STB FD 33388 9-1-98 D 190906

190906

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

WYANDOT-7

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WYANDOT DOLOMITE, INC.'S REPLY IN OPPOSITION TO
PETITION FOR RECONSIDERATION OF DECISION NO. 89
OF APPLICANTS CSX CORPORATION, CSX TRANSPORTATION, INC.,
NORFOLK SOUTHERN CORPORATION,
AND NORFOLK SOUTHERN RAILWAY COMPANY

Pursuant to the provisions of 49 CFR §§ 1104.13(a), Wyandot Dolomite, Inc. ("Wyandot") hereby replies to CSX/NS-209, "Petition for Reconsideration of Decision No. 89 of Applicants CSX Corporation, CSX Transportation, Inc., Norfolk Southern Corporation, and Norfolk Southern Railway Company" (hereafter, the "Petition"). As Wyandot will demonstrate in the sections to follow, the protective relief that the Board has imposed in favor of Wyandot is clearly worded and properly reflects the Board's specific intention to impose conditions on the subject transaction that are broader in scope than those that the applicants[1] themselves had "proffered." Furthermore, the

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[1] "Applicants," for the purposes of this reply, are CSX Corporation, CSX Transportation, Inc., Norfolk Southern Corporation, and Norfolk Southern Railway Company.

applicants have failed to establish an appropriate basis for reconsideration and modification of the Board's Decision No. 89. Finally, the applicants use the Petition as yet another attempt to re-litigate issues surrounding Wyandot's requests for relief For these reasons, the Board must deny the applicants' Petition to reconsider and modify the conditions it imposed to protect Wyandot.

I. INTRODUCTION

The record before the Board concerning Wyandot's request for protective conditions shows consistently how aggregate producers such as Wyandot will suffer irreversible injury without appropriate Board action. Throughout the proceeding, Wyandot demonstrated that it is uniquely dependent upon rail transportation to be competitive in several of the regional markets in which it participates today. It also showed that two-carrier (or "joint-line") rail transport for aggregate, especially at the relatively short distances involved, is uneconomical and impractical.

For the most part, the Board agreed with Wyandot, and its findings in Decision No. 89 seem to embrace much of Wyandot's evidence and argument. The Board declined to grant Wyandot the specific relief it had requested,[2] but did choose to impose conditions clearly intended to -- (1) preserve single-line

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[2] Generally, the relief Wyandot requested concerned trackage rights that would ensure an NS presence at Wyandot's facility in Carey, OH.

service for all existing movements of aggregates, and (2) protect into the future Wyandot's ability to compete in markets where it would otherwise lose the benefits of single-carrier service. In Decision No. 89, the Board did not impose any time limitations to the relief granted in favor of Wyandot, nor did the Board find that the harms its conditions were intended to ameliorate were "transitory."

The applicants clearly expected that the Board would adopt without revision the "aggregate solution" that they had first introduced during the closing phases of the Board's hearings on June 3 and 4, 1998, and that the applicants subsequently detailed in documents submitted after the time when such new evidence should have been tendered. Indeed, the applicants, in their Petition, seem very disappointed that the Board would devise a remedy for the aggregate shippers that deviates in scope from what the applicants had indicated they would be willing to accept. Because the Board imposed conditions for the aggregate shippers that are broader in scope and more lasting in duration that what the applicants would have preferred, and because they expected (but did not get) a blanket adoption of their own settlement proposal, the applicants have filed the subject Petition for Reconsideration.

II. ARGUMENT

A. The Board's Decision No. 89 is sufficiently clear and purposely does not include any temporal restrictions upon the relief granted to Wyandot

The applicants' Petition underscores a theme consistent in recent, major rail consolidations. Namely, when Class I rail carriers offer some arrangement that they allege will ameliorate any harms otherwise suffered by an opponent to the subject transaction, they expect that the Board will adopt and impose the "condition" without modification. This is especially so when large Class I carriers confront the concerns of smaller shippers. In this case, while it did not grant the relief that Wyandot requested, the Board did not simply serve as the applicants' "rubber stamp" either. It is fair to say that neither Wyandot nor the applicants are pleased with the Board's Decision No. 89. However, none of the parties can seriously argue that the relevant portions of the Board's Decision No. 89 -- including Ordering Paragraph No. 43 -- contain specific Board-imposed time limitations or other temporal restrictions to the relief it has elected to grant.

The protective conditions extended to Wyandot are clear. First, NS and CSX are to provide to Wyandot single-carrier service for existing movements of aggregates (provided they are tendered in blocks of 40 or more cars). There is no stated time limitation anywhere in this part of the decision. Second, NS and CSX are to provide run-through service to Wyandot where Wyandot-produced aggregate moves at least 75 miles (and in

blocks of 60 cars or more), or devise pre-blocking arrangements for aggregate tendered in blocks of 10 to 60 cars. Once again, if the Board meant for this condition to be a fleeting remedy -- an aggregate "swan song" -- they would have stated clearly that it was applicable only for a certain stated period of time.

Even the applicants acknowledge that the Board departed significantly from the scope of relief that the applicants would have preferred to be imposed.[3] The Board recognized the scope of the harms facing Ohio aggregate producers, and, in the applicants' own words, granted relief that "explicitly goes beyond" what the applicants had offered in their written proposal. CSX/NS-209 at 14. By going explicitly beyond the applicants' "proffered" relief, the Board constructed protective conditions that may have borrowed in part from what applicants had recommended (and represented at closing argument), but the Board obviously did not adopt verbatim what the applicants had offered in written settlement.

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[3] At the closing phases of oral argument in this proceeding, the applicants unveiled for the first time the protective conditions they were willing to accept to address the concerns of Wyandot and National Lime & Stone. At this time, while the respective counsel for Norfolk Southern and CSX both argued against the imposition of "permanent" relief "for the rest of time," neither explained to the Board that their settlement offer would remain in effect for only five years. That was a critical omission, for the Board later noted that "what was offered at oral argument is somewhat broader than what was offered in writing in the proffers dated June 6, 1998." Decision No. 89 at 111. The Board-imposed conditions therefore appear rather consistent with the applicants' original proposal which, as orally presented to the Board, did not include any specific "drop dead" date.

Throughout this proceeding, Wyandot argued consistently that temporary forms of relief would not outlive the harm that it would suffer as a result of the subject transaction. Temporary relief, it noted more than once, would be a mere "stay of execution." Wyandot was not alone in expressing that sentiment. The State of Ohio -- most notably through the Ohio Rail Development Commission -- recognized the worthlessness of temporary fixes for affected aggregate producers.[4] The harms Ohio identified in the event that Wyandot and other stone producers lost single carrier service (such as lost jobs, highway congestion, higher aggregate prices in Ohio, deteriorated roads, and reductions in air quality), will occur regardless of whether they take place immediately after consummation of the subject transaction or are delayed for five years.

As the record shows, the Board had plenty of evidence upon which to rely in granting protective conditions without time limitations. In fact, in discussing the relief it would extend to aggregate producers such as Wyandot, The Board was sensitive to what the transaction could mean to Wyandot's future traffic patterns. Neither the Board nor Wyandot assessed the future according to a limited five-year time frame. Instead, Wyandot's concern for its ability to compete in certain markets, and the

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[4] The Ohio Rail Development Commission ("ORDC") remains of this opinion. Attached hereto as Exhibit A, is a letter from Mr. Thomas M. O'Leary, ORDC's Executive Director, in opposition to the applicants' Petition. This letter repeats again the State of Ohio's objection to temporary relief for aggregate producers such as Wyandot.

Board's recognition of that concern both focus upon the indefinite future. To be sure, the Board is not prohibited from imposing permanent forms of relief in favor of Wyandot, as it did in this case. Not even the applicants argue such an absurd proposition.

Ultimately, and to the applicants' apparent dismay, the Board did not "rubber stamp" the relief package the applicants offered in an effort to conveniently (for the applicants) "resolve" the concerns of the State of Ohio and aggregate producers such as Wyandot. However, that is what the applicants think the Board meant to do, or should have done, and so they are now requesting reconsideration. Simply put, if the Board meant to embrace the applicants' written settlement offer "hook line and sinker," they would have made that clear in the decision by specifically adopting by direct reference the proffered settlement. If the Board had meant to impose such significant (and short-sighted) time limitations to the relief they have granted -- especially in light of both Wyandot's and the State of Ohio's strenuous objections to such temporary arrangements -- it also would have made this abundantly clear in its Decision No. 89.

B. The applicants have petitioned the Board to reconsider the scope of the protective relief extended to Wyandot, but the applicants fail to show why reconsideration is warranted under 49 CFR §1115.3(b)(1) or (3)

By the applicants' own representations, the Petition is strictly a "Petition for Reconsideration" submitted pursuant to the provisions of 49 CFR §1115.3. Not only is CSX/NS-209 so entitled, but, in its opening statement, the applicants make plain that they are seeking reconsideration of the Board's Decision No. 89 as it concerns the relief granted to aggregate producers.[5] Clearly, whether the applicants like it or not, the standards prescribed at 49 CFR §1115.3 apply to those portions of the Petition devoted to eroding Board-imposed relief to aggregate producers.

For all of their blustering about what they think is the "appropriate" or intended scope of relief, the applicants fail to establish -- as they are required to do under 49 CFR §1115.3(b)(1) or (3) -- that new evidence or changed circumstances warrant Board reconsideration or that the Board materially erred in granting to Wyandot the protective conditions that it did. Instead, the applicants only challenge the Board's wisdom in granting protective conditions over and above the "proffered" five year period. See, CSX/NS-209 at 15. Wyandot has scoured the Petition, but finds no presentation of changed

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[5] On the first page of the Petition, applicants state that they request "reconsideration of... one 'transportation' condition." (Emphasis added.) Later, the applicants make clear that the "transportation" condition involves the relief extended to aggregate shippers such as Wyandot.

circumstances or new evidence. Similarly, while the Petition is clearly a criticism of the Board's decision, the applicants fail anywhere to assert that the Board committed material error warranting the requested reconsideration. Thus, unless the Board is radically to depart from its own regulations, it must deny the applicants' Petition.

C. Applicants' Petition is little more than an attempt to re-litigate issues concerning the appropriate scope of relief for aggregate producers such as Wyandot

If the portion of the applicants' Petition dealing with aggregate producers were to be paraphrased, it could read as follows: "Why didn't the Board impose protective conditions that followed exactly the terms of the relief we had proffered to Wyandot and National Lime & Stone? The Board should have, and probably meant to do so. Well, let us tell you again why the Board should modify Decision No. 89 to more accurately comport with what we were offering." Most of the applicants' Petition on this subject is devoted to re-hashing arguments that they have already made, and that the Board has already adequately taken into consideration. Yet, in dealing with the unique interests of aggregate producers such as Wyandot, the applicants have time and again endeavored improperly to influence the Board with "13th hour" arguments.

The applicants' infamous "proffer," which served to influence the Board's decision-making process, was, Wyandot insists, introduced into the record after such submission were

appropriate. See, Wyandot-6 at 6. Indeed, there was insufficient time for Wyandot fully to demonstrate to the Board the inadequacy of the so-called "relief" that the applicants had devised. Nonetheless, the Board tried to excuse the applicants' actions in a footnote tucked quietly away in the latter parts of Decision No. 89. Decision No. 89, Appendix H, at 301 (footnote 498). Now, once again, the applicants insist on abusing administrative procedure by devoting yet a few more pages to the debate of whether or not the Board should prescribe long-term relief for aggregate producers. What is worse, the applicants employ selected portions of Decision No. 89, not as a demonstration of material error on the Board's part, but rather as "precedent" to support their argument against lasting relief for Wyandot.

A few of the applicants' "re-arguments" warrant response. First of all, Wyandot is merely attempting to preserve its rail access to the markets in which it is now competitive. Thus, its efforts were devoted to preserving the most efficient routes and services necessary for Wyandot to remain a factor in the only markets in which the economics of aggregate production and sale permit it to serve today. The focus, therefore, is protection of economical rail access to markets or destinations, not the preservation of specific routes. Thus, not only are the applicants' arguments about the so-called "DT&I conditions"[6]

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[6] See, CSX/NS-209 at 14 and 15.

inappropriately raised in the Petition, but the applicants simply miss the point.

Applicants, for the very first time ever, suggest that Wyandot will, in time, find new markets to replace those that will be lost as a result of the subject transaction. See, CSX/NS-209 at 15. To the contrary, the Board recognized the uniqueness of aggregate transport by rail in Decision No. 89, and not one party has ever before seriously alleged that Wyandot would ever be able to secure "replacement" business. In fact, Wyandot has already made clear that it will gain access to no new markets to offset the losses it will suffer as a result of the subject transaction. See, Wyandot-5 at 23 ("Wyandot will not... find itself enjoying competitive rail access to markets for which it is now non-competitive"). The applicants never disputed this assertion until now, and the record before the Board simply does not support the applicants' new claims. The fact is, no allotted amount of time will make new aggregate markets materialize out of thin air, despite what the applicants would have the Board believe.

Unfortunately, that is not the end of the wild stabs that the applicants make to justify a modification of the Board's Decision No. 89. Among other inappropriate "red herrings" that the applicants toss into their Petition is the assertion that Wyandot's loss of single carrier service to many markets is not really a hardship, since Class I - to - short line "spinoffs" create "1-to-2" situations all of the time. See, CSX/NS-209 at

15, fn. 11. Wyandot, however, is not seeking protection from such a spinoff, but it has established that, while aggregates can and do move by rail in single-carrier service, aggregate transport is rarely (if ever) economical when two or more Class I carriers must participate in a similar move. Equating Class I - shortline joint service to two-Class I carrier service is, as the Board should recognize, like comparing apples to oranges. More fundamentally, however, the Board will (hopefully) ask what business the applicants have making such arguments at this phase of the proceeding in the first place.

III. CONCLUSION

Unfortunately, the protective conditions extended to aggregate producers such as Wyandot have satisfied no one. Wyandot continues to believe that the trackage rights form of relief requested in its earlier filings is a far simpler, more easily enforced, and all-encompassing solution to the harms that it would otherwise experience as a result of the subject transaction. It is highly skeptical that the relief prescribed by the Board will work. The applicants, on the other hand, are frustrated that they are barred by the Board's decision from washing their hands of Wyandot in five year's time. They are upset that the Board did not effectively "rubber stamp" a relief package that is merely designed to make the applicants look less insensitive to the more difficult aspects of this transaction.

But Wyandot recognizes that the Board is more than a "rubber stamp" for Class I railroads, and that the Board will continue to abide by its decision to provide lasting and meaningful relief in favor of shippers such as itself. Although disappointed with the Board's Decision No. 89, and outraged at the applicants' continued 13th hour efforts to counter Wyandot's position, Wyandot is pleased that the Board recognized the impact of the subject transaction on Wyandot's business future -- a future that Wyandot hopes the Board will preserve well beyond a period of five years. There is critical comfort in the Board's determination not to limit its relief to the five year period that the applicants prefer. Were the Board to modify its conditions to ensure relief only for a five year period, such a change would, from the beginning, make the Board's decision entirely ineffective and wholly objectionable to Wyandot.

Primarily <u>because</u> the Board has elected to impose protective conditions without time limitations in favor of Wyandot, Wyandot has decided to take a "wait-and-see" approach to the subject transaction. Only when they are applied will Wyandot (and the Board, for that matter) be able to determine whether or not the Board's conditions are truly meaningful, enforceable, and effective. If the Board were to erode the scope of the relief it has provided, it would inexplicably convey the message that its concern for Wyandot's future traffic patterns is a matter only worthy of attention for a period of five years. Such action would also convey the message to the rail shipping community that

the Board regards as shipper-oriented "protection" steps designed merely to delay the inevitable, undisputed harms of a major railroad transaction for a period of time acceptable to the involved Class I railroads.

The Board should stand firm in its commitment to extend to Wyandot lasting and meaningful protective relief. Its decision as concerns aggregate producers such as Wyandot is sufficiently clear -- the relevant protection does not contain any specific time limitations. The Board has heard Wyandot and the State of Ohio, and it has avoided imposing any sort of mere "stay of execution." Indeed, the Board has before it absolutely no valid reason to entertain any reconsideration of the protective conditions granted to Wyandot. The applicants' Petition -- exclusively a petition for reconsideration under 49 CFR §1115.3 -- fails to demonstrate changed circumstances or to allege material error. Finally, it is time for the Board to stop accommodating the applicants' 13th hour litigation tactics, including the applicants' constant efforts to introduce new evidence and argument.

For the foregoing reasons, the Board should deny the applicants' Petition, at least to the extent that it addresses the protective conditions the Board has imposed in favor of aggregate producers such as Wyandot.

Respectfully submitted

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Counsel for Wyandot Dolomite, Inc.

DATED: September 1, 1998

CERTIFICATE OF SERVICE

I hereby certify that I have this 1st day of September, 1998, served copies of the foregoing document upon the Primary Applicants, ALJ Jacob Leventhal, and all parties of record by means of U.S. mail, first class postage prepaid, or by means of more expeditious delivery.

Robert A. Wimbish

Ohio Rail Development Commission

50 West Broad Street, Suite 1510 • Columbus, Ohio 43215 • (614) 644-0306 phone • (614) 728-4520 fax

August 28, 1998

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

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

CSX/NS-209, Petition for Reconsideration of Decision No. 89 of Applicants CSX Corporation, CSX Transportation, Inc., Norfolk Southern Corporation and Norfolk Southern Railway Company

Dear Mr. Williams:

I am writing on behalf of the State of Ohio (State) in response to a recent filing entitled as CSX/NS-209, "Petition for Reconsideration of Decision No. 89 of Applicants CSX Corporation, CSX Transportation, Inc., Norfolk Southern Corporation, and Norfolk Southern Railway Company" (hereafter, the Petition). In particular, I am writing to express the State's opposition to that portion of the Petition wherein the Applicants[1] request the Board to reconsider and modify the scope of the relief granted to two Ohio-based aggregate and lime producers, Wyandot Dolomite, Inc. (Wyandot) and National Lime & Stone (NL&S). While the Applicants have largely cooperated with the State to promote safe rail transportation in Ohio, and while the Applicants have generally committed to preserving rail competition in Ohio, the State is dismayed and deeply disappointed by the Applicants' efforts to erode the protective relief the Board clearly granted to Wyandot and NL&S. In this respect, the Applicants' Petition is unjustified, contrary to the objectives of the Board, and wholly inconsistent with the interests of Ohioans.

As the record in this proceeding reflects, both Wyandot and NL&S established that each would suffer considerable, permanent injury without the preservation of the single-carrier rail routes that each company enjoys today. There is nothing in the record to establish that the harms to Wyandot or NL&S are merely "transitory," or that such harms will abate over time. For that reason, the State strongly supported Wyandot and NL&S in their respective requests for the imposition of certain trackage rights conditions (extremely modest in scope) that would provide lasting protection to these companies and promote the most efficient transport of aggregates and

[1] "Applicants," for the purposes of this submission, are CSX Corporation, CSX Transportation, Inc., Norfolk Southern Corporation, and Norfolk Southern Railway Company.

EXHIBIT A

similar commodities in and around the State of Ohio. At the Board's June 4th hearing in this proceeding I made clear that Ohio supported Wyandot and NL&S in their efforts to obtain lasting, permanent relief from the otherwise inevitable harms of the subject transaction. Short-term conditions such as those "proffered" by the Applicants fail to do anything more than delay the harm Wyandot and NL&S will suffer.

I am aware that Wyandot and NL&S are disappointed with the protective conditions the Board ultimately elected to impose in their favor. I can understand their misgivings and skepticism that the "relief" they obtained will prove truly effective. However, the State was pleased to find that the Board elected to grant certain relief over and above what the Applicants would have had the Board grant. Indeed, the State is satisfied that, with respect to the preservation of single-carrier routings, the Board wisely recognized that the harms threatening Wyandot and NL&S are not merely "transitional," and imposed conditions that exceeded the Applicants' intent to provide only short-term relief.

Now the Applicants would have the Board reverse itself and further circumscribe the relief it has extended to Wyandot and NL&S. To the State, the Applicants' efforts here suggest that they expect the Board merely to "rubber stamp" as adequate any protective conditions to which the Applicants are willing to accede, but that the Board should go no further. There is no basis to support Board reconsideration. Further, any such modification designed to narrow the scope of the protective conditions imposed in favor of Wyandot and National would be carried out at the expense of the State of Ohio, its highways, its work force, and the environment.

For all of these reasons, the Board should at the very least preserve the scope of the relief it has already tendered to Wyandot and NL&S, and uphold the plain language of the protective conditions imposed here. I am confident that the Board's protective conditions reflect a refusal to subscribe to the Applicants' Petition, as well as a commitment to prescribe meaningful and lasting protective relief. With respect to the conditions granted in favor of Wyandot and NL&S, the State of Ohio submits that the Board must deny the Applicants' Petition for Reconsideration.

Respectfully submitted,

Thomas M. O'Leary
Executive Director
Ohio Rail Development Commission

Enclosures: 25 copies

cc: All Parties of Record

STB FD 33388 9-1-98 D 190926

19652C

BEFORE THE
SURFACE TRANSPORTATION BOARD

EP-L-17

Finance Docket No. 33388

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

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REPLY OF INDIANAPOLIS POWER & LIGHT COMPANY IN OPPOSITION TO PETITION OF THE INDIANA RAIL ROAD COMPANY FOR RECONSIDERATION OF DECISION NO. 89

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Dated: September 1, 1998
Due Date: September 1, 1998

IP&L-17

UNITED STATES OF AMERICA
DEPARTMENT OF TRANSPORTATION
SURFACE TRANSPORTATION BOARD

Finance Docket No. 33388

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

REPLY OF INDIANAPOLIS POWER & LIGHT COMPANY IN OPPOSITION TO PETITION OF THE INDIANA RAIL ROAD COMPANY FOR RECONSIDERATION OF DECISION NO. 89

Introduction and Summary

Indianapolis Power & Light Company ("IPL") hereby replies in opposition to the "Petition of The Indiana Rail Road Company for Reconsideration of Decision No. 89" (INRD-2) ("Petition"). IPL sincerely appreciates the considerable time and attention the Board already has devoted to the detailed and complicated circumstances that require protective conditions at IPL's Stout Plant in order to preserve IPL's existing competitive options. The Board has already spent a substantial amount of time on the very issues that INRD now seeks, belatedly, to address. The Board should not, and need not, address them again, but should simply deny INRD's untimely Petition for Leave to Intervene for the reasons set forth in IPL's separate Reply (IP&L-16), filed simultaneously with this Reply. **Moreover, CSX, INRD's parent, and one of the primary Applicant in this proceeding, opposes INRD's reconsideration Petition and has stated that**

it accepts the Board's condition granting NS direct trackage rights into the Stout Plant. CSX-163 at 3 n.1.

If the Board nevertheless addresses the merits of INRD's reconsideration Petition, it should first recognize that INRD misstates IPL's prior position in this litigation. IPL did not seek only to preserve its existing build-out option, but also its existing rail-to-rail competition at the Stout Plant which Conrail provides for Indiana Southern Railroad ("ISRR")-origin coal movements. Accordingly, the Board should adhere to its conclusion that granting NS trackage rights to serve the Stout Plant directly preserves IPL's pre-Transaction competitive options from Conrail for ISRR-origin coal movements, and was therefore justified. The current competitive circumstances caused IPL to achieve a relatively low switching charge, as the Board recognized (Decision No. 89 ("Decision") at 117). It is also correct, as the Board observed, that IPL may not be able to cause INRD to maintain that low switching charge in the future when INRD's parent CSX takes over the Conrail lines in Indianapolis. Id. Therefore, the only way to maintain the current competitive circumstances at the Stout Plant was to give NS direct access.

Moreover, INRD asserts without authority that the 29 cents/car-mile trackage rights does not apply to INRD. INRD-2 at 7 n.5. That is simply wrong. First, when IPL asked CSX and NS in discovery if the 29 cents/car-mile fee would apply to NS movements to the Stout Plant, CSX and NS stated (in CSX/NS-51) "NS will pay the 29 cents per car-mile." Second, when IPL challenged the 29 cents/car-mile trackage rights fee proposed by CSX and NS, INRD's parent CSX submitted rebuttal testimony which accepted IPL's premise that the proposed trackage rights fee would apply to direct movements by NS into Stout and Perry K. CSX/NS-177, Vol. 2B, Whitehurst V.S. at HC-681. Witness Whitehurst contended that the proposed charge contested by IPL should have been adopted by the Board, as it was, despite IPL's objections.

Decision at 94, 140. However, nowhere in Witness Whitehurst's testimony or in the Board's analysis did either respond to IPL's arguments by asserting or concluding that the proposed fee would not apply at the Stout Plant. Had the proposed trackage rights fee not applied to NS movements to the Stout Plant, one would have expected either Witness Whitehurst, on behalf of CSX, or the Board, to have said so, rather than to have analyzed the reasonableness of the fee in response to IPL's contentions. Neither did. It follows that INRD's belated contention that the proposed fee does not apply to movements into the Stout Plant is simply incorrect, and in any event comes far too late in the proceeding to be considered now. Had CSX or INRD asserted that the 29 cents/car-mile fee did not apply to movements to the Stout Plant, IPL would have taken discovery to determine what charge would apply. It would thus be fundamentally unfair to IPL now to conclude that the charge proposed by CSX and litigated by IPL did not apply to IPL's movements to the Stout Plant, long after the discovery and the evidentiary phases have ended.

IPL therefore urges the Board to deny INRD's Petition, for the reasons stated herein and also because INRD's parent, CSX, itself opposes INRD's belated Petition (at 1 n.1).

I.

INRD'S PETITION IGNORES THE BOARD'S RATIONALE FOR PROVIDING NS DIRECT ACCESS TO THE STOUT PLANT, WHICH WAS BASED ON THE FAVORABLE SWITCHING CHARGE THAT IPL NOW ENJOYS DUE TO COMPETITION FROM CONRAIL FOR INDIANA SOUTHERN RAILROAD-ORIGIN MOVEMENTS

The Board's rationale for granting relief at the Stout Plant was based on its finding that IPL now enjoys the benefit of rail-to-rail competition for coal originated on ISRR, routed over Conrail, and then switched via INRD. Decision at 117. Although IPL has been able to maintain the current, favorable switching charge due to that competition, the Board correctly found that

Applicants only offered to maintain it "for the immediate future." Id. Thus, the Board adopted a **permanent** solution -- direct access via NS -- rather than to have to impose a regulatory remedy -- a capped switching charge -- indefinitely (which would have required that this proceeding never end). The Board's remedy was appropriate, because CSX's takeover of Conrail's lines in Indianapolis will be **permanent** as well, avoiding the need for endless regulatory supervision of the switching charge.[1] Only by giving NS direct access to the Stout Plant can IPL maintain the present, vigorous rail-to-rail competition it enjoys at the Stout Plant.[2]

Without the Board's grant of direct NS trackage rights into the Stout Plant, IPL would be at the mercy of CSX/INRD when it loses the alternative routing of ISRR/Conrail("CR")/INRD

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[1]Moreover, long after the 1980s litigation in which IPL succeeded in obtaining rulings that the astronomical switching charge Illinois Central Gulf Railroad (the predecessor owner of the line serving Stout before INRD bought it) sought to impose was excessive, the Board has ruled that such switching charges cannot be challenged, apparently as an expansion of the rationale underlying the Board's "bottleneck" decisions. Omaha Public Power District v. Union Pacific R.R., No. 42006 (served Oct. 17, 1997), petition to reopen pending. While IPL respectfully disagrees with those rulings, they do now appear to bar IPL from again obtaining a favorable switching charge through litigation.

[2]INRD's Petition is misleading in characterizing IPL's requests to the Board for protective conditions as focusing only on preservation of IPL's build-out option. While IPL certainly asked the Board to preserve its build-out option, IP&L-3 at 18-20; IP&L-11 at 21, the bulk of IPL's Supplemental Comments (IP&L-3) and its Supplemental Brief (IP&L-11) also focused on the unique circumstances and consequences stemming from the proposed transaction's replacement of Conrail (the primary carrier serving Indianapolis) by CSX (owner and controller of INRD) and the need for direct access from NS or ISRR to the Stout (and Perry K) Plants. See IP&L-11 at 4-7, 16-21, 30-31, 37; see also IP&L-3 at 21-27, ISRR-9, Weaver V.S. at 4-11 and Crowley V.S. at 12-13. As IPL explained and the Board found in providing IPL relief at the Stout Plant (Decision at 117), the loss of Conrail would substantially alter the competitive dynamics that IPL experiences at the Stout Plant. Id. Accordingly, IPL sought trackage rights for NS (and ISRR) directly into the Stout Plant and the Board granted them to NS with an interchange to be established with ISRR (Decision at 117) to serve the Stout Plant directly so as to "approximate more closely pre-transaction market conditions." Id. INRD's omission of the other contentions of IPL was critical to its false assertion that IPL itself contended that merely preserving IPL's build-out option would preserve the current competitive circumstances.

(switch), its rail-to-rail competition at the Stout Plant, because there would no longer be a constraint to discipline INRD's rates and switching charges. As the Board found, CSX/INRD was willing to maintain IPL's current, favorable switching charge for ISRR-origin coal movements, "but only for the immediate future." Id.

The ISRR/CR/INRD (switch) alternative, not truck competition, has disciplined INRD at the Stout Plant, as IPL's and ISRR's evidence asserted and the Board found. Decision at 117. Under that favorable switching charge (that itself is mostly absorbed by Conrail), Conrail/ISRR[3] has competed effectively with INRD at the Stout Plant.[4] Mr. Michael Weaver, Manager of the Fuel Supply Organization of IPL, explained the impact of ISRR/CR/INRD (switch) alternative as a discipline on INRD's rates:

---

[3]IPL was concerned because of NS's limited presence in Indianapolis following the transaction, NS would not be able to compete effectively with CSX. That is why IPL asked the Board to ensure ISRR's presence by granting it direct access into the Stout Plant from the southern Indiana coal fields and also by granting NS direct access to the Stout Plant from Western and Eastern coal fields. In order to move southern Indiana-origin coal to the Stout Plant, NS would have to route the coal from southern Indiana through Louisville, Kentucky and St. Louis, Missouri and then north of Indianapolis before bringing the coal south into Indianapolis. NS is therefore obviously not in a position to effectively compete with INRD. Although the Board did not grant IPL every aspect of the relief it requested, the Board attempted to strike a competitive balance by giving NS direct access to the Stout Plant. IPL understands that NS is still pondering how it will conduct the "island" operations expected if it in Indianapolis by the Board and IPL.

[4]The details of IPL's switching charge and its history can be found in the Highly Confidential versions of IP&L-3 at 8-9, IP&L-11 at 31, and ISRR-9 at 10. Whereas the switching charge is now "favorable," as the Board found (Decision at 117), IPL explained that, in the past, when the INRD line was owned by Illinois Central Gulf Railroad (and Mr. Hoback was employed there), ICG tried to impose a switching charge of **$1229 per car, or over $12/ton just for the switching**, which is obviously absurd when compared to the current, highly confidential level of the charge. Perhaps it was that **$1229 per-car switching charge** that Mr. Hoback had in mind when he retained new counsel to argue (for the first time in this proceeding) in INRD's reconsideration Petition that IPL should have to pay a "market-based" trackage rights fee for NS direct access to the Stout Plant.

> In fact, when IP&L was negotiating a new contract with INRD, it used ISRR/Conrail and then INRD for switching, and the rail rate for that alternative was nearly identical to the INRD rate . . . Mr. Hoback at INRD agreed to lower our rate in return for a volume commitment of at least [%] of our business. He agreed to retain our [favorable] switching charge, but only because ISRR/Conrail would get no more than the remaining [%] of Stout's business. (Most of that switching charge was absorbed by Conrail under our contract with it.)

ISRR-9, Weaver V.S. at 10. As a result of this negotiation, IPL convinced INRD to lower its rate by about 20%. Id. ; CSX/NS-177, Vol. 2B, Vaninetti V.S. at P-506. The reality of ISRR/CR as a competitive threat to INRD was demonstrated beyond doubt by IPL's actual use of ISRR/CR to move significant amounts of coal to Stout in 1995 and 1996. E.g., IP&L-11 at 30. If IPL were to be without a competitive restraint to discipline INRD/CSX at the Stout Plant, it is likely that, beyond the immediate future, IPL would lose both the rate reduction that it successfully negotiated with INRD and the favorable switching charge that it won long ago.

The Department of Justice ("DOJ") recognized the competition afforded by Conrail at the Stout Plant and the need for the Board to impose conditions to preserve that competition. DOJ-2 at 11-12, 14. DOJ concluded that "Conrail therefore does provide significant competition at Stout. If the Board does not impose conditions to replicate this lost competition, then the prices Stout pays for its coal transportation are likely to rise." Id., at 11-12.

Moreover, CSX, INRD's parent, and one of the primary Applicant in this proceeding, **opposes** INRD's reconsideration Petition and in fact stated that it **accepts** the Board's condition granting NS direct trackage rights into the Stout Plant. CSX-163 at 3 n.1. In its Reply to IPL's Petition for Clarification or Reconsideration (IP&L-15), CSX stated:

> [a]t the behest of a minority shareholder [presumably Mr. Thomas G. Hoback, INRD Chairman, President, and CEO] the Indiana Rail Road ("INRD") has sought leave to file a petition for reconsideration, which challenges NS's ability to obtain direct access to the Stout plant over trackage rights provided by INRD. INRD-1, INRD-2. CSX does not support the petition for reconsideration,

which was filed without its consent and against its will. In fact, CSX accepts the Board's conditions as set forth in Ordering Paragraph #23 of Decision No. 89.

Id. INRD has therefore engaged the Board in a useless act (for which it cites no authority) because CSX (as INRD admits (INRD-2 at 2 n.3)) could compel INRD to grant the trackage rights to NS in any event. In these circumstances, it would be unprecedented for the Board to act upon INRD's reconsideration Petition in view of CSX's objection -- particularly given that it is INRD's parent.

It is, of course, CSX's 89-percent ownership of INRD, and INRD's admission that CSX controls it, that is at the heart of IPL's concerns. Conrail now has the ability **and incentive** to provide service to the Stout Plant **in competition against INRD**. If ISRR/CR did not compete vigorously to serve IPL, Conrail would lose (and has lost) the business to INRD. But when CSX takes control of Conrail's lines, there would be no motivation on the part of CSX to compete with its subsidiary INRD. Without the Board's imposed condition granting NS direct trackage rights into the Stout Plant, ISRR alone could not achieve what ISRR/CR now achieves. Moreover, there is no reason for CSX to retain the favorable switching agreement that Conrail has agreed to provide to IPL because CSX's alter ego INRD would get IPL's Stout Plant business in any event.

Because of the unique circumstances in Indianapolis, the Board does not have the ability to recreate precisely IPL's pre-Transaction situation. Therefore, the Board correctly, and consistent with its intent to "approximate more closely pre-transaction market conditions" (Decision at 117), granted IPL a protective condition -- direct access from NS -- that comes as close as possible to retaining the current competitive circumstances. The Board should not be confused by INRD's attempt to leave IPL with only its current build-out option, when it has

other rail-to-rail competition today. INRD's assertion that the Board's condition protecting IPL's build-out option is sufficient to maintain the status quo ignores the powerful competitive discipline that ISRR/CR service, **without a build-out**, actually has provided in the past and potentially does today.

II.

INRD'S CLAIM THAT THE 29 CENTS/CAR-MILE TRACKAGE RIGHTS DOES NOT APPLY TO MOVEMENTS BY NS TO THE STOUT PLANT IS CONTRARY TO CSX'S DISCOVERY RESPONSES AND EVIDENCE.

A. CSX Has Admitted that the 29 Cents/Car-Mile Trackage Rights Fee Applies to NS Movements to the Stout Plant.

In August 1997, IPL served Applicants with its second set of interrogatories (IP&L-2). IPL asked Applicants, "[w]ith respect to deliveries of coal to, and pickup of empty coal cars from, IP&L's Perry K Plant and Stout Plant," whether NS or IPL would pay CSX the 29 cents/car-mile trackage rights fee in Indianapolis (IP&L-2, relevant pages attached as Attachment A hereto). Applicants responded that "NS will pay the 29 cents per car-mile" (CSX/NS-51, relevant pages attached as Attachment B hereto). Had CSX subsequently concluded that its response was not correct and that the proposed 29 cents/car-mile trackage rights fee not applied to movements of coal to the Stout Plant (and Perry K Plant), CSX was under an obligation to have so informed IPL. Therefore, CSX (and INRD) must be bound by CSX's representation to IPL that the proposed fee would apply at the Stout Plant. CSX never provided any other or different responses to IPL's discovery requests. Therefore, INRD's assertion comes entirely too late, even if it is assumed to be correct. As we now show, however, it is not.

B. INRD's Assertion That the 29 Cent/Car-Mile Trackage Rights Fee Does Not Apply to INRD's Line into the Stout Plant Is Contrary to CSX's Testimony.

INRD stated without citation that the 29 cents/car-mile trackage rights fee proposed by CSX and NS and adopted by the Board over IPL's objection does not apply to movements into the Stout Plant. INRD-2 at 7 n.5. INRD's claim is incorrect, because CSX Witness Whitehurst, in his rebuttal testimony, began from the premise that the fee would apply to NS movements into the Stout (and Perry K) Plants, CSX/NS-177, Vol. 2B, Whitehurst V.S. at HC-681, and responded instead to IPL's evidence only about the alleged **reasonableness** of the proposed fee. The Board's Decision (at 94, 140) also was premised on the understanding that the proposed fee would apply to movements to the Stout and Perry K Plants. It is therefore untenable for INRD, as CSX's subsidiary, now to argue the opposite, i.e., that the proposed charge would **not** apply to movements via NS to the Stout Plant.

Conclusion

INRD's reconsideration Petition simply reargues the same points CSX has previously argued and lost. There is no need to hear the same arguments again. In any event, the Board's condition granting NS direct trackage rights into the Stout Plant preserves IPL's existing competition at the Stout Plant. This condition is entirely consistent with the Board's intention to "approximate more closely pre-transaction market conditions" (Decision at 117) and is essential to prevent substantial harm to IPL.

Accordingly, INRD's late-filed "Petition for Reconsideration of Decision No. 89" should be denied.

Respectfully submitted,

Michael F. McBride

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Attorneys for Indianapolis Power & Light Company

Attachment A

IP&L-2

UNITED STATES OF AMERICA
DEPARTMENT OF TRANSPORTATION
SURFACE TRANSPORTATION BOARD

Finance Docket No. 33388

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

INDIANAPOLIS POWER & LIGHT COMPANY'S
SECOND SET OF INTERROGATORIES
TO APPLICANTS

To: Conrail
c/o Gerald P. Norton, Esq.
Harkins Cunningham
1300 Nineteenth Street, N.W.
Suite 600
Washington, DC 20036

To: Norfolk Southern
c/o John V. Edwards, Esq.
Patricia Bruce, Esq.
Zuckert, Scoutt
& Rasenberger, L.L.P.
888 17th Street, N.W.
Washington, D.C. 20036

To: CSX
c/o Drew A. Harker, Esq.
Chris Datz, Esq.
Susan Cassidy, Esq.
Arnold & Porter
555 Twelfth Street, N.W.
Washington, DC 20004-1202

To: CSX
c/o David H. Coburn, Esq.
Steptoe & Johnson, L.L.P.
1330 Connecticut Ave., N.W.
Washington, DC 20036-1795

Pursuant to 49 C.F.R. §§ 1114.21-1114.31 and the Discovery Guidelines entered pursuant to the Order dated June 27, 1997 ("Discovery Guidelines"), Indianapolis Power & Light Company

claimed to be privileged, furnish a copy of those portions of the document that are not privileged.

7. If you want clarification concerning a Discovery Request, you are instructed to contact counsel for IP&L reasonably in advance of the response date.

8. These Discovery Requests are continuing in nature and you are under a duty to supplement or correct any responses that are incomplete or incorrect and otherwise supplement your responses in accordance with 49 C.F.R. § 1114.29.

INTERROGATORIES

With respect to deliveries of coal to, and pickup of empty coal cars from, IP&L's Perry K Plant and Stout Plant:

1. What charge or charges -- whether referred to as a "switching charge," "pickup delivery charge," or some other name -- will IP&L be expected to pay, if any, for coal originating on a railroad other than CSX or Indiana Rail Road after expiration of IP&L's current contract with Conrail?

2. If the answer to Interrogatory No. 1 is "none," to whom will IP&L be expected to pay the charge(s) referred to in Interrogatory No. 1 for each of the two IP&L destinations, if anyone?

3. Is it anticipated that NS will pay CSX 29 cents per car-mile for trackage rights in Indianapolis, or that IP&L will pay CSX 29 cents per car-mile for those trackage rights, or that IP&L will pay NS 29 cents per car-mile for those trackage rights?

4. If the information is not already provided in response to Interrogatories Nos. 1-3,

(a) Who will pay the 29 cents per car-mile trackage rights fee referred to at page 148 of Volume 2A of the Application?

(b) Who will pay the switching charge for switching performed by CSX in and around Indianapolis?

(c) Who will pay the "pickup delivery charges" referred to at page 148 of Volume 2A of the Application?

5. How will any or all of the fees and charges referred to in Interrogatory No. 4 be made applicable to the rates IP&L pay (a) immediately after the proposed transaction is approved, and (b) after any applicable contract expires?

6. Is the reference to Volume "8C" in response to Interrogatory No. 11 of IP&L's First Set of Interrogatories, dated August 7, 1997, supposed to be Volume "8B"?

Attachment B

CSX/NS-51

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' RESPONSE TO SECOND SET OF INTERROGATORIES AND APPLICANTS' SUPPLEMENTAL RESPONSE TO FIRST SET OF INTERROGATORIES, FIRST SET OF REQUESTS FOR PRODUCTION OF DOCUMENTS, AND FIRST SET OF REQUESTS FOR ADMISSIONS FROM INDIANAPOLIS POWER & LIGHT COMPANY

Applicants[1] hereby respond to the Second Set of Interrogatories from Indianapolis Power & Light Company ("IP&L" or "requester") (IP&L-2) and supplement the response to IP&L's First Set of Interrogatories, First Set of Requests for Production of Documents, and First Set of Requests for Admission.

GENERAL RESPONSES

The following general responses are made with respect to all of the requests and interrogatories.

---

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

coal originating on a railroad other than CSX or Indiana Rail Road after expiration of IP&L's current contract with Conrail?

1. Applicants object to the extent that requester seeks information concerning charges imposed by a railroad other than Applicants. Subject to this objection and their general objections, Applicants respond as follows: See Volumes 8B and 8C of the Application. Upon the expiration of the current contract between Conrail and IP&L, new charges will be subject to negotiation. Applicants do not know what those charges will be.

Interrogatory No. 2: If the answer to Interrogatory No. 1 is "none," to whom will IP&L be expected to pay the charge(s) referred to in Interrogatory No. 1 for each of the two IP&L destinations, if anyone?

2. See response to Interrogatory No. 1.

Interrogatory No. 3: Is it anticipated that NS will pay CSX 29 cents per car-mile for trackage rights in Indianapolis, or that IP&L will pay CSX 29 cents per car-mile for those trackage rights, or that IP&L will pay NS 29 cents per car-mile for those trackage rights?

3. Subject to their general objections, Applicants respond as follows: NS will pay the 29 cents per car-mile and Applicants do not know what the charges to IP&L will be.

Interrogatory No. 4: If the information is not already provided in response to Interrogatories Nos. 1-3,

(a) Who will pay the 29 cents per car-mile trackage rights fee referred to at page 148 of Volume 2A of the Application?

BEFORE THE
SURFACE TRANSPORTATION BOARD

FINANCE DOCKET NO. 33388

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

CERTIFICATE OF SERVICE

I hereby certify that I have served, this 1st day of September, 1998, a copy of the foregoing "Reply of Indianapolis Power & Light Company in Opposition to Petition of the Indiana Rail Road Company for Leave to Intervene [Out-of-time]" (IP&L-16) and "Reply of Indianapolis Power & Light Company in Opposition to Petition of the Indiana Rail Road Company for Reconsideration of Decision No. 89" (IPL-17), by first-class mail, postage prepaid, or by more expeditious means, upon all parties of record. The following persons were served by hand delivery or facsimile:

Office of the Secretary
Case Control Unit
ATTN: STB Finance Dkt. 33388
Surface Transportation Board
Mercury Building
1925 K Street, N.W.
Washington, DC 20423-0001
VIA HAND DELIVERY

Mr. Vernon Williams, Secretary
Surface Transportation Board
Mercury Building
1925 K Street, N.W.
Washington, DC 20423-0001
VIA HAND DELIVERY

David M. Konschnik, Director
Office of Proceedings
Surface Transportation Board
Mercury Building
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Patricia Bruce, Esq.
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Brenda Durham

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190725

LeBoeuf, Lamb, Greene & MacRae

L.L.P.

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

190725

September 1, 1998

VIA HAND DELIVERY

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

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

Dear Secretary Williams:

Enclosed are the original and 25 copies of the "Reply of Indianapolis Power & Light Company in Opposition to 'Petition of the Indiana Rail Road Company for Leave to Intervene [Out-of-Time]'" (IP&L-16) and "Reply of Indianapolis Power & Light Company in Opposition to Petition of the Indiana Rail Road Company for Reconsideration of Decision No. 89" (IPL-17) in the above-referenced proceeding. Also enclosed is a 3.5" diskette containing the Replies in WordPerfect format, and three additional copies of the Replies for time-stamping and return via our messenger.

ENTERED
Office of the Secretary
SEP 02 1998
Part of
Public Record

Respectfully submitted,

Michael F. McBride

Michael F. McBride
Attorney for Indianapolis Power & Light Company

cc(w/encl.): All Parties of Record

IP&L-16

BEFORE THE
SURFACE TRANSPORTATION BOARD

Finance Docket No. 33388

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

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REPLY OF INDIANAPOLIS POWER & LIGHT COMPANY IN OPPOSITION TO "PETITION OF THE INDIANA RAIL ROAD COMPANY FOR LEAVE TO INTERVENE [OUT-OF-TIME]"

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Attorneys for Indianapolis Power & Light Company

Dated: September 1, 1998
Due Date: September 1, 1998

IP&L-16

UNITED STATES OF AMERICA
DEPARTMENT OF TRANSPORTATION
SURFACE TRANSPORTATION BOARD

Finance Docket No. 33388

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

REPLY OF INDIANAPOLIS POWER & LIGHT COMPANY IN OPPOSITION TO "PETITION OF THE INDIANA RAIL ROAD COMPANY FOR LEAVE TO INTERVENE [OUT-OF-TIME]"

Introduction and Summary

Indianapolis Power & Light Company ("IPL") hereby replies in opposition to the "Petition of The Indiana Rail Road Company for Leave to Intervene (INRD-1)," which is clearly out-of-time, and otherwise unjustified. INRD was aware of the possible effect of this proceeding on its interests for more than one year, and had numerous opportunities to seek to intervene if it felt it necessary to do so, yet it did not, even though its Chairman and Chief Executive Officer was a witness in the proceeding against IPL. Now that its parent, CSX, **opposes** the relief INRD seeks, INRD has belatedly sought to intervene to reargue points CSX argued and lost. INRD makes no claim that it has new evidence or changed circumstances to present, but rather claims only that the Board made "material error." But **any** subsidiary of **any** losing party could now claim the same thing; that is not a reason to allow it to intervene. CSX and Norfolk Southern sought an expedited schedule in this proceeding, and have successfully opposed late-filed

intervention requests filed long ago as untimely. CSX's subsidiary INRD should not now be held to a different standard. In any event, the Board's Decision with respect to the matters raised by INRD on reconsideration was correct, as IPL explains in its separate Reply to that Petition.

Discussion

INRD's Petition for Leave to Intervene should be denied for the following reasons:

1. The Board ordered that notices of intent to participate be filed on or before August 7, 1997, not after its final Decision in 1998. Decision No. 6 at 5 (served May 30, 1997)(setting "F [i.e., June 23, 1997] + 45 days [i.e. August 7, 1997]" as the due date for notices of intent to participate); see also Decision No. 76 at 2 ("Movants indicate that their original jury verdict was rendered on September 9, 1997, but they have made no showing why they could not have appeared and made their alleged safety claims by the October 21, 1997 deadline."). While the Board many months ago granted requests for modest extensions of time to participate to entities who were engaged in settlement discussions (see Decision No. 50), the Board **denied** previous intervention requests that were filed **months ago** and well before the June 3-4, 1998 oral argument, even as to parties who claimed that they were not aware previously of the impact of the proceeding on their interests. Decision No. 82 at 2 ("Movants maintain that they had no notice of our deadlines. . . . In these circumstances, we must affirm our conclusion that movants' request to intervene, filed more than 5 months after the October 21, 1997 deadline, is too late.").[1]

2. Perhaps the most notable example of such a party was CONSOL, which sought leave to intervene on the ground that then-failure (in early April 1998) of NS and CSX to agree on the

---

[1] In contrast, the Board granted several requests for leave to file notices of intent to participate that were filed a relatively short time after August 7, 1997. Decision No. 43 at 1-2; see also Decision No. 57 at 4 (granting petition for leave to intervene filed October 17, 1997 by 24 members of Congress); but see Decision No. 21 at 2 (denying a request for more time to participate because of "the expedited procedural schedule adopted in this proceeding").

operation of the Monongahela coal lines was a change of circumstances justifying late intervention. The Board **denied** CONSOL's Petition, holding both that it was too late (even though filed in April 9, 1998, long ago and almost two months before oral argument, but because it had "not shown extraordinary or compelling reasons for permitting it to participate now") **and also because CONSOL is 50-percent owned by DuPont, apparently because DuPont was aware long before of the impact of this proceeding on its interests.** Decision No. 77 at 2 & n.5; see also Decision No. 79 at 2 (denying Cyprus Amax's Petition for Leave to Intervene on the ground that the issues Cyprus Amax and CONSOL wished to raise were raised by other parties and would be assessed by the Board). INRD is in a far worse posture than CONSOL to argue that it should **now** -- after the **final** Decision of the Board approving the transaction that its **parent, CSX**, commenced -- be allowed to intervene in out-of-time, because INRD does not allege **any** change of circumstances or new evidence, but merely "material error," about the same matters which have been at issue for most of this proceeding, and because INRD is **89-percent owned by CSX, one of the primary Applicants in this proceeding.** There is simply no conceivable basis for denying CONSOL's Petition, and granting INRD's Petition, when INRD (1) has no excuse for not having intervened to protect its interests long ago, whereas CONSOL arguably had good cause for its delay, and (2) INRD is 89-percent owned by CSX, which clearly has known at every stage of the possible risk to INRD's interests herein.

3. INRD also cannot, and does not, claim to have been unaware of the potential impact of this proceeding on its interests. In fact, in August 1997, counsel for IPL sought discovery information from INRD, which counsel for CSX, acting for INRD, opposed, but which requests

were permitted, compelling INRD to produce information in discovery.[2] Thus, for **over one year** INRD must have been aware that its interests were at risk in this proceeding. Yet, it did not intervene at that time.

4. On October 21, 1997, as INRD concedes, IPL filed Comments (ACE, et al.-18) and Supplemental Comments (IP&L-3) that put INRD's interests at issue in the proceeding. Through CSX, INRD's parent company, INRD knew or is deemed to have known of the potential effect that IPL's requested conditions might have on it. Yet it did not seek leave to intervene promptly thereafter.

5. On the same day, October 21, 1997, Indiana Southern Railroad filed a responsive application (ISRR-4) seeking, inter alia, direct access to IPL's Stout Plant, and the Department of Justice filed comments and evidence supporting treatment of IPL's Stout Plant as a "2 to 1" facility and advocating that the Board adopt a competitive remedy for IPL as a consequence. INRD knew or should have known of those pleadings, yet it did not intervene at that time to protect its interests.

6. CSX submitted rebuttal testimony **from INRD Chairman, CEO, and President Hoback**[3] with its filing of December 15, 1997. CSX/NS-177, Vol. 2A, Hoback V.S. at 194-202 .

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[2] In fact, at that time counsel for CSX argued that CSX did not control INRD except for financial control. IP&L-3, Ex. 5, Tr. 20-22, Sept. 25, 1997 Discovery Conf. CSX did not appeal that determination by Judge Leventhal, and now INRD concedes that CSX does control it. INRD-2 at 2 n.3. Had CSX conceded the point a year ago, the Board and IPL could have been spared the need to address the issue.

[3] Although INRD states that "[t]he remaining 11% of the stock in Midland United Corporation is owned by interests not affiliated with CSXT," Petition for Leave to Intervene at 2, for clarity the Board should be aware that the 11% of the stock not owned by CSX is owned by Mr. Hoback, who is clearly affiliated with CSX for purposes of this proceeding. Moreover, CSX employees occupy 3 of the 5 seats on the Board of Directors of INRD.

Plainly, by that time, and obviously long before, INRD knew that its interests were potentially at risk in the proceeding. Yet, it did not seek leave to intervene at that time.

7. Mr. Hoback was deposed on January 9, 1998 by counsel for Indiana Southern Railroad Company, IPL, and the Department of Justice. Much of the deposition was consumed with questions and answers about the various matters INRD now seeks to have the Board address. Yet, INRD did not seek leave to intervene at that time. Indeed, despite previous claims that INRD was not subject to the control of CSX except financially, Mr. Hoback chose to be defended at that deposition by one of the counsel of record for CSX from Arnold & Porter, rather than the counsel INRD now has retained. That again was Mr. Hoback's choice, but it demonstrates that INRD's interests were being defended **by CSX**, and that INRD chose not to appear separately at that time.

8. On January 14, 1998, ISSR filed rebuttal evidence (ISRR-9) in support of its Responsive Application, which included a Verified Statement from an IPL Witness, Mr. Michael A. Weaver, Manager of IPL's Fuel Supply Organization, supporting direct access for ISRR to the Stout Plant. While INRD implies in its two Petitions that IPL did not support direct access to the Stout Plant, the fact is that, once ISRR filed its Responsive Application seeking precisely that, IPL supported ISRR in seeking that relief. IPL also supported direct access for NS to INRD in its October 21, 1997 Supplemental Comments of which INRD's Petitions quote only selectively. IP&L-3 at 18-27. In other words, at the time IPL filed those Supplemental Comments, it did not know that ISRR would seek direct access to its Stout Plant, so IPL sought such access for NS, to maintain its existing, rail-to-rail competition at the Stout Plant. However, once it was known to IPL that ISRR would seek such access, IPL supported it, including in the rebuttal evidence filed by ISRR, and in IPL's Supplemental Brief (IPL-11). It is simply a fallacy for INRD to suggest

that IPL only sought or claimed rail-to-rail competition at Stout because of the possibility of a "build out" to that Plant. Yet, INRD did not seek to intervene at the time that ISRR filed its rebuttal evidence, again seeking direct access to Stout.

9. In February 1998, IPL and ISRR, along with the Department of Justice, filed Briefs advocating direct access from one or more rail carriers other than INRD into the Stout Plant. INRD knew or should have known about those Briefs, yet it did not seek leave to intervene at that time to protect its interests.

10. On June 1, 1998, CSX filed a Notice of Intent to accept additional conditions with respect to IPL's concerns. Included in the filing was an earlier joint letter from CSX **and Mr. Hoback for INRD** to IPL offering it relief at Stout. INRD allowed CSX to make that filing on behalf of CSX and (implicitly) on behalf of INRD, even though INRD was a separate signatory on the joint letter. INRD did not seek leave to intervene at that time to protect its interests.

11. At the oral argument in these proceedings on June 4, 1998, counsel for CSX appeared on behalf of CSX **and (implicitly) INRD**, again demonstrating that INRD chose to have CSX defend its interests, rather than appear on its own behalf. There was nothing inappropriate about INRD's choice to appear in this proceeding through CSX's excellent counsel, but that was a choice that it made. It did not seek leave to intervene at that time to appear on its own behalf, even after counsel for IPL filed a Motion to Strike the June 1, 1998 Notice and Exhibits filed by CSX, **including the joint letter from CSX and INRD** (CSX-152).[4]

12. On June 8, 1998, the Board met in open Voting Conference to discuss the conditions it would adopt to the proposed transaction, and indicated that it would adopt conditions to

---

[4]Although IPL successfully moved to strike CSX-152, the Board allowed CSX to make an offer to IPL, at the oral argument, repeating the offer in the joint letter. CSX did so.

preserve rail-to-rail competition at the Stout Plant. Counsel for CSX, who presumably was still appearing (at least implicitly) on behalf of INRD, was present, and thus INRD knew or is deemed to have known of the Board's determination. Yet, INRD did not seek leave to intervene at that time.

13. Finally, on August 12, 1998, at the same time that INRD suddenly sought leave to appear separately in this proceeding, CSX itself has sought reconsideration in two separate Petitions, neither of which addresses the issues INRD addresses in its own Petitions for Leave to Intervene and for Reconsideration (INRD-1 and -2). There is no reason that CSX could not have addressed those issues itself, having defended INRD throughout the proceeding, through the same counsel (and obviously with the consent of both CSX and INRD).

14. Thus, **for over one year**, INRD's interests have been at risk in this proceeding, yet it chose, **with knowledge of the proceeding and the fact that its interests were at stake, not to intervene and appear separately.** For some reason, INRD now seeks leave, more than one year out-of-time, to do so, with no good cause for having waited so long. **Its excuse seems to be that CSX opposes its effort to intervene (Petition at 7-8) and the substantive relief it seeks ("INRD understands that CSX does not support this petition or the positions taken therein.").** But that is no excuse for granting the relief, but rather a reason to deny it. If CSX does not believe that the Board's decision merits reconsideration, the Board can be confident that it need not permit CSX's subsidiary to intervene in order to argue to the contrary. Indeed, the admission by INRD demonstrates that CSX could have, but chose not to, seek reconsideration on the grounds pressed by INRD, and CSX should not, therefore, be allowed indirectly (and perhaps over its objection) to seek relief it chose **not** to seek. In fact, since INRD concedes it is subject to CSX's control (INRD-2 at 2 n.3) ("CSXT, thus, is in a position to cause INRD to grant the

trackage rights in question to NS."), CSX could grant NS the very the trackage rights INRD opposes, thus rendering wholly unnecessary the Board's action. In the circumstances, there are ample reasons to conclude that INRD should not be allowed to raise issues on reconsideration that CSX not only chose not to raise, but in fact opposes.

15. Of all entities who might claim justification for late intervention in this proceeding, the foregoing history demonstrates that INRD probably has the worst case that any non-party could have. There is simply no reason that every other party should be held to the Board's long-prescribed schedule, but to let **a subsidiary of one of the primary Applicants** intervene out-of-time -- especially when it is over one **year** out-of-time.

16. In any event, INRD seeks to raise the same tired arguments that CSX has espoused throughout this proceeding about why IPL allegedly does not enjoy rail-to-rail competition at its Stout Plant. The Board has heard all of those arguments at great length from CSX which also retained other Witnesses to address the Stout Plant's circumstances. See, e.g., CSX/NS-177, Vol. 2B, Vaninetti V.S. at 500-22. INRD has thus had every opportunity to have the Board address whatever evidence and arguments it wished to raise, and has (through CSX) in fact done so.

17. In the circumstances, there is not a scintilla of good cause for INRD's extraordinarily late filing. The Board, having denied other late-filed requests to intervene that were filed much earlier in the proceeding, cannot now grant INRD's Petition for Leave to Intervene without adopting a double standard, one for Applicants (and their subsidiaries), the other for everyone else.

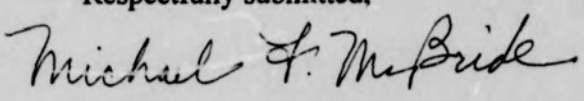
18. Moreover, there is nothing to distinguish INRD from any other entity that is now disappointed by the results of the Board's Decision No. 89. Should any subsidiary or minority

shareholder of a party now be allowed to intervene, if either is unhappy with the outcome? Surely not, or the Board's interest in expediting this proceeding **for the benefit of CSX and NS, and at their request,** would be totally undermined. INRD, as a subsidiary of CSX, is bound by CSX's election to seek expedited relief, oppose others' late interventions, and seek finality so that it can close the transaction and get on with implementing it. As a subsidiary of CSX, INRD (and, indirectly, CSX, as its 89-percent owned majority shareholder) should not be allowed to have it both ways, seeking relief it purportedly opposes.

Conclusion

Accordingly, for good cause shown, INRD's extraordinarily late-filed "Petition for Leave to Intervene" should be denied, as the Board has done with intervention requests filed months ago.

Respectfully submitted,



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Attorneys for Indianapolis Power & Light Company

Dated: September 1, 1998
Due Date: September 1, 1998

STB FD 33388 9-1-98 D 190924

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September 1, 1998

Honorable Vernon A. Williams
Office of the Secretary
Case Control Branch
ATTN: STB Finance Docket No. 33388
Surface Transportation Board
1925 K Street, N.W.
Washington, D.C. 20423-0001

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

Dear Sir:

Enclosed are an original and twenty-five (25) copies of the Reply of the City of Cleveland, Ohio to Petition for Reconsideration of Decision No. 89 in the above referenced proceeding. I am also enclosing an additional copy for date stamp and return with our messenger. Please note that a diskette in Microsoft Word 97 format is also enclosed.

Thank you.

Sincerely,

Charles A. Spitulnik.

Enclosure

P14995-1

CLEV-21

Before the
SURFACE TRANSPORTATION BOARD
Washington, D.C. 20423

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 THE CITY OF CLEVELAND, OHIO TO PETITION FOR RECONSIDERATION OF DECISION NO. 89

The City of Cleveland, Ohio, hereby submits this reply to the Petition for Reconsideration of Applicants CSX Corporation, CSX Transportation, Inc., Norfolk Southern Corporation, and Norfolk Southern Railway Company (CSX/NS-209)[1]. One of the issues Applicants raise in their Petition concerns the location of Wheel Impact Load Detectors ("WILD") in the greater Cleveland area. Applicants seek discretion in determining the placement of the WILD on CSX line on the west side of the City (the "WILD-west"), and seek authorization to install the WILD on the CSX line on the east side (the "WILD-east") approximately sixty miles to the east in West Springfield, PA. Cleveland agrees with CSX on the WILD-east, and agrees that CSX should have discretion as the placement of the WILD-west, but within carefully defined limits.

[1] In this Reply, CSX Corporation, CSX Transportation, Inc., Norfolk Southern Corporation, and Norfolk Southern Railway Company are collectively referred to as "Applicants"; CSX Corporation and CSX Transportation, Inc. are collectively referred to as "CSX"; and Norfolk Southern Corporation and Norfolk Southern Railway Company are collectively referred to as "NS".

The WILDs are intended, according to the Final Environmental Impact Statement, to be part of an early warning ring around the City that, along with other devises, will reduce the probability of freight train accidents and hazardous materials incidents by detecting high wide, and shifted loads; defective wheel bearings; dragging equipment; and other possible defects that could contribute to an accident." Final Environmental Impact Statement ("FEIS"), vol. 5, chapter 7 at 7-45. Other elements of this protective ring include hot bearing detectors, dragging equipment detectors and shifted load/high-wide indicators. *Id.* at 7-46.

Cleveland agrees that relying on the WILD that is located sixty miles away, rather than requiring a new WILD-east within the 20 mile limit ordered in the FEIS and Decision No. 89 (Appendix Q at 408-409) is appropriate. With respect to the WILD-west, CSXT seeks discretion as to its placement on the Berea - Greenwich line. The City agrees that CSX should be allowed to use its expertise to determine the appropriate placement for the WILD-west, and that the WILD-east can be located at West Springfield, PA, with two important limitations:

(1) The distance of the WILD-west from the City should be no greater than 60 miles. To the best of Cleveland's understanding, this will give CSX substantial flexibility in determining where to place the WILD-west on this line segment.

(2) Applicants should be required to place a WILD, or any of the other devises required to provide the early warning ring around the City, on both tracks where there are double tracks over which

trains can be operated in both directions. Condition 26(C) in the FEIS, as adopted in Decision No. 89, requires Applicants to place WILDs and the other listed devises to "scan all their trains entering the Greater Cleveland area." Decision No. 89, App. Q at 408. If the line segments on which the WILDs and other devises are placed are double track lines, and if each track is automatically signaled in a way that permits operation in either direction, Applicants can not place the WILD or other devise on only one of those tracks. If the predominant use of a track is for movement in a particular direction, that does not remove the possibility that a train could be moving towards the City on the line other than the one usually used and that a defect on a train on that line would escape detection. Placement of WILDS and other early warning devises on both tracks will guarantee that all trains entering the City and its environs will be scanned by the devises installed in accordance with Condition 26(C).

CONCLUSION

Cleveland does not object to the changes sought in Condition 26(C), as long as the WILD-west is not placed further away than Greenwich, Ohio, thus providing the protection that the early detection ring is intended to provide. Moreover, when demonstrating compliance with this Condition, Applicants should be required to demonstrate that the location they select will meet the

objective of scanning all trains entering the Greater Cleveland area, not just those moving in the predominant direction on a double track line. Subject to the Applicants' fulfilling these conditions, Cleveland does not oppose the relief requested with respect to Condition 26(C).

Respectfully submitted,

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Dated: September 1, 1998

Counsel for the City of Cleveland, Ohio

CERTIFICATE OF SERVICE

I hereby certify that on September 1, 1998, a copy of the foregoing Reply of the City of Cleveland, Ohio to Petition For Reconsideration of Decision No. 89 was served by hand delivery upon the following:

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

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John V. Edwards
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and by first class mail, postage pre-paid upon all other Parties of Record in this proceeding.

Charles A. Spitulnik

STB FD 33388 9-1-98 D 190923

NLS-10

190923

BEFORE THE
SURFACE TRANSPORTATION BOARD

Finance Docket No. 33388

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

D

RESPONSE OF NATIONAL LIME AND STONE COMPANY TO PRIMARY APPLICANTS' PETITION FOR RECONSIDERATION

Pursuant to 49 C.F.R. § 1104.13(a) (1997), National Lime & Stone Company (National) hereby responds to the Request for Reconsideration the Primary Applicants filed on August 12, 1998. In Decision No 89, the Surface Transportation Board (Board) recognized that the Primary Applicants' acquisition of Conrail would have an adverse impact on National. In Paragraph 43 of Decision No. 89, the Board imposed a merger condition purportedly designed to ameliorate this adverse impact. In two filings with the Board, one submitted prior to the June 8, 1998 voting conference and one filed on June 18, 1998, National explained in detail that the condition imposed by the Board alleviates only a small portion of the harm National will experience as a result of the Conrail acquisition.

Despite the unsupportably narrow condition imposed in favor of National, the Primary Applicants seek through their Petition for Reconsideration to limit the condition still further. The Primary Applicants claim that the Board should limit the duration of the condition to five years. The Board should reject the Primary Applicants' request. As it stands, the condition imposed in Paragraph 43 of Decision No. 89 fails to achieve the Board's stated goal of preventing National

from experiencing a loss of essential service. Granting the Primary Applicants' request to impose a five-year time limit would only magnify the inadequacy of the Board's condition.

I. Background

Through the submission of substantial record evidence, National established that the "one to two" effects of the Conrail transaction as proposed would rob National of adequate transportation service. See June 4, 1998 Oral Argument Transcript (at pp. 130-31) and NLS-2 (National's October 23, 1997 Protest and Request for Conditions and the attached Verified Statement of Ronald Kruse). During oral argument before the Board on June 4, 1998, National stated its request for conditions in clear terms: "National only asks that the status quo be maintained. We plead that the Board order the Applicants to negotiate with National the arrangements needed to assure the continuation of the single-line service that is the lifeblood of National's business, and required by National's customers to obtain necessary industrial minerals at reasonable costs." June 4, 1998 Oral Argument Transcript, at p. 131.

In support of this request, National explained the importance to National's business of existing single-line movements from both Bucyrus (Spore) and Carey, Ohio to points in eastern Ohio, Pennsylvania and West Virginia. As explained in National's prior pleadings, National currently relies on single-line service from Conrail (1) to ship industrial minerals from Carey to eastern markets, and (2) to ship aggregates from Bucyrus to eastern markets. If National "were faced with the prospect of 'two line hauls' from Carey and Bucyrus to points east of Crestline, Ohio, it would suffer the loss of all business currently shipped by Conrail from these locations[.]" NLS-2, Kruse VS at p. 6. In addition, no other form of transport -- including joint-line rail movements or trucking -- is a viable alternative to National's existing single-line service from

Conrail because of increases in costs and reductions in reliability and quality of service that would attend these other forms of transport. Id.

In their rebuttal argument at oral argument, counsel for the Primary Applicants for the first time made several sweeping claims that appeared directly to address National's protest and request for conditions. Richard Allen, Esq., speaking for Norfolk Southern, stated:

> With respect to the three Ohio stone shippers that have presented requests for conditions in this case, we have had discussions with them with respect to their problems and have tried very hard to work out their problems. We have not succeeded in reaching an agreement with all of them.
>
> However, for perfectly valid and independent commercial reasons, Norfolk Southern and CSX concluded that, well, indeed, if a reciprocal grant -- not a reciprocal, but a grant to each other of operating rights would make sense, a grant to each other of operating rights that would permit one or the other of them to continue providing single-line service to those three shippers on the -- for the movements that they are currently moving, would make sense to both of our railroads.

June 4, 1998 Oral Argument Transcript, at pp. 371-73 (emphasis added).

In a June 6, 1998 letter, the Primary Applicants unilaterally filed several "proffered conditions" purportedly designed to address the protests and requests for conditions submitted by various parties. One such proffered condition was an unexecuted "Settlement Agreement" between Norfolk Southern, CSX, Wyandot, National and Martin Marietta Materials, Inc. (MMM). The June 6, 1998 letter indicated that this proffer of conditions was being extended to National, Wyandot and MMM "regardless of whether they agree to such Agreement or not." Because the Primary Applicants served this document on National by regular mail, National did not receive a copy of the Applicants' proffer until after the Board's June 8, 1998 voting conference.

The proffered condition states that NS will grant CSX "operational rights between Crestline and Wooster" so that CSX may provide "the functional equivalent of single-line service to National's aggregate traffic between Spore and Wooster." The proffered condition then imposes:

1. a volume requirement (only shipments via 40-car unit trains or blocks are covered, not National's current shipments of less than 40 cars);
2. a product limit (only aggregate shipments are covered, not National's industrial mineral shipments); and
3. a duration limit (the offer covers only five years, whereas National had an opportunity to secure single-line service for these movements from Conrail so long as Conrail remained in operation).

As explained in two prior submissions by National to the Board (NLS-8 and NLS-9), the proffered condition falls far short of the Primary Applicants' claim at oral argument that the condition "would permit one or the other of them to continue providing single-line service to those three shippers on the -- for the movements that they are currently moving[.]" The Primary Applicants' commitment covers just one of National's five existing Conrail single-line movements. The proffered condition leaves unremedied National's loss of the existing single-line movement of limestone aggregate from Bucyrus to Weirton Steel Company in Weirton, West Virginia. See NLS-2, pp. 8-9. The condition also fails to address National's existing movements of lime and limestone-based industrial minerals via Conrail from Carey to (1) Weirton, West Virginia; (2) Meadville, Pennsylvania; and (3) Martin's Ferry, Ohio. Id. at pp. 7-8.

Nevertheless, in Decision No. 89, the Board adopted the volume and product limits set out in the Primary Applicants' proffer, even though the record contains no evidence to support the

condition Applicants sought to cram down on National at the eleventh hour in order to avoid imposition by the Board of conditions that would more fully protect National from harm. Without explanation, the Board accepted most of what the Applicants proposed, but did not adopt the proposed duration limit.

II. The record in this proceeding does not support the limits already imposed on the condition requested by National, much less the additional "duration" limit the Primary Applicants now seek.

National's request for a condition preserving its existing single-line service for two aggregate movements from Bucyrus and three industrial mineral movements from Carey satisfies each of the Board's requirements for granting conditions. See 49 C.F.R. § 1180.1(d)(1) (1997). National's plea for preservation of single-line service: (1) was directly related to the harmful effects of the Conrail transaction -- the loss of single-line service; (2) was designed to enable National to receive adequate service in the form of continued single-line service; (3) would not have posed unreasonable operating or other problems for the Primary applicants; and (4) would not have frustrated the ability of the Primary Applicants to obtain anticipated public benefits. See NLS-6, National's Brief in Support of Protest and Request for Conditions, pp. 9-29. The Primary Applicants never submitted any evidence to rebut National's showing that a condition requiring continuation of single-line service for National was necessary and appropriate under the Board's governing standards.

Instead of addressing the merits of National's request for conditions, the Primary Applicants have relied on a generalized and unsupported assertion that providing single-line service for each of the four remaining National movements at issue would be operationally infeasible. The Primary Applicants presented no evidence whatsoever in support of this claim. See discussion NLS-6, pp. 25-29. On this issue, the Board in Decision No. 89 improperly relied

upon the Applicants' bare assertions; the Board has failed to point to any record evidence to support its conclusion that the specific single-line movements proposed by National will interfere with the Primary Applicants' post-transaction operations.

The Board also failed to point to substantial record evidence to support its conclusion that the loss of single-line service for National's three movements of industrial minerals from Carey would not injure National. As noted, National is the only party that submitted evidence on the issue of how the loss of single-line service for these movements would impact National. In addition, National's presentation of evidence showing that National would receive no benefits from the transaction through the creation of new single-line movements stands unrebutted. The Primary Applicants submitted a few conclusory sentences regarding the alleged differences between industrial minerals and aggregates in response to the allegations of another shipper, Martin Marietta Materials, Inc. See CSX/NS-176, Rebuttal Verified Statement of John T. Moon at p. 6. But the only witness presented by the Primary Applicants to address National's circumstances specifically never made a distinction between aggregate movements and industrial mineral movements and never evaluated the impact of the transaction on National if the conditions National sought were not imposed. See discussion NLS-6, pp. 14-15. The Board's finding that National will not be injured by the loss of single-line service for the three movements of industrial minerals from Carey is not based on substantial record evidence [1]

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[1] Because the Board's action will result in a reduction in the quality and pricing of National's existing service, Decision No. 89 also is inconsistent with Chairman Morgan's claim that:

> By preserving the settlements of many railroads and shippers such as coal and utility shippers, while imposing conditions to assist others such as aggregates shippers, and smaller railroads that provide important services, our decision ensures that, overall, shippers will be better off after the merger than they were before. and that none will have less service than they had before.

(continued...)

In their Petition for Reconsideration, the Primary Applicants once again ask the Board to act in the Applicants' favor without presenting any evidentiary basis for such action. The Primary Applicants argue that their unilateral proffer to National was subject to a five-year time limit, and that the Board's decision not to adhere strictly to the Primary Applicants' unilateral offer should be reconsidered. Under the Board's regulations, a petition for reconsideration will be granted only upon a showing of new evidence, changed circumstances, or material error. 49 C.F.R. § 1115.3(b) (1997). The Primary Applicants, in their Petition for Reconsideration, do not address these standards and cannot satisfy them.

The Primary Applicants' incorrectly assert that the Board's condition with respect to existing movements was intended to last for only five years because the condition is based on the Applicants' "offer." CSX/NS-209 at p. 14. The Primary Applicants conveniently ignore that the offer they made at oral argument was significantly broader than the written offer they later tendered to the Board. See Decision No. 89 at p. 111 n.172. In its decision, the Board imposed a condition requiring the Applicants "to provide single-line service for all existing movements of aggregates as offered at oral argument[.]" Id. at p. 111. Then, without explanation or support, the Board largely undermined that condition by imposing the volume and product limitations set out in the Applicants' unilateral "proffered condition." Id. However, the Board did not impose the five-year time limit set out in the proffered condition. Indeed, in NLS-9, National had argued that the Board should no impose any of the limitations set out in the unilateral proffered condition. Thus, the Board's refusal to adopt the five-year limit was not inadvertent and there is no need or basis for clarifying the duration of the condition.

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[1] (...continued)
Decision No. 89 at p. 187 (emphasis added).

Granting the "clarification" demanded by the Primary Applicants' would constitute an abdication of the Board's statutorily mandated role as decisionmaker. As with each of the other limits on the proffered condition, the Primary Applicants claim that their unilateral business judgements must govern the terms and conditions of the remedy purportedly designed to protect National.[2] According to the Applicants, any further effort to preserve National's access to existing single-line service constitutes a "dead-hand" condition that undermines the Applicants' transaction, CSX/NS-209 at p. 16, yet the Primary Applicants have to this day never offered any explanation as to how the conditions National sought or the much narrower condition the Board imposed would impede the Primary Applicants' operations. As National explained in its prior submission (NLS-9), any condition should stay in effect at least for an initial period of five years. The condition should then remain in force until the Primary Applicants obtain permission from the Board to abandon service to National, just as Conrail would have to have done.

In sum, the Board erred when it accepted the Primary Applicants' unsupported assertions regarding the limits on the condition imposed with respect to National in Decision No. 89. The Board should not compound the errors of Decision No. 89 by limiting the narrow relief the Board granted National still further based solely on the Primary Applicants' bald faced assertions at this stage of the proceeding. The Board should not so quickly forget Mr. Allen's empty promise at oral argument that all of National's current single-line movements would be continued. The proffer the Primary Applicants made a few days later, most of which the Board adopted without a foundation in substantial evidence, was a far cry from that misleading statement The Board should do no further harm.

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2 "If there is economic justification for the railroads to provide run-through operations or pre-blocking arrangements beyond the lifetime of the Condition, or in cases not provided for in the Condition, surely they will[.]" CSX/NS-209 at p. 16.

WHEREFORE, for the reasons stated above, National respectfully requests that the Board reject the Primary Applicants' Petition for Reconsideration.

Respectfully submitted,

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Counsel for
NATIONAL LIME & STONE COMPANY

September 1, 1998

CERTIFICATE OF SERVICE

I certify that I will cause today to be served a conformed copy of the foregoing "Response of National Lime and Stone Company to Primary Applicants' Petition for Reconsideration," filed in Finance Docket No. 33388, by first class mail, properly addressed with postage prepaid, or more expeditious manner of delivery, upon all persons required to be served as set forth in 49 C.F.R. § 1180.(d), namely:

(i) The applicants;

(ii) The Secretary of the United States Department of Transportation (Docket Clerk, Office of Chief Counsel, Federal Railroad Administration, Room 5101, 400 7th Street, S.W., Washington, D.C. 20590);

(iii) The Attorney General of the United States;

(iv) Judge Jacob Leventhal; and

(v) All parties of record in Finance Docket 33388.

Dated at Washington, D.C., this 1st day of September, 1998.

Kenneth B. Driver

STB FD 33388 9-1-98 D 190901

190901

WEINER, BRODSKY, SIDMAN & KIDER

ATTORNEYS AT LAW

PROFESSIONAL CORPORATION

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September 1, 1998

BY HAND

NYAR No. 7

Honorable Vernon A. Williams
Secretary
Surface Transportation Board
1925 K Street, NW
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 with the Surface Transportation Board (the "Board") in the above-reference proceeding are an original and 25 copies of New York & Atlantic Railway's Reply to Application of the Congressional Delegation (the "Reply"). In accordance with Decision No. 6, dated May 30, 1997, issued by the Board in this proceeding, also enclosed is a 3.5-inch disk containing the Reply formatted in Word Perfect. This Reply and the accompanying disk are designated as NYAR No. 7, in accordance with 49 C.F.R. § 1180.4(a)(2).

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

Very truly yours,

Rose-Michele Weinryb

Rose-Michele Weinryb

Enclosure

19701

NYAR No. 7

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 NEW YORK & ATLANTIC RAILWAY TO APPLICATION OF CONGRESSIONAL DELEGATION LED BY REPRESENTATIVE JERROLD NADLER

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: September 1, 1998

190901

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 NEW YORK & ATLANTIC RAILWAY TO APPLICATION OF CONGRESSIONAL DELEGATION LED BY REPRESENTATIVE JERROLD NADLER

Pursuant to 49 C.F.R. §1104.13, New York & Atlantic Railway ("NYAR") hereby files this reply (the "Reply") in opposition to the application, filed on August 12, 1998 ("Reconsideration Application"), by the above-referenced Congressional Delegation led by Jerrold Nadler[1], insofar as it seeks reconsideration of its proposal to include NYAR's Bay Ridge Line in a joint facility east of the Hudson River.

I. INTRODUCTION

In a decision served July 23, 1998, the Surface Transportation Board (the "Board"), subject to certain conditions, approved the primary application (the "Primary Application") filed by CSX Corporation, CSX Transportation, Inc, Norfolk Southern Corporation and Norfolk Southern Railway Company (the "Primary Applicants") in Finance Docket No. 33388 (the

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[1] For purposes of identification, the full title of the Reconsideration Application is: Application of Representatives Jerrold Nadler, Christopher Shays, Charles Rangel, Ben Gilman, Barbara Kennelly, Nancy Johnson, Charles Schumer, Rosa DeLauro, Michael Forbes, Sam Gejdenson, Nita Lowey, Major Owens, Thomas Manton,

"Approval Decision").[2] The Congressional Delegation seeks reconsideration of the portion of the Approval Decision affecting rail service east of the Hudson River. Specifically, the Congressional Delegation appears to seek reconsideration of the portion of the Approval Decision denying the creation of its proposed joint facility operation. *See* Approval Decision at 79-84. This proposed joint facility operation included the Bay Ridge Line, an 11-mile rail line owned by The Long Island Rail Road and operated by NYAR. Because the Congressional Delegation has failed to demonstrate that reconsideration of the Approval Decision, as it relates to the Bay Ridge Line, is appropriate, this portion of its Reconsideration Application should be denied.

II. RECONSIDERATION OF JOINT ACCESS OVER THE BAY RIDGE LINE IS INAPPROPRIATE

In order for the Board to reconsider the Approval Decision as it relates to the Bay Ridge Line, the Congressional Delegation must demonstrate that (i) new evidence or changed circumstances exist that materially affect the Board's prior treatment of the Bay Ridge Line, or (ii) the Board's treatment of the Bay Ridge Line was the result of material error. *See* 49 C.F.R. § 1115.3(b). The Congressional Delegation has not met this burden of proof.

A. Joint Use of the Bay Ridge Line is not Feasible

In an effort to expand the North Jersey Shared Asset Area proposed by Primary Applicants to rail facilities located east of the Hudson River, the Congressional Delegation previously argued that approval of the Primary Application be conditioned, among other things,

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Maurice Hinchey, Ed Towns, Carolyn B. Maloney, Nydia M. Velazquez, Gary Ackerman, Eliot L. Engel, Louise M. Slaughter, John Lafalce, Michael McNulty, James Maloney and Gregory Meeks.

[2] *See* 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*, Decision No. 89, slip op., served July 23, 1998.

on providing Conrail Shared Asset Operator with trackage rights over the Bay Ridge Line. In the Approval Decision, the Board declined to impose trackage rights over NYAR. In reaching this decision, the Board noted that the proposed joint facility operation would be "very difficult to execute, and likely...outside [the Board's] authority to grant vis-à-vis use of the rail property of nonapplicant railroads [New York Cross Harbor ("NYCH")] and NYAR...." *See* Approval Decision at 9.

In its Reconsideration Application, the Congressional Delegation now asserts that Canadian Pacific Railway should be given the right to operate over the Bay Ridge Line. Although styled as a petition for reconsideration, this request, therefore, is more akin to a request for a new condition. In any event, the Congressional Delegation cites no new evidence, changed circumstances or material error to suggest that the Bay Ridge Line is a suitable candidate for joint use operations.

In this proceeding, NYAR submitted substantial evidence that joint carrier use over the Bay Ridge Line is not feasible from either an operational, legal or economic standpoint. As NYAR demonstrated in its December 15, 1997, filing (the "Response"), the Bay Ridge Line is not appropriate for use as a joint facility. It is singled track. It is not signaled or dispatched. It has only one siding and the capacity of that siding is limited to one 15-car train. Thus, the physical characteristics of the Bay Ridge Line would not lend themselves easily to multiple carrier operations. *See* Response at 5.

In its Response, NYAR also argued that the Board did not have the authority to mandate joint use of the Bay Ridge Line. In its Approval Decision, the Board agreed that such a forcible divestiture of NYAR's operating rights likely would be outside the Board's jurisdiction. *See*

Approval Decision at 81. In its Application, the Congressional Delegation does not cite any legal authority that would warrant the Board revisiting this issue.

B. Metro North Did Not Ban Municipal Solid Waste Traffic over NYAR

In its Reconsideration Application, the Congressional Delegation also states that municipal solid waste ("MSW") traffic necessitates joint access over the Bay Ridge Line, because NYAR is prohibited from transporting this type of traffic. Once again the Congressional Delegation fails to cite any new evidence, changed circumstances or material error to support its request for the Board to reconsider joint use over the Bay Ridge Line. In its Brief, filed in this proceeding, the Congressional Delegation made a similar argument, asserting that NYAR had entered into an agreement with Metro-North and Queens Borough not to transport MSW traffic for five years. *See* Brief at 8. As NYAR noted in its March 19, 1998, reply to this Brief, no such agreement exists. The only "ban" on MSW traffic over NYAR is a temporary moratorium that exists at the request of the Governor of New York, not Metro-North, and that expires December 1999.

III. THE BOARD SHOULD RULE ON THE REQUEST FOR RECONSIDERATION NOW

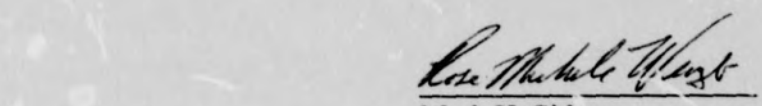
The Congressional Delegation urges that the Board "adjourn any consideration of this application for reconsideration for one year to allow applicants, the Congressional Delegation, the States and the other affected carriers time to attempt to reach a settlement, " Reconsideration Application at 2, and that "all action thereon be stayed until July 20, 1999 or until such earlier time as any party shall move to reopen the matter." *Id.* at 7. The Board's rules do not provide for requests for "adjournment" of the type sought by the Congressional Delegation. NYAR stands ready and willing to participate in any discussions with the Congressional Delegation and

representatives of any other interested parties regarding the improvement of rail service east of the Hudson River. NYAR, however, should not have to face uncertainty as to critical portions of its franchise while any such discussions are conducted. In fact, such uncertainty would likely impede rather than enhance the productivity of these discussions. Accordingly, NYAR requests that as to the issues raised by the Congressional Delegation involving the Bay Ridge Line or NYAR, the Board rule of the requests for reconsideration now.

IV. CONCLUSION

For the foregoing reasons, NYAR requests that the Board deny the request of the Congressional Delegation for reconsideration of the Approval Decision, as it relates to the Bay Ridge Line.

Respectfully submitted,



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Washington, D.C. 20005-4797

Dated: September 1, 1998

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CERTIFICATE OF SERVICE

I hereby certify that on September 1, 1998, a copy of the foregoing Reply of New York & Atlantic Railway was served by first-class mail, postage prepaid on:

(i) Parties of Record

(ii) Judge Jacob Leventhal
Federal Energy Regulatory Commission
888 First Street, NE, Suite 11F
Washington, D.C. 20426

(iii) Honorable Janet Reno
Attorney General of the United States
Department of Justice
950 Pennsylvania Avenue, NW
Room 4440
Washington, DC 20530-0001

(iv) U.S. Secretary of Transportation
Department of Transportation
400 7th Street, SW
Washington, DC 20590

Rose-Michele Weinryb, Esq.

STB FD 33288 9-1-98 D 190911

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Public Record

September 1, 1998

VIA HAND DELIVERY

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

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

Dear Secretary Williams:

Enclosed for filing with the Board in the above-captioned proceeding are an original and twenty-five copies of the **Reply of I & M Rail Link, LLC to Petitions for Reconsideration of Reporting Conditions** (IMRL-9), dated September 1, 1998. A computer diskette containing the text of IMRL-9 in WordPerfect 5.1 format also is enclosed.

Please feel free to contact me should any questions arise regarding this filing. Thank you for your assistance on this matter.

Respectfully submitted

William C. Sippel

William C. Sippel
Attorney for I & M Rail Link, LLC

WCS:tjl

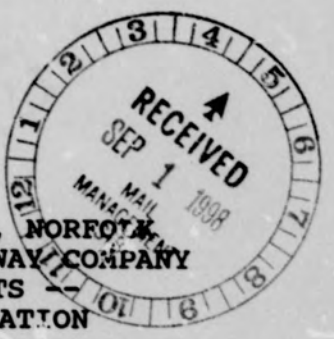
Enclosures

cc: Parties of Record

ORIGINAL

IMRL-9

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 I & M RAIL LINK, LLC TO PETITIONS FOR RECONSIDERATION OF REPORTING CONDITIONS

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ATTORNEYS FOR I & M RAIL LINK, LLC

Dated: Septerber 1, 1998

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 I & M RAIL LINK, LLC TO PETITIONS FOR RECONSIDERATION OF REPORTING CONDITIONS

I & M Rail Link, LLC ("IMRL") hereby submits this reply in support of the petitions for reconsideration filed by Wisconsin Central Ltd. ("WCL") and the Four City Consortium[1] (WC-19 and FCC-18, respectively) regarding the reporting conditions imposed on the Applicants herein[2] in Decision No. 89 with respect to the Chicago switching district. As those parties make clear, public availability of the information to be provided on rail operations in the Chicago terminal and on the Indiana Harbor Belt Railroad Company ("IHB") is essential if the Board's oversight and monitoring conditions are to be effective and credible. IMRL urges that those petitions for limited reconsideration of Decision No. 89 be granted.

IMRL was an active participant in this case and, with other parties, sought divestiture of Conrail's 51% ownership

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[1] East Chicago, Hammond, Gary and Whiting, Indiana.

[2] Norfolk Southern Corporation and Norfolk Southern Railway Company ("NS"), CSX Corporation and CSX Transportation, Inc. ("CSXT") and Conrail, Inc. and Consolidated Rail Corporation ("Conrail").

interest in the IHB as a condition of the proposed division of Conrail between CSXT and NS. IMRL's participation was predicated on its concern that IHB's status as a neutral, independent intermediate and terminal switching railroad within the Chicago switching district would be seriously jeopardized by the proposed Conrail transaction. The Board in its decision approving the transaction specifically recognized the importance of the IHB as a neutral switching carrier and indicated that the Applicants would be required to preserve IHB's existing independent status. Decision No. 89 at 92. The Board also held that its five-year oversight process would assess "the effects of IHB's management change on its role as a neutral switching carrier" and imposed reporting requirements for operations and yards in the Chicago area, including IHB's major yards. Decision No. 89 at 161, 164-165.

The Board has thus already made its findings regarding the importance of the IHB as a neutral switching carrier and the at least implicit threat that the Conrail transaction poses to the present role and status of the IHB. The current issue is solely whether the reporting conditions imposed by the Board are an effective means to address those concerns. As WCL and the Four Cities Consortium detail in their Petitions, and as the Prairie Group has subsequently reiterated in its reply filing, the shielding of information to be submitted on the Chicago switching district and the IHB from public availability and scrutiny is not in the public interest and negates in large

measure the very purpose of the conditions.[3] As a party which seriously and consistently questioned throughout this proceeding the effects of the Conrail transaction on the IHB, IMRL believes that public dissemination of the information to be provided by Applicants on operations in the Chicago switching district is essential if the Board's stated intentions with respect to the IHB are to be effectively and credibly carried out. Parties dependent on the IHP need such information as an "early warning" of potential problems and to meaningfully participate in the Board's oversight process.

As the various pleadings on this matter indicate, the effects of the proposed Conrail transaction on the Chicago switching district and the IHB are of concern to a wide range of interests and parties. The Board's operational monitoring conditions for the Chicago area should reflect this overriding public interest in the information to be reported by Applicants. IMRL thus supports the petitions for reconsideration filed by WCL and the Four City Consortium with respect to those operational monitoring conditions and requests that those petitions be granted.

WHEREFORE, IMRL respectfully requests that the Board accept this reply to the WCL and Four City Consortium petitions for reconsideration and grant those petitions as they relate to

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[3] Those parties also raise concerns with the content of the reports to be filed by Applicants pursuant to the Board's operational monitoring condition. IMRL agrees that the information to be submitted may not prove sufficient in relevance or breadth to adequately monitor the continued neutrality and independence of the IHB.

the public availability of information to be reported by Applicants on the Chicago switching district and the IHB.

Respectfully submitted,

By: William C. Sippel BF

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ATTORNEYS FOR I & M RAIL LINK, LLC

Dated: September 1, 1998

CERTIFICATE OF SERVICE

I hereby certify that on this 1st day of September, 1998, a copy of the foregoing **Reply of I & M Rail Link, LLC to Petitions for Reconsideration of Reporting Conditions** (IMRL-9) was served by first class mail, postage prepaid, upon all designated parties of record appearing on the official service list in this proceeding, served August 19, 1997 and revised on October 7, 1997 and December 5, 1997.

William C. Sippel BP

William C. Sippel

STB FD 33388 9-1-98 D 190914

ORIGINAL

ISRR-11

BEFORE THE

SURFACE TRANSPORTATION BOARD

STB FINANCE DOCKET NO. 33388

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

REPLY OF INDIANA SOUTHERN RAILROAD, INC. IN SUPPORT OF PETITION OF INDIANAPOLIS POWER & LIGHT COMPANY FOR CLARIFICATION OR RECONSIDERATION OF DECISION NO. 89, AND IN OPPOSITION TO PETITIONS OF THE INDIANA RAIL ROAD COMPANY FOR LEAVE TO INTERVENE AND FOR RECONSIDERATION OF DECISION NO. 89

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Attorneys for:
INDIANA SOUTHERN
RAILROAD, INC.

Dated: September 1, 1998

BEFORE THE
SURFACE TRANSPORTATION BOARD

STB FINANCE DOCKET NO. 33388

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

REPLY OF INDIANA SOUTHERN RAILROAD, INC. IN SUPPORT OF PETITION OF INDIANAPOLIS POWER & LIGHT COMPANY FOR CLARIFICATION OR RECONSIDERATION OF DECISION NO. 89, AND IN OPPOSITION TO PETITIONS OF THE INDIANA RAIL ROAD COMPANY FOR LEAVE TO INTERVENE AND FOR RECONSIDERATION OF DECISION NO. 89

Indiana Southern Railroad, Inc. ("ISRR"), hereby replies in support of the Petition of Indianapolis Power & Light Company ("IPL") for Clarification or Reconsideration of Decision No. 89, and in opposition to the Petitions of the Indiana Rail Road Company ("INRD") for Leave to Intervene ("INRD-1") and for Reconsideration of Decision No. 89 ("INRD-2").

ISRR supports IPL's requested clarification concerning the interchange location between ISRR and Norfolk Southern Railway Company ("NS"). ISRR urges the Surface Transportation Board ("Board") to clarify that, in the absence of an agreement between the parties, the ISRR-NS interchange take place either at Crawford Yard or Transfer Yard for coal movements to the Stout and Perry K Plants. The Board should further clarify that CSX Transportation, Inc. ("CSXT") is not entitled to a switch charge if IPL elects to utilize NS direct service to Stout.

ISRR also supports IPL's request for reconsideration of the Board's finding that there will be no loss of competition at the Perry K Plant. As IPL correctly points out, in Decision No. 89 served July 23, 1998 ("Decision"), the Board apparently ignored IPL's ability to bypass Consolidated Rail Corporation's ("CRC") switching of coal into Perry K with two short-haul trucking options. IPL's trucking options were pointed out by several witnesses and are readily conceded by CSXT. **The uncontroverted evidence of record demonstrates that CRC is not a bottleneck monopolist for coal movements to Perry K, whereas CSXT will become a bottleneck carrier by gaining control over all direct rail routes to Perry K and the transloading facilities that can be used to serve Perry K by truck.**

INRD's petitions, on the other hand, should be summarily rejected or denied. INRD is 89-percent controlled by CSXT and CSXT opposes INRD's requested relief. Also, INRD was or should have been aware of the issues raised in this proceeding concerning the Stout Plant long ago and it has failed to show extraordinary or compelling reasons why it should be permitted to intervene at this late stage of the proceeding. Moreover, INRD raises no new facts or arguments that have not already been thoroughly considered and properly addressed by the Board.

I. IPL'S PETITION FOR CLARIFICATION OR RECONSIDERATION SHOULD BE GRANTED

With respect to future service to IPL's Stout Plant, IPL seeks clarification that: (1) the ISRR-NS interchange for coal movements to Stout be at the same location as the current ISRR-CRC interchange; and (2) NS direct service to Stout be free of any CSXT switching charges. IPL's requests for clarification as to the Stout Plant should be granted.

The Board required Applicants to amend their agreements to permit an ISRR-NS interchange at milepost 6 in order "to approximate more closely pre-transaction market conditions." Decision at 117. As IPL correctly notes, however, no interchange between ISRR and CRC has taken place at milepost 6. Indeed, an interchange at milepost 6 is operationally impracticable. ISRR's track at milepost 6 consists of a single main line with no sidings at or near milepost 6. Also, the narrow width of the right-of-way at milepost 6 precludes ISRR from constructing a siding. The east side of the right-of-way is paralleled by Indiana State Route 67 and adjacent to the west side is a commercial and residential area. Even if adjacent land were available, the construction of a siding at or near milepost 6 would be cost prohibitive because the right-of-way is elevated.

When ISRR acquired its rail line from CRC in 1992, ISRR obtained incidental overhead trackage rights over CRC to CRC's Avon Yard (located west of Indianapolis) and to CRC's Transfer Yard (located at approximately milepost 2) for purposes of interchanging traffic. ISRR and CRC also entered into interchange agreements whereby the interchange of all non-coal traffic between CRC and ISRR would take place at Avon Yard and the interchange of all coal traffic would occur at Transfer Yard, which is located less than one mile from IPL's Perry K Plant. A few years later, the interchange agreement for non-coal traffic was amended in order to move the interchange location from Avon to Crawford Yard. Because of CRC's subsequent congestion at its Transfer Yard, ISRR and CRC agreed to interchange all traffic at the Crawford Yard.

Because of the significant operational changes that may occur in Indianapolis, ISRR believes that, at this point in time, CSXT, NS and ISRR should be given an opportunity mutually

to agree upon an interchange arrangement in Indianapolis that is optimally efficient for all parties concerned. The Board, however, should clarify that, in the absence of an agreed upon interchange location, the ISRR-NS interchange take place at either Crawford Yard or Transfer Yard for movements to Stout and Perry K.

In order to preserve rail competition at Stout, the Board imposed a condition that gives IPL the choice of having its Stout Plant served directly by NS or via an INRD switch. Clearly, if IPL elects to utilize an INRD switch, CSXT (through its 89-percent owned subsidiary) is entitled to a reasonable switch charge. Alternatively, if IPL elects to utilize NS direct service, CSXT (through its 89-percent owned subsidiary) is entitled to a reasonable trackage rights fee. In the latter situation, however, CSXT should not be entitled to a switch fee, since neither CSXT nor its subsidiary will be providing any switching services. Accordingly, the Board should clarify that NS direct service to the Stout Plant is not subject to any switching charges.

ISRR also supports IPL's request for clarification or reconsideration of the Board's Decision regarding the Perry K Plant. In the Decision, the Board apparently denied IPL's requested relieve for coal movements to Perry K on two grounds: First, the Board determined that CRC "is already a bottleneck carrier controlling rail access to [the Perry K Plant]"; and second, the Board noted that, "under applicants' proposal, NS will permanently have access via cost-based switching to the plant, a benefit the plant did not enjoy before." Decision at 116. As IPL notes, the Board's Decision is materially in error in two fundamental respects.

First, the Board's decision is apparently premised on the mistaken believe that IPL's options at Perry K are limited to rail-to-rail competition. In its prior filings in this proceeding, ISRR demonstrated that there are currently five routing options for coal deliveries to the Perry K

Plant: (1) CRC direct; (2) ISRR via CRC switch at Indianapolis; (3) INRD via CRC switch at Indianapolis; (4) INRD to the Stout Plant and truck to Perry K; and (5) INRD to its switching yard in Indianapolis and truck to Perry K. *See e.g.*, ISRR-10 at 13. In denying IPL's requested relief at Perry K, the Board concluded that "Conrail is already a bottleneck carrier controlling rail access to this plant." Decision at 116. In other words, the Board determined that CRC was a bottleneck carrier for the three all rail routing options IPL currently enjoys. **The Decision, however, ignored IPL's short-haul trucking options to the Perry K Plant and the effectiveness of the truck options in disciplining CRC's switch rates to Perry K.**

IPL's ability to bypass CRC with truck movements to Perry K was pointed out by several witnesses in this proceeding. For example, Mr. Crowley explained that "[f]or existing and future movements of coal to Perry K, IP&L currently has access to two alternatives: 1) ISRR/Conrail direct; and 2) INRD to Stout and truck to Perry K." Crowley V.S. at 5, IPL-3. *See also id,* at 8, 9 ("Perry K can also receive coal trucked from Stout, therefore having the same alternatives available to the Stout plant."), and 18 ("Since the competitive alternative to this move is trucking from Stout ... "); Crowley R.V.S. at 3 and 9, ISRR-9 ("The competitive alternatives available to Perry K [include] trucking from the Stout Plant."). IPL Witness Weaver similarly pointed out that CRC currently competes for coal movements to Perry K with "a short truck haul from the Stout Plant." Weaver V.S. at 5, IPL-3. ISRR Witness Neuman explained that:

> In the past, IPL has trucked some coal to the Perry K facility from its storage area at Stout. According to Mr. Hoback, INRD has also moved coal to its Senate Avenue Terminal, located one mile from the Perry K facility, and trucked to Perry K. Consequentiy, IPL currently has the options of receiving coal at Perry K from: (1) CRC direct; (2) ISRR via CRC switch at Indianapolis; (3) INRD via CRC switch at Indianapolis; (4) INRD to Stout and truck to Perry K; and (5) INRD to its switching yard in Indianapolis and truck to Perry K.

Neuman R.V.S. at 3, ISRR-9.

Applicants have submitted no evidence whatsoever in this proceeding contradicting or refuting the testimony of ISRR and IPL witnesses concerning the practicability and economic feasibility of hauling coal by truck to Perry K from the nearby transloading facilities. Indeed, Applicants have confirmed actual past truck movements of coal to Perry K:

> From time to time, INRD also has moved coal for delivery to IP&L's Perry K plant. INRD delivers that coal to the Stout plant where it is unloaded and then trucked to the Perry K plant.
>
> In the past, INRD coal also has been unloaded at the Senate Avenue Terminal, INRD's principal switching yard in Indianapolis, and trucked about one mile to the Perry K plant.

Hoback V.S. at 195, CSX/NS-177.

In summary, the uncontroverted evidence of record in this proceeding demonstrates that CRC is not a bottleneck monopolist for coal movements to Perry K because, at a minimum, IPL has the ability to bypass CRC with short truck movements from the nearby transloading facilities. It is, therefore, not surprising that applicants designated Perry K as a 2-to-1 facility. CSX/NS-37 at 12; CSX/NS-51 at 8; and CSX/NS-178 Vol. 3B at 638-39. Post-Transaction, however, CSXT and its subsidiary will control all routing options to Perry K. **CSXT will become a bottleneck carrier controlling all direct rail routes to Perry K as well as the rail routes to the two transloading facilities that have been utilized for the rail-truck movements of coal to Perry K.** Accordingly, the Transaction will significantly reduce competition at Perry K.

In the Decision, the Board correctly found the transportation of coal by truck to the Stout Plant as impractical. Decision at 117. The situation at Perry K, however, is distinguishable in a

number of respects. The volume of coal moving to the Stout Plant is 7.5 times larger than the movements to Perry K. Also, the trucking distances to Perry K are very short (about one mile from INRD's Senate Avenue Terminal), whereas the trucking distances to Stout are at least 76 miles. *See* CSX/NS-177, at 195, 197. Accordingly, IPL can -- and has -- disciplined rail rates to Perry K with relatively low volume movements of coal by truck over very short distances. IPL does not have the ability to discipline rail rates to Stout with trucks given the significantly higher volumes and distances involved. Most importantly, CSXT's claims of effective truck competition at Stout were purely theoretical, since CSXT was unable to identify a single truck movement of coal to that facility On the other hand, CSXT itself has readily conceded that truck movements to Perry K have occurred from time to time and that those movements were competitive with CRC's switching services.

Second, NS's purported access to Perry K via a CSXT switch cannot possibly be competitive with any of the routing options Perry K enjoys today. In the Decision, the Board noted certain Indiana coal sources served by NS. Decision at 116-17 n. 178. As ISRR previously explained, however, NS's route from those coal sources to Perry K is nearly 500 miles, or almost five times longer than the INRD-CSXT direct route. ISRR-10 at 14-15. NS's access to Eastern coal in nearby States would force NS to traverse equally circuitous and noncompetitive routes. *Id.* While the Board granted NS a connection with ISRR for coal movements to Perry K, NS's lack of direct access to Perry K renders any coal movements from ISRR origins via NS inefficient and uneconomical. In order for NS to participate in ISRR originated coal movements, NS would have to move its locomotives west from Hawthorne Yard

past the Perry K Plant to milepost 6 for interchange with ISRR,[1] proceed back east past Perry K to Hawthorne Yard for an interchange with CSXT, whereupon CSXT would have to proceed back west to Perry K. The reverse movements, of course, would be necessary in order to return the empty coal cars to ISRR. Such west-east-west routings through downtown Indianapolis would be operationally inefficient and uneconomical. These back-and-forth movements would add significantly to the number of crews needed to haul coal to the Perry K Plant. Moreover, Hawthorne Yard is not conducive to an efficient interchange of unit coal trains.

Accordingly, the Board should grant IPL's request for clarification or reconsideration and condition the Transaction on NS (or ISRR) being given trackage rights to directly serve the Perry K Plant. In so doing, the Board would be preserving IPL's competitive options for coal shipments to the Perry K Plant.

The United States Department of Agriculture supported ISRR's Responsive Application because of the importance of Indianapolis coal traffic to ISRR's ability to serve grain shippers on the ISRR. Also, coal moving to Perry K has been routed over the ISRR rail line for over 60 years. Accordingly, by granting NS direct access to Perry K, the Board would also be promoting ISRR's ability to provide efficient rail service to grain shippers and preserving a direct and efficient rail route to Perry K that has been utilized for over 60 years.

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[1] As already explained, an interchange at milepost 6 is impracticable.

II. INRD'S PETITIONS FOR LEAVE TO INTERVENE AND FOR RECONSIDERATION SHOULD BE REJECTED OR DENIED

INRD is 100 percent owned by Midland United Corporation, a non-carrier holding company, which, in turn, is 89-percent owned by CSXT. As the record in this proceeding demonstrates, the remaining 11 percent is owned by a minority shareholder and officer of INRD.

While INRD claims that it is a separate corporate entity, it acknowledges that it is under the control of CSXT. INRD further points out that its indirect parent, CSXT, opposes INRD's petitions, which allegedly were filed by "senior management, which is affiliated with the minority interest in INRD." INRD-1, at 7-8.

INRD is apparently not the real party in interest seeking to intervene, since the 89-percent owner of INRD opposes the requested relief. Instead, the petitions appear to be rogue filings on behalf of a disgruntled officer and minority shareholder of INRD. Accordingly, the Board should summarily reject the Petitions for Leave to Intervene and for Reconsideration, since the real party in interest, CSXT, opposes the requested relief.

Even if the Board were to find that the petitions were properly filed on behalf of INRD, the petitions should be denied for the same reasons other non-parties have been denied intervention in the latter stages of this proceeding. For example, in Decision No. 79, the Board denied Cyprus Amax Coal Sales Corporation's ("Amax") request to intervene filed on April 28, 1998. Amax's petition was denied, in part, on the grounds that its interests were addressed by one of its officials in other filings. In Decision No. 77, the Board denied a request to intervene filed by CONSOL Inc. ("CONSOL") on April 9, 1998. CONSOL's petition was denied because it had failed to show extraordinary or compelling reasons for permitting it to intervene late in the proceeding and because its interests were addressed by other parties, including a half owner of

CONSOL. In Decision No. 76, the Board denied the intervention request of three individuals filed March 30, 1998, or more than 5 months after their evidence was due, on grounds that the filing was too late to be considered.

Not unlike Amax, CONSOL and other non-parties that have been denied intervention, INRD has failed to explain why it could not have timely complied with the procedural schedule in this proceeding, or, at a minimum, sought to intervene months ago. On August 22, 1997, ISRR filed its Description of Anticipated Responsive Applications seeking, among other conditions, direct access to the Stout Plant. On October 21, 1997, ISRR filed its Responsive Application and IPL filed Comments each respectively seeking direct rail access to the Stout Plant. Applicants' Rebuttal, filed on December 15, 1997, included the testimony of Mr. Hoback, INRD's President and Chief Executive Officer, which specifically addressed the conditions sought by ISRR and IPL. Accordingly, INRD knew, or should have known, over nine to twelve months ago that conditions seeking direct access to Stout were being requested in this proceeding. If, as INRD now implausibly suggests, its interests are not identical to those of CSXT, INRD should have intervened as a matter of right over one year ago or sought leave to intervene well over 10 months ago.

Even if the Board were to grant INRD's request to intervene, its petition for reconsideration should be denied for at least one of two reasons. First, INRD does not dispute the fact that CSXT has the ability "to cause INRD to grant NS trackage rights over INRD's line" to the Stout Plant. INRD-1, at 6. *See also* INRD-2, at 2 n.1 ("CSXT, thus, is in a position to cause INRD to grant the trackage rights in question to NS."). Since CSXT accepts the Board's condition granting NS direct access to the Stout Plant (CSX-163, at 3 n. 1), INRD's petition is

moot. Even if INRD's petition for reconsideration had merit, which it does not, CSXT, the 89-percent owner of INRD, has stated that it will comply with the Board's condition.

Second, INRD's petition for reconsideration raises no new facts or arguments not already addressed by the Board. The very same arguments raised by INRD in its petition were raised by CSXT throughout this proceeding and properly rejected by the Board. INRD selectively cites to IPL's pleadings in arguing that IPL merely sought access to Stout via the build-out option. A fair reading of IPL's filings, however, demonstrates that IPL sought the very access at Stout that the Board granted. Also, contrary to INRD's contention, the condition imposed by the Board will essentially preserve the competitive options IPL currently enjoys at the Stout Plant. Based on the extensive evidence submitted by IPL, Department of Justice, and ISRR, the Board correctly found that the Stout Plant currently enjoys rail-to-rail competition vis-à-vis INRD direct and ISRR originated coal via a CRC and INRD switch. As the Board noted, the current competitive situation in Indianapolis in general forces INRD to offer a competitive switch charge for coal movements to the Stout Plant. Once CSXT replaces CRC in Indianapolis, CSXT and INRD will have no competitive pressure to offer IPL a favorable switch charge for movements to the Stout Plant.

CONCLUSION

For the foregoing reasons, ISRR respectfully urges the Board to grant IPL's Petition for Clarification or Reconsideration and to reject or deny the Petitions of INRD for Leave to Intervene and for Reconsideration.

Respectfully submitted,

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Attorney for:
INDIANA SOUTHERN
RAILROAD, INC.

Dated: September 1, 1998

CERTIFICATE OF SERVICE

I hereby certify that on this 1st day of September, 1998, I caused a copy of the Reply of Indiana Southern Railroad, Inc. (ISRR-11), to be served on counsel for Applicants by Hand Delivery and on Administrative Law Judge Jacob Leventhal and all other Parties of Record by first class mail, postage prepaid.

Karl Morell

Karl Morell

STB FD 33388 8-31-98 D 190877.

190877

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August 31, 1998

VIA 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, et al. -- Control and Operating Leases/Agreements Conrail Inc., et al.

Dear Secretary Williams:

Enclosed for filing in the referenced proceeding please find an original and 25 copies of the Reply of the State of New York to the Application of Jerrold Nadler, et al. for Reconsideration and Stay (NYS-29). Included with the filing is a computer diskette containing the Reply in WordPerfect 7.0 format.

An additional copy of the Reply also is enclosed. Please indicate receipt and filing by time-stamping this extra copy and returning it with our messenger.

Thank you for your attention to this matter.

Sincerely,

Kelvin J. Dowd
An Attorney for the State of New York

KJD/cbh
Enclosures

190877

NYS-29

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. CONSOLIDATED RAIL CORPORATION	Finance Docket No. 33388

REPLY OF THE STATE OF NEW YORK TO THE APPLICATION OF REPRESENTATIVE JERROLD NADLER, ET AL. FOR RECONSIDERATION AND STAY

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

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Dated: August 31, 1998

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. CONSOLIDATED RAIL CORPORATION	Finance Docket No. 33388

REPLY OF THE
STATE OF NEW YORK
TO THE APPLICATION OF
REPRESENTATIVE JERROLD NADLER, ET AL.
FOR RECONSIDERATION AND STAY

The State of New York, acting by and through its Department of Transportation ("New York"), hereby replies to the Application filed in this proceeding on or about August 11, 1998 by the Honorable Jerrold Nadler and twenty-three (23) other Members of Congress (the "Congressional Delegation"),[1] seeking (1) reconsideration of the Board's disposition of the Congressional Delegation's petition for inclusion of a cross-harbor float operation and related rail lines and yards in the so-called North Jersey Shared Assets Area; and (2) a one-year stay of further action on the reconsideration request pending negotiations between the Primary Applicants CSX and NS,[2] and the Congressional Delegation.

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[1] Hereinafter referred to as the "Nadler Application."

[2] "CSX" refers collectively to CSX Corporation and CSX Transportation, Inc. "NS" refers collectively to Norfolk Southern Corporation and Norfolk Southern Railway Company.

New York takes no position regarding reconsideration of the Congressional Delegation's inclusion petition or the requested stay, subject to certain exceptions noted infra. However, New York respectfully submits that whatever the Board's disposition of that Application, it should in no way delay or adversely affect implementation of the pro-competitive East-of-Hudson conditions adopted in Decision No. 89.[3]

In support hereof, New York shows as follows:

1. In Decision No. 89, the Board imposed a number of conditions on the approval of CSX and NS' application to acquire Conrail.[4] Four of them -- described in Ordering Paragraphs 22, 28, 29 and 30 -- relate specifically to the restoration and promotion of intramodal rail competition East of the Hudson River. Decision No. 89 at 79-83, 177-78. These conditions were directly responsive to the Joint Responsive Application submitted by New York and the New York City Economic Development Corporation ("NYCEDC") in Finance Docket No. 33388 (Sub-No. 69) (NYS-11/NYC-10), and likewise addressed some of the concerns raised by the Congressional Delegation in their inclusion petition. The inclusion petition itself, however, was denied. Decision No. 89, at 81, 184. The Nadler Application seeks reconsideration of this ruling.

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[3] Decision served July 23, 1998.

[4] "Conrail" refers collectively to Conrail, Inc. and Consolidated Rail Corporation.

2. New York neither opposes nor supports reconsideration of the Board's findings in Decision No. 89 regarding prospective increases in truck traffic and the feasibility of intermodal rail freight operations through the existing, cross-Hudson tunnel system. See Nadler Application at 4,6. To the extent that the Congressional Delegation's arguments rest on the claim that the rail infrastructure East of the Hudson River is inadequate to support the pro-competitive rail access contemplated by Decision No. 89,[5] however, New York submits that they are in error.[6]

3. As New York and NYCEDC demonstrated in their Joint Responsive Application[7] and Joint Rebuttal Statement,[8] the capacity of the Hudson Line can accommodate the near-term increase in traffic expected to result from the restoration of competitive rail service to New York City and surrounding points. The Board agreed in Decision No. 89, and made a specific finding to that effect. Id. at 83, n. 130. Should future growth push the limits of the existing infrastructure, simple economic logic directs the assumption that the prospect of increased rail volumes and

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[5] Id. at 177 (Ordering Paragraphs 28 and 29).

[6] The Congressional Delegation also raises a claim under the Civil Rights Act of 1964, alleging that a limited moratorium on the movement of municipal solid waste via the New York & Atlantic Railway was motivated by racial bias. New York does not subscribe to this charge, which in any event is beyond the scope of the Board's jurisdiction.

[7] NYS-11/NYC-10, V.S. Schuchmann, V.S. Nelson.

[8] NYS-24/NYC-17, Argument at 38-39.

associated profits, and a concomitant decrease in truck traffic and related environmental degradation, will provide ample incentives for private and public investment for any necessary facilities expansion. Cf. Decision No. 89 at 177, 318.

4. The Congressional Delegation also requests that the Board "adjourn" consideration of its Application for one year, in deference to negotiations purportedly underway involving the Congressional Delegation, CSX and NS. See Nadler Application at 7. New York has no objection to this request, so long as the Board's disposition has no effect on the timely implementation of the pro-competitive East-of-Hudson conditions adopted in Decision No. 89. No showing has been made that the actions that CSX and NS are required to take pursuant to Ordering Paragraphs 22, 28, 29 and 30 (id. at 177-78) should be delayed pending the outcome of separate and purely voluntary negotiations between CSX and NS and the Congressional Delegation. Indeed, any such delay would be contrary to the public interest, as demonstrated by New York and NYCEDC and confirmed by the Board. See Decision No. 89 at 81-82.

WHEREFORE, New York submits that whatever action the Board elects to take in response to the Congressional Delegation's August 11 Application for Reconsideration and Stay, full and timely implementation of the East-of-Hudson conditions imposed by the Board in Decision No. 89 must be assured.

Respectfully submitted,

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

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Dated: August 31, 1998

CERTIFICATE OF SERVICE

I hereby certify that on the 31st day of August, 1998, I caused copies of the foregoing Reply of the State of New York to the Application of Representative Jerrold Nadler, Et Al. for Reconsideration and Stay to be served upon all parties of record in this proceeding, by first-class United States mail, postage prepaid.

Kelvin J. Dowd

STB FD 33388 8-31-98 D 190876

190876

mdco Transportation Management Ltd.
407 South Dearborn, Suite 1260 • Chicago, Illinois 60605

August 28, 1998

Via Hand Delivery

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

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

Dear Secretary Williams:

Enclosed for filing in the above-referenced docket are an original and twenty-five copies of a Statement in support of Petition for Partial Reconsideration of Monitoring and Reporting Conditions by Prairie Group.

Also enclosed is a 3 ½" computer disk containing the submission in Word 97 format.

Should you have any questions regarding this submission, please call.

Sincerely,

Sandra J. Dearden
President

Consultant for Prairie Group

Enclosures

cc: All Parties of record

190876

ENTERED
Office of the Secretary

SEP - 1 1998

Part of
Public Record

BEFORE THE
SURFACE TRANSPORTATION BOARD

Reply to Petition for Reconsideration By Wisconsin Central Ltd., and Cities of East Chicago, Indiana; Hammond, Indiana; Gary Indiana; And Whiting, Indiana (Collectively The Four City Consortium)	))))))	**FINANCE DOCKET NO. 33388**

STATEMENT OF PRAIRIE GROUP
IN SUPPORT OF PETITION FOR
FOR PARTIAL RECONSIDERATION OF
MONITORING AND REPORTING CONDITIONS

Commentor

Gerald J. Vinci
Vice President – Brick Division
Prairie Group
7601 West 79th Street
Bridgeview, IL 60455
(708) 344-1000

DUE DATE: September 1, 1998

BEFORE THE
SURFACE TRANSPORTATION BOARD

Reply to Petition for Reconsideration	)	
By Wisconsin Central Ltd., and	)	
Cities of East Chicago, Indiana;	)	**FINANCE DOCKET**
Hammond, Indiana; Gary Indiana;	)	**NO. 33388**
And Whiting, Indiana (Collectively	)	
The Four City Consortium)	)	

STATEMENT OF PRAIRIE GROUP
IN SUPPORT OF PETITION FOR
FOR PARTIAL RECONSIDERATION OF
MONITORING AND REPORTING CONDITIONS

In Decision No. 89, the Board imposed certain monitoring and reporting obligations on the Applicants as a condition to approval of the transaction. Id. at 160-65. Among other things, the Applicants will require the Indiana Harbor Belt Railroad Company (IHB) to file weekly reports on the operation of its yards in the Chicago area identified in Appendix R, including the Blue Island Yard. Id. at 165.

Prairie Group is pleased that the Board has recognized the operational complexity and broad scope of this transaction, and established oversight for a five-year period. We believe that these important reports to be filed with the Board have the potential to provide critical data on the Applicants' progress in carrying out their merger plans, and through the oversight process the Board will have the ability to determine if additional conditions are necessary to address unforeseen harms caused by the transaction.

However, we support the petitions of Wisconsin Central Ltd. and of the Four City consortium, seeking a modification of the monitoring and reporting condition imposed by the Board with respect to the Chicago Switching District and the operations of the IHB, to have the information reported to the Board made available to the public, just as it will in the Shared Asset Areas.

As an end user of switching and terminal services in the Chicago area, we will have the ability to monitor and document service and to judge the meaning and impact of information filed in the reports as it relates to our experience of service provided by IHB to our distribution yards and, if necessary, to furnish information to the Board of concerns or opportunities that may need to be addressed, to assure the interests of Prairie Group and the public interest are adequately protected.

In particular, operational monitoring element 15 explains informational reporting that will be available to the public. It provides that all such information will be public except for those elements that have any relationship to the Chicago area. It is only with respect to element 11, the information most relevant to the Chicago Switching District and IHB issues raised by Prairie Group and others, that the public will be denied such information in its entirety. The implication from the Board's explanation is that information under element 11 must be kept secret because it is somehow "commercially sensitive." However, the yard/terminal information reported under element 11 is identical to the information to be reported with respect to yards in the Shared Asset Areas. It is difficult to understand why the information reported to the Board under operational monitoring element 11 cannot and should not be made available to the public, as it will in the Shared Asset Areas.

Public dissemination of this operational information is vital to keeping the shipping communities, the media, and public officials, apprised of important service performance indicators. CSX Transportation appears to be confident in its ability to respond to the service requirements on traffic moving on IHB to, from and through the Chicago terminal, as a result of construction they have initiated to address capacity constraints. If the Applicants are earnest in their expressed desire to address the capacity and service requirements of the shipping public routing traffic through the Chicago terminal, there does not appear to be any good reason to suppress this critical performance data from public view. On the other hand, shielding this information from the public could impede communication between the Applicants and the public, and raises the questions, (1) "*just what are they trying to hide?*" and (2) *"can we realistically expect good service in the Chicago terminal?"*

Union Pacific's post-merger service problems in the Houston, TX terminal demonstrate the importance of obtaining objective operational information for monitoring purposes. It is not only important for the Board to establish accountability with the oversight process, but to also have information available to assist communities, shippers, and receivers in monitoring the Applicants' progress toward achieving promised improvements in rail operations, and to work with the Applicants as they start their new operations, to assist the Applicants in making decisions on corrective actions that may be required to address problems and opportunities that may develop, as expeditiously as possible.

CONCLUSION

In view of the foregoing, we support the Petitions for Reconsideration filed by Wisconsin Central Ltd. and by the Four Cities Consortium, requesting that the Board grant partia reconsideration of Decision No. 89 to provide that reports filed by the Applicants pursuant to reporting element 11 Aof the operational monitoring condition will be placed in the public docket as they are filed.

Respectfully submitted,

By: _____

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(708) 344-1000

Dated: August 27, 1998

STB FD 33388 8-27-98 D 190777

190777

CSX/NS-212

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 NORFOLK SOUTHERN AND CSX TO PETITION FOR RECONSIDERATION/CLARIFICATION OF THE WHEELING AND LAKE ERIE RAILWAY

Applicants NS[1] and CSX[2] submit this reply in opposition to the "Petition for Reconsideration/Clarification of Responsive of the Wheeling and Lake Erie Railway" (WLE-9) dated August 12, 1998.

INTRODUCTION

WLE-9 is a curious pleading. First, although it purports to seek reconsideration of Decision No. 89, it does not ask the Board to reconsider or alter any of the relief granted or any of the conditions imposed by that decision, including, specifically, the conditions imposed in favor of the Wheeling and Lake Erie Railway ("W&LE"). Instead, it merely asks the Board to "recognize" that it "understated the magnitude of the loss facing W&LE." WLE-9 at 13. Since W&LE expresses no dissatisfaction with the relief granted or conditions the Board

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1 "NS" refers to Norfolk Southern Corporation and Norfolk Southern Railway Company ("NSR").

2 "CSX" refers to CSX Corporation and CSX Transportation, Inc. ("CSXT").

imposed based on its findings. W&LE does not make clear what the purpose of such an exercise would be.[3]

Second, WLE-9 specifically asks the Board not to correct the alleged errors in its findings "at this point," since, according to W&LE, "[s]uch an effort would prove time-consuming, and could prove counter-productive to the private negotiations [among W&LE, NS and CSX] that are soon to commence." WLE-9 at 13. Instead, W&LE asks the Board merely "to recognize that it understated the magnitude of the loss facing W&LE," and to "hold in abeyance further determinations as to the scope of the loss, unless and until such time that the parties are unable to reach an accord . . . ." Id. W&LE does not indicate how the Board is supposed to "recognize" that it has understated the magnitude of the losses facing W&LE without determining what the scope of those losses are actually likely to be.

In any event, there is no merit whatever to W&LE's petition for reconsideration and it should be promptly denied. As we discuss below, a party that expresses no objection to the substantive relief granted by the Board, including the conditions imposed, has no basis for seeking agency reconsideration of statements in the agency's opinion that that party may not like. Here, the statements objected to, even if erroneous, will have no adverse consequences to W&LE; accordingly, W&LE cannot require the Board to waste its time reconsidering them. Furthermore, W&LE's claim that Decision No. 89 made erroneous findings regarding the impact of the Transaction on W&LE is simply and plainly wrong.

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[3] Although WLE-9 is styled a "Petition for Reconsideration/Clarification," Applicants can find nothing in it that seeks clarification of any aspect of Decision No. 89.

ARGUMENT

I. ALLEGED ERRORS NOT AFFECTING A PARTY'S RIGHTS PROVIDE NO GROUNDS FOR RECONSIDERATION.

In Decision No. 89, the Board thoroughly considered W&LE's responsive application and the conditions requested in it and decided to impose some but not all of the requested conditions. The Board correctly noted that W&LE "does not propose its conditions as a competitive solution to offset the diminution of competition experienced by any shipper or group of shippers," but proposed them solely "to offset the adverse financial impact of the Transaction on W&LE." Decision No. 89 at 107-108. With respect to the conflicting estimates by W&LE and Applicants regarding the likely impact of the Transaction on W&LE's finances, the Board stated as follows:

> Although W&LE's projections of a $12.7 to $15 million yearly gross traffic revenue loss are overstated, it does appear that W&LE would lose substantial revenue due to this transaction. Applicants' estimate of $1.4 million may be somewhat understated.

Id. at 108. After discussing various reasons why it believed W&LE's projections were overstated, the Board nevertheless concluded:

> Even with these adjustments, however, it is apparent that a substantial amount of traffic, probably between $1.4 and $3.0 million, could be diverted from W&LE because of this transaction. Much of this traffic loss claimed by W&LE is due to new, more efficient routings afforded applicants by the transaction rather than to any enhancement of applicants' market power. Nevertheless, we think that the combination of W&LE's precarious financial situation and these rather heavy losses calls out for a remedy to preserve essential services and an important competitive presence here.

Id. (Emphasis supplied.) Based on its perceived need to preserve the financial viability of W&LE, the Board imposed the following conditions on Applicants:

> [A]pplicants must (a) grant W&LE overhead trackage or haulage rights access to Toledo, with connections to AA and other railroads at Toledo, (b) extend

> W&LE's lease at, and trackage rights access to, NS' Huron Dock on Lake Erie, and (c) grant W&LE overhead haulage or trackage rights to Lima, OH, with a connection to IORY at Lima. Applicants and W&LE must attempt to negotiate a solution with regard to these matters; and, if negotiations are not fully successful, may submit separate proposals no later than October 21, 1998. Further, applicants and W&LE must attempt to negotiate an agreement concerning mutually beneficial arrangements, including allowing W&LE to provide service to aggregates shippers or to serve shippers along CSX's line between Benwood and Brooklyn Junction, WV, and inform us of any such arrangements reached.

Decision No. 89 at 181; see also id. at 109.

W&LE does not seek reconsideration of any of the relief granted by Decision No. 89 or any of the conditions imposed. It merely complains about the discussion in the decision of the impact of the transaction on W&LE and the "findings" that W&LE claims the Board made with respect to that impact. Since W&LE does not seek reconsideration of any of the relief granted or conditions imposed by Decision No. 89, however, the alleged "findings" about which it complains have no effect on W&LE's substantive rights. Accordingly, there is no basis for W&LE's request that those findings be reconsidered.

It is well settled that a party to an administrative or judicial proceeding cannot seek review or reconsideration of statements in a decision that it does not like if it does not seek to change any of the substantive aspects of the judgment or decision. As the D.C. Circuit stated recently in declining to review underlying findings in a Federal Maritime Commission order when the protesting parties did not object to the order itself: "Appellate courts 'review[] judgments, not statements in opinions.'" Sea-Land Service, Inc. v. Department of Transportation, 137 F.3d 640. 647 (D.C. Cir. 1998)(quoting from Black v. Cutter Laboratories, 351 U.S. 292, 297 (1956). See also, e.g. California v. Rooney, 483 U.S. 307, 311 (1987); Warner/Elektra/Atlantic Corp. v. County of DuPage, 991 F.2d 1280, 1282 (7th Cir. 1993). Similarly, in declining to review an Interstate Commerce Commission opinion

explaining why it denied various unions' petitions for reconsideration, the Supreme Court stated: "[I]t is the Commission's formal action, rather than its discussion, that is dispositive." ICC v. Brotherhood of Locomotive Engineers, 482 U.S. 270, 281 (1987).

These principles apply fully to W&LE's petition for reconsideration. Since W&LE is satisfied to accept the conditions the Board imposed in its favor, what else the Board may have said about the impact of the transaction on W&LE is irrelevant; it has no effect on W&LE's substantive rights. For the Board to reconsider matters at a party's behest that have no impact on that party's rights would be a complete waste of time and administrative resources. Indeed, by saying that the Board is not being asked to "recalculate its loss findings," at least until the negotiations under the conditions are concluded, W&LE apparently is not even asking that the Board's opinion be re-worded.

W&LE, however, claims that the Board's discussion of the impact of the transaction on W&LE could have adverse consequences for W&LE in connection with "the forthcoming negotiations between the parties" and in connection with the "imposition of specific remedial measures by the Board should the parties be unable to resolve the issues through private negotiation." WLE-9 at 3. This claim is groundless. There is no reason to believe that the discussion in Decision No. 89 of the Transaction's impact on W&LE would have any impact on the negotiations (which have already commenced) among W&LE, NS and CSX regarding the detailed terms of the trackage or haulage rights and the extension of the Huron Dock lease that the Board has ordered Applicants to provide to W&LE. The Board has already imposed "specific remedial measures" in favor of W&LE, and if the parties are unable to agree on the details of those measures (for example, the amount of the trackage and haulage charges or the duration of the Huron Dock lease extension), the Board should have no difficulty resolving

them. The discussion in Decision No. 89 about the transaction's impact on W&LE should have no bearing on the Board's resolution of those details.[4]

II. DECISION NO. 89 DID NOT MAKE ERRONEOUS FINDINGS REGARDING THE TRANSACTION'S IMPACT ON W&LE.

Even if W&LE were entitled to seek reconsideration of the Board's discussion of the transaction's impact on W&LE, there would be no basis for such reconsideration because there was no error in the discussion to which W&LE objects.

First, the discussion in WLE-9 scarcely refers to the actual discussion in Decision No. 89 and bears little relation to it. Although WLE-9 claims that "the Board's findings concerning the magnitude of transaction related losses facing W&LE are materially erroneous" (WLE-9 at 1), it never specifically identifies the "findings" it claims to be erroneous. In fact, the operative finding of the Board, for purpose of the conditions it chose to impose, was that "a substantial amount of traffic . . . could be diverted because of this transaction." Decision No. 89 at 108. The Board also stated that the amount of that potential diversion is "probably between $1.4 million and $3 million" (id.), a statement indicating that the precise amount of the potential diversion may not be known with certainty and is in any event less important that the general conclusion that the amount is "substantial." W&LE completely mischaracterizes these statements when it asserts that the Board "adopt[ed] revenue loss projections [of $1.4

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[4] The discussion in Decision No. 89 should also have no effect on the negotiations the Board also directed Applicants to undertake regarding other "mutually beneficial arrangements." Those negotiations, which have also begun, will be guided by the parties' respective interests, not by what the decision may have said about W&LE. While Applicants are hopeful that they will be able to agree on mutually beneficial arrangements with W&LE, Decision No. 89 clearly indicates that those are matters strictly for good faith negotiations by the parties and not for imposition by the Board if the parties, after good faith negotiation, are unable to agree among themselves.

million] that are actually lower than those ultimately conceded by Applicants' themselves." WLE-9 at 7.

In any event, nothing in WLE-9 shows that any of the Board's discussion of the transaction's impact on W&LE was erroneous. W&LE first argues that the Board's alleged loss projection of $1.4 million is contrary to the evidence of NS's own rebuttal witness, John Williams. WLE-9 at 5-8. As noted earlier, the Board did not project a loss of $1.4 million; furthermore, such a projected revenue loss is not in conflict with Mr. Williams' rebuttal evidence. As explained in Applicants' Rebuttal (CSX/NS-176 at 391-394), the separate diversion studies of NS and CSX indicated a net annual revenue loss to W&LE of approximately $1.4 million. NS's study, by Mr. Williams, showed W&LE losing traffic worth $1.9 million, while the CSX study, by Howard Rosen, showed W&LE gaining other traffic worth $451,000 annually, for a net loss of about $1.4 million. Both studies used 1995 traffic data, as required by the Board in this case. W&LE's two traffic studies, in contrast, used 1996 traffic data. In his rebuttal statement, Mr. Williams showed that, even using 1996 traffic data, as W&LE had, the annual loss to W&LE would be only $2.0 million. WLE-9 fails to mention any of these facts when it contends, quite erroneously, that Mr. Williams' rebuttal evidence is in conflict with a diversion estimate of $1.4 million, which was NS's and CSX's combined estimate based on 1995 traffic data.

Next, W&LE argues that the Board's estimate of the impact on W&LE fails to include losses to W&LE that would have resulted from the termination of W&LE's lease of the Huron Docks. WLE-9 at 8-10. Again, since the Board has specifically required NS to extend W&LE's lease of and access to the Huron Docks, this alleged error plainly has no adverse effect on W&LE. In any case, there was no error. NS presented evidence that NS's

termination of that lease was unrelated to this transaction. CSX/NS-177 Vol. 2B at 777 (Williams RVS at 53). Although W&LE argued to the contrary, it presented no evidence on the matter. There was certainly an evidentiary basis for the Board to conclude that these losses were not transaction related.[5]

W&LE next quarrels with the Board's observation that "[i]t is inaccurate to assume, as W&LE uniformly does here, that NS single-line service will always replace a joint NS/W&LE service. If the W&LE routing and service is more efficient, as W&LE contends, then it is likely that NS would continue to use that service." Decision No. 89 at 108. WLE-9 at 10-13. It is difficult to see how W&LE could dispute this common-sense proposition, which is supported by substantial record evidence in this case (see, e.g., CSX/NS-177, Vol. 2B at 778-780 (Williams RVS at 54-56) and one the Board is certainly able to embrace on the basis of its experience and expertise. The conclusion that NS-single line service will not always displace joint NS/WLE service (or joint NS/CSX service) is not, as W&LE argues, inconsistent with Applicants' evidence that single-line service is usually more efficient and more attractive to shippers than joint-line service. For example, as Mr. Williams explained in his rebuttal statement, the fact that W&LE has already captured market share in existing competitive markets and the fact that it will likely work with CSX to compete for traffic with NS indicate that it is likely to retain a share of traffic that will compete with single-line NS service. Id.

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[5] Contrary to W&LE's suggestion, such a finding is not inconsistent with the condition the Board imposed regarding Huron Dock. The Board could reasonably conclude that requiring an extension of W&LE's lease to the Dock was an appropriate way to contribute to W&LE's viability even if NS's planned termination of the lease was not transaction related.

In sum, even if W&LE were entitled to seek reconsideration of statements that have no effect of its substantive rights, W&LE has not shown that any of the Board's statements in Decision No. 89 regarding the impact of the transaction on W&LE are erroneous.

III. THERE IS NO BASIS FOR HOLDING W&LE'S PETITION IN ABEYANCE.

Finally, the Board should deny W&LE's request that the Board should hold its petition "under pending consideration" pending negotiations with CSX and NS and act on the petition only if and after the parties "inform the Board that they are at an impasse as to the implementation of the Board's conditions." W&LE is satisfied with the conditions. If the mandated "specific remedial measures" are the subject of an impasse, the Board will resolve the issues based on whatever evidence is brought forward that is pertinent. There is absolutely no reason to hold the petition for reconsideration in abeyance. We have shown that W&LE has offered no basis for reconsidering Decision No. 89, either now or later. Holding the matter in abeyance would not facilitate any negotiations, but would merely leave the finality of the decision uncertain for an indefinite period. W&LE's request for holding the petition in abeyance should be denied.

CONCLUSION

The Petition for Reconsideration/Clarification of Responsive Applicant Wheeling & Lake Erie Railway Company (WLE-9) should be denied.

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CERTIFICATE OF SERVICE

I hereby certify that on this 27th day of August, 1998, I have served the foregoing CSX/NS-212, Reply of Norfolk Southern and CSX to Petition for Reconsideration/Clarification of the Wheeling and Lake Erie Railway, on all parties of record by first class mail, postage pre-paid, or by more expeditious means, and by hand delivery on the following:

The Honorable Jacob Leventhal
Administrative Law Judge
Federal Energy Regulatory Commission
Office of Hearings
825 North Capitol Street, N.W.
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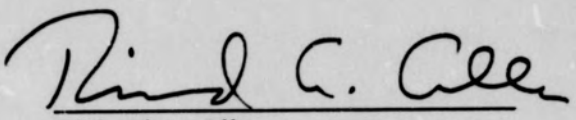

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Dated: August 27, 1998

STB FD 33388 8-27-98 D 190771

190771

CSX/NS-215

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 APPLICANTS CSX CORPORATION, CSX TRANSPORTATION, INC., NORFOLK SOUTHERN CORPORATION AND NORFOLK SOUTHERN RAILWAY COMPANY TO PETITION OF WISCONSIN CENTRAL LTD. FOR PARTIAL RECONSIDERATION OF MONITORING AND REPORTING CONDITIONS

Applicants CSX Corporation and CSX Transportation, Inc. (collectively, "CSX") and Norfolk Southern Corporation and Norfolk Southern Railway Company (collectively, "NS") hereby submit the following response to the Petition of Wisconsin Central Ltd. for Partial Reconsideration of Monitoring and Reporting Conditions (WC-19). Wisconsin Central seeks to make public operational monitoring information concerning yard operations in the Chicago terminal area that the Board directed Applicants to submit confidentially to the Office of Compliance and Enforcement. This response is filed pursuant to 49 C.F.R. § 1104.14(a).

In order to address concerns that the Conrail Transaction might lead to service problems, particularly in light of the difficulties that followed the merger of the Union

Pacific and Southern Pacific, the Board required in Decision No. 89 that Applicants regularly report to the Board on a number of operational matters during the transition period. Decision No. 89 at 162-65. The Board provided that commercially sensitive information would be held confidential by the Board, but that other information would be made public. Decision No. 89 at 165, para. 15. Applicants' discussions with shippers at the Conrail Transaction Council have led to a consensus on public reporting tailored to meet customer needs.

The Wisconsin Central Petition focuses on reporting requirement 11, which requires confidential submission to the Board on a weekly basis of daily status reports on operations at 23 yards -- 12 operated by CSX, 9 operated by NS and 2 operated by the Indiana Harbor Belt Railroad Company ("IHB"). Decision No. 89 at 164-65. Three of these 23 yards are in the Chicago terminal area -- CSX's Barr Yard and IHB's Blue Island Yard and Gibson Yard. Wisconsin Central asks the Board to reconsider, and to require instead that the status reports on the three Chicago terminal area yards be made public.

Applicants object to this requested disclosure of commercially sensitive information, as it could be used by competitors of Applicants, who are not subject to the same reporting requirements, to the commercial disadvantage of Applicants. The Board correctly provided that this commercially sensitive information should be submitted to the Board on a confidential basis. Moreover, contrary to the assertions of Wisconsin Central, there is no inconsistency between the Board's determinations that certain information should be held confidential and that other information should be made public. Furthermore, Wisconsin Central has presented no basis for granting the

requested modification of Decision No. 89. Wisconsin Central has demonstrated no need for this information. Wisconsin Central's Petition for Reconsideration should therefore be denied.

The Board correctly determined that the detailed reports that Applicants must submit to the Board about yard and terminal operations pursuant to reporting requirement 11 will contain commercially sensitive information that the Board should hold confidential. The Board, with its expertise in the rail transportation industry, can fully appreciate the competitive significance of this information. Among other uses, competitors could use the information to suggest to shippers that the Barr, Blue Island and Gibson Yards are congested and that the shipper should therefore make alternate arrangements with the competitor. Without similar information on the operations in the yards used by competitors, the shipper would have no basis to evaluate the claim.

Wisconsin Central argues that the Board's decision is inconsistent in providing for public disclosure of yard operations in the Shared Assets Areas while carving out for confidential handling information about operations at three yards in the Chicago terminal area. In fact, however, confidentiality is the rule rather than the exception. As explained above, the Board provided that reports regarding operations at the 23 yards listed in Appendix R would be held confidential.

The yards to be operated by Conrail in the Shared Assets Areas are provided special treatment because of the unique status of the Shared Assets Areas. Although Applicants do not believe that concerns expressed about potential operational problems in the Shared Assets Areas are warranted, Applicants understand that the Board provided for public disclosure of information about the Shared Assets Areas because of

heightened public concerns about service in these innovative service districts. Moreover, because the Shared Assets Areas will generally be served only from yards controlled by Applicants, unlike the Chicago terminal area, competitive harm is much less likely to follow from public disclosure of information about yard operations in the Shared Assets Areas. There is thus no inconsistency in the Board's decision that must be remedied.

Wisconsin Central has no valid need for the information it seeks. The primary concern asserted by Wisconsin Central as justification for the relief it sought was whether the IHB would retain its status as an independent switching carrier in the Chicago terminal area. The detailed information about yard operations sought by Wisconsin Central is not relevant to that issue, as Wisconsin Central acknowledges in its Petition (at 3 n.3). The Board fully addressed Wisconsin Central's arguments in Decision No. 89 at pages 90-92. The issue of whether IHB's ownership change affects its role as a switching carrier will be monitored as part of the Board's general oversight. Decision No. 89 at 161. In addition, Wisconsin Central does not need public disclosure of the Operational Monitoring information in order to assess how its own business is being handled. Wisconsin Central will obviously be able to monitor its own traffic directly.

It should also be pointed out that Wisconsin Central entered into a settlement agreement with NS in Finance Docket No. 33388. Its adversarial demand for commercially sensitive information from IHB, a carrier in which NS is acquiring an indirect financial interest, is on its face inconsistent with the support Wisconsin Central pledged for the Transaction in its settlement.

For the reasons stated, the Petition for Partial Reconsideration should be denied.

Respectfully submitted,

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August 27, 1998

CERTIFICATE OF SERVICE

I, Mary Gabrielle Sprague, certify that on August 27, 1998, I have caused to be served a true and correct copy of the foregoing CSX/NS- 215, "Response of Applicants CSX Corporation, CSX Transportation, Inc., Norfolk Southern Corporation and Norfolk Southern Railway Company to Petition of Wisconsin Central Ltd. For Partial Reconsideration of Monitoring and Reporting Conditions" to all parties on the Service List in Finance Docket No. 33388, by first-class mail, postage prepaid, or by more expeditious means.

Mary Gabrielle Sprague

STB FD 33388 8-27-98 D 190773

190773

CSX/NS-217

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 APPLICANTS CSX CORPORATION, CSX TRANSPORTATION, INC., NORFOLK SOUTHERN CORPORATION AND NORFOLK SOUTHERN RAILWAY COMPANY TO PETITION FOR RECONSIDERATION BY THE FOUR CITY CONSORTIUM

Applicants CSX Corporation and CSX Transportation, Inc. (collectively, "CSX") and Norfolk Southern Corporation and Norfolk Southern Railway Company (collectively, "NS") hereby submit the following response to the Petition for Reconsideration by the Cities of East Chicago, Indiana; Hammond, Indiana; Gary, Indiana; and Whiting, Indiana (Collectively the Four City Consortium) (FCC-18). The Four Cities seek environmental mitigation conditions in addition to those imposed by the Board. This response is filed pursuant to 49 C.F.R. § 1104.13(a).

PREFACE AND SUMMARY

The Four Cities assert that the package of environmental mitigation conditions imposed on the Applicants for their benefit is inadequate. In support of this assertion, the Four Cities

assert both procedural and substantive errors in the Board's environmental review process. On the procedural side, the Four Cities argue that the Board should not have considered any information submitted to the Section of Environmental Analysis ("SEA") after February 2, 1998, the close of the comment period on the Draft Environmental Impact Statement ("DEIS"). This contention was previously presented to the Board in the Motion to Strike of the Four City Consortium (FCC-16) (filed May 18, 1998), answered by CSX in a Response (CSX-149) (filed May 21, 1998), and rejected by the Board in Decision No. 83 (served May 27, 1998). The Four Cities do not present any new arguments in their Petition for Reconsideration that warrant a reversal of Decision No. 83. On the substantive side, the Four Cities argue that the environmental justice analysis in the Final Environmental Impact Statement ("FEIS") as applied to certain line segments within the Four City area was flawed.[1] As relief, the Four Cities ask that the Board impose limitations on the number of trains that Applicants may operate over their lines through the Four City area. The Four Cities also request that the Board modify the Operational Monitoring requirements of Decision No. 89 to facilitate oversight of the vehicle delay condition in the Four City area.

As explained below, the Board did not err, either procedurally or substantively, in evaluating the environmental impacts of the Transaction in the Four City area. Indeed, Applicants believe that the package of mitigation conditions ordered by the Board for the benefit

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[1] This argument was previously presented to the Board in the Petition for Clarification and Modification by the Four City Consortium (FCC-17) (filed July 7, 1998) and answered by CSX in its Reply (CSX-156) (filed July 10, 1998). The Board declined to address this argument in the context of that petition, advising the Four Cities that they needed to pursue the matter by administrative appeal pursuant to 49 C.F.R. § 1115.3. Decision No. 89 at 159.

of the Four Cities is very generous in light of the modest changes in traffic patterns projected for the Four City area. None of the projected changes on the rail line segments of concern to the Four Cities meet the objective thresholds for mitigation set forth in the DEIS and FEIS and adopted by the Board.[2] The Board would thus have been justified in concluding that the Four Cities was not entitled to any mitigation for environmental impacts that are not significant enough to meet these objective criteria.

However, in light of the Four City area's pre-existing vehicle delay problem, the Board fashioned an expansive package of conditions (Environmental Conditions 21(a) through (i)) designed to ensure that the Transaction would have little if any incremental impact on the Four City area.[3] Decision No. 89, App. Q at 405-06.

One can understand why the Four City Consortium would try to use the fortuity of the Conrail Transaction to put itself in a better position than it was in previously. But the relief it has sought throughout this proceeding (which would have required substantial modifications to the CSX and NS Operating Plans in the Chicago terminal area and would have limited Applicants'

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[2] CSX's Curtis Yard in Gary met the threshold for hazardous materials (Failure Mode and Effects Analysis) mitigation (Environmental Condition 6, Decision No. 89 at 391), and four highway/rail grade crossings in Gary on CSX's Willow Creek-Pine Junction line segment met the threshold for warning system upgrades (Environmental Condition 8(A), Decision No. 89 at 394). However, the Four Cities have never expressed concern in its filings in this proceeding about Curtis Yard or the Willow Creek-Pine Junction line segment.

[3] Because of its location as the eastern gateway to the critical Chicago terminal area, the Four City area is crossed by a substantial number of rail lines (including lines of Canadian National Railway, Chicago South Shore & South Bend Railroad, Elgin Joliet & Eastern Railway, and Indiana Harbor Belt Railroad, in addition to lines of Conrail, CSX and NS), and presently experiences a substantial level of rail traffic on many of these rail lines. Because most of the rail lines are at grade, the Four City area presently experiences vehicle delays in many locations, completely unrelated to the Conrail Transaction before the Board.

flexibility to adjust to changed conditions) is not legally supportable under the Board's precedent and was correctly rejected by the Board. It has been the consistent policy of the Board, as it was the policy of the Board's predecessor the Interstate Commerce Commission, not to exercise its conditioning power to remedy pre-existing conditions or other conditions not related to any effect of the proposed action before the Board. This policy was reaffirmed by the Board in Decision No. 89:

> A condition must address an effect of the transaction, and will generally not be imposed "to ameliorate longstanding problems which were not created by the merger." Finally, a condition should also be tailored to remedy adverse effects of a transaction, and should not be designed simply to put its proponent in a better position than it occupied before the consolidation.

Decision No. 89 at 78 (quoting Burlington Northern, Inc.—Control & Merger—St. Louis-San Francisco Ry. Co., 360 I.C.C. 788, 952 (1980)).

The Board, however, did not leave the Four City area without any relief. The Board imposed conditions that will accomplish the objectives of the Four Cities but through means that do not present the serious operational problems that those advocated by the Four Cities would create. The Board's conditions satisfy local needs in the Four City area without sacrificing the broader public interest in an efficient national rail system, which requires efficient rail operations through the critical Chicago terminal area. The Four Cities have not presented any persuasive new evidence or argument for imposing additional environmental conditions. The Petition for Reconsideration should accordingly be denied.

SPECIFIC RESPONSES TO THE FOUR CITIES' ARGUMENTS FOR ADDITIONAL ENVIRONMENTAL CONDITIONS

A. The Board Did Not Commit Any Procedural Errors in Evaluating the Environmental Impacts on the Four City Area and Determining the Appropriate Conditions to Mitigate Those Impacts

The Four Cities reassert the arguments they made in their May 18, 1998 motion to strike certain information submitted by CSX to SEA at the request of SEA after the close of the comment period on the DEIS. Those arguments were properly disposed of by the Board in denying the motion in Decision No. 83. There is even less merit in the Consortium's contentions now that three months have passed since the Four Cities obtained copies of the contested submissions.

The supposed "prejudice" of which the Four Cities mainly complain is that CSX revised its Operating Plan in April 1998 to reduce the projected increase in the number of trains operating over the CSX Pine Junction-Barr Yard line segment (C-023) from about six trains per day to about two trains per day, primarily by rerouting trains to other routes through the Four City area. This revision was made after the Four Cities made clear their position (unknown to CSX at the time it developed its Operating Plan) that the line segment on which they least wished to see a traffic increase was the Pine Junction-Barr Yard line segment. One might have thought that this amendment demonstrated that the procedures mandated by the National Environmental Policy Act, as implemented by the Board, were accomplishing the salutary objective for which they were designed. Instead, the Four Cities cried "foul." This cry does not ring true for several reasons.

First, the change is immaterial under the Board's objective criteria for mitigation. The DEIS evaluated the impacts on the Pine Junction-Barr Yard line segment, assuming the

originally projected 5.7-train-per-day increase on the segment, and concluded, using the same criteria as the FEIS, that there would be no impacts warranting mitigation on the line segment. DEIS, Vol. 3A at IN-26 to IN-27, IN-83 to IN-87. Thus, the change in the projected increase from about six trains per day to about two trains per day did not materially affect the Board's analysis, as the Board pointed out in Decision No. 83.

Second, both the six-train-per-day increase and the two-train-per-day increase are only good-faith projections of traffic changes on the Pine Junction-Barr Yard line segment. CSX and NS have done their best to project the traffic patterns that will follow consummation of the Transaction, but neither possesses a crystal ball. Both the Board's "merits" and environmental reviews must be based on projections, as there is no practical alternative. SEA and the Board do not simply accept operating plans at face value, however, but evaluate them to ascertain whether they appear to be sufficiently reliable for both the Board's "merits" and environmental analyses. Both the CSX and NS Operating Plans passed this review.

But even assuming, arguendo, that the projection of traffic on the Pine Junction-Barr Yard line segment (either as originally presented or as revised) turns out not to be accurate, whether because of an unexpected turn in the economy or, indulging the worst insinuations of the Consortium, because of deliberate dissembling by CSX in preparing or revising its operating plan, the Four Cities are not without recourse. In addition to any rights the Four Cities would have to reopen this proceeding under 49 C.F.R. § 1115.4, Environmental Condition 50 expressly provides as follows:

> **Condition 50.** If there is a material change in the facts or circumstances upon which the Board relied in imposing specific environmental mitigation conditions in this Decision, and upon petition by any party who demonstrates such material changes, the Board may review the continuing applicability of its final mitigation, if warranted.

Decision No. 89 at 420. There is no reason for Applicants, the Four Cities and the Board to continue to agonize over what precisely is going to happen in the future when the Board has afforded the opportunity in the future to address the situation, if necessary, based on concrete facts.

Third, the Four Cities had ample opportunity to respond to the substance of the contested late April/early May submissions to SEA in their August 12, 199[illegible] Petition for Reconsideration, but chose to forgo that opportunity and to rely entirely on their stale claim of procedural prejudice. Any claim of prejudice resulting from the Board's consideration of CSX's submissions in the FEIS dissipated to the vanishing point during the past three months. As early as the Board's Notice of Intent to Prepare an Environmental Impact Statement (EIS) and Request for Comments on Proposed EIS Scope, served July 3, 1997, the Board made it clear that there would be an opportunity to respond to matters presented for the first time in the FEIS:

> Parties that wish to file an administrative appeal of the Board's written decision (including any environmental conditions that might be imposed) may do so within 20 days from the service date of the Board's decision, as provided in the Board's rules. Any interested party will have approximately two months to consider the FEIS prior to commencement of the aforementioned period for filing administrative appeals. The schedule will provide adequate time to pursue administrative review of the Board's June 1998[4] decision after it is issued. Any administrative appeals will be addressed in a subsequent decision. This process is consistent with CEQ rules (40 CFR 1506.10(b)).

Notice of Intent at 5. See also Notice of F[illegible]al Scope of Environmental Impact Statement (EIS), served October 1, 1997, at 7; DEIS, Vol. 1 at 1-12; FEIS, Vol. 1 at 1-8 to 1-11.

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[4] Subsequent to the Notice of Intent, the scheduled dates for release of the FEIS, oral argument, the voting conference and the Board's written decision were all pushed back about one month to allow time for preparation of Safety Integration Plans.

The Board expressly reminded the Four Cities of the opportunity for administrative appeal in Decision No. 83 when rejecting their motion to strike. The Board's rules permit submission of evidence as well as argument through a petition for reconsideration. 49 C.F.R. § 1115.3. It appears then that the Four Cities could find nothing substantively wrong with CSX's revised traffic projections to present in their Petition for Reconsideration. The Board should reject their effort to use a spurious assertion of a procedural violation to obtain what they could not obtain on the merits.

B. The Board Did Not Err in its Conclusion that the Transation Would not Cause High and Disproportionate Impacts on Minority or Low Income Residents of the Four City Area

The Four Cities request that the Board stay the implementation of the CSX Operating Plan with respect to operations over the former Pennsylvania Railroad Fort Wayne Line between Hobart and Clarke Junction -- the Warsaw-Tolleston (C-026) and Tolleston-Clarke Junction (C-024) line segments -- pending completion of an analysis as to whether those operations would result in disproportionately high and adverse impacts on minority and low-income populations residing along that line. That request should be rejected on two grounds.

First, the Board has already completed that analysis. Contrary to the Consortium's assertions, there is no inconsistency between the DEIS and the FEIS. These two line segments were identified in the DEIS as segments that met the threshold for further environmental justice analysis based on the demographics of the population in the relevant area. DEIS, Vol. 5A, Appendix K, Table K-15 at pages K-22 to K-23. That is, SEA determined that minority and/or low-income populations live along these line segments. The DEIS, however, did not make any determination as to whether the Transaction-related impacts from the projected operations on these line segment were disproportionately high and adverse. That analysis was left to the FEIS.

In the FEIS, SEA completed the environmental justice analysis by first assessing the magnitude of the impacts on the line segments identified in the DEIS and then determining whether the minority and/or low-income populations on those line segments with "high" impacts – that is impacts exceeding SEA's criteria for significance in the categories of noise, hazardous materials transport, and highway/rail grade crossing safety and delay -- were disproportionately impacted. FEIS, Vol. 6C, Appendix M. Applying objective criteria, SEA concluded that the projected impacts on the minority and/or low income populations along the Hobart-Tolleston-Clarke Junction portion of the Fort Wayne Line were not disproportionately high. This is not surprising, since the increase in traffic on that line is only projected to be four to five trains per day. The projected increases in traffic on the line segments that were found to warrant mitigation for environmental justice impacts ranged from 17 to 40 trains. The Four Cities do not present any evidence or argument that suggests that the analysis in the FEIS is incorrect.

Second, the Four Cities have not properly asked for a stay of the Board's decision permitting implementation of the CSX Operating Plan, including operations over the Warsaw-Tolleston and Tolleston-Clarke Junction line segments. The Four Cities did not petition for a stay within ten days of the service of the decision. 49 C.F.R. § 1115.3(f). To justify a stay, a petitioner must demonstrate: (1) it has a strong likelihood of prevailing on the merits; (2) it will be irreparably harmed in the absence of a stay; (3) other interested parties will not be substantially harmed by the stay; and (4) the public interest supports granting the stay. See, e.g., Decision No. 91 (served Aug. 17, 1998). The Four Cities have failed to meet any of these requirements. As explained above, the Four Cities have not shown that the Board's environmental justice analysis was flawed. In addition, the Four Cities will not be harmed by rehabilitation of a rail line and subsequent operations over the line, when all operations will be

conducted in compliance with all applicable regulations and Environmental Conditions 21(b) and 21(d). In contrast, CSX would be seriously harmed if it were unable to use the Fort Wayne Line. The Fort Wayne line is an important component of CSX's Operating Plan for its Chicago terminal area traffic flows, as CSX has demonstrated in prior filings with the Board. See FEIS, Vol. 2 at 4-153. For the same reason, the public interest in efficient train operations through the Chicago terminal area does not support a stay of operations over the Fort Wayne Line.

Accordingly, the Consortium's argument that the Board should prohibit CSX from proceeding to rehabilitate the Fort Wayne Line and operating over that line pending some further Board review should be rejected.

C. The Board Should Not Limit the Number of Trains that Applicants May Operate Over Lines Through the Four Cities

The Four Cities here reiterate their request that the Board impose a cap on the number of trains Applicants may operate over their various lines through the Four City area. Applicants strenuously resisted throughout this proceeding the request by the Four Cities and other parties for conditions limiting train operations on particular line segments. See, e. g., CSX Comments on the DEIS, at 19-22 (filed Feb. 2, 1998); CSX Brief (CSX-140) at 39-40. The Four Cities' request for operating limitations was rejected by the Board after thorough examination and the Consortium provides no basis for reversing that rejection. Decision No. 89 recognizes the critical importance of efficient train operations through the Chicago terminal area. The FEIS correctly concluded that imposing a cap on the number of trains CSX may operate through the Four City area "is not a viable option because it would severely limit the routing flexibility that CSX needs to maintain operational flexibility throughout the Chicago area." FEIS, Vol. 2 at 4-153.

The Four Cities suggest in their Petition for Reconsideration that the Board impose train caps on CSX line segments as a sanction for CSX's modest revision of its projected train counts in April 1998. As explained above, however, CSX did nothing sanctionable in seeking to reroute a few trains off the Pine Junction-Barr Yard line segment consistent with the desires of the Four Cities. The Four Cities also suggest that the Board hold Applicants strictly to the projected train counts in their Operating Plans because Applicants represented that they would operate that way. This argument similarly misses the mark.

As explained above, operating plans are good-faith projections of post-Transaction operations that are designed to provide the Board with an adequate basis to evaluate both the "merits" and the environmental effects of a Transaction. The Board has never limited applicants to operations that strictly match their post-transaction projections. Such a requirement would not be in the public interest and would impose unworkable constraints on fundamental common carrier requirements. As SEA explained in the FEIS:

> The Board licenses railroads as common carriers, meaning that railroads are required to accept goods and materials for transport from all customers upon reasonable request and at a reasonable rate. The Board does not regulate how many trains the railroads operate or where they can operate. Railroads are able to operate as many trains as they need in order to serve their customers . . . .
>
> . . . In developing and evaluating environmental mitigation options, the Board is also guided by the historical authority of ICC and Congressional intent regarding railroad regulation. Over the last 20 years, Congress has continued to reduce the regulatory role of ICC and the Board. The statute allows carriers to compete and to increase the efficiency of their services, with regulatory intervention to be employed only as a last resort to prevent an abuse of market power. See 49 U.S.C. 1010[1].
>
> [T]rain traffic [is] a product of market forces affecting the flow of goods and materials. The railroads decide on a continuous and ongoing basis which routes are most efficient to meet customers' needs. The Board does not regulate these factors . . . .

FEIS, Vol. 3 at 5-69 to 5-70.

The Four Cities argue that if CSX is allowed to operate more trains through the Four City area than projected in its Operating Plan, CSX would make a "mockery" out of the Board's environmental review process. This kind of rhetoric belittles the Board's carefully crafted conditions. The Board could not have made it plainer to the Four Cities that the Board will hold the Applicants fully accountable, albeit not by the ill-advised means proposed by the Four Cities. The Board has imposed a general five-year oversight condition. Decision No. 89 at 160-61. The Board has imposed operational monitoring, including in the Chicago terminal area. Decision No. 89 at 162-65. The Board has required Applicants regularly to meet with representatives of the Four Cities for three years following the effective date of the Board's decision. Environmental Condition 21(i), Decision No. 89, App. Q at 406. Finally, the Board has provided Environmental Condition 50, which is worth quoting again here, precisely to address the situation the Four Cities are concerned about -- that an Applicant's operations will turn out to be materially different than was projected:

> **Condition 50.** If there is a material change in the facts or circumstances upon which the Board relied in imposing specific environmental mitigation conditions in this Decision, and upon petition by any party who demonstrates such material changes, the Board may review the continuing applicability of its final mitigation, if warranted.

Decision No. 89, App. Q at 420. Applicants have no doubt that the Four Cities would bring any material change in operations to the attention of the Board with a request for additional mitigation should there be a material change from the operating plan projections. This is all the accountability the Four Cities need.

D. The Interests of the Four Cities Would Not be Served by the Requested Modifications to the Board's Operational Monitoring Requirements for the Chicago Terminal Area

The Four Cities request that the Board make public the confidential weekly reports that Applicants will submit to the Board on Chicago Gateway Operations and on Yards and Terminals pursuant to Operational Monitoring Requirements 10 and 11. Decision No. 89 at 164-65. Applicants strenuously object to the disclosure of this commercially sensitive information to the Four Cities or any other party. This information could be used to the disadvantage of CSX and NS by competitors who are not subject to similar disclosure requirements. The Board plainly recognized this fact in directing that the reporting of certain information be made only to the Board's Office of Compliance and Enforcement.

Moreover, the Four Cities have no legitimate need for most of this information. The Operational Monitoring requirements are designed to assess the quality of rail service, not vehicle delay on a particular line segment. The information needs of the Four Cities can be satisfied by information that is not as commercially sensitive. From a service perspective, it matters greatly whether a particular train that crosses a particular grade crossing in Gary, Indiana is on schedule or twelve hours behind schedule, but from a vehicle delay perspective, it makes no difference. From a service perspective, as long as a train is on time to the yard, it makes little difference what its speed was at any particular point on the line, but from a vehicle delay perspective, the speed of the train at a particular crossing matters a great deal.

Recognizing that the Operational Monitoring information is not really useful for their purposes, the Four Cities also seek to have the Board expand the Operational Monitoring requirements to include information relevant to vehicle delay in the Four City area. Applicants object to using the Operational Monitoring requirements for purposes other than assessing service performance.

As CSX has stated repeatedly to the Board and to the Four Cities, CSX understands that it must provide relevant information to the Consortium. Environmental Condition 21(i) requires that Applicants attend "regularly scheduled meetings" with Four Cities representatives to "provide a forum for assessing traffic delay, emergency response, and driver compliance with railway grade crossing warning systems through improved education and enforcement." Decision No. 89, App. Q at 406. In these meetings, CSX intends to provide the kind of information the Consortium identifies at pages 17 and 18 of its Petition, just as CSX expects the Four Cities to share relevant information, such as about their efforts to enhance driver compliance with rail crossing warnings. The Board need not amend Decision No. 89 to specify exactly what information each party must provide to the other in exactly what format.[5]

Applicants believe that more will be accomplished through the face-to-face meetings required by the Board than through a proliferation of paper reporting requirements. Requiring monthly written reports in addition to the meetings would place an unnecessary administrative burden on Applicants without material benefit to the Four Cities. If any of the parties are not satisfied that the required meetings are fulfilling their purpose, they can always seek appropriate relief from the Board at that time.

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[5] For example, there are a variety of methods that could be employed to calculate train speed. Average train speed is not presently recorded by CSX for trains operating between Pine Junction and State Line Tower on the Pine Junction-Barr Yard line segment (C-023). CSX is presently evaluating the best method for collecting information on train speed relevant to assessing vehicle delay on the line segment. The Board should allow CSX to work this issue out with the Four Cities. There is no need for the Board to involve itself in this process, at least not in the first instance, and the Board should not mandate a particular method for measuring train speed or other performance measures without full consideration of the options.

In sum, then, neither the Operational Monitoring requirements nor the Environmental Conditions of Decision No. 89 should be modified in any respect, as the Board crafted the Decision to provide for the accountability that the Four Cities seek.

CONCLUSION

For the reasons stated, the Petition for Reconsideration should be denied.

Respectfully submitted,

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August 27, 1998

CERTIFICATE OF SERVICE

I, Mary Gabrielle Sprague, certify that on August 27, 1998, I have caused to be served a true and correct copy of the foregoing CSX/NS- 217, "Response of Applicants CSX Corporation, CSX Transportation, Inc., Norfolk Southern Corporation and Norfolk Southern Railway Company to Petition for Reconsideration by the Four City Consortium" to all parties on the Service List in Finance Docket No. 33388, by first-class mail, postage prepaid, or by more expeditious means.

Mary Gabrielle Sprague

STB FD 33388 8-27-98 D 190772

190772

CSX/NS-216

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 APPLICANTS CSX CORPORATION,
CSX TRANSPORTATION, INC.
NORFOLK SOUTHERN CORPORATION, AND
NORFOLK SOUTHERN RAILWAY COMPANY
TO PETITION FOR RECONSIDERATION
AND STAY OF THE CONGRESSIONAL DELEGATION
LED BY REPRESENTATIVE JERROLD NADLER**

Applicants CSX Corporation and CSX Transportation, Inc. (collectively, "CSX") and Norfolk Southern Corporation and Norfolk Southern Railway Company (collectively, "NS") hereby submit the following response to the Petition of the Congressional Delegation led by Representative Jerrold Nadler seeking

(i) reconsideration and (ii) a year's stay of the disposition of that request for reconsideration.[1] This response is filed pursuant to 49 C.F.R. § 1104 13(a).

SUMMARY

Generally following positions taken by it during the course of these proceedings, the Congressional Delegation (the "Delegation") seeks reconsideration of the Board's dispositions concerning its requests for additional rail service in the "East of the Hudson" region.[2] The Delegation also seeks a stay of disposition of its Petition for Reconsideration for a year pending the outcome of voluntary discussions among the Delegation, CSX and NS as to "the issues raised here [in the Petition] and in the many comments submitted in this proceeding relating to service East of the Hudson." Pet. at 7.

CSX and NS propose to have the dialog referred to by the Delegation and hope that it will be a fruitful source of agreements which will launch private and public initiatives that may, over time, bring increased use of rail services to New York City and the rest of the region East of the Hudson. But CSX and NS believe that the Petition for Reconsideration has no basis in law or under the Board's precedents and practices

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[1] Undesignated (filed August 12, 1998). We refer to the Petition as "Petition," abbreviated as "Pet."

[2] Primarily described in Decision No. 89 (the "Decision") at 79-84.

and that a year's stay of consideration of that Petition would not contribute to orderly procedure. Accordingly, the Petition should be denied in both respects.

BACKGROUND

The Delegation, and other parties taking similar views in part, proposed during the course of the case that various steps be taken to increase rail service East of the Hudson. These included: (i) creation of, or extension of, a Shared Assets Area to include cross-harbor float operations across Upper New York Bay from Greenville, NJ, to Brooklyn, NY, terminal facilities in Brooklyn, the Bay Ridge Line owned by LIRR[3] with freight rights granted to NYAR from Brooklyn to Fresh Pond Jct., Queens, and from that point North and East in various directions; (ii) the removal of the NYCH as cross-harbor operator and the conscription of CSX and NS as such operator; (iii) the grant of authority to NS or some other carrier to run freight service, using cars of appropriately low profile, through the Hudson and East River tunnels in midtown Manhattan, currently used by Amtrak and LIRR passenger operations, to New Haven, CT; (iv) the grant of trackage rights to an unspecified carrier (only the New England Central volunteered) to run freight service between Selkirk Yard, NY and points in New York City over Conrail's Hudson Line East of the river; and (v) certain related other proposals.

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[3] Abbreviations follow those in the Decision.

These proposals, whether they were right or wrong, all had in common as their stated purpose the laudable objective of increasing the carriage of freight by rail in and out of the Greater New York City area and decreasing the carriage of freight by trucks, an objective to which in general CSX and NS subscribe.

The proposals had another common characteristic: They were all inconsistent with the Board's settled precedents, to the effect that conditions would not be imposed by the Board on a rail merger or combination transaction which would introduce more competition after the transaction than existed before or which would bring more rail opportunities to a shipper or region than it had before.

The Board's Decision recognized this. However, the Board determined to impose certain of the requested conditions or variations of them anyhow. One, not consented to by the Applicants in the form imposed, was to provide additional competition on Conrail's East of the Hudson Line, running from Albany to New York City, via trackage/haulage right to be negotiated with CP, finding the same to be "feasible, sustainable, and appropriate." Decision at 71 n.110; Ordering Para. No. 28, Decision at 177. Other conditions, some consented to by the pertinent Applicant, included the establishment of a committee with the City of New York to promote the development of rail traffic to and from the City, with particular emphasis on the Hudson Line, and to address the goals of industrial development and reduction of truck traffic (Ordering Para. No. 29, Decision at 178); participation of CSX in studying the feasibility of upgrading cross-harbor float and tunnel facilities to facilitate cross-harbor rail movements and, in particular, the Cross Harbor Freight Movement Major

Investment Study launched by the City in that regard (Ordering Para. No. 30. Decision at 178); and mandating discussion between P&W and CSX as to the possibility of expanding P&W's present service via trackage or haulage rights between New Haven, CT and Fresh Pond Jct., Queens (Ordering Para. No. 31, Decision at 178). In addition, a monitoring condition was imposed upon the Applicants relating to truck traffic at their intermodal terminals in Northern New Jersey and in Massachusetts (Ordering Para. No. 22, Decision at 177). It involved the "origins, destinations and routings" for the truck traffic at those terminals, with a view to providing the basis for a determination as to whether the Transaction has led to substantially increased truck traffic over the George Washington Bridge. That subject has been a concern of the Delegation in various filings in the case and is repeated in the present Petition. Pet. at 6.

The Board extensively discussed the issues raised by the Delegation in the case and those raised with respect to East of the Hudson service by other interests. See, primarily, Decision at 79-84; see also id. at 71. The Board's discussion and actions taken go as far as – in fact, go further than – the Board's settled precedents permitted the Board to go in dealing with proposals for increased rail service made by civic and governmental groups in a rail merger proceeding. The Applicants have accepted the conditions referred to and are not seeking reconsideration of them.

REASONS FOR DENYING THE PETITION

The issues raised in the Petition are essentially attempts to reargue what has been brought forward before and on which the Board has passed. Those which at first blush might look new are not, or are beyond the Board's jurisdiction. Thus, the proposal to use the 65th Street facility in Brooklyn as the southern terminus of the trackage/haulage rights granted CP (Pet. at 3-4) is simply a variant of earlier requests that the Bay Ridge Fresh Pond Jct./Brooklyn line be included as a Shared Asset Area, incorporating a line of railroad in which NYAR, a non-applicant, has exclusive freight rights (a point made in the Decision at page 79). Likewise, the charges made in the Petition (Pet. at 6-7) that the Metropolitan Transit Authority, in imposing a ban on garbage traffic at points on Long Island, has manifested racial bias, do not seem to raise issues within the jurisdiction of the Board. Accordingly, the Petition for Reconsideration does not make the showing that the Board's regulations contemplate, namely, that the Board's order is "affected materially because of new evidence or changed circumstances" or that the Board's decision "involves material error." See 49 C.F.R. § 1115.3(b). Insofar as it seeks reconsideration, the Petition should be denied.

The Petition requests that all proceedings on the Petition, including, in particular, the Board's disposition of the Petition, be held in abeyance for approximately a year, until July 20, 1999 "or until such earlier time as any party shall move to reopen the matter." Pet. at 7. The Petition itself thus seems to contemplate "unanimous consent" of the Delegation, CSX and NS with respect to that stay and

"holding in abeyance"; the stay sought is one that any party can reopen at any time. CSX and NS do not consent to the stay, and it should not be granted.

CSX and NS are interested in having a constructive discussion with the Delegation, its representatives, and the representatives of other interested parties with respect to the provision of improved rail service to New York City. Holding the Petition for Reconsideration open would not facilitate that discussion, and would be unnecessary. In addition, as to the conditions imposed by the Board on the Transaction looking toward improved rail service "East of the Hudson," certain of the conditions have reporting requirements and expressly reserve such powers as the Board may have to take further action if agreements are not reached; the conditions are enforceable by the Board on its own motion or on petition, and a general reservation of the Board's oversight for a five-year period has been ordered. Ordering Para. No. 1, Decision at 173-74. No purpose would be served by holding the Petition for Reconsideration in abeyance, and the conditions in question and the Board's retained powers over the Transaction and its general powers to enforce the pertinent statutes, are ample to protect the public interest.

It may well be that the solutions necessary to achieve the goals of the Delegation will come only through public infrastructure projects, mixed private/public activities, including tax or other incentives to industries best served by rail to participate in industrial redevelopment in the City, or other activities beyond the scope of the Board's specialized competence. The conferences initiated by the Delegation, the proceedings of the committee proposed by CSX and ordered by the Board, and the

Major Investment Study launched by the City of New York may all lead to solutions. The request for a "freeze" on consideration of the Petition for Reconsideration adds nothing to these potential avenues of progress and could well detract from them. The request for a stay should be denied.

CONCLUSION

For the reasons stated, the Petition for Reconsideration and for a Stay should be denied.

Respectfully submitted,

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August 27, 1998

CERTIFICATE OF SERVICE

I, Dennis G. Lyons, certify that on August 27, 1998, I have caused to be served a true and correct copy of the foregoing CSX/NS-216, Response of Applicants CSX Corporation, CSX Transportation, Inc. Norfolk Southern Corporation, and Norfolk Southern Railway Company to Petition for Reconsideration and Stay of the Congressional Delegation Led by Representative Jerrold Nadler, to all parties on the Service List in Finance Docket No. 33388, by first-class mail, postage prepaid, or by more expeditious means.

DENNIS G. LYONS

STB FD 33388 8-27-98 D 190770

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CSX/NS-210

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 APPLICANTS CSX CORPORATION, CSX TRANSPORTATION, INC., NORFOLK SOUTHERN CORPORATION AND NORFOLK SOUTHERN RAILWAY COMPANY TO PETITION FOR RECONSIDERATION OF STARK DEVELOPMENT BOARD

Applicants CSX Corporation and CSX Transportation, Inc. ("CSX") and Norfolk Southern Corporation and Norfolk Southern Railway Company ("NS") (collectively "Applicants") hereby reply to the Petition for Reconsideration of Stark Development Board ("Stark") filed August 12, 1998 (SDB-15). Applicants urge the Board to deny the Stark Petition on the grounds that it raises no arguments that warrant reconsideration of the Board's denial in Decision No. 89 of the intrusive conditions requested by

Stark for the benefit of the Neomodal Terminal that it owns. Throughout this proceeding, Stark has endeavored to use the Board's consideration of the Conrail Transaction as a means to solve problems associated with Neomodal that have nothing to do with the Transaction. Its latest Petition is more of the same and, were it granted, would significantly improve Neomodal's situation beyond that which existed before the Transaction. There is simply no problem for the Board to fix here -- intermodal shippers in Northeast Ohio will benefit from the Transaction and Neomodal will benefit from the conditions that the Board has imposed in favor of the Wheeling and Lake Erie Railway Company ("W&LE"), on whose tracks Neomodal is located.

I. BACKGROUND

Stark's interest in this proceeding relates to an intermodal terminal in Stark County, OH known as Neomodal, which is located on the W&LE. Throughout the proceeding, Stark has sought numerous conditions designed, it claims, to protect Neomodal from the impact that Stark believes the Conrail Transaction has already had on the terminal. In fact, however, Stark has sought to impose conditions on CSX and NS that essentially would make CSX and NS responsible for the operating and financial success of the Neomodal Terminal. In its initial evidentiary filing (SDB-4), Stark requested a series of overly

broad conditions that would require CSX and NS to "provide competitive pricing, schedules, market access and reliability to Northeast Ohio industries;" to "integrate[] [Neomodal] into the CSX and NS systems and market[] [it] as if it were their own terminal;" and to "enter into long-term 'take or pay' lift contracts" of unspecified terms to guarantee repayment of the public sector loans used to build the Terminal. As an alternative, Stark sought to have CSX and NS "be required to purchase the Terminal, at its fair market value, and integrate it into their systems in a manner that will continue competitive rail service to NEO and Western Pennsylvania."

Although the Board granted none of these extraordinary conditions (which Applicants opposed in full), Stark and Neomodal clearly did benefit from the Board's decision. They did so by virtue of the significant relief granted to the W&LE, i.e., several trackage, haulage and other rights, designed to offset any impact on W&LE's financial position resulting from the Transaction. See Decision No. 89 at 107-109 and Ordering Paragraph No. 68 at page 181.[1] The expansion of W&LE's service

[1] By virtue of Decision No. 89, W&LE will obtain overhead haulage or trackage rights to Toledo with connections to the Ann Arbor Railroad and other railroads there; an extension of its lease for Huron Docks and trackage rights access to Huron Docks and overhead haulage or trackage rights to Lima, OH, including a connection with the Indiana and Ohio Railroad.

territory and enhancement of its access to other railroads will bolster W&LE's financial health, thereby benefiting the Neomodal Terminal.

Not content with this relief, Stark requests greatly expanded relief in its Petition for Reconsideration. Stark now seeks "written assurances," in many cases for ten year terms, that CSX and NS will each operate a specified number of trains per day through their Willard and Bellevue yards respectively (one eastbound and one westbound train in CSX's case and one train "in all directions" in NS' case) to service Neomodal and W&LE traffic; that CSX will "connect the W&LE directly into its Collinwood, Ohio Yard"[2] and provide timely, reliable and daily access thereto; that CSX and NS will provide certain rate benefits for Neomodal traffic in the form of "levelized, total intermodal system haulage rate[s]" as between Neomodal and CSX and NS terminals in the Northeast Ohio/Western Pennsylvania area; that CSX and NS will provide "timely schedules and reliable service" to W&LE and Neomodal; that both will provide an unlimited supply of empty containers to Neomodal; that both will enter ten year lift contracts guaranteeing 20,000 lifts/year at the rate, subject to 5% escalation, of $30/lift; and that both will "aggressively market and sell Neomodal as if

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[2] It is not clear what Stark means by this request.

it were their own terminal." While several of these requested conditions seem to be interposed for the benefit of W&LE, as well as Neomodal, it bears note that W&LE has not itself requested these conditions, or the imposition of any conditions beyond those granted to it by the Board. Thus, Neomodal is over-reaching in its requests not only on behalf of itself (as Applicants will show next), but seemingly on behalf of another party.[3]

II. NEOMODAL'S PROBLEMS ARE UNRELATED TO THE TRANSACTION AND WARRANT NO SPECIAL CONDITIONS

A Petition for Reconsideration may be granted only if there is new evidence, changed circumstances or material error in the Board action. See 49 C.F.R. 1115.3(b). Stark offers no new evidence or evidence of changed circumstances. As shown below, neither does it demonstrate any material error in the denial of its requested conditions.

Decision No. 89 did not expressly address the requests for relief propounded by Stark. The Decision provided, however, that "all requests for conditions not specifically discussed and approved in this decision should be considered denied."

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[3] W&LE filed a Petition for Reconsideration/Clarification (WLE-9) of Decision No. 89, but therein seeks none of the relief requested in Stark's filing. W&LE's silence in this regard can reasonably be interpreted as an absence of support for the conditions that Stark requests on its behalf.

Decision No. 89 at 78-79. Stark assumes in its Petition that the Board denied its request for conditions on the basis that it sought relief for a pre-existing "problem." Applicants submit that that is exactly the basis on which Stark's specific requests for conditions related to the Neomodal Terminal were properly denied.[4] As discussed below, Neomodal's competitive problem stems primarily from its location. Applicants further submit that the Board's decision did not leave Stark empty-handed, for the conditions imposed for the benefit of W&LE will benefit Stark as well.

The gist of Stark's complaint is that, because of its less advantageous location, Neomodal may lose business to improved intermodal terminals that CSX and NS plan to operate on Conrail lines allocated to them; i.e., that shippers that might today use Neomodal may favor these other terminals in the future. To state this proposition is to recognize why Stark is entitled to no relief. Conditions are not appropriate merely to protect entities from enhanced competition resulting from a transaction, and from the better service and improved facilities that the

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[4] The Board properly concluded in Decision No. 89 that, "A condition must address an effect of the transaction, and will generally not be imposed 'to ameliorate longstanding problems which were not created by the merger.'" Decision No. 89 at page 78, quoting Burlington Northern, Inc. -- Control & Merger -- St. L., 360 I.C.C. 788, 952 (footnote omitted).

parties to the transaction will provide. See Santa Fe Southern Pacific Corp. – Control – Southern Pacific Transportation Co., 2 I.C.C.2d 709, 808 (1986) (conditions warranted only when a transaction will result "in a lessening of the adequacy of transportation to the public . . . carriers are not entitled to protection from traffic diversion or from the risk of competition.") To impose conditions to protect entities like Stark from the effects of improved service from NS and CSX would in fact harm the public interest because it would "tend[] to limit a shipper's ability to obtain the best service from the merged company and [would] dampen[] the incentives for competitive response to the merged company from existing railroads." Burlington Northern, Inc. – Control and Merger – St. Louis-San Francisco Railway Company, 360 I.C.C. 788, 951 (1980), aff'd 632 F.2d 392 (5th Cir.), cert. denied 451 U.S. 1017 (1981).

In fact, Neomodal today competes for intermodal cargo with existing Conrail intermodal terminals in Cleveland (Collinwood) (to be allocated to CSX), Crestline, OH and Pittsburgh, PA, the latter two terminals to be allocated to NS as a result of the Transaction.[5] Neomodal will compete with those same terminals

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[5] The Crestline facility is today a Triple Crown facility operated jointly by NS and Conrail.

after the Transaction as well. As Stark notes, CSX will be expanding the Conrail intermodal facility at the Collinwood Yard and NS will be relocating the Crestline facility a short distance to Bellevue, OH. Petition, p. 3. However, the fact that both of the Applicants will be investing in assets now owned by Conrail, and improving those assets or relocating them to a more favorable location, hardly justifies the imposition of a condition to protect Neomodal. The Transaction, in short, will not create any new terminals to serve Northeast Ohio shippers, contrary to the impression left by Stark in its Petition; though if it did, Neomodal could scarcely complain. In any event, the Transaction will improve existing facilities available for the benefit of intermodal customers, but again, the Board's conditioning power should not be used to protect competitors from increased competition.[6]

It seems that Neomodal may not be meeting the expectations of those who decided (without the support of, or even knowledge of, CSX and NS) to construct the terminal at its present location, but the Applicants should not pay for that problem. Indeed, the root cause of Neomodal's problems has nothing to do with the Conrail Transaction, and everything to do with

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[6] Of course, even if new facilities were to be established by CSX or NS, that would hardly justify the imposition of a condition to favor Neomodal.

Neomodal's poor location, which was chosen for reasons unrelated to sound transportation decisionmaking.

As CSX and NS demonstrated in their rebuttal testimony (with the extensive assistance of Stark's own testimony and exhibits), Neomodal is not located where it is because of careful and considered transportation planning by a Class I carrier or because its planners consulted with a Class I carrier before committing to its construction.[7] See Verified Statement of Peter Rutski, CSX/NS-177, Vol. 2B at 28-30; Rebuttal Verified Statement of Thomas L. Finkbiner, CSX/NS-177, Vol. 2A, at HC-83-85. Rather, it is uncontroverted that Neomodal was sited where it is as a by-product of a track relocation project that was designed to induce a major Stark County employer, Fleming Foods, to retain and expand its facility in the county.

In fact, Neomodal's location on the lines of the W&LE, rather than the lines of a Class I carrier, results in an inherent detriment for that facility because intermodal cargo handled there must be switched to or from a Class I carrier, thereby necessarily extending transit times and increasing costs, as fully explained in the verified statements of Mr.

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[7] As the record evidence discloses, neither CSX nor NS learned of the project until after the decision had been made to build Neomodal at its current location and public funding had been procured. This point is discussed further below.

Rutski for CSX and Mr. Finkbiner for NS. See Rutski Verified Statement at HC-397; Finkbiner Rebuttal Verified Statement at HC 84-85. Further, Neomodal was located in an area that does not generate a large volume of intermodal business. Its relative proximity to major East Coast markets (it is 450 miles to Northern New Jersey) and Chicago (about 350 miles distant) makes truck transport highly competitive with intermodal traffic moving between the Neomodal area and these markets. Rutski Verified Statement at HC-24. Thus, by virtue solely of its location on the W&LE tracks in Stark County, Neomodal suffers from increased transit times -- a serious shortcoming for intermodal services that are generally competitive with trucking only if transit times are favorable -- and from the absence of a large local market.

With these natural disadvantages, which obviously are unrelated to the Conrail Transaction, it is not surprising that Stark wants somebody else to shoulder responsibility for solving Neomodal's problems. In a vain effort to fit Neomodal within the criteria for the issuance of conditions, Stark contends in its Petition that Neomodal is confronting "operational and financial problems" that "were created as a result of the Conrail breakup." Petition, p. 4. However, Stark utterly fails to show that any such problems are related to the Conrail Transaction.

To the contrary, Stark's own evidence shows that the Terminal has not met financial expectations over the last several years, a fact that can hardly be blamed on the Conrail Transaction. See SDB-4, Verified Statement of Joseph R. Stadelman at 4-7 (blaming Neomodal's performance on alleged actions of CSX and NS that bear no relation to the Conrail Transaction.)

In an effort to prove that Neomodal's problems are not related to its location, Stark argues that CSX and NS would not have aggressively pursued W&LE to secure haulage contracts if Neomodal's location were a problem. This contention, of course, does not demonstrate any relation between Stark's problems and the Conrail Transaction. What Stark is referring to is the fact that CSX and NS have indeed undertaken efforts to market the Neomodal Terminal and have entered agreements to do so – but its poor location has burdened these efforts. See Rutski Verified Statement at HC-32-33, Finkbiner Rebuttal Verified Statement at HC-85. It is ironic indeed that the efforts by CSX and NS to work with W&LE to promote traffic via Neomodal are now held against them.

Stark also argues that federal funds would not have been committed to build Neomodal if Stark had known that "CSX and NS were secretly buying Conrail in the time period prior to the start of the construction of Neomodal." Petition, p. 4. Stark

is attempting to revise history here -- the decision to build Neomodal was made in 1993 and the Terminal was constructed in 1995, well before CSX and NS struck a deal (about which there was little secrecy) to purchase Conrail. See Rutski Verified Statement at HC-394-396; Finkbiner Verified Statement at HC-83-84. The fact that federal funds were committed to the project is simply not relevant to the issues before the Board here.

Further, Stark readily acknowledged in an interrogatory response in this case that, "SDB [Stark] consciously did not involve any of the Class I carriers that connected with the Wheeling and Lake Erie Railway Company System ("W&LE") prior to requesting and obtaining" federal funds to build the Terminal on November 22, 1994. Interrogatory Response, SDB-5 at 1. As Mr. Rutski and Mr. Finkbiner have testified, neither CSX nor NS in any way induced Stark to build the Neomodal Terminal.

Nonetheless, both applicant railroads have undertaken efforts to market the Neomodal terminal. Whether Neomodal succeeds or not in the future will, and should be, determined by market forces, not regulatory conditions. Notably absent from Stark's filing is any proof that shippers in the Northeast Ohio area will have inadequate competitive options compared to those available today. Both CSX and NS will have a significant presence in the area. So too will W&LE, which as noted will

benefit from the conditions imposed on its behalf by the Board. In fact, contrary to Stark's self-serving efforts to distance itself from the conditions imposed for the benefit of W&LE, those conditions will benefit Neomodal by strengthening W&LE.

Finally, Stark's proposed conditions are entirely unrealistic and unjustified even if any relief were warranted, which it is not. Neomodal does not today generate nearly enough traffic to warrant a guaranteed daily drop off/pick up of its cars at Willard and Bellevue; a rate equalization condition would be inappropriate in the highly competitive, deregulated intermodal market; a requirement that Neomodal be supplied with an unending stream of containers, trailers and cars and that it be favored with guaranteed lift contracts at Stark-determined 1998 rate and volume levels is totally unjustified by any record evidence of need or relationship to the Transaction; and written assurances of service or marketing levels should not be required.[8] If the market produces traffic at Neomodal, CSX and NS will serve it consistent with their ability to timely and economically do so, as is the case with any other shipper. There is simply no reason to favor Neomodal over others with

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[8] Stark's request that W&LE be given access to CSX's Collinwood Yard in Cleveland does not appear to have anything to do with Neomodal. This requested condition, like the others Stark has requested, is unexplained and unjustified, and not sought by W&LE.

special conditions which, if adopted, would plainly improve Neomodal's position over that which it holds today.

CONCLUSION

Stark's filing ignores the central truth that the Board's role is to protect competition, not competitors. There will be no Transaction-related loss of competition for intermodal shippers in Northeast Ohio; if anything, they will have more competition than before with the allocation of the pertinent Conrail facilities to CSX and NS and their improvement or relocation. The silence of those shippers in supporting Stark's position speaks volumes to that point. Stark is simply trying to use the Board to fix a situation of its own making. The Board should reject that effort and deny its Petition for Reconsideration.

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August 27, 1998

CERTIFICATE OF SERVICE

I, Dennis G. Lyons, certify that on August 27, 1998, I have caused to be served a true and correct copy of the foregoing CSX/NS-210, "Reply of Applicants CSX Corporation, CSX Transportation, Inc., Norfolk Southern Corporation and Norfolk Southern Railway Company to Petition for Reconsideration of Stark Development Board," to all parties on the Service List in Finance Docket No. 33388, by first-class mail, postage prepaid, or by more expeditious means.

DENNIS G. LYONS

STB FD 33388 8-27-98 D 190778

190778

CSX/NS-213

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 NORFOLK SOUTHERN AND CSX TO PETITION OF READING BLUE MOUNTAIN & NORTHERN RAILROAD COMPANY TO REOPEN AND TO CLARIFY

Applicants NS[1] and CSX[2] submit this reply in opposition to the "Petition of Reading Blue Mountain & Northern Railroad Company to Reopen and To Clarify" (RBMN-10) dated August 11, 1997. Reading Blue Mountain & Northern Railroad ("RBMN") is requesting the Board to "clarify" three aspects of its Decision No. 89 in this proceeding. None of those aspects of the decision need or warrant clarification, and RBMN's petition should be denied.

BACKGROUND

RBMN is a Class III railroad serving central Pennsylvania. It is mainly formed from lines formerly owned and operated by Conrail. Some of those lines, referred to as the "Lehigh Cluster" were acquired by RBMN from Conrail pursuant to a purchase and sale agreement dated August 19, 1996 (the "Lehigh Agreement"). The Lehigh Agreement contains provisions

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[1] "NS" refers to Norfolk Southern Corporation and Norfolk Southern Railway Company ("NSR").

[2] "CSX" refers to CSX Corporation and CSX Transportation, Inc. ("CSXT").

pertaining to the ongoing interchange of traffic between RBMN and Conrail and setting forth mutual rights and obligations concerning rates, allowances and other matters.

Under the Transaction Agreement, the Conrail lines that connect with RBMN will be allocated to PRR and operated by NS. In its comments filed on October 21, 1997 (RBMN-5), RBMN requested several conditions, including a condition that the Lehigh Agreement "be amended so as to remove or modify the 'penalties' imposed on RBMN for traffic interlined with carriers other than Conrail . . . ." RBMN-5 at 3. Nothing in RBMN's comments or subsequent pleadings asked for the right to terminate the Lehigh Agreement altogether or asserted the right to do so following implementation of the Transaction if the Board were to approve it. In the Application, Applicants specifically requested the Board to authorize NS and CSX to "use, operate and perform and enjoy [Conrail's Allocated Assets] to the same extent as CRC could, notwithstanding any provisions purporting to limit or prohibit CRC's assignment of its rights to another person or person." CSX/NS-18 at 102-103. RBMN never objected to this requested relief.

In Decision No. 89, the Board granted in part the conditions requested by RBMN. In Ordering Paragraph 39, it ordered:

> As respects any shortline, such as RBMN, that operates over lines formerly operated over by CSX, NS or Conrail (or any of their predecessors), and that, in connection with such operations, is subject to a "blocking" provision: CSX and NS, as appropriate, must enter into an arrangement that has the effect of providing that the reach of such blocking provision is not expanded as a result of the CSX/NS/CR Transaction.

Decision No. 89 at 178. The Board also granted in pertinent respects the relief sought by Applicants regarding the use and enjoyment of Conrail's Allocated Assets by NS. Id. at 175, Ordering Paragraphs 8 and 10.

ARGUMENT

I. THE BOARD'S DECISION RESPECTING THE NITL AGREEMENT REQUIRES NO CLARIFICATION.

RBMN first perceives some ambiguity in Ordering Paragraph No. 20, and requests the Board to clarify it "to provide that the single-line to joint-line protection may be exercisable by both Class III railroads and/or by shippers served by Class III carriers." RBMN-10 at 2. NS and CSX submit that the decision is clear enough in that respect and requires no further clarification. Footnote 264 to Ordering Paragraph 20 requires "the extension of the single-line to joint-line and reciprocal switching protections [in the NITL agreement] to reach shortlines that connect with Conrail and the shippers served by such shortlines." (Emphasis supplied.) See also Decision No. 89 at 56.[3]

II. THE CHANGE RBMN REQUESTS TO ORDERING PARAGRAPHS 8 AND 10 SEEKS A NEW CONDITION NOT PREVIOUSLY REQUESTED AND IS UNWARRANTED.

Ordering Paragraphs 8 and 10 clearly and unequivocally granted the relief sought in the Application that is necessary to permit the unrestricted assignment of Conrail assets to Conrail's two new limited liability company subsidiaries, PRR and NYC, for use and operation

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[3] In this regard, by letter dated July 20, 1998 the Ohio Rail Development Commission urged the Board to clarify in its forthcoming written decision "that regional rail carriers and the shippers they serve are included within the single-line to joint-line relief adopted by the Board." Decision No. 89 extends the single-line-to-joint-line protections of the NITL Agreement to Class III railroads and the shippers they serve, but does not extend it to larger "regional" railroads that are not Class III carriers. This was entirely reasonable, and ORDC has not petitioned for reconsideration of that decision. Class III railroads are often surrogates for one or a few shippers, and the Board's premise in extending this protection to such carriers appears to have been that Class III-Conrail service is similar, if not equivalent, to single-line service. Interchanges with larger regional railroads, however, are not the same They are more like conventional joint-line service. Applying the NITL Agreement provisions to (continued...)

by NS and CSX and to permit NS and CSX fully to "use, operate, perform and enjoy the Allocated Assets" of Conrail "notwithstanding any provision in any law, agreement, order, document, or otherwise, purporting to limit or prohibit CRC's assignment of its rights to use, operate, perform, and enjoy such assets to another person or persons, or purporting to affect those rights in the case of a change in control."

RBMN voiced no objection to this aspect of the relief sought by the Application and did not request a condition terminating, or allowing RBMN to terminate, the Lehigh Agreement. Now, however, RBMN asks the Board to "clarify" Ordering Paragraphs 8 and 10 "to provide that contracts such as the Lehigh Agreement that were not specified as Allocated Assets in the Transaction Agreement may not be assigned unilaterally to NYC or PRR [and may not be used by NS or CSX] where a valid anti-assignment clause is present, without the consent of the other party to the contract or a showing that the contract is essential to the transaction." RBMN-10 at 5.

There is no warrant whatever for RBMN's request, which would not "clarify" but instead would significantly change Decision No. 89. Conrail's rights under existing contracts such as the Lehigh Agreement are assets of Conrail, and as such the Transaction Agreement provides that they are to be allocated either to NYC or to PRR for the use and benefit of CSX or NS, as the case may be. RBMN agrees that Conrail's rights under the Lehigh Agreement constitute "Allocated Assets" as that term is used in the Transaction Agreement and in

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(...continued)
routings with regional railroads would tend to preserve inefficient routings in ways that are inappropriate and unwarranted.

Decision No. 89.[4] Ordering Paragraphs 8 and 10 are not ambiguous with regard to Allocated Assets, so granting RBMN's present request would require making a fundamental change to Decision No. 89.

Such a fundamental and far-reaching change to the decision is completely unwarranted. That change would effectively give RBMN (and other similarly situated parties) the right to terminate their agreements with Conrail and thus escape all continuing obligations under those agreements which they originally assumed in order to get substantial benefits from Conrail. That goes far beyond any relief RBMN sought in this proceeding, and is therefore not an appropriate request to make for the first time in a petition to reconsider the Board's final decision. RBMN was fully aware that NS or CSX intended, and were seeking Board authority, to succeed to Conrail's contractual rights and obligations, including those under the Lehigh Agreement, notwithstanding any anti-assignment provisions in such contracts. If RBMN had any objection to that relief in connection with its contracts, it should have voiced such an objection when it filed its comments and requested conditions. Some other parties did express objections to the override of anti-assignment clauses for specific reasons, and in some cases the Board found those objections well founded and denied (pp. 100-101) or modified (p. 175) the overrides requested by Applicants.[5] RBMN, however, expressed no such

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[4] Rights under contracts that are not Transportation Contracts or other contracts specifically covered by Section 2.2 of the Transaction Agreement will be allocated to either NYC or PRR under Section 2.2(e) of the Transaction Agreement in accordance with guidelines specified therein. All such contracts are included in the definition of Allocated Assets. See Section 1.1 of the Transaction Agreement and the definitions therein of "Allocated Assets," "NYC Allocated Assets" and "PRR Allocated Assets." CSX/NS-25, Vol. 8B at 10, 17-19.

[5] For example, Decision No. 89 has special provisions for rail transportation contracts (Ordering Paragraph 10, final sentence). The Lehigh Agreement, however, is not a rail transportation contract.

objection, but instead merely sought a modification of the Lehigh Agreement. Furthermore, the Board granted the modification sought by RBMN in significant part by requiring NS and CSX to ensure that the reach of the blocking provision in the agreement is not expanded as a result of the transaction. RBMN provides no reason why the Board should now go beyond that relief and entertain a completely new request to allow RBMN to cancel its agreement altogether.

Furthermore, granting that request would threaten serious harm. The relief requested by the Application and granted in Ordering Paragraphs 8 and 10 is clearly necessary to ensure that NS and CSX will be able fully to acquire control of a substantial portion of Conrail's assets - its rights under contracts -- and effectively divide the use, operation and enjoyment of those assets between them. The revision now requested by RBMN, however, would cloud the rights of NS and CSX to acquire control of and use of an undetermined but potentially large portion of those assets.

III. NO CLARIFICATION IS WARRANTED WITH RESPECT TO ORDERING PARAGRAPGH NO. 39.

As noted, Ordering Paragraph No. 39 granted in substantial part the relief RBMN requested from the operation of the "blocking" provisions in its Lehigh Agreement; it provides that "CSX and NS, as appropriate, must enter into an arrangement that has the effect of providing that the reach of such blocking provision is not expanded as a result of the CSX/NS/CR transaction." RBMN now claims that is not clear "who the parties to such an arrangement should be," and it asks the Board to clarify "that whatever entity is ultimately determined to hold the Lehigh Agreement be subject to the requirement of Ordering Paragraph 39, whether it be Conrail or PRR (and NSR to the extent it will use and operate the Lehigh

Agreement)." RBMN-10 at 5-6. No such clarification is needed or warranted. Who the proper parties to the arrangements required by Ordering Paragraph No. 39 should be cannot be specified in advance but will depend on the terms and circumstances of particular agreements and on the entities to which the agreements are allocated. The basic intent of the Board's decision is clear enough, and the Board should not become involved in its application to particular agreements unless and until some interested party complains that it is not being observed.

CONCLUSION

The Petition of Reading Blue Mountain and Northern Railroad Company to Reopen and to Clarify (RBMN-10) should be denied.

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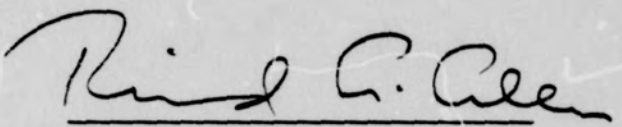
CERTIFICATE OF SERVICE

I hereby certify that on this 27th day of August, 1998, I have served the foregoing CSX/NS-213, Reply of Norfolk Southern and CSX to Petition of Reading Blue Mountain & Northern Railroad Company to Reopen and to Clarify, on all parties of record by first class mail, postage pre-paid, or by more expeditious means, and by hand delivery on the following:

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



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STB FD 33388 8-27-98 D 190776

190776

CSX/NS-211

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 NORFOLK SOUTHERN AND CSX TO
THE FERTILIZER INSTITUTE'S PETITION FOR
CLARIFICATION OR RECONSIDERATION OF DECISION NO. 89

Applicants NS[1] and CSX[2] submit this reply in opposition to the "The Fertilizer Institute's Petition for Clarification or Reconsideration of Decision No. 89" (TFI-8) dated August 12, 1998.

The Fertilizer Institute ("TFI") contends that Decision No. 89 should be clarified or amended to require that the Rail Cost Adjustment Factor (Adjusted) ("RCAF-A") rather than the Rail Cost Adjustment Factor (Unadjusted) ("RCAF-U") be used in any adjustment mechanism adopted in this proceeding with the exception of adjustment mechanisms applicable to switching charges imposed by Applicants. Specifically, TFI contends that the Board should require the RCAF-A to be applied to trackage rights fees charged by CSX and NS to each other and to the three-year rate cap on interline rates agreed to by Applicants and the National

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1 "NS" refers to Norfolk Southern Corporation and Norfolk Southern Railway Company ("NSR").

2 "CSX" refers to CSX Corporation and CSX Transportation, Inc. ("CSXT").

Industrial Transportation League ("NITL"). TFI argues that 49 U.S.C. § 10708 and Edison Electric Institute v. ICC, 969 F.2d 1221 (D.C. Cir. 1992) requires the use of the RCAF-A.

There is no need for clarification and no warrant for amendment of Decision No. 89 regarding application of adjustment mechanisms. By specifically requiring Applicants to "adhere to all terms of the NITL agreement, subject to the modifications made in this decision" (Decision No. 89 at 176, Ordering Paragraph 20), the decision clearly requires application of the RCAF-U to the three-year rate cap on interline rates agreed to in the NITL agreement, because that is what Section III.E. of that agreement expressly provides. See CSX/NS-176 at 773-774. As to trackage rights fees, Decision No. 89 specifically approved the trackage rights agreements that NS and CSX negotiated and agreed upon among themselves and found that the compensation terms in those agreements were reasonable and "will allow the carriers receiving trackage rights to compete effectively, replacing competition that would otherwise be lost through this transaction. . . ." Decision No. 89 at 140; see also id. at 147-175, Ordering Paragraph 7. Those agreements provide for a specific adjustment mechanism that does not employ either the RCAF-A or the RCAF-U. See, e.g., CSX/NS-25, Vol. 8B at 256-258.

Decision No. 89 is thus perfectly clear regarding the various adjustment mechanisms to be employed, and there is no reason to change them. The mechanisms prescribed were arrived at through arms-length negotiation by the interested private parties. This Board has stated many times its preference for privately-negotiated solutions over Board-imposed ones. The mechanisms negotiated are reasonable, and there is no reason for the Board to change them.

TFI is simply wrong in contending that 49 U.S.C. § 10708 requires application of an RCAF-A mechanism to all of the rates and charges involved in this proceeding. Section 10708

was enacted as part of the ICC Termination Act of 1995 to replace the Zone-of-Ratemaking-Freedom mechanism of former 49 U.S.C. § 10707a, which was abolished. Although it no longer serves the same function, Section 10708(a) directs the Board to continue publishing a rail cost adjustment factor every quarter, but § 10708(b) requires that it publish both an RCAF-A and an RCAF-U. Nothing in Section 10708 remotely indicates that the Board is required to apply either an RCAF-A or an RCAF-U mechanism for any particular purpose or in any proceeding. TFI's citation to the Edison Electric Institute decision in support of its claim that the statute requires use of the RCAF-A is something of a stretch, since that decision in fact reaffirmed an earlier decision that the statute in effect at that time "neither mandates nor prohibits a productivity adjustment." 969 F.2d at 1225.

CONCLUSION

The Fertilizer Institute's Petition For Clarification or Reconsideration of Decision No. 89 should be denied.

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Counsel for CSX Corporation and CSX Transportation , Inc.

CERTIFICATE OF SERVICE

I hereby certify that on this 27th day of August, 1998, I have served the foregoing CSX/NS-211, Reply of Norfolk Southern and CSX to The Fertilizer Institute's Petition for Clarification or Reconsideration of Decision No. 89, on all parties of record by first class mail, postage pre-paid, or by more expeditious means, and by hand delivery on the following:

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

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

Dated: August 27, 1998

STB FD 33388 8-27-98 D 190775

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CSX-163

BEFORE THE
SURFACE TRANSPORTATION BOARD

Finance Docket No. 33388

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

REPLY OF CSX CORPORATION AND CSX TRANSPORTATION, INC. TO THE PETITION OF INDIANAPOLIS POWER & LIGHT COMPANY FOR CLARIFICATION OR RECONSIDERATION OF DECISION NO. 89

CSX Corporation and CSX Transportation, Inc. (collectively, "CSX") hereby reply to the Petition of Indianapolis Power & Light Company ("IP&L") for Clarification or Reconsideration of Decision No. 89 ("IP&L-15").

I. Clarification Concerning the Stout Plant

A. ISSR/NS Interchange at MP 6.0

IP&L alleges that Decision No. 89 inappropriately permits Norfolk Southern ("NS") and Indiana Southern Railroad ("ISRR") to interchange traffic at MP 6.0 on ISRR's Petersburg Subdivision and requests the Board to require that ISRR traffic and NS traffic interchange at Crawford Yard. IP&L-15 at 2. The Board should deny this request outright.

IP&L asserts that there is no interchange point at MP 6.0 today and therefore, MP 6.0 should not be the point of interchange for ISRR and NS. The interchange arrangements in place today between Conrail and ISRR are irrelevant to an interchange

between ISRR and NS. Today, Conrail gets a portion of the revenues for coal moved from ISRR to the Stout plant, and thus has a financial interest in providing interchange facilities to ISRR. In contrast, CSX will receive no such benefit from the new interchange arrangement established in Decision No. 89.

IP&L has requested the Board to designate Crawford Yard as the appropriate place of interchange between NS and ISRR. IP&L would have the Board do so without any input from the three railroads concerned. Today, Conrail manages access to and movement of cars into and out of its interchange facilities. In doing so, Conrail (or any railroad in its position) must consider a number of factors – including traffic flow, yard capacity, and operating efficiencies. Where, as here, the interchanging railroads are not the owners of the interchange facility, proper management of interchanging cars becomes more critical. Under the IP&L scenario, CSX would lose operational control over its own facilities. For this reason, IP&L has no business dictating this interchange arrangement, as IP&L is attempting to do. In any event, Crawford Yard is a small, heavily used facility, and there is no evidence that Crawford Yard could even accommodate NS cars without seriously disrupting CSX operations there. Moreover, mandating use of Crawford Yard could have severe negative repercussions for service to other shippers throughout the Indianapolis area.

Finally, IP&L asserts that no interchange can occur at MP 6.0. IP&L-15 at 2. There is no evidence to support that assertion; in fact, it is not true. The interchange can be accomplished if it is properly coordinated. CSX is willing to grant NS trackage rights to permit an interchange with ISRR at MP 6.0 on the same basis that CSX has granted NS other trackage rights in Indianapolis. NS and ISRR can determine the most effective and

efficient means of effecting that interchange. Interestingly, neither NS nor ISRR has raised any concerns about the MP 6.0 interchange in Decision No. 89. Accordingly, IP&L's request should be denied.

B. CSX Switch Charge for Direct Service

IP&L requests clarification of footnote 151 by deleting the word "presumably" from the phrase, "imposing on traffic to IP&L's Stout plant will result in availability of direct NS service presumably free of CSX switching charges." IP&L-15 at 3 (quoting Decision No. 89 at 94) (emphasis in IP&L-15). CSX does not oppose the deletion of the word "presumably" from that phrase.[1]

II. Clarification and Reconsideration Concerning the Perry K Plant

A. Train Routings to Perry K

IP&L requests the Board to clarify that NS's Perry K-bound trains will not be routed through Hawthorne Yard. In Decision No. 89, after full consideration of CSX's proposal to route non-CSX cars through Hawthorne Yard, the Board concluded that "no remedy is required at Perry K." Decision No. 89 at 116. CSX supports the Board's conclusion and requests that the Board deny IP&L's request.

IP&L complains that movements to Perry K will "become less efficient." IP&L-15 at 4 (emphasis in original). That is impossible. Today, Conrail is the sole rail carrier serving IP&L's Perry K plant. Post-transaction, CSX will provide the same service that

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[1] At the behest of a minority shareholder, the Indiana Rail Road ("INRD") has sought leave to file a petition for reconsideration, which challenges NS's ability to obtain direct access to the Stout plant over trackage rights provided by INRD. INRD-1, INRD-2. CSX does not support the petition for reconsideration, which was filed without its consent and against its will. In fact, CSX accepts the Board's conditions as set forth in Ordering Paragraph #23 of Decision No. 89.

Conrail provides today. Thus, it is hard to see why the coal routings would become less efficient. In addition, Perry K gains access by a second carrier – NS. For operational reasons, CSX will route Perry K-bound coal cars through Hawthorne Yard. IP&L only stands to gain by having NS access its Perry K plant.

B. Imposition of a Switch Fee

IP&L also asserts that CSX should assess a trackage rights fee for the NS line-haul movement over the CSX-allocated line into Hawthorne Yard, but not a switch fee for the switching movement out of Hawthorne Yard, on non-CSX traffic bound for delivery to Perry K. The Board already has fully considered the switch fee issue, noted that there would be "cost-based switching," and decided that "no remedy was required at Perry K." Decision No. 89 at 116. And clearly CSX is entitled to compensation for the use of its allocated line by NS into Hawthorne, as IP&L admits. CSX supports the Board's conclusion and requests that the Board deny IP&L's request.

IP&L expresses fear that CSX will use the switch fee to eliminate competitive movements to the Perry K plant. IP&L-15 at 6. In support of its argument, IP&L asserts that today Conrail is not a "classic" bottleneck carrier at Perry K. IP&L-15 at 5. As evidence, IP&L states that rail movements to IP&L's Stout plant compete with Conrail's movements to Perry K. Even if true, such movements do not change the fact that Conrail exercises total control over rail movements to the Perry K plant. In contrast, post-transaction, NS will gain competitive access to that plant.

IP&L speculates that after the transaction CSX will favor its affiliate, INRD, over ISRR as a source-serving carrier for Perry K movements. Even if there were any basis

for that speculation – and there is none – such vertical integration by a destination carrier does not justify relief under Board precedent. Accordingly, the request should be denied.

III. Adjustment Mechanism for CSX's Trackage Rights Fee

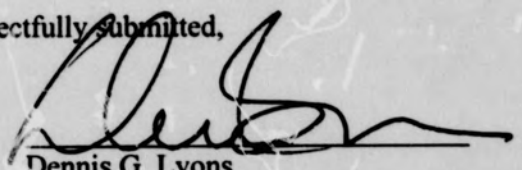
Without discussion (perhaps because no statutory support is available), IP&L states that it supports the petition of The Fertilizer Institute regarding the use of RCAF(A) as the adjustment mechanism for the CSX trackage rights fee. IP&L-17 at 7 n.6. CSX s response to this issue is set forth in the Reply of Norfolk Southern and CSX to The Fertilizer Institute's Petition for Clarification or Reconsideration of Decision No. 89 (CSX/NS-211), which is being filed with the Board today.

CONCLUSION

In short, IP&L is better off post-transaction than it is today. Its petition is merely an attempt to improve its post-transaction position. Accordingly, the Petition of IP&L for

Clarification or Reconsideration of Decision No. 89 should be denied in part, and granted in part, as discussed above.

Respectfully submitted,



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Counsel for CSX Corporation and CSX Transportation, Inc.

CERTIFICATE OF SERVICE

I, Dennis G. Lyons, certify that on August 27, 1998, I have caused to be served a true and correct copy of the foregoing "Reply of CSX Corporation and CSX Transportation, Inc. to the Petition of Indianapolis Power & Light Company for Clarification or Reconsideration of Decision No. 89" to all parties on the Service List in Finance Docket No. 33388, by first-class mail, postage prepaid, or by more expeditious means.

DENNIS G. LYONS

STB FD 33388 8-27-98 D 190774

190774

ENTERED
Office of the Secretary

AUG 28 1998

Part of
Public Record

CSX-162

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 APPLICANTS CSX CORPORATION AND CSX TRANSPORTATION, INC. TO PETITION OF APL LIMITED FOR CLARIFICATION OF DECISION NO. 89

Applicants CSX Corporation and CSX Transportation, Inc. (collectively, "CSX") hereby submit the following response to the Petition of APL Limited for Clarification of Decision No. 89. APL-27 (filed Aug. 12, 1998). This response is filed pursuant to 49 C.F.R. § 1104.13(a).[1]

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[1] We refer jointly in this response to Applicants Norfolk Southern Corporation and Norfolk Southern Railway Company as "NS," to APL Limited as "APL," and to Decision No. 89 as "Decision." Other decisions of the Board will be referred to by their numbers. We refer to APL-27 as the "Petition," abbreviated "Pet."

SUMMARY

APL initially sought an extension of time within which to file a post-Decision petition in this matter (APL-25), characterizing what it was going to file as a "Petition for Clarification and/or a Petition for Reconsideration" of Decision No. 89. Id. at 1. That request for an extension of time was denied in Decision No. 90, served August 7, 1998. On July 31, 1998, APL filed a Petition for Stay pending disposition of its (yet-to-be-filed) post-Decision petition and the completion of judicial review. APL-26. Their prospective petition was similarly referred to as one for "clarification and/or reconsideration." Id. at 2. The Petition for Stay was denied in Decision No. 91, served August 19, 1998. On August 12, 1998, APL filed the present Petition, in form simply seeking "clarification of Decision No. 89." APL-27. Presumably, the formal request for "reconsideration" was dropped because on August 14, 1998, APL filed a Petition for Review in the United States Court of Appeals for the District of Columbia Circuit, seeking review of Decision No. 89.[2] To the extent that the text of the Petition in fact seeks reconsideration of the Board's Decision No. 89, it is out of order, since a party may not simultaneously maintain both a Petition for Reconsideration and a Petition for Review in court. See, e.g., City of New Orleans v. Securities and Exch. Comm'n, 137 F.3d 638, 639 (D.C. Cir. 1998) (dismissing petition for review: "It is well-established

[2] Apparently, APL filed in the wrong Court of Appeals. The only petition for review that was filed in the 10-day period following service of the Board's Decision No. 89 was that of the Erie-Niagara Rail Steering Committee, which was filed in the United States Court of Appeals for the Second Circuit. That filing accordingly determined the venue for petitions for review following the 10-day period. See 28 U.S.C. § 2112.

that a party may not simultaneously seek both agency reconsideration and judicial review of an agency's order.'") (citation omitted); Wade v. Federal Communications Comm'n, 986 F.2d 1433, 1434 (D.C. Cir. 1993) (dismissing petition for review: "The danger of wasted judicial effort that attends the simultaneous exercise of judicial and agency jurisdiction arises whether a party seeks agency consideration before, simultaneous with, or after filing an appeal or petition for judicial review."). To the extent that it seeks clarification the Board's Decision No. 89 is unambiguous in all pertinent respects and does not need clarification. The Petition for Clarification should accordingly be summarily denied.

REASONS FOR DENYING THE PETITION

Little discussion appears to be necessary, the Board having ruled twice earlier this month, in Decision Nos. 90 and 91, served respectively on August 7 and August 19, 1998, that "[o]ur override ruling is unambiguous." Decision No. 91 at 2. With somewhat increasing verbosity, APL now makes essentially the same arguments that it made before in connection with its earlier filings, particularly APL-26. It now adds a citation to Ordering Paragraphs Nos. 1 and 8 (see Pet. at 3-4, n.8), which have nothing to do with the override of anti-assignment clauses in Conrail's Existing Transportation Contracts. They add nothing to its argument. The argument still ignores the plain meaning of Ordering Paragraph No. 10. See Decision at 175. Nothing in any of the other references by the Board in Decision No. 89 contradicts the clear statement in Ordering Paragraph No. 10 despite APL's contentions. Pet. at 5-7.

The Petition makes plain, although it was relatively clear before, that what APL wants from the Board is for the Board to say that while APL may terminate its contract on Day 181 (or, better still, on Day 1), that termination shall not constitute a "termination" for any other purpose. This invitation by APL to play a word game is not a request for clarification, but a request for reconsideration. In any event, even if it were to be considered a request for clarification, it is dealt with in Decision No. 91 under the discussion of "irreparable injury." See Decision No. 91 at 3. A "termination" is a "termination"; APL can avoid "termination" by accepting the Section 2.2(c) allocation and continuing it after the first 180 days, by seeking a carrier change under Section II.C of the NITL Settlement Agreement (which, of course, does not authorize the negotiation of lower rates, one of APL's objectives), or, as finally seems to have dawned on APL, APL can "renegotiate" a commercial settlement agreeable to all involved parties. This last possibility -- renegotiation -- is recognized by APL in note 20, page 14 of the Petition.[3]

The preference of APL for attempting to "clarify" what is crystal clear already over engaging in commercial negotiations seems bizarre. As a customer, APL is the classic 800-pound gorilla. It offers rail carriers an enormous annual volume of intermodal shipments between Chicago and various points in the East and otherwise. Its total rail freight bill in 1997 was $600 million. APL-18 at 6. The Conrail contract

[3] Renegotiation would be considerably facilitated by the abandonment of APL's public position that it is concerned about dealing with CSX Intermodal, Inc., or by the grant of CSX's Petition for Clarification, CSX-160, filed August 12, 1998.

covers a considerable number of origination and destination city pairs. Many of these, including Chicago to the North Jersey Shared Assets Area, apparently the largest in volume, can be served either by CSX or NS on a complete single-line basis. The leverage created by this for APL is enormous. If APL chooses to terminate the Conrail contract after the 180-day period, the notion that, when the lease terminates thereafter as specified in the lease's terms (as APL has admitted (APL-26 at 3)), CSX will tell APL never to darken its door at South Kearny again, is ridiculous. APL will be a welcome customer of CSX and will be in a position to negotiate very satisfactory terms as to rates and facilities for service.

In any event, the Board has already answered all of the issues raised in APL's Petition, and the Petition should be summarily denied.[4]

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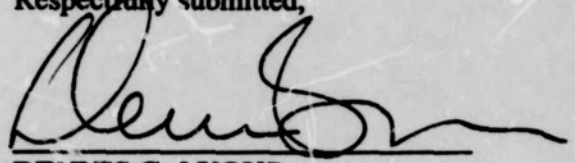
[4] APL asks for clarification as to whether the period intended by Ordering Paragraph No. 10 is 180 days, as it says, or six months, as in a few colloquial references elsewhere in the Decision. Pet. at 9 n.13 and 15 n.22. APL says that: "The interim period should be 180 days not six months." Pet. at 15 n.22. APL is right. That is what the Ordering Paragraph says. That is also what Decision No. 91 says. See Decision No. 91 at 2. We certainly would not be opposed to the Board's saying so again.

CONCLUSION

For the reasons stated APL's Petition for Clarification of Decision No. 89 should be denied.

Respectfully submitted,



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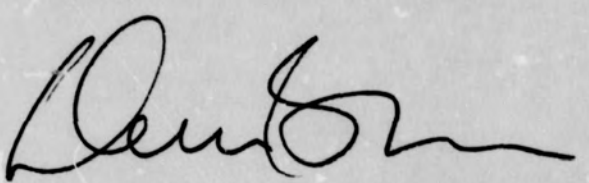
Counsel for CSX Corporation and CSX Transportation, Inc.

August 27, 1998

CERTIFICATE OF SERVICE

I, Dennis G. Lyons, certify that on August 27, 1998, I have caused to be served a true and correct copy of the foregoing CSX-162, "Response of Applicants CSX Corporation and CSX Transportation, Inc. to Petition of APL Limited for Clarification of Decision No. 89" to all parties on the Service List in Finance Docket No. 33388, by first-class mail, postage prepaid, or by more expeditious means.



DENNIS G. LYONS

STB FD 33389 8-27-98 D 190779

190779

CSX/NS-214

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 NORFOLK SOUTHERN AND CSX TO REQUEST OF NEW JERSEY DEPARTMENT OF TRANSPORTATION/NEW JERSEY TRANSIT CORPORATION FOR CORRECTION OF MINOR FACTUAL ERRORS AND MODIFICATION OF ENVIRONMENTAL CONDITION

Applicants NS[1] and CSX[2] submit this reply to the letter of New Jersey Department of Transportation/New Jersey Transit Corporation ("NJT") dated August 12, 1998 requesting what NJT characterizes as "correction of certain minor factual errors" in Decision No. 89 and also requesting modification of an environmental condition contained in that decision. NJT is requesting the Board to clarify and/or modify three aspects of Decision No. 89 in this proceeding. NJT Request Nos. 1 and 2 should be denied for the reasons set forth below. NS and CSX do not oppose NJT's Request No. 3 regarding modification of environmental condition 4(A).[3]

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1 "NS" refers to Norfolk Southern Corporation and Norfolk Southern Railway Company ("NSR").

2 "CSX" refers to CSX Corporation and CSX Transportation, Inc. ("CSXT").

3 NJT explains that for ease of reference, its request regarding condition 4(A) includes portions of conditions 4(B) and 5(A) that are applicable to "key routes." Applicants do not object this inclusion for purposes of NJT's Request No. 3.

REQUEST NOS. 1 AND 2

In its first request, NJT seeks clarification of Decision No. 89 to reflect that references appearing on pages 25 through 27 describing NYC-Allocated Assets and PRR-Allocated Assets whose routes originate or terminate at "NJ Terminal," "North NJ Terminal," and "North New Jersey Terminal" "do not include the two mile segment of NJT-owned railroad between West End, New Jersey and Hoboken, New Jersey because Conrail does not have rights over that segment." In its second request, NJT asks the Board to make five modifications and/or clarifications to Decision No. 89, page 26, Section (1),[4] which sets forth a general description of primary routes currently operated by Conrail that will be allocated to PRR upon consummation of the Transaction. In essence, NJT claims in Request No. 1 that Conrail does not have rights between West End and Hoboken, NJ and in Request No. 2 that Conrail does not have rights between a) Orange and Summit; b) Orange and Roseville Avenue; and c) High Bridge and Ludlow.

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[4] As to Section "(1) NJ Terminal to Crestline," NJT seeks the following modifications/clarifications: 1. Change (a) "North NJ Terminal to Allentown, PA, via Somerville, NJ" to "North NJ Terminal to Allentown, PA via Bound Brook/Port Reading Jct./Royce." NJT claims that this modification is necessary because Somerville is part of the NJT Raritan Valley Line and is included in the segment described in subpart (i) of Section (1). 2 Change (c) "Orange, NJ to Denville, NJ (TR)" to "Summit, NJ to Denville, NJ (TR)." NJT claims that this modification is necessary because Conrail does not have rights between Orange and Summit, NJ. 3. Change (d) "Dover to Rockport (TR)" to "Dover to Netcong (TR); Netcong to Rockport." NJT explains that this change is necessary because Conrail has trackage rights over the segment between Dover and Netcong and owns the line between Netcong and Rockport. 4. Change (g) "Orange to NJ Terminal (TR)" to "Roseville Avenue to NJ Terminal (TR)." According to NJT, Conrail does not have rights over the segment between Orange and Roseville Avenue. 5. Change (i) "Bound Brook to Ludlow, NJ (TR)" to "Bound Brook to High Bridge, NJ (TR)." NJT claims that this modification is necessary because Conrail does not have rights over the segment between High Bridge and Ludlow.

NJT's Requests Nos. 1 and 2 should be denied. First, NJT presents no evidence to support its claim that Conrail does not have any rights to operate over these segments. Instead, NJT merely sets forth a blanket assertion as to the status of Conrail's rights regarding these segments. In fact, based on their review of the pertinent agreements, Applicants believe that NJT is wrong in contending that Conrail does not have rights between West End and Hoboken, NJ and between a) Orange and Summit; b) Orange and Roseville Avenue; and c) High Bridge and Ludlow. The descriptions in Decision No. 89 of the NYC-Allocated Assets and the PRR-Allocated Assets were based on the identical descriptions set forth in the Application, filed 14 months ago (see CSX/NS-18 at 35-38), and NJT never objected to those descriptions in any comments filed in this proceeding. Applicants would have been happy to discuss this with NJT if NJT had raised it with them, but NJT's unsupported assertion at this time that there is some error in the Board's final decision provides no basis for reconsideration or modification of that decision.

Second, even if NJT were correct regarding Conrail's rights over these segments, no modification of Decision No. 89 would be necessary or warranted. The descriptions of the Conrail routes (both owned by Conrail and operated by Conrail via trackage rights) set forth in the Application and in Decision No. 89 were not intended to constitute exact legal descriptions of the geographic boundaries of those routes or of the scope of Conrail's operating rights over them, such as would be found in deeds and trackage rights agreements. The exact scope of Conrail's trackage rights is established by trackage rights agreements, and those rights would not be enlarged or diminished by the general descriptions of Conrail's routes in Decision No. 89. Decision No. 89 makes clear that it is only authorizing the allocation of Conrail's assets, and no other entity's assets, to PRR and NYC. As the Board clearly explained:

> On the date of the Division, CRC will assign to NYC and PRR certain of CRC's assets. NYC will be assigned those CRC assets designated to be operated as part of the CSX rail system (the NYC-Allocated Assets), and PRR will be assigned those CRC assets designated to be operated as part of the NS rail system (the PRR-Allocated Assets). These assets will include, among other things, certain lines and facilities currently operated by Conrail, whether owned by Conrail or operated by Conrail under trackage rights.

Decision No. 89 at 24 (emphasis added). Disputes that may arise as to the exact scope of Conrail's rights under its numerous trackage rights agreements can and should be resolved elsewhere. There is no warrant for the Board to attempt to resolve any particular dispute in the context of reconsidering Decision No. 89.

REQUEST NO. 3

NJT seeks modification of environmental condition 4(A), as described in Appendix Q of Decision No. 89 to include the following two line segments: N-064 (Ridgewood Jct., NJ to Suffern, NY) and N-050 (Croxton, NJ to Ridgewood Jct., NJ) based on its assertion that these segments should have been classified as "key routes." NS and CSX agree that the FEIS understated the volumes of annual carloads of hazardous materials that would traverse these segments following the Transaction. Thus, they do not oppose classification of these two segments (N-064 and N-050) as "key routes."

CONCLUSION

The Request of New Jersey Department of Transportation/New Jersey Transit Corporation for Correction of Certain Minor Factual Errors and Modification of Environmental Condition should be denied as to Request Nos. 1 and 2 because NJT has presented no evidence that the requested modifications and/or clarifications are necessary. NS and CSX do not oppose the Board's granting of Request No. 3.

Respectfully submitted,

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Counsel for CSX Corporation and CSX Transportation , Inc.

CERTIFICATE OF SERVICE

I hereby certify that on this 27th day of August, 1998, I have served the foregoing CSX/NS-214 Reply of Norfolk Southern and CSX To Request of New Jersey Department of Transportation/New Jersey Transit Corporation for Correction of Minor Factual Errors and Modification of Environmental Condition (Undesignated), on all parties of record by first class mail, postage pre-paid, or by more expeditious means, and by hand delivery on the following:

The Honorable Jacob Leventhal
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Dated: August 27, 1998