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July 16, 1997

BY HAND

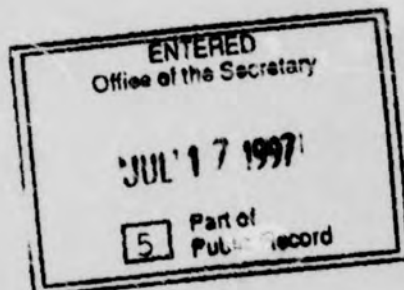
Honorable Vernon A. Williams, Secretary
Office of the Secretary
Case Control Branch
ATTN: STB Finance Docket No. 33388
Surface Transportation Board
1925 K Street, N.W.
Washington, DC 20423-001

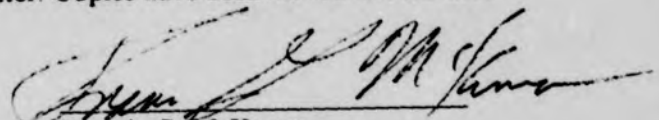


Re: CSX CORPORATION AND CSX TRANSPORTATION, INC.,
NORFOLK SOUTHERN CORPORATION AND NORFOLK
SOUTHERN RAILWAY COMPANY, -- CONTROL AND
OPERATING LEASES/AGREEMENTS -- CONRAIL, INC. AND
CONSOLIDATED RAIL CORPORATION.
FINANCE DOCKET NO. 33388

The West Virginia State Rail Authority, ("WVSRA") for and on behalf of the State of West Virginia, hereby gives notice of their intent to participate in the above-captioned proceeding as parties of record. This Notice of intent to participate is filed pursuant to the Surface Transportation Board Decision No. 6. Issued May 30, 1997. An earlier Notice of Appearance was filed on May 15, 1997. As counsel for WVSRA I would appreciate being added to the service list for receipt of all orders of the Board and the presiding Administrative Law Judge.

Enclosed are an original and 25 copies of this letter. Copies have been served as indicated.




Francis G. McKenna

Attorney for
West Virginia State Rail Authority

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CERTIFICATE OF SERVICE

The undersigned herewith certify that a copy of this notice of intent to participate have been sent to the below named parties, this 16th day of July, 1997.


Francis G. McKenna

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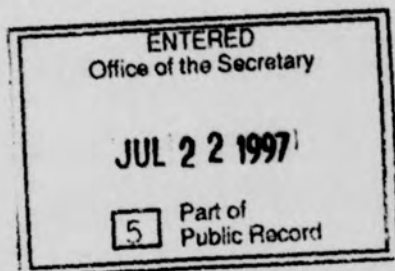
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GEORGE F. GALLAND (1910-1985)
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July 21, 1997



VIA COURIER

Mr. Vernon A. Williams, Secretary
Office of the Secretary
Surface Transportation Board
1925 K Street, N.W., Room 711
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--Transfer of Railroad Line by Norfolk Southern Railway Company to CSX Transportation, Inc. (Finance Docket No. 33388)

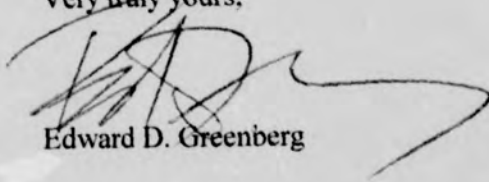
Dear Secretary Williams:

Enclosed please find an original and twenty-five (25) copies of the Notice of Appearance of Steel Warehouse Co., Inc. in the above-referenced docket.

Also enclosed is an additional copy of the filing to be date-stamped when filed and returned to us.

Should you have any questions concerning this, please do not hesitate to contact us.

Very truly yours,


Edward D. Greenberg

Enclosures

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180777

**BEFORE THE
SURFACE TRANSPORTATION BOARD
Washington, D.C.**

Finance Docket No. 33388



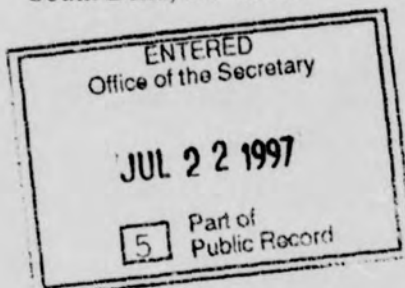
**CSX Corporation and CSX Transportation, Inc.,
Norfolk Southern Corporation and Norfolk Southern
Railway Company--Control and Operating Leases/
Agreements--Conrail, Inc. and Consolidated Rail
Corporation--Transfer of Railroad Line by Norfolk
Southern Railway Company to CSX Transportation, Inc.**

NOTICE OF APPEARANCE

Please enter the appearance of the undersigned counsel on behalf of Steel Warehouse Co., Inc., which intends to participate and become a party of record in these proceeding. Please add the names of Steel Warehouse Co., Inc. counsel in both South Bend and Washington as separate entries to the service list, and make service of all future pleadings and other correspondence on both Steel Warehouse Co., Inc. counsel as indicated below:

Gerald Lerman, Esq.
Vice President & General Counsel
Steel Warehouse Co., Inc.
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South Bend, IN 46619

Edward D. Greenberg, Esq.
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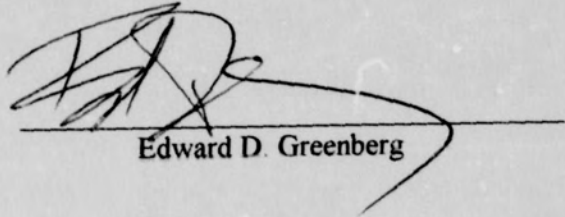
Respectfully submitted,

Edward D. Greenberg
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1054 - 31st Street, N.W.
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(202) 342-5200

Dated: July 21, 1997

CERTIFICATE OF SERVICE

I certify that on this 21st day of July, 1997 I caused a copy of the foregoing Notice of Appearance to be served by first-class mail, postage prepaid, on Applicants' representatives, all parties of record and on the Honorable Jacob Levanthal, Federal Energy Regulatory Commission, 888 First Street, N.E., Suite 11F, Washington, D.C. 20426.



Edward D. Greenberg

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July 21, 1997



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BY HAND DELIVERYThe Honorable Vernon A. Williams
Secretary
Surface Transportation Board
1925 K Street, N.W.
Washington, D.C. 20423Re: Finance Docket No. 33388, CSX Corporation and CSX Transportation, Inc., Norfolk Southern Corporation and Norfolk Southern Railway Company -- Control and Operating Leases/Agreements -- Conrail Inc. and Consolidated Rail Corporation

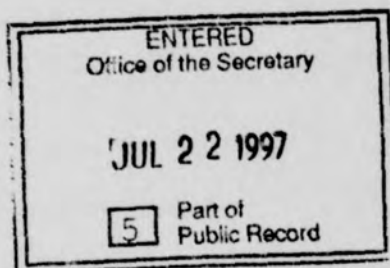
Dear Secretary Williams:

Enclosed please find CSX/NS-28, the Response of Applicants CSX Corporation, CSX Transportation, Inc., Norfolk Southern Corporation, Norfolk Southern Railway Company, Conrail Inc. and Consolidated Rail Corporation to Joint Petition for Supplementation of Application in the above-referenced docket.

Accompanying this letter are an original and twenty-five copies of the Submission, as well as a formatted diskette in WordPerfect 6.1.

Thank you for your assistance in this matter. Please contact me (202-942-5858) if you have any questions.

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



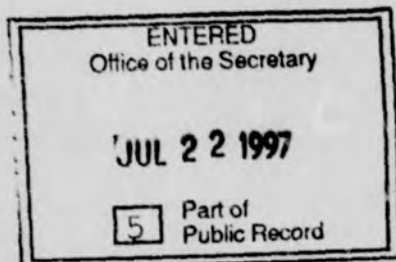
Respectfully yours,

ARNOLD & PORTER

By:

Dennis G. Lyons
Counsel for CSX Corporation and
CSX Transportation, Inc.Enclosures
cc: Service List

180723



BEFORE THE
SURFACE TRANSPORTATION BOARD

Finance Docket No. 33388



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

**RESPONSE OF APPLICANTS CSX CORPORATION,
CSX TRANSPORTATION, INC., NORFOLK SOUTHERN
CORPORATION, NORFOLK SOUTHERN RAILWAY COMPANY,
CONRAIL INC. AND CONSOLIDATED RAIL CORPORATION TO
JOINT PETITION FOR SUPPLEMENTATION OF APPLICATION**

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July 21, 1997

BEFORE THE
SURFACE TRANSPORTATION BOARD

Finance Docket No. 33388

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

**RESPONSE OF APPLICANTS CSX CORPORATION,
CSX TRANSPORTATION, INC., NORFOLK SOUTHERN
CORPORATION, NORFOLK SOUTHERN RAILWAY COMPANY,
CONRAIL INC. AND CONSOLIDATED RAIL CORPORATION TO
JOINT PETITION FOR SUPPLEMENTATION OF APPLICATION**

INTRODUCTION

Applicants CSX Corporation ("CSXC"), CSX Transportation ("CSXT"),¹ Norfolk Southern Corporation ("NSC"), Norfolk Southern Railway Company ("NSRC"),² Conrail Inc. ("CRI") and Consolidated Rail Corporation ("CRC")³ hereby oppose the petition of New Jersey Transit Corporation ("NJT"), Massachusetts Bay Transit Authority ("MBTA"), and Virginia Railway Express ("VRE") (collectively, "Petitioners") to require Applicants to supplement their primary application (the "Application") in this proceeding to provide unspecified additional information related to the impact of the proposed control transaction on commuter rail lines.⁴

¹ CSXC and CSXT are referred to collectively as "CSX."

² NSC and NSRC are referred to collectively as "NS."

³ CRI and CRC are referred to collectively as "Conrail."

⁴ The petition is denominated as NJT-1, VRE-2 and MBTA-1. For simplicity, it will be cited here as "Pet." or "Petition." The three Petitioners will be called "Petitioners"; they and other commuter authorities in the territory served by Applicants will be called "Authorities."

Petitioners' request is very puzzling. As discussed below, the primary Application in fact contains substantial discussion and information about the impact of the transaction on commuter rail lines, including the three Petitioners. In addition, NS and CSX have met many times with NJT, VRE, MBTA and other Authorities, both before and after the filing of the Application, and further meetings are scheduled. Moreover, when each of CSX and NS counsel asked counsel for Petitioners what additional information Petitioners wanted Applicants to provide in any supplement to the Application, Petitioners' counsel replied that he did not know and could not say. It is therefore difficult to see any basis for a request to supplement the Application when the requesting party gives no indication of what supplemental information is desired.

In any event, Petitioners' request is misplaced. The primary Application fully discusses, in compliance with the Board's rules, the anticipated effects, if any, of the proposed transaction on passenger and commuter rail service -- including, specifically, effects relating to Petitioners. To the extent that Petitioners or any other parties seek to explore further any matters raised in the Application of special concern to them in order to respond to the Application and prepare their submissions to the Board, the proper avenue to do so is through discovery or consultation, not a vague request to supplement the Application. As explained further below, the Petition to supplement the Application should be denied.

BACKGROUND

Applicants were first made aware of the desire of the Petitioners that there be some

"supplementation" of the Application on the afternoon of July 16, 1997, when counsel for Petitioners separately telephoned counsel for CSX and NS. In those telephone conversations and subsequent conversations the morning of the next day, July 17, counsel for CSX and NS repeatedly requested counsel for Petitioners to identify just what additional information Petitioners wanted, but no answer was forthcoming.⁵ The Petition was filed later that day.

**1. THE PRIMARY APPLICATION PLAINLY AND FULLY
ADDRESSES THE IMPACT OF THE PROPOSED
TRANSACTION ON COMMUTER RAIL SERVICE**

The Board's rules require applicants in a major transaction to discuss in their application the anticipated impacts of the proposed transaction on commuter or other passenger rail services. *See* 49 C.F.R. § 1180.8(a)(2). Petitioners claim that Applicants have somehow failed to present a prima facie case by failing to comply with this requirement with respect to commuter rail. Pet. at 6.

Petitioners' claim is plainly baseless. The Application clearly and fully addresses the expected impacts of the proposed transaction on commuter rail service. In their respective operating plans, CSX and NS each discuss the several metropolitan areas where their respective freight trains share, or will share if the transaction is approved, rail lines with commuter trains -- including specifically each of the areas in which the Petitioners operate. They describe current

⁵ This apparently is what is meant by the statement in the Petition at 3 that the "parties discussed Petitioners' concerns." Despite repeated requests in several telephone conversations, counsel for Petitioners was unable to indicate to counsel for CSX and NS what further information the Petitioners wished to have, and the discussions terminated.

operations, anticipated changes resulting from the proposed transaction, and the expected resulting effect on commuter rail service.⁶

The CSX Operating Plan discusses commuter service in Volume 3A (CSX/NS-20) at pages 269, 275-80. Contrary to the assertion of Petitioners, supporting reasons are given as to why there will be no adverse impacts on Petitioners. For example, on the NJT's Raritan Valley Line, it is made plain that there will be a decrease of ten freight trains a day. *Id.* at 277. *See also id.* at 276-77, 279-80 (no increase in freight operations on MBTA's and Conrail's line from Worcester through Framingham to Boston; flexible-hour local freight service only on other MBTA lines; flexible local freight service predominates on NJT lines other than Raritan Valley; sufficient capacity exists on CSX line from Virginia Avenue, Washington, D.C., to Fredericksburg, VA, with three tracks and signals in certain areas, to handle both additional freight traffic and VRE passenger traffic).

NS's Operating Plan similarly addresses commuter operations. *See* Volume 3B (CSX/NS-20), pages 302-07. Together with material as to the other Authorities' operations, the discussion includes the basis for NS's belief that there will be no adverse impact on the Petitioners. *See id.* at 303-04, 306-07 (capacity adequate on Lehigh Line used by NJT, though future events may require additional capacity; adequate capacity on line between Suffern, NY and Hoboken,

⁶ It is fair to say that the attention devoted to commuter rail service in the primary application is substantially more than that in any other recent major rail merger application. It is considerably more, for example, than in the UP/SP case, which involved potential commuter rail impacts in Chicago, Southern California, and the San Francisco Bay area. *See* Finance Docket No. 32760, UP/SP-24 at 232-35. The ICC accepted the UP/SP application in that case.

NJ, owned and maintained by NJT; changes, including reroutes both from and to line between Manassas and Alexandria, VA, used by VRE; no adverse effects from net changes).

Other material, not mentioned by Petitioners, is set forth in tabular form with respect to the operations of CSX and NS, which permits the Petitioners to test, if they wish, the statements made in the Operating Plans. There are extensive tabular presentations appended to the Operating Plans as to the post-transaction operations, see, in particular as to CSX, Volume 3A at pages 387-413, and, most specifically, table 13.8-2, "Changes in Trains Per Day on CSX and Conrail Acquired Line Segments with Passenger Service" (id. at pp 409-13). As to NS, see Volume 3B at 451-82, and most specifically, Figures D.6-1 and D.6-2 (id. At 459-70).

Petitioners relegate to footnotes (Pet. at 4-5, nn. 7-9) reference to the Environmental Report. But there is extensive material in the Environmental Report concerning the impacts on commuter operations. See Volume 6A, pages 128-29 ("Impacts on Passenger Service"), pages 136-46 ("Commuter Operations") and pages 173-82 ("Schematic Presentation of Changes in Freight Traffic on Commuter Lines").

Material that is of considerable potential use to the Petitioners sits in the Applicants' Depository in Washington. The CSX and NS train schedules for the train movements referred to in the Operating Plans are there.⁷ Petitioners could, if they wished, review the schedules and use them to test the Applicants' position.

⁷ No one representing the Petitioners visited the Depository until the morning of July 17, the day the Petition was filed, when a representative of the Oppenheimer firm, representing two of the Petitioners, and a consultant for NJT paid a visit to the depository but ordered no copies of any documents.

The Petition also overlooks the fact that, as set forth in the Application,⁸ the Applicants and the Petitioners and other Authorities are bound to each other by written contracts under which the Authorities may occupy the lines of the Applicants for commuter operations, or, in certain cases, the Applicants may occupy the lines of the Authorities for freight operations. In connection with their operations over the former Conrail routes, NS and CSX propose, subject to the Board's approval, to succeed to, and to perform and be subject to, all of the respective contractual obligations of Conrail, including those with the Authorities. The situation is not one where CSX and NS are free of on-going contractual relations with the Authorities.

2. THE ADDITIONAL INFORMATION PETITIONERS DESIRE SHOULD BE SOUGHT THROUGH PROPER DISCOVERY REQUESTS AND OTHER MEANS, NOT A VAGUE EXHORTATION TO SUPPLEMENT THE APPLICATION

The Petition, albeit unspecific, contains a strong flavor of skepticism about the position of the Applicants. Whether the skepticism is that of counsel or of the Petitioners, it can be explored by them in various ways:

First, formal discovery is available. As the Board's predecessor aptly noted, the very purpose of discovery is "to allow the parties to obtain the facts in a proceeding so that relevant issues may be identified and addressed in their submissions." *Rail Carriers: Railroad Car Service and Car Hire Pooling Agreement; Amended Procedural Schedule*, Finance Docket No. 30214, 48 Fed. Reg. 43740 (Sept. 26, 1983). That is precisely what Petitioners should be doing.

⁸ Volume 6A at 128.

Further, it will not do to claim that resort to the discovery process is inadequate, particularly without trying it. Pet. at 7. First, the period for discovery is not "truncated." *Id.* Parties have been free to propound discovery since June 23 (the day the application was filed) and, under the discovery guidelines, can do so until October 6 -- a full 105 days. Petitioners could have served discovery requests weeks ago (as others have),⁹ and received answers by now. Moreover, according to the visitor logs maintained at the Applicants' document depository, no counsel for any of the Petitioners visited the depository until July 17 -- the very day they filed their petition, and more than three weeks after the depository opened. (*See* n.7, above.)

The Petition also overstates the difficulty of identifying NS and CSX personnel with relevant knowledge regarding commuter rail impacts. Pet. at 7. The discussions of those impacts, as Petitioners note, are part of the NS and CSX operating plans, and the persons sponsoring those plans are plainly identified in the Application and have made Verified Statements.

Second, the facts that the Applicants and the Authorities operate or propose to operate over the same routes and are bound by contractual ties put them in a position where there is constant communication and consultation between them. Specific consultations concerning the succession of CSX and NS to the present Conrail commuter arrangements have been and will continue to take place. Indeed, such a

⁹ To name just the first parties, Eighty-Four Mining Company served interrogatories and document requests on July 3; Atlantic City Electric Company, *et al.*, also served interrogatories and document requests on the same date. Potomac Electric Power Company served interrogatories on July 7.

meeting, to be attended by five or six senior officers of CSX and officials of NJT, the largest of the Petitioners, has been scheduled (since before the Petition was filed) for Tuesday, July 22, 1997, at the Washington offices of counsel for two of the Petitioners. The purpose of that meeting is to discuss operations, assuming that the Board looks with favor on the Application and the control and division of Conrail takes place. A similar meeting was held between NS and NJT on June 18, 1997.

Joined as they are to the Authorities by present and prospective contractual relationships and by present and proposed use of the same routes for freight and passenger service, the parties have every incentive to get along and discuss their concerns in a businesslike way, and have done so extensively already. CSX and NS are anxious to continue the process of informal consultation.

NS has stayed in close contact with Authorities in the months leading up to the filing of the primary application, and following the filing as well. NS personnel have met numerous times with representatives of Authorities, including Petitioners.¹⁰

¹⁰ While not necessarily an exhaustive list, these contacts since January 1 include at least the following: January 1997 meetings with representatives of the Massachusetts Department of Transportation and MBTA, and with New Jersey Department of Transportation (NJDOT), and a briefing before the American Public Transit Association (APTA) including representatives of NJT, VRE, MARC and MTA; a February briefing before the APTA including representatives of NJT, VRE, MARC and MTA, and separate meetings with the New Jersey Transportation Planning Authority (NJTPA) and NJDOT; March meetings involving the Long Island Railroad, NJDOT, NJTPA, and the New Jersey Department of Commerce; an April hearing before Sen. Lautenberg involving NJT and a meeting with MDOT/MARC; May 1997 meetings with Metro-North, NJT and VRE; June meetings involving MDOT/MARC, NJDOT/NJT, NJTPA and Metro-North; July meetings with SEPTA and MARC; and numerous meetings with Amtrak in February, March, April, May and July.

(continued...)

CSX, in regard to New Jersey alone (to use as an example the State of the Petitioner with the most extensive operations) has participated in numerous meetings, done its homework by reviewing the current Conrail passenger contracts and operations as well as a consultant report prepared for the New Jersey Authorities, and participated in state and federal legislative hearings.¹¹ As noted above, a major meeting with NJT staff is scheduled for tomorrow. Conscious of the fact that, assuming the Board's favorable action upon the Application, CSX will have more intercity passenger and commuter operations on its freight rail lines than any other railroad in the Nation, CSX recently announced the hiring of Paul Reistrup, former President of Amtrak, as Vice President-Passenger Integration. Mr. Reistrup will be involved in the continuing process of consultation with the Authorities and with Amtrak.

CSX and NS share in the highest degree the concerns for safety that they know the Authorities have, and hope to work with them constructively. The approach

(...continued)

Of particular note is the June meeting involving NJDOT and NJT, where NS representatives presented detailed information regarding the proposed freight use of Northeast Corridor (NEC)/NJT lines, net freight train change schematics on those lines, planned corridor investments and engineering drawings, and a detailed description of Shared Assets Area operations and proposed facility uses.

¹¹ Among other things, CSX has participated in a New Jersey legislative hearing on February 24, 1997; met with NJDOT Commissioner Hailey on March 11 and with Governor Whitman and him on March 27; participated in a conference with NJDOT on April 17th and a hearing before Sen. Lautenberg of New Jersey the next day; had a further meeting with NJDOT Commissioner Hailey and staff on May 21; and met with the Southeastern Pennsylvania Transportation Authority (including discussions of South Jersey service) on June 3 and June 25.

of counsel reflected in the Petition is not helpful in this regard, but as far as NS and CSX are concerned they look forward to an open process in which information will be exchanged in order to work out the details of the successful and safe use of the line segments in question both for commuter service and for freight service.

Much information is already available to Petitioners in the Application and the Depository. The avenues outlined above to obtain additional information are those that are available to Petitioners. With great respect, we submit that the Petitioners should use them and that the Applicants should not be asked to try to guess the concerns of the Petitioners and other Authorities and provide supplementation to deal with them -- which is what the Petition seeks.

CONCLUSION

The Applicants recognize the importance of considering the effects of the transaction they propose on commuter rail operations. The significant attention devoted to that issue in the Application, and Applicants' longstanding and ongoing efforts to keep open communications with commuter rail representatives, demonstrate that recognition. To the extent, however, that Petitioners believe additional information is necessary, the discovery process or the consultative process -- not supplementing the Application -- are the appropriate avenues for pursuing it.

For the reasons stated, the Petition should be denied.

Respectfully submitted,

JAMES C. BISHOP, JR.
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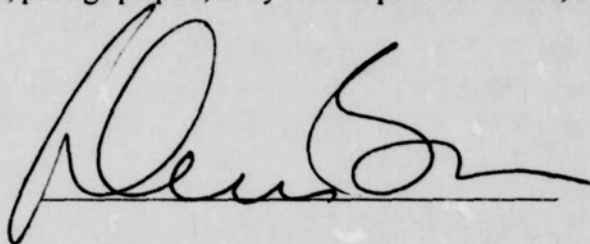
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(215) 209-4000

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

Counsel for Conrail Inc. and
Consolidated Rail Corporation

CERTIFICATE OF SERVICE

I, Dennis G. Lyons, certify that on July 21, 1997, I have caused to be served a true and correct copy of the foregoing CSX/NS-28, Response of Applicants CSX Corporation, CSX Transportation, Inc., Norfolk Southern Corporation, Norfolk Southern Railway Company, Conrail Inc. and Consolidated Rail Corporation to Joint Petition for Supplementation of Application, on all parties that have appeared in Finance Docket No. 33388, by first-class mail, postage prepaid, or by more expeditious means, as listed on the Service list.

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

STB

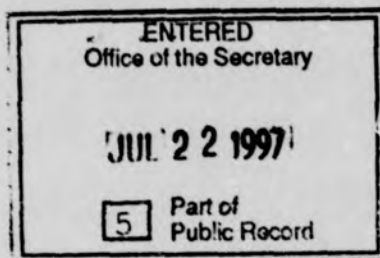
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Philip G. Sido
Director of
Transportation

1600 VALLEY ROAD, WAYNE, NJ 07470 TELEPHONE (201) 628-2321

July 17, 1997



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

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

Dear Secretary Williams:

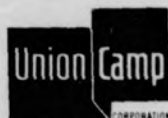
This letter serves to notify the Board that Union Camp Corporation is providing notification of intent to participate in the above referenced proceeding. This original and 25 copies are being served according to Decision No. 6, Notice of Issuance and procedural Schedule. Also attached is an original and 25 copies of Certificate of Service, which has been sent by first class mail to: Mr. Dennis G. Lyons, Esq., Arnold and Porter, 555 12th Street, N.W., Washington, DC 20004-1202, Mr. Richard A. Allen, Esq., Zuckert Scoutt & Rasenberger, L.L.P., Suite 600, 888 Seventeenth Street, N.W., Washington, DC 20006-3939, Paul A. Cunningham, Esq., Harkins Cunningham, Suite 600, 1300 Nineteenth Street, N.W., Washington, DC 20036 and Administrative Law Judge Jacob Leventhal, Federal Energy Regulatory Commission, 888 First Street, N.E., Suite 11F, Washington, DC 20426.

Thank you for your attention to this matter.

Sincerely,

Philip G. Sido

PGS/ljr
Enclosures



Philip G. Sido
Director of
Transportation

1600 VALLEY ROAD, WAYNE, NJ 07470 TELEPHONE (201) 628-2321

July 17, 1997

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



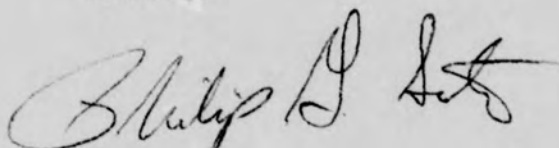
Re: Certificate of Service

Dear Secretary Williams:

I verify that on July 17, 1997 I have served, by first class mail, an original and 25 copies of Union Camp's Notice of Intent to participate in STB Finance Docket No. 33388, CSX Corporation and CSX Transportation Inc., Norfolk Southern Corporation and Norfolk Southern Railway Company - Control and Operating Leases/Agreements - Conrail, Inc. and Consolidated Rail Corporation to the following individuals: Mr. Dennis G. Lyons, Esq., Arnold and Porter, 555 12th Street, N.W., Washington, DC 20004-1202, Mr. Richard A. Allen, Esq., Zuckert Scoutt & Rasenberger, L.L.P., Suite 600, 888 Seventeenth Street, N.W., Washington, DC 20006-3939, Paul A. Cunningham, Esq., Harkins Cunningham, Suite 600, 1300 Nineteenth Street, N.W., Washington, DC 20036 and Administrative Law Judge Jacob Leventhal, Federal Energy Regulatory Commission, 888 First Street, N.E., Suite 11F, Washington, DC 20426.

Thank you for your attention to this matter.

Sincerely,


Philip G. Sido

PGS/ljr
Enclosures

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7-21-97

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180720

Before The
SURFACE TRANSPORTATION BOARD
Washington, D.C.



Finance Docket No. 33388

CSX Corporation and CSX Transportation Inc.
Norfolk Southern Corporation and
Norfolk Southern Railway Company
•• Control and Operating Leases/Agreements ••
Conrail, Inc. and Consolidated Rail Corporation -
Transfer of Line By Norfolk Southern Railway Company
To CSX Transportation Inc.

D

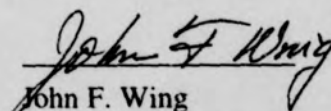
NOTICE OF INTENT TO PARTICIPATE

Please enter the appearance of the undersigned on behalf of the Citizens Advisory Committee (a body established by the Transportation Steering Committee, the metropolitan planning organization for the Baltimore region.) The Citizens Advisory Committee intends to participate and become a party of record in the above-captioned proceedings. Pursuant to 49 C.F.R. Sec. 1104.12, service of all documents filed in this proceeding should be made upon the undersigned.

This Notice shall supersede notice of intent submitted by the undersigned on behalf of the citizens Advisory Committee dated February 26, 1997.

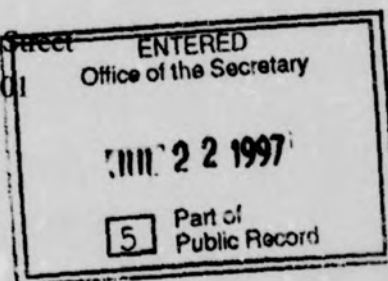
Dated: July 16, 1997

Respectfully submitted,


John F. Wing

Chairman, Citizens Advisory
Committee

601 North Howard Street
Baltimore, MD 21201



CERTIFICATE OF SERVICE

I hereby certify that on July 14, 1997, a copy of the foregoing Citizens Advisory Committee Notice Of Intent To Participate was served by first-class, U.S. mail, postage prepaid upon the following:

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

Richard A. Allen, Esquire
James A. Calderwood
Andrew R. Plump
John V. Edwards
Zuckert, Scoutt &
Rasenberger, LLP.
888 Seventeenth Street, N.W.
Washington, D.C. 20006-3939

John M. Nannes
Scot B. Hutchins
Skadden, Arps, Slate,
Meagher & Flom LLP
1440 New York Avenue, N.W.
Washington, D.C. 20005-2111

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

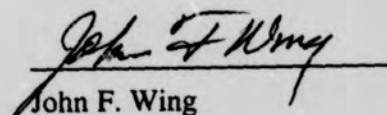
P. Michael Giftos
Paul R. Hitchcock
CSX Transportation, Inc.
500 Water Street
Speed Code J-120
Jacksonville, FL 32202

Dennis G. Lyons, Esquire
Richard L. Rosen
Paul T. Denis
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Samuel M. Sipe, Jr.
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Steptoe & Johnson LLP
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Constance L. Abrams
Consolidated Rail Corporation
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Philadelphia, PA 19103

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Harkins Cunningham
Suite 600
1300 Nineteenth Street, N.W.
Washington, D.C. 20036


John F. Wing

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L.L.P.

A LIMITED LIABILITY PARTNERSHIP INCLUDING PROFESSIONAL CORPORATIONS

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

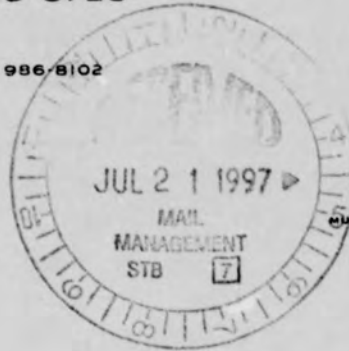
(202) 986-8000

TELEX: 440274 FACSIMILE: (202) 986-8102

WRITER'S DIRECT DIAL:

(202) 986-8050

July 21, 1997



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

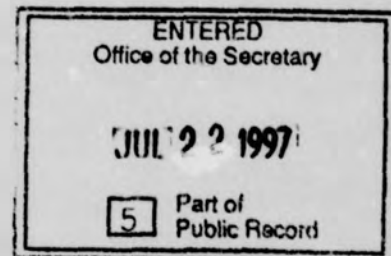
Via Hand Delivery and Facsimile

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

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

Dear Secretary Williams:

Pursuant to Board Decision No. 6, page 7, concerning deadlines applicable to appeals and replies, Movants American Electric Power, Atlantic City Electric Company, Delmarva Power & Light Company, and The Ohio Valley Coal Company understand that they have until Wednesday, July 23, 1997, to file an appeal from Judge Leventhal's ruling in Decision No. 11, served July 18, 1997.



Mr. Vernon A. Williams, Secretary

July 21, 1997

Page 2

Will you please confirm this to the undersigned by
telephone? Thank you.

Respectfully submitted,

Michael F. McBride

Michael F. McBride

Bruce W. Neely

Linda K. Breggin

Brenda Durham

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

cc: Restricted Service List

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L.L.P.

A LIMITED LIABILITY PARTNERSHIP INCLUDING PROFESSIONAL CORPORATIONS

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JACKSONVILLE

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

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TELEX: 440274 FACSIMILE (202) 986-8102

WRITER'S DIRECT DIAL:

(202) 986-8050
E-Mail Address: mfmcbriid@lgm.com

D

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

July 22, 1997



VIA HAND DELIVERY

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

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

Dear Secretary Williams:

Enclosed are the original and 25 copies of an "Appeal of American Electric Power, Atlantic City Electric Company, Delmarva Power & Light Company, and The Ohio Valley Coal Company from the Order of the Presiding Judge Restricting Discovery, and Motion for Expedited Consideration" for filing in the above-referenced proceeding. Also enclosed is a 3.5" diskette containing the document in WordPerfect format.

Because all parties have already been served by the Board on July 18, 1997, with a copy of the Presiding Administrative Law Judge's Order, and because all such persons were served by us on July 3, 1997, with discovery requests, the service copies of this Appeal contain only the affidavits in Exhibit C and not the previously served documents. This Appeal was filed as promptly as possible, but necessarily awaited the Supplementary Affidavits of Drs. Kahn and Dunbar, which was not in our possession until today.

FEE RECEIVED

JUL 22 1997

SURFACE
TRANSPORTATION BOARD

ENTERED	
Office of the Secretary	
JUL 23 1997	
5	Part of Public Record

Vernon A. Williams
July 22, 1997
Page 2

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

Very truly yours,

Michael F. McBride

Michael F. McBride

Brian D. O'Neill

Bruce W. Neely

Linda K. Breggin

Brenda Durham

Joseph H. Fagan

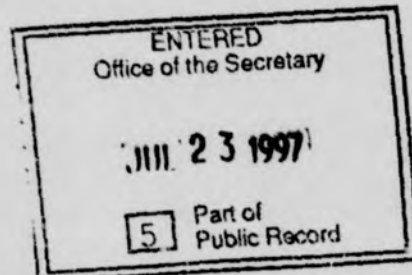
Attorneys for American Electric Power.

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

Enclosures

cc (w/Enclosures as stated): Restricted Service List

180743



ACE, et al.-6

Expedited Consideration Requested

UNITED STATES OF AMERICA
DEPARTMENT OF TRANSPORTATION
SURFACE TRANSPORTATION BOARD



FINANCE DOCKET NO. 33388

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

APPEAL OF AMERICAN ELECTRIC POWER, ATLANTIC CITY ELECTRIC
COMPANY, DELMARVA POWER & LIGHT COMPANY, AND
THE OHIO VALLEY COAL COMPANY
FROM THE ORDER OF THE PRESIDING JUDGE RESTRICTING DISCOVERY,
AND MOTION FOR EXPEDITED CONSIDERATION

INTRODUCTION AND SUMMARY

Pursuant to Section 1115.1(c) of the Rules of Practice of
the Surface Transportation Board ("Board") and Decision No. 6 in
this proceeding, American Electric Power, Atlantic City Electric
Company, Delmarva Power & Light Company, and The Ohio Valley Coal
Company (jointly, "Movants" or "ACE, et al.") hereby respectfully
appeal from the Presiding Judge's order, issued and served on
July 18, 1997 (attached hereto as Exhibit A). The Presiding

Judge determined that the documents requested in Movants' three document requests served July 3, 1997 (and attached hereto as Exhibit B) are relevant or reasonably calculated to lead to the production evidence relevant to the subject matter of this proceeding, but limited the required production in light of the burden of production on Applicants. While it is understandable that the Presiding Judge would apply a traditional balancing test for discovery (see July 18 Order at 2), it was error to do so here in light of the threshold test the ICC and the Board have adopted in prior merger and acquisitions proceedings, and affirmed by the Court of Appeals, for overcoming the presumption that sole-served shippers (i.e., those shippers that are served by only one of the Applicants for all or any part of their transportation) are not at risk of harm from such mergers and acquisitions. Simply put, the Board cannot establish a rebuttable presumption for proceedings such as this one and then deny parties the evidence necessary to rebut the presumption.

The documents the Movants have requested be produced are necessary, in the judgment of Movants' experts (Drs. Alfred E. Kahn, Robert Julius Thorne Professor Emeritus at Cornell University, and Frederick C. Dunbar and Mr. Thomas D. Crowley), to meet the standard set forth by the Interstate Commerce Commission ("ICC") and affirmed by the United States Court of

Appeals for the District of Columbia Circuit for determining whether the Applicant railroads set their rates to maximize net revenues, subject to regulatory restraints (if any). Western Resources, Inc. v. Surface Transportation Bd., 109 F.3d 782, 787 (D.C. Cir. 1997) ("Western Resources") (quoting Burlington Northern/Santa Fe, Finance Docket No. 32549, served August 23, 1995, slip op. at 70 ("Burlington Northern")). This is a critical question the Board will have to answer in the first instance. If the Applicants do not set their rates to maximize net revenues, subject to regulatory limits (if any), Applicants still have room to raise rates to shippers that are solely served by any of the three Applicants, and the proposed transaction therefore places these shippers at great risk of having to pay increased prices as CSX and Norfolk Southern attempt to recover the \$4 to \$5 billion premium they have paid for Conrail.¹ Of course, the Board has already ruled, as a result of earlier pleadings filed by these Movants, that the payment of the substantial acquisition premium, and the possibility of attempts

¹ The prior discussions of the Board's theory, which sometimes is given the label "one lump" theory, have taken place in the context of whether the loss of origin competition as a result of a proposed merger adversely affects shippers. But as Drs. Kahn and Dunbar demonstrate, any shipper on any of the Applicants' systems whose transportation involves a monopoly or "bottleneck" carrier for all or a part of the transportation is at risk of rate increases if the proposed transaction is consummated.

by CSX and Norfolk Southern to recover it from some or all of their shippers if the proposed transaction is approved, is an issue to be decided in this proceeding. Thus, the Board itself should have a great interest in the information sought by Movants in discovery.

Although appeals from discovery rulings are not favored, Decision No. 6, Finance Docket No. 33388, served May 30, 1997; see also 49 C.F.R. § 1115.1(c), expedited and careful Board review of the July 18 Order is necessary "to correct an clear error of judgment" and "to prevent a manifest injustice." The requested information about the Applicants' rate-setting practices can only be obtained from the Applicants, and the production of this information is necessary to the Movants' evidentiary presentation (in the judgment of the Movants' experts). In Western Resources, the Court appeared to contemplate a statistically reliable analysis of the carriers' rate-setting practices. Western Resources, 109 F.3d at 790-91 ("one lump" theory must be contradicted "frequently"; evidence contradicting the "one lump" theory must overcome the "multiplicity of real world variables."). If the information the July 18 Order would prevent Movants from obtaining is not made available to Movants, they may not have a sufficiently large universe of data to present statistically reliable analyses of

the Applicants' rate-setting practices. The Board should therefore decide this appeal on its merits to ensure the record contains the information Movants' experts believe is necessary to determine whether the Applicants' rate-setting practices conform to the Board's evidentiary presumptions, such as the "one lump" theory.

The size of the appropriate universe is necessarily, however, a matter of judgment, and the Board's judgment is ultimately the most important determinant of the size of the universe of data needed to test the Board's standard.

Accordingly, the issue presented by this appeal is:

ISSUE PRESENTED

Having determined the relevance of Movants' three document requests concerning Applicants' coal rate-setting practices, do the limitations placed on those requests by the July 18 Order require the Applicants to provide sufficient information to determine whether those practices "maximiz[e] net revenue for the traffic, subject to regulatory limits" (Western Resources, 109 F.3d at 787)?

The relief sought by this Appeal is needed promptly because this is an expedited proceeding and the evidence and testimony for which the discovery is the foundation will require substantial time to develop once the documents are made available to Movants.

In support hereof, Movants state:

ARGUMENT

I. The Discovery At Issue

The Movants served their First Set of Interrogatories and First Set of Requests for Production of Documents separately on each of the Applicants on July 3, 1997 (Exhibit B). Although served separately on each of the Applicants, Movants' interrogatories and requests for production of documents to each Applicant are essentially the same and consist of only three requests for production and six interrogatories. The six interrogatories ask the Applicants to explain their rate-setting theories and practices for movements of coal to sole-served destinations and, if different, the rate-setting theories and practices for other commodities. The requests for production seek documents to test whether the Applicants' actual practices conform to the Board's standard presumption in railroad merger and acquisition proceedings that sole-served shippers will not be harmed by such mergers or acquisitions. The first two requests seek the Applicants' bids for certain movements of coal by unit trains or trainloads since 1978 and documents relating thereto. The third request for production seeks the Applicants' 100% traffic tapes since 1978, which provide detailed information about each shipment of goods by the railroads.

The Applicants did not refuse to respond to the interrogatories, but each of the Applicants objected to Movants' first two requests for production, and Norfolk Southern objected altogether to the third request. Since Paragraph 16 of the Discovery Guidelines requires a responding party to object within five business days if it will provide no information or documents in response to a discovery request, it was clear that the Applicants were unwilling to provide even a single document relating to their bids to transport coal (the Applicants' single largest commodity, both in terms of tonnage and revenue) and that Norfolk Southern was unwilling to provide any traffic tapes. The Applicants claimed in summary fashion that the discovery requested is not relevant to the proceeding, even though by not objecting to Movants' interrogatories they effectively conceded that their rate-setting theories and practices for coal and other commodities are relevant. They also contended that the discovery is unduly burdensome and overly broad. Conrail and Norfolk Southern also claimed that the first two requests were ambiguous but the ambiguities have now been resolved by Movants' counsel and no longer appear to be an issue.

In the following Sections of this Appeal, Movants will show that the documents sought are, in the judgment of Movants' experts, necessary to be able to present statistically reliable

evidence on the central issue in this proceeding -- the threat to captive customers of rate increases. But, since that is necessarily a matter of judgment, and the Board's judgment is what is most important since the standard at issue is that of the Board, the Board's determination of the appropriate universe of data from which to draw conclusions about Applicants' rate-setting practices is most important. The Board's determination of the amount of information that Movants obtain from their document requests will necessarily define that universe of data, so the Board cannot escape from deciding the question.

II. The Documents Requested Are Well Within the Scope of Discovery

A. The Scope of Discovery Is Broad

The scope of discovery in proceedings such as this is quite broad. The Board's Rules of Practice, 49 C.F.R. § 1114.21 (1996), provide in pertinent part:

(a) When Discovery is available

- (1) Parties may obtain discovery . . . regarding any matter, not privileged, which is relevant to the subject matter involved in a proceeding. . . .
- (2) It is not grounds for objection that the information sought will be inadmissible as evidence if the information sought appears reasonably calculated to lead to the discovery of admissible evidence.

The scope of discovery authorized by the Board's Rules is modeled on the scope of discovery under the Federal Rules of Civil Procedure.² The Federal Rules of Civil Procedure "allow broad scope to discovery and this has been recognized by the courts." Wright, Miller & Marcus, Federal Practice and Procedure: Civil 2d § 2007 (1994) (cases omitted).

The discovery requested by Movants falls well within the broad parameters of these Rules. But there is one difference between this proceeding and proceedings before the Federal courts that requires discovery to have even greater scope here. Unlike the practice before the courts, here there will be no oral hearing with cross-examination of witnesses. Moreover, Movants do not possess the information, and it could not be elicited from a witness at deposition. Thus, the discovery process is the sole means by which the Movants will ever be able to obtain any data to determine the nature of Applicants' rate-setting practices in

² Rule 26 (b) (1) provides, in language virtually identical to the Board's Rules, that:

Parties may obtain discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action, whether it relates to the claim or defense of the party seeking discovery or to the claim or defense of any other party. . . . The information sought need not be admissible at the trial if the information sought appears reasonably calculated to lead to the discovery of admissible evidence.

fact, and thus whether the proposed acquisition of Conrail will have an anticompetitive effect on shippers.

B. The Matter About Which Movants Seek Discovery Is Relevant to This Proceeding

1. Under the governing statute, the Board is to approve the acquisition of control over a railroad if the Board finds the transaction "consistent with the public interest." 49 U.S.C. § 11324(c) (1996). Among the factors the Board "shall consider" in making this determination is "the adequacy of transportation to the public" (which includes the price of the service), "the total fixed charges that result from the proposed transaction," and "whether the proposed transaction would have an adverse effect on competition among rail carriers in the affected region or in the national rail system." 49 U.S.C. § 11324(b)(1), (3), and (5). The Board may also "impose conditions on the merger when needed to advance the public interest." Lamoille Valley Railroad Co. v. ICC, 711 F.2d 295, 300 (D.C. Cir. 1983) (discussing the predecessor to 49 U.S.C. § 11324(c) then codified at 49 U.S.C. § 11344(c)). Among the conditions the Board may impose are conditions "to protect the public from anticompetitive consequences" of the acquisition. Union Pacific, et al., 366 I.C.C. 462, 562 (1982) (citing Rail Consolidating Procedures, 363 I.C.C. 784, 789 (1981)) (emphasis in original).

The discovery sought by Movants is designed to obtain information to determine whether Norfolk Southern's and CSX's acquisition of Conrail will adversely affect the adequacy of transportation, competition among rail carriers, the effect on shippers of the total fixed charges incurred by CSX and Norfolk Southern to acquire Conrail, and whether conditions are warranted "to protect the public from anticompetitive consequences" of the acquisition.

2. One adverse effect of the transaction on the public may be to deprive shippers at the destination of the rail movement -- the consumers of the commodity being transported -- of the benefits of competition among shippers at the origin of the movement. The most obvious example is Delmarva Power & Light Company ("Delmarva"), which has two coal-fired generating plants in Delaware. Coal moved by rail is effectively the only source of fuel for these plants, and Conrail is the sole rail connection to them. Thus, Conrail, the destination carrier, is a monopolist. But there is competition for Delmarva's coal shipments by carriers operating between the coal fields and Conrail's interchange at Hagerstown, Maryland. The competing carriers are CSX and Norfolk Southern.³ Because of its contract

³ On a few occasions, Conrail has also transported coal from the coal fields to Hagerstown for Delmarva.

with Conrail, Delmarva has been able to use competition between CSX and Norfolk Southern to lower the price for transporting its coal from the coal fields to Hagerstown and Delmarva has reaped the benefit of this competition among origin carriers.

The proposed acquisition will eliminate Conrail as the destination carrier and will substitute Norfolk Southern as the monopolist transporting Delmarva's coal from Hagerstown. Delmarva is concerned that the elimination of a neutral destination carrier monopolist with a destination carrier monopolist that also competes for traffic from the origin of the movement may diminish CSX's effectiveness as a competitor to Norfolk Southern and will enable Norfolk Southern, the new destination carrier monopolist, rather than Delmarva, to capture any benefit of competition among origin carriers that remains.

To take just one more example, The Ohio Valley Coal Company ("Ohio Valley") sells coal to two Conrail-served generating stations owned by Centerior Energy Company. Ohio Valley is concerned that rail transportation of its coal will be more expensive than today both because of the premium paid to acquire Conrail and because under the Applicants' proposal Ohio Valley will require a two-line haul to Centerior Energy's plants while its chief competition will have single-line service from mines to be served by CSX. If Conrail is not now maximizing the net

revenues for the movement of Ohio Valley's coal to Centerior Energy's plants, the acquisition of Conrail by CSX and Norfolk Southern will give each every incentive, and the ability, to raise its portion of the rate charged for that transportation.

3. In prior merger cases, the Board and its predecessor, the Interstate Commerce Commission ("ICC") have adopted a theory that concludes that sole-served shippers are not at risk from mergers. Burlington Northern, supra; Chicago, Milwaukee, St. Paul and Pacific Railroad Co., et al., 2 I.C.C. 2d 161, 234, supplemental decision, 2 I.C.C. 2d 427 (1985); Union Pacific, et al., 366 I.C.C. at 538. The theory holds that:

there is only one monopoly profit to be gained from the sale of an end-product or service (here the transportation of coal for use at an electric generating plant).

Western Resources, 109 F.3d at 787 (citing 3 Areeda & Turner, Antitrust Law ¶ 725b, at 199 (1978)).

4. Many sole-served shippers, including the Movants, believe that in the real world they will suffer harm as the result of the acquisition of a carrier by another, such as is proposed in this case, because they do not believe the Board's theory correctly describes the way railroads set their rates. Significantly, as Drs. Kahn and Dunbar explain in their Supplementary Affidavit, which is attached included in Exhibit C

hereto, the Board's theory requires several "extremely demanding" assumptions to be valid. Among the required assumptions are:

- That there is no actual or potential alternative to the existing bottleneck, the entry or availability of which might be affected by the vertical integration or merger under consideration;
- That the bottleneck carrier has perfect information about the demand function of the shipper and the cost functions of competing carriers;
- That there is no uncertainty about future costs and prices;
- That the bottleneck carrier is already acting as a rational profit-maximizer;
- That different carriers have identical beliefs about the nature of any regulatory constraints; and
- That there is neither uncertainty nor possibility of differences of opinion about the profit-maximizing price, taking into consideration both long- and short-term demand elasticities.⁴

As Drs. Kahn and Dunbar further point out, these assumptions are never completely fulfilled in the merger at issue. What matters is whether they are sufficiently close to being valid to ensure that prices after the merger will behave more or less as the theory predicts, or "whether they will behave differently, as

⁴ Supplementary Affidavit of Drs. Alfred E. Kahn and Frederick C. Dunbar, Exhibit C, ¶ 4.

would be predicted if the assumptions are in fact rather far from the truth."⁵

In short, no claim can be made that the theory is conclusive and forecloses inquiry into the rate-setting practices of the railroads involved in this transaction to determine whether shippers will be harmed by the acquisition of Conrail. The theory is just that -- a theory, and the Board has made clear it gives rise only to a rebuttable presumption. Burlington Northern, slip op. at 71 (quoting Union Pacific, et al., 4 I.C.C. 2d 409, 476 (1988)); Chicago, Milwaukee, St. Paul and Pacific Railroad Co., et al., 2 I.C.C. 2d at 455. Thus, as the Court noted in Western Resources, whether the merger of two carriers will cause harm to sole-served shippers depends on the theory being "both correct and applicable. . . ." Western Resources, 109 F.3d at 787.

5. Although the Board's predecessor and the Court have recognized that the theory is only a theory that can be rebutted, they have created a formidable obstacle to any effort to rebut the theory, as Drs. Kahn and Dunbar and Mr. Crowley explain in their Affidavits. In Western Resources, the Court rejected a variety of arguments that would undermine the basis for the theory. More importantly, the Court found that the

⁵ Id., ¶ 9.

specific examples the six utilities offered from their own files to show that the theory did not apply to the way railroads set their rates were insufficient to rebut the theory. According to the Court, the theory is to be rejected "if its predictions are contradicted (frequently or more often than predictions from an alternative hypothesis)." Western Resources, 109 F.3d at 791 (quoting Friedman, Essays in Positive Economics 9 (1953)) (internal quotations omitted). The Court's continuing discussion implied that a statistically reliable showing would be necessary. Thus, specific examples that a utility might be able to produce from its own files as to how the railroads set the rates for shipments to the utility may not be enough to rebut the theory.⁶ The Court's decision requires evidence which will show that the Board's theory is contradicted "frequently" or "more often than an alternative hypothesis."

C. The Discovery Movants Seek Is Needed to Test Whether the Board's Theory Is Frequently Contradicted by the Applicants' Actual Practice

As Movants' experts explain in their Affidavits in support of this Appeal (attached hereto as Exhibit C), the discovery requested by Movants is necessary to produce the data the Court of Appeals believes is necessary to contradict the Board's theory

⁶ Some utilities, at least, have no such evidence in their files, since their contracts may be of sufficient length so as not to contain any railroad bids for at least several years.

frequently. The interrogatories ask each of the railroads to explain their rate-setting theories and practices for establishing rates for coal movements to utilities or other large coal users and whether the carrier serving the sole-served destinations obtain most or all of the profit associated with the movement of the coal. The interrogatories also ask whether there is a minimum level of profitability for each movement and, if so, how that level is calculated.⁷

The Applicants have responded to most of Movants' interrogatories. But Movants are not willing to rely solely on the Applicants' statements. And they cannot be expected to rely solely on these statements. As the Court and the ICC have recognized, "self-serving statements by a merging railroad's officers are entitled to little credence." Lamoille Valley Railroad Co., 711 F.2d at 318 (citing Norfolk & Western et al., 360 I.C.C. 498, 512 (1979)).

Accordingly, Movants have sought the production of documents to test whether the Applicants' actual rate-setting practices conform to the Board's theory and the railroads' statements concerning how they set rates. For example, the first two requests seek documents concerning the railroads' bids for

⁷ The data contained on the traffic tapes requested of Applicants will test the correctness of their responses to Movants' interrogatories.

carriage of coal by unit train or train load (the usual way coal is delivered to large buyers) to destinations which consumed 100,000 tons or more of coal per year since 1978. These documents will shed light on whether origin carriers are competing, whether the Applicants in fact analyze the market the way the theory predicts, and, if there is origin competition, whether the origin carriers are willing to accept the rate the theory predicts they will. The documents will also show, in conjunction with the data from the traffic tapes, whether the monopolistic destination carrier obtains the same profit no matter who the origin carrier is, as the theory predicts.

The third request, to which only Norfolk Southern objected altogether, seeks traffic tapes which show the actual revenues for each movement of freight and how the revenues have been divided among the carriers since 1978. This information is clearly relevant as the Presiding Judge found, and as the failure of CSX and Conrail to object altogether shows. In any event, the traffic tapes will demonstrate whether the profit for each movement of freight was determined in accordance with the theory in some other fashion.

Significantly, none of the Applicants provides even the slightest basis for their assertions that the documents requested by Movants are not relevant to the subject matter of this

proceeding. They clearly are. The documents are precisely the information the Court in Western Resources required to show that the acquisition of a monopolistic destination carrier by an origin carrier may cause competitive harm: Is the theory "both correct and applicable" and is the theory contradicted "frequently or more often than predictions from an alternative hypothesis." Western Resources, 109 F.3d at 787, 791.

III. The Requests Are Not Unduly Burdensome or Overly Broad

Each of the Applicants claimed that the requests for production to which they object are overly broad. Applicants asserted that the requests are overly broad because they request bids and related documents for movements of coal to certain destinations that occurred between 1978 and 1997, as well as the traffic tapes for the same period. Movants wish they could ask for documents for a shorter time period. But the prior decisions of the ICC, the Board, and the Western Resources decision seem to require the extended period. As noted above, the Western Resources decision requires evidence showing that the theory is contradicted "frequently or more often than predictions from an alternative hypothesis." Western Resources, 109 F.3d at 791.

As Drs. Kahn and Dunbar explain in their Supplementary Affidavit, the documents the Movants requested would enable them

to meet this test.⁸ However, as they also point out, the data concerning the eight routes the July 18 Order requires the Applicants to provide "is most unlikely to be sufficient to provide a statistically reliable sample."⁹ The limited data may also make it difficult to control for other factors that affect prices.¹⁰ The inability to exclude other factors affecting price is precisely the defect the Court in Western Resources found in the evidentiary presentations concerning the impact of the Burlington Northern/Santa Fe merger on prices paid by sole-served destinations. Western Resources, 109 F.3d at 791.

In short, to test whether the theory is contradicted "frequently," the data needs to be comprehensive. The failure to provide such data is the primary error in the July 18 Order.

Moreover, the data for each of the Applicants' rate-setting practices are relevant because the Applicants' rate-setting practices to any sole-served shipper may demonstrate departures from the Board's theory about those practices. Thus, it was error to confine the required production to destinations served by Conrail, let alone only to Movants' Conrail's sole-served destinations. Evidence of the Applicants' rate-setting practices

⁸ Supplementary Affidavit of Drs. Kahn and Dunbar, Exhibit C, ¶ 12, 15.

⁹ Id., ¶ 13.

¹⁰ Id.

for any sole-served shipper is relevant to determining the consistency, or lack thereof, of the Applicants' adherence to the Board's theory.¹¹

Data concerning the rate-setting practices of each of the Applicants is relevant for another reason. The issues the governing statute and precedent require to be considered are whether the acquisition of Conrail by Norfolk Southern and CSX will harm shippers, either because of anticompetitive consequences or because of the total fixed charges that CSX and NS have incurred to acquire Conrail. The ICC has found in approving prior mergers that shippers will not be harmed, based in part on the ICC's "experience." Burlington Northern, slip op. at 74. To be able to challenge that "experience," evidence showing that prior mergers involving the Applicants have had such an effect is clearly relevant. Unfortunately, the last merger involving CSX was in 1980 when the C&O, B&O, Western Maryland and other railroads merged; for Norfolk Southern, the last merger was in 1982 when Norfolk Southern was formed from the merger of Norfolk and Western and the Southern systems; and for Conrail,

¹¹ The prior discussions of the Board's theory (see supra, p. 3), may have induced Judge Leventhal to conclude that only Conrail-served destinations are relevant. However, as noted above (supra p. 3 n. 1), any shipper on any of the Applicants' systems whose transportation involves a monopoly or "bottleneck" carrier for all or a part of the transportation is at risk of rate increases if the proposed transaction is consummated.

the last acquisition was in 1990 when it acquired the Monongehela. Therefore, the time period of the documents ordered to be provided in response to requests must be extended even before those years so that there will be adequate documentation of the rate-setting practices of the Applicant railroads before the last major mergers occurred. While the Presiding Judge accepted the relevance of these prior mergers and the need to go back well into the past to determine the Applicants' behavior before and after each such merger, the July 18 Order unfortunately does not recognize that because Applicants competed with one another before and after those acquisitions, data about all three Applicants is necessary during the same time period to demonstrate the effect on competition and rates of these mergers and acquisitions. Without data from all three Applicants for the same time period, it may not be possible to draw meaningful comparisons and conclusions, as the Affidavits of Movants' experts attest. Supplementary Affidavit of Drs. Kahn and Dunbar, ¶ 14; Affidavit of Thomas D. Crowley, ¶ 5.

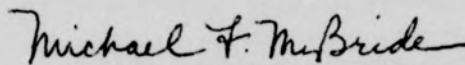
As to burden, both CSX and Conrail claim that they will have to produce thousands of documents to Movants in response to the first two requests. These assertions are easily answered. If necessary, Movants will go to the Applicants' offices to examine the files, but the Discovery Guidelines contemplate putting, and

the Applicants' preferences seem to be to put, all appropriate documents in the depository. The point is that counsel can resolve that issue. As for the traffic tapes, Norfolk Southern, but not CSX or Conrail, asserted that responding in any fashion to the third request is also burdensome. No reasons are given why the preparation of such tapes should be time-consuming, and thus there is no burden here. The tapes apparently exist, and Norfolk Southern should be able readily to produce the tapes in the computer readable format requested. (Its counsel claims that Norfolk Southern needs to "clean up" the tapes to make them computer-readable," but they ought to be computer-readable already.) CSX and Conrail worked from such tapes for their portion of the Application, and thus it cannot be denied that such data are relevant here.

CONCLUSION

WHEREFORE, Movants' Appeal should be granted, and Applicants should be required to produce, as promptly as possible, (1) the documents requested of them in Movants' three document requests served July 3, 1997, or (2) such lesser set of documents as will provide what the Board concludes is an adequate and probative universe of data to test whether shippers on any of the Applicants' systems that are served by only of of the Applicants for all or any part of their transportation are at risk of rate increases as a result of the proposed transaction.

Respectfully submitted,



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Dated: July 22, 1997

BEFORE THE
SURFACE TRANSPORTATION BOARD

FINANCE DOCKET NO. 33388

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

CERTIFICATE OF SERVICE

I hereby certify that I have served this 22nd day of July, 1997, a copy of the foregoing "Appeal of American Electric Power, Atlantic City Electric Company, Delmarva Power & Light Company, and The Ohio Valley Coal Company From the Order of the Presiding Judge Restricting Discovery, and Motion For Expedited Consideration" by facsimile or hand delivery (as designated) upon each of the following parties of record:

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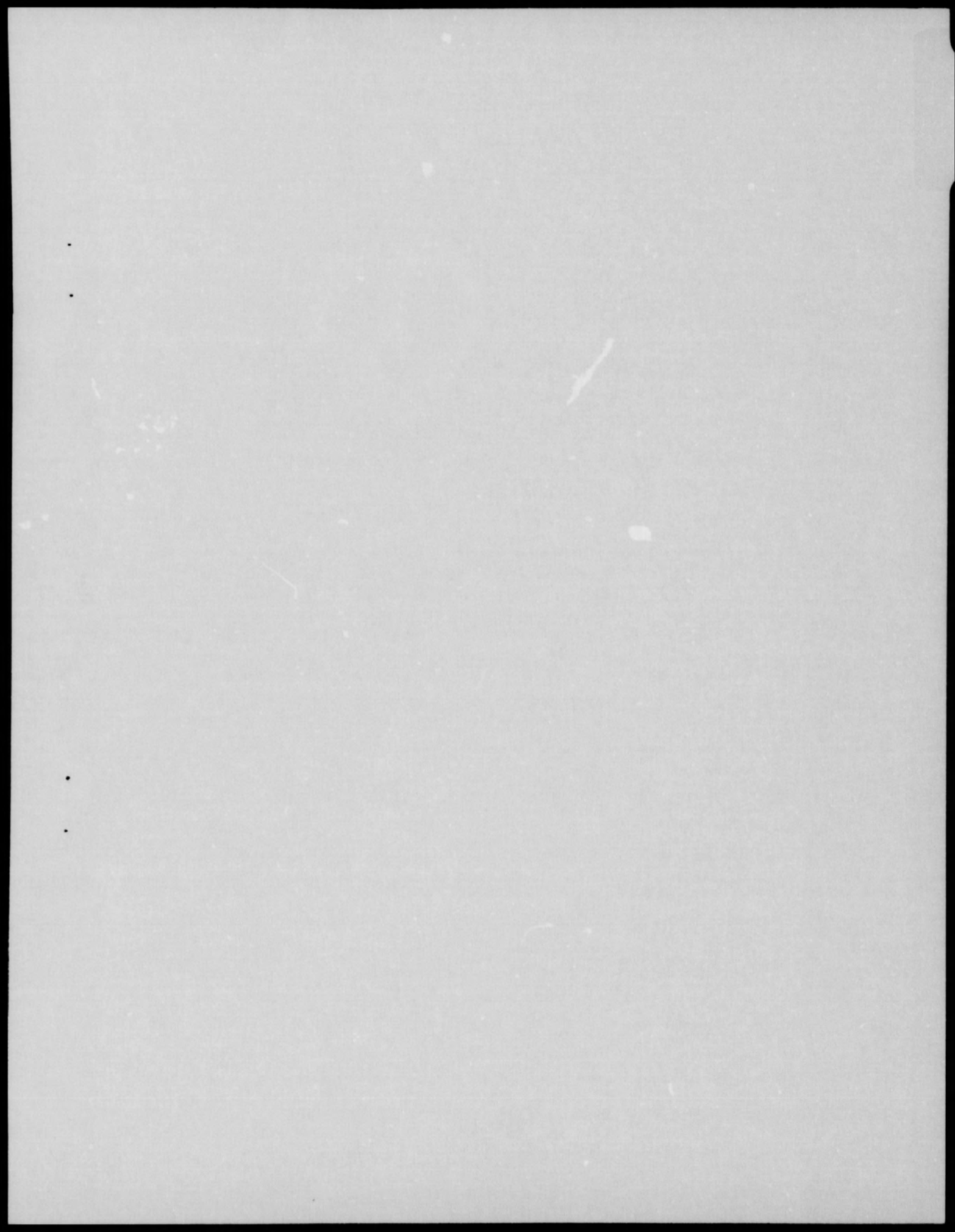
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Michael F. McBride

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28076
ALJ

SERVICE DATE - JULY 18, 1997

FD
3

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**

Decision No. 11

Decided: July 18, 1997

A discovery conference was held on July 16, 1997 to hear oral argument on a motion to compel responses to discovery by CSX Corporation and CSX Transportation, Inc. ("CSX"), Norfolk Southern Corporation and Norfolk Southern Railway Company (NS), and Conrail, Inc. and Consolidated Rail Corporation (Conrail).¹

The motion sought an order to compel responses to three Document Requests and six Interrogatories. Since the respondents had until July 19, 1997 to respond to the Interrogatories, action on the Interrogatories is being held in abeyance until the respondents reply. If a dispute arises, the movants will renew their motion.

After hearing argument, rulings on each of the requests were made on the record. The arguments of the parties are set forth in the moving papers and the responses thereto filed by NS, CSX and Conrail as well as advanced orally by counsel for each of the parties. All the arguments have been considered and the basis for the rulings made have been expressed by the Presiding Judge on the Record. This is a confirming decision.²

The following rulings are common to all of the document requests.

¹American Electric Power Service Corporation, by letter dated July 15, 1997, joined this proceeding as a movant.

²If there is an inconsistency with regard to any ruling between this confirming decision and the record of the Oral Argument, the Record ruling prevails.

I find that the discovery as limited below may lead to admissible evidence that may enable the movants to prove that the "one lump" economic theory does not apply in this proceeding. Balancing the burden asserted by the respondent against the need of the movants to know, I find that the need to know outweighs the burden, subject to the limitations described below. The discovery ordered below is necessary for the movants to establish their premise.

The information ordered produced shall be for the years 1995 through the second quarter of 1997, and with respect to each of the Documents Requests as follows: CSX, the years 1978 through 1982; NS, the years 1980 through 1984; and Conrail, the years 1988 through 1992.

The information ordered is limited to those destinations at which the movants receive service from the respondents.³

Discovery Request No. 1. Identify and produce all documents, in the department(s) for the carriage of coal by unit train or trainload movement, to every destination served by each of the respondents at which 100,000 tons or more of coal was consumed for the years 1987-97.

Ruling. Granted with the limitations set forth above.

Document Request No. 2. Identify and produce all files, of the department(s) responsible for establishing or negotiating rates for the carriage of coal, that relate to the bid documents responsive to Document No.1, including subsequent or prior correspondence or analyses.

Ruling. Granted subject to the limitations set forth above.

Document Request No. 3. Produce 100% traffic tapes from 1978 through second quarter 1997. We request that Conrail furnish these traffic tapes in computer readable form, where available, including all necessary record layouts field descriptions and documentation. For each carload handled by Conrail provide the information set forth in Motion to Compel.

³See letter dated July 16, 1997 annexed to this decision. In accordance with request from counsel for the movants, the term "Conrail destinations" include the coal delivered by Conrail to the Monongahela River and then by barge to plants of American Electric Power Service Corporation and the coal produced by Ohio Valley Coal Company delivered to the Conrail served plants of Centerior Energy at Eastlake and Ashtabula.

Ruling. Conrail and NS have until July 19, 1997 to respond. Therefore, as to these respondents, the motion to compel is held in abeyance subject to renewal by the movants after that date.

The motion is granted as to CSX limited to the years set forth above and limited to traffic tapes of coal.

This decision is effective on the service date.

By the Board, Jacob Leventhal, Administrative Law Judge.

Vernon A. Williams
Secretary

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

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July 16, 1997

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PORTLAND, OR
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SAN FRANCISCO
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ALMATY
LONDON
(A LONDON-BASED
MULTINATIONAL PARTNERSHIP)

VIA HAND DELIVERY and FACSIMILE

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

Re: STB Finance Docket No. 33388 -- Request to Clarify Ruling

Dear Judge Leventhal:

As you will recall, in your ruling on our Motion to Compel, you agreed with Applicants' request to limit document production to destinations "served by Conrail." In conversation with American Electric Power after returning to my office, I realized for the first time that it gets, or has gotten, coal that moves or has moved from origin to the Monongahela River via Conrail and then by barge to more than one of its plants. Given the logic of your ruling, it would seem to me that those plants should be deemed "served by Conrail" and I would ask you to make that clear in your ruling.

Similarly, for Movant The Ohio Valley Coal Company, coal it produces is consumed at two Conrail-served plants of Centerior Energy -- Eastlake and Ashtabula. Presumably, your ruling encompasses those plants, but I would ask that you make that clear also.

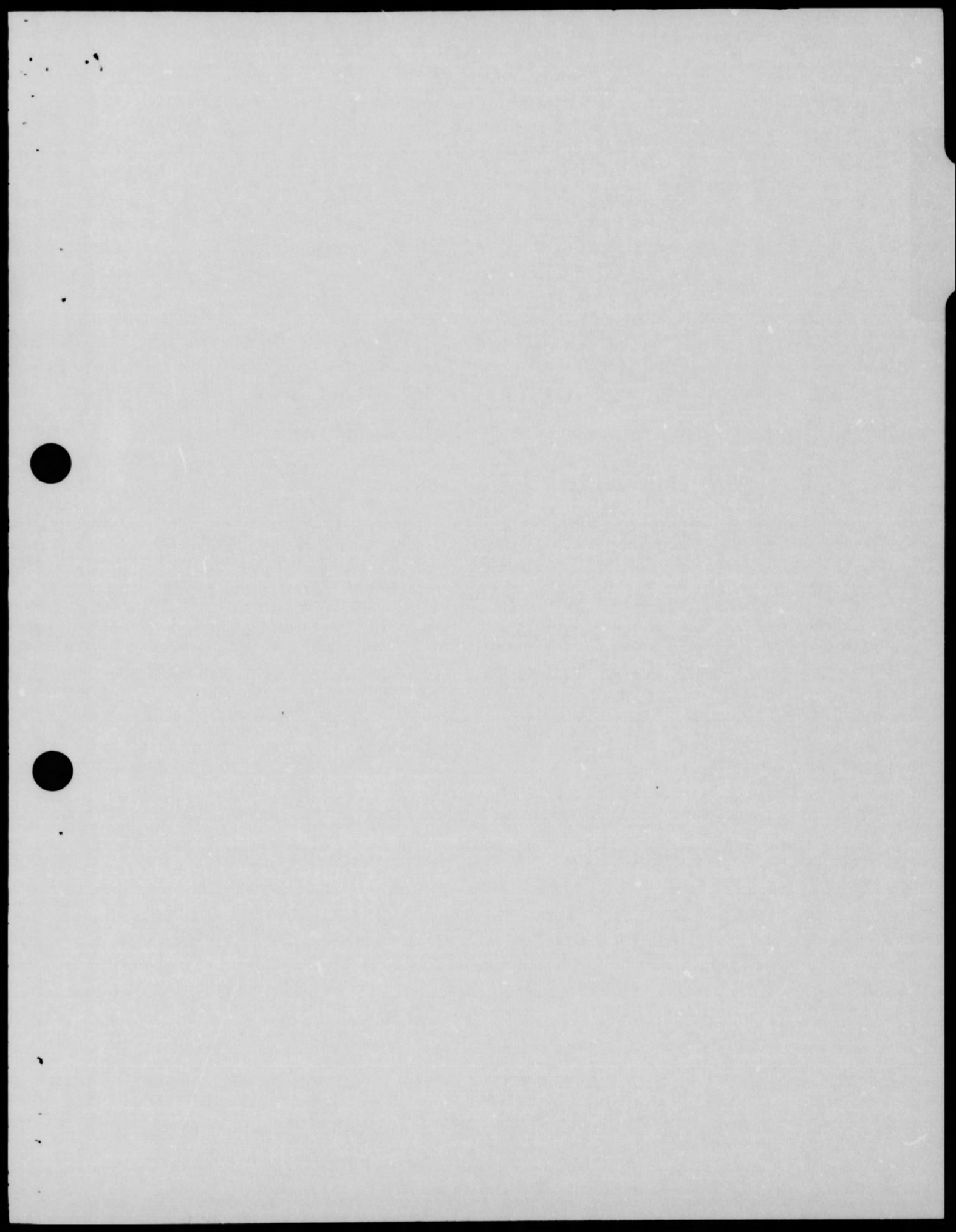
Thank you for your consideration to these matters.

Respectfully submitted,

Michael F. McBride
Michael F. McBride
Brian D. O'Neill
Bruce W. Neely

cc: Restricted Service List
Mr. Vernon A. Williams
Secretary, Surface Transportation
Board

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



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

**ATLANTIC CITY ELECTRIC COMPANY, ET AL.'S
FIRST SET OF INTERROGATORIES AND
FIRST SET OF REQUESTS FOR PRODUCTION OF DOCUMENTS TO CONRAIL**

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

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"), Atlantic City Electric Company,
Delmarva Power & Light Company, and The Ohio Valley Coal Company
("ACE, et al.") hereby submits this First Set of Interrogatories
and Requests for Production of Documents ("Discovery Requests")
to Conrail.

DEFINITIONS AND INSTRUCTIONS

The following definitions and instructions apply and are incorporated into each Discovery Request as though fully set forth therein:

1. "Applicants," "you," or "your," CSX Corporation ("CSXC"), CSX Transportation ("CSXT"), Norfolk Southern Corporation ("NSC"), Norfolk Southern Railway Company ("NSRC"), Conrail Inc. ("CRI") and Consolidated Rail Corporation ("CRC"), individually and collectively, and any division thereof (and includes present or former directors, officers, employees and agents) together with any parent, subsidiary, or affiliated corporation, partnership, or other legal entity, including all predecessor railroads.
2. "Application" means the Railroad Control Application, Finance Docket No. 33388, filed by Applicants on June 23, 1997.
3. "Conrail" means Conrail and all of its predecessor railroads.
4. "Document" means any and all writings and recordings as defined in Rule 1001 of the Federal Rules of Evidence, including drafts, typings, printings, minutes, tapes, recordings, or other electronic compilations, or copies or

reproductions thereof, in the possession, custody, or control of Conrail.

5. "Identify" or "identification" means:

a. With respect to a natural person, his or her name and current or last known home and business address (including street name and number, city or town, state, zip code, and telephone number), and his or her last known job title or position.

b. With respect to a person other than a natural person, its full name and type of organization, the address of its principal place of business (including street name and number, city or town, state, zip code, and telephone number), and the jurisdiction and place of its incorporation or organization.

c. With respect to a document, the type of document (e.g., letter, record, list, memorandum, report, deposition transcript), its date, title, and contents, the identification of the person who prepared the document, the identification of the person for whom the document was prepared or to whom it was delivered, and the identification of the person who has possession, custody, or control over the document.

6. "Relate" or "relating" or "related" to a given subject matter means constitutes, contains, comprises, consists

of, embodies, reflects, identifies, states, refers to, deals with, sets forth, proposes, shows, evidences, discloses, describes, discusses, explains, summarizes, concerns, authorizes, contradicts or is in any way pertinent to that subject, including, without limitation, documents concerning the presentation of other documents.

INSTRUCTIONS

1. Consistent with the Discovery Guidelines, these Discovery Requests are intended to be non-duplicative of previous written discovery of which ACE, et al. has been served copies. If you consider an Interrogatory or Document Request to be duplicative, you should so state and refer ACE, et al. to the specific documents or answers produced in response to such prior discovery.

2. If, in responding to each discovery request, you consider any part of the request objectionable, you should respond to each part of the request not deemed objectionable and set forth separately the part deemed objectionable and the grounds for objection.

3. All documents that respond, in whole or part, to any paragraphs of a Document Request shall be produced in their entirety. Documents that in their original condition were

stapled, clipped, or otherwise fastened together, shall be produced in such form. In addition, all documents are to be produced in the file folders or jackets in which they are maintained.

4. If any response to these discovery requests includes a reference to the Application, such response should specify the responsive volume(s) and page number(s). If any response to these Document Requests includes a reference to documents on file in the Document Depository, you should denote the document number of each document as it is filed in the Depository.

5. If any of the requested documents cannot be produced in full, you are requested to produce them to the fullest extent possible, specifying clearly the reasons for your inability to produce the remainder and stating whatever information, knowledge, or belief you have concerning the unproduced portion. If you cannot produce a responsive document because it is no longer in your possession, custody, or control, state the date on which each such document ceased being in your possession, custody, or control; describe the disposition of each such document and the reason for such disposition; and identify

each person presently in possession, custody, or control of the document or a copy thereof.

6. If any privilege or protection is claimed as to any information or document, state the nature of the privilege or protection claimed (e.g., attorney-client, work product, etc.) and state the basis for claiming the privilege or protection. For each such document, provide the following information: (a) the type of document; (b) the title of the document; (c) the name, address, and title of each author; (d) the name, address, and title of each addressee; (e) all persons to whom copies were sent or distributed and all other persons to whom the document or its contents were disclosed in whole or in part; (f) the date of the document; (g) the subject matter of the document; (h) the number of pages; (i) an identification of any attachments or appendices; (j) the current location of the document and the name of the current custodian; and (k) a statement of the basis on which privilege is claimed.

If less than an entire document is claimed to be privileged, furnish a copy of those portions of the document that are not privileged.

7. If you want clarification concerning an Interrogatory or Document Request, you are instructed to contact

counsel for ACE, et al. 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.

DOCUMENT REQUESTS

1. Identify and produce all documents, in the department(s) of Conrail responsible for marketing coal, concerning bids for the carriage of coal by unit train or trainload movement, to every destination served by Conrail at which 100,000 tons or more of coal was consumed, for the years 1978-97.

2. Identify and produce all files, of the department(s) responsible for establishing or negotiating rates for the carriage of coal, that relate to the bid documents responsive to Document Request No. 1, including subsequent or prior correspondence or analyses.

3. Produce your 100% traffic tapes from 1978 through second quarter 1997. We request that Conrail furnish these traffic tapes in computer readable form, where available, including all necessary record layouts, field descriptions and

documentation. For each carload handled by Conrail provide the following information:

- a. Waybill number and date;
- b. Consignee/shipper;
- c. Commodity (by 7 digit STCC);
- d. Car initial and number;
- e. Car type;
- f. Origin city and state (including Freight Station Accounting Code and Standard Point Location Code);
- g. Destination city and state (including Freight Station Accounting Code and Standard Point Location Code);
- h. Location of any interchange(s) (including Freight Station Accounting Code and Standard Point Location Code);
- i. Railroads involved in the routing (identified by on and off junction);
- j. Miles by railroad;
- k. Number of cars on waybill;
- l. Number of tons;
- m. Revenues by railroad (including any refunds, rebates, "take-or-pay" penalty or other adjustments);
- n. Car owner;
- o. Any mileage payments for shipper owned equipment;

- p. For TOFC/COFC shipments, the TOFC/COFC plan;
and,
- q. Variable costs.

INTERROGATORIES

1. Describe the rate-setting theory and practices of Conrail for proposing or establishing rates on shipments of coal by unit train or trainload to electric utilities and other major coal consumers served by only a single railroad at destination.

2. State whether the carrier serving the sole-served destinations referred to in Interrogatory No. 1 obtains most or all of the profit associated with any such movement in which two or more carriers are involved.

3. State whether, for the movements of coal referred to in Interrogatory No. 1, Conrail has a minimum required level of profitability for each such movement and, if so, how that level is calculated or defined.

4. State whether the rate-setting theory and practices of Conrail for coal furnished in response to Interrogatory No. 1 is the same as, or different from, the rate-setting theory and practices used for all other commodities.

5. If the answer to Interrogatory No. 4 is that the rate-setting theory and practices for coal differ from those for

one or more other commodities, state the commodity and describe the applicable rate-setting theory and practices applicable to those commodities.

6. State whether, for each commodity referred to in Interrogatories Nos. 4 and 5, Conrail has a minimum required level of profitability for such movement and, if so, how that level is calculated or defined.

Respectfully submitted,

Michael F. McBride

Michael F. McBride

Bruce W. Neely

Linda K. Breggin

Brenda Durham

Joseph H. Fagan

LeBoeuf, Lamb, Greene

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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

**ATLANTIC CITY ELECTRIC COMPANY, ET AL.'S
FIRST SET OF INTERROGATORIES AND
FIRST SET OF REQUESTS FOR PRODUCTION OF DOCUMENTS TO CSX**

To: CSX
c/o Drew A. Harker, Esq. David H. Coburn, Esq.
Arnold & Porter Steptoe & Johnson, L.L.P.
555 Twelfth Street, N.W. 1330 Connecticut Avenue, N.W.
Washington, D.C. 20004-1202 Washington, D.C. 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"), Atlantic City Electric Company,
Delmarva Power & Light Company, and The Ohio Valley Coal Company
("ACE, et al.") hereby submits this First Set of Interrogatories
and Requests for Production of Documents ("Discovery Requests")
to CSX.

DEFINITIONS AND INSTRUCTIONS

The following definitions and instructions apply and are incorporated into each Discovery Request as though fully set forth therein:

1. "Applicants," "you," or "your," CSX Corporation ("CSXC"), CSX Transportation ("CSXT"), Norfolk Southern Corporation ("NSC"), Norfolk Southern Railway Company ("NSRC"), Conrail Inc. ("CRI") and Consolidated Rail Corporation ("CRC"), individually and collectively, and any division thereof (and includes present or former directors, officers, employees and agents) together with any parent, subsidiary, or affiliated corporation, partnership, or other legal entity, including all predecessor railroads.

2. "Application" means the Railroad Control Application, Finance Docket No. 33388, filed by Applicants on June 23, 1997.

3. "CSX" means CSX and all of its predecessor railroads.

4. "Document" means any and all writings and recordings as defined in Rule 1001 of the Federal Rules of Evidence, including drafts, typings, printings, minutes, tapes, recordings, or other electronic compilations, or copies or

reproductions thereof, in the possession, custody, or control of CSX.

5. "Identify" or "identification" means:

a. With respect to a natural person, his or her name and current or last known home and business address (including street name and number, city or town, state, zip code, and telephone number), and his or her last known job title or position.

b. With respect to a person other than a natural person, its full name and type of organization, the address of its principal place of business (including street name and number, city or town, state, zip code, and telephone number), and the jurisdiction and place of its incorporation or organization.

c. With respect to a document, the type of document (e.g., letter, record, list, memorandum, report, deposition transcript), its date, title, and contents, the identification of the person who prepared the document, the identification of the person for whom the document was prepared or to whom it was delivered, and the identification of the person who has possession, custody, or control over the document.

6. "Relate" or "relating" or "related" to a given subject matter means constitutes, contains, comprises, consists

of, embodies, reflects, identifies, states, refers to, deals with, sets forth, proposes, shows, evidences, discloses, describes, discusses, explains, summarizes, concerns, authorizes, contradicts or is in any way pertinent to that subject, including, without limitation, documents concerning the presentation of other documents.

INSTRUCTIONS

1. Consistent with the Discovery Guidelines, these Discovery Requests are intended to be non-duplicative of previous written discovery of which ACE, et al. has been served copies. If you consider an Interrogatory or Document Request to be duplicative, you should so state and refer ACE, et al. to the specific documents or answers produced in response to such prior discovery.

2. If, in responding to each discovery request, you consider any part of the request objectionable, you should respond to each part of the request not deemed objectionable and set forth separately the part deemed objectionable and the grounds for objection.

3. All documents that respond, in whole or part, to any paragraphs of a Document Request shall be produced in their entirety. Documents that in their original condition were

stapled, clipped, or otherwise fastened together, shall be produced in such form. In addition, all documents are to be produced in the file folders or jackets in which they are maintained.

4. If any response to these discovery requests includes a reference to the Application, such response should specify the responsive volume(s) and page number(s). If any response to these Document Requests includes a reference to documents on file in the Document Depository, you should denote the document number of each document as it is filed in the Depository.

5. If any of the requested documents cannot be produced in full, you are requested to produce them to the fullest extent possible, specifying clearly the reasons for your inability to produce the remainder and stating whatever information, knowledge, or belief you have concerning the unproduced portion. If you cannot produce a responsive document because it is no longer in your possession, custody, or control, state the date on which each such document ceased being in your possession, custody, or control; describe the disposition of each such document and the reason for such disposition; and identify

each person presently in possession, custody, or control of the document or a copy thereof.

6. If any privilege or protection is claimed as to any information or document, state the nature of the privilege or protection claimed (e.g., attorney-client, work product, etc.) and state the basis for claiming the privilege or protection. For each such document, provide the following information: (a) the type of document; (b) the title of the document; (c) the name, address, and title of each author; (d) the name, address, and title of each addressee; (e) all persons to whom copies were sent or distributed and all other persons to whom the document or its contents were disclosed in whole or in part; (f) the date of the document; (g) the subject matter of the document; (h) the number of pages; (i) an identification of any attachments or appendices; (j) the current location of the document and the name of the current custodian; and (k) a statement of the basis on which privilege is claimed.

If less than an entire document is claimed to be privileged, furnish a copy of those portions of the document that are not privileged.

7. If you want clarification concerning an Interrogatory or Document Request, you are instructed to contact

counsel for ACE, et al. 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.

DOCUMENT REQUESTS

1. Identify and produce all documents, in the department(s) of CSX responsible for marketing coal, concerning bids for the carriage of coal by unit train or trainload movement, to every destination served by CSX at which 100,000 tons or more of coal was consumed, for the years 1978-97.

2. Identify and produce all files, of the department(s) responsible for establishing or negotiating rates for the carriage of coal, that relate to the bid documents responsive to Document Request No. 1, including subsequent or prior correspondence or analyses.

3. Produce your 100% traffic tapes from 1978 through second quarter 1997. We request that CSX furnish these traffic tapes in computer readable form, where available, including all necessary record layouts, field descriptions and documentation.

For each carload handled by Conrail provide the following information:

- a. Waybill number and date;
- b. Consignee/shipper;
- c. Commodity (by 7 digit STCC);
- d. Car initial and number;
- e. Car type;
- f. Origin city and state (including Freight Station Accounting Code and Standard Point Location Code);
- g. Destination city and state (including Freight Station Accounting Code and Standard Point Location Code);
- h. Location of any interchange(s) (including Freight Station Accounting Code and Standard Point Location Code);
- i. Railroads involved in the routing (identified by on and off junction);
- j. Miles by railroad;
- k. Number of cars on waybill;
- l. Number of tons;
- m. Revenues by railroad (including any refunds, rebates, "take-or-pay" penalty or other adjustments);
- n. Car owner;
- o. Any mileage payments for shipper owned equipment;

- p. For TOFC/COFC shipments, the TOFC/COFC plan;
and,
- q. Variable costs.

INTERROGATORIES

1. Describe the rate-setting theory and practices of CSX for proposing or establishing rates on shipments of coal by unit train or trainload to electric utilities and other major coal consumers served by only a single railroad at destination.

2. State whether the carrier serving the sole-served destinations referred to in Interrogatory No. 1 obtains most or all of the profit associated with any such movement in which two or more carriers are involved.

3. State whether, for the movements of coal referred to in Interrogatory No. 1, CSX has a minimum required level of profitability for each such movement and, if so, how that level is calculated or defined.

4. State whether the rate-setting theory and practices of CSX for coal furnished in response to Interrogatory No. 4 is the same as, or different from, the rate-setting theory and practices used for all other commodities.

5. If the answer to Interrogatory No. 2 is that the rate-setting theory and practices for coal differ from those for one or more other commodities, state the commodity and describe

the applicable rate-setting theory and practices applicable to those commodities.

6. State whether, for each commodity referred to in Interrogatories Nos. 4 and 5, CSX has a minimum required level of profitability for each such movement and, if so, how that level is calculated or defined.

Respectfully submitted,

Michael F. McBride

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Bruce W. Neely

Linda K. Breggin

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LeBoeuf, Lamb, Greene

& MacRae, L.L.P.

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Washington, D.C. 20009-5728

(202) 986-8000

Attorneys for Atlantic City

Electric Company, Delmarva

Power & Light Company and

The Ohio Valley Coal Company

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

**ATLANTIC CITY ELECTRIC COMPANY, ET AL.'S
FIRST SET OF INTERROGATORIES AND FIRST SET OF
REQUESTS FOR PRODUCTION OF DOCUMENTS TO NORFOLK SOUTHERN**

To: Norfolk Southern
c/o John V. Edwards, Esq.
Patricia Bruce, Esq.
Zuckert, Scoutt & Rasenberger, L.L.P.
888 Seventeenth Street, N.W.
Washington, D.C. 20006-3939

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"), Atlantic City Electric Company,
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recordings, or other electronic compilations, or copies or reproductions thereof, in the possession, custody, or control of Norfolk Southern.

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a. With respect to a natural person, his or her name and current or last known home and business address (including street name and number, city or town, state, zip code, and telephone number), and his or her last known job title or position.

b. With respect to a person other than a natural person, its full name and type of organization, the address of its principal place of business (including street name and number, city or town, state, zip code, and telephone number), and the jurisdiction and place of its incorporation or organization.

c. With respect to a document, the type of document (e.g., letter, record, list, memorandum, report, deposition transcript), its date, title, and contents, the identification of the person who prepared the document, the identification of the person for whom the document was prepared or to whom it was delivered, and the identification of the person who has possession, custody, or control over the document.

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3. Produce your 100% traffic tapes from 1978 through second quarter 1997. We request that Norfolk Southern furnish these traffic tapes in computer readable form, where available, including all necessary record layouts, field descriptions and

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documentation. For each carload handled by Norfolk Southern provide the following information:

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6. State whether, for each commodity referred to in Interrogatories Nos. 4 and 5, Norfolk Southern has a minimum required level of profitability for each such movement and, if so, how that level is calculated or defined.

Respectfully submitted,

Michael F. McBride

Michael F. McBride

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Linda K. Breggin

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1875 Connecticut Avenue, N.W.

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(202) 986-8000

Attorneys for Atlantic City

Electric Company, Delmarva

Power & Light Company, and

The Ohio Valley Coal Company

UNITED STATES OF AMERICA
DEPARTMENT OF TRANSPORTATION
SURFACE TRANSPORTATION BOARD

Finance Docket No. 32388

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

CERTIFICATE OF SERVICE

I hereby certify that I have served this 3rd day of July, 1997, a copy of the foregoing "Atlantic City Electric Company, et al.'s First Set of Interrogatories and First Set of Requests for Production of Documents" (ACE, et al., -2, -3, and -4) by first-class mail, postage prepaid, or by more expeditious means, as indicated below, upon each of the following:

Drew A. Harker (VIA FACSIMILE)
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Washington, D.C. 20036-1795
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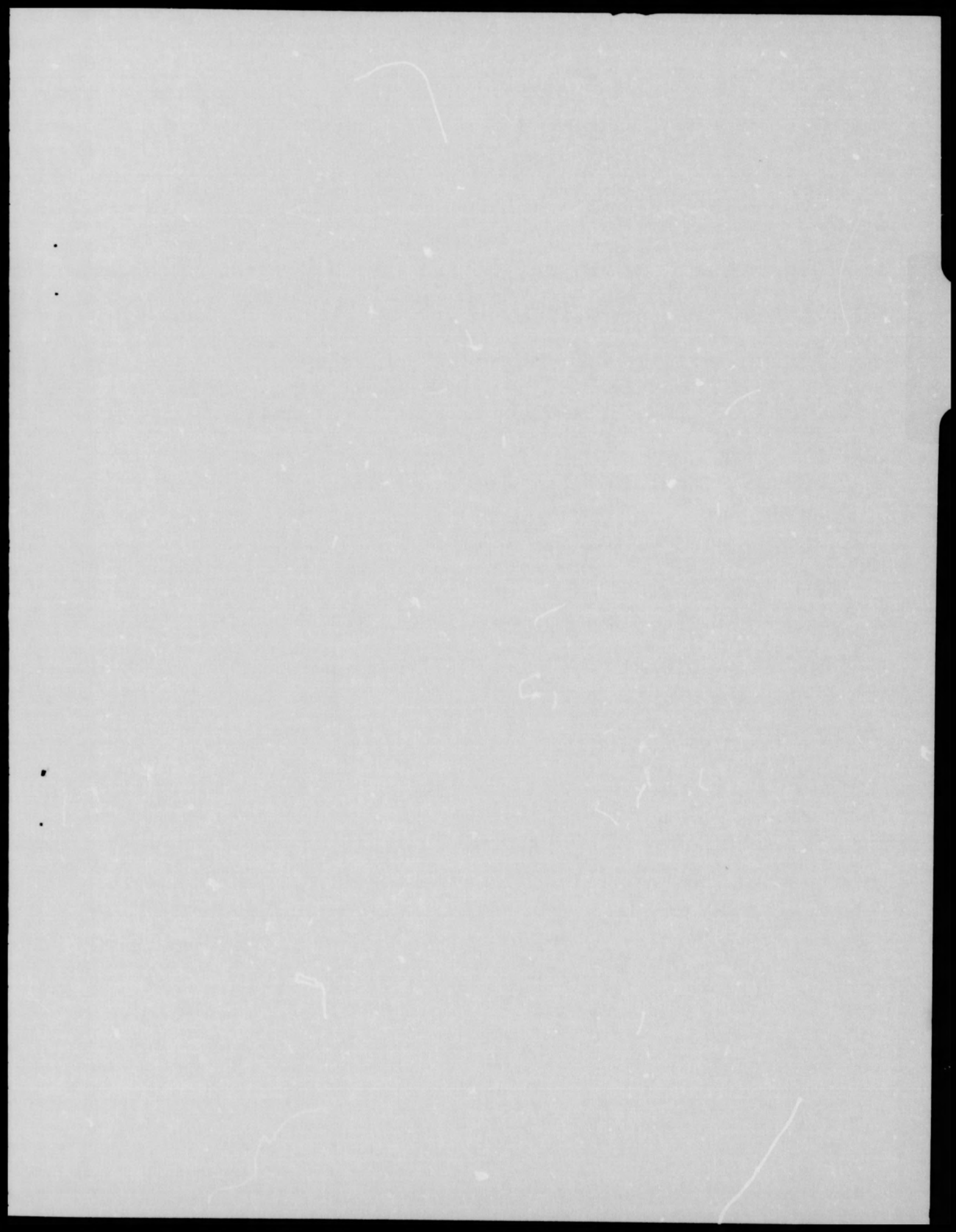
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Agricultural Section
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Washington, D.C. 20530

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

Kevin M. Sheys
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Suite 400
Washington, D.C. 20036-6105


Brenda Durham



**BEFORE THE
SURFACE TRANSPORTATION BOARD**

FINANCE DOCKET NO. 33388

State of New York)
) ss. (for Dr. Kahn)
County of Tompkins)

State of New York)
) ss. (for Dr. Dunbar)
County of New York)

**SUPPLEMENTARY AFFIDAVIT OF ALFRED E. KAHN
AND FREDERICK C. DUNBAR**

Alfred E. Kahn and Frederick C. Dunbar, being duly sworn, depose and say:

1. Our names are Alfred E. Kahn and Frederick C. Dunbar. We are, respectively, Special Consultant and Senior Vice President of National Economic Research Associates, Inc. (NERA). We have been asked by several of the clients represented by Mr. Michael F. McBride to analyze whether the acquisition of Conrail assets by CSX and Norfolk Southern will leave captive shippers less protected from monopoly pricing by the railroads. In particular, we have been asked to consider whether the possibility that captive shippers may be subject to higher rates or poorer service after the merger is precluded by the "one-lump" theory—and whether the theory accurately describes railroad pricing behavior. In our earlier affidavit, dated July 14, 1997 (attached), we explained why the data requested by Mr. Michael McBride on July 3, 1997 on behalf of Atlantic City Electric Company, et al., were necessary to test this hypothesis. In Decision No. 11, dated July 18, 1997, Administrative Law Judge Leventhal ruled that only a portion of this material would be made available. This Supplementary Affidavit provides further

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clarification of why the complete data set requested by Mr. McBride is important, particularly given the previous Decisions of the STB and the Court of Appeals.

2. The "one-lump" theory simply states that when one supplier has a monopoly of any input essential to a production process, that supplier will capture all the monopoly rents that are available, subject to regulatory restraints, if any. This is a standard result in the economics of industrial organization, usually formulated in terms of vertical integration: "Consider an admittedly extreme example. A monopolist supplier sells to a perfectly competitive industry. Assume the monopolist extends its monopoly downstream, acquiring the competitive industry through a series of vertical mergers. Does this monopolization at a second level result in any additional efficiency losses....[T]he answers to all these questions are negative."¹

3. In the railroad context, the theory applies to any situation in which a shipper uses a rail route at least one link of which is a bottleneck. (Typically, the bottleneck carrier serves the receiver at the destination, but, in principle, it may reside anywhere else—at an origin or a bridge link, for example). Under these circumstances, it follows from the theory that a railroad merger among carriers participating in a shipment where there is already a bottleneck carrier will not result in increased rates, because the shippers would already be charged the maximum price that a rational, profit-maximizing monopolist would charge.

4. There is no dispute that, given its underlying assumptions, the one-lump theory does indeed imply that the bottleneck carrier will not change its pricing behavior as a result of the merger. As in the case of most such stylized economic models, however, the required assumptions are extremely demanding. Indeed, as the text cited above clearly states, circumstances in which they hold represent an "extreme example. Among the required assumptions are:

¹ W.K. Viscusi, J.M. Vernon and J.E. Harrington, *Economics of Regulation and Antitrust*, D. C. Heath and Company, 1992 (First Edition), p. 229.

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- that there is no actual or potential alternative to the existing bottleneck, the entry or availability of which might be affected by the vertical integration or merger under consideration;
- that the bottleneck carrier has perfect information about the demand function of the shipper and the cost functions of competing carriers;
- that there is no uncertainty about future costs and prices;
- that the bottleneck carrier is already acting as a rational profit-maximizer;
- that different carriers have identical beliefs about the nature of any regulatory constraints; and
- that there is neither uncertainty nor possibility of differences of opinion about the profit-maximizing price, taking into consideration both long- and short-term demand elasticities.

5. It is easy to see that if any or all of these assumptions are not valid, the predictions of the one-lump theory need not hold, and an alternative economic analysis will be required. In particular, the first assumption—that the monopoly power is a given, both in its dimensions and over time—is critical. One of us pointed out the importance of this assumption as long ago as 1959²: “Were market position and power fixed and immutable quanta, vertical integration could do no harm and might do only good. It could not of itself enhance horizontal market power; and by causing complementary functions to be performed at cost, it might induce even monopolists to lower prices. In fact, however, market positions are subject constantly to encroachment and market power to erosion in a dynamic economy. Every business in the real world, therefore, must devote a good deal of attention to securing itself against the inroads of competition. Vertical integration is one important and familiar way of trying to do this. Like others of the tactics companies use to protect or extend their market positions, it may be a competitive phenomenon, productive of social benefit. But it may also be a method of forestalling potential competitive or countervailing pressures.”

²M. G. deChazeau and A. E. Kahn, *Integration and Competition in the Petroleum Industry*, Petroleum Monograph Series, Volume 3 (Yale University Press, 1959). Reprinted in 1971.

- 4 -

6. Consider the following example. Suppose that two carriers compete over most of a route, but one carrier has a bottleneck for some part of it, and that the second carrier could construct the remaining portion of the route bypassing the bottleneck portion, if the charges by the integrated carrier were high enough. In this case, economic theory predicts—contrary to the pure one-lump theory—that the bottleneck carrier would not be able to extract all the potential monopoly profits on the whole route, because if it tried to do so, the competing carrier would find it profitable to construct the remaining portion. The monopoly power of the bottleneck carrier would be at least partially constrained.³ Note that it would still appear to have a bottleneck, because the competing carrier would not actually construct the additional portion: merely the implied threat of such construction would constrain prices.

7. Now suppose that the bottleneck carrier and the competing carrier merge, thereby eliminating the competitive threat to its bottleneck monopoly. It will now be able to charge the full monopoly price, since a credible threat to construct an alternative would no longer exist. A simple analogous case would be if Delta Airlines owned the only bus route between National Airport and downtown DC; it would not be able to capture all the monopoly profits available on the Washington-New York shuttle, on which it competes with USAirways, because if it tried to do so USAirways could easily set up its own competing bus service. If Delta and USAirways merged, however, the merged carrier might well be able to capture monopoly profits, because such a merger would have unified the two major competitors in the offer of shuttle airline service and because there were no monopoly profits to be had from the apparently bottleneck bus service. So in this case, the merger would increase the effective monopoly power, would increase prices and reduce welfare, contrary to the predictions of the simple one-lump theory—not because the theory as formulated is incorrect, but because the monopoly power that it takes as given has been enhanced by its merger with a potential competitor. Observe its inherent assumption that the degree of monopoly power conveyed by control of the bottleneck facility is

³ A market that appears to be a monopoly, but where prices are in fact constrained by the threat of entry, is known as a contestable market. See W.J. Baumol, J.C. Panzer and R.D. Willig, *Contestable Markets and the Theory of Industry Structure*, New York: Harcourt Brace Jovanovich, 1982.

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given and not subject to enhancement or reinforcement against challenge by a merger of its possessor and a potential challenger.

8. Another of the assumptions that may well be violated in practice is that carriers have similar perceptions of the regulatory constraints to which they are likely to be subject and hence of their actual degree of monopoly power. If carriers have different beliefs about applicable regulation, then they will have correspondingly different beliefs about the level of the profit-maximizing price. As a result, a merger could lead to price increases if the acquiring carrier believes that the acquired carrier was not in fact charging the profit-maximizing price because it had an incorrect perception of the applicable regulatory constraint; or because of differences in their perceptions of the relevant long- and short-term elasticities of demand.

9. In practice, of course, the stylized assumptions necessary to formulate an elegant economic theory never hold entirely; and certainly it cannot possibly be the case that all the assumptions set out above are completely fulfilled in the merger at issue. What matters is whether they are sufficiently close to being valid to ensure that prices after the merger will behave more or less as the pure one-lump theory predicts, or whether they will behave differently, as would be predicted if the assumptions are in fact rather far from the truth. In order to assess these possibilities, we wish to pose two empirical questions, which can only be answered with real data from U.S. railroads.

10. The first question is whether in practice prices paid by shippers are higher when a bottleneck is "bigger." That is, consider two identical routes; on the first, a single railroad has a monopoly along the whole route; on the second, a single railroad has monopoly control over a short stretch, such as the spur line at the destination, but there is competition over the rest of the route. Other things being equal are prices higher in the first case? In order to answer this question empirically, we read the recent STB and Court of Appeals Decisions as requiring a sample of prices for a sufficient number of routes to perform a statistical analysis. These Decisions note that in practice it is not the case that other things are equal among routes, and therefore we need to control statistically for other factors that might influence prices. The size of the sample therefore needs to be large enough so that this analysis is statistically reliable. While

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it is very difficult to assess in advance precisely how large such a sample need be, statisticians generally regard sample sizes of less than 30 as "small" and hence likely to be of uncertain or questionable reliability.

11. The second question is whether when a merger results in a diminution of competition on part of a route where a bottleneck already exists—in other words moving a route from the second category described above to the first—do prices rise? In order to answer this question empirically, we need a sample of prices before and after mergers that have had this effect.

12. Recent decisions relevant to this case have made the need for soundly based statistical analysis very plain. The STB has made it clear that it does not accept shipper-specific evidence rebutting the one-lump theory in a merger proceeding as sufficient to reject it,⁴ and the Court of Appeals has affirmed this decision. Indeed, the Court's decision makes it quite clear why a statistical analysis is necessary:

The lore of classic economics methodology says that a theory is to be rejected "if its predictions are contradicted ('frequently' or more often than predictions from an alternative hypothesis)". Milton Friedman, *Essays in Positive Economics* 9 (1953). Here petitioners offer no alternative hypothesis and their efforts to contradict the one-lump theory are confounded by the multiplicity of real world variables. The presence or absence of origin competition cannot be isolated from conditions such as a decline in demand for Powder River Basin coal.⁵

In effect, the Court rejected an analysis on the basis that the sample size (six utilities) was too small to control for other factors that influence prices.

13. We understand that the data request authorized by ALJ Leventhal covers only 8 routes. This is probably not adequate to resolve the first question, since the number of routes

⁴ *Burlington Northern Inc. and Burlington Northern Railroad Company—Control and Merger—Santa Fe Pacific Corporation and the Atchison, Topeka and Santa Fe Railway Company*, ICC Finance Docket No. 32549, August 23, 1995

⁵ *Western Resources, Inc., Petitioner v. Surface Transportation Board and United States of America, Respondents, Santa Fe Pacific Corporation, et al., Intervenor*, U.S. Court of Appeals for the District of Columbia Circuit, 109 F.3d 782, 1997.

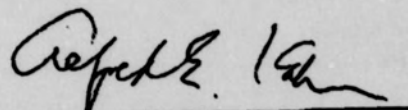
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covered at any one time is most unlikely to be sufficient to provide a statistically reliable sample. It may be very difficult to control for other factors that affect prices. Any statistical analysis based on such a small sample would be open to attack since it could be argued that such factors had not been properly controlled for.

14. The data request authorized by ALJ Leventhal is likely to be useful in answering the second question, since it covers the time period immediately surrounding several large railroad mergers. Again, however, the coverage of only eight routes would in all likelihood be criticized. To defend the analysis in the light of the above Decisions, the data provided should cover all routes served by the merging carriers before and after a merger, enabling us to better control for other factors that might lead to changes in prices.

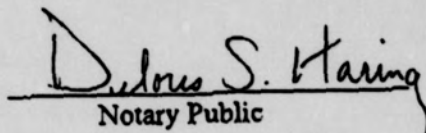
15. It is particularly important that the data provided be susceptible of reliable statistical analysis given the burden imposed by these Decisions on Mr. McBride's clients to show that in practice the predictions of the pure one-lump theory are unlikely to be correct. We do not wish to argue that the data request authorized would not provide useful information. Even one or two cases where a clear connection could be shown between a merger of the type described above and a change (or absence of a change) in prices would be at least suggestive. However, the data originally requested will enable us to meet precisely the tests specified by the Court. It will show if the predictions of the pure one-lump theory are contradicted "frequently," in a statistically meaningful sense. It will assist us in formulating alternative hypotheses (for example, whether the "contestability" of a bottleneck influences the extent to which a carrier can extract monopoly rents). And it will enable us to isolate the effect of the presence or absence of origin competition, by controlling for other factors (such as the demand for coal). We therefore believe that the comprehensive data requested of applicants by Mr. McBride on July 3, 1997 on behalf of Atlantic City Electric Company, et al is needed to surmount the hurdles set out above and to provide relevant and reliable economic evidence.

FURTHER AFFIANTS SAITH NOT.



Alfred E. Kahn

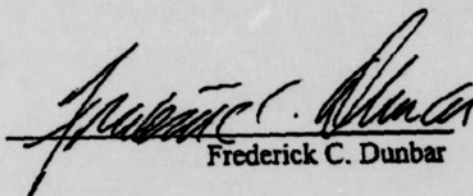
Subscribed and sworn to before me this 21st day of July, 1997.


Notary Public

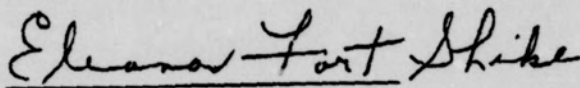
My Commission expires 6/30/98.

DELORES S. HARING
Notary Public, State of New York
No. 4766345
Qualified in Tompkins County
Commission Expires June 30, 1998

- 8 -


Frederick C. Dunbar

Subscribed and sworn to before me this 21st day of July, 1997.


Notary Public

My Commission expires _____.

ELEANOR FORT SHIKE
Notary Public, State of New York
No. 31-8974420
Qualified in New York County
Commission Expires March 30, 1998

FINANCE DOCKET NO. 33388

State of New York)
) ss. (for Dr. Dunbar)
County of Westchester)

1. Our names are Alfred E. Kahn and Frederick C. Dunbar. We are Special Consultant and Senior Vice President of National Economic Research Associates, Inc. (NERA), respectively, a nationally known economic consulting firm. Each of us has been a witness in numerous proceedings before the Interstate Commerce Commission ("ICC") and Surface Transportation Board ("STB") over the years. These proceedings are listed in our attached resumes as part of our qualifications. Most notably for current purposes, Dr. Kahn recently testified for several shippers in the so-called "bottleneck" proceedings (Central Power & Light Co. v. Southern Pacific Transportation Co., et al., Docket No. 41242, et al., served December 31, 1996). Dr. Kahn also submitted a recent statement, in conjunction with a study prepared by another of his colleagues at NERA, Professor Jerome E. Hass, criticizing the STB's railroad "revenue adequacy" standards. Dr. Kahn is the author of the treatise The Economics of Regulation, which is relied on by most regulatory agencies.

2. We have been asked by several of the clients represented by Mr. Michael F. McBride to analyze whether the acquisition of Conrail assets by CSX and Norfolk Southern will leave captive shippers less protected from monopoly pricing by the railroads. Among the concerns we have is whether acquisition accounting will allow the railroads to evade rate protection afforded shippers by the Staggers Act. More generally, it is commonplace in almost every merger to question whether the acquisition premium over market price (such as the one paid for Conrail's shares by CSX and Norfolk Southern) reflect, in part, the expectation of an increased ability of the railroads to extract monopoly profits from traffic over which they have market power.

3. We have been asked specifically to consider whether the possibility that shippers may be subject to higher rates or poorer service after the merge is precluded by the "one lump" theory--and whether the theory accurately describes railroad pricing behavior. The theory applies to a situation where a shipper uses a rail route at least one link of which is a bottleneck. (Typically, the bottleneck carrier serves the receiver at the destination, but it may reside anywhere else--at an origin or a bridge link--according to the theory.) Under these circumstances, the one lump theory posits that the bottleneck carrier captures all the monopoly rents that are available, subject to regulatory restraints, if any. It follows from this theory that a railroad merger among carriers participating in a shipment where there is a bottleneck carrier will not result in increased rates, because the shippers would already be charged the maximum price that a rational, profit maximizing monopolist would charge.

4. In assisting Mr. McBride and his colleagues with the discovery request in this manner we were mindful of the following:

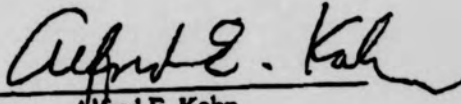
- a. There is considerable dispute among industry participants over the validity of this theory--with captive shippers believing it is not valid while railroads assert otherwise. Nonetheless, the ICC does not accept shipper-specific evidence

rebutting the theory in a merger proceeding as sufficient to reject it,¹ and the Court of Appeals has affirmed this decision.²

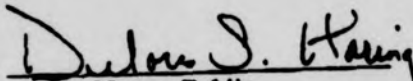
- b. At the present time there is no empirical support, of which we are aware, for the theory. Specifically, it has never been validated with railroad data in a peer-reviewed study.
- c. Nonetheless, the theory does lead to hypotheses that can be tested, but only with data now in possession of the railroads. Moreover, such an approach to testing the theory appears to be the only way which intervenors can satisfy their procedural burden in this matter.

5. To provide relevant and reliable economic evidence regarding the railroads' and STB's theory of rate setting, and to demonstrate the need (if any) for protective conditions for shippers if the theory is rejected, requires the comprehensive data requested of applicants by Mr. McBride on July 3, 1997 on behalf of Atlantic City Electric Company, et al. Anything less would not meet the requirements set by the STB and the courts.

FURTHER AFFIANTS SAITH NOT.


Alfred E. Kahn

Subscribed and sworn to before me this 14th day of July, 1997.

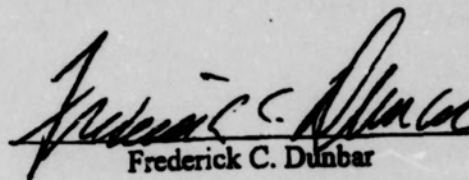

Notary Public

DELORES S. HARING
Notary Public, State of New York
No. 4766345
Qualified in Tompkins County
Commission Expires June 30, 1998

My Commission expires 6/30/98.

¹ *Burlington Northern Inc. and Burlington Northern Railroad Company--Control and Merger--Santa Fe Pacific Corporation and the Atchafalaya, Topeka and Santa Fe Railway Company*, ICC Finance Docket No. 32549, August 23, 1995

² *Western Resources, Inc., Petitioner v. Surface Transportation Board and United States of America, Respondents; Santa Fe Pacific Corporation, et al., Intervenor*, U.S. Court of Appeals for the District of Columbia Circuit, 109 F.3d 782, 1997.


Frederick C. Dunbar

Subscribed and sworn to before me this 14~~th~~ day of July, 1997.


Notary Public

My Commission expires October 31, 1997

DORIS L. GULOTTA
Notary Public, State of New York
No. 4640365 Qual. in Nassau County
Cert. Filed in New York County
Commission Expires 10/31/97

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**

State of Virginia)
) ss.
City of Alexandria)

AFFIDAVIT OF THOMAS D. CROWLEY

Thomas D. Crowley, being duly sworn, deposes and says:

1. My name is Thomas D. Crowley. I am President of L. E. Peabody & Associates, Inc., a transportation and economic consulting firm located in Alexandria, Virginia. My firm and I consult for a wide range of shippers and others in the transportation industry, with a particular speciality in advising and consulting for shippers who move commodities by rail. I have been involved in most of the major rail-related matters before the Surface Transportation Board and its predecessor, the Interstate Commerce Commission, for over 26 years. Most recently, I was a witness for numerous shippers in the Burlington Northern/Santa Fe merger and in the Union Pacific/Southern Pacific merger, and I was a witness in the recent "bottleneck" proceedings. I am the same Thomas D. Crowley that submitted an affidavit on July 14, 1997 supporting the "Motion of American Electric Power Service Corporation, Atlantic City Electric Company.

Delmarva Power & Light Company, And The Ohio Valley Coal Company To Compel Responses To Discovery" ("ACE, et al. 5"). I also attended the hearing before Judge Leventhal on July 16, 1997 where he addressed ACE, et al. 5.

2. In order to determine if Conrail, CSX and/Norfolk Southern set rates based on the so called "one lump" theory, I, along with Drs. Kahn and Dunbar of NERA, assisted counsel in drafting three document requests and six interrogatories. The three document requests were addressed in Judge Leventhal's July 18, 1997 Decision No. 11 in this proceeding wherein he ordered the involved railroads to provide only a subset of the requested and required information.

3. In the three document requests, ACE, et al. asked the NS, CSX and Conrail (collectively referred to herein as "Railroads") to provide movement specific data for the 1978-1997 time period contained in the individual marketing or data processing files of NS, CSX and Conrail for coal moving to all destinations that received 100,000 or more tons per year. Through his July 18, 1997 decision, Judge Leventhal limited the amount of data the railroads have to provide in two significant ways as shown below:

<u>Data Requested</u>	<u>Data Ordered To Be Produced</u>
a. Movements to all destinations on NS, CSX and Conrail that received 100,000 tons of coal per year.	a. Movements to only the destinations on Conrail of the parties involved in the Motion to Compel.
b. For NS, CSX and Conrail, the data for each calendar year 1978 through 1997 year-to-date.	b. For NS, the data for each calendar year 1980 through 1984 and 1995 through 2Q97. For CSX, the data for each calendar year 1978 through 1982 and 1995 through 2Q97. For Conrail, the data for each calendar year 1988 through 1992 and 1995 through 2Q97.

Judge Leventhal reasoned that a time line that encompassed two years prior and two years subsequent to each Railroad's last merger or acquisition would be sufficient, i.e., CSX merger in 1980, NS merger in 1982 and Conrail acquisitions in 1990.

4. The effect of Judge Leventhal's order is that the Railroads have to supply data from their marketing and data processing files for coal movements to eight (8) destinations, i.e., two Atlantic City destinations, two Delmarva destinations, two American Electric Power destinations that receive coal from Conrail origins, and two Conrail destinations that purchase coal from The Ohio Valley Coal Company. To place the eight destinations in perspective, in 1996 126 electric utility power plants received 100,000 or more tons of coal at destinations served by NS, CSX and Conrail. Of the 126 electric utility power plants, NS delivered coal to 26 power plants, CSX delivered coal to 58 power plants, Conrail delivered coal to 28 power plants, and 13 power

plants were jointly served. Stated differently, the eight (8) destinations represent 6% of the total power plants served by three Railroads.

5. The objective of our analysis and the reason we requested the Railroads 1978-1997 marketing and data processing data is to determine if the Railroads involved in the division of Conrail set rates to maximize net revenue subject to regulatory restraints or if the Railroads share the monopoly rents with their customers. In order to test if the railroads set their rates to maximize net revenue, both time series and point-in-time analyses have to be conducted. The time line for the time series analysis has to be of sufficient length to review each Railroad's pricing behavior before and after they merged to form the existing Railroads, while testing the pricing behavior of the other railroads serving the same markets or geographic area during the same period. The reason that the non-merging Railroads' previous behavior has to be reviewed for the same time period as the merging railroads is to determine how their pricing behavior changed as a result of the merger of two or more of their competitors.

6. The Railroads' pricing behavior at specific points in time also needs to be studied in order to determine if the railroad customers benefit from upstream competition prior to the monopolist extending its monopoly and, if so, is this sharing between customer and monopolist likely to be jeopardized by the division of Conrail. Contracting between the railroads and its customers plays a key role in this point-in-time study because of its limiting effect on the number of possible observations. For example, if Conrail is the bottleneck railroad serving Utility A, and Utility A and Conrail enter into a long term transportation contract to serve the destination for only the Conrail portion of the through movement, the pricing behavior and rationale of Conrail at the point in time the contract is executed is extremely important. At that same point

in time the pricing behavior and rationale of the railroads moving over alternate routes that could connect with Conrail requires study. In addition, the pricing behavior of the other competing railroads over the longer time horizon associated with the Utility A/Conrail contract is also extremely important. By limiting the time line and number of destinations, the number of available observations to test whether or not the railroads pricing behavior follows the one-lump theory will be severely curtailed.

7. Judge Leventhal's July 18, 1997 decision has effectively eliminated a specific point-in-time review of the three Railroads pricing behavior because the only time period that we will receive all three railroads data is for 1995 through 2Q97. This decision also has effectively eliminated time series analysis because the data to be produced is limited to eight destinations and only a portion of the total time line, and the time line is not the same for each railroad.

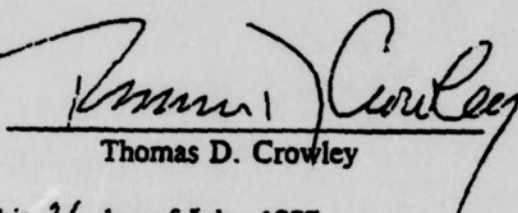
8. Finally, in the Burlington Northern/Santa Fe merger proceeding, a number of electric utilities presented evidence demonstrating that the railroads did not set their rates to maximize net revenue and that the shippers therefore benefited from origin competition.

The Interstate Commerce Commission ("ICC") rejected the evidence presented by the electric utilities because it was limited and also because it could have been construed as consistent with the theory that the railroads set their rates to maximize net revenue. This logic was upheld by the United States Court of Appeals, District of Columbia Circuit in a March 28, 1997 decision.

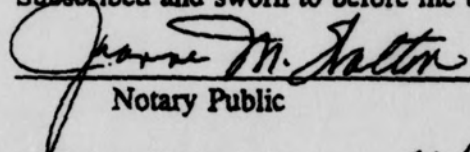
The ICC's decision shows that limited situation-specific evidence may not be sufficient to test whether or not the railroads set rates to maximize net revenue. However, Judge Leventhal

only ordered Applicants to provide ACE, et al. with situation-specific data and then limited the time period associated with the situation-specific data. Accordingly, what he ordered Applicants to provide may not be sufficient to test the applicability of the theory to the actual rate-setting practices of the Applicant Railroads in this proceeding.

FURTHER AFFIANT SAITH NOT


Thomas D. Crowley

Subscribed and sworn to before me this 21 day of July, 1997.


Notary Public

My Commission expires

12/31/98

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**

State of Virginia)
) ss.
City of Alexandria)

AFFIDAVIT OF THOMAS D. CROWLEY

Thomas D. Crowley, being duly sworn, deposes and says:

1 My name is Thomas D. Crowley. I am President of L. E. Peabody & Associates, Inc., a transportation and economic consulting firm located in Alexandria, Virginia. My firm and I consult for a wide range of shippers and others in the transportation industry, with a particular speciality in advising and consulting for shippers who move commodities by rail. I have been involved in most of the major rail-related matters before the Surface Transportation Board and its predecessor, the Interstate Commerce Commission, for over 26 years. Most notably with respect to the pending discovery dispute, I was a witness for numerous shippers in the Burlington Northern/Santa Fe merger and in the Union Pacific/Southern Pacific merger, and I was a witness in the recent "bottleneck" proceedings. A more complete description of my qualifications is set forth in Exhibit No. 1 to this Affidavit.

2. I have been retained by LeBoeuf, Lamb, Greene & MacRae, L.L.P. to support Mr. Michael F. McBride in his representation of several shippers in this proceeding. Among the assignments I have been given in support of Mr. McBride's representation of those clients, is

to assist him in developing evidence necessary to support the expected testimony of Professor Alfred E. Kahn, Robert Julius Thorne Professor Emeritus at Cornell University and a principal in NERA, and his colleague at NERA, Dr. Frederick C. Dunbar.

3. Among the subjects that Drs. Kahn and Dunbar are expected to address is the issue of the acquisition price paid for Conrail by CSX and Norfolk Southern and whether protective conditions for coal and other shippers are appropriate.

4. One issue to be explored is whether conditions should be imposed to protect shippers served by a "bottleneck" carrier from competitive harm caused by the acquisition of, and control of, Conrail. After consultation with Mr. McBride, I assisted him in developing discovery requests that would elicit information necessary to explore this issue. Specifically, the discovery requests seek information to determine the rate-setting practices of the Applicant railroads and whether the Applicants in fact set rates in accordance with the so-called "one lump" theory. Briefly, the "one lump" theory assumes that shippers whose rail service is dependent on a "bottleneck" carrier at origin or (more typically) at the destination are subject to monopoly pricing by the "bottleneck" carrier. The shipper is assumed to be charged a through rate that maximizes the net revenue for the traffic, subject to regulatory limits, with the destination carrier (in the typical case) forcing the origin carrier to take the lowest division of the through rate for its segment of the movement.

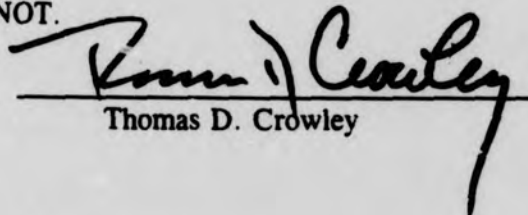
5. Based on the "one lump" theory, the ICC and STB have assumed in prior railroad merger and control proceedings that the merger or control transaction at issue will not harm the shippers in the circumstances described in paragraph 4 because they already are being charged the maximum rate, subject to regulatory limits, that they could be charged.

6. I and many shippers do not believe that railroads set rates in accordance with the "one lump" theory, and specifically the clients represented by Mr. McBride are apprehensive

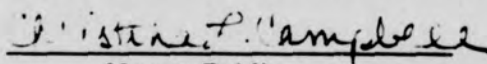
about the possibility of rate increases as a result of the acquisition of Conrail. At the same time, the ICC and the STB have erected a formidable hurdle to overcoming the assumption that the "one lump" theory is being followed, and the U. S. Court of Appeals for the District of Columbia Circuit has upheld the ICC's use of that theory in permitting the merger of the Burlington Northern/Santa Fe. In that case, the ICC did not accept limited, shipper-specific evidence that the "one lump" theory was not the basis for rate setting, finding it insufficiently comprehensive to rebut the theory, and the Court of Appeals seemed to require evidence that frequently departs from the theory.

7. Accordingly, I and Drs. Kahn and Dunbar have concluded that, in order to test whether the "one lump" theory accurately describes the rate-setting practices of the Applicants, and to demonstrate the need for protective conditions for shippers if it does not, railroad-wide, comprehensive evidence of the Applicants' rate-setting practices is needed to meet the standards previously set by the ICC and STB to overcome that theory. In my judgement, the discovery requests sent to Applicants by Mr. McBride on July 3, 1997 on behalf of Atlantic City Electric Company, et al. are absolutely essential for Drs. Kahn and Dunbar and me to test whether the Applicants' rate-setting practices conform in reality to the "one lump" theory.

FURTHER AFFIANT SAITH NOT.


Thomas D. Crowley

Sworn to and subscribed before me this 12 day of July, 1997.


Notary Public

My Commission expires My Commission Expires March 31, 2000

STB

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LAW OFFICES
of
T. SCOTT BANNISTER AND ASSOCIATES
ATTORNEY AND COUNSELOR AT LAW
1300 DES MOINES BUILDING
405 - SIXTH AVENUE
DES MOINES, IOWA 50309

TELEFAX:
(515) 244-8258

TELEPHONE:
(515) 244-0177
(515) 244-8877

D

July 17, 1997

Mr. 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 Mr. Williams:

Enclosed for filing in the above-referenced proceeding are the original and 25 copies of Iowa Interstate Railroad, Ltd. Notice of Intent to Participate with a Certificate of Service as required attached thereto.

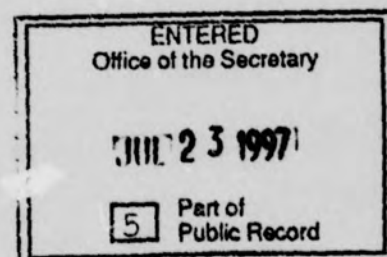
Your attention to this matter is appreciated.

Sincerely,


T. Scott Bannister

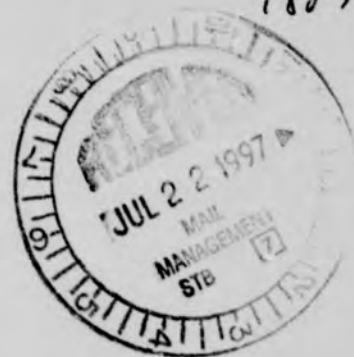
TSB/hjw
CC: Frederic W. Yocum, Jr.
Douglas H. Christy

1029/1/CORR/46522



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

IOWA INTERSTATE RAILROAD, LTD.
NOTICE OF INTENT TO PARTICIPATE

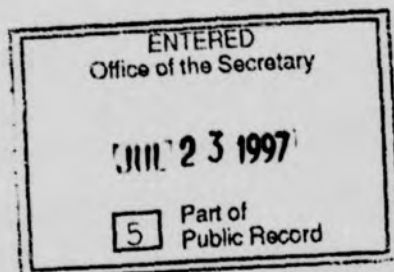
Iowa Interstate Railroad, Ltd. ("IAIS"), a Class II regional railroad common carrier, submits this Notice of Intent to Participate as its interests may appear in the above-captioned proceeding pursuant to Decision No. 6 of the Board served on May 30, 1997 (the "Decision").


For purposes of the Board's service list in this proceeding IAIS requests that the following address be used:

Iowa Interstate Railroad, Ltd.
Attn: T. Scott Bannister, Secretary and General Counsel
1300 Des Moines Building
405 - Sixth Avenue
Des Moines, IA 50309
(Telephone: 515-244-8877)
(Telefax: 515-244-8258)

A Certificate of Service as required by the Decision is attached hereto.

Dated: July 17, 1997




T. Scott Bannister
Secretary and General Counsel
Iowa Interstate Railroad, Ltd.
1300 Des Moines Building
405 - Sixth Avenue
Des Moines, IA 50309

CERTIFICATE OF SERVICE

I, T. Scott Bannister, hereby certify that a copy of the foregoing document has been served on the applicants' representatives and Administrative Law Judge Jacob Leventhal, by first class U.S. mail, postage prepaid or by other more expeditious means on this 17th day of July, 1997, as follows:

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

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

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

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


T. Scott Bannister

STB

FD

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7-23-97

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BALL JANIK LLP
ATTORNEYS

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

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

KARL MORELL

kmorell@bjllp.com

July 23, 1997

VIA HAND DELIVERY

The Honorable Vernon A. Williams
Secretary
Surface Transportation Board
1925 K Street, N.W., Suite 600
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 *FD-33388*

Dear Secretary Williams:

Enclosed for filing in the above-captioned matter are the original and twenty five (25) copies of the Notice of Intent to Participate of the Ann Arbor Railroad.

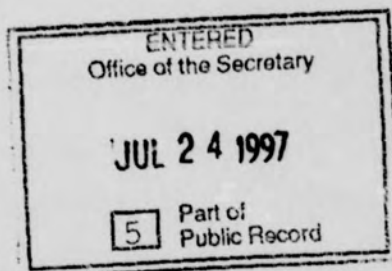
Please time and date stamp the extra copy of the pleading and return it with our messenger.

If you have any questions, please contact me.

Sincerely yours,

A handwritten signature in cursive script that reads "Karl Morell".

Karl Morell



180758
ORIGINAL

AA-1

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

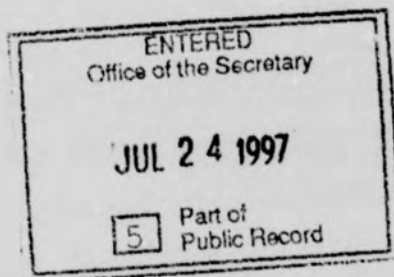
STB FINANCE DOCKET NO. 33388

**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**



NOTICE OF INTENT TO PARTICIPATE

Please enter the appearance of the undersigned on behalf of the Ann Arbor Railroad ("AA"), which intends to participate and become a party of record in this proceeding. Service of all documents filed in this is proceeding should be made upon the undersigned.



Respectfully submitted,

Karl Morell

**Karl Morell
Of Counsel
Ball Janik LLP
Suite 225
1455 F Street, N.W.
Washington, D.C. 20005
(202) 466-6530**

**Attorneys for:
ANN ARBOR RAILROAD**

Dated: July 23, 1997

CERTIFICATE OF SERVICE

I hereby certify that on this 23rd day of July, 1997. I caused a copy of the foregoing Notice of Intent to Participate to be served by first class mail, postage prepaid, on the following parties:

JAMES C. BISHOP, JR.
WILLIAM C. WOOLDRIDGE
JAMES L. HOWE, III
ROBERT J. COONEY
GEORGE A. ASPATORE
Norfolk Southern Corporation
Three Commerical Place
Norfolk, VA 23510-9241

MARK G. ARON
PETER J. SHUDTZ
CSX Corporation
On James Center
902 East Cary Street
Richmond, VA 23129

RICHARD A. ALLEN
JAMES. A. CALDERWOOD
ANDREW R. PLUMP
JOHN V. EDWARDS
Zuckert, Scoutt & Rasenberger, L.L.P.
888 Seventeenth Street, N.W.
Suite 600
Washington, D.C. 20006-3939

P. MICHAEL GIFTOS
PAUL R. HITCHCOCK
CSX Transportation, Inc.
500 Water Street
Speed Code J-120
Jacksonville, FL 32202

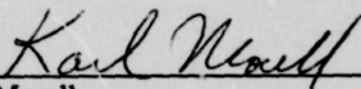
JOHN M. NANNES
SCOT B. HUTCHINS
Skadden, Arps, Slate, Meahger & Flom LLP
1440 New York Avenue, N.W.
Washington, D.C. 20005-2111

DENNIS G. LYONS
RICHARD L. ROSEN
PAUL T. DENIS
Arnold & Porter
555 12th Street, N.W.
Washington, D.C. 20004-1202

SAMUEL M. SIPE, JR.
TIMOTHY M. WALSH
Steptoe & Johnson LLP
1330 Connecticut Avenue
Washington, D.C. 20036-1795

TIMOTHY T. O'TOOLE
CONSTANCE L. ABRAMS
Consolidated Rail Corporation
Two Commerce Square
2001 Market Street
Philadelphia, PA 19103

PAUL A. CUNNINGHAM
Harkings Cunningham
1300 Nineteenth Street, N.W.
Suite 600
Washington, D.C. 20036


Karl Morell

STB

FD

33388

7-23-97

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180751



AFL-CIO, CLC

TRANSPORTATION • COMMUNICATIONS INTERNATIONAL UNION

LEGAL DEPARTMENT

180751

ROBERT A. SCARDELLETTI
International President

MITCHELL M. KRAUS
General Counsel

LARRY R. PRUDEN
Assistant General Counsel

July 15, 1997



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

Re: Finance Docket No. 33388

Dear Mr. Williams:

The Transportation • Communications International Union ("TCU"), through its undersigned counsel, hereby files an original and twenty-five copies of its notice of its intent to participate in the above-referenced case as a party of record. Service of all documents upon TCU may be made to the undersigned counsel, who previously entered an appearance.

Thank you for your attention to this matter.

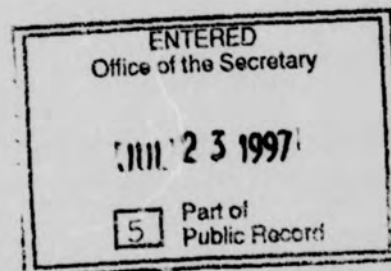
Very truly yours,

Mitchell Kraus

Mitchell M. Kraus
General Counsel

MMK:fm

Enclosures



CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing were mailed this 15th day of July, 1997, via first-class mail, postage prepaid, to the following:

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

James C. Bishop, Jr., Esquire
Norfolk Southern Corporation
Three Commercial Place
Norfolk, VA 23510-9241

Bruce B. Wilson, Esquire
Constance L. Abrams, Esquire
Consolidated Rail Corp.
Two Commerce Square
2001 Market Street
Philadelphia, PA 19103

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

Richard A. Allen, Esquire
Zuckert, Scoutt & Rasenberger, L.L.P.
888 - 17th Street, NW, Suite 600
Washington, DC 20006-3939

John M. Nannes, Esquire
Scot B. Hutchins, Esquire
Skadden, Arps, Slate,
Meagher & Flom LLP
1440 New York Avenue, NW
Washington, DC 20005-2111

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

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

Samuel M. Sipe, Jr., Esquire
Timothy M. Walsh, Esquire
Steptoe & Johnson LLP
1330 Connecticut Avenue
Washington, DC 20036-1795

Timothy T. O'Toole, Esquire
Constance L. Abrams, Esquire
Consolidated Rail Corporation
2001 Market Street
Philadelphia, PA 19103

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

Richard A. Edelman, Esquire
Highsaw, Mahoney & Clarke, P.C.
1050 - 17th Street, NW, Suite 210
Washington, DC 20036

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

Debra L. Willen, Esquire
Patrick R. Plummer, Esquire
Guerrieri, Edmond & Clayman, P.C.
1331 F Street, NW
Washington, DC 20004

Larry Willis, Esquire
Transportation Trades Department, AFL-CIO
400 North Capitol Street, NW, Ste. 861
Washington, DC 20001

Mitchell Klaus

STB

FD

33388

7-23-97

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CONIGLIO & UTHOFF

A PROFESSIONAL LAW CORPORATION
110 WEST OCEAN BOULEVARD, SUITE C
LONG BEACH, CALIFORNIA 90802-4615

TERRY J. CONIGLIO*
STEPHEN M. UTHOFF
ENRIQUE M. VASSALLO*

TELEPHONE: (562) 491-4644
TELECOPIER: (562) 435-1976
E-MAIL: candulaw@aol.com

*ALSO ADMITTED IN THE
DISTRICT OF COLUMBIA
*ALSO ADMITTED IN
NEW YORK AND TEXAS

July 21, 1997

VIA FEDERAL EXPRESS

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

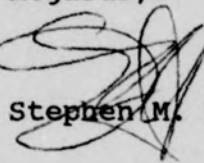
RE: RBTC Re: Access CSX/NS
File No.: 2312

Dear Secretary Williams:

Enclosed for filing please find an original, twenty five (25) copies and a 3.5 diskette of The Rail Bridge Terminals (New Jersey) Corporation's Notice of Intent to Participate. The Notice of Intent to Participate is saved on the disk in WordPerfect 5.2 and Text formats.

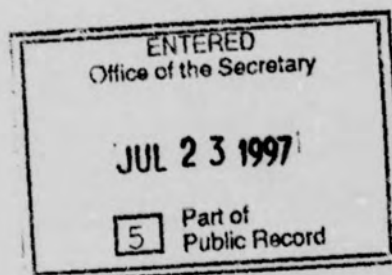
Please file the enclosed and return a conformed copy to our office in the enclosed self-addressed stamped envelope.

Regards,



Stephen M. Uthoff

SMU:lme2
Enclosures



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

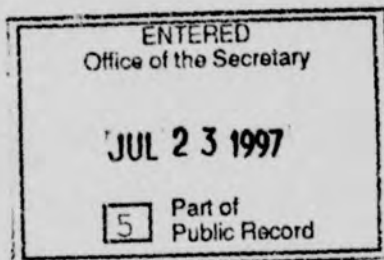
NOTICE OF INTENT TO PARTICIPATE

Please take notice that The Rail-Bridge Terminals (New Jersey) Corporation hereby intends to participate in STB Finance Docket No. 33388, including, but not limited the application of CSX Corporation, CSX Transportation, Inc., Norfolk Southern Corporation and Norfolk Southern Railway Company under 49 U.S.C. §11323-25 seeking the Service Transportation Board's authorization for, among other things, the acquisition and control of Conrail, Inc. and Consolidated Rail Corporation.

The Rail-Bridge Terminals (New Jersey) Corporation may be contacted through their counsel, Stephen M. Uthoff, Coniglio & Uthoff, a Professional Law Corporation, 110 West Ocean Boulevard, Suite C, Long Beach, California 90802-4615, (562) 491-4644.

DATED: July 21, 1997

Respectfully submitted,



By: 

TERRY J. CONIGLIO
STEPHEN M. UTHOFF
CONIGLIO & UTHOFF
A Professional Law Corporation
Attorneys for The Rail-Bridge
Terminals (New Jersey) Corporation
110 West Ocean Boulevard, Suite C
Long Beach, California 90802-4615
Telephone: (562) 491-4644

DECLARATION RE: REPRESENTATION

I, Stephen M. Uthoff declare:

1. That I am an attorney at law duly licensed to practice before all of the Courts of the State of California and the Surface Transportation Board.

2. Terry J. Coniglio, Stephen M. Uthoff and the firm of Coniglio & Uthoff, a Professional Law Corporation have been retained to represent The Rail-Bridge Terminals (New Jersey) Corporation in the above-captioned matter.

I declare under penalty of perjury under the laws of the United States that the foregoing is true and correct.

Executed this 21st day of July, 1997 at Long Beach, California.

By: 

STEPHEN M. UTHOFF, Declarant

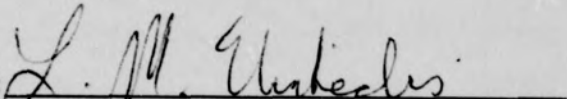
CERTIFICATE OF TRANSMITTAL AND SERVICE

I hereby certify that I have this day served the foregoing document upon: Administrative Law Judge, Jacob Leventhal, Federal Energy Regulatory Commission, 888 First Street, N.E., Suite 11F, Washington, D.C. 20426; Dennis G. Lyons, Esq., Arnold & Porter, 555 12th Street, N.W., Washington, D.C. 20004-1202; Richard A. Allen, Esq., Zuckert, Scoutt & Rasenberger, L.L.P., Suite 600, 888 Seventeenth Street, N.W., Washington, D.C. 20006-3939 and Paul A. Cunningham, Esq., Harkins, Cunningham, 1300 Nineteenth Street, N.W. Suite 600, Washington, D.C. 20036 by mailing, first class, postage prepaid a copy to each such person.

I declare under penalty of perjury under the laws of the United States that the foregoing is true and correct.

Dated at this 21st day of July, 1997 at Long Beach, California.

By:


LISA M. ELIAKEDIS

STB

FD

33388

7-23-97

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LAW OFFICES
FRITZ R. KAHN, P.C.
SUITE 750 WEST
1100 NEW YORK AVENUE, N.W.
WASHINGTON, D.C. 20005-3934
(202) 371-8037
FAX (202) 371-0900

ORIGINAL

July 21, 1997

Hon. Vernon A. Williams
Secretary
Surface Transportation Board
1925 K Street, NW (7th fl.)
Washington, DC 20423-0001

Dear Secretary Williams:

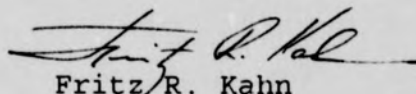
Enclosed for filing in STB Finance Docket No. 33388, CSX Corp., et al.--Control and Operating Leases/Agreement--Conrail, Inc., are the original and twenty-five copies of the Notice of Intent to Participate of Martin Marietta Materials, Inc.

Extra copies of the Notice and of this letter are enclosed for you to stamp to acknowledge your receipt of them and to return to me in the enclosed self-addressed, stamped envelope.

By copy of this letter, service is being effected upon counsel for each of the applicants and ALJ Leventhal.

If you have any question concerning this filing or if I otherwise can be of assistance, please let me know.

Sincerely yours,


Fritz R. Kahn

enc.
cc: Counsel for applicants
Hon. Jacob Leventhal
Bruce A. Deerson, Esq.

ENTERED	
Office of the Secretary	
JUL 23 1997	
5	Part of Public Record

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ORIGINAL

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BEFORE THE
SURFACE TRANSPORTATION BOARD
WASHINGTON, D.C. 20423



STB Finance Docket No. 33388

CSX CORPORATION, et al.,
-- CONTROL AND OPEATING LEASES/AGREEMENTS --
CONRAIL, INC., et al.

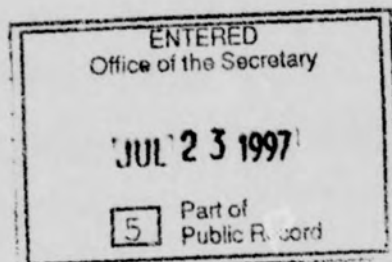
NOTICE OF INTENT
TO PARTICIPATE

Martin Marietta Materials, Inc., of Raleigh, NC ("MMM"), advises the Board of its intent to participate in the proceeding as its interests may appear and asks that the appearance of its attorneys be entered. MMM has selected the acronym "MMM" for identifying such filings as it may make.

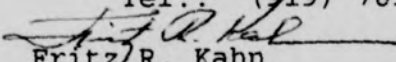
Respectfully submitted,

MARTIN MARIETTA MATERIALS, INC.

By its attorneys,



Bruce A. Deerson, Esq.
Vice Pres. & General Counsel
Martin Marietta Materials, Inc.
P. O. Box 30013
Raleigh, NC 27622
Tel.: (919) 783-4506

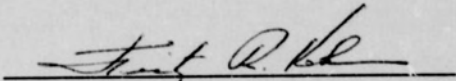

Fritz R. Kahn
Fritz R. Kahn, P.C.
Suite 750 West
1100 New York Avenue, NW
Washington, DC 20005-3934
Tel.: (202) 371-8037

Dated: July 21, 1997

CERTIFICATE OF SERVICE

Copies of the foregoing Notice this day were served by me by mailing copies thereof, with first-class postage prepaid, to counsel for each of the Applicants and ALJ Leventhal.

Dated at Washington, DC, this 21st day of July 1997.


Fritz R. Kahn

STB

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33388

7-25-97

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180797



July 21, 1997

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



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

Dear Mr. Secretary:

Enclosed for filing in the above referenced proceeding is the original and twenty- five
copies of the Comments of Champion International Corporation.

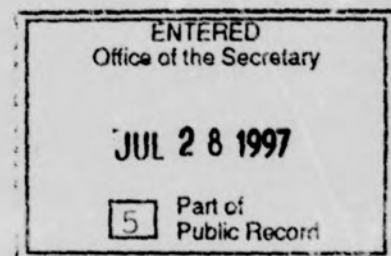
As noted in this document, pursuant to the provisions of 49 CFR § 1180.4 (d)(1),
Champion International Corporation requests the Board to enter Champion as a party
of record in Finance Docket No. 33888. In accordance with 49 CFR § 1180.4(a)(2),
Champion selects the acronym "CIC-x" for identifying all documents it submits in
this proceeding.

Also enclosed is a 3.5 inch diskette formatted for WordPerfect 5.0 so that it
can be converted into WordPerfect 7.0.

Sincerely,

Richard E. Kerth
Richard E. Kerth

cc: All Known Parties of Record



180797



CIC- 1

BEFORE THE SURFACE TRANSPORTATION BOARD

FINANCE DOCKET NO. 33388

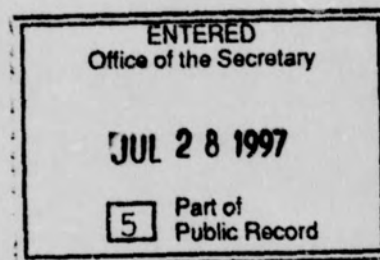
**CSX CORPORATION AND CSX TRANSPORTATION, INC.,
NORFOLK SOUTHERN CORPORATION AND NORFOLK SOUTHERN
RAILWAY COMPANY
-- CONTROL AND OPERATING LEASES / AGREEMENTS --
CONRAIL INC. AND CONSOLIDATED RAIL CORPORATION**

COMMENTS OF:

**CHAMPION INTERNATIONAL CORPORATION
101 KNIGHTSBRIDGE DRIVE
HAMILTON, OHIO 45020**

**SUBMITTED BY: RICHARD E. KERTH
TRANSPORTATION AND DISTRIBUTION MANAGER - COMMERCE,
REGULATORY AFFAIRS AND ORGANIZATIONAL IMPROVEMENT**

DATE: JULY 21, 1997



BEFORE THE SURFACE TRANSPORTATION BOARD

FINANCE DOCKET NO. 33388

VERIFIED STATEMENT OF RICHARD E. KERTH

On June 16, 1997, CSX Corporation (CSXC), CSX Transportation, Inc. (CSXT), Norfolk Southern Corporation (NSC), Norfolk Southern Railway Company (NSR), Conrail Inc. (CRI) and Consolidated Rail Corporation (CRC)¹ filed their primary application seeking Surface Transportation Board authorization under 49 U.S.C. 11343-45 for, among other things, (1) the acquisition by CSX and NS of control of Conrail, by and through a special purpose liability company (LLC) and LLC's wholly owned subsidiary, Green Acquisition Corporation; and, (2) the division of assets of Conrail's assets which will continue to be held by Conrail or its subsidiaries and operated for Conrail's account and that of its stockholders; (b) certain assets which will be subject of long term operating agreements, operating leases or other operating arrangements with CSX and NS respectively; and (c) certain assets which will be separately owned by CSX and NS. In addition, NS will sell to CSXT a line or railroad formerly owned by Conrail and now owned by NS.

Pursuant to the provisions of 49 C.F.R. § 1180.4 (d)(1), Champion International Corporation and its wholly owned subsidiary, Weldwood of Canada, Limited, hereinafter referred to as "Champion", respectfully submits its comments, evidentiary submission, and asks the Board to enter Champion as a party of record in Finance Docket No. 33388. In accordance with 49 C.F.R. § 1180.4 (a)(2), Champion selects the acronym "CIC-x" for identifying all documents it submits in this proceeding.

I. INTRODUCTION

Champion International Corporation and its wholly owned subsidiary, Weldwood of Canada Limited (hereinafter collectively referred to as "Champion") hereby submits Comments in this proceeding. The Witness for Champion is Richard E. Kerth, employed as Transportation and Distribution Manager - Commerce, Regulatory Affairs & Organizational Improvement. My

¹ CSXC and CSXT are herein referred to collectively as CSX. NSC and NSR are herein referred to collectively as NS. CRI and CRC are herein referred to collectively as Conrail. CSX, NS, and Conrail are referred to collectively as applicants.

business address is 101 Knightsbridge Drive, Hamilton, Ohio 45020. I am familiar with Champion's facilities and transportation requirements having been employed by Champion for nineteen (19) years. I am authorized to represent Champion's interests before federal and state regulatory bodies and I am authorized to present this verified statement on behalf of Champion.

II. Champion International Corporation

Champion International Corporation is an integrated forest products company. The company's operations in the United States, Brazil, and Canada produce paper and pulp, as well as lumber, plywood, and wood chips, that are sold throughout the world. One of the largest private land owners in the United States, Champion has responsibility for the sustainable management of over 10 million acres of forestlands worldwide which support our manufacturing facilities. The company employs 24,400 people worldwide and has the capacity to produce 5.2 million tons of paper for business, communications, commercial printing, publications, and newspapers. It also produces annually over 1.3 million tons of market pulp, 1.1 million board feet of lumber, and 1.2 million square feet of plywood.

The company's wholly-owned subsidiary, Weldwood of Canada Limited, is a major producer of forest products, with logging and manufacturing operations in British Columbia and Alberta, Canada. Weldwood operates seven sawmills producing approximately 950 million board feet of lumber; two plywood mills with a total production of 336 million square feet (3/8" basis); and, two pulp mills producing 567,000 short tons per year of bleached softwood kraft pulp. In total, these facilities produce the equivalent of 24,000 railcar loads annually of which 700 or more are exported annually into markets served by Conrail in the United States.

Domestically, the company operates 11 pulp and paper mills; 7 wood products manufacturing facilities; and 6 DairyPak® plants that produce milk and juice cartons and ovenable trays for the fast growing ready-to-serve food market. Champion receives rail service exclusively by Conrail at three facilities. Champion's publication papers mill in **Deferiet, New York** manufactures coated and uncoated groundwood publication papers for magazines, catalogs, newspaper inserts, and books. DairyPak® plants located in **Olmsted Falls, Ohio** and **Morristown, New Jersey** receive inbound movements of bleached paperboard from Champion's Waynesville, North Carolina extruder coating plant for conversion into milk and juice cartons.

In addition to the three facilities exclusively served by Conrail, Champion is also dependent upon Conrail as a bridge carrier for transportation of raw materials and supplies

used at our manufacturing operations located in the northeast United States. Similarly, Conrail participates in the transportation of finished products moving from the northeast to our customers throughout the United States. Rail service is essential for the movement of Champion's finished products and inbound raw materials. Bulk shipments of clay slurry, limestone, and coal are transported by rail to Champion's facilities. Rail is also the preferred method of transportation for Champion's paper shipments due to the size, diameter, and quantities shipped daily to our customers. The table below illustrates the extent of Conrail's participation in Champion's rail traffic during 1996:

Conrail's participation in Champion / Weldwood Traffic (Full year: 1996)

Champion Locations	1996 Shipments	1996 Tons
Deferiet, NY (inbound)	1,542	119,295
Deferiet, NY (outbound)	1,569	112,121
Morristown, NJ (inbound)	377	28,204
Olmsted Falls, OH (inbound)	358	27,250
Bridge Traffic (domestic)	6,986	531,165
Bridge Traffic (Weldwood origins)	773	53,890
Total	11,605	871,925

III. Summary of Champion's Position

As a general principle, Champion is concerned that large rail mergers, including the Burlington Northern Santa Fe² and the Union Pacific Southern Pacific³ have virtually eliminated effective rail-to-rail competition. The only good justification for the lessening of competition is where the public truly benefits from operating efficiencies resulting from elimination of duplicate facilities and the use of more direct routings. There is also an argument that consolidated carriers are financially stronger and therefore can offer shippers greater market opportunities or more services.

This proceeding, however, is not about a lessening of competition as was feared in previous mergers of the nation's largest railroads. Since its creation, Conrail has enjoyed extraordinary dominance in the northeast rail marketplace. Post merger, Norfolk Southern and

² Burlington Northern Inc. and Burlington Northern Railroad -Control and Merger- Santa Fe Pacific Corporation and The Atchison, Topeka and Santa Fe Railway Company, Finance Docket No. 32549

³ Union Pacific Corporation, Union Pacific Railroad Company, and Missouri Pacific Railroad Company --Control and Merger - Southern Pacific Rail Corporation, Southern Pacific Transportation Company, St. Louis Southwestern Railway Company, SPCSL Corp., and the Denver Rio Grande Western Railroad Company, Finance Docket No. 3276C, Decision 44 Decided August 6, 1996

CSX will share Conrail's markets each having carved out the individual markets they can effectively service. Further, Norfolk Southern and CSX jointly will operate Conrail assets in major terminal areas such as Philadelphia, Detroit, northern and southern New Jersey and share lines in Philadelphia and Indianapolis. The presence of two major railroads in those *jointly* served markets provides competition that does not exist today. Champion welcomes that competition.

CSX and NS have offered plans to streamline service by spending billions of dollars to make improvements to rail facilities. As noted, CSX and NS have purchased those track sections which best fit their operation and have agreed to provide each other with the rights to run overhead traffic on certain segments of one another's track for a fee. They have also offered to preserve reciprocal switching rights to those customers who have such rights pre-merger. Champion views these actions to be positive steps toward maintaining or improving service.

The agreement forged between Norfolk Southern and CSX and detailed in the primary application **should be approved**. Should the Board decide conditions are warranted, we urge the Board to follow the same guidelines they set for themselves in previous mergers, i.e. conditions be limited to preserving essential services and for which adequate alternative transportation is not available.

IV. STATEMENT OF SUPPORT

In 1996, Champion tendered 1,844 shipments (121,592 tons) to NS or CSX from our mills in the south and south east for Conrail delivery. As a result of this proposed consolidation, single line routes will be available for approximately 70% of our rail traffic originating in the south and destined to Conrail's current service area. [Qualified as originating and terminating on CSX, NS or the jointly owned and operated "Conrail".] These single line routings will provide improved service by eliminating inherent delays with the interchange of traffic between railroads. These single line routes will also create the opportunity for NS and CSX to compete with the trucking industry in both rates and service for our shipments currently moving over the highway.

Champion's paper mill at **Deferiet, New York** will be served by CSX post merger. Outbound traffic joint line routings will increase by 12% which, on the surface, would normally cause concern about our ability to compete in the marketplace. However, we believe the system route improvements promulgated by both CSX and NS will provide equal or better transit times as compared to today's standards. CSX has identified twelve (12) primary

service routes where they will offer faster transit times and increased efficiencies within terminals to reduce car handling. Implementation of these improvements will greatly decrease our concerns. We are also encouraged that CSX, with its large equipment base, will be able to provide additional paper quality boxcars to Deferiet reducing the need for Champion to lease additional boxcar equipment. Operational improvements being made by CSX and NS, coupled with the paper industry's efforts to improve turn times on cars, may be an incentive for railroads to once again invest capital in their boxcar fleets.

In 1996, Champion's paper mill at **Bucksport, Maine** shipped 2,185 cars of paper to the midwest, south, and southeast. Conrail participated in this traffic as a bridge carrier receiving traffic at Rotterdam Junction, NY at its interchange with the Springfield Terminal (Boston and Maine). As CSX and NS compete for traffic, additional service (routing) and cost options will be available to Champion. Competing with CSX, northbound shipments of raw materials and supplies, such as kaolin clay, utilized by the Bucksport mill can be routed via the NS consistent with their haulage agreement with CP for connections to Guilford Transportation. This is competition which is not available today.

Champion's specialty kraft paper mill located in **Roanoke Rapids, North Carolina** served by CSX will benefit from the efficiencies of new single line service for its principle markets in the northeast. The reduced transit times and lower railroad operating costs will allow CSX to effectively compete with trucks for our kraft paper business. We believe CSX will make every effort to become a strong rival to the trucking industry for traffic that currently moves from the southeast to New England over Interstate 95. Not only will that be good for Champion but for the motoring public as well who use Interstate 95 between Boston and Florida.

This merger provides great potential for many shipments currently moving by truck to be converted to rail or intermodal. NS and CSX have the opportunity to start unit train intermodal service from their origins in the northeast for southern customers and from the south to northeastern customers. This service would be beneficial to reducing traffic on the congested highway system. In addition, customers who are not rail served can receive the benefits of lower cost rail and intermodal transportation and still receive their delivery by truck. We strongly believe NS and CSX should be and will be rivals to truck traffic not only moving on Interstate 95 but all of the major highways in the area.

DairyPak® plants located in **Olmsted Falls, Ohio** and **Morristown, New Jersey** will receive single line inbound movements of bleached paperboard from Champion's Waynesville, North Carolina extruder coating plant for conversion into milk and juice cartons. This service will improve Champion's ability to better manage in-transit inventory.

This transaction offers an opportunity to improve access to potential markets for **Weldwood**. Traffic interchanged with Canadian railroads at Chicago, Detroit, or Buffalo, where routes are end to end with CSX or NS, will benefit from the elimination of interchanges when destined to eastern destinations. CSX and NS should be encouraged by the Board to verify their implementation plans to assure service disruptions don't occur to the extent such disruptions have occurred in the past mega-mergers of UP with SP and BN with SF. International traffic should be afforded the same "smooth" transition as domestic traffic.

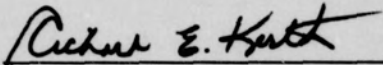
For all of these reasons, Champion believes this merger should be approved. Competition will be once again introduced into the East Coast markets. Since 1976, the management and laborers of Conrail have done a remarkable job rebuilding the eastern rail system and becoming a profitable carrier. Without their efforts, the East Coast would have lost viable rail service years ago. While we are sad to see Conrail broken up and consolidated into CSX and NS, we are confident of the benefits to the public.

#

VERIFICATION

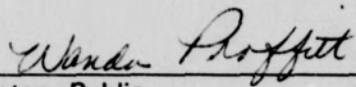
County of Butler)
) ss:
State of Ohio)

I, Richard E. Kerth, being duly sworn, do hereby state that I have read the foregoing document, have knowledge of the contents thereof, and that all facts therein are true to the best of my knowledge and belief.



Richard E. Kerth

Sworn to and subscribed to before me, a Notary Public, in and for the State of Ohio , this
21st day of July, 1997.



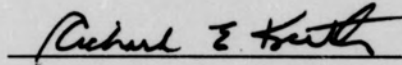
Notary Public

My Commission Expires:

WANDA PROFFITT
NOTARY PUBLIC, STATE OF OHIO
MY COMMISSION EXPIRES, OCT. 7, 1998

Certificate of Service

I hereby certify that a copy of the foregoing document has been served upon known parties of record, by U.S. Mail, post prepaid, this 21st day of July, 1997.



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July 23, 1997

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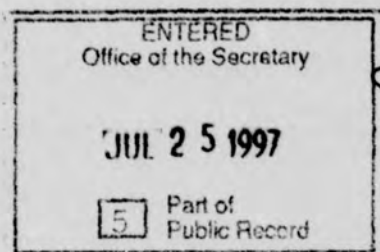
The Honorable Vernon A. Williams
Secretary
Surface Transportation Board
1925 K Street, NW
Washington, DC 20423-0001

RE: **STB Finance Docket No. 33388, CSX Corporation and CSX Transportation Inc., Norfolk Southern Corporation and Norfolk Southern Railway Company - Control and Operating Leases/Agreements - Cc rail, Inc. and Consolidated Rail Corporation (Livonia, Avon & Lakeville Railroad Corporation) (LAL File No. 9957)**

Dear Secretary Williams:

Supplementing my submission of July 3, 1997 in the captioned matter upon advice received by telephone I enclose twenty-four (24) copies of my Certificate of Service of the Notice of Appearance of the Livonia, Avon & Lakeville Railroad Corporation dated July 3, 1997.

Please arrange to have the enclosed extra copy of this letter stamped as received and returned to me in the return envelope attached. Please contact me if you have any further questions with respect to the foregoing or the enclosures.



Sincerely,

Sergeant W. Wise

Counsel for the LAL RR

SWW/ds
enclosure

Received:

Date: _____

By: _____

180791



LIVONIA AVON & LAKEVILLE RAILROAD CORP.

5769 Sweeteners Blvd.
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(716) 346-2090 ph.
(716) 346-6454 fax



July 3, 1997



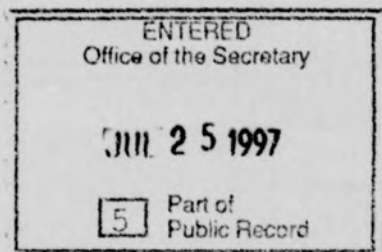
The Honorable Vernon A. Williams
Secretary
Surface Transportation Board
1925 K Street, N.W.
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RE: **STB Finance Docket No. 33388, CSX Corporation and CSX Transportation Inc.,
Norfolk Southern Corporation and Norfolk Southern Railway Company -
Control and Operating Leases/Agreements - Conrail, Inc. and Consolidated Rail
Corporation
(LAL File No. 9957)**

Dear Secretary Williams:

Enclosed you will find the original and 25 copies of the Notice of Appearance of the Livonia, Avon & Lakeville Railroad Corporation (LAL).

Please contact the undersigned if you have any questions.



SWW/ds
enclosures

cc: All Parties on Certificate of Service

Respectfully submitted,

A handwritten signature in dark ink, appearing to read "Sergeant W. Wise".

Sergeant W. Wise, Esq.
Counsel for Livonia, Avon & Lakeville
Railroad Corporation



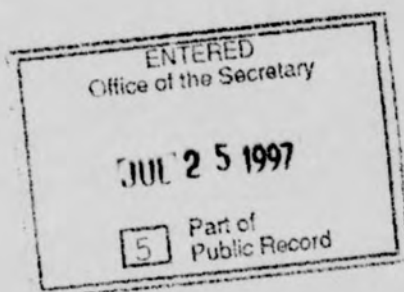
BEFORE THE
SURFACE TRANSPORTATION BOARD

Finance Docket No. 33388

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

NOTICE OF APPEARANCE OF
LIVONIA, AVON & LAKEVILLE RAILROAD CORPORATION

Please enter the appearance in this proceeding of the below-named attorney on behalf of Livonia, Avon & Lakeville Railroad Corporation ("LAL"). LAL is a Class III rail carrier. LAL intends to participate in this proceeding as a party of record. Accordingly, please place the named attorney, at the address provided, on the service list to receive all pleadings and decisions in this proceeding.



Respectfully submitted,

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

Counsel for Livonia, Avon & Lakeville
Railroad Corporation

Dated: July 3, 1997

CERTIFICATE OF SERVICE

I hereby certify that on this 3rd day of July, 1997, a copy of the foregoing Notice of Appearance was served upon the following people by first class mail, postage prepaid.

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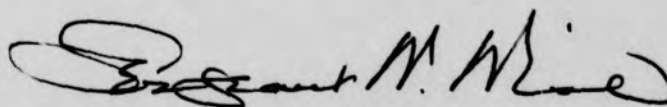
CSX Transportation, Inc.
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Attn.: P. Michael Giftos & Paul R. Hitchcock

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Sergeant W. Wise, Esq. 7/3/97

STB

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7-25-97

D

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ATTORNEYS AT LAW

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CHRISTOPHER C. McCRACKEN
Direct Dial (216) 902-8905

(216) 621-8400

July 21, 1997

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



D

Attention: STB Finance Docket No. 33388

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

Dear Secretary Williams:

Enclosed for filing in the captioned docket are an original
and twenty-five copies of ASHT-3, Ashta Chemicals Inc. Second
Notice of Intent to Participate, together with a 3.5" floppy
diskette, formatted for WordPerfect 5.1.

At the time of filing please date stamp the one additional
copy of ASHT-3 we have enclosed and return it to us in the self-
addressed postage prepaid envelope included herein. Thank you for
your cooperation.

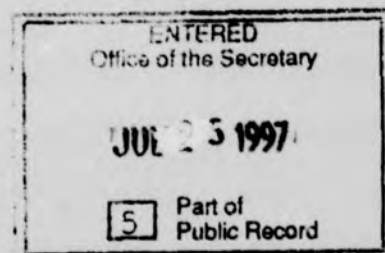
Respectfully submitted,

Chris McCracken
Christopher C. McCracken

114:diw
Enclosures

cc: Service List

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ASHT-3

BEFORE THE
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

ASHTA CHEMICALS INC.
SECOND NOTICE OF INTENT TO PARTICIPATE

ASHTA CHEMICALS INC.

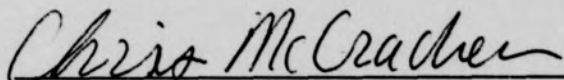
By: Christopher C. McCracken
Inajo Davis Chappell
Ulmer & Berne LLP
1300 East 9th Street
Suite 900
Cleveland, OH 44114-1583

Dated: July 21, 1997

SECOND NOTICE OF INTENT TO PARTICIPATE

ASHTA CHEMICALS INC., a Delaware corporation, hereby advises the Board of its intent to participate in the proceeding as a party of record without asserting a position for or against the transaction. Please forward any notices to ASHTA CHEMICALS INC.'s attorneys at the address listed below.

Respectfully submitted,

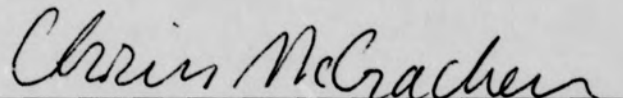


CHRISTOPHER C. MCCrackEN
INAJO DAVIS CHAPPELL
Ulmer & Berne LLP
1300 East 9th Street, Suite 900
Cleveland, Ohio 44114

Attorneys for ASHTA CHEMICALS INC.

CERTIFICATE OF SERVICE

I hereby certify that the foregoing ASHTA CHEMICALS INC. SECOND NOTICE OF INTENT TO PARTICIPATE (ASHTA-3) was served this 21st day of July, 1997, via first class mail, postage prepaid, upon all parties that appeared in Finance Docket No. 33388, as identified on the Service List.



Attorney for ASHTA CHEMICALS INC.

STB

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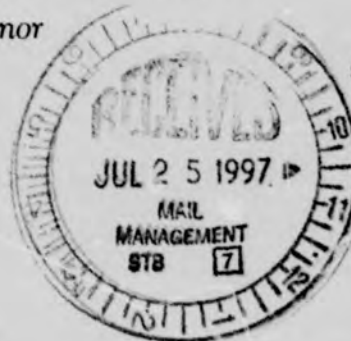
COMMONWEALTH of VIRGINIA

Office of the Governor

July 21, 1997

George Allen
GovernorRobert E. Martinez
Secretary of Transportation

Mr. Vernon A. Williams
Office of the Secretary
Case Control Branch
Attn: STB Finance Docket No. 33388
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

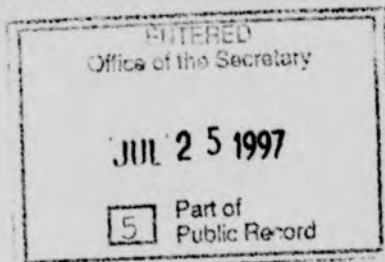
Dear Mr. Williams:

Based on a preliminary review of the primary application filed with the STB, the Commonwealth of Virginia believes that the agreement reached by CSX and Norfolk Southern, as set forth in the primary application, will bring more competition and better access for industries located in Virginia. I am confident that the rail systems, as proposed in the primary application, will open new markets for products produced in the Commonwealth. I am also aware, however, that issues will arise and changes may occur during the STB review process that may affect the Commonwealth.

As stated in Governor George Allen's letter to you on May 29, 1997, the Commonwealth of Virginia intends formally to participate throughout the STB review process. Moreover, the Commonwealth intends to appear as its interest may require. As such, this letter should serve as the Commonwealth of Virginia's intent to participate in the proceedings before the STB.

If you should have any questions regarding this letter or the Commonwealth's intent to participate in these proceedings, please let me know.

Sincerely,



Robert E. Martinez

REM/ow

Mr. Vernon A. Williams
July 21, 1997
Page Two

cc: The Honorable George Allen
Governor of Virginia

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

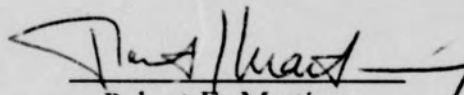
Dennis G. Lyons, Esquire
Arnold & Porter
555 12th Street, N.W.
Washington, D.C. 20004-1202

Richard A. Allen, Esquire
Zuckert Scoutt & Rasenberger, L.L.P.
Suite 600
888 Seventeenth Street, N.W.
Washington, D.C. 20006-3939

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

CERTIFICATION

I hereby certify that a copy of this letter was mailed first class postage prepaid to the Honorable Jacob Leventhal, Federal Energy Regulatory Commission, 888 First Street, N.E., Suite 11F, Washington, D.C. 20426; Dennis G. Lyons, Esquire, Arnold & Porter, 555 Twelfth Street, N.W., Washington, D.C. 20004-1202; Richard A. Allen, Esquire, Zuckert Scoutt & Rasenberger, L.L.P., Suite 600, 888 Seventeenth Street, N.W., Washington, D.C. 20006-3939; and Paul A. Cunningham, Esquire, Harkins Cunningham, Suite 600, 1300 Nineteenth Street, N.W., Washington, D.C. 20036 this 21 day of July, 1997.


Robert E. Martinez

STB

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ARNOLD & PORTER

555 TWELFTH STREET, N.W.
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DREW A. HARKER
(202) 942-5022

NEW YORK
DENVER
LOS ANGELES
LONDON

July 25, 1997

VIA HAND DELIVERY

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

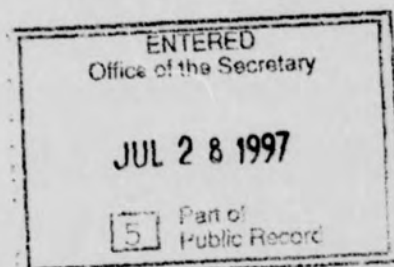


Re: Finance Docket No. 33388,
CSX Corporation and CSX Transportation, Inc.
Norfolk Southern Corporation and Norfolk
Southern Railway Company -- Control and
Operating Leases/Agreements -- Conrail Inc.
and Consolidated Rail Corporation

Dear Secretary Williams:

Enclosed are the original and 25 copies of CSX/NS-30, Applicants' Response in Opposition to the Appeal of American Electric Power, Atlantic City Electric Company, Delmarva Power & Light Company, and the Ohio Valley Coal Company from the Order of the Presiding Judge Restricting Discovery and Motion for Expedited Consideration (ACE, et al. - 6) for filing in the above-referenced proceeding. Also enclosed is a 3.5" diskette containing the document in WordPerfect format.

Please date-stamp and return the enclosed copy via our messenger.



Very truly yours,

A handwritten signature in cursive script that reads "Drew A. Harker".

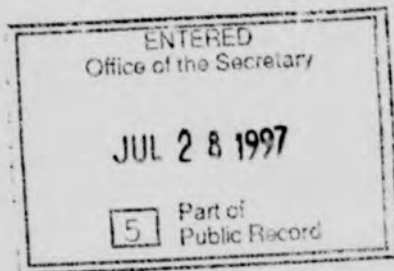
Drew A. Harker

Counsel for CSX Corporation
and CSX Transportation, Inc.

Enclosures

cc (w/Enclosure): Restricted Service List

180808



BEFORE THE
SURFACE TRANSPORTATION BOARD

FINANCE DOCKET NO. 33388



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

APPLICANTS' RESPONSE IN OPPOSITION TO THE APPEAL OF
AMERICAN ELECTRIC POWER, ATLANTIC CITY ELECTRIC COMPANY,
DELMARVA POWER & LIGHT COMPANY, AND
THE OHIO VALLEY COAL COMPANY FROM THE
ORDER OF THE PRESIDING JUDGE RESTRICTING DISCOVERY,
AND MOTION FOR EXPEDITED CONSIDERATION (ACE, ET AL.-6)

Applicants¹ hereby respond in opposition to the Appeal² of
American Electric Power,³ Atlantic City Electric Company,
Delmarva Power & Light, and The Ohio Valley Coal Company
(hereinafter "Appellants") seeking a reversal of the order of

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

² ACE, et al.-6, served on July 22, 1997.

³ As noted in their respective responses to Appellants' discovery requests, Applicants objected to the letter of July 15, 1997 by which counsel for Appellants, literally on the eve of the hearing for the motion to compel responses to discovery served on July 3, attempted to add American Electric Power to the discovery requests and motion. This last minute addition significantly expands the scope of the discovery requests and is inconsistent with the Board's rules and the Discovery Guidelines adopted by the Board in Decision No. 10.

Presiding Judge Leventhal addressing certain of Appellants' discovery requests.⁴

Appellants have failed to demonstrate that reversal of Presiding Judge Leventhal is in any way justified in order to correct "a clear error of judgment" or "to prevent manifest injustice," as required by the Board's decisions, regulations and precedent.

Appellants have submitted massively burdensome discovery requests which would require the production of virtually every document contained in the files of the coal marketing departments of all three railroads, as well as traffic tapes, for a twenty year period for virtually all shipments of coal.⁵ Appellants offered several unrelated, insufficient and contradictory rationales for why this information was necessary, but ultimately failed to make any showing of relevance that would justify the enormous burden imposed.

In response to Appellants' discovery requests, Applicants served five-day objections in accordance with Paragraph 16 of the Discovery Guidelines.⁶ In response to Appellants' Motion to

⁴ Decision No. 11, served July 18, 1997.

⁵ See ACE, et al.-2 (served July 3, 1997) (Conrail discovery request); ACE, et al.-3 (served July 3, 1997) (CSX discovery request); and ACE, et al.-4 (served July 3, 1997) (NS discovery request).

⁶ See CSX-9, (served July 11, 1997); NS-7, (served July 11, 1997); and CR-2, (served July 11, 1997). While Applicants also objected to certain of the other document requests and interrogatories served by Appellants, they were not required to, and did not, serve five-day objections to these other requests because they provided certain responsive information or documents.

Compel,⁷ and after considering the arguments of Appellants and Applicants at a hearing on July 16, 1997, ALJ Leventhal limited Appellants' requests. He required Applicants to produce documents concerning bids and related documents concerning coal movements as to locations of the Appellants on lines served by Conrail as a destination carrier for a selected time period.⁸ While still concerned about the breadth, burden and relevance, Applicants stand ready to comply with the terms of the Presiding Judge's order rather than appeal, and have already begun the process of identifying and gathering the documents.

Appellants assert that Applicants thereby acknowledged the relevance of such requests by not objecting within the five-day period. They are completely mistaken. Applicants' decision to provide interrogatory answers or requested documents is not an admission by them that such answers or documents are relevant, as plainly noted in the General Objections served with their discovery responses within the fifteen day period fixed by the Discovery Guidelines.

⁷ Motion of Atlantic City Electric Company, Delmarva Power & Light Company, and The Ohio Valley Coal Company to Compel Responses to Discovery (ACE et al.-5, served July 14, 1997).

⁸ See Decision No. 11, served July 18, 1997. The terms of the order require production of documents for the years 1995 through the first two quarters of 1997 for all three railroads, as well as the following years: 1978 through 1982 for CSX, 1980 through 1984 for NS, and 1988 through 1992 for Conrail. The earlier time periods were chosen at Appellants' urging to frame by two years on either side mergers or acquisitions involving each of the Applicants.

Appellants have submitted this appeal in an effort to reverse the Presiding Judge's order.⁹ Applicants respectfully request that this appeal be denied.

I. ARGUMENT

A. APPEALS ARE TO BE GRANTED ONLY IN EXCEPTIONAL CIRCUMSTANCES TO CORRECT A CLEAR ERROR OF JUDGMENT OR TO PREVENT MANIFEST INJUSTICE

The rules governing this proceeding and the Board's regulations make clear that appeals of decisions of the Presiding Judge are to be granted only in exceptional circumstances. Decision No. 6, served by the Board on May 30, 1997, states as follows:

Any interlocutory appeal to a decision issued by Judge Leventhal will be governed by the stringent standard of 49 C.F.R. 1115.1(c): "Such appeals are not favored; they will be granted only in exceptional circumstances to correct a clear error of judgment or to prevent manifest injustice."¹⁰

⁹ Appellants attach new affidavits by Drs. Alfred E. Kahn and Frederick C. Dunbar, and Mr. Thomas D. Crowley, in addition to the affidavits submitted as exhibits to their Motion to Compel. Applicants object to the use of the new affidavits on appeal, which expand the scope of review beyond the evidence which the Presiding Judge had an opportunity to consider. To the extent Appellants believe any new information is contained in the affidavits, such affidavits should properly have been submitted as part of a motion to reconsider before the Presiding Judge, not an appeal to the Board.

¹⁰ Decision No. 6, at 7 (quoting Union Pacific Corporation, Union Pacific Railroad Company and Missouri Pacific Railroad Company -- Control -- Chicago and North Western Transportation Company and Chicago and North Western Railway Company, Finance Docket No. 32133, Decision No. 17, at 9 (ICC served July 11, 1994)).

This standard is supported by the Board's and ICC's consistent precedents.¹¹

ALJ Leventhal exercised his proper discretion in imposing limits on the requested information. The Discovery Guidelines specifically require that parties seeking discovery "tailor [their requests] to be consistent with the procedural schedule adopted in the proceedings." Discovery Guidelines, ¶ 1. Because Appellants, by taking such a broad-brush discovery approach, failed to heed this requirement, ALJ Leventhal limited appellants requests accordingly. The Board should defer to Judge Leventhal's conclusion that Appellants' discovery request comport with the Guidelines.

The STB, and its predecessor, the Interstate Commerce Commission, have long recognized the potential for abuse of discovery, and have not hesitated to bar or limit overbroad discovery demands in similar situations.¹² Appellants have

¹¹ See, e.g., Union Pacific Corporation, Union Pacific Railroad Company and Missouri Pacific Railroad Company -- Control and Merger -- Southern Pacific Rail Corporation, Southern Pacific Transportation Company, St. Louis Southwestern Railway Company, SPCSL Corp., and the Denver and Rio Grande Western Railroad Company, Finance Docket No. 32760, Decision No. 40, (STB served June 13, 1996) (STB denying appeal by KCS of decision by ALJ because the "[t]he standard set out in section 1115.1(c) is a strict one."); Union Pacific Corporation, Union Pacific Railroad Company and Missouri Pacific Railroad Company -- Control -- Chicago and Northwestern Transportation Company and Chicago and North Western Railway Company, Finance Docket No. 32133, Decision No. 18, (ICC served July 18, 1994) (ICC affirming decision of ALJ under strict standard of review).

¹² See, e.g., Westinghouse Electric Corp. v. Alton & S. Ry. et al., 1 I.C.C.2d 182, 184 (1984) (ICC holding that it would "not sanction fishing expeditions for all of a carrier's movements.").

failed to carry their heavy burden of showing that the order constitutes clear error or will result in manifest injustice.

B. THE DOCUMENT REQUESTS AT ISSUE FAR EXCEED THE SCOPE OF RELEVANT DISCOVERY

Appellants claim that they need the massive volume of commercially sensitive pricing data that they have requested in order to allow them to test the Board's "one-lump" theory against the experience of the three Applicant railroads with respect to virtually all of their coal shipper customers over the last twenty years. They claim that the information they seek "is necessary to produce the data the Court of Appeals [in Western Resources v. Surface Transportation Board, 109 F.3d 782 (D.C. Cir. 1997) ("Western Resources")] believes is necessary to contradict the Board's theory frequently." Appellants' Appeal at 16-17 (emphasis in original).

Appellants have not offered any basis, however, for entitlement to such broad access to Applicants' coal marketing files and 100% traffic tapes. The one-lump theory is not even a relevant consideration for any of the Appellants other than Delmarva. Further, Delmarva does not need to gain access to the virtual entirety of each Applicants' coal marketing files or traffic tapes in order to satisfy its burden to rebut the one-lump theory as it applies to its traffic; that utility would already have in its own files whatever evidence it might need to challenge the applicability of the theory to its particular traffic.

1. Appellants Have No General Need for the Broad Fishing Expedition They Seek to Make into Applicants' Marketing Files

In Burlington Northern, Inc. and Burlington Northern Railroad Company -- Control and Merger -- Santa Fe Pacific Corporation and The Atchison, Topeka and Santa Fe Railway Company, F.D. 32549 (served August 23, 1995) (BN/Santa Fe), the Commission followed a long line of agency precedents in applying the one-lump theory as a framework for its analysis of claims by single-served entities that the vertical effects of a rail merger will unduly enhance the market power of the destination carrier in settings where two or more carriers can compete for the origin leg of a joint movement. See, e.g., Union Pacific Corp. -- Control -- Missouri K.T.R.R., 4 I.C.C.2d 409, 476 (1988) (UP/MKT), petition for review dismissed, 883 F.2d 1079 (1989), modified, 992 F.2d 742 (D.C. Cir. 1991); Union Pacific Corp. et. al -- Control -- Missouri Pacific Corp. et. al, 366 I.C.C. 459, 538 (1982); CSX Corp. -- Control -- Chessie System Inc. and Seaboard Coast Line Industries, Inc., 363 I.C.C. 521, 572-573 (1980). Consistent with widely-accepted economic theory that posits that vertical combinations are pro-competitive unless shown otherwise, the ICC long held that when a shipper is served by a single destination carrier, and that carrier can receive traffic from either of two origin carriers, the combination of one of the origin carriers with the destination carrier does not normally increase the market power to which the utility is subject because the destination carrier is already in a position

to maximize its "one lump" of profit. See UP/MP/WP, 366 I.C.C. at 538.¹³

Appellants claim that they intend to challenge the one-lump theory as a predictor of railroad behavior.¹⁴ They claim that they "do not believe the Board's [one-lump] theory correctly describes the way railroads set their rates" and argue that the requested documents "will shed light on whether the origin carriers are competing, whether the Applicants in fact analyze the market the way the [one-lump] theory predicts, and, if there is origin competition, whether the origin carriers are willing to accept the rate the theory predicts they will." Appellants'

¹³ Thus, the theory holds that there is no basis to conclude that the end-user will be harmed by integration of an origin carrier and a destination carrier because the destination carrier is in a position to capture the entire monopoly rent. Western Resources, 109 F.3d at 787 (citing Philip Areeda & Donald F. Turner, 3 Antitrust Law ¶ 725b, at 199 (1978)). As discussed further below, three of the four Appellants do not face a situation that even implicates the one-lump theory because they are not facing the circumstance where the railroad serving the facilities at issue is replacing one of the origin carriers.

¹⁴ At the July 16 hearing on their Motion before Judge Leventhal, Appellants' counsel was frank about his intentions here:

The Board, frankly -- I'll be very frank with you, and I'll put this on the record -- they've used this theory for 15 years to deny shippers relief in merger proceedings, and I've decided for the first time to challenge it, and we're going to see whether the Board is open to providing relief to shippers.

And they've used this theory as a trap door to avoid giving shippers relief. I can't let them pull the trap door on me again.

Appeal at 13, 18.¹⁵ Appellants are thus embarked on an effort to broadly review rail pricing policies in the hope that they may find something in the hundreds of thousands of documents requested that will enable them to argue that the one-lump theory does not generally apply to rail transportation.¹⁶

In attacking the applicability of the one-lump theory to rail transportation, Appellants bear a heavy burden. Few economic principles relevant to railroad pricing have become more firmly settled. The principle been endorsed and applied by the ICC in every railroad consolidation in recent years and was squarely approved by the D.C. Circuit in Western Resources, which recognized that the theory has been "consistently applied" to railroad transportation. See Western Resources, 109 F.3d 782, 787 (D.C. Cir 1997).¹⁷

¹⁵ Similarly, Appellants' economists state that the assumptions underlying the one-lump theory may not apply to rail transportation (Supplementary Kahn/Dunbar Affidavit, July 21, 1997 at 3-5) and that they need the data to test the applicability of the one-lump theory to rail pricing generally (Crowley Affidavit, July 21, 1997 at 4-5).

¹⁶ Appellants do not challenge the one-lump theory as an economic model, and their consultants acknowledge that the theory "applies to any situation in which a shipper uses a rail route at least one link of which is a bottleneck." Supplementary Kahn/Dunbar Affidavit at 2. What they apparently question is the applicability of the theory to particular circumstances.

¹⁷ See STB Finance Docket No. 32760, Union Pacific Corporation, Union Pacific Railroad Company, and Missouri Pacific Railroad Company -- Control and Merger -- Southern Pacific Rail Corporation, Southern Pacific Transportation Company, St. Louis Southwestern Railway Company, SPCSL Corp., and The Denver and Rio Grande Western Railroad Company, Decision No. 44, served August 12, 1996, slip op. at 191 (denying all relief requested by International Paper Company which had argued, in part, that the one lump theory did not apply to certain movements); ICC Finance Docket No. 32549, Burlington

In their effort to re-litigate the applicability of the one-lump theory to rail transportation, Appellants must convincingly demonstrate that the burden imposed by their discovery is justified by any benefit the Appellants may derive from the discovery.¹⁸ Appellants cannot meet that burden because the data that they have requested would not allow them to test the applicability of the one-lump theory to rail pricing either in general terms or in any specific case. The key inquiry in any such challenge is whether the rates that the destination carrier charges exploit a specific shipper's demand for the traffic at

Northern Inc. and Burlington Northern Railroad Company -- Control and Merger -- Santa Fe Pacific Corporation and The Atchison, Topeka and Santa Fe Railway Company, ("BNSF"), Decision No. 42, served November 16, 1995, 1995 ICC LEXIS 291 *6-*7 (affirming in relevant part Decision No. 38); BNSF, Decision No. 38, served August 23, 1995, slip op. at 70-79 (citing and discussing CSX Corp. - Control - American Commercial Lines, Inc., 2 I.C.C.2d 490, 572-73 (1984); Norfolk Southern Corp - Control - North American Van Lines, Inc., 1 I.C.C.2d 842 (1985); CSX Corp. - Control - Chessie and Seaboard C.L.I., 363 I.C.C. 518, 567-573 (1980); Union Pacific - Control - Missouri Pacific; Western Pacific, 366 I.C.C. 462, 533-546 (1982); Chicago, Milwaukee, St. Paul and Pacific Railroad Company -- Reorganization -- Acquisition by Grand Truck Corporation, 2 I.C.C.2d 427, 454-456 (1985); ICC Finance Docket No. 32133, Union Pacific Corporation, Union Pacific Railroad Company and Missouri Pacific Railroad Company - Control - Chicago and North Western Transportation Company and Chicago and North Western Railway Company, served March 7, 1995, slip op. at 87-89; Union Pacific Corp., et al. - Control - Missouri-Kansas-Texas Company, et al., 4 I.C.C.2d 409, 476 (1988).

¹⁸ See, e.g., The Bridgeport and Port Jefferson Steamboat Co., Extension -- Connecticut and New York Points (New York, NY), No. W-271 (Sub No. 4), 1987 ICC LEXIS 489 at *7-*8 (Jan. 5, 1987) ("Even in an 'age of discovery run riot,' we are not required to allow a 'dragnet, expensive exercise of discovery' upon demand . . . Here, the burden of production of the requested material on applicant would be great and the benefit to be derived from ordering production is doubtful. The motion to compel will be denied.")

issue. Thus, for any challenge to the applicability of the one-lump theory to rail transportation to succeed, it must be based on a particular shipper's experience, including the elasticity of demand for that shipper's traffic. The Applicants' files would not disclose this; only the particular coal shipper would have this information. For that simple reason, providing the Appellants with virtually unlimited access to all or most of Applicants' coal marketing files for virtually all their coal customers, and placing the substantial associated burdens of reviewing and producing these files on Applicants, would not serve the end Appellants profess to seek with their discovery.¹⁹

Appellants offer no viable alternative theory to show (contrary to the logic of the one-lump theory) that railroads do not seek to maximize their economic advantage. Also, Appellants do not explain how the data they seek would allow them to test the various assumptions underlying the one-lump theory that their consultants have identified.²⁰

Instead, Appellants claim that the Commission's decision in BN/Santa Fe, affirmed by the D.C. Circuit in Western Resources, leaves them no choice but to review the marketing files of each

¹⁹ Without doubt, outside counsel and consultants for the Appellants, who regularly represent utilities in rail transportation cases before the Board, (and often in contract negotiations) would enjoy the opportunity to gain virtually open access to the coal marketing files of these three railroads. However, any discovery that they seek in this case must of course, be limited to issues relevant to this case.

²⁰ See Supplementary Kahn/Dunbar Affidavit at 3; Appeal at 14.

Applicant for virtually all of Applicants' coal shippers.

Appellants, however, grossly misread these decisions.

Nothing in the BN/Santa Fe or Western Resources holdings even remotely hints at the proposition, relied on by Appellants, that now the one-lump theory can only be rebutted by evidence derived from an across-the-board review of railroad marketing files wholly unrelated to the entity seeking the imposition of a protective condition. Thus, in BN/Santa Fe, which expressly relied on the Commission's prior analyses of vertical competition issues, the Commission quoted the two-part test as set forth in UP/MKT and observed that, "to qualify for relief, we have required an affirmative showing that a specific utility was able to obtain the real benefits from origin competition even though it was served exclusively by one carrier at the destination." BN/Santa Fe at 71 (emphasis added). Contrary to the Appellants' contrived arguments, the Commission did not hold that evidence from a shipper's own files can never be sufficient to rebut the one-lump theory and it certainly did not hold that in any future case a shipper seeking to satisfy its burden of rebutting the theory must first seek all pricing files from railroads, including those that relate to all other coal shippers and receivers, whether or not they faced a bottleneck situation. Rather, the Commission carefully reviewed the evidence adduced by the specific utilities seeking relief and found that none "has presented convincing evidence" that the benefits of origin competition were passed along to them. BN/Santa Fe at 76-78.

In affirming the BN/Santa Fe decision, Western Resources did not license the virtually unlimited discovery Appellants seek, or even address discovery issues at all. The Court's holding cannot fairly be read to suggest that the rebuttal evidence offered by the utilities in BN/Santa Fe was insufficient because it did not address the experience of other utilities or because it was not derived from railroad files. Instead, the Court agreed with the Commission that the specific evidence offered by the utilities was unpersuasive because it showed behavior that in fact could be explained as being fully consistent with the one-lump theory. Western Resources, 109 F.3d at 791 (concluding that evidence of rail pricing behavior adduced by utilities "is consistent with the one-lump theory").

In sum, Appellants have not met their burden. This is, after all, a control proceeding, and not an inquisition into the ratemaking practices of the Applicant railroads.²¹ If Appellants are entitled to any relief here, that entitlement will turn narrowly on how the transaction at issue will effect the

²¹ Appellants also appear to argue that they wish to conduct a comprehensive retrospective analysis of the history of Applicants' pricing of coal traffic before and after the last mergers of CSX and NS in the early 1980's. See, e.g., July 21 Affidavit of Crowley at 4. Their document requests, however, are grossly overbroad in reference to that alternative rationale in that they call for all bids and any related documents from each Applicant to virtually every destination to which they shipped coal, not only for the years after the other Applicants' mergers but for destinations far from their merging parties' lines. Of course, testing how other mergers might have impacted bids is far beyond the scope of this case. Further, Appellants have other avenues of relief available to them if they believe that rates are unreasonably high; that is not an issue for this control proceeding.

specific situation that each Appellant faces, and not on how these three railroads have bid on coal traffic over the course of the last twenty years; what the files at issue might reveal to Appellants would not help Appellants satisfy their burden. Judge Leventhal's ruling recognizes that the reach of the discovery at issue far exceeds the issues in this case and properly allows Appellants to explore only those coal marketing files and traffic tape data that might arguably be relevant (because it relates to Appellants).²²

2. Appellants Have Shown No Particular Need for the Fishing Expedition They Seek To Make Into Applicants' Marketing Files

Appellants' arguments are particularly misplaced in light of the fact that they have not shown how granting them access to virtually all of Applicants' coal marketing files, and broad access to twenty years worth of traffic tapes, would allow them to fashion arguments under the one-lump theory. Three of the four Appellants do not even have a credible vertical integration

²² Moreover, even if the applicability of the one-lump theory to rail transportation were open to refutation as a general proposition, much of the data that the Appellants seek would be of negligible probative value, at best. It is difficult to see how railroad bids for particular coal movements would disprove the theory given the substantial changes to the regulatory environment that have occurred over the past 19 years. Notably, the Staggers Rail Act of 1980, Pub. L. No. 96-448, 94 Stat. 1895 (1980), vastly changed the regulatory structure by allowing bilateral contracts and the ICC changed its approach to regulation of coal rates in 1985. See Coal Rate Guidelines, Nationwide, 1 I.C.C.2d 520 (1985). Further, the manner in which Applicants have bid on coal transportation as to which the one-lump theory has no application would not advance any legitimate goal of the Appellants. Nonetheless, their "meat-axe" document requests would capture a multitude of files as to which the theory can have no application.

concern at all and the fourth (Delmarva) does not need to explore the files and tapes relative to other utilities to put forward its case.

Appellant Atlantic City Electric is now served exclusively by Conrail and, were the Application approved, would be served by both NS and CSX, at origin and destination, due to its location in the South Jersey/Philadelphia Shared Assets Area. Thus, that utility will experience enhanced competitive options at destination were the Application approved, hardly a basis for allowing that utility's outside lawyer and consultant access to highly confidential pricing and marketing information for hundreds of other utilities.

Appellant Ohio Valley is not a utility, but rather provides coal, as relevant, to a non-Appellant utility that is now served by Conrail and that, post-acquisition, would be served by NS at origin and CSX at destination. That mine is not in a position to challenge or rebut the one-lump theory, which simply does not extend to its situation.

Appellant American Electric also does not appear to face an Acquisition-related vertical competition issue. Its Conrail-served facilities (including those served by a combination of Conrail and barge) each obtain their coal from Conrail-served mines. The Acquisition will serve to substitute CSX and/or NS for Conrail, but will not reduce or eliminate origin point competition that exists today. Thus, this utility's situation does not implicate the one-lump theory.

Only Appellant Delmarva is, arguably, in a position to even be concerned with the one-lump theory -- it is now served by Conrail at destination and CSX and NS serve at the origin coal fields; post-acquisition, it will be served at destination by NS. Delmarva might thus argue in this proceeding that, as applied to its traffic, the one-lump theory should not apply. To sustain this argument, Delmarva needs only the data required to meet the well-established two-part test for rebutting the applicability of the theory to a particular circumstance:

[T]he record must clearly show the following in order for a nonmerging carrier to qualify for a grant of trackage rights to a utility over the line of the destination monopoly carrier. First, it must show that, prior to the merger, the benefits of origin competition flowed through to the utility and were not captured by the destination monopoly carrier. Second, if it is established that the benefits of origin competition are in fact passed on to the utility, there must be an additional showing that such a competitive flow-through will be significantly curtailed by the merger.

BN/Santa Fe at 71; UP/MKT, 4 I.C.C.2d at 476. The inquiry under this two-part test is utility-specific and of necessity focused on the experience of the single-served entity that claims the benefit of origin competition.

Delmarva claims that it obtains the benefit of origin competition today and thus that it can satisfy the first part of the two-part test. To prove that claim or to satisfy the second part of the test, Delmarva certainly does not need information from each Applicant on bids they have made to hundreds of other utilities and mines over the last twenty years. Instead, it

needs only information it already has -- including the bids made to it, the rates charged to it and, just as important, its alternatives for sourcing coal and/or electricity. In other words, Delmarva already knows whether or not it has a basis for arguing that Conrail misjudged Delmarva's willingness to pay by charging too little so that NS could (assuming approval of the Application) raise Delmarva's rates. In fact, Delmarva acknowledged in Appellants' July 14 Motion to Compel that it has information showing "that Delmarva has been able to use competition between CSX and Norfolk Southern to lower the price for transporting its coal . . . [and] has reaped the benefit of this competition among origin carriers." Motion to Compel at 9-10.

Under settled precedent, Delmarva could never be entitled to relief in the form of a protective condition unless it could show at a minimum that the acquisition will result in some competitive harm to it, e.g., that it will lose the benefit of competition that it now receives. BN/Santa Fe at 70-73. Thus, under that precedent, neither Delmarva nor any of the other Appellants would be entitled to relief even if the Appellants could show, upon review of the massive files they seek, that in some cases involving other utilities the assumptions underlying the one-lump theory do not apply. Since they would not be entitled to relief regardless of how Conrail, CSX or NS have bid on other traffic over the last twenty years, they have no basis for sustaining

their broad document requests for files containing such bids and related information or for all traffic tapes.

Judge Leventhal's ruling allows the Appellants access to more information than they need. Thus, Appellants have no basis on which to complain that they cannot meet their burden under settled precedent.

C. IN FORMULATING THE ORDERED DISCOVERY LIMITATION, ALJ LEVENTHAL PROPERLY WEIGHED THE APPLICANTS' BURDEN IN PRODUCING THE REQUESTED MATERIALS AGAINST THE BENEFIT OF THAT MATERIAL TO APPELLANTS

The Surface Transportation Board and its predecessor have recognized that discovery should not be permitted when the burden of producing the requested material outweighs the benefit to be derived from the material by the requesting party. Courts, too, have recognized this principle in applying Rule 26 of the Federal Rules of Civil Procedure. See, e.g., Aramburu v. The Boeing Co., 885 F. Supp. 1434, 1444-1445 (D. Kan. 1995) (sustaining objection to document production because limited value of requested material was disproportionate to substantial burden of producing it).

The volume of documents conceivably encompassed by Appellants' Document Requests is simply enormous.²³ Indeed, in

²³ The discovery sought by Appellants "would require the production of virtually every document in CSX's files relating to bids for the movement of coal, the single largest commodity carried by CSX, over a nineteen year period. The discovery request would require the production of hundreds of thousands of potentially responsive pages from various CSX sites. . . ." CSX's Response in Opposition to the Motion of Atlantic City Electric Company, Delmarva Power and Light, and The Ohio Valley Coal Company to Compel Responses to Discovery at 2.

this regard, the discovery requests at issue here go far beyond "fishing"; they are "an effort 'to drain the pond and collect the fish at the bottom.'" Amcast Indus. Corp. v. Detrex Corp., 138 F.R.D. 115, 121 (N.D. Ind. 1991) (quoting In Re IBM, 77 F.R.D. 39, 41-42 (N.D. Cal. 1977)).

Appellants claim that Applicants' concerns regarding the burden attached to Document Requests 1 and 2 are "easily answered" by their offer to travel to Applicants' offices to examine the subject files in person. Appellants' Appeal at 22. This is hardly an "easy answer", and is clearly unacceptable. These files almost certainly contain information not responsive to the document requests and not relevant to the proceeding, as well as responsive documents that are protected by privilege.

In the case of NS, Requests 1 and 2 would require NS to search over 90 files cabinets -- which could take NS employees over 800 man-hours to review simply to identify potentially responsive documents, not to mention the time required for counsel to review for privilege and confidentiality. Norfolk Southern's Response to Atlantic City Electric Company, Delmarva Power and Light Company, and the Ohio Valley Coal Company ("NS Responded") at 9. A thousand additional hours is likewise involved for Request 3 seeking 100% traffic tapes. Id.

Appellants erroneously conclude that in regard to the production of 100% traffic tapes for over 20 years, "there is no burden here." Appellants' Appeal at 23. In fact, as stated in NS's Response at 9 and at the July 16th hearing, Tr. at 105-107, the production of these traffic tapes, whose probative value is at best questionably marginal, would place an enormous burden on NS.

As to Conrail, "[c]oal constitutes one of Conrail's most important categories of business . . . [Coal] files include hundreds of contracts and thousands of documents relating to them not only bids and related documents, but other documents relating to matters other than bids, such as day-to-day service issues." Conrail's Reply to Motion to Compel of Atlantic City Electric Company, Delmarva Power & Light Company, and The Ohio Valley Coal Company at 8.

The burden of this production lies not only in locating and identifying responsive documents, but also in reviewing these massive documents for confidentiality and privilege.

Appellants' "easy answer" likewise fails to acknowledge the fact that the requested files contain highly sensitive shipper information which the Applicants have an obligation to protect under 49 U.S.C. § 11904 (prohibiting disclosure of certain information to persons other than the shipper or consignee without the consent of the shipper or consignee). See also, STB Docket No. 41687, Grainland Cooper v. Canadian Pacific Limited and Soo Line Railroad Company d/b/s/ CP Rail System, served June 9, 1997, appeal pending, (holding that neither the Board nor the Administrative Law Judge has the jurisdiction to require that information protected by § 11904 be released). In addition, in some instances these documents may be subject to contractual confidentiality provisions between the shipper and the railroad.

Appellants readily admits that "[t]his is a burdensome discovery request" (Tr. at 31) but now ask the Board to set aside ALJ Leventhal's exercise of his discretion in applying the Discovery Guidelines and weighing the burden of producing the requested material against the benefit of that material to Appellants. After hearing extensive argument from Appellants' counsel on the need to obtain the requested material in its totality, and argument from Applicants' counsel on the burden involved in producing the requested material, ALJ Leventhal held:

. . . [i]n the question of discovery, you have to weigh the burden against the need to

know. I feel that keeping that in mind, you need to know is limited to the competition for business involving each of these railroads, involving the shippers before and after the mergers that you have put on the record. So I'm going to order the time frame to be limited to 1978 to 1982 for CSX; 1980 to 1984 for Norfolk Southern; and 1988 to 1992 for Conrail.

Tr. at 87. ALJ Leventhal further ruled that production subject to the Appellants' Motion to Compel would encompass the years 1995, 1996 and the first two quarters of 1997 relating to Appellants destinations currently served by Conrail which either CSX or NS would serve after the proposed acquisition. Tr. 101

ALJ Leventhal in formulating the ordered discovery limitation properly weighed the burden that would be placed upon the Applicants in producing the requested material against the benefit of that material to Appellants. No "clear error of judgment" or "manifest injustice" has been demonstrated that would warrant a reversal of the decision.

CONCLUSION

For all of the above-stated reasons, the Appeal from the Order of the Presiding Judge should be denied.

Respectfully submitted,

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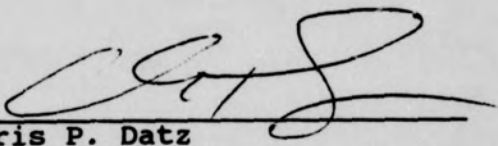
Counsel for Conrail Inc. and
Consolidated Rail Corporation

CERTIFICATE OF SERVICE

I, Chris P. Datz, certify that on July 25, 1997 I caused to be served by facsimile service a true and correct copy of the foregoing CSX/NS-30, Applicants' Response in Opposition to the Appeal of American Electric Power, Atlantic City Electric Company, Delmarva Power & Light Company, and the Ohio Valley Coal Company from the Order of the Presiding Judge Restricting Discovery and Motion for Expedited Consideration (ACE, et al. - 6) on all parties that have submitted to the Applicants a Request to be Placed on the Restricted Service List in STB Finance No. 33388 and by hand delivery on the following:

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

Office of the Secretary
Case Control Unit
Attn: STB Finance Docket 33388
Surface Transportation Board
1925 K Street, N.W.
Washington, D.C. 20423-0001


Chris P. Datz

July 25, 1997.

STB

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7-25-97

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180807

CRL-1

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



NOTICE OF INTENT TO PARTICIPATE

Please enter the appearance of the undersigned on behalf of the Chicago Rail Link, L.L.C. ("CRL"), which intends to participate and become a party of record in this proceeding. Service of all documents filed in this proceeding should be made upon the undersigned.



Respectfully submitted,

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Attorneys for:
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Dated: July 25, 1997

CERTIFICATE OF SERVICE

I hereby certify that on this 25th day of July, 1997. I caused a copy of the foregoing Notice of Intent to Participate to be served by first class mail, postage prepaid, on the following parties:

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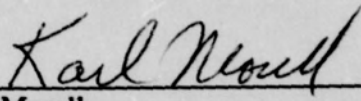
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Karl Morell

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7-25-97

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BEFORE THE
SURFACE TRANSPORTATION BOARD

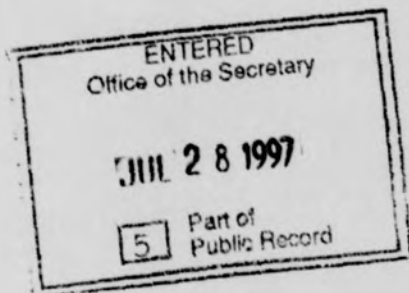
STB FINANCE DOCKET NO. 33388



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

NOTICE OF INTENT TO PARTICIPATE

Please enter the appearance of the undersigned on behalf of the Georgia Woodlands Railroad, L.L.C. ("GWR"), which intends to participate and become a party of record in this proceeding. Service of all documents filed in this proceeding should be made upon the undersigned.



Respectfully submitted,

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Attorneys for:
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RAILROAD, L.L.C.

Dated: July 25, 1997

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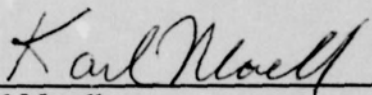
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7-25-97

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NSR-1

BEFORE THE

SURFACE TRANSPORTATION BOARD

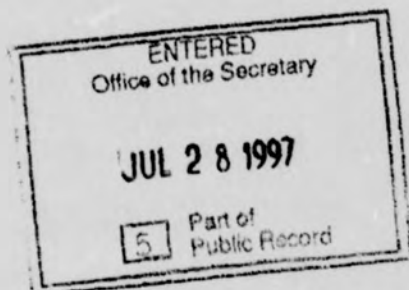
STB FINANCE DOCKET NO. 33388

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



NOTICE OF INTENT TO PARTICIPATE

Please enter the appearance of the undersigned on behalf of the Newburgh & South Shore Railroad, Ltd. ("NSR"), which intends to participate and become a party of record in this proceeding. Service of all documents filed in this proceeding should be made upon the undersigned.



Respectfully submitted,

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Attorneys for:
NEWBURGH & SOUTH SHORE
RAILROAD, LTD.

Dated: July 25, 1997

CERTIFICATE OF SERVICE

I hereby certify that on this 25th day of July, 1997. I caused a copy of the foregoing
Notice of Intent to Participate to be served by first class mail, postage prepaid, on the
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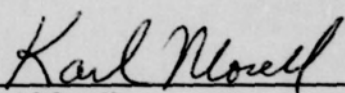
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BEFORE THE
SURFACE TRANSPORTATION BOARD

STB FINANCE DOCKET NO. 33388

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

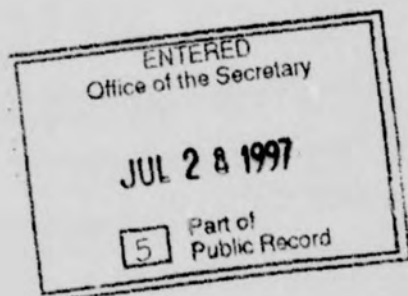


NOTICE OF INTENT TO PARTICIPATE

Please enter the appearance of the undersigned on behalf of the Northern Ohio & Western Railway, L.L.C. ("NOWR"), which intends to participate and become a party of record in this proceeding. Service of all documents filed in this proceeding should be made upon the undersigned.

Respectfully submitted,

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Attorneys for:
NORTHERN OHIO & WESTERN
RAILWAY, L.L.C.

Dated: July 25, 1997

CERTIFICATE OF SERVICE

I hereby certify that on this 25th day of July, 1997. I caused a copy of the foregoing Notice of Intent to Participate to be served by first class mail, postage prepaid, on the following parties:

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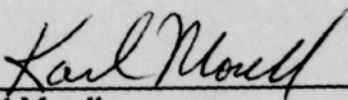
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TELEPHONE 202-638-3307
FACSIMILE 202-783-6947

KARL MORELL

kmorell@bjllp.com

July 25, 1997

VIA HAND DELIVERY

The Honorable Vernon A. Williams
Secretary
Surface Transportation Board
1925 K Street, N.W., Suite 600
Washington, DC 20423-0001



Re: STB FINANCE DOCKET NO. 33388, CSX CORPORATION AND CSX
TRANSPORTATION INC., NORFOLK SOUTHERN CORPORATION
AND NORFOLK SOUTHERN RAILWAY COMPANY --CONTROL
AND OPERATING LEASES/AGREEMENTS-- CONRAIL INC. AND
CONSOLIDATED RAIL CORPORATION

Dear Secretary Williams:

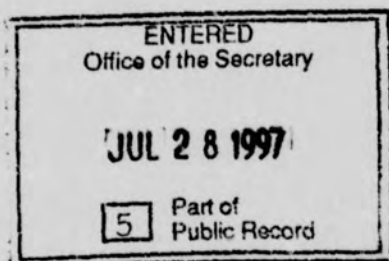
Enclosed for filing in the above-captioned matter are the original and twenty five (25) copies of the Notice of Intent to Participate of the Georgia Woodlands Railroad, L.L.C., Chicago Rail Link, L.L.C., Manufacturers' Junction Railway, L.L.C., Northern Ohio & Western Railway, L.L.C., and Newburgh & South Shore Railroad, LTD.

Please time and date stamp the extra copy of each of the pleadings and return them with our messenger.

If you have any questions, please contact me.

Sincerely yours,

Karl Morell



180801

MJ-1

BEFORE THE
SURFACE TRANSPORTATION BOARD

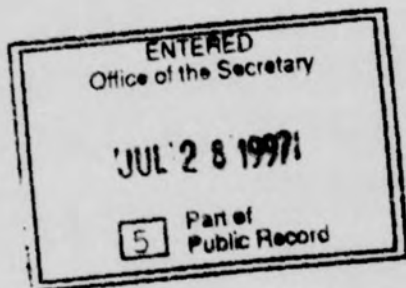
STB FINANCE DOCKET NO. 33388



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

NOTICE OF INTENT TO PARTICIPATE

Please enter the appearance of the undersigned on behalf of the Manufacturers' Junction Railway, L.L.C. ("MJ"), which intends to participate and become a party of record in this proceeding. Service of all documents filed in this proceeding should be made upon the undersigned.



Respectfully submitted,

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Dated: July 25, 1997

CERTIFICATE OF SERVICE

I hereby certify that on this 25th day of July, 1997. I caused a copy of the foregoing Notice of Intent to Participate to be served by first class mail, postage prepaid, on the following parties:

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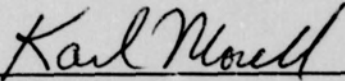
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