United Cable Television of Connecticut regarding proper ratemaking and cost of equity.
May, 1983	Illinois Commerce Commission on behalf of Illinois Power Company regarding customers' costs and benefits from permitting construction work in progress in rate base.
1981-1983	Public Service Commissions in Minnesota, North Dakota and South Dakota and the Federal Energy Regulatory Commission on behalf of Otter Tail Power Company regarding the cost of common equity.
March, 1979	Testimony before the Philadelphia Gas Commission relating to proper practices for service termination, billing, and other customer-related activities of the Philadelphia Gas Works.
September, 1976	Before the Federal Power Commission on behalf of the Commission Staff regarding the determination of the fair market value and net salvage value of a pipeline proposed to be abandoned from gas transmission service.

TESTIMONY BEFORE COURTS:

June, 1994	Long Island Lighting Company v. The Assessor and the Board of Assessment for the Town of Brookhaven, <u>et al</u> , Supreme Court of the State of New York, County of Suffolk. Testified regarding the maximum economic values and percent conditions of the Shoreham Nuclear Power Station for the years 1984 through 1991.
June, 1992	Niagara Mohawk Power Corporation <u>et al</u> , v. Stone & Webster Engineering Corporation, <u>et al</u> , United States District Court for the Northern District of New York. Testified regarding the reasonableness of financing costs incurred by plaintiffs associated with repairs to the Nine Mile Point 2 nuclear power plant.
August, 1990	Long Island Lighting Company v. The Assessor and the Board of Assessment for the Town of Brookhaven, <u>et al</u> , Supreme Court of the State

of New York, County of Suffolk. Testified regarding the maximum economic values and percent conditions of the Shoreham Nuclear Power Station for the years 1976 through 1983.

- November, 1989 Continental Airlines, et al, v. American Airlines, et al, U.S. District Court (Central District of California). Testified regarding the reasonableness of the rate of return earned by American Airlines on its computerized reservation system investment.
- February, 1989 ETSI Pipeline Project, et al, v. Burlington Northern, et al, U.S. District Court (Eastern District of Texas). Gave oral expert testimony regarding the determination of damages to Houston Light & Power customers arising from the actions of railroads which forced cancellation of the ETSI project, a coal slurry pipeline.
- October, 1987 Shamrock Associates v. Horizon Corporation et al, U.S. District Court (Southern District of New York). Gave oral expert testimony regarding fairness of two security transactions between Horizon Corporation and MCO Holdings and provided estimates of damages to Horizon therefrom.
- July, 1984 Exxon Corporation v. The United States, U.S. Claims Court. Filed expert report and testified on behalf of Exxon regarding valuation of refining and marketing assets seized in Cuba.
- April, 1984 State of Alaska v. Phillips Petroleum Company, Alaska District Court. Filed expert report on behalf of State in royalty litigation regarding the value of natural gas produced in Cook Inlet for liquification and sale to Japan.
- February, 1982 Carl F. Matzen, et al v. Cities Service Oil Company, et al. Testified on behalf of producers in royalty litigation regarding value of natural gas sold in interstate commerce.

EXPEDITED CONSIDERATION REQUIRED

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

FINANCE DOCKET NO. 33388

CERTIFICATE OF SERVICE

I hereby certify that I have served this 16th day of April, 1996, a copy of the foregoing

Reply by first-class mail, postage prepaid, upon each of the following parties or record:

Mr. Vernon A. Williams, Secretary
Surface Transportation Board
Mercury Building
1925 K Street, N.W.
Washington, DC 20423

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

David M. Konschnik, Director
Office of Proceedings
Surface Transportation Board
Mercury Building
1925 K Street, N.W.
Washington, DC 20423

Mark G. Aron, Esq.
Peter J. Schudtz, Esq.
CSX Corporation
One James Center
902 East Cary Street
Richmond, VA 23129

William G. Mahoney, Esq.
Richard S. Edelman, Esq.
Melissa Kirgis, Esq.
Higsaw, Mahoney & Clarke, P.A.
1050 Seventeenth Street, N.W., Suite 210
Washington, DC 20036

Ronald A. Lane, Esq.
Myles L. Tobin, Esq.
Law Department
Illinois Central Railroad Company
455 North Cityfront Plaza Drive
Chicago, IL 60611-5504

Donald F. Griffin, Esq.
Assistant General Counsel
Brotherhood of Maintenance of Ways
Employees
400 N. Capitol Street, N.W., Suite 852
Washington, DC 20001-1511

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

Timothy T. O'Toole, Esq.
Constance L. Abrams, Esq.
Consolidated Rail Corporation
Two Commerce Square
2001 Market Street
Philadelphia, PA 19103

Paul A. Cunningham, Esq.
Harkins Cunningham
1300 Nineteenth Street, N.W.
Suite 600
Washington, DC 20036

P. Michael Giftos, Esq.
Paul R. Hitchcock, Esq.
CSX Transportation, Inc.
500 Water Street
Speed Code J-120
Jacksonville, FL 32202

William C. Sippel, Esq.
Oppenheimer Wolff & Donnelly
Two Prudential Plaza
180 North Stetson Avenue, 45th Floor
Chicago, IL 60601-6710

Martin W. Bercovici, Esq.
Keller and Heckman, L.L.P.
1001 G Street, N.W.
Suite 500 West
Washington, DC 20001

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

Mr. Ronald L. Young
Managing Director - Transportation
American Electric Power Service Corporation
Fuel Supply Department
One Memorial Drive
P.O. Box 700
Lancaster, OH 43130-0700

Mr. James L. Parks
Manager, Fuel Supply
Delmarva Power & Light Company
P.O. Box 6066
Newark, DE 19714-6066

Richard A. Allen, Esq.
James A. Calderwood, Esq.
Andrew R. Plump, Esq.
John V. Edwards, Esq.
Zuckert, Scoutt & Rasenberger, L.L.P.
888 Seventeenth Street, N.W.
Washington, DC 20006-3939

L. John Osborn, Esq.
Sonnenschein Nath & Rosenthal
1301 K Street, N.W.
Suite 600 East Tower
Washington, DC 20005

Janice G. Barber, Esq.
Michael E. Roper, Esq.
Burlington Northern Santa Fe Corporation
3800 Continental Plaza
777 Main Street
Ft. Worth, TX 76102-5384

Mr. G.W. Herkner, Jr., Director
Rail Contract Administration
NJ Transit Rail Operations
One Penn Plaza East
Newark, NJ 07105-2246

Mr. Paul D. DeMariano
President and Chief Executive Officer
The Port of Philadelphia & Camden, Inc.
3460 North Delaware, Suite 200
Philadelphia, PA 19134

Clinton J. Miller, III, Esq., General Counsel
Daniel R. Elliott, III, Asst. General Counsel
United Transportation Union
14600 Detroit Avenue
Cleveland, OH 44107-4250

C. Michael Loftus, Esq.
Robert D. Rosenberg, Esq.
Christopher a. Mills, Esq.
Donald G. Avery, Esq.
Kelvin J. Dowd, Esq.
Frank J. Pergolizzi, Esq.
Slover & Loftus
1224 Seventeenth Street, N.W.
Washington, DC 20036

Mr. Jeffrey R. Moreland
Mr. Richard E. Weicher
Burlington Northern Santa Fe Corporation
1700 East Gold Road
Schaumburg, IL 60173

Erika Z. Jones, Esq.
Adrian L. Steel, Jr., Esq.
Roy T. Englert, Jr., Esq.
Kathryn A. Kusske, Esq.
Mayer, Brown & Platt
2000 Pennsylvania Avenue, N.W.
Washington, DC 20006

Mr. Dean R. Kleckner
President
American Farm Bureau Federation
600 Maryland Avenue, S.W., Suite 800
Washington, DC 20024

Neal M. Mayer, Esq.
Paul D. Coleman, Esq.
Hoppel, Mayer & Coleman
1000 Connecticut Avenue, N.W.
Suite 400
Washington, DC 20036

Mr. Robert F. Hagan
State Representative
64th House District
Ohio House of Representatives
562 Madera Avenue
Youngstown, OH 44504

Mitchell M. Kraus, Esq., General Counsel
Larry R. Pruden, Asst. General Counsel
Transportation Communications
International Union
3 Research Place
Rockville, MD 20850

Mr. John Livingood
201 Glencolter Court
Serverna Park, MD 21146

Mr. Patrick C. Hendricks
Iowa State Legislative Director
United Transportation Union
317 East 5th Street, Suite 11
Des Moines, IA 50309

Stephen M. Carpman, Esq.
General Attorney
The Detroit Edison Company
2000 Second Street
Detroit, MO 48226

James C. Bishop, Jr., Esq.
William C. Wooldridge, Esq.
James L. Howe, III, Esq.
Robert J. Conney, Esq.
George A. Aspatore, Esq.
Norfolk Southern Corporation
Three Commercial Place
Norfolk, VA 23510-2191

Nicole Clark, Esq.
Wachtell, Lipton, Rosen & Katz
51 West 52nd Street
New York, NY 10019-6150

Mr. William W. Whitehurst, Jr.
Economic Consultant
W.W. Whitehurst & Associates, Inc.
12421 Happy Hollow Road
Cockeysville, MD 21030

Secretary David L. Winstead
Maryland Department of Transportation
P.O. Box 8755
BWI Airport, MD 21240

Samuel M. Sipe, Jr., Esq.
Timothy M. Walsh, Esq.
David H. Corburn, Esq.
Steptoe & Johnson, L.L.P.
1330 Connecticut Avenue, N.W.
Washington, DC 20036

Ms. Alison Shipman
National Corn Growers Association
122 C Street, N.W.
Washington, DC 20001

Nancy McFadden, Esq.
General Counsel
Paul Smith, Esq.
Senior Trial Attorney
Office of General Counsel
U.S. Department of Transportation
Office of the Secretary of Transportation
400 Seventh Street, S.W.
Washington, DC 20590

Ms. Gabriel Calvo
The Ackerson Group
1275 Pennsylvania Avenue, N.W.
Washington, DC 20004

Ms. Missy Cassidy
Maryland Department of Transportation
P.O. Box 8755
BWI Airport, DM 21240-0755

John M. Cutler, Jr., Esq.
McCarthy, Sweeney & Harkaway, P.C.
1750 Pennsylvania Avenue, N.W.
Suite 1105
Washington, DC 20006

Mr. Gerald W. Fauth, III
G.W. Fauth & Associates, Inc.
P.O. Box 2401
Alexandria, VA 22301

Joseph Guerrieri, Jr., Esq.
Guerrieri, Edmond & Clayman, P.C.
1331 F Street, N.W., Suite 400
Washington, DC 20004

Thomas Leary, Esq.
Hogan & Hartson, L.L.P.
Columbia Square
555 Thirteenth Street, N.W.
Washington, DC 20004-1109

George Mayo, Jr., Esq.
Hogan & Hartson, L.L.P.
Columbia Square
555 13th Street, N.W.
Washington, DC 20004-1109

Christopher C. O'Hara, Esq.
Brickfield, Burchette & Ritts, P.C.
1025 Thomas Jefferson Street, N.W.
8th Floor
Washington, DC 20007

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

Nicholas DiMichael, Esq.
Frederic L. Wood, Esq.
Donelan, Cleary, Wood & Maser, P.C.
1100 New York Avenue, N.W.
Suite 750
Washington, DC 20005-3934

Mr. John Gallagher
Fieldston Publications, Inc.
1800 Massachusetts Avenue, N.W.
Suite 500
Washington, DC 20036

Ms. Maureen Healy, Director
Federal Environmental and
Transportation Issues
The Society of the Plastics Industry, Inc.
1275 K Street, N.W., Suite 400
Washington, DC 20005

Mr. Charles M. Chadwick
Chairman and Chief Executive Officer
Maryland Midland Railway, Inc.
P.O. Box 1000
Union Bridge, MD 21791-0568

John J. Sullivan, Esq.
Associate General Counsel
Potomac Electric Power Company
1900 Pennsylvania Avenue, N.W.
Washington, DC 20068

Jean Pierre Ouellet, Esq.
Chief Legal Officer and Corporate Secretary
Canadian National Railway Company
935 de La Gauchetiere Street West, 16th Floor
Montreal, Quebec
CANADA H3B 2M9

Thomas Schick, Esq.
Assistant General Counsel
Chemical Manufacturers Association
1300 Wilson Boulevard
Arlington, VA 22209

Mr. Thomas Schmitz
The Fieldston Company, Inc.
1800 Massachusetts Avenue, N.W., Suite 500
Washington, DC 20036-1613

Richard G. Slattery, Esq.
National Railroad Passenger Corporation
60 Massachusetts Avenue, N.E.
Washington, DC 20002

Marcella Szel, Esq.
Vice President - Legal Service
Canadian Pacific Railway Company
Gulf Canada Square, Suite 500
Calgary, Alberta
CANADA T2P 4Z4

Debra Willen, Esq.
Guerrieri, Edmond & Clayman, P.C.
1331 F Street, N.W., Suite 400
Washington, DC 20004

Mr. Edward Wytkind, Executive Director
Larry Willis, Esq.
Transportation Trades Department, AFL-CIO
400 N. Capitol Street, N.W., Suite 861
Washington, DC 20002

Roger W. Fones, Chief
Transportation, Energy & Agriculture Section
Antitrust Division
U.S. Department of Justice
325 Seventh Street, N.W., Suite 500
Washington, DC 20530

Mr. Jon Scholl
Director of Public Policy
Illinois Agricultural Association
1701 N. Towanda Avenue
P.O. Box 2901
Bloomington, IL 61702-2901

Robert Szabo, Esq.
Van Ness Feldman, P.C.
1050 Thomas Jefferson Street, N.W.
Seventh Floor
Washington, DC 20007

Eric Von Salzen, Esq.
Hogan & Hartson, L.L.P.
Columbia Square
555 Thirteenth Street, N.W.
Washington, DC 20004-1109

Premier Notification Office
Bureau of Competition
Federal Trade Commission
Sixth & Pennsylvania Avenue, N.W.
Room 303
Washington, DC 20530

Mr. William Wright
Public Utilities Commission of Ohio
Borden Building, 7th Floor
Columbus, OH 43216

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

John K. Maser III, Esq.
Jeffrey O. Moreno, Esq.
Karyn A. Booth, Esq.
Donelan, Cleary, Wood & Maser, P.C.
1100 New York Avenue, N.W., Suite 750
Washington, DC 20005-3934

Mr. Michael Matti
Director, Risk Management
Institute of Scrap Recycling Industries, Inc.
1325 G Street, N.W.
Washington, DC 20005

STB FD 33388 4-16-97 D 179360 2 of 2

Charles A. Spitulnik, Esq.
Alicia M. Serfaty, Esq.
Hopkins & Sutter
888 16th Street, N.W.
Washington, DC 20006

Ms. Doreen C. Johnson
Chief, Antitrust Section
Ohio Attorney General's Office
State Office Tower
30 E. Broad Street - 16th Floor
Columbus, OH 43215-3428

William A. Mullins, Esq.
Troutman Sanders, L.L.P.
1300 I Street, N.W.
Suite 500 East
Washington, DC 20005

Nathan R. Fenno, Esq.
Vice President & General Counsel
Delaware Otsego Corporation
One Railroad Avenue
Cooperstown, NY 13326

Richard J. Schiefelbein
Woodharbor Associates
7801 Woodharbor Drive
Ft. Worth, TX 76179

Kevin M. Sheys, Esq.
Edward J. Fishman, Esq.
Oppenheimer Wolff & Donnelly
1020 Nineteenth Street, N.W., Suite 400
Washington, DC 20036

Eric M. Hocky, Esq.
Gollatz, Griffin & Ewing, P.C.
213 West Miner Street
P.O. Box 796
West Chester, PA 19381-0796

Mr. Robert K. Dreiling
The Kansas City Southern Railway Company
114 West 11th Street
Kansas City, MO 64105

Mr. George R. Arnold
Member
Madison County Conservation Alliance, Inc.
1306 St. Louis Street
Edwardsville, IL 62025

William P. Quinn, Esq.
Gollatz, Griffin & Ewing, P.C.
213 West Miner Street
P.O. Box 796
West Chester, PA 19381-0796

John M. Nannes, Esq.
Scot B. Hutchins, Esq.
Skadden, Arps, Slate, Meager & Flom, L.L.P.
1440 New York Avenue, N.W.
Washington, DC 20005-2111

Mr. Donald Knight
Vice President - Fuel Supply
Indianapolis Power & Light Company
25 Monument Circle
P. O. Box 1595
Indianapolis, IN 46206-1595

David Barnard, Esq.
Indianapolis Power & Light Company
25 Monument Circle
P. O. Box 1595
Indianapolis, IN 46206-1595

Mr. Charles Linderman
Director, Fossil Fuels and Renewable Programs
Edison Electric Institute
701 Pennsylvania Avenue, N.W.
Washington, D.C. 20004-2696

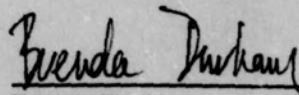
Mr. Donald J. Casey
Director, Regulatory Programs
The Fertilizer Institute
501 Second Street, N.E.
Washington, D.C. 20002

Charles L. Young, Esq.
Senior Attorney
Office of the General Counsel
Tennessee Valley Authority
400 West Summit Hill Drive
Knoxville, TN 37902

Mr. Robert Herman
Manager of Fuels
Atlantic City Electric Company
6801 Black Horse Pike
Egg Harbor, NJ 08234

Daniel Mecklenborg, Esq.
Vice President and General Counsel
Ingram Barge Company
4400 Harding Road
Nashville, TN 37205-2290

Mr. Robert E. Murray
President
The Ohio Valley Coal Company
29525 Chagrin Boulevard, Suite 111
Pepper Pike, OH 44122


Brenda Durham

STB

FD

33388

4-16-97

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D

SONNENSCHN NATH & ROSENTHAL

1301 K STREET N.W.
SUITE 600, EAST TOWER
WASHINGTON, D.C. 20005

CHICAGO
LOS ANGELES
NEW YORK
SAN FRANCISCO
ST. LOUIS

April 16, 1997

(202) 408-6400
FACSIMILE
(202) 408-6399



DIRECT LINE
(202) 408-6351

By Hand

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

Re: Finance Docket No. 33388, CSX and Norfolk Southern -- Control and Lease -- Conrail

Dear Secretary Williams:

On behalf of Canadian National Railway Company, enclosed are the signed original and 25 copies of its (1) Response in Opposition to Petition For Waiver of Three-Month Notice Requirement (CN-4), and (2) Response in Opposition to Petition For Protective Order (CN-5). For your convenience, a 3.5-inch floppy diskette in Wordperfect 5.1 is enclosed.

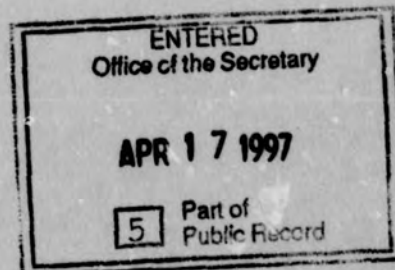
Kindly stamp the enclosed additional copy of this letter at the time of filing and return it to our messenger.

Sincerely yours,

L. John Osborn

Enclosures

cc: Director David M. Konschnik
Administrative Law Judge Leventhal
Counsel for all parties



CN-5

BEFORE THE
SURFACE TRANSPORTATION BOARD

Finance Docket No. 33388



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

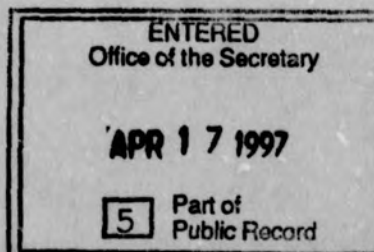
CANADIAN NATIONAL RAILWAY COMPANY'S
RESPONSE IN OPPOSITION TO PETITION FOR PROTECTIVE ORDER (CSX/NS-3)

Jean Pierre Cuellet
Chief Legal Officer and Corporate
Secretary
Canadian National Railway Company
935 de La Gauchetiere Street West
16th Floor
Montreal, Quebec
H3B 2M9
(514) 399-2100

L. John Osborn
Douglas E. Rosenthal
Amber C. Haskett
Sonnenschein Nath & Rosenthal
1301 K Street, N.W.
Suite 600 East
Washington, D.C. 20005
(202) 408-6351

Attorneys for:
CANADIAN NATIONAL RAILWAY COMPANY

Dated: April 16, 1997



**BEFORE THE
SURFACE TRANSPORTATION BOARD**

Finance Docket No. 33388

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

**CANADIAN NATIONAL RAILWAY COMPANY'S
RESPONSE IN OPPOSITION TO PETITION FOR PROTECTIVE ORDER (CSX/NS-3)**

Canadian National Railway Company ("CN") hereby responds to the Petition For Protective Order, filed on April 10, 1997 by CSX, NS and Conrail (CSX/NS-3).¹ For the reasons set forth below, the Board should invite comments from all parties before issuing a Protective Order, so that important issues relating to the exchange of information between "arch competitors" can be properly addressed.

CN recognizes that the Board's practice in recent cases has been to issue a Protective Order without awaiting comments from other parties. Under such an approach, a party

¹ Unless the context indicates otherwise, "CSX" will embrace both CSX Corporation and CSX Transportation, Inc., "NS" will embrace both Norfolk Southern Corporation and Norfolk Southern Railway Company, and "Conrail" will embrace both Conrail Inc. and Consolidated Rail Corporation.

opposed to certain terms of the Protective Order must file a petition for reconsideration, reopening, or modification of the order. For a number of reasons, such an approach would be inappropriate and prejudicial in this proceeding, which raises issues different from those presented in prior railroad merger cases.

The critical distinction in this case is that CSX and NS are "arch competitors" who are not proposing to merge, but instead are collaborating in an effort to acquire and divide a third competitor, Conrail. In other words, CSX and NS are principal competitors today, and the competition between them necessarily must be preserved -- or even intensified -- both during and after the merger proceeding, even if the Board approves the proposed transaction. The instant case is quite different from prior mergers considered by the Board, in which the applicants sharing information in order to submit an application were proposing to become one company upon issuance of a Board decision approving the proposed merger. In UPSP, for example, UPRR and SPRR had competing operations in certain markets. They necessarily collaborated in the preparation of an application, but the entire thrust of the proposed transaction, as ultimately approved by the Board, was that competition between UPRR and SPRR did not, under the appropriate conditions, need to be preserved. In the instant case, no party -- and certainly not the Applicants themselves -- would argue that competition between CSX and NS should be diminished in any way, even if the proposed transaction is approved. The intensive pre-merger and post-merger competitive relationship between the joint applicants, CSX and NS, makes it necessary to craft the terms of any Protective Order with extreme care.

The Protective Order proposed by Applicants is ambiguous at best, and silent at worst, as to the appropriateness of, and need for, exchanges of confidential, competitively sensitive information between CSX and NS. In this regard, we refer not merely to competitively sensitive Conrail information obtained by CSX directly from Conrail, competitively sensitive Conrail information obtained by NS directly from Conrail, or even the exchange of competitively sensitive Conrail information between CSX and NS. Even beyond such exchanges of Conrail information, the proposed Protective Order would permit the transfer of competitively sensitive *CSX information* to NS, and the transfer of competitively sensitive *NS information* to CSX.

The proposed Protective Order contains no limitations whatsoever on the identities, positions and numbers of CSX and NS personnel who could obtain competitively sensitive information from their company's arch competitor. The only limitation on such exchanges of information is a requirement that the exchange be "for the purpose of preparing for or participating in the Proceedings, but not for any other business, commercial, or other competitive purpose" This is a determination that CSX and NS personnel would make unilaterally, with no standards to govern their determination. The Board and other parties would have no knowledge of the type or scope of information exchanges CSX and NS elect to engage in. Finally, it would be up to the individual CSX and NS personnel who receive sensitive information from their chief competitor to refrain -- if, indeed, this would be humanly possible -- from subsequently using such information for "commercial" purposes in the ordinary course of their work.

In these circumstances, the potential for misuse of competitively sensitive information is quite great. CSX and NS marketing personnel could freely exchange the most sensitive information as to prices and other terms on which transportation is provided. The nature of such exchanges would be hidden from their customers and from other parties. Yet during and after the current merger case, these same personnel would be expected to compete aggressively with each other, while somehow blotting from their minds the sensitive information they obtained from their participation in the merger case. Ironically, the Board imposes much more stringent limitations on access to the Waybill Sample, which contains competitively sensitive information and, in its "raw" form, generally is not made available to in-house railroad personnel, and certainly is not made available to railroad marketing personnel.

Before a Protective Order is adopted in this case, the Board should invite further comments -- including comments from Applicants themselves -- regarding the extent to which CSX and NS really need to directly exchange any of their own competitively sensitive information in order to prepare an application. If CSX and NS are indeed to remain vigorous competitors after any Board decision approving the proposed merger, do CSX and NS really need to collaborate in projecting the results of such post-merger competition? Do CSX and NS intend to make joint assumptions as to the post-merger rate levels and service offerings of both companies? Is such a collaboration really necessary or desirable?

Access by CSX and NS personnel to competitively sensitive Conrail information appears to present somewhat lesser risks, and may be more necessary to the preparation of an application. The application, at least, will propose that Conrail be subsumed into its two

competitors in the event of a favorable Board decision, making the CSX-Conrail and NS-Conrail exchanges somewhat more like the UPRR-SPRR exchanges that took place in UPSP. But it is important to remember that the Board ultimately may deny the proposed acquisition of Conrail by CSX and NS, or may impose conditions deemed unacceptable to Applicants, in which case the merger would not be consummated. It is important to ensure that, in such circumstances, future competition among CSX, NS and Conrail will not have been compromised. Accordingly, the Board should invite all parties to comment as to the appropriateness of placing some limitations on the transfer of competitively sensitive Conrail information to CSX and NS.

The Board also should consider whether antitrust immunity would extend to all or any of the exchanges of competitively sensitive information that may occur under the Protective Order in this case, and whether the availability of such immunity would depend upon whether the merger application is approved or denied. Applicants presumably will argue that, at least in the event the merger is consummated pursuant to a favorable Board decision, all information exchanges undertaken in furtherance of the merger approval process would be entitled to antitrust immunity. The likelihood that Applicants would claim antitrust immunity in such circumstances underscores the need for a Protective Order that contains appropriate safeguards. The Protective Order should permit only information exchanges that are necessary to the process of Board review, and should establish a "bright line" between proper and improper exchanges. The Protective Order proposed by Applicants fails to do so, particularly in the context of a collaboration between principal post-merger competitors.

Finally, it is extremely important that the Board invite comments in order to afford full consideration of these issues *before* issuing a Protective Order. It would be unfair to deny other parties a reasonable opportunity to comment on the proposed order, and require them instead to seek to overturn an effective Board decision. In addition, if an inappropriate Protective Order were issued at this time, competitively damaging information exchanges would be sanctioned by the Board, and potentially would receive antitrust immunity that could not subsequently be withdrawn. Allowing a brief period for comments will give the Board and all parties an opportunity to consider the changes that should be made to the proposed Protective Order, given the novel circumstances of this case.²

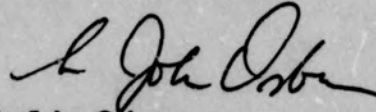
Conclusion

For all of these reasons, the Board should invite comments on the proposed Protective Order so as to ensure that the order ultimately adopted contains appropriate safeguards reflecting the special circumstances of this case.

² If additional time is allowed for comments, CN will provide a more detailed analysis of these issues than has been possible in the short time since the pending petition was filed.

Jean Pierre Ouellet
Chief Legal Officer and Corporate
Secretary
Canadian National Railway Company
935 de La Gauchetiere Street West
16th Floor
Montreal, Quebec
H3B 2M9
(514) 399-2100

Respectfully submitted,



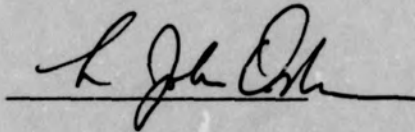
L. John Osborn
Douglas E. Rosenthal
Amber C. Haskett
Sonnenschein Nath & Rosenthal
1301 K Street, N.W.
Suite 600 East
Washington, D.C. 20005
(202) 408-6351

Attorneys for:
CANADIAN NATIONAL RAILWAY COMPANY

Dated: April 16, 1997

Certificate of Service

The undersigned hereby certifies that on this 16th day of April, 1997, he served a true copy of the foregoing on counsel for all known parties by first-class mail, postage prepaid.



L. John Osborn

STB

FD

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4-16-97

D

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179358

SONNENSCHN NATH & ROSENTHAL

CHICAGO
LOS ANGELES
NEW YORK
SAN FRANCISCO
ST. LOUIS

1301 K STREET N.W.
SUITE 600, EAST TOWER
WASHINGTON, D.C. 20005

(202) 408-6400
FACSIMILE
(202) 408-6399

April 16, 1997



DIRECT LINE

(202) 408-6351

By Hand

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

Re: Finance Docket No. 33388, CSX and Norfolk Southern -- Control and Lease -- Conrail

Dear Secretary Williams:

On behalf of Canadian National Railway Company, enclosed are the signed original and 25 copies of its (1) Response in Opposition to Petition For Waiver of Three-Month Notice Requirement (CN-4), and (2) Response in Opposition to Petition For Protective Order (CN-5). For your convenience, a 3.5-inch floppy diskette in Wordperfect 5.1 is enclosed.

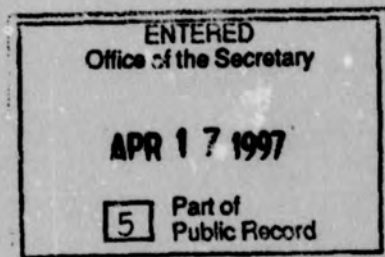
Kindly stamp the enclosed additional copy of this letter at the time of filing and return it to our messenger.

Sincerely yours,

L. John Osborn

Enclosures

cc: Director David M. Konschnik
Administrative Law Judge Leventhal
Counsel for all parties



179358

BEFORE THE
SURFACE TRANSPORTATION BOARD

Finance Docket No. 33388



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

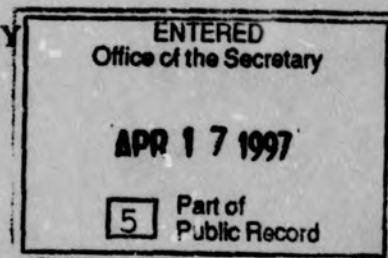
CANADIAN NATIONAL RAILWAY COMPANY'S
RESPONSE IN OPPOSITION TO PETITION FOR WAIVER OF THREE-MONTH NOTICE
REQUIREMENT (CSX/NS-2)

Jean Pierre Ouellet
Chief Legal Officer and Corporate
Secretary
Canadian National Railway Company
935 de La Gauchetiere Street West
16th Floor
Montreal, Quebec
H3B 2M9
(514) 399-2100

L. John Osborn
Douglas E. Rosenthal
Amber C. Haskett
Sonnenschein Nath & Rosenthal
1301 K Street, N.W.
Suite 600 East
Washington, D.C. 20005
(202) 408-6351

Attorneys for:
CANADIAN NATIONAL RAILWAY COMPANY

Dated: April 16, 1997



**BEFORE THE
SURFACE TRANSPORTATION BOARD**

Finance Docket No. 33388

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

**CANADIAN NATIONAL RAILWAY COMPANY'S
RESPONSE IN OPPOSITION TO PETITION FOR WAIVER OF THREE-MONTH NOTICE
REQUIREMENT (CSX/NS-2)**

Canadian National Railway Company ("CN") hereby responds to the Petition For Waiver of 49 C.F.R. § 1108.4(b)(1), filed on April 10, 1997 by CSX, NS and Conrail (CSX/NS-2).¹ For the reasons set forth here, the Board should not grant the waiver on the terms requested by Applicants.

At the outset, there are good reasons to question the need for *any* waiver of the 3-month notice requirement and *any* expedition of the Board's merger review process. The only

¹ Unless the context indicates otherwise, "CSX" will embrace both CSX Corporation and CSX Transportation, Inc., "NS" will embrace both Norfolk Southern Corporation and Norfolk Southern Railway Company, and "Conrail" will embrace both Conrail Inc. and Consolidated Rail Corporation.

justification for a waiver offered by Applicants is their voluntary decision to make a total cash outlay of over \$10 billion "up front." Putting aside for the moment the prudence of this decision, it clearly is one that is entirely of the Applicants' own making, and should not dictate the schedule of proceedings before the Board.²

Any waiver of the 3-month notice requirement would cut into time needed by the Board and all parties to deal with a transaction of the size and scope proposed in this proceeding. Applicants themselves undoubtedly have a great deal of work to do in order to prepare a proper application, and may well need at least three full months. Indeed, even though they seek a waiver, Applicants do not state that they *will* file the application before July 10; instead, they merely say that they "hope to file their application as much as four or five weeks earlier . . ." than July 10. (Notice of Intent at 4). The pre-filing notice period also is needed by other parties, who in just the last few days have received only preliminary information as to the proposed terms of the CSX/NS "carve up" of Conrail.

If there is to be any expedition whatsoever of the Conrail merger proceedings, however, it is better that it come during the period when the application is being *prepared*, rather than during the period when the application is being analyzed, responded to and acted upon by the agency with responsibility to decide this matter. Thus, if Applicants truly believe that they can prepare and submit a proper application prior to July 10, any resulting waiver of the pre-filing notice requirement should not set a precedent for truncating the 365-day procedural schedule earlier adopted by the Board for considering a proposed Conrail merger.

² CN reserves the right to comment further on the proposal of Applicants to pay the over \$10 billion cash consideration "up front," as this proposal may bear upon the procedural schedule and other aspects of the merger proceedings.

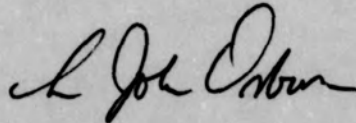
The *post*-filing procedural schedule, as to which the Board presumably will invite further comments, instead should reflect the need for careful consideration of the important issues raised by this merger proposal, and should take into account any shortening of the 3-month notice requirement that may have been granted.

Finally, a complete and open-ended waiver of the 3-month notice requirement, as requested by Applicants, is inappropriate and would be prejudicial to all other parties. A complete waiver theoretically would permit the application to be filed next week, or at any time after issuance of the waiver decision. This would permit far more expedition than Applicants even claim to need, since they merely "hope" to file on approximately two months' notice. But it would create considerable uncertainty for the Board and for other parties, who conceivably could be faced with a "surprise" filing of the application five or six weeks from now. Thus, if the Board is inclined to grant any waiver, it should not grant a complete waiver, and instead should preserve a minimal notice period -- certainly not less than two months -- so that the agency and other interested parties will be better able to plan for the filing of the application.

Conclusion

For all of these reasons, the Board either should deny the waiver or should limit the waiver so as to require notice of not less than two months.

Respectfully submitted,



Jean Pierre Ouellet
Chief Legal Officer and Corporate
Secretary
Canadian National Railway Company
935 de La Gauchetiere Street West
16th Floor
Montreal, Quebec
H3B 2M9
(514) 399-2100

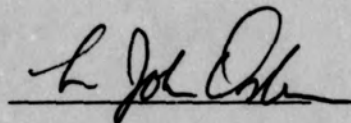
L. John Osborn
Douglas E. Rosenthal
Amber C. Haskett
Sonnenschein Nath & Rosenthal
1301 K Street, N.W.
Suite 600 East
Washington, D.C. 20005
(202) 408-6351

Attorneys for:
CANADIAN NATIONAL RAILWAY COMPANY

Dated: April 16, 1997

Certificate of Service

The undersigned hereby certifies that on this 16th day of April, 1997, he served a true copy of the foregoing on counsel for all known parties by first-class mail, postage prepaid.



L. John Osborn

STB

FD

33388

4-16-97

D

179357

179357

HOPKINS & SUTTER

(A PARTNERSHIP INCLUDING PROFESSIONAL CORPORATIONS)

888 SIXTEENTH STREET, N.W., WASHINGTON, D.C. 20006 (202) 835-8000
FACSIMILE (202) 835-8136CHICAGO OFFICE THREE FIRST NATIONAL PLAZA 60602
DALLAS OFFICE 3700 BANK ONE CENTER 1717 MAIN STREET 75201
DETROIT OFFICE 1333 BREWERY PARK BOULEVARD SUITE 101 48207ALICIA M. SERFATY
(202) 835-8049

April 16, 1997

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

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

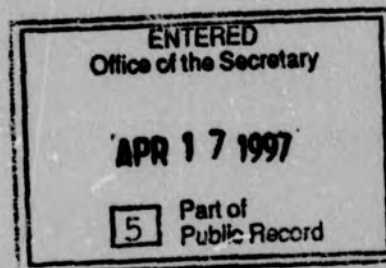
Dear Secretary Williams:

Enclosed are an original and twenty-five (25) copies of Philadelphia Belt Line Railroad Company's Notice of Intent to Participate for filing in the above-referenced proceeding. An additional copy is enclosed for file stamp and return with our messenger. Please note that a copy of this pleading is also enclosed on a 3.5-inch diskette in WordPerfect 5.1 format.

Sincerely,

Alicia M. Serfaty

AMS/lhb
encl; a/s
cc: Applicants' Representatives



179357

Before The
SURFACE TRANSPORTATION BOARD
Washington, D.C.

Finance Docket No. 33388



CSX Corporation and CSX Transportation Inc.
Norfolk Southern Corporation and
Norfolk Southern Railway Company
-- Control and Operating Leases/Agreements --
Conrail, Inc. and Consolidated Rail Corporation --
Transfer of Line By Norfolk Southern Railway Company
To CSX Transportation Inc.

NOTICE OF INTENT TO PARTICIPATE

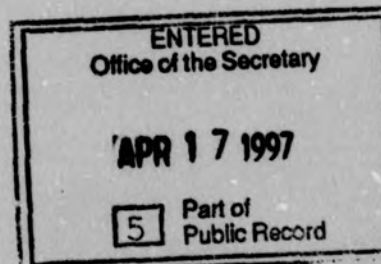
Please enter the appearance of the undersigned counsel on behalf of the Philadelphia Belt Line Railroad Company ("PBL"), which intends to participate and become a party of record in this proceeding. Pursuant to 49 C.F.R. § 1104.12, service of all documents filed in this proceeding should be made upon the undersigned.

Dated: April 16, 1997

Respectfully submitted,

Charles A. Spitulnik
Alicia M. Serfaty
HOPKINS & SUTTER
888 Sixteenth Street, NW
Washington, D.C. 20006
(202) 835-8000

Counsel for Philadelphia Belt Line
Railroad Company



CERTIFICATE OF SERVICE

I hereby certify that on April 16, 1997, a copy of the foregoing Philadelphia Belt Line Railroad Company's Notice Of Intent To Participate was served by first-class, U.S. mail, postage prepaid upon the following:

James C. Bishop, Jr.
William C. Wooldridge
James L. Howe, III
Robert J. Cooney
George A. Aspatore
Norfolk Southern Corporation
Three Commercial Place
Norfolk, VA 23510-9241

Richard A. Allen, Esquire
James A. Calderwood
Andrew R. Plump
John V. Edwards
Zuckert, Scoutt &
Rasenberger, L.L.P.
888 Seventeenth Street, N.W.
Washington, D.C. 20006-3939

John M. Nannes
Scot B. Hutchins
Skadden, Arps, Slate,
Meagher & Flom LLP
1440 New York Avenue, N.W.
Washington, D.C. 20005-2111

Mark G. Aron
Peter J. Shudtz
CSX Corporation
One James Center
902 East Cary Street
Richmond, VA 23129

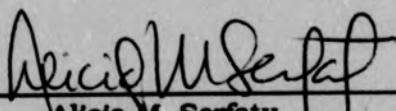
P. Michael Giftos
Paul R. Hitchcock
CSX Transportation, Inc.
500 Water Street
Speed Code J-120
Jacksonville, FL 32202

Dennis G. Lyons, Esquire
Richard L. Rosen
Paul T. Denis
Arnold & Porter
555 12th Street, N.W.
Washington, D.C. 20004-1202

Samuel M. Sipe, Jr.
Timothy M. Walsh
Steptoe & Johnson LLP
1330 Connecticut Avenue
Washington, D.C. 20036-1795

Timothy T. O'Toole
Constance L. Abrams
Consolidated Rail Corporation
Two Commerce Square
2001 Market Street
Philadelphia, PA 19103

Paul A. Cunningham, Esquire
Harkins Cunningham
Suite 600
1300 Nineteenth Street, N.W.
Washington, D.C. 20036


Alicia M. Serfaty

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179356

HOPKINS & SUTTER

(A PARTNERSHIP INCLUDING PROFESSIONAL CORPORATIONS)

388 SIXTEENTH STREET, N.W., WASHINGTON, D.C. 20006 (202) 835-8000
FACSIMILE (202) 835-8136

CHICAGO OFFICE THREE FIRST NATIONAL PLAZA 40402
DALLAS OFFICE 3700 BANK ONE CENTER 1717 MAIN STREET 75201
DETROIT OFFICE BREWERY PARK BOULEVARD SUITE 101 48207



ALICIA M. SERFATY
(202) 835-8049

April 16, 1997

D

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

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

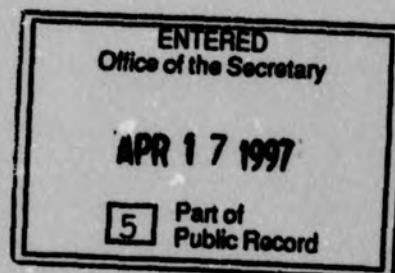
Dear Secretary Williams:

Enclosed are an original and twenty-five (25) copies of New York City Economic Development Corporation's Notice of Intent to Participate for filing in the above-referenced proceeding. An additional copy is enclosed for file stamp and return with our messenger. Please note that a copy of this pleading is also enclosed on a 3.5-inch diskette in WordPerfect 5.1 format.

Sincerely,

Alicia M. Serfaty

AMS/lb
encl; a/s
cc: Applicants' Representatives



179356

Before The
SURFACE TRANSPORTATION BOARD
Washington, D.C.

Finance Docket No. 33388

CSX Corporation and CSX Transportation Inc.
Norfolk Southern Corporation and
Norfolk Southern Railway Company
-- Control and Operating Leases/Agreements --
Conrail, Inc. and Consolidated Rail Corporation --
Transfer of Line By Norfolk Southern Railway Company
To CSX Transportation Inc.



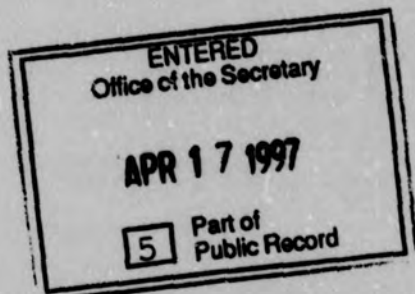
NOTICE OF INTENT TO PARTICIPATE

Please enter the appearance of the undersigned counsel on behalf of the New York City Economic Development Corporation ("NYCEDC"), acting on behalf of the City of New York, New York, which intends to participate and become a party of record in this proceeding. Pursuant to 49 C.F.R. § 1104.12, service of all documents filed in this proceeding should be made upon the undersigned.

Dated: April 16, 1997

Respectfully submitted,

Charles A. Spivulnik
Alicia M. Serfaty
HOPKINS & SUTTER
888 Sixteenth Street, NW
Washington, D.C. 20006
(202) 835-8000



Counsel for New York City
Economic Development Corporation,
acting on behalf of the City of New York,
New York

CERTIFICATE OF SERVICE

I hereby certify that on April 16, 1997, a copy of the foregoing New York City Economic Development Corporation's Notice Of Intent To Participate was served by first-class, U.S. mail, postage prepaid upon the following:

James C. Bishop, Jr.
William C. Wooldridge
James L. Howe, III
Robert J. Cooney
George A. Aspatore
Norfolk Southern Corporation
Three Commercial Place
Norfolk, VA 23510-9241

Richard A. Allen, Esquire
James A. Calderwood
Andrew R. Plump
John V. Edwards
Zuckert, Scoutt &
Rasenberger, L.L.P.
888 Seventeenth Street, N.W.
Washington, D.C. 20006-3939

John M. Nannes
Scot B. Hutchins
Skadden, Arps, Slate,
Meagher & Flom LLP
1440 New York Avenue, N.W.
Washington, D.C. 20005-2111

Mark G. Aron
Peter J. Shudtz
CSX Corporation
One James Center
902 East Cary Street
Richmond, VA 23129

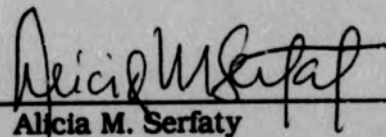
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1300 Nineteenth Street, N.W.
Washington, D.C. 20036


Alicia M. Serfaty