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DONELAN, CLEARY, WOOD & MASER, P.C.

ATTORNEYS AND COUNSELORS AT LAW

SUITE 750

1100 NEW YORK AVENUE, N.W.

WASHINGTON, D.C. 20005-3934

OFFICE: (202) 371-9500

January 13, 1998



Via Hand Delivery

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

Re: Finance Docket No. 33388. *Supplement To Comments and Request For Conditions.*

Dear Secretary Williams:

Please find enclosed for filing in the above-referenced proceeding an original and twenty-five (25) copies of the Supplement To Comments and Request For Conditions submitted on behalf of The National Industrial Transportation League.

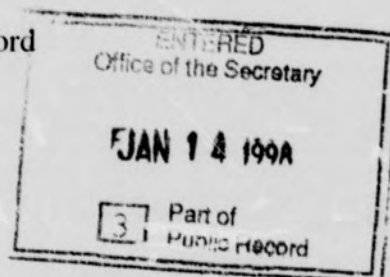
Respectfully submitted,

Nicholas J. DiMichael^{SW}
Nicholas J. DiMichael
Attorneys for The National Industrial
Transportation League

ENCLOSURES

0124-532

cc: All Parties of Record



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BEFORE THE
SURFACE TRANSPORTATION BOARD

Finance Docket No. 33388

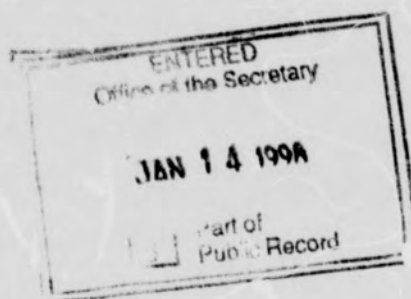


CSX CORPORATION AND CSX TRANSPORTATION, INC.
NORFOLK SOUTHERN CORPORATION AND
NORFOLK SOUTHERN RAILWAY COMPANY
--CONTROL AND OPERATING LEASES/AGREEMENTS--
CONRAIL INC. AND CONSOLIDATED RAIL CORPORATION

SUPPLEMENT TO COMMENTS AND REQUEST FOR CONDITIONS

submitted on behalf of

THE NATIONAL INDUSTRIAL TRANSPORTATION LEAGUE



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*Attorneys for The National Industrial
Transportation League*

January 13, 1998

BEFORE THE
SURFACE TRANSPORTATION BOARD

Finance Docket No. 32760

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

SUPPLEMENT TO COMMENTS AND REQUEST FOR CONDITIONS

submitted on behalf of

THE NATIONAL INDUSTRIAL TRANSPORTATION LEAGUE

The National Industrial Transportation League ("League") hereby submits this Supplement to its Comments and Request for Conditions that were filed on October 21, 1997 in this proceeding (NITL-7). On December 12, 1997 the League signed an Agreement with the Norfolk Southern Corporation ("NS") and the CSX Corporation ("CSX") regarding a number of matters that the League had raised in its Comments and Request for Conditions. Among other things, the December 12 Agreement obligates the League to file a statement with the Surface Transportation Board ("STB") withdrawing its request for conditions and supporting the transaction in all respects other than with respect to matters directly related to the conditions requested by the League at page 6, Section III of its October 21, 1997 Comments and Request for Conditions. A copy of the Agreement between the League, NS and CSX is attached to this Supplement for the Board's convenience.

This Supplement has three purposes. First, this Supplement is filed to formally implement certain of the obligations entered by the League as a result of its Agreement with NS and CSX.

Second, since the December 12 Agreement seeks action from and approval by the Board in a variety of matters, the League desires to set out for the Board the process by which this agreement was entered, so that the Board, in evaluating this Agreement in the context of this transaction, can be assured of the broad-based and careful nature of the consideration that was given by the League to this matter.

Third, the League desires to briefly discuss both the general nature of the December 12 Agreement, as well as the substance of its various provisions, in order to explain to the Board why the Agreement overall is in the public interest and why the agency should act to approve those provisions of the Agreement for which approval is sought.

I. LEAGUE IMPLEMENTATION OF THE AGREEMENT WITH NS AND CSX

The League states, pursuant to the requirements of the Agreement, that it is withdrawing its Comments and Request for Conditions filed October 21, 1997 ("Comments and Request for Conditions") and is supporting the transaction in all respects other than with respect to matters directly related to the conditions requested by the League pertaining to rates summarized at page 6, Section III of its Comments ("Post-implementation Rate Conditions"). The Agreement states that the League reserves the right to pursue Post-Implementation Rate Conditions. The parts of its October 21, 1997 Comments and Request for Conditions directly related to Post-Implementation Rate Conditions include the discussion set forth in Section III (pages 8-10); Section VI (pages 15-27); Section VII (pages 27-31); and that part of Section VIII at pages 42-48. The League respectfully requests that these sections continue to be considered by the Board.

Moreover, the League wishes to make clear that the parties to the Agreement have affirmed that the consent by the League to the Agreement is not to be construed as expressing opposition to any condition or responsive or inconsistent application requested by any other party to this proceeding.

II. THE PROCESS OF CONSIDERATION AND ADOPTION OF THE AGREEMENT WITH NS AND CSX BY THE LEAGUE

As this Board knows, the League is a voluntary organization of shippers and groups and associations of shippers conducting industrial and/or commercial enterprises in all states of the Union. It is a very broad-based organization: its members include industrial and commercial enterprises both large and small, shipping extraordinarily diverse numbers and kinds of commodities. Under the League's Articles of Incorporation and Bylaws, it operates under the authority of a Board of Directors elected annually by the membership.

The work of the League's Board of Directors and staff is assisted by large and broad-based committees, whose membership is not selected by staff or the League's Board, but is instead comprised of all persons who at any time indicate that they wish to serve on a particular committee. Issues involving rail matters, for example, are regularly referred to the League's large Railroad Transportation Committee. Where a matter involves formal action by the League, a committee submits a recommendation to the League's Board of Directors, for formal vote by the Board. At various times, matters requiring more intensive review are considered by a subcommittee or task force, or even a more informal group, before being considered by a committee as a whole.

The nature of the League as a large, diverse, and democratic organization means that the League does not -- and cannot -- operate by consensus, but by majority vote. Indeed, the League strongly believes that the strength of its positions arises not from mindless, "least-common-denominator" unanimity but

from a broad-based and searching consideration of an issue by a very diverse and knowledgeable group of shippers. Candid discussion and respectful disagreement are part of this process: in fact, the League's Articles of Incorporation specifically protect the rights of member companies to take a position contrary to the position taken by the organization.

The acquisition of Conrail by NS and CSX has been, and will continue to be, an extremely important issue for the League. The position set forth in the League's October 21, 1997 Comments and Request for Conditions was developed after initial consideration of the matter by a task force in June 1997. The initial task force recommendation concerning the approach to be taken as the merger proceeding went forward was then adopted by the League's Railroad Transportation Committee in July 1997, after which it was submitted to and approved by the League's Board. As the administrative proceeding progressed, the League's position was further refined in light of the evidence arising in the case and in light of further experience by the League's members, particularly recent experience from the implementation of past rail mergers, including the UP/SP service meltdown. In late September, a more refined position was reviewed by a group of interested shipper members of the League and was discussed by these shippers with representatives of the applicants. As a result of this review and discussion, a final proposed position was sent to the members of the League's Railroad Transportation Committee for review and comment in very early October. The League's Comments were then drafted and submitted to the agency on October 21, 1997.

Substantially the same process was followed in the consideration and adoption of the December 12 Agreement between the League and the NS and CSX. Just before the League's annual meeting in November, NS and CSX indicated to League staff that they would be interested in discussing a possible settlement of the issues raised in the League's Comments and Request for Conditions. On

November 19, League staff announced at a well-attended meeting of the League's Railroad Transportation Committee during the League's Annual Meeting that the NS and CSX had proposed settlement discussions; that staff and counsel would be meeting with NS and CSX; and that any proposal would be submitted to the entire Railroad Transportation Committee for consideration and to the League's Board of Directors for approval. During the meeting, Railroad Transportation Committee members suggested that another, in-person meeting of the Committee to review any settlement proposal would also be helpful.

Accordingly, just after the League's annual meeting, League staff and counsel met with NS and CSX to review a proposal that the carriers had submitted; a number of clarifications and changes were discussed, and the railroads submitted a revised proposal. On December 2, a meeting of the Railroad Transportation Committee was held in Washington, D.C. at which the revised settlement proposal was discussed. Further changes were negotiated, and a further-revised proposal was sent to the full Railroad Transportation Committee on December 8, which by a vote of 39 to 16 recommended approval of the Agreement to the League's Board of Directors. Thereafter, the Agreement was submitted to the League's Board, which approved the Agreement by a vote of 35 to 9.

The similarity between the League's October 21 Comments and the December 12 Agreement is not limited to the League's internal procedures for consideration of the matter. As the agency can itself determine by comparing the League's October 21 Comments and Request for Conditions with the December 12 Agreement, an effort was made to address in the Agreement many of the concerns raised by the League in its October 21 Comments and Request for Conditions. Where agreement was not possible, the parties agreed to disagree.

We turn, then, to the substance of the Agreement.

III. THE DECEMBER 12 AGREEMENT BETWEEN THE LEAGUE, NS AND CSX REPRESENTS A SOUND PARTIAL SETTLEMENT OF IMPORTANT MATTERS RAISED IN THIS PROCEEDING, AND SHOULD BE APPROVED BY THE BOARD

A. GENERAL NATURE OF THE DECEMBER 12 AGREEMENT BETWEEN THE LEAGUE, NS AND CSX

Two points should be emphasized about the general nature of the Agreement that the League has entered with NS and CSX.

First of all, the Agreement is a settlement of certain matters raised in the League's Comments and Requests for Conditions. It is the nature of a settlement that no party receives all that it is asking; and that each party, in deciding to settle a dispute, balances the hope of achieving more through litigation with the risk that less will be actually obtained. Yet, the fact that a settlement involves a compromise is not at all to denigrate its value, for in the give and take of negotiations there should emerge real benefits for both sides. In this case, the League believes that the Agreement does contain numerous, substantial and certain benefits for shippers. These include, for example, the carriers' promise to keep any point at which Conrail now provides reciprocal switching, open for reciprocal switching for a ten-year period, and to reduce from \$450 to \$250 per car the reciprocal switching charges at those points, as well as numerous other benefits discussed further below.

Second, it should be emphasized that this Agreement is a partial settlement between NS, CSX and the League. It is a narrowing of differences rather than a complete resolution. The Agreement provides that the League can -- and the League will -- still pursue matters in its Comments and Request for Conditions related to the so-called Post Implementation Rate Conditions, which the League still strongly believes are needed in order to cure certain adverse effects and protect against certain substantial risks flowing from this transaction.

B. SECTION-BY SECTION COMMENTS ON THE DECEMBER 12 AGREEMENT

The League believes that it would be helpful to the Board to provide some background and rationale for a number of the provisions of the Agreement. The text of the Agreement, of course, speaks for itself.

A. Creation of Conrail Transaction Council

The Agreement provides for the creation of a Conrail Transaction Council ("Council"), to be composed of representatives from the carriers, the League, and any other organization of affected rail users, to serve as a forum for constructive dialogue. The Agreement specifically states that the Council is not to supplant STB oversight of the transaction. The Agreement requires NS and CSX to discuss the implementation of the transaction with the Council, and requires NS and CSX to respond to concerns raised by the Council. In addition to these functions, the Council is also to develop, with NS and CSX, "objective, measurable standards" to be recommended to the Board to use in reporting the progress of implementation of the transaction.

The League believes that a Council is a useful device to assist in the process of dialogue between shippers and the involved carriers that must take place if this transaction is to succeed. The League expects that the members of the Council will be knowledgeable transportation professionals, able to provide both independent, useful ideas as well as informed feedback. While the actions of the Council clearly will not have and cannot have any legal force and effect, the League clearly expects that a recommendation to the carriers from a Council composed of representatives of the carriers' customers will carry a special weight not easily ignored by the carriers.

As noted above, the Council is not intended to supplant Board oversight of the transaction. Yet, the League believes that the Council can act as a valuable

addition to that oversight. As the recent activities related to the UP/SP service debacle indicate, Board oversight is an extremely valuable and powerful instrument, but it is by its nature a blunt tool. All parties would, the League believes, be assisted by a supplemental mechanism that could be more flexible than the formal procedures mandated by the Administrative Procedure Act under which the Board must operate.

Moreover, the Council is also not intended to supplant other voluntary shipper councils or committees or the literally hundreds of contacts that are and will increasingly be taking place between the carriers and individual shippers. But these other activities are by their very nature specialized and limited, representing as they do the points of view of a single industry or company. Hopefully, a broad-based regular consideration of problems by a group representing a variety of industries can provide a useful perspective, "leaving" the thinking of both NS and CSX and the shipping community. Moreover, a multi-industry Council may be able to better focus and highlight shippers' concerns than existing, specialized shipper councils or committees.

B. Shared Asset Area Summary Description of Operations

In Decision No. 44 in this proceeding, the Board ordered the Applicants to provide a detailed operating plan for the North Jersey Shared Asset Area. In response to that order, NS and CSX prepared CSX/NS-119, and offered witnesses for deposition on November 19. The Agreement states that, by February 1, 1998, NS and CSX shall provide a "summary description" of operations in each of the Shared Asset Areas ("SAA").

While the Board's Decision No. 44 was helpful to detail operations in that area, a more "user friendly" format may also be useful. The League would note that, to date, no party interested in the Philadelphia/Southern New Jersey SAA or the Detroit SAA has made a request to the agency for a detailed operating

description similar to that required by Decision No. 44 for the North Jersey SAA, a fact that suggests that shippers' concerns in these other areas may not be as acute. Indeed, the dense format of CSX/NS-119 may have even discouraged shipper review: out of the numerous parties participating in the proceeding, many of whom have interests in the effectiveness of the carriers' services in the North Jersey Shared Asset Area, only seven parties (including the League) chose to attend the deposition of the witnesses designated to testify regarding CSX/NS-119, and fewer still filed comments on the carriers' operating plan on November 24, 1997 as permitted by Decision No. 44. The December 12 Agreement, which provides for the submission of a summary description by the carriers, could be especially helpful to shippers in the Shared Asset Areas who may not have the time or inclination to analyze a detailed operating plan.

C. Labor Implementing Agreements

The Agreement states that NS and CSX "will obtain" the necessary labor implementing agreements prior to the Closing Date of the transaction, and "will advise" the STB when that has been accomplished. The League believes that these unconditional promises by the carriers will help to assure the shipping public that the chances for a replay of the disastrous UP/SP experience are reduced. The League believes that the requirement for a formal, public notification to the Board that a matter absolutely necessary for successful implementation of the transaction -- labor implementing agreements -- is complete, will make the carriers particularly conscious of their responsibilities and particularly cautious in their assessment of their readiness. Moreover, the carriers will be loathe to provide this notification if they know that a key party (such as labor) materially disagrees with that assessment, for no party to this proceeding will be disabled under this provision from expressing its own views about the carrier's notification to the Board, which of course retains plenary power under the statute and under the

oversight conditions made a part of this Agreement to oversee implementation of the transaction.

D. Management Information Systems

Similar to the provision regarding labor implementing conditions, this provision of the Agreement requires the carriers to advise the STB that all management information systems ("MIS"), including car tracking capabilities, are in place before the Closing Date. In UP/SP, this was not done, and shippers have suffered greatly because of the flaws in UP/SP's ability to track cars. The same considerations set forth with respect to labor implementing agreements above are also true here. Moreover, other aspects of the Agreement are also likely to assist in the process of developing the necessary management information systems. For example, the members of the Council should be in a position to ask the tough questions of NS and CSX on this matter even before the MIS certification is provided, and the League expects that the carriers will be extremely cautious in making the MIS certification if they have not satisfied the shipper members of the Council that all necessary MIS systems are in place before the Closing Date. Moreover, any party can submit to the Board its own views regarding to the carriers' certification.

E. Oversight

The Agreement provides for a definite oversight period of three years. The Agreement also provides that the Board on its own may provide for additional oversight now; and parties, including the League, may request an additional oversight period if the circumstances warrant.

Though this period is shorter than that approved in the UP/SP merger proceeding, this compromise is reasonable. The UP/SP transaction involved the critical need for the emergence by BNSF as substantial competitor in the areas

served by the trackage rights ordered in that case. That emergence, by its very nature, could not take place immediately. But that problem is not present in this transaction. By contrast, the key issues involved in this transaction are either operational (division of Conrail physical assets, personnel, computer systems, databases, contracts, communications systems, etc.), which must be faced and resolved very early in the process and whose success or failure should be known well before three years have passed; or involve matters covered by Post-Implementation Rate Conditions, which are not covered by the December 12 Agreement.

If operational circumstances after implementation of the transaction warrant, the Agreement provides the Board and the parties with the flexibility to extend the oversight period from three to five (or even more) years.

F. Reports

The Agreement states that the Board should require quarterly reports from NS and CSX, with an opportunity for comment by shippers. This provision goes far beyond the quarterly oversight provided in UP/SP, since it states that the carriers and the Council "shall recommend" the development of "measurable standards" for information; and sets forth a number of matters which were not and still are not part the UP/SP reporting process.

G. Specification of Contract Movement Responsibilities

Section 2.2(c) of the Transaction Agreement sets forth how NS and CSX will divide current Conrail contracts. Under that provision, where only CSX can provide single line transportation, CSX will provide the services called for under the contract; where only NS can provide single line service, NS will assume responsibility for operations under a contract. But if either NS or CSX can perform single line service (that is, CSX and NS will both serve the origin and the

destination), section 2.2(c) provides that the carriers will allocate the responsibility for providing service between them. Thus, under the current provision, shippers in such dual-carrier origin/destination situations have no rights at all, even where both carriers could provide single-line service.

The League was concerned about this situation, and there was little precedent in past merger cases to assure that this problem would be recognized and rectified by the Board. Section II.C. of the Agreement was therefore negotiated to provide an opportunity to shippers to "undo" the carriers' choice where the carrier to whom a dual-carrier origin/destination contract was assigned, was not performing to the shipper's satisfaction. Thus, where shippers now have no rights at all, the December 12 Agreement gives all shippers an opportunity for expedited legal redress.

Specifically, the Agreement provides that, beginning six months after the Closing Date, if the shipper is dissatisfied with the service it is receiving, it can submit to expedited, binding arbitration the question of whether service under the contract should be transferred to the other carrier. Six months appears to be a reasonable "test period" for the shipper to evaluate the service and for the carrier to rectify any problems. Moreover, the Agreement contemplates that an arbitration protocol will be developed before July 1, 1998, so that expedited arbitration procedures are actually in place by the Closing Date, with the arbitration itself to take no more than 30 days after the arbitrator is selected. Thus, the arbitration process itself is designed to be inexpensive, and will not delay resolution of the matter.

H. Transload and New Facilities Within the SAA

This provision clarifies the conditions under which CSX and NS will have access to transload or new facilities within the SAAs. Access to new facilities developed solely by one carrier is limited to the railroad that develops the facility,

since no carrier would invest its own money in a new facility if it had to share that facility with the non-investing carrier without compensation.

I. Reciprocal Switching

The Agreement provides that all points at which Conrail now provides reciprocal switching will be kept open to reciprocal switching for ten years after the closing date. This provision will assure that Conrail's practice of canceling reciprocal switching -- a practice that has bedeviled shippers for years -- will end. Indeed, no other carrier in the nation -- including NS and CSX -- has had Conrail's record for cancelling reciprocal switching services. More to the point, under the law as it stands today, a carrier can cancel reciprocal switching with virtual impunity, with shippers' only remedy being a lengthy challenge under the Board's competitive access rules,¹ under which shippers have never won a single case.

The December 12 Agreement will change this situation completely with respect to reciprocal switching now provided by Conrail.² The reciprocal switching provision in the December 12 Agreement will absolutely insure that, whatever economic incentives drove Conrail in the past to cancel reciprocal switching will not infect either NS or CSX for at least a decade. Thus, the important competitive pressures that can come to bear through reciprocal switching will be available to all shippers with reciprocal switching services now provided by Conrail, particularly when this provision of the December 12 Agreement is

¹ 49 C.F.R. § 1144 (1997).

² This provision is limited to reciprocal switching now provided by Conrail because reciprocal switching provided by either NS or CSX (or by other carriers, for that matter) to Conrail may be argued not to be a change in the current competitive situation caused by the transaction, and therefore, under the Board's longstanding approach set forth in its rules and applied in every recent merger proceeding, including this one, and approved by the courts, would not fall within the ambit of remedial action by the Board. See, 49 C.F.R. § 1180.1(c)(2)(i); UP/SP, slip op. at 100, 145; IN/SE, slip op. at 55-56; see also, Decision No. 40 in this proceeding, slip op. at 2; see also, Grainbelt Corp. v. STB, 109 F.3d 794, 797 (D.C. Cir. 1997).

combined with the drastic reduction in reciprocal switching charges discussed immediately below.

J. Reciprocal Switching Rates

Linked to the provision above to assure that reciprocal switching points are kept open is a provision in the Agreement that drastically reduces the current Conrail reciprocal switching rates of about \$450 per car by nearly half, to not more than \$250 per car, in the case of reciprocal switch charges between NS and CSX at points where Conrail now provides reciprocal switching, to be adjusted only annually by the RCAF-U. Where Conrail now provides reciprocal switching at other points or to other carriers (i.e., not NS and CSX), the rates will be the existing reciprocal switch charges subject to RCAF-U adjustment, or the rates in settlement agreements with other carriers. Reciprocal switching rates will in any case will be limited only to adjustment by the RCAF-U, for a period of five years after the Closing Date.

This Agreement, then, implements a very substantial decline in currently-existing reciprocal switching rates, to the substantial benefit of shippers throughout the current Conrail service territory.

K. Gateways

The Agreement clarifies that NS and CSX anticipate that all major interchanges with other carriers will be kept open "if they are economically efficient." This provision clarifies the current state of the law. In considering this provision of the December 12 Agreement, the League recognized that the agency has, since the Staggers Act, generally refused in the context of a merger proceeding as a matter of formal policy to limit carriers' discretion to make efficiency-enhancing improvements in interchanges with other carriers. *See, Rulemaking*

Concerning Traffic Protective Conditions in Railroad Consolidation Proceedings,
366 I.C.C. 112 (1982).

L. Interline Service

Because NS and CSX are dividing the Conrail system, this transaction, unlike others before it, will create shippers who were served in single line service by Conrail, but after implementation of the transaction will be served in joint line service by NS and CSX -- so-called "1-to-2 shippers." Because single-line service is frequently superior to joint line service, these shippers may be disadvantaged.

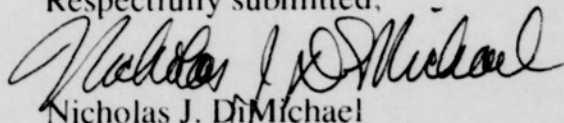
Section III.E. of the December 12 Agreement attempts to address these situations. The Agreement provides that, in such situations that involve movements of more than 50 cars in the calendar year prior to the Control Date, NS and CSX will protect the existing Conrail rate to that shipper for a three-year period, subject to RCAF-U increases, and work with that shipper to provide fair and reasonable joint line service. If the shipper disagrees with the routing or the interchange point, the dispute will be submitted to expedited, binding arbitration.

The League believes that this is a fair and reasonable compromise, and will provide to "1-to-2 shippers" who have significant transportation volumes over a particular single-line-to-joint-line route both rate protection and a means of redressing service failures.

III. CONCLUSION

The League respectfully requests the Board to approve the December 12 Agreement between NITL, NS and CSX, as set forth in that Agreement.

Respectfully submitted,



Nicholas J. DiMichael

Frederic L. Wood

DONELAN, CLEARY, WOOD &
MASER, P.C.

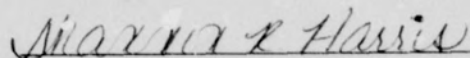
1100 New York Avenue, N.W.
Washington, D.C. 20005-3934

*Attorneys for The National Industrial
Transportation League*

January 13, 1998

Certificate of Service

I hereby certify that I have on this 13th day of January 1998 served a copy of the foregoing Supplement to Comments and Request for Conditions on all parties of record, in accordance with the Rules of Practice.



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

Mr. Donald G. Avery
Slover & Loftus
1224 -- 17th Street, N.W.
Washington, D.C. 20036-3003

Judge Jacob Leventhal, Office of Hearings
Federal Energy Regulatory Commission
888 - 1st Street, NE, Suite 11F
Washington, DC 20426

Mr. T. Scott Bannister
T. Scott Bannister and Associates
1300 Des Moines Building
405 Sixth Avenue
Des Moines, IA 50309

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

Mr. J. R. Barbee
General Chairperson
Post Office Box 9599
Knoxville, TN 37940

Mr. David G. Abraham
Suite 631 West
7315 Wisconsin Avenue
Bethesda, MD 20814

Harry C. Barbin, Esquire
PA I.D. No. 08539
William M. O'Connell, III, Esquire
PA I.D. No. 20023
Barbin, Lauffer & O'Connell
608 Huntingdon Pike
Rockledge, PA 19046

Mr. Nels Ackerson
The Ackerson Group
1275 Pennsylvania Avenue, N.W.
Suite 1100
Washington, D.C. 20004-2404

Mr. James L. Belcher
Eastman Chemical Company
Post Office Box 431
Kingsport, TN 37662

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

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

Mr. William D. Ankner
Rhode Island Dept. of Trans.
Two Capitol Hill
Providence, RI 02903

Mr. David Berger
Berger and Montague, P.C.
1622 Locust Street
Philadelphia, PA 19103-6305

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

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

Mr. Charles D. Bolam
United Trans. Union
1400 -- 20th Street
Granite City, IL 62040

Mr. Charles M. Chadwick
Maryland Midland Railway, Inc.
Post Office Box 1000
Union Bridge, MD 21791

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

Mr. Angelo J. Chick, Jr.
Local Chairman
Post Office Box 48398
Old Goose Bay Road
Redwood, NY 12679

Mr. William T. Bright, et al.
Post Office Box 149
200 Greenbrier Road
Summersville, WV 26641

Ms. Sylvia Chinn-Levy
Intergovernmental Co-Op
969 Copley Road
Akron, OH 44320-2992

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

Ms. Elaine L. Clark
Maine Dept. of Trans.
16 State House Station
Augusta, ME 04333

Mr. Ross B. Capon
Nat'l. Ass'n. of Railroads Passenger
900 Second Street, N.E.
Suite 308
Washington, D.C. 20002-3357

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

Mr. Hamilton L. Carmouche
City of Gary
401 Broadway
4th Floor
Gary, IN 46402

Mr. John F. Collins
Collins, Collins & Kantor, P.C.
267 North Street
Buffalo, NY 14201

Mr. Michael Connelly
City of East Chicago
4525 Indianapolis Boulevard
East Chicago, IN 46312

Ms. Sandra J. Dearden
MDCO Consultants, Inc.
407 South Dearborn
Suite 1145
Chicago, IL 60605

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

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

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

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

Mr. Steve M. Coulter
Exxon Company, U.S.A.
Post Office Box 3272
Houston, TX 77210-4692

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

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

Mr. Daniel Duff
American Public Transit Ass'n.
1201 New York Avenue, N.W.
Washington, D.C. 20005

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

Mr. John K. Dunleavy
Assistant Attorney General
133 State Street, State Admin. Bldg.
Montpelier, VT 05633-5001

Mr. Lewin L. Davis
1980 State Tower Building
Syracuse, NY 13202

Mr. Donald W. Dunlevy
230 State Street
UTU State Legislative Director
Penn. AFL-CIO Building, Second Floor
Harrisburgh, PA 17101-1138

Ms. Fay D. Dupuis, City Solicitor
City Hall
801 Plum Street, Room 214
Cincinnati, OH 45202

Mr. Terrell Ellis
CAEZWW
Post Office Box 176
Clay, WV 25043

Martin T. Durkin, Esquire
Durkin & Boggia
Centennial House
71 Mount Vernon Street
Ridgefield Park, NY 07660

Mr. Robert L. Evans
OXYCHEM
P.O. Box 809050
Dallas, TX 75380

Mr. David Dysard
TMACOG
Post Office Box 9508
300 Central Union Plaza
Toledo, OH 43697-9508

Ms. Sara J. Fagnilli
Director of Law
12650 Detroit Avenue
Lakewood, OH 44107

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

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

Mr. Richard S. Edelman
Highsaw, Mahoney, Clarke
1050 -- 17th Street, N.W.
Suite 210
Washington, D.C. 20036

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

Mr. Robert Edwards
Eastern Transport and Logistics
1109 Linnette Drive
Cincinnati, OH 45230

Mr. Michael P. Ferro
Millennium Petrochemicals, Inc.
11500 Northlake Drive
Cincinnati, OH 45249

Mr. Daniel R. Elliott III
Assistant General Counsel
United Transportation Union
14600 Detroit Avenue
Cleveland, OH 44107

Mr. Edward J. Fishman
Oppenheimer, Wolff & Donnelly
1020 -- 19th Street, N.W.
Suite 400
Washington, D.C. 20036

Mr. J. D. Fitzgerald
UUT. General Chairperson
400 East Evergreen Blvd., Suite 217
Vancouver, WA 98660-3264

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

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

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

Mr. Garland B. Garrett, Jr.
N.C. Dept. of Trans.
P.O. Box 25201
Raleigh, NC 27611

Mr. Edward D. Greenberg
Galland, Kharasch & Morse
1054 -- 31st Street, N.W.
Washington, D.C. 20007-4492

Mr. Michael J. Garrigan
BP Chemicals, Inc.
4440 Warrensville Center Road
Cleveland, OH 44128

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

Mr. Richard A. Gavril
16700 Centry Lane, No. 104
Tinley Park, IL 60477

Mr. Robert E. Greenlese
Toledo-Lucas County Port Authority
1 Maritime Plaza, Suite 700
Toledo, OH 43604

Mr. Peter A. Gilbertson
Regional RRS of America
122 C Street, N.W.
Suite 550
Washington, D.C. 20001

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

Mr. Louis E. Gitomer
Ball Janik, L.L.P.
1455 F Street, N.W.
Suite 225
Washington, D.C. 20005

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

Mr. Vaughn R. Groves
Pittston Coal Company
Post Office Box 5100
Lebanon, VA 24266

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

Mr. Joseph Guerrieri, Jr.
Guerrieri, Edmond, et al.
1331 F Street, N.W.
4th Floor
Washington, D.C. 20004

Mr. William P. Hernan, Jr.
General Chairman
Post Office Box 180
Hilliard, OH 43026

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

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

Mr. Michael P. Harmonis
U.S. Dept. of Justice
325 -- 7th Street
Suite 500
Washington, D.C. 20530

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

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

Mr. James E. Howard
90 Canal Street
Boston, MA 02114

Ms. Nicole Harvey
The Dow Chemical Co.
2020 Dow Center
Midland, MI 48674

Mr. John Hoy
Post Office Box 117
Glen Burnie, MD 21060

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

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

Mr. Paul M. Laurenza
Oppenheimer, Wolff & Donnelly
1020 -- 19th Street, N.W.
Suite 400
Washington, D.C. 20036

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

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

Mr. Frank N. Jorgensen
The Elk River Railroad, Inc.
Post Office Box 460
Summersville, WV 26651

Mr. Ernest J. Ierardi
Nixon Hargrave DeVans Doyle, L.L.P.
P.O. Box 1051, Clinton Square
Rochester, NY 14603-1051

Mr. Fritz R. Kahn
1100 New York Avenue, N.W.
Suite 750 West Tower
Washington, D.C. 20005-3934

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

Mr. Steven J. Kalish
McCarthy, Sweeney & Harkaway
1750 Pennsylvania Avenue, N.W.
Washington, D.C. 20006-4502

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

Mr. Larry B. Karnes
Transportation Building
Post Office Box 30050
425 West Ottawa
Lansing, MI 48909

Ms. Doreen C. Johnson
Ohio Attorney General's Office
30 East Broad Street, 16th Floor
Columbus, OH 43215

Mr. David D. King
Beaufort and Morehead R.R. Co.
Post Office Box 25201
Raieigh, NC 27611-5201

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

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

Mitchell M. Kraus, Esquire
Trans. Comm. Int'l. Union
3 Research Place
Rockville, MD 20850

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

Hon. Dennis J. Kucinich
U.S. House of Representatives
Washington, D.C. 20515

Mr. C. Michael Loftus
Slover & Loftus
1224 -- 17th Street, N.W.
Washington, D.C. 20036

Mr. Paul H. Lamboley
Oppenheimer, Wolff & Donnelly
1020 Nineteenth Street, N.W.
Suite 400
Washington, D.C. 20036

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

Mr. J. Patrick Latz
Heavy Lift Cargo System
Post Office Box 51451
Indianapolis, IN 46251-0451

Mr. Gordon P. MacDougall
1025 Connecticut Avenue, N.W.
Suite 410
Washington, D.C. 20036

Mr. John K. Leary
S.E. Penn. Trans. Authority
1234 Market Street, 5th Floor
Philadelphia, PA 19107-3780

Mr. William G. Mahoney
Highsaw, Mahoney & Clarke
1050 -- 17th Street, N.W.
Suite 210
Washington, D.C. 20036

Ms. Sherri Lehman
Corn Refiners Ass'n.
1701 Pennsylvania Avenue, N.W.
Washington, D.C. 20006-5805

Mr. Ron Marquardt
Local Union 1810 UMW
R. D. #1
Rayland, OH 43943

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

Mr. Robert E. Martinez
VA Secretary of Trans.
Post Office Box 1475
Richmond, VA 23218

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

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

George W. Mayo Jr.
Hogan & Hartson, L.L.P.
555 Thirteenth Street, N.W.
Washington, D.C. 20004-1109

Ms. Coletta McNamee
Cude, Improvement, Inc.
11500 Franklin Blvd., Suite 104
Cleveland, OH 44102

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

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

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

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

Mr. Christopher C. McCracken
Ulmer & Berne, L.L.P.
1300 East 9th Street
Suite 900
Cleveland, OH 44114

Mr. G. Paul Moates
Sidley & Austin
1722 Eye Street, N.W.
Washington, D.C. 20006

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

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

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

Mr. Karl Morell
Ball Janik, L.L.P.
1455 F Street, N.W.
Suite 225
Washington, D.C. 20005

Mr. Ian Muir
Bunge Corporation
Post Office Box 28500
St. Louis, MO 63146

Mr. Christopher C. O'Hara
Brickfield, Burchette & Ritts, P.C.
1025 Thomas Jefferson Street, N.W.
3th Floor
Washington, D.C. 20007

Mr. William A. Mullins
Troutman & Sanders, L.L.P.
1300 Eye Street, N.W.
Suite 500 East
Washington, D.C. 20005-3314

Mr. Thomas M. O'Leary
Ohio Rail Development Comm.
50 West Broad Street
5th Floor
Columbus, OH 43215

Mr. John R. Nadolny
Boston & Maine Corporation
Iron Horse Park
North Billerica, MA 01862

Mr. John L. Oberdorfer
Patton, Boggs, L.L.P.
2550 M Street, N.W.
Washington, D.C. 20037-1301

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

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

Mr. Peter Q. Nyce, Jr.
U.S. Dept. of the Army
901 North Stuart Street
Arlington, VA 22203

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

Mr. Keith G. O'Brien
Rea, Cross & Auchincloss
1920 N Street, N.W.
Suite 420
Washington, D.C. 20036

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

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

Mr. Monty L. Parker
CMC Steel Group
Post Office Box 911
Seguin, TX 78156

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

Mr. James F. Roberts
210 East Lombard Street
Baltimore, MD 21202

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

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

Mr. Patrick R. Plummer
Guerrieri, Edmond & Clayman, P.C.
1331 F Street, N.W.
Washington, D.C. 20004

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

Mr. Joseph R. Pomponio
Federal Railroad Administration
400 -- 7th Street, S.W.
RCC-20
Washington, D.C. 20590

Mr. Edward J. Rodriguez
Post Office Box 298
67 Main Street
Centerbrook, CT 06409

Mr. Harold P. Quinn, Jr.
Senior V.P. and General Counsel
National Mining Ass'n.
1130 -- 17th Street, N.W.
Washington, D.C. 20036

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

Mr. J. T. Reed
General Chairperson UTU
7785 Bay Meadows Way
Suite 109
Jacksonville, FL 32256

Mr. John Jay Rosacker
Kansas Department of Trans.
217 S.E. 4th Street, Second Floor
Topeka, KS 66603

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

Ms. Christine H. Rosso
Ill. Assistant Attorney General
100 West Randolph Street
13th Floor
Chicago, IL 60601

Mr. Thomas R. Rydman
Indian Creek Railroad Co.
3905 West 600 North
Anderson, IN 46011

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

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

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

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

Mr. James E. Shepherd
Tuscola & Saginaw Bay
Post Office Box 550
Owosso, MI 43367-0550

Mr. G. Craig Schelter
PIDC
1500 Market Street
Philadelphia, PA 19102

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

Mr. Frederick H. Schranck
Post Office Box 778
Dover, DE 19903

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

Mr. Randolph L. Seger
McHale, Cook & Welch, P.C.
320 North Meridian Street
Suite 1100
Indianapolis, IN 46204

Mr. Patrick B. Simmons
N.C. Dept. of Trans.
One South Wilmington Street
Room 557
Raleigh, NC 27611

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

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

Mr. William L. Slover
Slover & Loftus
1224 -- 17th Street, N.W.
Washington, D.C. 20036-3003

Mr. James F. Sullivan
Conn. Dept. of Trans.
P.O. Box 317546
Newington, CT 06131

Mr. Garret G. Smith
Mobil Oil Corporation
3225 Gallows Road
Room 8A-903
Fairfax, VA 22037-0001

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

Mr. Paul Samuel Smith
U.S. Dept. of Transportation
400 7th Street, S.W.
Room 4102-C-30
Washington, D.C. 20590

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

Mr. Mike Spahis
Fina Oil & Chemical Company
Post Office Box 2159
Dallas, TX 75221

Mr. J.E. Thomas
Hercules Inc.
1313 N. Market St.
Wilmington, DE 19894

Mr. Charles A. Spitunik
Hopkins & Sutter
888 -- 16th Street, N.W.
Washington, D.C. 20006

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

Ms. Eileen S. Stommes
Agricultural Marketing Service, USDA
Post Office Box 36456
Washington, D.C. 20090-6456

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

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

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

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

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

Mr. Stephen M. Uthoff
Coniglio & Uthoff
110 West Ocean Boulevard
Suite C
Long Beach, CA 90802

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

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

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

Mr. F. Ronald Walker
Citizens Gas & Coke Utility
2020 North Meridian Street
Indianapolis, IN 46202

Mr. Jack A. Walter
WCI Steel, Inc.
1040 Pine Avenue, S.E.
Warren, OH 44483

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

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

Mr. Charles H. White, Jr.
Galland, Kharasch & Garfinkle, P.C.
1054 -- 31st Street, N.W.
Washington, D.C. 20007-4492

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

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

Mr. Robert J. Will
United Transportation Union
4134 Grave Run Road
Manchester, MD 21102

Mr. Richard R. Wilson
1126 Eighth Avenue
Suite 403
Altoona, PA 16602

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

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

Edward Wytkind, Executive Director
Larry i. Willis, Esq.
Transportation Trades Department, AFL-CIO
1000 Vermont Avenue, N.W., Suite 900
Washington, D.C. 20005

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

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

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

Mr. Walter E. Zullig, Jr.
Metro - North Commuter
Railroad Company
347 Madison Avenue
New York, NY 10017-3706

Mr. Sergeant W. Wise
Livonia, Avon & Lakeville RR Corp.
Post Office Box 190-B
5769 Sweetners Boulevard
Lakeville, NY 14480

Ms. Alice C. Saylor, V.P. & Gen. Counsel
American Short Line Railroad Ass'n.
1120 G Street, N.W., Suite 520
Washington, D.C. 20005-3889

Mr. Timothy A. Wolfe
Wyandot, Doliotte, Inc.
Post Office Box 99
1794 Co. Rd. #99
Carey, OH 43316

Mr. M. W. Currie
UTU GO-851, General Chairperson
3030 Powers Avenue, Suite 2
Jacksonville, FL 32250

Mr. E.C. Wright
Rail Trans. Procurement Manager
1007 Market Street
duPont Building 3100
Wilmington, DE 19898

Mark T. Durkin
Durkin & Boggia, Esqs.
Centennial House
71 Mt. Vernon Street
P.O. Box 378
Ridgefield, NJ 07660

Mr. Gary Edwards
Superintendent of Railroad Operations
Somerset Railroad Corporation
7725 Lake Road
Barker, NY 14012

R. Lawrence McCaffrey, Jr.
New York & Atlantic Railway
405 Lexington Avenue, 50th Floor
New York, NY 10174

Mr. Robert P. vom Eigen
Hopkins & Sutter
885 16th Street, N.W., Suite 700
Washington, D.C. 20006

Mr. Samuel J. Nasca
State of New York Legislative Board
United Transportation Union
35 Fuller Road, Suite 205
Albany, NY 12205

Scott A. Roney, Esq.
Archer Daniels Midland Co.
P.O. Box 1470
4666 Faries Parkway
Decatur, IL 62525

Christopher J. Burger, President
Central Railroad Company of Indianapolis
500 North Buckeye
Kokomo, IN 46903-0554

Harry C. Barbin, Esquire
PA I.D. No. 08539
William M. O'Connell, III, Esquire
PA I.D. No. 20023
Barbin, Lauffer & O'Connell
608 Huntingdon Pike
Rockledge, PA 19111

Mr. Thomas E. Schick
Chemical Manufacturers Ass'n.
1300 Wilson Boulevard
Arlington, VA 22209

Peter A. Gilbertson
Louisville & Indiana Railroad Company
53 W. Jackson Boulevard, Suite 350
Chicago, IL 60604

Mr. Leo J. Wasescha
Gold Medal Division
General Mills Operation, Inc.
Number One, General Mills Blvd.
Minneapolis, MN 55426

Mr. Douglas S. Golden
Main Line Management Services, Inc.
520 Fellowship Road, Suite A-105
Mount Laurel, NJ 08054-3407

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

**AGREEMENT BETWEEN THE NATIONAL INDUSTRIAL
TRANSPORTATION LEAGUE, NORFOLK SOUTHERN, AND CSX**

THIS SETTLEMENT AGREEMENT, made this 12TH day of December, 1997, between and among, on the one hand, Norfolk Southern Corporation (NS) and CSX Corporation (CSX) on behalf of their rail carrier subsidiaries, and, on the other hand, the National Industrial Transportation League, an organization of affected rail users, (Organization).

WITNESSETH that

WHEREAS, NS and CSX have filed an application (Application) before the Surface Transportation Board (STB) in Finance Docket No. 33388, for authority to control and operate specified portions of Conrail, and

WHEREAS, the parties desire to record the terms on which the Organization and NS and CSX have agreed on certain matters, and the remaining conditions that the Organization may seek from the STB

NOW THEREFORE, for and in consideration of the mutual covenants contained herein, NS, CSX and Organization agree as follows:

1. Upon execution of this agreement, Organization shall file a statement withdrawing its request for conditions and supporting the transaction in all respects other than with respect to matters directly related to the conditions requested by Organization pertaining to rates summarized at page 6, Section III ("Post-Implementation Rate Conditions") of its October 21, 1997 Comments and Request for Conditions submitted to the STB. NS and CSX shall file with the STB a statement that they do not oppose action by the STB consistent with the terms of this agreement. Organization shall not take a position inconsistent with this agreement, except that Organization reserves the right to pursue the conditions requested pertaining to Post-Implementation Rate Conditions and NS and CSX reserve the right to oppose those proposed conditions. This agreement by Organization is not to be construed as expressing opposition to any condition or responsive or inconsistent application requested by any other party to this proceeding.

2. The terms of this agreement are set forth in Appendix A. Except as specified otherwise in this Agreement, defined terms have the same meaning they have in the Application.

IN WITNESS WHEREOF, the parties hereto have caused this agreement to be executed by their duly authorized representatives.

CSX

NS

NITL

By: [Signature]
Title: EVP
Date: 12/16/97

By: [Signature]
Title: VP-Marketing
Date: 12-12-97

By: [Signature]
Title: President
Date: 12/12/97

APPENDIX A

I. Implementation and Oversight - Pre Closing Date

- A. Council. NS and CSX will create on or before February 1, 1998, a Conrail Transaction Council (Council). The Council shall consist of representatives from NS and CSX, each Organization that has agreed to the terms of this Agreement and representatives of other organizations of affected rail users. The Council is intended to function as a forum for constructive dialogue. NS and CSX shall discuss the implementation process with the Council. The Council may present to NS and CSX mechanisms to identify and address any perceived obstacles to the effective and efficient implementation of the proposed transaction, and may convey to NS and CSX any particular concerns or recommendations with respect to implementation planning or the implementation process. NS and CSX shall endeavor to address such presentations, concerns or recommendations, and shall report to the Council on the actions taken with respect thereto or the reasons for taking different actions. The Council is not intended to supplant STB oversight of the transaction as set forth in Section II of this Appendix A.
- B. Shared Asset Area (SAA) Summary Description of Operations. In order to facilitate a better understanding of the SAA's among the shipping public, NS and CSX shall provide to the Council no later than February 1, 1998 a summary description of how operations will be conducted in each SAA, i.e. Northern New Jersey, Philadelphia/Southern New Jersey and Detroit. The summary shall focus on the function and interrelationship of the various crews of each railroad, the dispatching controls and the effect of the SAA's on individual shippers with respect to concerns such as car ordering, car supply and car location.
- C. Labor Implementing Agreements. NS and CSX will obtain the necessary labor implementing agreements prior to the Closing Date and will advise the STB when that has been accomplished. NS and CSX will, consistent with safe and efficient rail operations, implement the transaction as soon after Control Date as possible. If NS or CSX request the STB to initiate the

labor implementing agreement process prior to the Control Date, Organization will support the request.

- D. Management Information Systems. Prior to the Closing Date, NS and CSX will advise the STB that management information systems designed to manage operations on the former Conrail system within the SAA's and interchanges between the NS/Conrail and CSX/Conrail systems, including necessary car tracking capabilities, are in place.

II. Implementation and Oversight - Post Closing Date

- A. Oversight. The Board should require specific oversight of the implementation and effect of the transaction for a three-year period. This condition is not intended to limit the authority of the Board to continue oversight beyond the three-year period, or limit the right of any party, including the Organization, to request continued oversight if conditions at the end of the three year period warrant such a request.
- B. Reports. As part of this continuing oversight, the Board should require quarterly reports from NS and CSX and should provide an opportunity for comment by shippers. NS, CSX and the Council shall jointly recommend to the Board objective, measurable standards to be used in such reports. The base for the standards, to the extent the information is readily available, shall be the standards on Conrail prior to the Control Date. In addition to the measurable standards, information in the quarterly reports may include:
- a. status of implementation plans for operations in the SAA's;
 - b. status of labor implementing agreements;
 - c. status of integration of management information systems;
 - d. status of allocation of responsibility for performing Conrail transportation contracts; and
 - e. any other matters about which the Board or Council reasonably requests information.

- C. Specification of Transportation Contract Movement Responsibilities. NS and CSX will cause Conrail transportation contracts to be allocated between their rail carrier subsidiaries and discharged in accordance with their terms subject to allocation and other terms of Section 2.2(c) of the Transaction Agreement between NS and CSX. If a shipper whose contract has been allocated pursuant to the "Percentage Division" of 50-50 provided for in such Section 2.2(c), is dissatisfied with the service it receives from the carrier performing the contract from specified origins to specified destinations, it may at any time after six months from the Closing Date (after written notice to the carrier as to claimed operating or other deficiencies below the level at which Conrail provided performance of the contract, and an opportunity of thirty days to improve its performance and to cure those deficiencies going forward), submit the issues to expedited binding arbitration under an arbitration protocol for the selection of arbitrator(s) and the conduct of the arbitration to be developed by NS, CSX and Organization not later than July 1, 1998, with arbitration to be concluded within thirty days from the date the arbiter is selected. In that arbitration, the issue shall be whether there is just cause because of such deficiency in performance to have the responsibility for the performance of the contract (for the specified origin/destination pairs) transferred. In such arbitration the only remedy shall be, if such just cause appears, to order the transfer of such responsibility for performance to the other carrier. Such transfer shall be affected unless the transferee certifies that it is not operationally feasible for it to perform the service; provided, however, that unless otherwise agreed by NS, CSX and the shipper, such transfer shall not become effective for 30 days in order to allow NS and CSX to make the appropriate operating changes. Except for such transfer, such arbitration shall not address or affect in any way the rights, obligations or remedies of any party under the terms of such contract; and the award in such arbitration shall not be deemed to establish any facts with respect to the performance of such contract for any purpose other than the arbitration. No such transfer of responsibility shall affect the "50-50" Percentage Division of revenues and expenses with

respect to the contract in question and the other contracts which are allocated pursuant to the "Percentage Division" in Section 2.2(c) of the Transaction Agreement. Notwithstanding the maintenance of the Percentage Division of 50-50, no reallocation of any other contract shall be made to equalize the responsibilities for performance of the contracts subject to the Percentage Division.

III. Other Conditions and Provisions

- A. Transload and New Facilities within the SAA During the term of the Shared Assets Operating Agreements, any new or existing facility within the three Shared Assets Areas (other than an "Operator Facility") shall be open to both NS and CSX, to the extent and as provided in those Agreements, including, without limitation, Section 6 thereof. By way of example of the foregoing, the Agreements generally provide that: 1) both NS and CSX will have access to existing or new shipper owned facilities, 2) both NS and CSX will have the opportunity to invest in joint facilities in the Shared Assets Areas in order to gain access to such facilities, and 3) either NS or CSX may solely develop facilities that it will own or control (such as transloading facilities or automotive ramps) that will be accessed exclusively by the railroad that develops such facility.
- B. Reciprocal Switching. NS or CSX, as the case may be, will cause any point at which Conrail now provides reciprocal switching to be kept open to reciprocal switching for ten years after the Closing Date.
- C. Reciprocal Switching Rates. For a period of five years after the Closing Date, reciprocal switch charges between NS and CSX at the points referred to in the preceding paragraph will not exceed \$250 per car, subject to annual RCAF-U adjustment, and at other points and/or with all other carriers will not exceed: (a) where no separate settlement is made between carriers, the existing rates subject to RCAF-U adjustment, or (b) where there are such settlements, the amount therein prescribed (not in excess of that provided for in (a)). The foregoing does not

apply where NS and CSX have entered into agreements intended to address so-called 2-to-1 situations as set forth in the Application.

- D. Gateways. NS and CSX anticipate that all major interchanges with other carriers will remain open as long as they are economically efficient.
- E. Interline Service. This paragraph does not apply to a shipper who has an existing Conrail transportation contract if a more favorable treatment is provided under Section 2.2(c) of the Transaction Agreement. NS and CSX agree to take the following actions with respect to transportation services to Conrail shippers on routes (i.e. origin-destination pairs) over which at least fifty (50) cars were shipped in the calendar year prior to the Control Date in single line Conrail service (i.e. origin and destination served by Conrail) where that service will become joint line NS-CSX after the Closing Date. Upon request by the affected shipper, NS and CSX will, for a period of three years, (a) maintain the Conrail rate (subject to RCAF-U increases); and (b) work with that shipper to provide fair and reasonable joint line service. If a shipper objects to the routing employed by NS and CSX, or to the point selected by them for interchange of its traffic, the disagreement over routing or interchange, or both, shall be submitted to binding arbitration under the procedures adopted by the STB in Ex Parte 560. The arbiter in such an arbitration shall determine whether the route employed by NS or CSX or the point of interchange selected by them, or both, satisfies the requirements of 49 U.S.C. §10705; and if it not, the arbiter may establish as the sole award in such arbitration, a different route or point of interchange for such traffic.
- F. STB Approval. Except as provided in this paragraph, this agreement is not subject to STB approval and will be binding on the parties in the absence of STB approval except with respect to any provision disapproved by the STB or inconsistent with the STB's action on the Application. Notwithstanding the

foregoing provision, the parties will ask the STB to approve the creation of the Council, the exchange of information, the process for addressing shipper implementation and service concerns hereunder and the allocation of transportation contracts under II(C). In the absence of such approval by the STB, NS and CSX shall not be obliged to take any action which in their sole judgment might create liability under the antitrust laws.

STB

FD-33388

1-13-98

D

ID-185204

185204

NEFCO

NORTHEAST OHIO FOUR COUNTY REGIONAL PLANNING & DEVELOPMENT ORGANIZATION

969 Copley Road, Akron, Ohio 44320-2992

(330) 836-5731 • Fax (330) 836-7703

Gayle Jackson, Chair

Joseph Hadley, Jr., Executive Director

January 7, 1998

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



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

Dear Secretary Williams:

Enclosed are one original and ten (10) copies of the Certificate of Service verifying our submission of previous filings on October 21, 1997 (MRTA-1) and December 15, 1997 (MRTA-2), to Robert J. Cooper at his corrected address, as required by Decision Number 27.

These submissions were made by the Northeast Ohio Four County Regional Planning and Development Organization (NEFCO) as a party of record on behalf of the METRO Regional Transit Authority (METRO) and the Summit County Port Authority. NEFCO is a regional council representing Portage, Stark, Summit, and Wayne counties and their local governments in northeast Ohio in the areas of economic and environmental planning.

If you have any questions, please contact me at (330) 836-5731. Thank you.

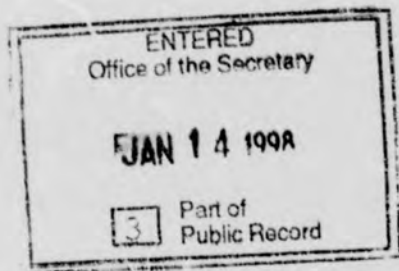
Sincerely,

Sylvia R. Chinn-Levy

Sylvia R. Chinn-Levy
Economic Development Planner

SRC:rlm

Enclosures



CERTIFICATE OF SERVICE

I hereby certify that on the 7th day of January, 1998 I served a copy of the Request for Conditional Operating Rights for the METRO Regional Transit Authority and the Response to Responsive Application for Wheeling and Lake Erie Railway on behalf of METRO Regional Transit Authority and the Summit County Port Authority by first class mail, postage prepaid, upon Robert J. Cooper, United Transportation Union, as required by Decision No. 27.

Sylvia R Chinn-Levy

Sylvia R. Chinn-Levy
Northeast Ohio Four County
Regional Planning and
Development Organization
969 Copley Road
Akron, OH 44320



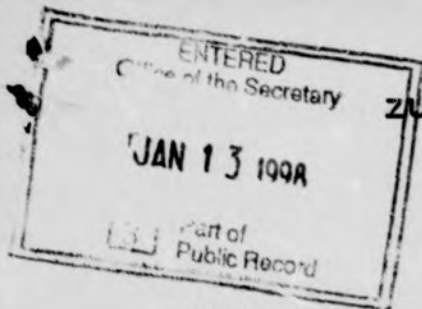
STB

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1-12-98

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ID-185174



RICHARD A. ALLEN

LAW OFFICES

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

858 SEVENTEENTH STREET, N.W.

WASHINGTON, D.C. 20006-3939

TELEPHONE: (202) 298-8660

FACSIMILES: (202) 342-0583

(202) 342-1316



185174

January 12, 1998

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:

On behalf of the Applicants, I submit an original and
twenty-five copies of CSX/NS-189, Errata to the Applicants'
Rebuttal. Also enclosed is a 3 1/2" computer disk containing the
pleading in Wordperfect 5.1 format, which is capable of being
read by Wordperfect 7.0.

Should you have any questions regarding this, please call.

Sincerely,

Richard A. Allen

Counsel for Norfolk Southern
Corporation and Norfolk
Southern Railway Company

Enclosures

cc: The Honorable Jacob Leventhal
All Parties of Record

BEFORE THE
SURFACE TRANSPORTATION BOARD

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

STB FINANCE DOCKET NO. 33388

ERRATA TO APPLICANTS' REBUTTAL

Applicants^{1/} hereby file their errata to CSX/NS-176, CSX/NS-177 and CSX/NS-178 ("Applicants' Rebuttal"). Unless otherwise noted, the page references are to the highly confidential version of the Applicants' Rebuttal.

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

Volume 1 (CSX/NS-176)

<u>Page</u>	<u>Line</u>	<u>Change</u>
74	12	Change "Section XIII.B.6" to "Section XIII.C.6"
75	6	Change "Section XIII.B.6" to "Section XIII.C.6"
75	18	Change "Section: XIII.B." to "Section: XIII.C."
118	n.5 last line	Change "Group" to "Scrap"
147	3	Charge "Section XIV" to "Section XIII"
288	10	Change "Section VIII.4" to "Section VIII"
289	n.4	The excerpt from The Historical Development of the Louisville & Nashville Railroad System (1926) was inadvertently omitted from Volume 3 of Applicants' Rebuttal and is provided herewith
292	8	Change "chemical route" to "chemicals routed"
294	15	Change "instructions, designed" to "instructions designed"
320	2	Change "EJE-10 at; Danzl VS at 9" to "EJE-10; Danzl VS at 9"
335	9	Change "WC" to "WCL"
336	1	Change "Chicago. Booth RVS, Attachments -- (letter of July 25, 1987)" to "Chicago (<u>see</u> Booth RVS, attachments - letter of July 25, 1987)"
342	11	The interrogatory response cited (RJCW-7 at 9) was inadvertently omitted from Volume 3 of Applicants' Rebuttal and is provided herewith
349	3	Change " <u>Id.</u> at 27-28" to "HRRC-10 at 27-28"

Volume 1 (CSX/NS-176)

<u>Page</u>	<u>Line</u>	<u>Change</u>
352	n.48	Change "August 21" to "August 22"
358	4	Insert " <u>Id.</u> " before footnote signal
361	10	Change "Section IV.D.2." to "Section IV.D.5."
363	9	Change "shortline onto" to "shortline operations onto"
364	3	Change "IORY-4, Ex. 15" to "IORY-4, Ex. 1"
365	15	Change "Section IV.A.4." to "Section IV.A.3."
366	6	Change "Section IV.A.6." to "Section IV.A.5."
370	4 and n.64	Document ISRR000105 (highly confidential) was inadvertently omitted from Volume 3 of Applicants' Rebuttal and is provided herewith
381	n.77, line 3	Change "a year little" to "a little"
382	5	Change "Section VIII.1" to "Section VIII.B.4"
382	22	Change "Hubbard" to "Corry"
383	13	Change "Section XIV.C.4" to "Section XIV.C.5"
383	17	Change "VIII.5.b" to "VIII.A.2.e"
412	6	Change "Section VII.B.3.c" to "Section VIII.A.2.c."
412	n.91, line 5	Change "CSX/NS-21" to "CSX/NS-33"
582	n.8	Change "Se" to "See"
585	6	Change "Association" to "Association's"
653	23	Change "1432" to "1431"

Volume 2A (CSX/NS-177)

Table of Contents

In the Public Version only, the Rebuttal Verified Statement of Jonathan M. Broder begins on page P-32, and the Rebuttal Verified Statement of Joseph G. B. Bryan begins on page P-22.

<u>Page</u>	<u>Line</u>	<u>Change</u>
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Jonathan M. Broder RVS

23		The original letter from USDOT is attached to the Rebuttal Verified Statement of Jonathan M. Broder, rather than the copy of the letter containing Mr. Broder's correction of the typographical error -- an error described by Mr. Broder in his rebuttal verified statement.
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Thomas L. Finkbiner RVS

76	n.4	Change "[]%" to "9%"
77	n.5	Change "predatory pricing, [Cite]," to "predatory pricing, Schmitz VS at 12, n.10,"
77	n.5	Change "losing market share since 1993. [Cite]" to "losing market share since 1993. AAPA Advisory, American Association of Port Authorities, May 1993 - May 1997"
81	2-3	Change "[insert cite to response to ATA interrogatories]" to "See ATA-7, American Trucking Associations, Inc. Response to CSX's and NS' First Set of Interrogatories and Requests for Production of Documents, response to Interrogatory No. 1, which is included in the Appendix."

Christopher P. Jenkins RVS

211	1	Insert "been" between "have" and "made"
226	11	Delete "line" between "mile" and "railroad"
227	1	Delete "is" between "IP" and "expresses"

Volume 2A (CSX/NS-177)

<u>Page</u>	<u>Line</u>	<u>Change</u>
<u>Joseph P. Kalt RVS</u>		
238	14	Insert "served " between "traffic" and "by"
254	bottom	Add footnote 46: " <u>See</u> Kalt Rebuttal V.S. on behalf of BN/Santa Fe in ICC Finance Docket 32548 (redacted)."

Volume 2A (CSX/NS-177)

William M. McCain RVS

326	28	After "Certain" add "Labor Organizations for Labor Contributions to Self-Sufficiency for Conrail" (hereinafter '1981 Agreement'), under which Conrail deferred certain nationally negotiated wage increases. Specifically,"
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D. Michael Mohan RVS

438	2-3	Delete "and with Guilford Transportation (GTI)"
438	5	Change "(GTI)" to "Guilford Transportation (GTI)"

John W. Orrison RVS

473	12	Add "Sections VII and VIII discuss coal operations in Indianapolis and the impact of the proposed Transaction on IPL's Stout and Perry K plants."
480	16	Insert "to" before "another"
495	4	Change "minimized" to "minimal"
509	2	Change "abandon" to "discontinue use of" and delete ", sell the real estate."
511	7-8	Change "and both CSX and IC trains transverse the segment in 30 minutes (.5 hours)" to "; moreover, the average transit time for all IC trains that traverse the segment is exactly the same as that for all CSX trains -- .5 hours."

Volume 2A (CSX/NS-177)

<u>Page</u>	<u>Line</u>	<u>Change</u>
515	16	Change "their" to "its"
515	17	Delete "to" after "trains"
516	20	Insert "the" before "length"
529	n.8	Delete last two lines of footnote beginning with "to" and ending with "Wheeling"
551	19	Change "over 6 hours long" with "over six hours longer"
563	17	Delete "on the map"
579	17	Delete "area"
603	1	Change "48" to "148"
617	6	Change "Powhatan [6 Mine" to "Powhatan #6 Mine"
622	5	Delete "90"

Volume 2B (CSX/NS-177)

<u>Page</u>	<u>Line</u>	<u>Change</u>
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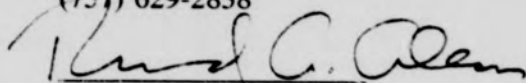
Robert L. Sansom RVS

455	4	Change "Table ____" to "the following Table"
-----	---	--

Ian P. Savage RVS

483		Figures 3 and 4 were inadvertently reproduced atop one another. These figures are reproduced correctly herewith.
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James C. Bishop, Jr.
William C. Wooldridge
J. Gary Lane
James L. Howe III
Robert J. Cooney
George A. Aspatore
Roger A. Petersen
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, Scott & Rasenberger LLP
888 Seventeenth Street, N.W.
Suite 600
Washington, D.C. 20006-3939
(202) 298-8660

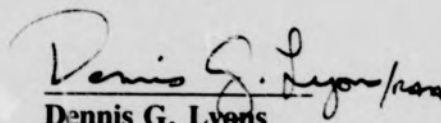
John M. Nannes
Scot B. Hutchins
Skadden, Arps, Slate, Meagher
& Flom LLP
1440 New York Ave., N.W.
Washington, D.C. 20005-2111
(202) 371-7400

Counsel for Norfolk Southern
Corporation and Norfolk Southern
Railway Company

Respectfully submitted,

Mark G. Aron
Peter J. Staudtz
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
Jacksonville, FL 32202
(904) 359-3100

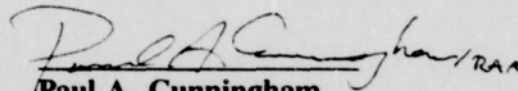


Dennis G. Lyons
Drew A. Harker
Michael Caglioti
Arnold & Porter
555 12th Street, N.W.
Washington, D.C. 20004
(202) 942-5000

Samuel M. Sipe, Jr.
David H. Coburn
Steptoe & Johnson LLP
1330 Connecticut Avenue
Washington, D.C. 20036
(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

RAA

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

Counsel for Conrail Inc. and
Consolidated Rail Corporation

Dated: January 12, 1998

LOUISVILLE & NASHVILLE RAILROAD CO.
OFFICE OF THE PRESIDENT
LOUISVILLE, KY.

HISTORICAL DEVELOPMENT
OF THE
LOUISVILLE AND NASHVILLE RAILROAD SYSTEM.

INTRODUCTORY NOTE.

This history has been written with the purpose of recording, chronologically, the main features of the development of the railroad system operated by, and under the name of, the Louisville and Nashville Railroad Company as it existed on June 30, 1917. It is based on data obtained from the annual reports and other records of the Company, supplemented to some extent by information taken from Poor's Manuals as to the history of independent railroads prior to their acquisition by the Louisville and Nashville Railroad Company. No attempt has been made to deal with matters of finance or details of operations, but there has been covered the building and development of the original lines forming the nucleus of the present system; the visions, the hopes and the aspirations of the projectors, as well as difficulties, financial storms, etc., successfully weathered; including, also, a picture of the competitive and connecting transportation systems in existence during the early days of the Company, and the traffic and travel hoped to be gained and developed by the new road. Step by step, the history shows the acquisition of independent railroads and the building of new lines to be added to the system, the reasons why they were acquired or built, and a brief prior history of the acquired roads. The history does not attempt to show the development of terminals, either by construction, or through trackage agreements with other carriers.

JOSEPH G. KERR,
Assistant to Vice-President, Traffic,
Louisville & Nashville Railroad Company.

January 1, 1926.

While the surveys were being made between Louisville and Nashville, the chief engineer made a reconnaissance of the line extending from Memphis, Tenn., to an intersection of the proposed road at or near Bowling Green, Ky., many influential individuals in Kentucky and Tennessee having felt a deep interest in the establishment of a railroad connection between Louisville and Memphis.

Solicitations were also made about the same time to construct a branch of the new road to Lebanon, Ky.

PERIOD FROM OCTOBER, 1852, TO OCTOBER, 1855.

On October 23, 1852, the Board of Directors of the Company ordered the location and purchase of the depot grounds on Broadway between 9th and 10th Streets, extending to Kentucky Street in Louisville, Ky., in order to prepare for the operation of the first part of the road which it was proposed to construct southward from Louisville to Muldraugh's Hill, a distance of 33 miles.

The depot grounds being located, a proposal was made by C. A. Olmstead and Company, and accepted by the Company, to erect thereon machine shops and to construct locomotives, rolling stock and machinery of all kinds for the Company.

On December 18, 1852, an order was issued locating the first division of the road, commencing at the depot on Broadway in Louisville, thence in the direction of Shepherdsville, there crossing Salt River, thence continuing to the summit of Muldraugh's Hill, thence to Elizabethtown, Ky. A further order of the board was issued, locating the road from Elizabethtown so as to cross Green River at or near Munfordville, Ky., and thence to Bowling Green, Ky., a distance of about 113 miles. In the meantime, parties were kept in the field between the towns of Bowling Green, Ky., and Nashville, Tenn., to ascertain the most favorable route between these points, which resulted in making Franklin, Ky., a point on the road and thus completing the location of the entire road from Louisville to Nashville.

On April 13, 1853, a contract was let by the Louisville and Nashville Railroad Company to build the railroad according to the specifications and instructions of the chief engineer, the entire work to be completed in two and a half years from the commencement, which, by order of the board, was made the first Monday in May, 1853.

On June 18, 1853, an order was issued directing the purchase of the first iron rails, consisting of 3,000 tons, to be delivered in the months of January, February and March, 1854, with a further amount of 17,000 tons, upon a contingency indicated by the uncertainty of the money markets of the country at that time.

During this period the Louisville and Nashville Railroad Company was being solicited by citizens and counties along the line to build the proposed branch from Bowling Green, Ky., to Memphis, Tenn., there to connect with the "perpetual navigation of the Mississippi." Assistance offered by various counties in the way of stock subscriptions left little doubt of the ability of the Louisville and Nashville Railroad Company to construct said branch.

A spirit no less enterprising also sprung up in counties to the southeast of the new line, desiring a branch of the new railroad from some point south of Salt River through the counties of Nelson and Marion, in the direction of Knoxville, Tenn. Marion County, Ky., had already voted financial assistance, which, if properly seconded by Nelson County, Ky., was felt sufficient to insure the construction of a branch to Lebanon, Ky., which the President of the Louisville and Nashville Railroad Company, on October 1, 1853, said "must ultimately be extended into East Tennessee, and thence by roads completed to the Southeastern Atlantic."

Ground was broken for the construction of the Louisville and Nashville Railroad by the contractors in May, 1853, and the work of grading, masonry, bridge and railway superstructure was executed until May 1, 1854, at which time, because of pecuniary embarrassments, its suspension was ordered and the force gradually withdrawn from the various points along the line, until a total suspension took place in June, 1854.

On October 8, 1853, the Louisville and Nashville Railroad acquired, by purchase, the Bowling Green Portage Railway, which had constructed, in 1836, a railroad from Bowling Green, Ky., to the Barren River, 1.30 miles in length.

During the months of July and August, 1854, efforts were made to recommence work upon the first 30 miles south of Louisville for the purpose of completing and bringing into use that portion of the road. The project also had in view the reaching, by means of a branch road, from the terminus of the 30 miles, the towns of New Haven and Lebanon, Ky., and securing at Lebanon the trade of a large and fertile portion of the state. Work was commenced upon the line by a new contractor in September, 1854, but owing to the embarrassed condition of the treasury of the Company it was not deemed prudent to force the work with very great dispatch; however, a moderate force, suited to the finances of the Company, was steadily employed during the winter of 1854-1855, which was gradually increased in the spring of 1855. By September, 1855, most of the roadbed was ready for the reception of

4

the rails and bridge superstructure in readiness for erection as soon as the rails were laid.

On August 27, 1855, the track had reached a point 8 miles from Broadway in Louisville, Ky.; on September 17th, 1855, 12 $\frac{1}{4}$ miles had been laid, with a prospect of completing the first 30 miles by November, 1855.

At this time the Company possessed 3 locomotives, 2 passenger cars, 1 baggage car, 75 platform cars, 75 gravel cars and 2 hand cars, most of which were being used in construction work on the new line.

A number of contracts were let during the period for construction of the Lebanon Branch, and it was estimated that the branch would be completed by June, 1856.

The construction of the road during this period was proceeding very slowly and under very trying conditions, financially and otherwise. There seemed to be an impression in the public mind that the construction of the Louisville and Nashville Railroad was an undertaking far beyond the combined means of the cities at its extremities and of the cities it traversed. Troubles were had with the original contractor, resulting in a cancellation of the contract. Public confidence had been largely lost prior to the cancellation of the contract and many cities had refused to comply with the terms of their subscriptions. Severe sickness among the workers also delayed the work.

An exhaustive report made by L. L. Robinson, chief engineer, in June, 1854, as to the preliminary surveys, final location of the original road and prospective revenue of the road, contains a study of the possible sources of revenue from local and through traffic, analyzing in detail the revenue as might be expected from the transportation of products of the forests, products of agriculture, manufactures, merchandise, live stock and coal, all of which, except coal, were expected to be produced in large quantities along the line of the new road. The coal expected to be transported and used along the line between Louisville and Green River was then being supplied from the Ohio River by wagon; from Green River to Tennessee Ridge the supply was obtained from the slack water navigation of Green and Barren rivers at Bowling Green by wagon; and from Nashville to Tennessee Ridge the supply was distributed by wagons and obtained from the Cumberland River.

As to through business, the following is taken from the report of June, 1854:

"By reference to the general map of the railways of the United States herewith, and to which I invite attention, it will be

seen, that your road will have the following railway and river connections from which to draw through trade and travel.

"At your northern terminus, your road will have connections with

1st, The Ohio River (navigable both ways for many hundred miles), which may be considered as the most important of all the highways tributary to your Road.

2nd, With the Louisville and Frankfort Railroad, now in operation to Frankfort, Lexington, and Paris, 113 miles thence in progress of construction by the Maysville and other Companies, to the eastern extremity of Kentucky.

3d, With the Louisville and Covington Railroad, now in progress of construction, about 100 miles, to opposite Cincinnati.

4th, With the Louisville and Sandusky Railroad, at present in progress of construction.

5th, With the Louisville and Cleveland Straight Line Railroad also in progress of construction.

6th, With the Jefferson and Columbus Railroad, completed and in operation.

7th, With the Fort Wayne and Southern Railroad, also in progress of construction.

8th, With New Albany and Salem Railroad, completed and in operation.

"By means of these various railroads, direct communication may be had from the northern terminus of your Road, with all of the eastern, northern, and northwestern cities and states.

"At its southern terminus, your Road will have connections

9th, With the Cumberland River, navigable both ways for considerable portions of the year.

10th, With the Nashville and Chattanooga Railroad, complete and in operation.

11th, With the Tennessee and Alabama Railroad, the first portion of which will be in operation this season.

"It may not be amiss at this place, to describe also the local connections, to wit:

12th, Thirty miles from Louisville, the Lebanon Branch Road diverges, which will eventually be extended to East Tennessee, under your own or some other charter.

13th, One hundred and thirteen miles from Louisville, the Southwestern Branch diverges, which is destined to be extended to the Mississippi River, as also to form connections with, 1st, the Henderson and Nashville Railroad; 2d, with the Cumberland River; 3d, with the Nashville and Northwestern Railroad; 4th, with the Tennessee River; 5th, with the Mobile and Ohio Railroad; 6th, with the Mississippi Central Railroad; 7th, with the Mississippi River at Memphis; 8th, with the Memphis and Little

The Cincinnati Branch of the Louisville, Cincinnati & Lexington Railroad (afterwards acquired by the Louisville and Nashville Railroad in 1881), was completed and opened for business on July 1, 1869, and as an increase in business was expected from this source, and also with the completion of the bridge over the Ohio River between Newport, Ky., and Cincinnati, Ohio, then under contract, efforts were being made to secure a right of way through Louisville so as to give a satisfactory connection with the new road.

The work on the railroad bridge over the Ohio River at Louisville was progressing favorably and completion thereof expected within a year, the effect thereof, and the general condition of the Company being stated by the President in his Report to the stockholders, as follows:

"This will afford us direct and uninterrupted connection with all points north, northeast, and northwest of Louisville. The completion of this noble structure will add very largely to our facilities for business, and greatly increase our income. The rolling stock and entire property of the Company is in a better condition than at any former period. The increase of business, however, will necessarily require a large addition to our rolling stock during the ensuing year. Our depot accommodations and offices are inadequate to your wants, and will call for a considerable expenditure during the coming year to provide for the increasing business of the Company. With new and improved connections in almost every direction, now completed and soon to be completed, by judicious, faithful, and able management on our part, the revenues of the Company will continue to increase; aid will be given to the development of the country, and building of villages and cities, which will make the Louisville & Nashville Railroad all that its Stockholders should desire. The road is just entering into business life. It was opened through to Nashville for traffic in November, 1859, and is therefore less than ten years old (dated from its first through train)."

In connection with the development of through business and fast freight lines, in which work the Louisville and Nashville Railroad Company was a pioneer, the following excerpt from the same Report is of interest and value:

"The increase in the revenue from south-bound freight, both from Louisville to Nashville and via the Memphis Branch to the Southwest, is due to the increased prosperity of the country, and also to the improved facilities which are now offered for the transshipment of freight by this Company and its connecting lines. Freight is now shipped from Louisville to all points in the South

on the Atlantic coast and the Gulf without breaking bulk. The operation of the 'Fast Freight Line' between Louisville and New Orleans has been much improved since the trains of the Mississippi Central Railroad make close connections with our trains at Humboldt."

YEAR ENDING JUNE 30, 1870.

At this time, the total length of road operated was 605.3 miles, the Memphis & Ohio Railroad being continued to be operated under lease, and the Memphis, Clarksville & Louisville Railroad being operated as the agent for the receiver.

As to the Lebanon Branch, the President's Annual Report for 1869-70 stated:

"The traffic of the Lebanon Branch is gradually increasing, and when extended so as to connect with the East Tennessee & Virginia Road we may reasonably expect some return for the large expenditure made.

"By order of your Directors, George MacLeod, Esq., Chief Engineer, has made a survey and estimates for a railroad from London to Cumberland Gap, which is hereby annexed. Two routes have been surveyed—one, 55.2 miles, . . . the other is 54 miles. . . ."

The Lebanon Branch was extended and opened for business shortly after June 30, 1870, to Big Rockcastle River, 11 miles beyond Mount Vernon, Ky., thus entering the western portion of the eastern Kentucky coal fields.

As to the reason for the further development of this line, the following is taken from the same Annual Report.

"General Mahone, President of the Southside Railroad and the Virginia & Tennessee Railroad, reports that he expects soon to effect the permanent consolidation of the several companies, which will make up a line from Norfolk, Va., to Cumberland Gap. There is only about one hundred miles from Bristol to Cumberland Gap to be constructed in Virginia.

"When we shall have received satisfactory evidence that the link from Bristol to the Gap can be constructed, it will remain for you to determine what shall be done to enable us to join rails with the Virginia Railroad at Cumberland Gap, giving us an unbroken connection with the railway system of this great State, and a direct line to Norfolk."

As to the development of through business the following is also quoted:

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

FINANCE REPORT 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**

**RESPONSES OF R.J. CORMAN RAILROAD/WESTERN
OHIO LINE TO
CSX AND NORFOLK SOUTHERN'S
FIRST SET OF INTERROGATORIES
AND REQUESTS FOR PRODUCTION OF DOCUMENTS**

**Kevin M. Sheys, Esq.
Christopher E. V. Quinn, Esq.
Oppenheimer Wolff & Donnelly
1020 Nineteenth Street, N.W.
Suite 400
Washington, DC 20036
(202) 293-6300**

**ATTORNEYS FOR R.J. CORMAN
RAILROAD/WESTERN OHIO LINE**

Dated: November 21, 1997

RESPONSE: RJCW objects to this Interrogatory on the grounds that the use of the word "detail" is undefined and makes the Interrogatory vague, ambiguous, overly broad and burdensome. Without waiver of these objections, and subject to the General Objections stated above, RJCW refers Applicants to the contents of the Responsive Application, RJC-6, which provides information about shipper traffic, including alternative means of transportation.

15. With respect to each shipper identified in response to the preceding interrogatory, identify: (a) The location of each of the shipper's facilities served by RJCW, including street address; and (b) The volume of traffic originating or terminating at each such facility handled by RJCW for each month from January 1995 to date.

RESPONSE:

(a) Elgin, Ohio.

(b) RJCW objects to part (b) of this Interrogatory on the grounds that part (b) of this Interrogatory is burdensome and requires a special study. Without waiver of these objections, and subject to the General Objections stated above, RJCW refers Applicants to the contents of the Responsive Application, RJC-6, and documents which have been or soon will be placed in RJCW's document depository.

16. Identify: (a) The date on which RJCW obtained the right to operate over: (i) the line between Lima and Glenmore, and (ii) the line from Lima to St. Mary's, Ohio and beyond; (b) The date on which RJCW began providing rail service over each of those lines; (c) All agreements or other arrangements for the interchange of traffic moving over each of those lines; and (d) All agreements pursuant to which RJCW operates over each of those lines.

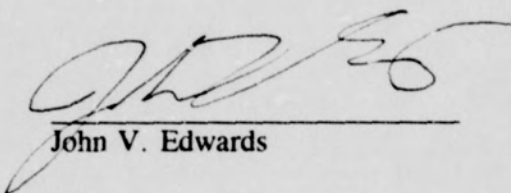
RESPONSE: RJCW objects to this Interrogatory on the grounds that the Interrogatory is burdensome and seeks information that is not relevant. Without waiver of these objections, and subject to the General Objections stated above, RJCW states as follows:

(a)(i): May 10, 1996

CERTIFICATE OF SERVICE

I, John V. Edwards, certify that on January 12, 1998 I have caused to be served by first class mail, postage prepaid, or by more expeditious means a true and correct copy of the foregoing CSX/NS-189, Errata to Applicants' Rebuttal, on all parties that have appeared in STB Finance Docket No. 33388 and by hand delivery on the following:

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



John V. Edwards

Dated: January 12, 1998

STB

FD-33388

1-8-98

D

ID-185124

LAW OFFICES
REA, CROSS & AUCHINCLOSS

SUITE 420
1920 N STREET, N.W.
WASHINGTON, D. C. 20036
(202) 785-3700
FACSIMILE: (202) 659-1834

THOMAS M. AUCHINCLOSS, JR.
LEON J. FRANEY
JOHN D. HEFFNER
KEITH G. O'BRIEN
BRYCE REA, JR.
BRIAN L. TROIANO
ROBERT A. WIMBISH



January 5, 1998

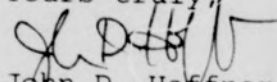
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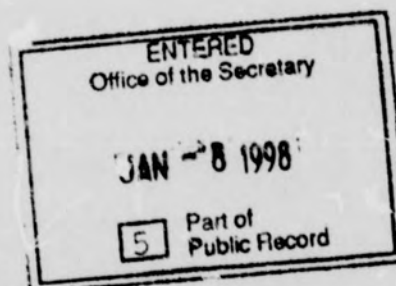
Mr. Vernon Williams
Secretary
Surface Transportation Board
1925 K Street, N.W.
Washington, DC 20423

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

Dear Mr. Williams:

Enclosed is an original ink verification of the signature of Daniel D. Luizzi which replaces the faxed copy that was attached to the October 21, 1997 comments of Fort Orange Paper Company submitted in this proceeding.

Yours truly,

John D. Heffner



VERIFICATION

STATE OF _____)
) ss:
COUNTY OF _____)

Daniel D. Luizzi, being duly sworn, deposes and
says that he has read the foregoing statement, knows the facts
asserted there are true and that the same are true as stated.

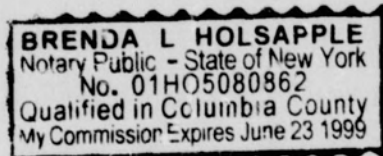
Daniel D. Luizzi

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

Notary Public of State of New York

Brenda L. Holsapple

My Commission expires: 6/23/99



STB

FD

33388

12-31-97

D

ID-185038

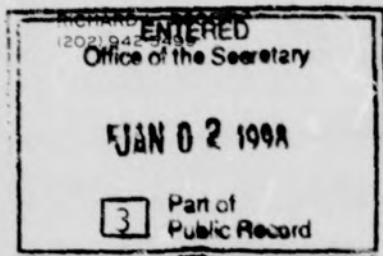
185038

ARNOLD & PORTER

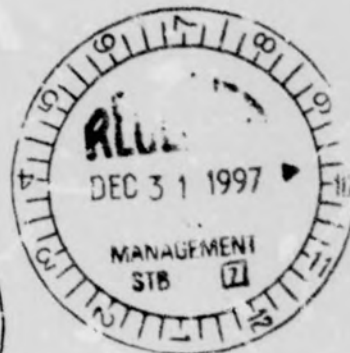
555 TWELFTH STREET, N.W.
WASHINGTON, D.C. 20004-1202

(202) 942-5000
FACSIMILE (202) 942-5999

NEW YORK
DENVER
LOS ANGELES
LONDON



December 30, 1997



VIA MESSENGER

Vernon A. Williams
Secretary
Surface Transportation Board
1925 K Street, N.W.
Room 711
Washington, DC 20423-0001

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

Dear Secretary Williams:

Enclosed please an original and 25 copies of the public (redacted) version of CSX/NS-181, Applicants' Rebuttal to Centerior Energy Corporation's Supplemental Comments for filing in the above-captioned matter. A diskette containing a WordPerfect 5.1 version of this document is enclosed as well.

The Highly Confidential version is being submitted under separate cover.

Sincerely,

Richard L. Rosen

Enclosure

cc: All Parties on Restricted Service List

PUBLIC VERSION



**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' REBUTTAL
TO CENTERIOR ENERGY CORPORATION'S
SUPPLEMENTAL COMMENTS**

Pursuant to Decision No. 59, issued December 19, 1997, Applicants hereby submit their Rebuttal to Centerior Energy Corporation's Supplemental Comments filed on December 10, 1997 (CEC-14). Centerior's Supplemental Comments object to a settlement CSX and NS have reached with one of Centerior's coal suppliers, the Ohio Valley Coal Company ("OVCC"), and reiterate the request for trackage rights conditions made in Centerior's Comments in this proceeding (CEC-05 and CEC-06).

The settlement CSX and NS have reached with OVCC¹ resolves the primary concern raised by Centerior in its initial comments on the Application and eliminates the basis asserted for the trackage rights condition sought by Centerior. Centerior's argument in its Supplemental Comments that the settlement agreement with OVCC is itself anticompetitive is, at best, based on a misunderstanding of the OVCC Agreement.

FACTUAL BACKGROUND

Centerior owns three generating plants -- Ashtabula, Eastlake and Lake Shore -- located on Conrail lines that will be operated by CSX after the Transaction. The Lake Shore plant is currently shut down. CEC-05, Kovach VS at 7; [[

]]. OVCC has been in recent years a substantial supplier of coal to the Ashtabula and Eastlake plants. Its mines are served by Conrail lines that will be operated by NS after the Transaction. Accordingly, movements of OVCC coal to Ashtabula and Eastlake that are single-line moves on Conrail today will become joint-line NS-CSX moves after the Transaction.

In its Comments, Centerior's primary argument was that it would be adversely affected by "the loss of single-line service from southeastern Ohio coal regions." CEC-05, Argument

¹ As used herein and in the OVCC Agreement, "OVCC" refers to the Ohio Valley Coal Company and other entities under the control of Robert E. Murray engaged in the production and sale of coal in southeastern Ohio.

at 13.² Accordingly, it asked the Board to grant NS trackage rights over a Conrail line to be operated by CSX in order to enable NS to transport coal trains to and from Centerior's Ashtabula, Eastlake and Lake Shore plants. Id. at 16.

As Centerior was aware when it filed its Comments, CSX and NS had reached a Settlement Agreement with OVCC ("OVCC Agreement") which fully addresses not only OVCC's concerns but the issue raised by Centerior. That Agreement is attached to Centerior's Supplemental Comments. CEC-14, Counsel's Exhibit No. CE-1 at 8-14.³ In the recitals to that Agreement, CSX, NS and OVCC state that [[[

]]] Id. at

8. They state [[[

]]] Id.

Accordingly, for a period [[[]]], the parties agreed as follows:

[[[

² Centerior also contended it would be harmed competitively by the fact that other utilities were obtaining direct access to two rail carriers while Centerior is not, and that the so-called acquisition premium will result in "unjust" rate increases. CEC-05, Argument at 2. Applicants have fully responded to those contentions in our Rebuttal and will not repeat that discussion here. See CSX/NS-176 at 41-43, 106-12, 417-18, 443-44.

³ There is additional correspondence clarifying various aspects of the OVCC Agreement. See id. at 2-7.

]]]

Id. at 9, ¶ 1. The Agreement also states that [[[

]]] id. at 11, ¶ 9.

In order to provide a mechanism for assuring CSX's and NS's compliance with the above-quoted requirement, the Agreement provides that [[[

]]] Id.

at

10, ¶ 5. [[[

]]] Id. The Supplemental Verified

Statement of Raymond L. Sharp, attached hereto as Exhibit A, makes clear that this provision does not contemplate that CSX or NS will disclose to OVCC the actual rates paid by Centerior. Rather, the carriers will certify to OVCC that they are doing what the Agreement requires -- that is, [[[

]]] The Agreement also provides that [[[

]]] CEC-14, Counsel's

Exhibit No. CE-1 at 11, ¶ 5.

In addition to [[

]]] Id. at

10, ¶¶ 3-4. [[

]]] Id.,

¶

3.

**I. CSX AND NS WILL NOT DIVULGE CENTERIOR'S
TRANSPORTATION RATES TO OVCC**

Centerior's principal objection to the OVCC Settlement is based on its misapprehension that CSX and NS would divulge the rates in any transportation contract with Centerior to OVCC. As the foregoing discussion makes clear, Centerior is wrong. The Agreement merely requires CSX and NS [[

]]] As Mr. Sharp's Supplemental Verified Statement explains, [[

]]] Centerior's argument that this provision is anticompetitive is based on a misreading of the Agreement and should be disregarded.

Centerior also seems to insinuate that Applicants will provide OVCC with Centerior's rates from other coal origins. CEC-14, Att. A at 4. But [[

]]] The Agreement expressly refers to [[

]]] Id., Counsel's Exhibit No. CE-1 at 9, ¶ 1 (emphasis added); see also id. at 2-4.

II. THE OVCC SETTLEMENT DOES NOT INAPPROPRIATELY SET CENTERIOR'S RAIL RATES

It is not true, as Centerior contends, that Applicants and OVCC [[

]]] CEC-14, Att. A at 5.

The

Agreement acknowledges that [[

]]] The Agreement merely protects OVCC -- and

Centerior -- by [[

]]] Nothing

in the OVCC Agreement prevents Centerior from seeking to negotiate better terms than those provided in the settlement with OVCC.

III. THE OVCC SETTLEMENT IS NOT ILLUSORY

Centerior also objects to provisions in the agreement under which [[

]]] This argument overlooks the fact that Applicants settled with OVCC, not Centerior. Each of the Applicants customarily seeks to expand the markets for the shippers located on its lines. In the special case of OVCC, which faces the loss of single-line service to a major customer, it is entirely appropriate for Applicants to work with OVCC in an effort to find mutually beneficial commercial arrangements that help it to find attractive outlets for its coal.

Moreover, the Agreement contemplates that [[[

]]] Thus, only if Centerior decides to reduce its consumption of OVCC coal, or OVCC finds more profitable outlets for its coal notwithstanding [[[

]]] It is neither anticompetitive nor illusory.

It is also rather ironic for Centerior to raise questions about the lasting nature of the agreement CSX and NS have made with OVCC in light of its negotiations for a new coal supply contract with OVCC. The OVCC Agreement [[[

]]] ⁴ In other words,

the OVCC Agreement [[[

]]] It is thus clear that Centerior's real interest here is not to redress the loss of single-line service from OVCC -- inasmuch as the OVCC Agreement fully compensates for that loss in all respects -- but to gain two-carrier access to its Eastlake, Ashtabula and Lake Shore plants, something it does not currently have, and which the Board should not grant.

IV. CENTERIOR'S CONCERNS ABOUT THE LOSS OF SINGLE-LINE SERVICE FROM OTHER OHIO COAL ORIGINS ARE ILLUSORY

Recognizing that the OVCC Agreement moots its principal complaint about the Transaction, Centerior has shifted its ground and now argues that it will lose single-line service from other Ohio coal origins. But, as Applicants point out in their Rebuttal,

[[[]]] moves by truck and [[[]]] moves by rail. See CSX/NS-176 at 442; CSX/NS-177, Sanson, RVS, Vol. 2B at 427. Thus, it is Centerior's claim that is illusory, and there is no plausible basis for its request for trackage rights to preserve single-line rail service for shipments [[[]]] ⁵

⁴ [[[

]]]

⁵ In addition to truck transportation, coal from southeastern Ohio can move to Centerior's Ashtabula plant via a single-line rail move on NS to the Pinney Dock, from where it can be

Moreover, Applicant's have shown in their Application and Rebuttal that Centerior gains rather than loses coal supply and transportation options as a result of the Transaction. See CSX/NS-19, Sharp VS, Vol. 2A at 360-61; CSX/NS-177, Sansom RVS, Vol. 2B at 425-30. Its request for a trackage rights condition is totally unfounded.

transloaded for truck delivery to Centerior. Centerior has used this mode of delivery. See CSX/NS-177, Sansom RVS, Vol. 2B at 429.

CONCLUSION

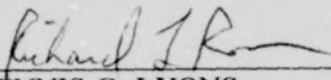
For all the foregoing reasons, and those set forth in the Application and Applicants' Rebuttal, Centerior's request for conditions should be denied. Its further request that provisions of the OVCC Agreement be nullified by the Board is completely unjustified, not least because the Applicants have not sought Board approval or imposition of the settlement. It should likewise be denied.

Respectfully submitted,

MARK G. ARON
PETER J. SHUDTZ
CSX Corporation
One James Center
901 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

*Counsel for CSX Corporation
and CSX Transportation Inc.*


DENNIS G. LYONS
RICHARD L. ROSEN
Arnold & Porter
555 Twelfth Street, N.W.
Washington, DC 20004-1202
(202) 942-5000

SAMUEL M. SIPE, JR.
TIMOTHY M. WALSH
Steptoe & Johnson LLP
1330 Connecticut Avenue, N.W.
Washington, DC 20036-1795
(202) 429-3000

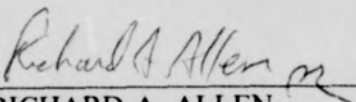
JAMES C. BISHOP, JR.
WILLIAM C. WOOLDRIDGE
J. GARY LANE
ROBERT J. COONEY
GEORGE A. ASPATORE
Norfolk Southern Corp.
Three Commercial Place
Norfolk, VA 23510-9241
(757) 629-2838

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

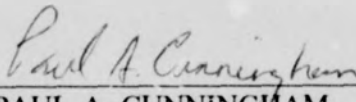
TIMOTHY T. O'TOOLE
CONSTANCE L. ABRAMS
ANNE E. TREADWAY
Consolidated Rail Corporation
Two Commerce Square
2001 Market Street
Philadelphia, PA 19101
(215) 209-4000

*Counsel for Conrail Inc. and
Consolidated Rail Corporation*

December 30, 1997


RICHARD A. ALLEN
JOHN V. EDWARDS
PATRICIA E. BRUCE
Zucker, Scoutt &
Rasenberger, LLP
888 Seventeenth Street, N.W.
Suite 600
Washington, DC 20006-3939
(202) 298-8660

JOHN M. NANNES
SCOT B. HUTCHINS
Skadden, Arps, Slate, Meagher
& Flom LP
440 New York Avenue, N.W.
Washington, DC 20005-2111
(202) 371-7400


PAUL A. CUNNINGHAM
GERALD P. NORTON
Harkins Cunningham
1300 Nineteenth Street, N.W.
Suite 600
Washington, DC 20036
(202) 973-7600

**SUPPLEMENTAL VERIFIED STATEMENT
OF RAYMOND L. SHARP**

I am Vice President, Coal Sales and Marketing for CSX Transportation, Inc. ("CSXT"). I was responsible for negotiating the settlement agreement among CSXT, Norfolk Southern Railway Company ("NSR") and Ohio Valley Coal Company ("OVCC") which is the subject of the Supplemental Comments of Centerior Energy Corporation. In this Verified Statement I would like to clarify a misconception that Centerior has concerning that Settlement Agreement.

The main purpose of the Settlement Agreement with OVCC was to respond to OVCC's concerns that its shipments of coal to Centerior's Ashtabula and Eastlake plants, which had been single-line on Conrail, would become joint line after the Transaction in which CSX and NS jointly are acquiring Conrail and allocating its routes and assets. The Settlement Agreement provides that [[[

]]] Subject to other provisions of the Agreement, [[[

]]]

In the provision of the Agreement that Centerior has challenged, CSXT and NSR agreed [[[

]]] The parties to the Agreement have made clear that [[[

]]] Regarding the certification requirement, the parties did not intend that CSXT or NSR would provide OVCC with the actual rates in any contract with Centerior. Rather, the Agreement makes clear that [[[

]]] This provision simply states that CSXT and NSR are required [[[

]]] The Agreement also makes clear that [[[

]]] But to be perfectly clear, the Agreement does not require or permit CSXT or NSR to divulge any rates in a Centerior transportation contract to OVCC.

VERIFICATION

I, Raymond L. Sharp, declare under penalty of perjury that the foregoing is true and correct. Further, I certify that I am qualified and authorized to file this statement. Executed on December __, 1997.

Raymond L. Sharp

1 BEFORE THE
2 SURFACE TRANSPORTATION BOARD
3

4 - - - - - x

5 CSX CORPORATION AND CSX :
6 TRANSPORTATION INC., : STB Finance Docket
7 NORFOLK SOUTHERN CORPORATION : No. 338
8 AND NORFOLK SOUTHERN RAILWAY :
9 COMPANY--CONTROL AND OPERATING:
10 LEASES/AGREEMENTS--CONRAIL :
11 INC. AND CONSOLIDATED RAIL :
12 CORPORATION :

13 - - - - - x

14

15

16 DEPOSITION OF MICHAEL A. KOVACH

17

18

19

Washington, D.C.

20

Friday, December 5, 1997

21

REPORTED BY:

22

SUSIE K. STROUD

ACE-FEDERAL REPORTERS, INC.

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410-684-2550

1 Deposition of MICHAEL A. KOVACH, called for
2 examination pursuant to notice of deposition, on
3 Friday, December 5, 1997, in Washington, D.C. at the
4 law offices of Slover and Loftus, 1224 Seventeenth
5 Street, N.W., at 9:36 a.m. before SUSIE K. STROUD, a
6 Notary Public within and for the District of
7 Columbia, when were present on behalf of the
8 respective parties:

9
10 RICHARD L. ROSEN, ESQ.
11 Arnold & Porter
12 555 Twelfth Street, N.W.
13 Washington, D. C. 20004-1202
14 (202) 942-5858
15 On behalf of CSX Corporation and
16 CSX Transportation, Inc.

17
18
19
20
21
22

-- continued --

1 APPEARANCES (CONTINUED):

2

3

SCOTT M. ZIMMERMAN, ESQ.

4

Zuckert, Scoutt & Rasenberger, LLP

5

888 Seventeenth Street, N.W.

6

Suite 600

7

Washington, D. C. 20006

8

(202) 298-8660

9

On behalf of Southern Railway

10

11

FRANK J. PERGOLIZZI, ESQ.

12

Slover & Loftus

13

1224 Seventeenth Street, N.W.

14

Washington, D. C. 20036

15

(202) 347-7170

16

On behalf of the Deponent

17

18

19

20

21

22

1 5 and Avon 9. And Avon 9 is borderline, you know.
2 I'm not sure even all the time that's running as a
3 base load unit.

4 Q Is the Lake Shore station currently
5 completely idle?

6 A As of today, yes.

7 Q Has it generated electricity in 1997?

8 A Yes.

9 Q And why is it idle?

10 A Because the electricity is no longer needed
11 and/or cost effective to sell at this time.

12 Q Now, am I correct that coal has been
13 delivered to the Lake Shore station by lake, with a
14 subsequent truck movement?

15 A Yes.

16 Q Would you turn, please, to page 7 in your
17 verified statement and the paragraph concerning Lake
18 Shore at the top where you refer to various options
19 that Centerior is considering that would return Lake
20 Shore to service. Can you describe those options for
21 me.

22 A Well, the way I would sum it, the actions

1 cost compliance -- coals with sulfur content greater
2 or less than those specified in this case can be used
3 with emission allowances as dictated by changing
4 market conditions.

5 Q Where are you reading from, sir?

6 A The last page, 12 -- 22. That's what I
7 keep referring to, was really the essence of our
8 plan, like even we said the intention was to switch,
9 that's only if these projected numbers hold off.
10 Basically we're going to remain responsive to market
11 conditions and whatever appears to be least cost on
12 an evaluated basis as we bid the spectrum of coals is
13 what we would use, and that's our plan.

14 Q Mr. Kovach, I'd like to turn back now to
15 your verified statement for a moment at page 5. And
16 in footnote 2 you say that "Centerior and Ohio Valley
17 have entered into an arrangement" --

18 A He took the redacted one --

19 Q -- "have entered an arrangement that would
20 enable the continuation of their relationship subject
21 to Centerior entering an adequate transportation
22 agreement with Conrail's successors." Can you

1 describe that arrangement, for me, that is between
2 Centerior and Ohio Valley.

3 A Sure, give me a minute.

4 (Witness reviewed the document.)

5 THE WITNESS: From what I can remember,
6 what I can tell you, yeah. We would continue the
7 coal arrangement, of course, at different prices,
8 for, I think, up to 30 months, something like that,
9 2-1/2 years, if we could get a, you know,
10 satisfactory rail rate, and we knew we were going to
11 get satisfactory rail treatment after the Conrail
12 acquisition.

13 MR. ROSEN: Could you read back that
14 answer, please.

15 (The reporter read the record as requested.)

16 THE WITNESS: I mean, if we knew -- if we
17 know we're going to get -- sorry. If we knew we had
18 a satisfactory rail agreement, then we would, you
19 know, get into a coal agreement.

20 MR. ROSEN: Off the record.

21 (Discussion off the record.)

22 BY MR. ROSEN:

1 Q When you say "at different prices," do you
2 mean lower prices?

3 A Yes.

4 Q And when you say "satisfactory rail
5 treatment," what do you mean by that?

6 A Hopefully better than what we're paying
7 now, or at the minimum equal to what we're paying
8 now.

9 Q Is it your testimony that if CSX and
10 Norfolk Southern offered you rates that are equal to
11 what you are paying now that that would be
12 satisfactory to Centerior?

13 MR. PERGOLIZZI: I'm going to object to the
14 extent -- I believe we heard this objection. You're
15 asking the witness negotiate -- answer what is
16 effectively a negotiation question. This provision
17 speaks for itself. If he has an opinion that they
18 accept, then the coal agreement continues. It's a
19 condition of the coal agreement, if it's not
20 satisfied, the agreement would be terminated.

21 BY MR. ROSEN:

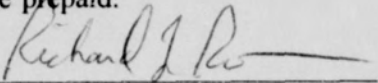
22 Q And I'm asking, Mr. Kovach, isn't it true

CERTIFICATE OF SERVICE

I, Richard L. Rosen, certify that on December 30, 1997, I have caused to be served a true and correct copy of the foregoing CSX/NS-181, Applicants' Rebuttal to Centerior Energy Corporation's Supplemental Comments, upon

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

counsel for Centerior Energy Corporation; and on all other parties of record in Finance Docket No. 33388, by first-class mail, postage prepaid.



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ID-185035

LAW OFFICES

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

883 SEVENTEENTH STREET, N.W.
WASHINGTON, D.C. 20006-3939
TELEPHONE: (202) 293-8660
FACSIMILES: (202) 342-0683
(202) 342-1316

RICHARD A. ALLEN



December 30, 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:

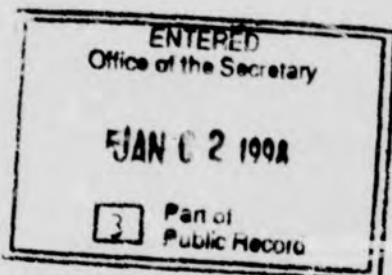
On behalf of CSX Corporation, CSX Transportation, Inc.,
Norfolk Southern Corporation and Norfolk Southern Railway
Company, I enclose for filing an original and twenty-five copies
of CSX/NS-182, Reply of NS and CSX in Opposition to the Motion of
the Chemical Manufacturers Association and the Society of the
Plastics Industries, Inc. for Leave to File Comments Out of Time.
Also enclosed is a 3 1/2" computer disk containing the pleading
in Wordperfect 5.1 format, which is capable of being read by
Wordperfect 7.0.

Should you have any questions regarding this, please call.

Sincerely,

Richard A. Allen

Counsel for Norfolk Southern
Corporation and Norfolk
Southern Railway Company

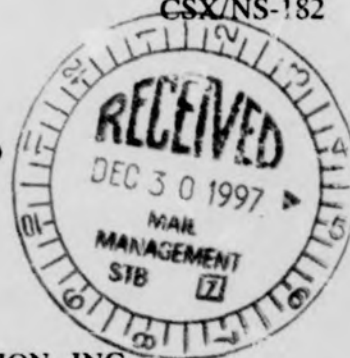


Enclosures

cc: The Honorable Jacob Leventhal
All Parties of Record

BEFORE THE
SURFACE TRANSPORTATION BOARD

FINANCE DOCKET NO. 33388



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

REPLY OF NS AND CSX IN OPPOSITION TO
THE MOTION OF
THE CHEMICAL MANUFACTURERS ASSOCIATION
AND THE SOCIETY OF THE PLASTICS INDUSTRIES, INC.
FOR LEAVE TO FILE COMMENTS OUT OF TIME

Applicants¹ NS and CSX oppose the motion of the Chemical Manufacturers Association ("CMA") and the Society of the Plastics Industries, Inc. ("SPI" and, collectively with CMA, "CMA/SPI") for leave to file comments out of time (CMA-17; SPI-11). CMA and SPI moved on December 23, 1997 for leave to submit section-by-section comments on a settlement that Applicants reached with the National Industrial Transportation League ("NITL") on December 11, 1997. No reason advanced by CMA/SPI justifies a deviation from the procedural schedule governing this proceeding. If the Board does, nevertheless,

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

accept the CMA/SPI comments for filing, the Board should permit Applicants an opportunity for rebuttal.

CMA/SPI argue that they should be permitted to file comments out of time because the NITL agreement was reached too late for CMA/SPI to comment on it by December 15, 1997 (the date on which parties were obligated to respond to requests for conditions which would adversely affect them). However, CMA/SPI had NITL's request for conditions available to them since October 21, 1997. Moreover, CMA/SPI had ample opportunity following announcement of the settlement to submit a request on or before December 15, 1997, for an extension of time to submit comments.²

CMA/SPI cite no precedent permitting the submission of comments on a settlement in a control proceeding in the face of an objection to the filing of such comments. The Board generally does not grant the right to comment on settlement agreements and has instead directed comments to be submitted in parties' briefs.³ Briefs are not due in the present proceeding until February 23, 1998, and thus CMA/SPI still has the opportunity to comment on the NITL settlement. To be sure, in this proceeding, the Board permitted Centrior

² Under the Board's regulations, a request for an extension of time to file a document must be filed before the document is due to be filed, and such an extension may be granted only for good cause. 49 C.F.R. § 1104.7(b). See, Decision No. 56, served November 28, 1997 ("Although we have granted previous extensions of time to file comments in this proceeding, the requests were made on or before the comment due date").

³ See, e.g., Union Pacific Corp., et al. -- Control and Merger -- Southern Pacific Rail Corp., et al., Finance Docket No. 32760, Decision No. 35, served May 9, 1996 (the Board denied the request of the Kansas City Southern Railway Company for either an order compelling the Applicants to submit an amended application or to permit discovery on and evidentiary submission addressing the effects of the Applicants' settlement agreement with the CMA).

Energy Corporation ("Centerior") to supplement its comments to address a settlement agreement that CSX and NS reached with one of Centerior's coal suppliers, but in doing so the Board specifically noted that Applicants did not oppose Centerior's request, and permitted Applicants to file rebuttal against Centerior's misapprehensions that it would be harmed by the settlement. Decision No. 59, served December 15, 1997.

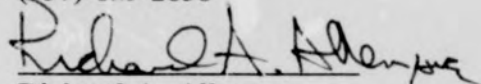
CMA/SPI claim that the Board should grant their motion because they "believe that the intent of the Board's procedural order in this case is that parties have a full and fair opportunity to comment on the conditions sought by other parties," citing Decision No. 12, served July 23, 1997. The Board's procedural order, issued in Decision No. 6, served on May 30, 1997, does reflect an intent for a full and fair hearing, but it also reflects an intent to set specific limits on the proceeding. To permit the filing of comments regarding settlements reached in a control proceeding where other methods of response are available could lead to an unending series of comment and rebuttal periods not appropriate for the strict procedural schedule governing such proceedings. Here, the February 23, 1998 submission of briefs is available. It is an imposition on the Board to seek to make such filings and to accompany them with the comments themselves, adding pleadings not contemplated by the procedural schedule to the Board's docket regardless of the formal disposition of the motion for leave to file.

If the Board were to accept the CMA/SPI comments, Applicants would be prejudiced if they were not given the right to submit rebuttal, in order to correct the inaccuracies contained in the CMA/SPI comments, and by Applicants' use of their allotment of briefing

pages to respond to what is in essence a "free" brief filed by CMA/SPI.

For all the reasons set forth herein, the Board should deny CMA/SPI's motion and make it plain that it looks with disfavor on such filings, particularly when briefs are yet to come, in the absence of some urgent need to make such a filing (such as in the case of a major development after briefs have been filed). If, nevertheless, the Board grants CMA/SPI's motion to file their comments out of time, the Board should also grant Applicants the right to submit rebuttal within a reasonable time frame

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, Scoutt & Rasenberger, LLP
888 Seventeenth Street, N.W.
Suite 600
Washington, D.C. 20006-3939
(202) 298-8660

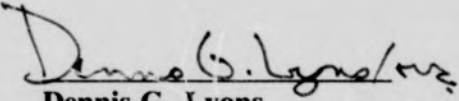
John M. Nannes
Scot B. Hutchins
Skadden, Arps, Slate, Meagher
& Flom LLP
1440 New York Ave., N.W.
Washington, D.C. 20005-2111
(202) 371-7400

Counsel for Norfolk Southern
Corporation and Norfolk Southern
Railway Company

Respectfully submitted,

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
Jacksonville, FL 32202
(904) 359-3100


Dennis G. Lyons
Jeffrey A. Burt
Drew A. Harker
Susan B. Cassidy
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

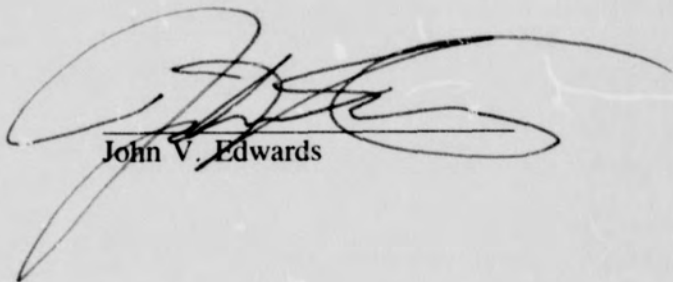
Counsel for CSX Corporation
and CSX Transportation, Inc.

Dated: December 30, 1997

CERTIFICATE OF SERVICE

I, John V. Edwards, certify that on December 30, 1997 I have caused to be served by first class mail, postage prepaid, or by more expeditious means a true and correct copy of the foregoing CSX/NS-182, Reply of NS and CSX in Opposition to the Petition of the Chemical Manufacturers Association and the Society of the Plastics Industries, Inc. for Leave to File Comments Out of Time, on all parties that have appeared in STB Finance Docket No. 33388 and by hand delivery on the following:

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



John V. Edwards

Dated: December 30, 1997

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CMA-18
SPI-12

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 CMA AND SPI
ON THE NITL AGREEMENT

The Chemical Manufacturers Association ("CMA") and The Society of the Plastics Industry, Inc. ("SPI") respectfully submit these comments on the provisions of the agreement between Applicants and the National Industrial Transportation League ("NITL") filed with the Board on December 15, 1997 (hereinafter the "NITL Agreement").¹

Because of the timing of the NITL Agreement, it was not possible for CMA and SPI to comment on it by December 15, 1997. CMA and SPI have therefore in their accompanying motion (CMA-17/SPI-11) requested leave from the Board to file these comments. These comments are directed solely to the NITL Agreement, not to any portion of Applicants' Rebuttal.

¹ The Agreement was filed as Appendix P in Vol. 1 of Applicants' Rebuttal, CSX/NS-176, pages P-768-P-774.

INTRODUCTION

Many of the conditions originally requested by NITL in its comments (NITL-7)² were similar to conditions also requested by CMA and SPI in their joint comments (CMA-10).³ For example, NITL requested certain pre-implementation conditions such as certification by NS and CSX that necessary labor agreements were in place as well as oversight conditions and conditions addressing the maintenance of reciprocal switching and the amelioration of harm to shippers losing single-line service.

The requested CMA SPI conditions, however, include several not addressed at all in NITL-7, such as a condition designed to ensure CSX's and NS' responsibility for shipments in the Shared Assets Areas ("SAAs"), a condition requiring that construction of connection be complete prior to the start of integrated operations, and a condition requiring, as a transitional matter, the filing of tariffs/ supplements establishing baseline rates for all commodities and baseline routings as now reflected in Conrail tariffs. Even where the conditions requested in NITL-7 addressed the same general subject matter as the conditions suggested by CMA and SPI, the CMA/SPI conditions differed in a number of material respects.

CMA and SPI did not participate in negotiating the NITL Agreement, are not parties to the Agreement, and wish to state for the record that many of the conditions requested by CMA

² The NITL comments were submitted jointly with the US Clay Producers Traffic Association, Inc. and The Fertilizer Institute.

³ The CMA/SPI conditions are set out and discussed at pages 27-42 of CMA-10, and in Attachment 1 to CMA-10..

and SPI are not satisfied or resolved by the NITL Agreement.⁴ Therefore, CMA and SPI submit these comments in order to make clear to the Board and interested parties the respects in which the NITL Agreement fails to address, or addresses inadequately, the concerns of CMA and SPI. For convenience, CMA and SPI reprint below the text of each section of Appendix A of the NITL Agreement, which contains the operative provisions of the Agreement. Following each section are (1) a comparison of the quoted provision with the conditions requested CMA-10 and (2) CMA's and SPI's comments on the section.

CMA/SPI SECTION-BY-SECTION COMMENTS ON NITL AGREEMENT

Text of NITL Agreement:

- I. Implementation and Oversight - Pre Closing Date**
 - A. Council. NS and CSX will create on or before February 1, 1998, a Conrail Transaction Council (Council). The Council shall consist of representatives from NS and CSX, each Organization that has agreed to the terms of this Agreement and representatives of other organizations of affected rail users. The Council is intended to function as a forum for constructive dialogue. NS and CSX shall discuss the implementation process with the Council. The Council may present to NS and CSX mechanisms to identify and address any perceived obstacles to the effective and efficient implementation of the proposed transaction, and may convey to NS and CSX any particular concerns or recommendations with respect to implementation planning or the implementation process. NS and CSX shall endeavor to address such presentations, concerns or recommendations, and shall report to the Council on the actions taken with respect thereto or the reasons for taking different actions. The Council is not intended to supplant STB oversight of the transaction as set forth in Section II of this Appendix A.**

⁴ CMA and SPI note, however, that they are engaged in independent discussions with Applicant, and nothing said herein should be taken to be in derogation of CMA's and SPI's continuing desire to resolve their concerns through those discussions if possible.

Comparison with Conditions Requested in CMA-10:

A railroad-shipper advisory council was not suggested in the conditions requested by CMA/SPI in CMA-10.

CMA/SPI Comments:

Although the idea of an advisory council has superficial appeal, closer examination reveals the potential for mischief. In the first place, NS and CSX have already, in connection with their transition planning, established voluntary shipper advisory councils. Those councils, together with the host of informal contacts that occur daily between NS and CSX and shippers, already provide ample opportunity for informal shipper input to Applicants.

CMA and SPI fail to see what purpose would be served by elevating a shipper advisory council to an ambiguous quasi-official status. As is evident on the face of the above-quoted section of the NITL Agreement, NS and CSX would have no obligation to abide by the recommendations of the proposed Council. Yet the creation of the Council would have to be approved by the Board,⁵ and NS and CSX could seek to cite ideas expressed by the Council to attempt to justify or deflect responsibility for their actions. It is also possible that NS or CSX could attempt to delay the resolution of troublesome issues, or prevent Board scrutiny, by "referring" issues to the Council.

There is also already ample scope in the procedural schedule established by the Board, for formal comments by interested parties, and for the Board, in both its decision on the transaction and in any oversight proceeding, to order such actions on the part of Applicants as

⁵ Section 3F of the NITL Agreement requires the parties to the Agreement to seek Board approval of the creation of the Council.

may be appropriate in the public interest. Although the NITL Agreement states that the Council "is not intended to supplant Board oversight of the transaction," there is a danger that NS and CSX would portray the advice of the Council as being entitled to special weight. This would be unwarranted, because most shippers and other interested parties would not have the opportunity, time and resources to participate regularly in the Council, and hence, however earnest and well-meaning the members of the Council might be, their views may not be representative. Even for large organizations such as CMA and SPI, attempting to select members to sit on the Council, thereby effectively delegating to them the deliberative functions ordinarily handled by sizable CMA and SPI committees, would be vexatious. Moreover, the Council in its deliberations would necessarily be largely dependent on information supplied by the railroads. Again, however well-intentioned the members of the Council, it would be difficult for them, without the ability to independently investigate and analyze factual issues, to arrive at conclusions much different from those of their railroad hosts on the Council.

Not is their any assurance that the Council would be run on any sort of democratic basis, requiring quorums or majority voting, for example. The lack of any stated structure or procedures governing the Council's operations creates the possibility that the Council's views could be selectively presented and interpreted by the various participating members.

Text of NITL Agreement:

- B. **Shared Asset Area (SAA) Summary Description of Operations.** In order to facilitate a better understanding of the SAAs among the shipping public, NS and CSX shall provide to the Council no later than February 1, 1998 a summary description of how operations will be conducted in each SAA, i.e. Northern New Jersey, Philadelphia/Southern New Jersey and Detroit. The summary shall focus on the function and interrelationship of the various crews of

each railroad, the dispatching controls and the effect of the SAAs on individual shippers with respect to concerns such as car ordering, car supply and car location.

Comparison with Conditions Requested in CMA-10:

CMA/SPI condition A.1 would require NS and CSX to certify that necessary SAA management and operations protocols are in place, subject to a 15-day comment period and a further 15-day period for the Board to accept or reject the certification. See CMA-10 at 30.

CMA/SPI Comments:

CMA and SPI submit that "summary descriptions" of operations would be inadequate to demonstrate to the Board and to interested persons that NS, CSX and CSAO⁶ operations in the SAAs will be feasible. Rather, operating plans like that submitted for the North Jersey SAA in CSX/NS-119 should be filed.

In addition, it is critical not only that NS and CSX certify that necessary SAA operating protocols are in place, but that the Board pass on the adequacy of those certifications after interested parties are afforded an expedited comment period. It would be up to NS and CSX to present details to the Board sufficient to inspire confidence that NS and CSX were indeed prepared to go forward with operations in the SAAs.

Text of NITL Agreement:

- C. **Labor Implementing Agreements.** NS and CSX will obtain the necessary labor implementation agreements prior to the Closing Date and will advise the STB when that has been accomplished. NS and CSX will, consistent with safe and efficient rail operations, implement the transaction as soon after Control Date as possible. If NS and CSX

⁶ Conrail Shared Asset Operator.

request the STB to initiate the labor implementing agreement process prior to the Control Date, Organization will support the request.

Comparison with Conditions Requested in CMA-10:

This section of the NITL Agreement is similar to CMA/SPI condition A.3 with one important difference. The NITL Agreement lacks any provision requiring the Board to pass upon the adequacy of the certification, or enabling interested parties to comment on the certification.

CMA/SPI Comments:

The importance of a brief opportunity for public comment cannot be overstated. If, for example, one or more of the NS or CSX unions took issue with the certification that all labor implementing agreements were in place, this view should be aired prior to the Board's approving integrated operations, rather than emerging in the form of a labor dispute following implementation.

Text of NITL Agreement:

- D. Management Information Systems. Prior to the Closing Date, NS and CSX will advise the STB that management information systems designed to manage operations on the former Conrail system within the SAAs and interchanges between the NS/Conrail and CSX/Conrail systems, including necessary car tracking capabilities, are in place.**

Comparison with Conditions Requested in CMA-10:

This section of the NITL Agreement is similar to CMA/SPI condition A.4, with the difference again that the NITL Agreement lacks provisions requiring the Board to pass upon the adequacy of the certification, or enabling interested parties to comment on the certification.

CMA/SPI Comments:

Again, CMA and SPI view it as extremely important that there be a brief 15-day comment period in response to the certification presented by NS and CSX that they have the necessary management information systems in place, after which the Board should have 15 days to accept or reject the certification. NS and CSX would be able to demonstrate in whatever manner they think convincing that they are prepared to go forward to implement the transaction.

Text of NITL Agreement:

II. Implementation and Oversight - Post Closing Date

- A. Oversight. The Board should require specific oversight of the implementation and effect of the transaction for a three-year period. This condition is not intended to limit the authority of the Board to continue oversight beyond the three-year period, or limit the right of any party, including the Organization, to request continued oversight if conditions at the end of the three year period warrant such a request.**

Comparison with Conditions Requested in CMA-10:

CMA/SPI condition C.4 requests five years of oversight. CMA/SPI condition C.4 also provides expressly that there would be the opportunity during the oversight proceeding for public comments, carrier replies, and expedited resolution of issues by the Board. These elements are not expressed in the NITL Agreement.

CMA/SPI Comments:

CMA and SPI believe it is far preferable to establish a five-year oversight proceeding at the outset rather than establishing a three-year period with the virtual certainty of a mini-proceeding during the third year to determine whether the oversight proceeding should be

continued. The types of quarterly reports called for by CMA and SPI (see CMA-10 at 41-42, conditions C.4 and C.5) would not be burdensome for the railroads to prepare.⁷ In the event that there were few (or no) problems resulting from the transaction after three years, there will be little burden on the Board other than to publish and serve notices regarding comment periods, and little burden on the railroads to respond to comments. Nonetheless, providing with certainty a forum for shippers to raise problems associated with the transaction would be extremely valuable. If anything, the Conrail transaction is more complex than the UP/SP transaction, and there is no reason why the oversight period here should be shorter. (For example, the need to disentangle and divide the physical assets, personnel, computer systems, databases, contracts, communications systems, and other aspects of Conrail's operations was not faced by UP, which acquired all of SP. CMA-10 at 20.)

Text of NITL Agreement:

- B. Reports. As part of this continuing oversight, the Board should require quarterly reports from NS and CSX and should provide an opportunity for comment by shippers. NS, CSX and the Council shall jointly recommend to the Board objective, measurable standards to be used in such reports. The base for the standards, to the extent the information is readily available, shall be the standards on Conrail prior to the Control Date. In addition to the measurable standards, information in the quarterly reports may include:**
- a. status of implementation plans for operations in the SAAs;**
 - b. status of labor implementing agreements;**
 - c. status of integration of management information systems;**

⁷ As explained by CMA and SPI (CMA-10 at 40), CSX in deposition testimony in this proceeding has said that it has, or shortly will have, the ability to track and report on time performance of virtually every car in its system.

- d. **status of allocation of responsibility for performing Conrail transportation contracts; and**
- e. **any other matters about which the Board or Council reasonably requests information.**

Comparison with Conditions Requested in CMA-10:

CMA/SPI condition C.5 specifies in some detail areas that should be addressed during oversight, such as safety performance, transit times, attainment of protected traffic volumes, and realization of projected cost savings. See CMA-10 at 42. CMA/SPI condition C.3 also specifies that NS and CSX performance would be judged against the post-transaction transit times presented in their operating plan and train schedules. See CMA-10 at 40.

CMA/SPI Comments:

If the Board approves the transaction and implements an oversight proceeding, CMA and SPI urge the Board to require, as elements of the quarterly reports and of continuing Board oversight, the specific items listed in CMA/SPI Condition C.5. In addition the Board should measure NS and CSX performance not just against current Conrail performance, but against the operating plans and train schedules presented by NS and CSX.

Text of NITL Agreement:

- C. **Specification of Transportation Contract Movement Responsibilities.**
NS and CSX will cause Conrail transportation contracts to be allocated between their rail carrier subsidiaries and discharged in accordance with their terms subject to allocation and other terms of Section 2.2(c) of the Transaction Agreement between NS and CSX. If a shipper whose contract has been allocated pursuant to the "Percentage Division" of 50-50 provided for in such Section 2.2(c), is dissatisfied with the service it receives from the carrier performing the contract from specified origins to specified destinations, it may at any time after six months from the Closing Date (after written notice to the carrier as to claimed operating and other deficiencies below the level at which Conrail provided performance of the contract, and an

opportunity of thirty days to improve its performance and to cure those deficiencies going forward), submit the issues to expedited binding arbitration under an arbitration protocol for the selection of arbitrator(s) and the conduct of the arbitration to be developed by NS, CSX and Organization not later than July 1, 1998, with arbitration to be concluded within thirty days from the date the arbiter is selected. In that arbitration, the issue shall be whether there is just cause because of such deficiency in performance to have the responsibility for the performance of the contract (for the specified origin/destination pairs) transferred. In such arbitration the only remedy shall be, if such just cause appears, to order the transfer of such responsibility for performance to the other carrier. Such transfer shall be affected unless the transferee certifies that it is not operationally feasible for it to perform the service; provided, however, that unless otherwise agreed by NS, CSX and the shipper, such transfer shall not become effective for 30 days in order to allow NS and CSX to make the appropriate operating changes. Except for such transfer, such arbitration shall not address or affect in any way the rights, obligations or remedies of any party under the terms of such contract; and the award in such arbitration shall not be deemed to establish any facts with respect to the performance of such contract for any purpose other than the arbitration. No such transfer of responsibility shall affect the "50-50" Percentage Division of revenues and expenses with respect to the contract in question and the other contracts which are allocated pursuant to the "Percentage Division" in Section 2.2(c) of the Transaction Agreement. Notwithstanding the maintenance of the Percentage Division of 50-50, no reallocation of any other contract shall be made to equalize the responsibilities for performance of the contracts subject to the Percentage Division.

Comparison with Conditions Requested in CMA-10:

CMA/SPI condition B.4 would permit shippers under Conrail contracts for movements between two open points (including points that become part of an SAA) the opportunity to (a) select, on a trial basis, either NS or CSX to provide service under the contract, (b) select NS or CSX to perform the remainder of the Conrail contract, and/or (c) terminate or renegotiate the contracts. The NITL Agreement, by contrast, would provide only a limited right to seek

arbitration should the shipper be dissatisfied with the service provided by either NS or CSX, with the shipper bearing the burden of proof that the service is inadequate.

CMA/SPI Comments:

Shippers to, from and within the SAAs should have the ability to take advantage of the competition for SAA movements which has been presented as one of the principal public benefits of this transaction. A right to arbitration in which the shipper would bear the burden of proving that new service provided by CSX or NS is inadequate, and in which the shipper would presumably bear half the cost of the arbitration, is a cumbersome and inadequate remedy for deficiencies in new service thrust upon shippers by NS' and CSX's private allocations of contracts. For further comment, CMA and SPI refer the Board to CMA-10 at 35-36.

Moreover, even this inadequate remedy would be completely unavailable for more than seven months after implementation of the transaction. First shippers would have to wait until the end of a six-month period during which no claim could be brought, and then they would have to provide 30 days' notice of a desire to switch railroads. It is unlikely that more than a few Conrail contracts would still be in existence by the time the seven months, plus the time for the arbitration, had elapsed, and in the interim shippers would have had no relief.

Text of NITL Agreement:

III. Other Conditions and Provisions

- A. Transload and New Facilities within the SAA. During the term of the Shared Assets Operating Agreements, any new or existing facility within the three Shared Assets Areas (other than an "Operator Facility") shall be open to both NS and CSX, to the extent and as provided in those Agreements, including, without limitation, Section 6 thereof. By way of example of the foregoing, the Agreements generally provide that: 1) both NS and CSX will have access to**

existing or new shipper owned facilities, 2) both NS and CSX will have the opportunity to invest in joint facilities in the Shared Assets Areas in order to gain access to such facilities, and 3) either NS or CSX may solely develop facilities that it will own or control (such as the transloading facilities or automotive ramps) that will be accessed exclusively by the railroad that develops such facility.

Comparison with Conditions Requested in CMA-10:

CMA/SPI condition B.2 would require all existing bulk chemicals/plastics transloading terminals within SAAs to be open to both NS and CSX. (CMA and SPI believe that this would affect only one facility -- the Croxton bulk chemical facility in northern New Jersey, which is allocated solely to NS under the proposed transaction.) CMA/SPI condition B.3 would require all new facilities within SAAs to be open to both NS and CSX, rather than permitting facilities to be solely served by NS or CSX if one of them invests in the facility.

CMA/SPI Comments:

CMA and SPI are concerned that, if NS and CSX are permitted to solely serve facilities in which they make an investment, the result will be a gradual fragmentation of the SAAs into solely served fiefdoms. Moreover, an emphasis on investments by the individual railroads could tend to diminish the desire of NS and CSX, the joint owners of the Conrail Shared Asset Operator, to invest in joint facilities in the SAAs. CMA and SPI believe that the benefits of two-railroad competition should be available to everyone within the SAAs, without reference to an array of partially-hidden private arrangements.

Text of NITL Agreement:

- B. Reciprocal Switching. NS or CSX, as the case may be, will cause any point at which Conrail now provides reciprocal switching to be kept open to reciprocal switching for ten years after the Closing Date.**

Comparison with Conditions Requested in CMA-10:

CMA/SPI condition C.2(a) would require reciprocal switching points on Conrail, NS and CSX that were open on June 23, 1997 to be kept open. The provision of the NITL Agreement is much narrower, requiring only that points at which Conrail now provides reciprocal switching be kept open.

CMA/SPI Comments:

The NITL provision as written would not even require NS and CSX, where they now provide reciprocal switching for traffic moving to or from Conrail, to keep that reciprocal switching open in cases in which the Conrail line from which they switch traffic is taken over by the other of them (NS or CSX). For example, in South Charleston, West Virginia (a major petrochemical production area), where CSX now provides reciprocal switching for Conrail, CSX would not be obligated to keep that reciprocal switching open when the Conrail line passes to NS post-transaction (assuming the transaction is approved).

Text of NITL Agreement:

- C. **Reciprocal Switching Rates.** For a period of five years after the Closing Date, reciprocal switch charged between NS and CSX at the point referred to in the preceding paragraph will not exceed \$250 per car, subject to annual RCAF-U adjustment, and at other points and/or with all other carriers will not exceed: (a) where no separate settlement is made between carriers, the existing rates subject to RCAF-U adjustment, or (b) where there are such settlements, the amount therein prescribed (not in excess of that provided for in (a)). The foregoing does not apply where NS and CSX have entered into agreements intended to address so-called 2-to-1 situations as set forth in the Application.

Comparison with Conditions Requested in CMA-10:

CMA/SPI condition C.2(b) requests a \$130 per car reciprocal switching fee, but limits it to reciprocal switching charges between NS and CSX in Conrail Territory.⁸

The quoted provision of the NITL Agreement, like provision III.B which preceded it, is limited to points at which Conrail today provides reciprocal switching. (In the words of the quoted provision, it is limited to "the points referred to in the preceding paragraph . . .")

CMA/SPI Comments:

The \$130 reciprocal switching rate as between UP and SP was adopted in the SP case on the basis that it reflected those carrier's costs.⁹ CMA and SPI find it surprising that CSX and NS would require a switching fee of \$250 per car in order to recover their cost of switching. CMA and SPI believe that NS and CSX should be required to provide a cost justification for whatever reciprocal switching rate might be ordered by the Board. Of equal concern to CMA and SPI, however, is the limitation of the NITL Agreement provision to situations in which Conrail today provides the switching. At a minimum, the provision should cover all switching between NS and CSX within Conrail territory, or where NS or CSX switches a movement received from the other from Conrail territory.

⁸ CMA/NITL's use of the term "Conrail Territory" is intended to encompass switching to, from and within the territory now served by Conrail.

⁹ Finance Docket No. 32760, Union Pacific Corp., et al. -- Control and Merger -- Southern Pacific Rail Corp. et al., UP/SP-231, Rebuttal Verified Statement of John H. Rebensdorf, p. 8.

Text of NITL Agreement:

- D. Gateways. NS and CSX anticipate that all major interchanges with other carriers will remain open as long as they are economically efficient.**

Comparison with Conditions Requested in CMA-10:

CMA/SPI condition C.1(a) would require all existing gateways and interchanges to be kept open on competitive rate and service terms. See CMA-10 at 36-37.

CMA/SPI Comments:

The quoted gateway provision of the NITL Agreement provides little if any protection. It states only what NS and CSX currently subjectively "anticipate," and fails to define "major interchanges" or "economically efficient."

The maintenance of current gateways, particularly the high volume gateways in the St. Louis and Illinois area for movements of chemicals and plastics from the Gulf Coast to the Northeast, is of utmost importance to CMA, SPI and their members. Recognizing that historically there have been numerous ways in which carriers have effectively closed gateways, the CMA/SPI condition requires simply that gateways be kept open on "competitive rate and service terms." While CMA and SPI are willing to have shippers bear the burden of proof in any oversight proceeding that gateways have been closed, it is important to have standards against which gateway closures can be meaningfully assessed. It is relatively straightforward to present evidence that rate and service terms have rendered gateways uncompetitive in the real world. It would be much harder to determine whether gateways are in the abstract "economically efficient," assuming one could decide initially which gateways are "major interchanges."

Text of NITL Agreement:

- E. **Interline Service.** This paragraph does not apply to a shipper who has an existing Conrail transportation contract if a more favorable treatment is provided under Section 2.2(c) of the Transaction Agreement. NS and CSX agree to take the following actions with respect to transportation services to Conrail shippers on routes (i.e. origin-destination pairs) over which at least fifty (50) cars were shipped in the calendar year prior to the Control Date in single line Conrail service (i.e. origin and destination served by Conrail) where that service will become joint line NS-CSX after the Closing Date. Upon request by the affected shipper, NS and CSX will, for a period of three years, (a) maintain the Conrail rate (subject to RCAF-U increases); and (b) work with that shipper to provide fair and reasonable joint line service. If a shipper objects to the routing employed by NS and CSX, or to the point selected by them for interchange of its traffic, the disagreement over routing or interchange, or both, shall be submitted to binding arbitration under the procedures adopted by the STB in Ex Parte 560. The arbiter in such an arbitration shall determine whether the route employed by NS and CSX or the point of interchange selected by them, or both, satisfies the requirements of 49 U.S.C. § 10705; and if it [does] not, the arbiter may establish as the sole award in such arbitration, a different route or point of interchange for such traffic.

Comparison with Conditions Requested in CMA-10:

CMA/SPI condition C.1(b) would not specify how NS and CSX should reconfigure their service patterns, but would prevent a double harm to shippers (i.e., worse service and a higher rate) by capping the rates for such shippers (and such shippers only)¹⁰ at the level existing at June 23, 1997, as increased by the RCAF-adjusted factor. Nor does CMA/SPI condition C.1(b) limit relief to origin-destination pairs between which at least 50 cars were shipped during the calendar year prior to the transaction.

¹⁰ This is the only condition among those requested by CMA/SPI, other than the request for a \$130 reciprocal switching fee, that contains a rate cap.

CMA/SPI Comments:

The limitation of relief to origin-destination pairs over which at least 50 cars moved in 1997 cripples the usefulness of the provision. A study performed jointly by the CMA/SPI consultant, GRA Associates, Inc., and the consultants for Applicants showed a total of 152 origin-destination pairs for chemicals/plastics traffic moving over single system Conrail service in 1995 (as shown on the Conrail 1995 100% traffic tapes) that would become interline movements following the transaction.¹¹ Of these 152 O-D pairs, only 23 had over 50 cars move in 1995. Hence only about 15% of the movements would be covered by the NITL Agreement, although by definition the longer-volume movements would be covered.

Moreover, the "relief" offered by the NITL Agreement (other than a cumbersome arbitration provision concerning the routing) is limited to three years of rate protection using an RCAF-U escalator. In sum, this portion of the NITL Agreement would provide no relief at all for most movements whose single line service will become interline, and to those few who move 50 cars annually between a given O-D pair, the provision would permit modest rate increases to accompany the worse service.

Text of NITL Agreement:

- F. STB Approval. Except as provided in this paragraph, this agreement is not subject to STB approval and will be binding on the parties in the absence of STB approval except with respect to any provision disapproved by the STB or inconsistent with the STB's action on the Application. Notwithstanding the foregoing provision, the parties will ask the STB to approve the creation of the Council, the exchange of information, the process for addressing shipper implementation and service concerns hereunder and the allocation of transportation**

¹¹ Cite "Williams Study."

contracts under 11(C). In the absence of such approval by the STB, NS and CSX shall not be obliged to take any action which in their sole judgment might create liability under the antitrust laws.

Comparison with Conditions Requested in CMA-10:

There are no comparable provisions in the suggested CMA/SPI conditions.

CMA/SPI Comments:

Inasmuch as the NITL Agreement purports to have been concluded for the benefit of all shippers, not just NITL members, CMA and SPI believe that the Board should pass on whether the NITL Agreement, or individual portions of it, are in the public interest. For the reasons stated herein, CMA and SPI believe that many provisions of the NITL Agreement are at best marginally in the public interest. To the extent that these provisions might be accepted by the Board in substitution for the conditions requested by CMA and SPI, which would more effectively protect shippers from adverse changes resulting from the transaction, adoption of the NITL provision could be contrary to the public interest.

CMA/SPI CONDITIONS NOT ADDRESSED AT ALL IN THE NITL AGREEMENT

The NITL Agreement does not address a number of important CMA/SPI conditions. Because this current set of comments is limited to addressing the NITL Agreement, CMA and SPI do not seek to reargue the merits of these suggested conditions. CMA and SPI simply direct the Board's attention to the following CMA/SPI conditions, and the accompanying commentary in CMA-10 justifying their adoption by the Board:

Table 1

CMA/SPI Conditions Not Addressed in NITL Agreement

	<u>CMA/SPI Condition</u>	<u>Citation in CMA-10</u>
A.2	Adoption of all existing tariffs and circulars that were in effect when the application was filed (June 23, 1997) and publication of supplements incorporating new routes.	CMA-10, pages 36-37
A.5	Construction of connections must be complete prior to implementation of integrated operations.	CMA-10, page 32
B.1	Recognizing that Conrail will operate the SAAs as an agent, NS and CSX each must be fully responsible and liable for its shipments to/from/within SAAs.	CMA-10, pages 33-34
C.2	c) Eliminate reciprocal switching charges on all former Conrail-NS and Conrail-CSX interline movements that become NS and CSX single-line movements.	CMA-10, pages 38-39
	d) Reinstate reciprocal switching at Buffalo and Niagara Falls.	CMA-10, pages 38-39
C.3	Service Standards: Hold NS and CSX to the post-transaction transit times presented in their operating plans and train schedules in this proceeding and monitor NS and CSX service not reflected in operating plans and train schedules to ensure that current NS and CSX service does not deteriorate.	CMA-10, page 40

CONCLUSION

As stated above, the Board should carefully review the NITL Agreement to determine whether the Agreement, or any portion of it, is in the public interest. CMA and SPI urge the Board, in those instances identified above in which the NITL Agreement falls short of the protections that would be afforded by the CMA/SPI conditions, to adopt the CMA/SPI conditions in lieu of those contained in the NITL Agreement.

Respectfully submitted,

Martin W. Bercovici /s/s

Martin W. Bercovici
Keller and Heckman, L.L.P.
1001 G Street, N.W.
Suite 500 West
Washington, DC 20001
(202) 434-4144

Counsel for The Society of the
Plastics Industry, Inc.

Thomas E. Schick /s/s

Thomas E. Schick, Counsel
Chemical Manufacturers Association
1300 Wilson Boulevard
Arlington, VA 22209
(703) 741-5172

Scott N. Stone

Scott N. Stone
Patton Boggs, L.L.P.
2550 M Street, N.W.
Washington, DC 20037
(202) 457-6335

Counsel for the Chemical
Manufacturers Association

Dated: December 23, 1997

CERTIFICATE OF SERVICE

I hereby certify that I have, in accordance with the Board's decisions in this proceeding, served copies of the foregoing Comments of CMA and SPI on the NITL Agreement this 23rd day of December, 1997, by first class mail upon all parties of record and by hand upon the following:

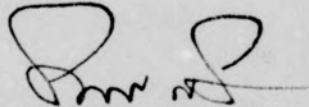
Administrative Law Judge Jacob Leventhal
Federal Energy Regulatory Commission
888 First Street, N.E.
Suite 11F
Washington, DC 20426

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

Richard A. Allen, Esq.
Zuckert, Scott & Rasenberger, L.L.P.
888 Seventeenth Street, N.W.
Washington, DC 20006-3939

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

David A. Coburn, Esq.
Steptoe & Johnson, LLP
1330 Connecticut Avenue, NW
Washington, DC 20036-1795



Scott N. Stone

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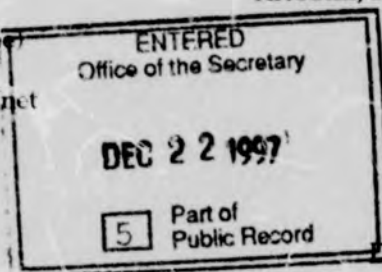
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Richard R. Wilson, P.C.

**Attorney at Law
A Professional Corporation
1126 Eighth Avenue, Suite 403
Altoona, PA 16602**

(814) 944-5302
888-454-3817 (Toll Free)
(814) 944-6978 FAX
rrwilson@mail.cslink.net

Of counsel to:
Vuono & Gray LLC
2310 Grant Building
Pittsburgh, PA 15219
(412) 471-1800
(412) 471-4477 FAX



December 17, 1997

The Honorable Vernon A. Williams
Secretary Surface Transportation Board
Case Control Unit
ATTN: Finance Docket No. 33388
1925 K Street, N.W., Room 715
Washington, D.C. 20423

D



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:

This letter is filed on behalf of Ohi-Rail Corporation, ("Ohi-Rail") a Class III shortline railroad company which serves coal fields in southeastern Ohio. On October 21, 1997, Ohi-Rail filed Comments with the Board supporting the grant of competitive access trackage rights to Norfolk Southern for the purpose of serving the Centerior Energy Corporation ("Centerior") generating station at Eastlake, Ohio. (See Ohi-Rail-2). The grant of such trackage rights would preserve Ohi-Rail's ability to participate in competitive coal movements via Norfolk Southern from the southeastern Ohio coal fields which it serves.

On December 15, 1997 we received Centerior's Petition to File Supplemental Comments and Supplemental Comments (Redacted, Public Version). Although much of the detail regarding this Petition was omitted from the public version of that pleading, it is clear that Norfolk Southern and CSX have entered into an agreement with Ohio Valley Coal Company which is not only detrimental to the interests of Centerior but also will have an anticompetitive affect on coal suppliers served by Ohi-Rail. This agreement further demonstrates the anticompetitive fallout produced by the allocation of Conrail markets between Norfolk Southern and CSX. Accordingly, Ohi-Rail strongly supports Centerior's Petition to File Supplemental Comments and requests that the Board

The Honorable Vernon Williams
Page Two - Ohi-Rail-3
December 17, 1997

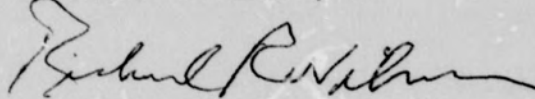
thoroughly investigate whether the Ohio Valley Coal Company agreement is anticompetitive and contrary to the public interest.

Copies of Ohi-Rail-3 have been served by first class mail, postage prepaid on all parties of record listed on the Board's service list and a computer diskette containing the text of this writing in Microsoft Word 7.0 format is also enclosed.

Should you have any further questions, please contact the undersigned.

Very truly yours,

RICHARD R. WILSON, P.C.

A handwritten signature in dark ink, appearing to read "Richard R. Wilson", written in a cursive style.

Richard R. Wilson

RRW/klh

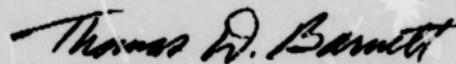
xc: The Honorable Jacob Leventhal
All parties of record

12-16-1997 2:50PM FROM

P.3

VERIFICATION

I, the undersigned, declare under penalty of perjury, that the foregoing is true and correct. Further, I certify that we are qualified and authorized to file these comments on behalf of the Ohi Rail Corporation. Executed on December 16, 1997.

Thomas D. Barnett

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ARNOLD & PORTER

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

(202) 942-5000
FACSIMILE (202) 942-5

DENNIS G. LYONS
(202) 942-5558

December 18, 1997



BY HAND DELIVERY

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

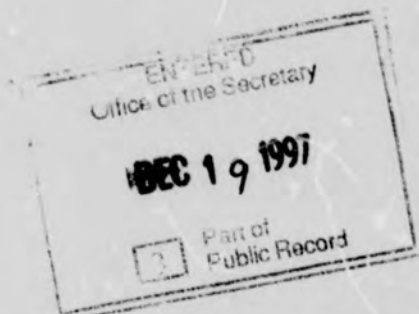
Re: Finance Docket No. 33388, CSX Corporation and CSX Transportation, Inc., Norfolk Southern Corporation and Norfolk Southern Railway Company -- Control and Operating Leases/Agreements - Conrail Inc. and Consolidated Rail Corporation

Dear Secretary Williams:

On behalf of Applicants in the above-referenced proceeding, enclosed are disks containing the text of the Highly Confidential and Public versions of Volumes 2A and 2B (rebuttal verified statements) (CSX/NS-177) of Applicants' Rebuttal.

Also enclosed are replacement disks containing the text of the Highly Confidential and Public versions of Volume 1 (narrative) (CSX/NS 176) of the Rebuttal. These disks contain a correction to an error we discovered in the disks for Volume 1 that were previously provided to you on December 16. We accordingly ask that you discard the disks that were provided to you on December 16, and replace them with the enclosed corrected disks.

Documents that contain text on the enclosed disks are formatted in WordPerfect 5.1. Spreadsheets and charts are formatted in Excel 5.0, MS Word 6.0/95 and Powerpoint 4.0.



ARNOLD & PORTER

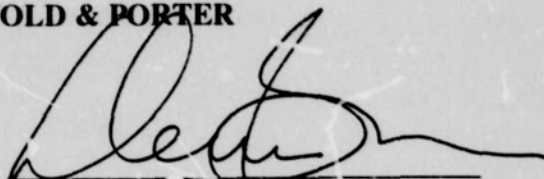
Hon. Vernon A. Williams
December 15, 1997
Page 2

Thank you for your assistance in this matter. Please contact myself
((202) 942-5858) or Susan Morita ((202) 942-5252) if you have any questions.

Respectfully yours,

ARNOLD & PORTER

By:

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

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

Enclosures

cc: Richard A. Allen, Esq.

STB

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12-18-97

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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



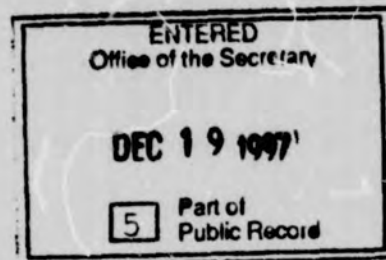
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Brussels
Chicago
Detroit
Geneva
Irvine
Los Angeles
Minneapolis
New York
Paris
Saint Paul
San Jose
Washington, D.C.

December 18, 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 10 copies of a Certificate of Service attesting to service of prior pleadings on behalf of New Jersey Department of Transportation/New Jersey Transit Corporation, Northern Virginia Transportation Commission/Potomac and Rappahannock Transportation Commission, R.J. Corman Railroad Company/Western Ohio Line and Livonia, Avon and Lakeville Railroad Corporation on all parties which have been added to the official service list as indicated in the Appendix to Decision 57.

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

Respectfully submitted,

Kevin M. Sheys

Enclosure

cc: Parties added to the Service List

CERTIFICATE OF SERVICE

Pursuant to Decision 57 in STB Finance Docket No. 33388, CSX Corporation and CSX Transportation, Inc., Norfolk Southern Corporation and Norfolk Southern Railway Company -- Control and Operating Leases/Agreements -- Conrail Inc. and Consolidated Rail Corporation -- Transfer of Railroad Line by Norfolk Southern Railway Company to CSX Transportation, Inc., I hereby certify that on this 18th day of December, 1997, a copy of all pleadings previously submitted in this proceeding by New Jersey Department of Transportation/New Jersey Transit Corporation, Northern Virginia Transportation Commission/Potomac and Rappahannock Transportation Commission, R.J. Corman Railroad Company and Livonia, Avon and Lakeville Railroad Corporation was served upon the following parties of record by first class mail, postage prepaid:

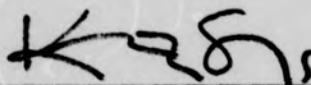
John M. Cutler
McCarthy, Sweeney & Harkaway, P.C.
Suite 1105
1750 Pennsylvania Avenue, N.W.
Washington, DC 20006

Clark Evans Downs
Jones, Day, Reavis & Pogue
1450 G Street, N.W.
Washington, DC 20005-2088

Richard F. Friedman
Earl L. Neal & Associates
3600 East 95th Street
Chicago, IL 60617-5193

John F. McHugh
McHugh & Sherman, Esqs.
20 Exchange Place
New York, NY 10005

The Honorable Jerrold Nadler
U.S. House of Representatives
Washington, DC 20515



Kevin M. Sheys

STB

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**BEFORE THE
SURFACE TRANSPORTATION BOARD**

FINANCE DOCKET NO. 33388

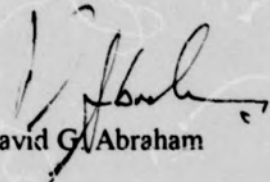
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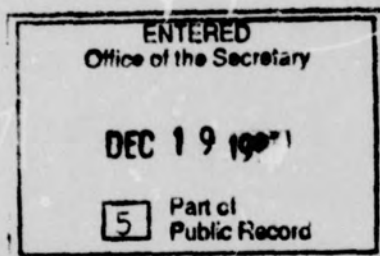
**CSX CORPORATION AND CSXT TRANSPORTATION, INC.
NORFOLK SOUTHERN CORPORATION AND
NORFOLK SOUTHERN RAILWAY COMPANY
--CONTROL AND OPERATING LEASES/AGREEMENTS--
CONRAIL INC., AND CONSOLIDATED RAIL CORPORATION**

CERTIFICATE OF SERVICE

I, David G. Abraham, Registered Representative for Indiana Port Commission, herewith certifies that he has this date sent copies of his Request for Conditions, IPC-1, filed with the Board on October 21, 1997 to all Parties of Record added to the Service List as per Decision No. 57 of December 3, 1997.

December 17, 1997


David G. Abraham



STB

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CITY OF DUNKIRK
DEPARTMENT OF LAW
CITY HALL, DUNKIRK, N. Y. 14048
(716) 366-9866
FAX (716) 366-2049



SHEILA MECK HYDE
CITY ATTORNEY

December 15, 1997

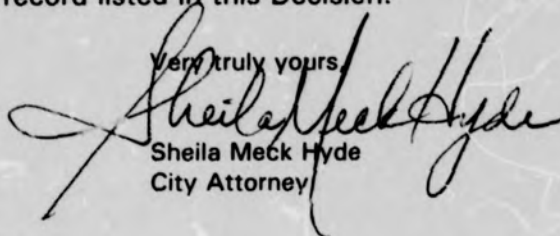
Hon. Vernon A. Williams, Secretary
Case Control Branch
ATTN: STB Finance Docket No. 33388
Surface Transportation Board
1925 K Street NW
Washington, D.C. 20423-0001

Re: **CSX CORPORATION AND CSX TRANSPORTATION, INC.**
NORFOLK SOUTHERN CORPORATION AND
NORFOLK SOUTHERN RAILWAY COMPANY
--CONTROL AND OPERATING LEASES/AGREEMENTS--
CONRAIL INC. AND CONSOLIDATED RAIL CORPORATION
Finance Docket No. 33388
Decision No. 58 dated December 5, 1997

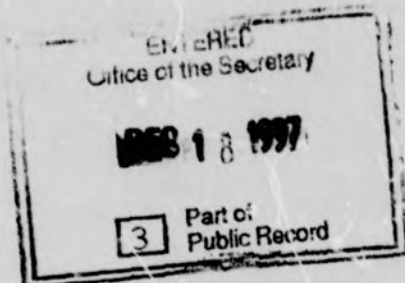
Dear Secretary Williams:

Pursuant to Decision No. 58 in the above-entitled matter, enclosed please find the original and ten (10) copies of the Certificate of Service of Notice of Intent to Participate by the City of Dunkirk, New York showing that this filing was served by mail on the additional parties of record listed in this Decision.

Very truly yours,


Sheila Meck Hyde
City Attorney

SMH:v
Enc.





**BEFORE THE
SURFACE TRANSPORTATION BOARD**

=====

FINANCE DOCKET NO. 33388

=====

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

=====

CERTIFICATE OF SERVICE

=====

I hereby certify that, pursuant to the provisions of Decision No. 58, dated December 5, 1997, and received by this office on December 9, 1997 in the above-captioned case, a copy of the attached **Notice of Intent to Participate** was served on all parties of record identified in previous Decisions, and presently identified in Decision 58, a copy of which list is shown on the back of this certification, via first class mail, postage prepaid, on this 15th day of December, 1997.

Respectfully submitted,

Virginia Lis

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

Dated: December 15, 1997.

Added to list on 12-5-97

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

Clark Evans Downs
Jones, Day, Reavis & Pogue
1450 G Street, N.W.
Washington, D.C. 20005-2088

Richard F. Friedman
Earl L. Neal & Associates
3600 East 95th Street
Chicago, Il. 60617-5193

John F. McHugh
McHugh & Sherman, Esqs.
20 Exchange Place
New York, NY 10005

The Honorable Jerrold Nadler
U. S. House of Representatives
Washington, D.C. 20515

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

**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--
CONFAIL INC. AND CONSOLIDATED RAIL CORPORATION**

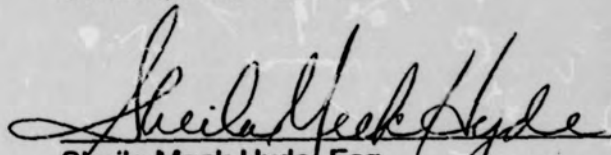
NOTICE OF INTENT TO PARTICIPATE

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

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

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

Dated: July 25, 1997.


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

CERTIFICATE OF SERVICE

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

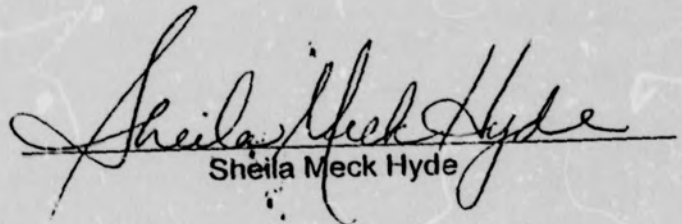
Administrative Law Judge Jacob Leventhal
Federal Energy Regulatory Commission
Suite 11F, 888 First Street, N.E.
Washington, DC 20426

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

Richard A. Allen, Esquire
Zuckert, Scoutt & Rasenberger, L.L.P.
888 Seventeenth Street, N.W.
Washington, DC 20006-2939

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

Dated: July 25, 1997.


Sheila Meck Hyde

STB

FD

33388

12-17-97

D

184912

184912

WEINER, BRODSKY, SIDMAN & KIDER

ATTORNEYS AT LAW

PROFESSIONAL CORPORATION

1350 NEW YORK AVENUE, N.W., SUITE 800

WASHINGTON, D.C. 20005-4797

(202) 628-2000

TELECOPIER (202) 628-2011



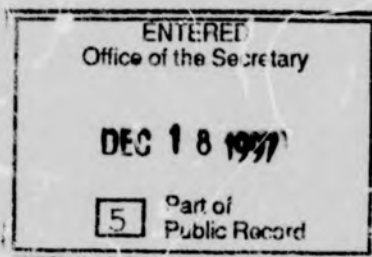
December 17, 1997

H. GERRY ANDERSON*
RICHARD J. ANDREANO, JR.
JAMES A. BRODSKY
JENNIFER A. COHN
JO A. DeROCHE
CYNTHIA L. GILMAN
KAREN R. GUSTAVSON*
DON J. ALPERN
CHRISTOPHER E. KACZMAREK
MITCHEL H. KIDER
SUSAN L. KORYTKOWSKI
SHERRI L. LEDNER
MARK H. SIDMAN
KUGENIA SILVER
HARVEY E. WILNER
ROSE MICHELE WEINRYB*
JOSEPH F. YENOUSKAS

*NOT ADMITTED IN D.C.

BY HAND

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



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

Dear Secretary Williams:

On December 15, 1997, an original and 25 copies of Response of New York & Atlantic Railway to Intervention Petition of Honorable Jerrold Nadler, Honorable Christopher Shays, Honorable Charles Rangel, Honorable Ben Gilman, Honorable Barbara Kennelly, Honorable Nancy Johnson, Honorable Charles Schumer, Honorable Rosa DeLauro, Honorable Michael Forbes, Honorable Sam Gejdenson, Honorable Nita Lowey, Honorable Major Owens, Honorable Thomas Manton, Honorable Maurice Hinchey, Honorable Ed Towns, Honorable Carolyn B. Maloney, Honorable Nydia M. Velazquez, Honorable Floyd Flake, Honorable Gary Ackerman, Honorable Eliot L. Engel, Honorable Louise M. Slaughter, Honorable John LaFalce, Honorable Michael McNulty, and Honorable James Maloney (the "Response") was filed with the Surface Transportation Board. The verification page of the Verified Statement of Fred L. Krebs, designated as Exhibit A to the Response, was a facsimile. Enclosed with this letter is a verification page containing an original signature of Mr. Krebs.

WEINFR, BRODSKY, SIDMAN & KIDER, P.C.

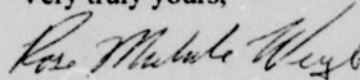
Hon. Vernon A. Williams

- 2 -

December 17, 1997

Please acknowledge receipt of this letter by date-stamping the enclosed acknowledgment copy and returning it to our messenger.

Very truly yours,

A handwritten signature in cursive script, appearing to read "Rose Michele Weinryb".

Rose-Michele Weinryb

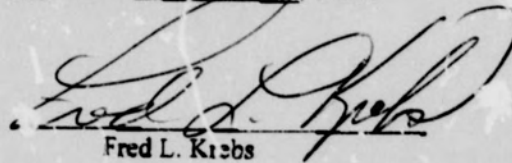
Enclosure



VERIFICATION

I, Fred L. Krebs, hereby affirm and state that I have read the foregoing statement, that I am personally familiar with its contents, that I have executed it with full authority to do so, and that the facts set forth therein are true and correct to the best of my knowledge, information, and belief.

Executed by the undersigned on this 15 day of December, 1997.


Fred L. Krebs

STB

FD

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12-16-97

D

184871



GENESEE TRANSPORTATION COUNCIL

184871

December 9, 1997

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



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

Dear Secretary Williams:

Pursuant to the instructions contained in Decision 57, served December 5, 1997, I am enclosing for filing in the above captioned docket the original and ten copies of a Certificate of Service, showing that copies of all pleadings to date by the GENESEE TRANSPORTATION COUNCIL have been mailed to the parties added to the Service List in this decision.

Respectfully submitted,

H. Douglas Mickliff
Transportation Specialist

Enclosures



Part of
Public Record

HDM/wj





CERTIFICATE OF SERVICE

I, H. Douglas Midkiff, hereby certify that on December 9, 1997, I have mailed by priority mail, postage prepaid, copies of all filings to date by the GENESEE TRANSPORTATION COUNCIL, in STB Finance Docket 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, to the parties added to the Service List in Decision 57, served December 5, 1997.

By H. Douglas Midkiff
H. Douglas Midkiff
GENESEE TRANSPORTATION COUNCIL



STB

FD

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12-15-97

D

184796

347 Madison Avenue
New York, NY 10017-3739
212 340-3000

Donald N. Nelson
President

184786



Metro-North Railroad

December 9, 1997

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



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

Dear Secretary Williams:

Pursuant to Decision No. 57 in the above-referenced proceeding, enclosed please find the original and ten copies of the Certificate of Service of Metro-North Commuter Railroad Company for filing in this matter.

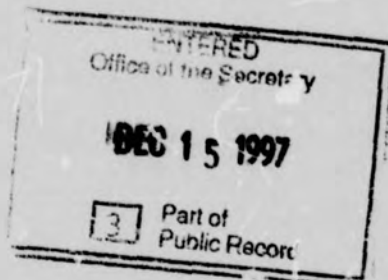
Please contact the undersigned if you have any questions regarding this transmittal.

Respectfully submitted,

Walter E. Zullig, Jr.
Special Counsel
(212) 340-2027

Enclosure

[62914/WEZ]/18



CERTIFICATE OF SERVICE

I hereby certify that on this 9th day of December, 1997, a copy of all filings in Finance Docket No. 33388 submitted by Metro-North Commuter Railroad Company prior to the service date of Board Decision No. 57 have been served (to the extent not previously served), by first class U.S. mail, postage prepaid, upon all Parties of Record added to the service list by Board Decision No. 57.



WALTER E. ZULLIG, JR.

STB

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12-15-97

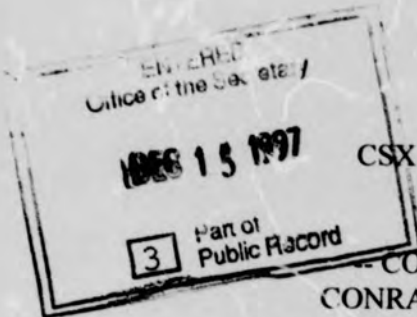
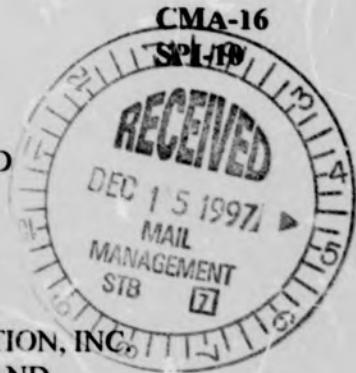
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BEFORE THE
SURFACE TRANSPORTATION BOARD

Finance Docket No. 33388



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

JOINT RESPONSE OF THE
CHEMICAL MANUFACTURERS ASSOCIATION
AND THE SOCIETY OF THE PLASTICS INDUSTRY, INC.

The Chemical Manufacturers Association ("CMA") and The Society of the Plastics Industry, Inc. ("SPI") respectfully submit these comments in response to the requests for conditions filed by parties on October 21, 1997 in this proceeding.

The concerns expressed by many commenters mirror those of CMA and SPI. Even parties who, unlike CMA and SPI, express qualified support for the transaction, often state that the Board should not approve the transaction without establishing an oversight proceeding.¹ Many parties also support conditioning start-up of operations over the merged N-Conrail and CSX-Conrail systems upon the completion of necessary labor agreements, training, detailed operating plans, and data systems integration. Likewise, many parties request conditions to

¹ See, e.g., OAG-4, the Comments of the Ohio Attorney General et al., at 44-47.

ameliorate adverse affects of the transaction on traffic that is able to move via single-system Conrail service today but will become NS-CSX interline traffic after the merger, resulting in probable reduced service levels and higher costs. Other parties express concern that gateways may be closed, eliminating efficient and desirable shipper options. Finally, many parties note the danger that, in light of the bidding war between CSX and NS, and the resulting premium paid for NS' and CSX's Conrail stock, there will be pressure on NS and CSX to raise prices on captive traffic if they prove unable to generate all of the new intermodal and other traffic they hope to capture.

Nothing in the conditions or comments filed by other parties would lead CMA and SPI to modify the conditions that they have suggested to the Board in CMA-10, Attachment 1. Further, CMA and SPI would like to commend the comments of several parties for specific consideration by the Board.

Port Authority of New York and New Jersey ("NYNJ")

NYNJ has focused its comments on planned operations by NS, CSX and the Conrail Shared Assets Operator in the North Jersey SAA. In the NYNJ comments filed November 24, 1997 regarding the North Jersey SAA operating plan, the former Conrail manager who served as NYNJ's consultant concluded after painstaking analysis, and based on his detailed familiarity with the Northern New Jersey rail network, that **"should this plan be implemented as currently proposed, I have no doubt that the result would be operational paralysis in a matter of weeks."** NYNJ-18 at 19.

Although CMA and SPI support competition, NYNJ's comments demonstrate that the operations in the North Jersey SAA will not be feasible and will result in severe freight traffic congestion.

Illinois Central Railroad Company ("IC")

IC has apparently concluded an interline marketing agreement with NS, but expresses concern that it may be harmed by gateway shifts forced by CSX by means of imposition of higher rates that have been charged by Conrail on Conrail's portion of joint movements over Illinois gateways. IC therefore requests a condition that CSX will cooperate with it in marketing joint rates over Illinois gateways, and that CSX's revenues on these joint-line movements would be "comparable" on a per mile basis with CSX's revenues for CSX's preferred long-haul route between the same origins and destinations.

CMA and SPI have requested a condition under which the Board in its oversight proceeding would have jurisdiction to address whether NS or CSX are rendering shipper-preferred gateways uncompetitive. (See CMA-10, Attachment 1, conditions C.1(a) and C.5(d).) The IC proposal would provide a concrete test by which to measure whether CSX is attempting to make Illinois gateways uncompetitive. These are the preferred gateways for movements of chemicals and plastics between the Gulf Coast and Northeastern points. The Board may wish to consider IC's condition as one means of ensuring that these important gateways stay open.

Elgin, Joliet and Eastern Railway Company ("EJE")

CMA and SPI did not in their comments address the issue of the concentration of power over Chicago area switching in the hand of the Applicants. Having carefully reviewed the responsive application of the EJE and its aligned parties, Transtar, Inc. and I & M Rail Link, Inc., CMA and SPI believe that these parties make a persuasive argument that the public will be served by transferring the 51% of IHB now owned by Conrail to these parties at a fair price. CMA and SPI would benefit from the assurance of neutral switching in Chicago as considerable chemicals and plastics traffic is interchanged in Chicago.

CMA and SPI would not be averse to giving other parties the opportunity to bid for the 51% share of IHB owned by Conrail, but at the moment EJE et al. are the only parties to come forward with a proposal.

National Industrial Transportation League ("NITL")

In addition to providing the above comments, CMA and SPI have recently learned that NITL has entered into an agreement with Applicants.² As the Board will recognize, certain conditions requested in NITL's October 21 comments (NITL-7) addressed issues that are also of concern to CMA and SPI. There were, however, significant differences between the conditions requested by NITL and those requested by CMA and SPI in CMA-10, Attachment 1. As of the morning of December 15, 1997, the NITL agreement had not yet been served on the parties of record to this proceeding. CMA and SPI had intended to comment in response to NITL-7, but instead are reserving comment pending an opportunity to review and evaluate the NITL

² See NITL press release dated December 11, 1997.

agreement. As appropriate, CMA may seek to comment on that agreement, but would not seek to extend the overall procedural schedule to do so.

Conclusion

The comments submitted by many other parties reflect the same concerns voiced by CMA and SPI in this proceeding. CMA and SPI have noted above several comments and requests for conditions that particularly merit the Board's consideration.

Respectfully submitted,

Martin W. Bercovici, Sr.

Martin W. Bercovici
Keller and Heckman, L.L.P.
1001 G Street, N.W.
Suite 500 West
Washington, DC 20001
(202) 434-4144

Counsel for The Society of the
Plastics Industry, Inc.

Thomas E. Schick, Sr.

Thomas E. Schick, Counsel
Chemical Manufacturers Association
1300 Wilson Boulevard
Arlington, VA 22209
(703) 741-5172

Scott N. Stone

Scott N. Stone
Patton Boggs, L.L.P.
2550 M Street, N.W.
Washington, DC 20037
(202) 457-6335

Counsel for the Chemical
Manufacturers Association

Dated: December 15, 1997

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CERTIFICATE OF SERVICE

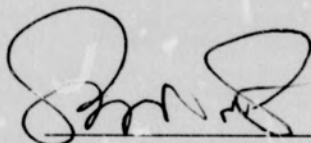
I hereby certify that I have, in accordance with the Board's decisions in this proceeding, served copies of the foregoing comments this 15th day of December, 1997, by first class mail upon all parties of record and by hand upon the following:

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

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

Richard A. Allen, Esq.
Zuckert, Scoutt & Rasenberger, L.L.P.
888 Seventeenth Street, N.W.
Washington, DC 20006-3939

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



Scott N. Stone

STB

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12-15-97

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NEFCO

NORTHEAST OHIO FOUR COUNTY REGIONAL PLANNING & DEVELOPMENT ORGANIZATION

969 Copley Road, Akron, Ohio 44320-2992

(330) 836-5731 • Fax (330) 836-7703

Christopher Smiles, Chairman

Robert Hadley, Jr., Executive Director

December 8, 1997

VIA HAND DELIVERY

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

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

Dear Secretary Williams:

Enclosed are one original and ten (10) copies of the Certificate of Service verifying our submission of a previous filing on October 21, 1997, to the names added to the service list, as required by Decision Number 57.

This submission was made by the Northeast Ohio Four County Regional Planning and Development Organization (NEFCO) as a party of record on behalf of METRO Regional Transit Authority (RTA). NEFCO is a regional council representing Portage, Stark, Summit, and Wayne counties and their local governments in northeast Ohio in the areas of economic and environmental planning.

Copies of MRTA-1 were served via first-class mail, postage prepaid on the Parties of Record identified in Decision No. 57. If you have any questions, please contact me at (330) 836-5731. Thank you.

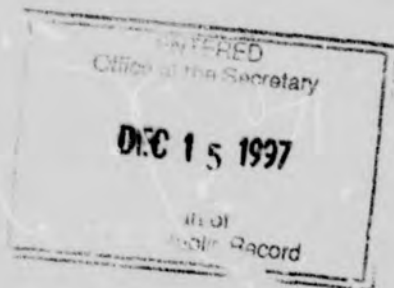
Sincerely,

Sylvia R. Chinn-Levy
Sylvia R. Chinn-Levy
Economic Development Planner

SRC:rlm

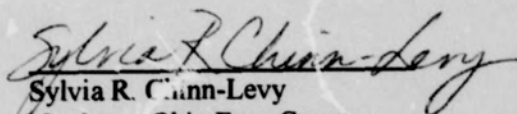
Enclosures

OPTIONAL FORM NO. 10 (REV. 11-83)



CERTIFICATE OF SERVICE

I hereby certify that on the 8th day of December, 1997, I served a copy of the Request for Conditional Operating Rights for The METRO Regional Transit Authority (MRTA-1) by first class mail, postage prepaid, upon additional Parties of Record, as required by Decision No. 57 of the Surface Transportation Board.


Sylvia R. Chinn-Levy
Northeast Ohio Four County
Regional Planning and
Development Organization
969 Cerley Road
Akron, OH 44320

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12-15-97

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SLOVER & LOFTUS

ATTORNEYS AT LAW

1224 SEVENTEENTH STREET, N. W.
WASHINGTON, D. C. 20036

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

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Office of the Secretary

DEC 15 1997

3 Part of
Public Record

202 347-7170

December 15, 1997

BY HAND DELIVERY

The Honorable Vernon A. Williams
Secretary
Surface Transportation Board
Case Control Branch
ATTN: STB Finance Docket 33388
1925 K Street, N.W.
Washington, D.C. 20420-0001



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

Dear Secretary Williams:

Enclosed for filing in the above-referenced proceeding,
please find the original and twenty-five (25) copies of the
**"Response of the National Railroad Passenger Corporation (AMTRAK)
to the Preliminary Comments of the United States Department of
Transportation" (NRPC-10)**. In accordance with the Board's prior
order, we have enclosed a Wordperfect 5.1 diskette containing
this filing.

We have included an extra copy of the filing. Kindly
indicate receipt by time-stamping the copy and returning it with
our messenger.

Sincerely,

Donald G. Avery

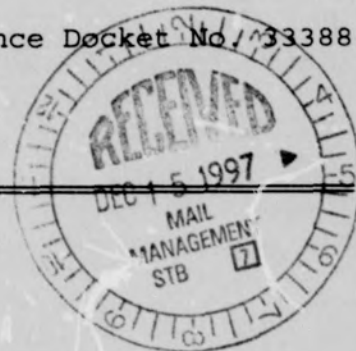
Donald G. Avery
An Attorney for
National Railroad Passenger
Corporation

DGA:cef
Enclosures

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

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

Finance Docket No. 33388



**RESPONSE OF THE
NATIONAL RAILROAD PASSENGER CORPORATION (AMTRAK)
TO THE PRELIMINARY COMMENTS OF THE
UNITED STATES DEPARTMENT OF TRANSPORTATION**

**NATIONAL RAILROAD PASSENGER
CORPORATION**

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

OF COUNSEL:

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

Date: December 15, 1997

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

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

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

**RESPONSE OF THE
NATIONAL RAILROAD PASSENGER CORPORATION (AMTRAK)
TO THE PRELIMINARY COMMENTS OF THE
UNITED STATES DEPARTMENT OF TRANSPORTATION**

The National Railroad Passenger Corporation ("Amtrak") hereby responds to the Preliminary Comments of the United States Department of Transportation ("DOT") with respect to the safety implications of Applicants' proposed operations over the Northeast Corridor ("NEC") if their proposed transaction ("the merger") is approved.

As the owner of the portion of the NEC between New York and Washington that will receive increased freight usage following the merger, Amtrak strongly endorses DOT's position that changes in freight operations that result from the merger must be carried out in a manner that does not in any way threaten or diminish the safety of rail operations. As Amtrak explained in its comments (NRPC-7), the NEC is a unique rail facility, on which high speed intercity passenger train operations, dense commuter train operations, and substantial freight operations all

share the same tracks and infrastructure. In order to ensure that these diverse operations are carried out safely, Amtrak has adopted operating and safety rules that, in many respects, are far more stringent than those that apply to other conventional rail lines.

The 1986 Freight Operating Agreement between Amtrak and Conrail requires Conrail to comply with all of Amtrak's operating and safety rules that govern train operations over the Northeast Corridor. Specifically, Section 2.2(d) of that agreement provides that:

All personnel, including employees of Conrail, rendering any services which involve responsibility for Amtrak's operating facilities or for the handling or movement of any trains over the NEC, shall be subject to the direction, supervision and control of Amtrak, and any such services performed by or for Conrail shall be governed by and subject to all then current operating and safety rules, orders and procedures of Amtrak with respect thereto.

(Emphasis added.)

Amtrak will require any freight railroad(s) that succeeds to Conrail's rights under the NEC Operating Agreement to comply with Amtrak's operating and safety rules and procedures, and with any changes in those rules and procedures (such as the adoption of the proposed "ACES" signalling system to which DOT's filing refers) that may be warranted in the future. At its initial meeting with the Applicants following the announcement of the merger, Amtrak ensured that they were aware of the operating and safety rules that would apply to their proposed post-merger

operations over the Northeast Corridor; neither has taken exception to any of those requirements.

* * * *

Pursuant to the Board's decision served on November 3, 1997, the Applicants have been required to file Safety Integration Plans ("SIPs") detailing the manner in which they will address the safety concerns raised in DOT's comments. Amtrak operating and safety personnel will carefully review Applicants' SIPs, and Amtrak expects to provide comments on the SIPs' treatment of NEC and other safety issues that affect Amtrak in accordance with the procedures set forth in the Board's decision.

Respectfully submitted,

NATIONAL RAILROAD PASSENGER
CORPORATION

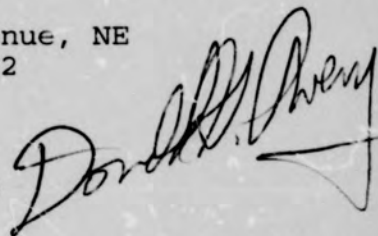
Richard G. Slattery
60 Massachusetts Avenue, NE
Washington, DC 20002
(202) 906-3987

OF COUNSEL:

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

Date: December 15, 1997

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



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CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing document were served this 15th day of December, 1997, by hand delivery upon:

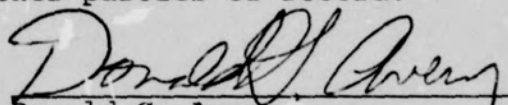
Drew A. Harker, Esq.
Arnold & Porter
555 Twelfth Street, N.W.
Washington, D.C. 20004-1202
(202) 942-5999 (fax)

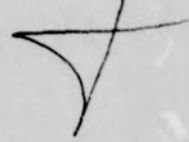
John V. Edwards, Esq.
Patricia E. Bruce, Esq.
Zuckert, Scoutt & Rasenberger,
L.L.P., Suite 600
888 Seventeenth Street, N.W.
Washington, D.C. 20006-3939
(202) 342-1608 (fax)

David H. Coburn, Esq.
Steptoe & Johnson L.L.P.
1330 Connecticut Ave., N.W.
Washington, D.C. 20036-1795
(202) 429-3902 (fax)

Gerald P. Norton, Esq.
Harkins Cunningham
1300 Nineteenth Street, N.W.
Suite 600
Washington, D.C. 20036
(202) 973-7610 (fax)

and by first class mail upon all other parties of record.


Donald G. Avery



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**BEFORE THE
SURFACE TRANSPORTATION BOARD**

FINANCE DOCKET NO. 33388

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

**RESPONSE OF CSX AND NORFOLK SOUTHERN
TO CENTERIOR ENERGY CORPORATION'S
PETITION TO FILE SUPPLEMENTAL COMMENTS**

CSX Corporation and CSX Transportation, Inc.
(collectively, "CSX"), and Norfolk Southern Corporation
and Norfolk Southern Railway Company (collectively,
"NS"), hereby respond to the "Petition to File
Supplemental Comments" filed by Centerior Energy
Corporation in this proceeding on December 10, 1997
(CEC-14). Centerior's Petition seeks leave to file
Supplemental Comments raising objections to a settlement
CSX and NS (collectively, "Applicants") have reached
with one of Centerior's coal suppliers, the Ohio Valley
Coal Company ("OVCC") and reiterating the request for
conditions made in Centerior's Comments in this
proceeding (CEC-05 and CEC-06).

The arguments in Centerior's proposed
Supplemental Comments are completely meritless and, at



best, are based on a misunderstanding of the OVCC settlement. Applicants take no position on whether the Board should grant Centerior's petition and accept additional comments in response to the primary application at this late date. Should the Board do so, however, Applicants request that they be granted 21 days in which to file any rebuttal comments or evidence.

BACKGROUND

Under the procedural schedule adopted by the Board in this proceeding, comments, protests and requests for conditions in connection with the primary application were due October 21, 1997. Centerior filed comments requesting conditions including, inter alia, a grant of trackage rights to NS over Conrail lines to be operated by CSX for the purpose of allowing single-line moves of coal to Centerior from certain Ohio coal mines, particularly including the mines of OVCC.¹ Applicants' rebuttal was due December 15, 1997.

OVCC has been a substantial supplier of coal to Centerior's Eastlake and Ashtabula generating stations. Its mines are located on Conrail lines that will be operated by NS upon implementation of the Transaction

¹ As used herein, "OVCC" refers to Ohio Valley Coal Company and other entities under the control of Robert F. Murray engaged in the production or sale of coal in Ohio.

that is the subject of this proceeding. The two Centerior plants in question are located on lines that will be operated by CSX after the Transaction. Thus, movements of OVCC coal to Centerior are among the small category of movements that had been single-line but will become interline as a result of the Transaction.

As Centerior notes, Applicants entered into a settlement agreement with OVCC on October 7, 1997. The settlement is intended to preserve OVCC's ability to ship coal efficiently to Centerior.

As Centerior admits, it was aware of the settlement prior to filing its Comments on October 21. It states that it did not learn of the precise terms until very recently; but it did not ask about those terms until November 18, nearly one month after its filing, when it served a document request upon Applicants. It filed the instant petition on the eve of Applicants' rebuttal filing responding to the filings of over 160 parties.

ARGUMENT

I. CENTERIOR'S ATTACK ON THE OVCC SETTLEMENT IS MISGUIDED.

Centerior claims that the OVCC settlement agreement is "blatantly anticompetitive" and "illusory," and that Applicants and OVCC have "set Centerior's rail rates amongst themselves." None of these charges is true.

First, Centerior is wrong in alleging that the settlement agreement contemplates that Applicants will divulge Centerior's rail rates to OVCC. The agreement

Id. The scenario spun out by Centerior, under which Applicants would violate 49 U.S.C. 11904 and assist OVCC in obtaining its customer's confidential information, is simply wrong.

Centerior also seems to insinuate that Applicants will provide OVCC with Centerior's rates from other coal origins.

Centerior also objects to provisions in the agreement under which

This argument overlooks the fact that Applicants settled with OVCC, not Centerior. Each of the Applicants customarily seeks to expand the markets for the shippers located on its lines. In the special case of OVCC, which faces the loss of single-line service to an important customer, it is entirely appropriate for Applicants to

It is neither anticompetitive nor illusory.

One of Centerior's principal complaints about the Transaction has been that it will disrupt existing single-line service between OVCC and Centerior. See CEC-05 at 7; see also id. at 15 n.8 (expressing concern that heightened divisions from post-Transaction joint rates "would undoubtedly make [OVCC'S] Powhatan No. 6

coal far too expensive on a delivered cost basis".

The OVCC settlement eliminates that concern.

Recognizing this, Centerior has shifted its ground and now argues that it will lose single-line service from other Ohio coal origins. But, as Applicants point out in their rebuttal filed today,

Thus, it is Centerior's claim that is illusory, and there is no plausible basis for its request for trackage rights to preserve single-line rail service for shipments that do not move by rail today.

**II. IF THE BOARD GRANTS CENTERIOR'S PETITION,
APPLICANTS REQUEST A BRIEF OPPORTUNITY TO REPLY**

Centerior's petition was filed seven weeks after comments, protests and requests for conditions were due, and only five days before Applicants' rebuttal was to be filed. As set forth below, Applicants believe that Centerior's proposed Supplemental Comments lack any merit and would not assist the Board in its consideration of the Application. Moreover, as set forth above, Centerior was aware of the settlement in early October, and referred to it in its Comments filed on October 21. Even assuming that discovery against the Applicants was not available until after October 21, Centerior waited until November 18 even to request the settlement agreement from the Applicants.

Applicants are prepared to respond in detail to Centerior's Supplemental Comments should the Board decide to accept them. The OVCC settlement, however, is only one of numerous settlements either or both Applicants have entered into with various shippers and shipper groups, railroads and state and local governments. If each settlement can trigger new discovery and reopening of the record, the Board may find that the proceeding will become unmanageable.

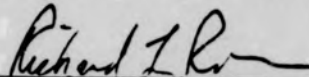
Given these facts, and given that Centerior's petition was not filed until the eve of Applicants' omnibus rebuttal filing, Applicants respectfully request that, if the Board grants Centerior's petition and accepts its Supplemental Comments into the record, the Applicants be given 21 days thereafter to make a brief filing of any supplemental evidence or argument in response to Centerior's Supplemental Comments.

CONCLUSION

For all the foregoing reasons, Applicants request that, if the Board grants Centerior's petition and accepts its Supplemental Comments into the record, the Applicants be given 21 days thereafter to make a brief

filing of any supplemental evidence or argument in
response to Centerior's Supplemental Comments.

Respectfully submitted,



MARK G. ARON
PETER J. SHUDTZ
CSX Corporation
One James Center
901 East Cary Street
Richmond, VA 23129
(804) 782-1400

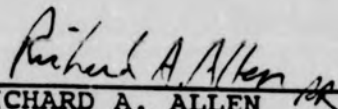
DENNIS G. LYONS
RICHARD L. ROSEN
DREW A. HARKER
SHARON L. TAYLOR
Arnold & Porter
555 12th Street, N.W.
Washington, DC 20004-1202
(202) 942-5000

P. MICHAEL GIFTOS
PAUL R. HITCHCOCK
CSX Transportation, Inc.
500 Water Street
Speed Code J-120
Jacksonville, FL 32201
(904) 359-3100

SAMUEL M. SIPE, JR.
TIMOTHY M. WALSH
Steptoe & Johnson LLP
1330 Connecticut Avenue, N.W.
Washington, DC 20036-1795
(202) 429-3000

Counsel for CSX Corporation
and CSX Transportation, Inc.

JAMES C. BISHOP, JR.
WILLIAM C. WOOLDRIDGE
J. GARY LANE
ROBERT J. COONEY
GEORGE A. ASPATORE
Norfolk Southern Corp.
Three Commercial Place
Norfolk, VA 23510-9241
(757) 629-2838


RICHARD A. ALLEN
JOHN V. EDWARDS
PATRICIA E. BRUCE
Zuckert, Scoutt
& Rasenberger, LLP
888 Seventeenth Street, N.W.
Suite 600
Washington, DC 20006-3939
(202) 298-8660

JOHN M. NANNES
SCOT B. HUTCHINS
Skadden, Arps, Slate, Meagher
& Flom LP
440 New York Avenue, N.W.
Washington, DC 20005-2111
(202) 371-7400

Counsel for Norfolk Southern Corporation
and Norfolk Southern Railway Company

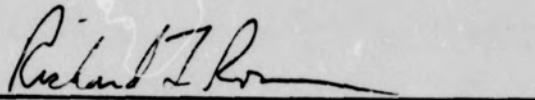
December 15, 1997

CERTIFICATE OF SERVICE

I, Richard L. Rosen, certify that on December 15, 1997, I have caused to be served a true and correct copy of the foregoing CSX/NS-179, Response of CSX and Norfolk Southern to Centerior Energy Corporation's Petition to File Supplemental Comments, to

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

counsel for Centerior Energy Corporation, by facsimile transmission; and on all other parties on the Restricted Service list in Finance Docket No. 33388, by first class mail, postage prepaid.



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SLOVER & LOFTUS

ATTORNEYS AT LAW

1224 SEVENTEENTH STREET, N. W.

WASHINGTON, D. C. 20036

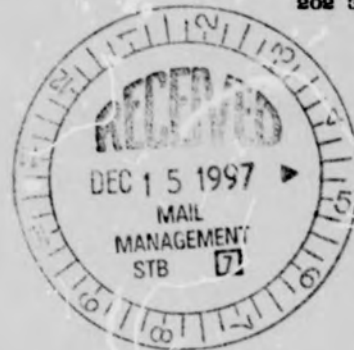
WILLIAM L. SLOVER
G. MICHAEL LOFTUS
DONALD G. AVERY
JOHN H. LE SEUR
KELVIN J. DOWD
ROBERT D. ROSENBERG
CHRISTOPHER A. MILLS
FRANK J. PERGOLIZZI
ANDREW B. KOLESAR III
JEAN M. CUNNINGHAM
PETER A. PROHL

202 347-7170

184860 December 15, 1997

BY HAND DELIVERY

The Honorable Vernon A. Williams
Secretary
Surface Transportation Board
Case Control Branch
ATTN: STB Finance Docket 33388
1925 K Street, N.W.
Washington, D.C. 20423-0001



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

Dear Secretary Williams:

Enclosed for filing in the above-referenced proceeding,
please find the original and twenty-five (25) copies of the
**"Reply of the State of New York to the Comments of Northwest
Pennsylvania Rail Authority"** (NYS-21). In accordance with the
Board's prior order, we have enclosed a Wordperfect 5.1 diskette
containing this filing.

We have included an extra copy of the filing. Kindly
indicate receipt by time-stamping the copy and returning it with
our messenger.

Sincerely,

Jean M Cunningham

Jean M. Cunningham
An Attorney for
the State of New York

JMC:cef
Enclosures

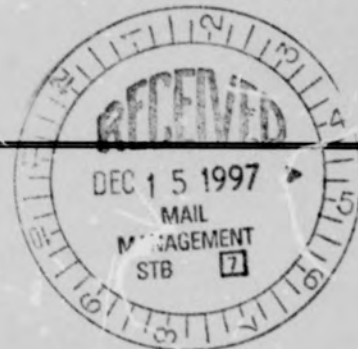
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13 Part of
Public Record

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

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

Finance Docket No. 33388



**REPLY OF
THE STATE OF NEW YORK
TO THE COMMENTS OF
NORTHWEST PENNSYLVANIA RAIL AUTHORITY**

THE STATE OF NEW YORK BY AND
THROUGH ITS DEPARTMENT OF
TRANSPORTATION

Dennis C. Vacco
Attorney General of the
State of New York
Stephen D. Houck
Assistant Attorney General
George R. Mesires
Assistant Attorney General
120 Broadway, Suite 2601
New York, New York 10271

William L. Slover
Kelvin J. Dowd
Christopher A. Mills
Jean M. Cunningham
Slover & Loftus
1224 Seventeenth Street, N.W.
Washington, D.C. 20036
(202) 347-7170

OF COUNSEL:

Slover & Loftus
1224 Seventeenth Street, NW.
Washington, D.C. 20036

Dated: December 15, 1997

Attorneys and Practitioners

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

The State of New York, acting by and through its Department of Transportation ("New York"), hereby submits this Reply to the Comments filed by Northwest Pennsylvania Rail Authority ("NWPRA") on October 16, 1997 (NWPR-2).¹ For the reasons set forth below, New York urges that the Board grant NWPRA's requested relief only if and to the extent that such relief does

1 Decision No. 12 in this proceeding establishes December 15, 1997 as the due date for filing "responses to inconsistent and responsive applications, comments, requested conditions, and opposition evidence and argument." See Finance Docket No. 33388, CSX Corporation and CSX Transportation, Inc., Norfolk Southern Corporation and Norfolk Southern Railway Company -- Control and Operating Leases/Agreements -- Conrail Inc. and Consolidated Rail Corporation, Decision served July 23, 1997; see also Finance Docket No. 32760, Union Pacific Corp., Union Pacific R.R. Co., and Missouri Pacific R.R. Co. -- Control and Merger -- Southern Pacific Rail Corp., Southern Pacific Transp. Co., St. Louis Southwestern Ry. Co., SPCSL Corp., and The Denver and Rio Grande Western R.R. Co., Decision No. 31, served Apr. 19, 1996 at 3 (clarifying that similar language used to describe permissible responsive filings in UP/SP merger proceeding allows "non-applicant parties to file responses to comments, protests, requests for conditions and other opposition evidence," where, "[f]or instance, . . . [such a] part[y] believes that it would be harmed by a condition proposed by another party").

not compromise New York's substantial and continuing rights with respect to the railroad lines involved, or interfere with the relief requested in this proceeding by Southern Tier West Regional Planning and Development Board ("STW").²

IDENTITY AND INTEREST

New York is a sovereign state, and a full party of record in this proceeding. The New York State Department of Transportation is the executive department charged with responsibility for the supervision and administration of State policies and interests relating to rail transportation through, within, or affecting New York.

On October 21, 1997, New York submitted Comments on the Primary Application³ filed in this proceeding (NYS-10). As

² See Comments and Request for Conditions of Southern Tier West Regional Planning and Development Board (STW-2), filed October 21, 1997 (requesting that the Board approve the proposed transaction, if at all, only upon condition that: (1) NS state its plans for future service over the Southern Tier Extension line; (2) Conrail repay debts owed to New York under existing agreements between them, or, alternatively, reinvest the same sum in rail-related projects; (3) NS restore to operable status portions of lines protected by New York/Conrail agreements; and (4) NS agree to an extension of New York/Conrail agreements relating to the Southern Tier Mainline and Southern Tier Extension).

³ For purposes of this Reply, the terms "Primary Application," or "Application" without further clarification, refer to CSX/NS-18-25, submitted by the Applicants on June 23, 1997, and accepted by the Board on July 23, 1997 in Decision No. 12. For purposes of this Reply, all references to "CSX" include CSXC, CSXT, and their wholly owned subsidiaries; all references to "NS" include NSC, NSR, and their wholly owned subsidiaries; all references to "Conrail" include CRR, CRC, and their wholly owned subsidiaries; all references to "Applicant(s)" indicate either or both CSX and NS.

those Comments describe, the State of New York has a long-standing and comprehensive interest in the northeastern United States' railroad industry.⁴ New York has invested hundreds of millions of dollars and entered into dozens of contractual arrangements to provide for the construction, maintenance, rehabilitation, and improvement of, as well as adequate and efficient service over, major and smaller railroad lines throughout the State.⁵ In particular, New York has demonstrated a strong and enduring commitment to shippers and communities located in the southwestern corner of the State, by negotiating a series of agreements over the last two decades protecting and providing for service along two rail routes: the Southern Tier Mainline, from New York City/northern New Jersey through Binghamton and Hornell, New York to Buffalo, New York; and the Southern Tier Extension, connecting Hornell, New York to Corry, Pennsylvania.⁶ As detailed below these agreements evidence the State's overriding interest in and commitment to assuring New York rail users located on the Southern Tier and Southern Tier Extension adequate and reliable rail service.

New York's interest in this portion of its rail network will not disappear or diminish as a result of the proposed Conrail division. To the contrary, New York both expects and is

⁴ See NYS-10, Argument at 11, 24-25, 32; V.S. James A. Utermark at 6-13, Exs. 2-5.

⁵ Id.

⁶ See NYS-10, Argument at 24-30, 32-34; V.S. Utermark at 8, Exs. 3, 5.

entitled to Conrail's successors' continued observation of and adherence to all New York/Conrail arrangements relating to the Southern Tier lines.⁷ In addition, New York anticipates that the Applicants will cooperate with New York to improve future service over these lines. At the same time, New York assumes that no other, third-party entity will attempt to interfere with its continuing interests in the Southern Tier and Southern Tier Extension. The Comments filed by NWPRA in this proceeding, however, raise the potential for just such interference. For this reason, and to clarify and defend its position respecting the rail lines that NWPRA's Comments address, New York submits this Reply.

NWPRA'S COMMENTS

NWPRA states that in 1995, it entered a purchase and sale agreement with Conrail to acquire all but .3 miles of a railroad line between Meadville and Corry, Pennsylvania. At the same time, NWPRA purportedly received a leasehold interest in the remaining .3-mile segment, with a right to buy that piece upon expiration of a New York/Conrail contract relating to the South-

⁷ Indeed, as New York's prior Comments in this proceeding explain, New York is entitled to the Applicants' full performance of all outstanding New York/Conrail contracts. New York has requested that the Board condition any approval of the proposed transaction upon the Applicants' express commitment to assume these contracts, and discharge reimbursement and settlement obligations already accrued under them. See NYS-10, Argument at 4, 24-30, 32-34; V.S. Utermark at 9-13.

ern Tier and Southern Tier Extension.⁸

In the present proceeding, NWPRA has asserted that its lease of and alleged right to purchase the .3-mile segment of track vests it with control over the track's future use and disposition.⁹ NWPRA contends that neither Conrail nor its successors may operate any through freight route incorporating this track without "obtain[ing] trackage rights from [NWPRA]".¹⁰ In particular, NWPRA claims that the Applicant carrier acquiring the Southern Tier Extension -- NS -- cannot provide service over that line through Corry to Erie, Pennsylvania¹¹ without securing trackage rights from NWPRA. Though NWPRA indicates its willingness to grant NS such trackage rights, in return it seeks "more extensive rights over another segment of the Southern Tier Extension from Corry to Waterboro, New York. In the event that NS does not voluntarily agree to such a trackage rights exchange,

⁸ See NWPR-2 at 1-2. New York and Conrail entered into the referenced contract in 1990 for the purpose of amending a prior New York/Conrail contract, originally executed in 1982, and amended once before in 1987. The 1982 agreement, as amended in 1987 and 1990, partially and temporarily superseded three other New York/Conrail contracts, all entered into in 1979, and all obligating Conrail to perform a number of maintenance and service activities benefitting the Southern Tier lines. This Reply refers to the 1982 agreement, as amended in 1987 and 1990, as the "Superseding Agreement." The Superseding Agreement, among other things, limits Conrail's right to dispose of or discontinue service on Southern Tier track.

⁹ NWPR-2 at 3-4.

¹⁰ Id.

¹¹ NS would operate from Corry to Erie pursuant to existing Conrail trackage rights over an Allegheny and Eastern Railroad line connecting those two points. See NWPR-2 at 3; CSX/NS-18, Application, vol. 1 at 38.

NWPRA requests that the Board condition any approval of the proposed transaction on the implementation of this arrangement.

As explained more fully below, New York opposes NWPRA's requested relief to the extent that it contemplates a second rail carrier operating on the Southern Tier Extension incompatibly with NS. New York has an overriding interest in safe, efficient through freight service across the southern portion of the State, and objects to any activity on the Southern Tier Extension that would disrupt or impede such service.

REPLY OF THE STATE OF NEW YORK

I. New York Has A Substantial Investment in and Continuing Rights Respecting the Southern Tier Lines

Over the last two decades, New York has allocated more than \$ 29.6 million to projects benefitting and protecting the facilities and operations of the Southern Tier Mainline and Southern Tier Extension.¹² New York has entered into agreements with Conrail requiring the railroad to maintain, operate and preserve particular portions of the Southern Tier lines, and restricting activities by Conrail that could affect the future usefulness of those lines. Collectively, these contractual arrangements establish New York's commitment to ensuring and encouraging viable transportation through and within the southern portion of the State. Details of the various individual New York/Conrail agreements confirm this overriding State purpose.

¹² See NYS-10, V.S. Utermark at Exs. 3, 5.

New York's "Orange County" Agreement,¹³ for example, declares as its objective the "improve[ment of] rail transportation services across the Southern Tier of New York State," and the "fulfill[ment of] the State's commitment to upgrade main line rail freight transportation services" on the same line.¹⁴ The contract obligates Conrail to perform or facilitate various maintenance and construction projects, and provide main-line and local train service between specified Southern Tier Mainline points. In addition, the agreement prohibits Conrail from ceasing service on portions of the Southern Tier Mainline, except as the agreement specifically allows. In some circumstances, such cessation of service permits the State to either purchase the line from Conrail, or demand reimbursement of the State's contractual investment.¹⁵

The State's "Wellsville" Agreement¹⁶ covers track and signal installation and maintenance on the Southern Tier Extension, and prohibits Conrail from ceasing operations without receiving the State's prior approval, reimbursing the State's investment, and/or honoring New York's right of first refusal to

¹³ The Orange County agreement is one of the original three Southern Tier agreements entered into by Conrail and New York in 1979. See n. 8, supra.

¹⁴ Orange County agreement at 1.

¹⁵ Id. at App. 3.

¹⁶ The Wellsville agreement is another of the original three Southern Tier agreements entered into by Conrail and New York in 1979. See n. 8, supra.

purchase the line.¹⁷ A separate provision of the agreement forbids Conrail from selling, relinquishing, disposing of, or rendering unusable particular portions of the Southern Tier Extension without New York's permission.¹⁸

The New York/Conrail Superseding Agreement once again declares New York's purpose of "maintaining rail service" on the Southern Tier lines, and "maintaining the Southern Tier Line as a mainline through route across the State."¹⁹ The Superseding Agreement provides for modified but continued local and through train service on the Southern Tier and Southern Tier Extension, and imposes certain maintenance obligations on Conrail as well. The agreement requires that Conrail preserve intact "all track assets" on the Southern Tier Extension, "including those . . . where no train service is to be provided."²⁰ The agreement also restricts Conrail's right to sell, relinquish, or dispose of any land, tracks or structures of the Southern Tier lines "required for the efficient operation of said lines."²¹

Taken together the language used, work contemplated and remedies provided by these several agreements evidence New York State's enduring interest in and efforts to develop viable

¹⁷ Wellsville agreement at App. 3.

¹⁸ Id. at 4.

¹⁹ See Superseding Agreement, 1987 amend. at 1; 1990 amend. at 1.

²⁰ Superseding Agreement, 1990 amend. at 3.

²¹ Id. at 2.

rail transportation on the Southern Tier Mainline and Southern Tier Extension. Though a new rail carrier -- NS -- may soon acquire ownership of these lines, New York's investment in and plans for their continued and expanded operation remain unchanged. New York has a significant interest in preventing any nullification of its past and prospective support for the Southern Tier lines, and, therefore, not only expects that all existing Southern Tier commitments between the State and Conrail will continue in force, but also that Conrail's successors will work toward implementing New York's long-term goal of utilizing the Southern Tier lines effectively.

II. The Board Must Deny NWPRA's Requested Trackage Rights to the Extent That Such Relief Interferes With New York's Southern Tier Line Rights and Interests

A. The Board Should Not Allow NWPRA to Compromise Viable Through Service Over the Southern Tier Lines

NWPRA's requested trackage rights relief threatens to interfere with New York's plans for continued and improved rail service on the Southern Tier lines.²² NWPRA has asked the Board to grant its operator trackage rights from Corry, Pennsylvania to Waterboro, New York, over 37.3 miles of the Southern Tier Extension. NWPRA acknowledges that NS will, by virtue of acquiring both Southern Tier lines, have the ability to run through freight service over the Southern Tier Extension to a connection at Erie,

²² See NYS-10 at 32-34; see also STW-2.

Pennsylvania and other major interchange points.²³ NWPRA nevertheless seeks to introduce a second, potentially conflicting rail carrier on a segment of track comprising an essential piece of this NS through route. NWPRA provides no assurance that the service it contemplates can co-exist with NS' through operations on the Southern Tier Extension; its Comments leave entirely unresolved whether and how the two carriers would share Southern Tier track without compromising the safety, efficiency, or availability of either carrier's service.

Though perhaps NWPRA could operate over the Corry-Waterboro track without impeding NS' service on the same, neither NWPRA nor the Board can simply assume this to be true. As discussed above, New York has far too great an investment in maintaining and further upgrading rail service on the Southern Tier lines to risk frustration of these efforts by a smaller rail carrier seeking to expand its service territory. Before the Board gives any consideration to NWPRA's requested trackage rights, New York urges that it require NWPRA to prepare evidence showing its proposed operations are feasible and compatible with NS through service on the Southern Tier lines. Absent a demonstration to this effect, neither the Board nor any affected party -- like New York -- can be certain of the full impact NWPRA's proposed new service would have. Unless NWPRA dispels this uncertainty, the Board should reject its requested relief.

²³ NWPR-2 at 3.

B. NWPRA Does Not Control the Future Disposition
of Any Portion of the Southern Tier Extension

Not only does New York have a significant, overriding interest in protecting and facilitating service on the Southern Tier lines, it also has contractual control over the use and disposition of certain portions of these lines. As mentioned above, provisions of New York's various Southern Tier agreements with Conrail limit the railroad's ability to convey away or impair the usefulness of Southern Tier track and facilities. These contractual restrictions apply regardless of whether Conrail permits another operator to occupy a part of the lines, and notwithstanding any corporate or structural changes Conrail undergoes. NWPRA and Conrail's lease arrangement, allegedly in effect now and through June, 1998, evidences those parties' recognition that the latter cannot freely transfer even a small segment -- .3 miles -- of the Southern Tier Extension. Because Conrail retains ownership of this segment along with the rest of the Southern Tier lines, Conrail may transfer them in their entirety to NS upon consummation of the proposed transaction.²⁴ NS will then decide -- in conjunction with New York as New York/Conrail contracts require -- whether and how to operate these lines. NWPRA's claimed lease and purchase option with respect to a small segment of the Southern Tier Extension will not stand in the way of the lines' owner -- Conrail -- transferring control of them to NS, or NS' subsequent use and enjoyment

²⁴ See CSX/NS-18, Application, vol. 1 at 38.

of the same.

CONCLUSION

For all of the reasons stated above, the Board should reject NWPRA's request for trackage rights between Corry, Pennsylvania and Waterboro, New York, to the extent that those rights would compromise New York's past and prospective plans and investments relating to the Southern Tier Mainline and Southern Tier Extension. NWPRA has not shown that the operations it would conduct pursuant to these trackage rights can co-exist compatibly with NS through service across the Southern Tier Extension. Unless NWPRA presents evidence to this effect, the Board should reject its trackage rights request.

Respectfully submitted,

THE STATE OF NEW YORK BY AND
THROUGH ITS DEPARTMENT OF
TRANSPORTATION

By: Dennis C. Vacco
Attorney General of the
State of New York
Stephen D. Houck
Assistant Attorney General
George R. Mesires
Assistant Attorney General
120 Broadway, Suite 2601
New York, New York 10271

OF COUNSEL:

Slover & Loftus
1224 Seventeenth Street, NW.
Washington, D.C. 20036

William L. Slover
Kelvin J. Dowd
Christopher A. Mills
Jean M. Cunningham
Slover & Loftus
1224 Seventeenth Street, N.W.
Washington, D.C. 20036
(202) 347-7170

Dated: December 15, 1997

Attorneys and Practitioners

CERTIFICATE OF SERVICE

I hereby certify that on this 15th day of December, 1997, I caused copies of the foregoing Reply of the State of New York to the Comments of Northwest Pennsylvania Rail Authority (NYS-21) to be served by hand upon:

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

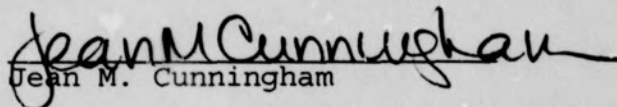
Dennis G. Lyons, Esq.
Arnold & Porter
555 12th Street, N.W.
Washington, D.C. 20004

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

Samuel M. Sipe, Jr., Esq.
Steptoe & Johnson
1330 Connecticut Ave., N.W.
Washington, D.C. 20036

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

and by first-class U.S. mail, postage pre-paid, upon all other parties of record.


Jean M. Cunningham

STB

FD

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12-15-97

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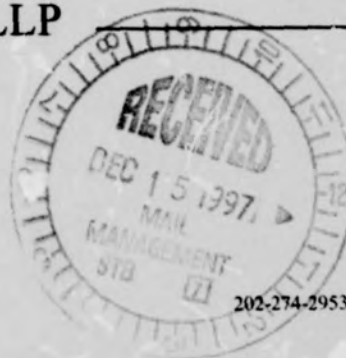
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TROUTMAN SANDERS LLP

ATTORNEYS AT LAW
A LIMITED LIABILITY PARTNERSHIP

1300 I STREET, N.W.
SUITE 500 EAST
WASHINGTON, D.C. 20005-3314
TELEPHONE 202-274-2950
FACSIMILE 202-274-2994



William A. Mullins

December 15, 1997

The Honorable Vernon A. Williams
Secretary
Surface Transportation Board
1925 K Street, NW
Room 711
Washington, D.C. 20423

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

Dear Secretary Williams:

Pursuant to Decision No. 57, served on December 5, 1997 in the above referenced proceeding, please find the enclosed original and ten copies of the Certificate of Service for New York State Electric and Gas (NYSEG-20).

Please date stamp the enclosed extra copy of the Certificate of Service and return it to the messenger for our files.

Sincerely yours,

William A. Mullins
Attorney for New York State Electric & Gas

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

BEFORE THE
SURFACE TRANSPORTATION BOARD

FINANCE DOCKET NO. 33388



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

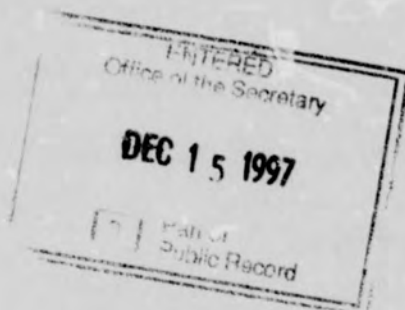
CERTIFICATE OF SERVICE

I hereby certify that a true copy of the filing submitted by New York State Electric & Gas (NYSEG-14) in Finance Docket 33388 prior to the service date of Board Decision No. 57 was served this 15th day of December, 1997, by first class mail, postage prepaid, to all new Parties of Record on the service list attached to Board Decision No. 57. All other filings are available upon request.

Respectfully submitted,

William A. Mullins
TROUTMAN SANDERS LLP
1300 I Street, N.W.
Suite 500 East
Washington, D.C. 20005-3314
202-274-2950 (PHONE)
202-274-2994 (FAX)

Attorney for New York State Electric & Gas



STB

FD

33388

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D

184816

184816

WEINER, BRODSKY, SIDMAN & KIDER

ATTORNEYS AT LAW

PROFESSIONAL CORPORATION

1350 NEW YORK AVENUE, N.W., SUITE 800

WASHINGTON, D.C. 20005-4797

(202) 628-2000

TELECOPIER (202) 628-2011



December 15, 1997

RICHARD J. ANDREANO, JR.
JAMES A. BRODSKY
JENNIFER A. COHN
JO A. DeROCHE
CYNTHIA L. GILMAN
KAREN R. GUSTAVSON*
DON J. HALPERN

CHAIL W. KARDASH*
MITCHEL H. KIDER
SUSAN I. KORYTKOWSKI
SHERRI L. LEDNER
TODD A. NEWMAN*
MARK H. SIDMAN
RUGENIA SILVER
JOHN D. SOCKNAT*
HARVEY E. WEINER
ROSE-MICHELE WEINRYB*
JOSEPH E. YENOU* JAS

*NOT ADMITTED IN D.C.

BY HAND

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

NYAR NO. 3

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

Dear Secretary Williams:

Enclosed for filing in the above-reference proceeding are an original and 25 copies of Response of New York & Atlantic Railway to Intervention Petition of Honorable Jerrold Nadler, Honorable Christopher Shays, Honorable Charles Rangel, Honorable Ben Gilman, Honorable Barbara Kennelly, Honorable Nancy Johnson, Honorable Charles Schumer, Honorable Rosa DeLauro, Honorable Michael Forbes, Honorable Sam Gejdenson, Honorable Nita Lowey, Honorable Major Owens, Honorable Thomas Manton, Honorable Maurice Hinchey, Honorable Ed Towns, Honorable Carolyn B. Maloney, Honorable Nydia M. Velazquez, Honorable Floyd Flake, Honorable Gary Ackerman, Honorable Eliot L. Engel, Honorable Louise M. Slaughter, Honorable John Laffalle, Honorable Michael McNulty, and Honorable James Maloney (the "Response"). In accordance with Decision No. 6, dated May 30, 1997, issued by the Surface Transportation Board in this proceeding, also enclosed is a 3.5-inch disk containing this Response formatted in Word Perfect. This Response and the accompanying disk are designated as NYAR No. 3, in accordance with 49 C.F.R. § 1180.4(a)(2).

WEINER, BRODSKY, SIDMAN & KIDER, P.C.

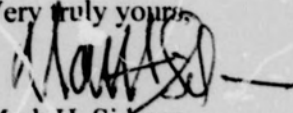
Hon. Vernon A. Williams

- 2 -

December 15, 1997

Please acknowledge receipt of this letter by date-stamping the enclosed acknowledgment copy and returning it to our messengers.

Very truly yours,


Mark H. Sidman

Enclosures

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

Finance Docket No. 33388

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



**RESPONSE OF NEW YORK & ATLANTIC RAILWAY
TO INTERVENTION PETITION OF
UNITED STATES REPRESENTATIVES
HONORABLE JERROLD NADLER, HONORABLE CHRISTOPHER
SHAYS, HONORABLE CHARLES RANGEL, HONORABLE BEN
GILMAN, HONORABLE BARBARA KENNELLY, HONORABLE
NANCY JOHNSON, HONORABLE CHARLES SCHUMER,
HONORABLE ROSA DELAURO, HONORABLE MICHAEL FORBES,
HONORABLE SAM GEJDENSON, HONORABLE NITA LOWEY,
HONORABLE MAJOR OWENS, HONORABLE THOMAS MANTON,
HONORABLE MAURICE HINCHEY, HONORABLE ED TOWNS,
HONORABLE CAROLYN B. MALONEY, HONORABLE NYDIA M.
VELAZQUEZ, HONORABLE FLOYD FLAKE, HONORABLE GARY
ACKERMAN, HONORABLE ELIOT L. ENGEL, HONORABLE LOUISE
M. SLAUGHTER, HONORABLE JOHN LAFALCE, HONORABLE
MICHAEL MCNULTY, AND HONORABLE JAMES MALONEY**

NEW YORK & ATLANTIC RAILWAY

By its Attorneys,

**Mark H. Sidman
Rose-Michele Weinryb
Weiner, Brodsky, Sidman & Kider, P.C.
1350 New York Avenue, N.W.
Suite 800
Washington, D.C. 20005-4797
(202) 628-2000**

Dated: December 15, 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

RESPONSE OF NEW YORK & ATLANTIC RAILWAY
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ACKERMAN, HONORABLE ELIOT L. ENGEL, HONORABLE LOUISE
M. SLAUGHTER, HONORABLE JOHN LAFALCE, HONORABLE
MICHAEL MCNULTY, AND HONORABLE JAMES MALONEY

Pursuant to the procedural schedule issued by the Surface Transportation Board (the "Board") in Decision Nos. 6 and 12 in the above-referenced proceeding, New York & Atlantic Railway ("NYAR") hereby files this response ("Response") in opposition to certain conditions requested in the intervention petition ("Intervention Petition"), dated October 8, 1997, filed by the above-listed United States Representatives (the "Intervenors").

I. INTRODUCTION

The Intervention Petition requests that the Board condition approval of the primary application ("Primary Application") filed by CSX Corporation, CSX Transportation, Inc., Norfolk Southern Corporation and Norfolk Southern Railway Company in Finance Docket No. 33388 (the "Applicants"), on the creation of a joint facility east of the Hudson River. The Intervenor's characterize this joint facility as "a cross-harbor float operation and a core system of rail lines and terminals east of the Hudson. . . ." Intervention Petition at 13. This joint facility would include the Bay Ridge Line (also referred to herein as the "Line"), which is owned by The Long Island Rail Road Company ("LIRR"), and over which NYAR is the exclusive freight operator.

The Board must reject Intervenor's proposal that the Bay Ridge Line be included in a new joint facility. This action would significantly reduce the value of NYAR's freight franchise, and would not address any competitive harm resulting from the transaction described in the Primary Application. Furthermore, the Board lacks jurisdiction to force a non-applicant in a proceeding under 49 U.S.C. § 11323, such as NYAR, to divest operating rights in the manner proposed by Intervenor's. For the reasons set forth below, the Board should refrain from imposing any condition in Finance Docket No. 33388 that would cause an involuntary divestiture by NYAR of any portion of its operating rights.

II. JOINT USE OF THE BAY RIDGE LINE WOULD THREATEN NYAR'S EXISTENCE

A. Background

LIRR, which is a New York State public benefit corporation, is among the busiest commuter railroads in the country. It handles approximately 4,000 passenger trains per week. Exhibit A, The Verified Statement of Frederick L. Krebs ("VS Krebs") at ¶ 2. The railroad operates from Pennsylvania Station in New York City, at its western end, to Montauk, at the eastern tip of Long Island.

Prior to May 12, 1997, LIRR provided both passenger and freight service over its rail system. The volumes of freight traffic historically were low and stagnant, due at least in part to the fact that LIRR's primary focus was on its passenger business. In early 1995, LIRR determined that its freight operations should be privatized. In 1996, LIRR solicited bids from qualified parties for a 20-year *exclusive* freight franchise over the LIRR rail system. NYAR was selected as the winning bidder. It executed an operating agreement with LIRR on November 18, 1996 (the "Operating Agreement"). Under the terms of the Operating Agreement, NYAR paid an initial "concession fee" and obligated itself to pay annual fees over the life of the Operating Agreement, in aggregate, of \$12.7 million. *Id.* at ¶ 3. This fee structure was negotiated on the basis that NYAR would have exclusive access to shippers served by LIRR, and that NYAR's operations would not be impeded in any manner by third party freight carriers. NYAR commenced service on May 12, 1997. *Id.*

As indicated on the map appended hereto as Exhibit B, NYAR is the only freight carrier serving the vast majority of Long Island. The New York Cross Harbor Railroad ("Cross Harbor") is located on the Brooklyn waterfront, and operates a car float service across New York

Harbor to Greenville, NJ. Consolidated Rail Corporation ("Conrail") and Providence & Worcester Railroad Company ("P&W") each operate over the line from Oak Point, NY, which traverses a short distance into Queens, to the interchange with NYAR at Fresh Pond. *Id.* at ¶ 4. No other railroads serve Long Island. Neither Conrail nor P&W serves any shippers on Long Island. *Id.* Thus, with the exception of the Conrail and P&W presence in the extreme western portion of Queens for the purpose of interchange, NYAR is the sole provider of freight service on the approximately 100-mile length of Long Island.

The transaction proposed by the Primary Applicants will not cause any reduction in the number of carriers serving Long Island. NYAR, Cross Harbor and P&W will continue to operate in this market, and CSXT will take over the Conrail line from Oak Point to Fresh Pond. There is no fundamental change in the *status quo* resulting from the transaction described in the Primary Application that would justify the inclusion of the Bay Ridge Line in a Joint Facility.

B. The Bay Ridge Line Should Not Be Included In A Joint Facility

The vast majority of the rail lines over which NYAR provides freight service is subject to joint use by LIRR for passenger operations. Given the extraordinarily high density of LIRR's passenger traffic, NYAR's use of much of the LIRR system is subject to considerable restrictions, including hours of operations. *Id.* at ¶ 6. Only two rail lines in NYAR's rail system, the Bay Ridge Line and the Bushwick Line, are used solely for freight operations. *Id.* at ¶ 5.

The Bay Ridge Line is a critical link in the NYAR rail system. As shown on the map appended hereto as Exhibit B, the Line runs 11 miles from Bush Junction in Brooklyn to Fresh Pond in Queens. The Line provides NYAR with its only access to its interchange with Cross Harbor at Bush Junction, and its sole freight-only access to its interchange with Conrail and P&W at Fresh Pond. *Id.*

The physical characteristics of the Bay Ridge Line do not make it a good candidate for multiple carrier use. The line is single tracked. It has only one siding, which can accommodate a 15-car train. Because LIRR does not conduct passenger operations on the Line, it is not signaled and is not dispatched. It is maintained to FRA class 1 condition, which limits operations to 10 miles per hour. *Id.* at ¶ 7. In short, there is nothing about the physical condition of the line that suggests it should be included in a joint facility utilized by Class I railroads.

Despite the fact that the Bay Ridge Line is inappropriate for use as a joint facility, it is of critical importance to NYAR. It is located in a highly commercial area. Whereas NYAR's service over most of the rail lines in its system is restricted due to the presence of the high density passenger operations of the LIRR over those same lines, the Bay Ridge Line, which is not used for passenger service, provides NYAR the flexibility to cater to the service needs of its shippers. *Id.* at ¶ 8. Such flexibility will be important in attracting new industries to locate on the Line and inducing current shippers to increase the amount of traffic they ship over the line. NYAR views the Bay Ridge Line as presenting one of the best opportunities on its system for building its traffic base. *Id.*

In addition to the potential that the Line has for developing traffic from on-line shippers, it is also of great strategic importance to NYAR. The Bay Ridge Line is NYAR's sole freight-only line that provides it with access to its interchange points. *Id.* at ¶ 5. It also is the only line in the NYAR system over which NYAR can handle overhead traffic. *Id.* at ¶ 9.

Intervenor's proposal to allow Applicants to operate over the Bay Ridge Line would financially harm NYAR without offering corresponding benefits to the shippers located on the Line. Applicants would have a tremendous advantage over NYAR in competing for originating and terminating traffic on the Line that is interlined to their respective systems. Applicants likely

would focus their marketing efforts on high volume shippers of highly rated traffic, while ignoring lower volume, less profitable traffic. *Id.* at ¶ 10. Similarly, traffic that NYAR handles today as overhead traffic on the Bay Ridge Line likely would be lost to the Applicants. As NYAR's traffic density and profitability decrease, service to shippers not on the Bay Ridge Line would suffer and rates likely would increase.

The Board should not create a situation in which the Applicants will cherry-pick NYAR's traffic. NYAR is a classic short line operation, which currently handles approximately 14,000 carloads of traffic annually. *Id.* at ¶ 11. It is using flexible, innovative marketing and service initiatives to build traffic in a market that historically has not received high quality service. Increases in traffic are accomplished on a customer by customer basis, usually through the addition of small numbers of carloads. This is precisely the type of market that Class I railroads, like Applicants, are seeking to avoid. Indeed, no Class I railroad even bid to obtain the LIRR freight franchise. Applicants should not be handed an opportunity to skim off NYAR's best traffic opportunities.

III. THE BOARD'S CONDITIONING POWER UNDER 49 U.S.C. § 11324(c)

A. 49 U.S.C. § 11324(c) Does Not Contemplate Forced Inclusion

The Board's power to impose conditions on a transaction under 49 U.S.C. § 11324(c)¹ does not contemplate the involuntary inclusion of a rail carrier into a proposed merger. The Intervenor states that "[t]he Board has been given the specific power to condition its approval of any consolidation upon the inclusion of other railroads operating in the territory involved *upon*

¹ As to the issues addressed in this Response, no substantive differences exist between 49 U.S.C. § 11324(c) and its predecessor, 49 U.S.C. § 11344(c).

request...." (emphasis added) Intervention Petition, at 3. Intervenors fail to note, however, that the "request" for inclusion in a proposed merger must be made by the carrier, not a third party:

The Board may require inclusion of other *rail carriers* located in the area involved in the transaction if *they* apply for inclusion and the Board finds their inclusion to be consistent with the public interest. (emphasis added). 49 U.S.C. § 11324(c)

Board precedent also make clear that the Board's power to include a rail carrier in a proposed consolidation cannot be used against an unwilling, nonapplicant carrier. The Interstate Commerce Commission (the "Commission"), predecessor to the Board, has stated:

We can impose conditions upon our approval of a consolidation proposal, but we cannot require the applicants to consummate the transaction, *nor can we require another railroad to relinquish parts of its system to a consolidated system*. Thus, the Commission may not force an inclusion, except to the extent parties involved are willing to accept the inclusion in order to obtain a decision approving their consolidation proposal. (emphasis added)

See Ex Parte No. 282 (Sub-No.2), *Railroad Consolidation Procedures*, 359 I.C.C. 195, 1978 ICC LEXIS 5, Dec. 6, 1978, *modified by Railroad Consolidation Procedures, General Policy Statement*, 363 ICC 784 (1981). See also *Union Pacific Corporation, Union Pacific Railroad Company and Missouri Pacific Railroad Company--Control And Merger--Southern Pacific Rail Corporation, Southern Pacific Transportation Company, St. Louis Southwestern Railway Company, SPCSL Corp., and The Denver And Rio Grande Western Railroad Company*, Finance Docket No. 32760 ("*Union Pacific*"), (not printed), 1996 STB LEXIS 220, at *528, served August 12, 1996 (noting that "we have no authority to impose conditions ...on non-terminal trackage of a nonapplicant carrier..."). There is simply no basis for using section 11324(c) as a means for requiring NYAR to relinquish valuable rights to the Applicants at the behest of Intervenors.

B. The Condition Does Not Address a Harm Caused by the Approval of the Primary Application.

Even assuming that Intervenor could overcome the patent jurisdictional defect in seeking the Board's authority to force NYAR to become part of the proposed consolidation, the Intervenor has failed to justify the joint use of the Bay Ridge Line. Board precedent states that "[t]o be granted, a condition must first address an effect of the transaction." See *Burlington Northern Inc. and Burlington Northern Railroad Company -- Control and Merger -- Santa Fe Pacific Corporation and the Atchison, Topeka and Santa Fe Railway Company*, Finance Docket No. 32549, (not printed), 1995 ICC LEXIS 214, at *143, served Aug. 16, 1995 ("*Burlington Northern*"). Intervenor has failed to explain how the proposed consolidation will alter the freight operations currently conducted over the Bay Ridge Line, or on Long Island generally, and, therefore, has failed to justify the need for any remedy. In fact, approval of the Primary Application, as proposed, will have little effect on the Bay Ridge Line operations. Today, that line is operated by NYAR, which has no affiliation with NS, CSXT or Conrail. Except for the interchange with NYAR at Fresh Pond, Conrail has no freight operations on Long Island. Replacement of Conrail by CSXT over that line will do little to change the *status quo*. Intervenor is seeking a remedy for a scenario that simply does not present any harm.

Instead of addressing the effect of the proposed consolidation on the Bay Ridge Line, Intervenor's joint use proposal focuses largely on the current inadequacies of the Cross Harbor car float operation and the desire of Intervenor to use the opportunity presented by the Primary Application to improve this operation.² The Intervenor states: "[u]nless a rail float operation is

² "We will not impose a condition that would put its proponent in a better position than it occupied before the consolidation." See *Burlington Northern*, at * 143.

included in the Joint Facilities Railroad, the lack of service experienced by this region since 1962 will continue.” See Intervention Petition, at 12. In other words, Intervenor’s purpose is designed to address a perceived inadequacy of the rail system in the New York metropolitan area that has existed for 35 years; it has nothing to do with harms that will result from the transaction described in the Primary Application.

The Board has held that it “will not impose conditions ‘to ameliorate long-standing problems which were not created by the merger...’” See *Burlington Northern*, at * 143 quoting *Burlington Northern, Inc. -- Control and Merger -- St. Louis-San Francisco Railway Company*, Finance Docket No. 28583 (Sub-No. 1F), 360 I.C.C. 788 (1980), *aff’d sub nom*, 632 F.2d 392 (5th Cir. 1980), *cert. denied*, 451 US 1017 (1981). The Primary Application contemplates the establishment of a joint facility west of the Hudson River, but no such facility to the east. To the extent that Intervenor’s assert that Applicant’s joint facility to the west would provide western shippers with a competitive advantage over equivalent shippers to the east, the Board has rejected use of its conditioning power under such circumstances.³ Furthermore, Intervenor’s fail to identify how the joint use of the Bay Ridge Line is critical to the preservation of a competitive equilibrium on both sides of the Hudson River or to identify a single shipper or class of shippers that would be harmed by the creation of a joint facility west of the Hudson River without the creation of a similar facility to the east. Significantly, the joint responsive application filed by the State of New York and the New York City Economic Development Corporation, which clearly addressed the issue of preserving competitive rates between shippers to the east and

³ See *Union Pacific*, (not printed), STB LEXIS 356, at *29, served Dec. 31, 1996 (noting that the Board’s conditioning power under section 11344(c), predecessor to section 11324(c), “was not used by the ICC and will not be used by [the Board] to equalize rates and service among competing shippers”).

shippers to the west of the Hudson River, did not include the joint use of the Bay Ridge Line in their proposal.⁴

IV. THE BAY RIDGE LINE IS NOT A TERMINAL FACILITY

Intervenors correctly point out that the Board has jurisdiction under 49 U.S.C. § 11102 to mandate joint access to terminal facilities, but Intervenors fail even to argue that the Bay Ridge Line is, in fact, part of a terminal facility. The Bay Ridge Line is a classic short line operation, serving six active shippers along the line, each a distinct source of originating and terminating traffic. VS Krebs at ¶ 9. None of these industries is open to reciprocal switching. Likewise, none of these shippers is located within yard limits. *Id.* at 12. The line is single-tracked for its entire 11-mile length, and has only one siding, which can accommodate no more than 15 cars. *Id.* at ¶ 7. Although the line feeds into a yard at its western end at Fresh Pond, the eastern end at Bush Junction does not provide access to a NYAR yard. The Fresh Pond Yard provides direct access to only one, low volume shipper. If the Bay Ridge Line could be considered part of a terminal facility then so could every urban rail line located near a freight yard. In addition, 49 U.S.C. § 11102(a) states that the "[t]he Board may require terminal facilities...to be used by another rail carrier *if* the Board finds that use to be practicable and in the public interest *without substantially impairing the ability of the rail carrier...entitled to use the facilities to handle its own business.*" As demonstrated above, however, multi-carrier use of the Bay Ridge Line would threaten both the quality and quantity of NYAR's service to its shippers.

⁴ Finance Docket No. 33388 (Sub Nos. 54 and 69), Joint Responsive Application of the State of New York and the New York City Economic Development Corporation, October 21, 1997 (seeking approval of the Board for certain unrestricted trackage rights only over Conrail lines, as well as the right of Metro-North Commuter Railroad

V. FEEDER LINE PROVISIONS ARE INAPPLICABLE

Finally, Intervenor:s assert that "[t]o the extent that this petition would require the Board to order the sale of rail assets and operating rights from one carrier to another, such a sale is authorized by 49 U.S.C. 10907(c)(1)." See Intervention Petition at 3. Intervenor's reliance on section 10907(c)(1) is misplaced. Forced sales of rail lines under section 10907(c)(1) were not intended to address competitive access concerns. Board precedent makes clear that a forced sale is a tool used to prevent the neglect or abandonment of a line, not to stimulate competition. See *PSI Energy, Inc. -- Feeder Line Development -- Norfolk Southern Corp. Line Between Cynthiana and Carol, IN*, Finance Docket No. 31608, 7 I.C.C.2d 277, 1991 ICC LEXIS 3, at *13-14, Jan. 3, 1991 ("PSI Energy") (stating that "Congress did not intend for the feeder line development program to be used to create additional competition, as opposed to preserving service."); *Revision of Feeder Railroad Development Rules*, Ex Parte No. 395 (Sub-No. 2), 7 ICC.2d 902, 1991 ICC LEXIS 177, at * 2-3, July 24, 1991, (noting that the predecessor statutory provision to section 10907, section 10910,² "was enacted to enable shippers and communities to acquire marginal rail lines prior to their being downgraded and/or abandoned."), modified by *Revision of Feeder Railroad Development Rules*, Ex Parte No. 395 (Sub-No. 2), (not printed), 1992 ICC LEXIS 25, Feb. 6, 1992. As a general matter, the Bay Ridge Line does not have any of the attributes necessary to make it a candidate for a forced sale under section 10907.

Company to disregard any provision in any agreement concerning certain rail lines, which limits the grant of unrestricted trackage rights to Conrail or CSX).

² As to the issues addressed in this Response, no substantive changes exist between Section 10907 and its predecessor, section 10910.

NYAR paid substantial excelsior fees and took over freight operations on the Bay Ridge Line and the rest of LIRR to build traffic, not downgrade it. NYAR is aggressively marketing traffic to and from shippers on the Line, and revenues for 1997 will exceed \$300,000. *VS Krebs* at ¶ 9. The Bay Ridge Line is being maintained in good operating condition, satisfying FRA class I track standards. Indeed, NYAR has a contractual obligation to maintain the Line to this standard. *Id.* at ¶ 7. Far from neglecting the line, NYAR considers the Bay Ridge Line a valuable portion of its system, particularly in terms of its growth potential.

Section 10907 provides that the Board "may determine that the public convenience and necessity require or permit the sale of a railroad line" only if the Board determines that certain criteria have been met.⁶ For example, the Board must conclude that (i) current rail service over the line is inadequate for shippers' needs; (ii) the forced sale of the line will not have a significant, adverse effect on the financial condition of the carrier; *and* (iii) such a sale will not adversely effect the operations of the rail carrier's remaining system. *See* 49 U.S.C. 10907(c)(1).

Intervenors have not, and could not, demonstrate that the Bay Ridge line satisfies these criteria. As a short line operator, NYAR is more likely than other carriers to provide its shippers with service that is customized to meet their individual needs. Indeed, Intervenors have failed to identify shipper dissatisfaction with NYAR's service over the Bay Ridge Line. In addition, the sale of Bay Ridge Line would significantly affect the value of NYAR; as noted above, this line provides NYAR with its only source of overhead traffic and is viewed as a key to the future development of NYAR's system. The Bay Ridge Line also provides the only access NYAR has to Cross Harbor, and the only access to Conrail and P&W that is not restricted by passenger train

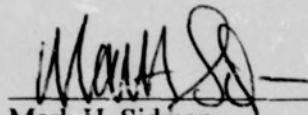
⁶ Board precedent makes clear that *all* of these factors listed in 49 U.S.C. §10907 must be satisfied before the Board will authorize a forced sale of rail line. *See PSI Energy*, at *14.

operations. NYAR's remaining freight franchise clearly, therefore, would be adversely affected by the loss of the Bay Ridge Line. In short, the forced sale provision of Section 10907(c)(1) does not apply to the Bay Ridge Line.

VI. CONCLUSION

For the reasons stated above, the Board should deny Intervenor's request that the approval of the Primary Application be conditioned on joint use of the Bay Ridge Line.

Respectfully submitted,

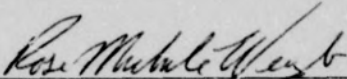
A handwritten signature in dark ink, appearing to read 'Mark H. Sidman', is written over a horizontal line.

Mark H. Sidman
Rose-Michele Weinryb
Weiner, Brodsky, Sidman & Kider, P.C.
1350 New York Avenue, N.W.
Suite 800
Washington, D.C. 20005-4797
(202) 628-2000

CERTIFICATE OF SERVICE

I hereby certify that on December 15, 1997, a copy of the foregoing Response of New York & Atlantic Railway was served by first-class mail, postage pre-paid on:

- (i) All current Parties of Record
- (ii) Administrative Law Judge Jacob Leventhal
Federal Energy Regulatory Commission
888 First Street, NE, Suite 11F
Washington, DC 20006-3939
- (iii) Honorable Janet Reno
Attorney General of the United States
Department of Justice
950 Pennsylvania Avenue, N.W.
Room 4440
Washington, D.C. 20530-0001
- (iv) U.S. Secretary of Transportation
Department of Transportation
400 7th Street, S.W.
Washington, D.C. 20590


Rose Michele Weinryb, Esq.

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

FINANCE DOCKET NO. 33388

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

EXHIBIT A

**VERIFIED STATEMENT
OF
FRED L. KREBS**

1. I am Fred L. Krebs, President of New York & Atlantic Railway ("NYAR"). I have been president of NYAR since September 17, 1997. Prior to my employment with NYAR, I worked in the railroad industry for 18 years, most recently as General Manager of San Joaquin Valley Railroad Company.

2. NYAR operates on rail lines owned by The Long Island Rail Road Company ("LIRR"). LIRR handles approximately 4,000 passenger trains per week.

3. NYAR and LIRR are parties to an Operating Agreement, dated November 18, 1996. Under the terms of the Operating Agreement, NYAR paid an initial concession fee, and agreed to pay annual fees, for its exclusive freight concession over the LIRR. The fees, in aggregate, are \$12.7 million. This fee structure was based on an understanding that NYAR would be the exclusive rail carrier serving shippers on the LIRR system, and that no other rail

freight carriers would be using the LIRR rail lines. NYAR commenced operations on May 12, 1997.

4. NYAR interchanges with Consolidated Rail Corporation ("Conrail") and Providence and Worcester Railroad Company ("P&W") at Fresh Pond, in Queens, New York. Neither Conrail nor P&W directly serves any shippers on Long Island. NYAR interchanges with New York Cross Harbor Railroad Terminal Corp. ("Cross Harbor") at Bush Junction in Brooklyn, New York. These are the only rail carriers to provide freight service on Long Island.

5. The Bay Ridge Line is an 11-mile line that runs from Bush Junction to Fresh Pond. It is one of two lines operated by NYAR on which LIRR does not provide passenger service (the other being the Bushwick Line). It is NYAR's sole means of access to Fresh Pond on a freight-only line and its only access to Bush Junction.

6. The vast majority of rail lines that constitute NYAR's freight franchise are jointly used by LIRR for passenger operations. On the LIRR lines that NYAR shares with LIRR, NYAR is subject to numerous restrictions, including hours of operations. It is extremely difficult to tailor freight service to shippers' needs for shippers that are served from lines on which there are both freight and passenger operations.

7. The Bay Ridge Line is single-tracked. It has only one siding, which can accommodate a 15-car train. The line is not signaled or dispatched, because LIRR does not operate passenger trains on it. The Bay Ridge Line is maintained to FRA class 1 condition, which allows for operations to be conducted at a maximum speed of 10 miles per hour. NYAR is contractually obligated to maintain the Bay Ridge Line to this standard.

8. The Bay Ridge Line is critical to NYAR's operations. As a freight-only line, it provides NYAR with service and operations flexibility that is absent on the rest of NYAR's

system (with the exception of the 3.3-mile Bushwick Line). For this reason, and the fact that the line runs through a highly commercial area, the Bay Ridge Line presents one of the best opportunities on the NYAR to develop new business.

9. The Bay Ridge Line is the only line on the NYAR system that handles overhead traffic. There are currently six active shippers on that line, each a distinct source of originating and terminating traffic. The shippers generate, in aggregate, more than \$300,000 of freight revenue per year.

10. Inclusion of the Bay Ridge Line in a joint facility east of the Hudson would cause NYAR significant financial harm. It would be difficult for NYAR to compete with CSX Transportation, Inc. ("CSXT") or Norfolk Southern Railway Company ("NS") for overhead traffic that either of those carriers handles beyond the Bay Ridge Line. Similarly, NS and CSXT likely would aggressively market high volume, highly rated traffic from shippers located on the Bay Ridge Line. Those carriers would attempt to cherry pick high contribution traffic, and leave the less profitable traffic to NYAR.

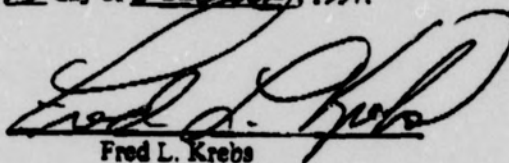
11. NYAR currently handles approximately 14,000 carloads per year of freight traffic.

12. None of the industries on the Bay Ridge Line is open to reciprocal switching and none of these industries is located within yard limits. The sole NYAR yard accessed by the Bay Ridge Line is located at Fresh Pond. Only one, low volume shipper has direct access to this yard.

VERIFICATION

I, Fred L. Krebs, hereby affirm and state that I have read the foregoing statement, that I am personally familiar with its contents, that I have executed it with full authority to do so, and that the facts set forth therein are true and correct to the best of my knowledge, information, and belief.

Executed by the undersigned on this 15 day of December, 1997.



Fred L. Krebs

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

FINANCE DOCKET NO. 33388

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

EXHIBIT B

MAP OF NYAR

NEW YORK
&
ATLANTIC
RAILWAY

NEW YORK & ATLANTIC RAILWAY COMPANY

