

STB

FD

33388

10-31-97

D

183655



Argeo Paul Cellucci  
Governor

Patrick J. Moynihan  
Secretary and MBTA Chairman

183655  
*The Commonwealth of Massachusetts*  
*Executive Office of Transportation and Construction*  
*Ten Park Plaza, Boston MA 02116-3969*

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



FD-33388 ~~33388~~

October 31, 1997

Dear Sir or Madam:

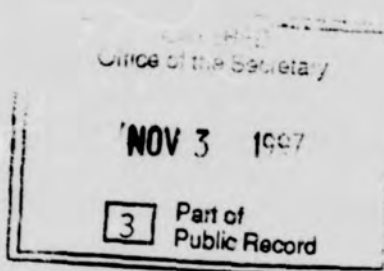
Enclosed for filing are the original and twenty-five copies of the "Comments and Request for Conditions by Commonwealth of Massachusetts." Also enclosed is a 3.5" diskette containing the Description formatted for WordPerfect 6.1 which can be converted to WordPerfect 7.0.

Would you please date-stamp and return the extra copy of this document to the messenger?  
Thank you very much for your assistance.

Sincerely,

*J. Cirame*

John D. Cirame  
Deputy General Counsel  
for the Commonwealth of  
Massachusetts Executive  
Office of Transportation  
and Construction



Enclosures



BEFORE THE SURFACE TRANSPORTATION BOARD

---

FINANCE DOCKET NO. 33388

Sub 86

---

CSX Corporation and CSX Transportation, Inc.  
Norfolk Southern Corporation and Norfolk Southern Railway  
-Control and Operating Leases/Agreements-  
Conrail Inc. and Consolidated Rail Corporation

COMMENTS AND REQUEST FOR CONDITIONS BY  
COMMONWEALTH OF MASSACHUSETTS

SUMMARY OF POSITION

The Commonwealth of Massachusetts ("The Commonwealth") supports, for the reasons set forth below, the approval of the partition of Conrail by CSX and NS as outlined in their joint application but conditioned upon fulfillment of the agreed upon stipulations reached by the Commonwealth of Massachusetts with CSX Corporation and its subsidiaries. The Commonwealth requests that the Board retain jurisdiction over the proposed transaction for the specific purpose of confirming the fulfillment of these stipulations within a reasonable time frame, but not less than three years nor more than five years after the effective date of approval.

BACKGROUND

In August the Commonwealth filed a Description of Responsive Application with the Surface Transportation Board which highlights the public interest concerns of the Commonwealth.

The Commonwealth recognizes that the proposed control of Conrail by CSX and NS will enhance certain railroad service opportunities throughout the eastern United States. These enhancements will benefit shippers, industries and businesses, and communities through the delivery of cost effective freight services.

In the case of Massachusetts, however, the proposed transaction simply replaces Conrail service with service by CSX. The apparent impact to Massachusetts is the status quo, but this places the Commonwealth and its business community at a disadvantage when compared to other regions formerly served only by Conrail which will now enjoy competitive freight service by two (or more) class one railroad companies.

CSX will also assume the rights, duties and obligations of Conrail under terms of trackage rights agreements with the Massachusetts Bay Transportation Authority ("MBTA"). These agreements impact on the operation of commuter rail services over Conrail owned properties, and the operation of freight services over MBTA owned properties. Additionally, the integration and coordination of such services has important public safety implications.

The Commonwealth, acting through its Executive Office of Transportation & Construction, has addressed these concerns to representatives of CSX. The Commonwealth has found a serious lack of specificity in the joint filing with respect to passenger and commuter operations as well as a lack of adequate justification for the failure to include the Boston metropolitan area among those receiving dual class one rail service.

#### AGREEMENTS REACHED BY THE COMMONWEALTH AND CSX

CSX has demonstrated a serious commitment to address the concerns raised by the Commonwealth and has agreed, with its subsidiary companies, CSXT, CSXI and Sea-Land, to the following conditions:

##### Economic Issues

1. Immediate resumption of multi-party negotiations to reach accord on the Master Agreement required by the Seaport Act, Section 29, pertaining to Doublestack clearance improvements, and a commitment by CSX to provide funding for its share of the improvements on a timely basis following successful completion of negotiations.
2. CSX, Sea-Land and Massport will cooperate in collective efforts to substantially reduce costs of doing business at the Port of Boston while concurrently improving labor flexibility and stability. Sea-land, as a subsidiary of CSX, agrees to maintain current vessel services in the Port of Boston until at least 2001 provided that labor stability exists and Sea-Land's Vessel Sharing Agreement continues to operate. Sea-Land also agrees to immediately commence substantive discussions with Massport regarding the addition of Boston to its trans-Suez Asian service. Sea-Land also agrees to immediately commence substantive discussions with Massport regarding the movement of additional intermodal cargo through the Port of Boston.
3. CSX commits to engage in discussions with EOTC and MassPike about long and short term strategies pertaining to development potential in the Allston-Brighton section of Boston. These strategies relate to the functional use of Beacon Park rail yard and will be consistent with CSX freight requirements. Consistent with its transaction agreements, and limitations on control of Conrail under Federal law, CSX will support the prompt opening (or continuation) of discussions with Conrail regarding possible interim measures related to this matter. This commitment recognizes that CSX succeeds to Conrail's perpetual rights at this location.



4. CSX agrees to work equitably with short line and regional railroads currently connected to those Conrail lines that CSX will operate in a good-faith effort to resolve service and interchange issues, and to develop mutually acceptable commercial agreements. The Commonwealth expects that such efforts will produce a reasonable rate structure to rail customers served by CSX or its connecting carriers.

5. After STB approval of the joint CSX/NS application for control of Conrail, CSX agrees to perform an adequate maintenance effort on all lines currently operated by Conrail in the Commonwealth. Consistent with its transaction agreements and limitations on control of Conrail under Federal law, CSX will urge Conrail to continue to maintain and serve all branch lines up to the date of CSX assumption of service, in compliance with applicable FRA safety rules, standards and regulations.

### **Passenger and Freight Operations Issues**

1. After STB approval of the joint CSX/NS application for control of Conrail, CSX will continue dispatching of the Boston Main line from Conrail's current facilities at Selkirk, New York. CSX agrees not to relocate that dispatching function without giving a minimum of six months prior notice to MBTA and will consult with the MBTA regarding a relocation decision. CSX will permit the MBTA (and its contract operator) to obtain adequate technical information to monitor the dispatching function of commuter operations over the Boston Main Line. CSX acknowledges statutory, contractual and safety related requirements and considerations regarding the priority of passenger trains over freight trains. CSX will strive to achieve maximum on time performance standards (OTP) for the involved services. Weather related delays excepted, CSX will strive for an OTP of at least 96% for passenger operations on the Boston Main Line. CSX and MBTA will establish a clearly defined line of communication between MBTA and the dispatching office responsible for the Boston Main Line, which will facilitate prompt response to MBTA service needs.

2. CSX agrees to honor Conrail's existing contractual obligations to MBTA as to maintenance, staffing, and passenger train OTP. CSX also acknowledges existing contractual requirements as to the need to seek MBTA's prior approval of maintenance activities, and to the need to consult with the MBTA to minimize the effects of such activities on passenger train OTP.

3. After approval of the CSX/NS joint application for control of Conrail, CSX agrees to discuss with the MBTA extensions of commuter rail services. Consistent with its transaction agreements and limitations of control of Conrail under Federal law, CSX will support the prompt opening of discussions between MBTA and Conrail regarding interim measures in these matters. Notably, service extensions to Fall River and New Bedford, via the Conrail owned branch lines, will be explored with total flexibility of options as to funding, ownership and operation. Any new passenger rail service over CSX property will be developed consistent with the following CSX principles:

a) Adherence to all applicable federal and AAR industry railroad safety laws, regulations, rules and standards;

b) The importance and necessity for growth and increasing reliability of rail freight service throughout the CSXT network, including Massachusetts branchlines;

c) No CSXT direct or indirect subsidy of passenger rail operations;

d) A level of tort liability indemnity and/or insurance acceptable to CSXT and taking into account federal and state law for those areas of rail operation under the control of CSXT.

4. Following STB approval of the joint CSX/NS application for control, CSX agrees to discuss with MBTA resolution of issues of ownership and operations, especially concerning the Grand Junction Branch and the Foxboro special service trains. Consistent with limitations of law, CSX will support the prompt opening (or continuation) of discussions with Conrail in these matters.

#### HARM TO PUBLIC INTEREST ABSENT AGREEMENT

The Commonwealth believes that the transaction as proposed could cause economic harm to businesses in Massachusetts which rely on rail freight transportation services, and has the potential to disrupt the safe and efficient operation of passenger services within the Commonwealth. This belief is based on expert review of the application, and the facts presented therein which demonstrate unequivocally that economic development and growth are fostered by having competitive service by two or more class one railroads. The lack of specificity in the application with respect to passenger rail services within the Commonwealth leaves open important operational concerns.

CSX has agreed to certain conditions, outlined above, which, if implemented, will bring about economic balance and enhance passenger and freight operational coordination.

#### THE TRANSACTION IS UNIQUE

The Commonwealth urges the Board to consider the unique history of the Conrail property, the role which the federal and state governments had in the creation of Conrail, and the compromises made to preserve freight services some twenty one years ago. The provision of cost effective, competitive freight rail service, and the delivery of safe passenger services are critical components of Massachusetts's transportation policy. Therefore, the oversight sought herein seeks to assure that the public interests mandated by the Board are met in a timely and effective manner.

COMPLIANCE AND REVIEW IS FEASIBLE AND NOT BURDENSOME

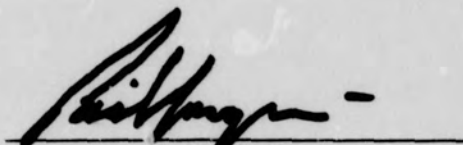
The retention of jurisdiction by the Board to oversee the public interest issues raised by the Commonwealth is reasonable, and will impose no economic burden on the parties to the transaction. The Commonwealth believes that the agreements reached with CSX are mutually beneficial, and will enhance the public benefits of the transaction.

SUMMARY

The Commonwealth respectfully requests the Board to retain jurisdiction over the transaction, to provide for periodic oversight of the issues raised by the Commonwealth, and to assure compliance with the elements of the agreements reached by the Commonwealth with CSX.

Respectfully submitted,

COMMONWEALTH OF MASSACHUSETTS

A handwritten signature in dark ink, appearing to read "Patrick J. Moynihan", is written over a horizontal line.

PATRICK J. MOYNIHAN

SECRETARY

EXECUTIVE OFFICE OF TRANSPORTATION  
& CONSTRUCTION

CERTIFICATE OF SERVICE

I hereby certify that on the 31st day of October, 1997, I served a copy of the foregoing Executive Office of Transportation and Construction's Conditional Comments In Support on behalf of the Commonwealth of Massachusetts, by first class mail, postage prepaid, upon:

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

Administrative Law Judge Jacob Leventhal  
Federal Energy Regulatory Commission  
888 First Street, N.E., Suite 11F  
Washington, D.C. 20004-1202

Paul A. Cunningham, Esq.  
Markins Cunningham  
1300 19th Street, N.W., Suite 600  
Washington, D.C. 20002

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

James C. Bishop, Jr., Esq.  
Norfolk Southern Corporation  
Three Commercial Place  
Norfolk, VA 23510-2191

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

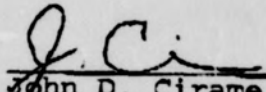
Mark G. Aron, Esq.  
Peter J. Schudtz, Esq.  
Ellen M. Fitzsimmons, Esq.  
CSX Corporation  
One James Center  
901 East Cary Street  
Richmond, VA 23129

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

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

Timothy O'Toole, Esq.  
Constance L. Abrams, Esq.  
Consolidated Rail Corporation  
Two Commerce Square  
2001 Market Street  
Philadelphia, PA 19101

and upon all other Parties of Record in this proceeding.

  
John D. Cirame  
Deputy General Counsel  
for the Commonwealth of  
Massachusetts Executive  
Office of Transportation  
and Construction

STB

FD-33388

10-22-97

D

ID-182837



182837

ATMC-2

BEFORE THE  
SURFACE TRANSPORTATION BOARD  
WASHINGTON, D.C.



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

STB Finance Docket No. 33388

ARGUMENT OF  
A. T. MASSEY COAL COMPANY, INC.,  
IN SUPPORT OF REQUEST FOR  
IMPOSITION OF CONDITIONS

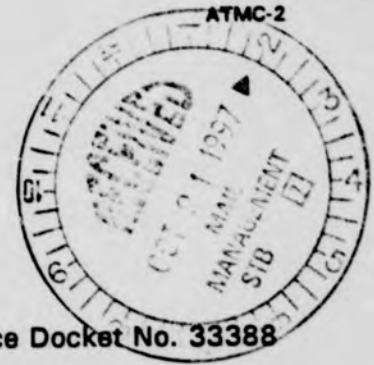
William P. Jackson, Jr.  
Attorney for A. T. Massey Coal  
Company, Inc., et al.

## OF COUNSEL:

JACKSON & JESSUP, P.C.  
Post Office Box 1240  
Arlington, VA 22210  
(703) 525-4050

Due and Dated: October 21, 1997

BEFORE THE  
SURFACE TRANSPORTATION BOARD  
WASHINGTON, D.C.



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

STB Finance Docket No. 33388

ARGUMENT OF  
A. T. MASSEY COAL COMPANY, INC., ET AL.  
IN SUPPORT OF REQUEST FOR  
IMPOSITION OF CONDITIONS

In CSX Corporation and CSX Transportation, Inc., Norfolk Southern Corporation and Norfolk Southern Railway Company--Control and Operating Leases/Agreements-- Conrail Inc. and Consolidated Rail Corp., STB Finance Docket No. 33388, approval is sought for dividing the assets of Conrail, Inc., and its subsidiaries, including Consolidated Rail Corporation, referred to collectively as "Conrail." The application proposes that the Conrail assets be divided between Norfolk Southern Corporation and its subsidiaries including Norfolk Southern Railway Company, which will be collectively referred to as "NS," and CSX Corporation and its subsidiaries including CSX Transportation, Inc., which will be collectively referred to as "CSX."

A. T. Massey Coal Company, Inc. ("Massey"), timely filed its Notice of Intent to Participate in this proceeding individually as well as on behalf of certain named subsidiaries. The subsidiaries named in the notice of intent were the following:

Bandytown Coal Company  
Central West Virginia Energy Company  
Eagle Energy, Inc.  
Elk Run Coal Company, Inc.  
Goals Coal Company  
Green Valley Coal Company  
Hillsboro Coal Company  
Independence Coal Company, Inc.  
Knox Creek Coal Corporation  
Long Fork Coal Company  
Marfork Coal Company, Inc.

Martin County Coal Corporation  
A.T. Massey Coal Company, Inc.  
Massey Coal Sales Company, Inc.  
New Ridge Mining Company  
Omar Mining Company  
Peerless Eagle Coal Co.  
Performance Coal Company  
Rawl Sales & Processing Co.  
Sidney Coal Company, Inc.  
Stirrat Coal Company  
Stone Mining Company  
Tennessee Consolidated Coal Company  
United Coal Company  
Vantage Mining Company  
Vesta Mining Company  
Wellmore Coal Corporation

Power Mountain Coal Company and Spartan Mining Company were recently formed to develop properties acquired by Massey earlier this month, and also join in the Massey presentation to the Surface Transportation Board (STB). In this argument, reference to Massey will include all of its subsidiaries named previously, unless otherwise specified.

Massey is one of the five largest marketers of coal in the United States. Until earlier this year Massey was the largest coal shipper on both CSX and NS, and is now the second largest such shipper, following a merger involving Massey competitors. The accompanying Verified Statement of A. T. Massey Coal Company, Inc., ATMC-3, gives specific data to support this assertion.

Massey's concern relates to how its own competitive position will be affected by the proposals contained in the application in the above-styled proceeding. The application itself ("Application") at pages 4 and 5 shows the reason for that concern:

CSX and NS have agreed that certain areas will be served by both of them, including the three "Shared Assets Areas" of South Jersey/Philadelphia, North Jersey and Detroit, as well as the coal fields served by the former Monongahela Railroad and the Ashtabula, Ohio dock facility. Numerous shippers in these areas will have access to dual rail service for the first time since the creation of Conrail. CSX and NS will compete aggressively for automotive traffic moving from Detroit to Baltimore, Philadelphia and New York, for coal moving off the former Monongahela Railroad and for coal moving to the Ashtabula Dock facility for subsequent lake movement. [emphasis added]

As stated in the accompanying verified statement of Massey, ATMC-3, Massey has major competitors located on the former Monongahela Railroad ("MGA") who will enjoy rail rates set by intramodal rail competition following the reallocation of Conrail assets. Presently, neither Massey nor its MGA competitors enjoy intramodal rail competition for their traffic.

Following consummation of the transaction proposed in the Application, Massey is quite concerned that its competitive position may be significantly degraded with respect to its MGA competitors. Considerable adverse effect could be experienced by Massey. Despite this, Massey is in favor of the proposed transaction, since it will produce more single-line service than has ever existed for the movement of Massey's coal.

But service is only one factor in the transportation equation. Another, and one which frequently is determinative of Massey's ability to sell its coal, is freight cost. It is the per ton delivered price of coal which is ultimately the important number. If the price is too high, the coal can't be sold.

Railroad pricing policy generally has been to charge what the market will bear - and that refers not to the coal market, but to the transportation market. That being the case, it is clear that the coal producers on the MGA will receive better rates than they presently get. Indeed, NS and CSX each state in no uncertain terms that they will compete strongly for the MGA coal traffic, with the result being lower freight rates than at present. The verified statement<sup>1</sup> of James McClellan, Vice President - Strategic Planning of NS, Vol. I, p. 514, confirms this:

**Shared Assets Areas.** In some major areas -- Northern New Jersey, Southern New Jersey, most of Philadelphia and the CR lines in Detroit -- separation of trackage between NS and CSX was not feasible or was not acceptable to NS or CSX. Therefore, these markets will be in Shared Assets Areas, with both CSX and NS having access to all customers within each. The Monongahela coal region in southwestern Pennsylvania presents a similar situation. Because virtually all Monongahela traffic is coal moving in full trainloads, under NS operation with full CSX access via trackage rights, both will serve all customers directly, in a position of equality. [emphasis added]

CSX also acknowledges competition and hence lower rates for the MGA coal shippers, as evidenced by the verified statement of John Q. Anderson, its Executive Vice President, Sales and Marketing, Vol. 2A, p. 275 et seq.

---

<sup>1</sup> Citation to a verified statement submitted with the Application will be to a volume of the Application and page number therein; e.g., Vol. I, p. 1.



While it is clear that the MGA coal shippers will very much enjoy their new intramodal rail competition post consummation, it is not at all clear that Massey will be so favorably affected. Despite the discussions in various verified statements of Applicants which attempt to equate the two-carrier competitive structure of eastern railroads to area-wide competition, it remains to be seen how this will play out for coal shippers not actually served by two railroads. If rail competition is indeed enjoyed by all coal shippers, then that will be well and good. But it is the nagging possibility that this will not happen which has caused Massey to bring its concerns to the STB.

The remedy that Massey suggests is a mild one, tailored as closely as possible to cover the situation without unduly imposing on the post-consummation prerogatives of the Applicants. Massey assumes that the Application will ultimately be granted, albeit with appropriate conditions. Massey wants the STB to hold oversight proceedings during a ten year period following consummation of the division of Conrail in order to allow problems that crop up to be addressed.

For the first several years, the proceedings should be held annually. For example, annual proceedings could be conducted beginning on each anniversary of consummation for four years, and then biennially or at such intervals as the STB, in its discretion, may find useful. The results in Union Pacific Corp., Union Pacific Railroad Co., and Missouri Pacific Railroad Co.--Control and Merger--Southern Pacific Rail Corp., Southern Pacific Transportation Co., St. Louis Southwestern Railway Co., SPCSL Corp. and The Denver and Rio Grande Western Railroad Co., Finance Docket No. 32760, indicate that it is wise not to take at face value what applicants say in a proceeding that involves unknown and unknowable consequences at the time approval is given. In that matter, oversight proceedings have been prescribed for a five year period. Based on grave service deficiencies and other problems that have arisen, oversight is definitely needed. How much more oversight will be needed in connection with the Conrail dismemberment awaits the judgment of time.

Accordingly, in view of the facts currently known to Massey, adoption of conditions for approving the application in conformance with the following precepts is requested:

1. In view of the great uncertainty and significant problems that could develop following the division of Conrail assets, oversight proceedings should be conducted following consummation.
2. Oversight proceedings should be conducted over a ten year period, no less often than annually for the first several years and then at such intervals as experience warrants.
3. Because of the consequences that will flow from consummation, the Board should reserve continuing jurisdiction to impose such conditions as future

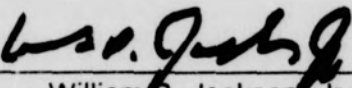
facts and circumstances may warrant, in order to correct problems as and if they occur.

4. Should it become apparent after consummation that Massey's competitive position has suffered with respect to its competitors who will have competitive rail service following consummation, then Massey should be granted leave to seek the imposition of competitive access or other conditions in the oversight proceedings to remedy any substantial harm that may be done to Massey's relative competitive position as a result of changed rail service.

Imposition of conditions based on the foregoing standards will encourage fair treatment of Massey. The mere existence of such conditions will tend to negate the need to invoke the help of the STB. But without such conditions and the possible imposition of appropriate sanctions, railroad pricing practices may adversely affect Massey's competitive position in the post-consummation future.

Respectfully submitted,

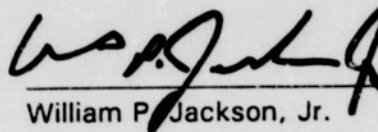
A. T. Massey Coal Company, Inc.,  
and Named Subsidiaries

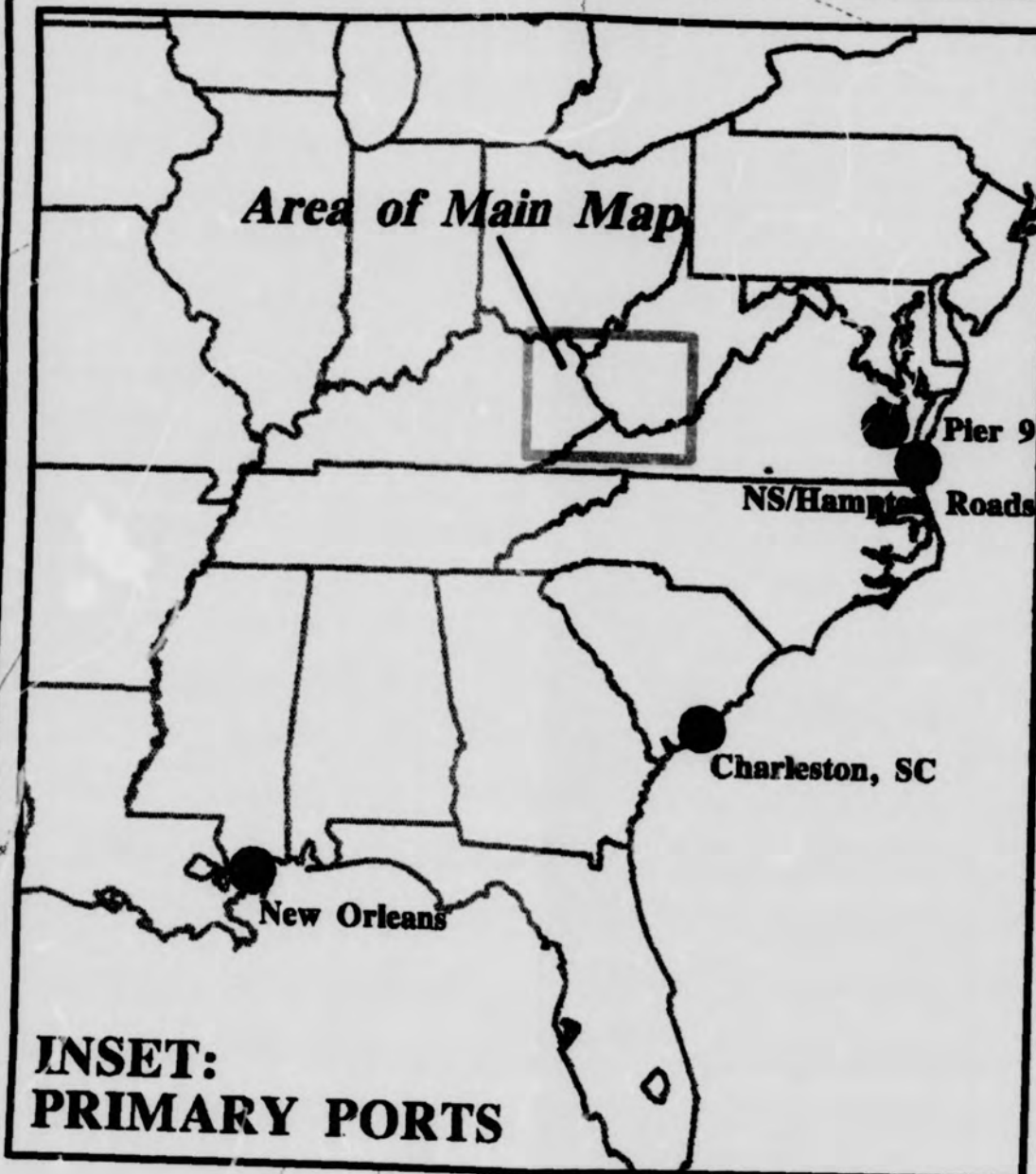
By   
William P. Jackson, Jr.  
Their Attorney

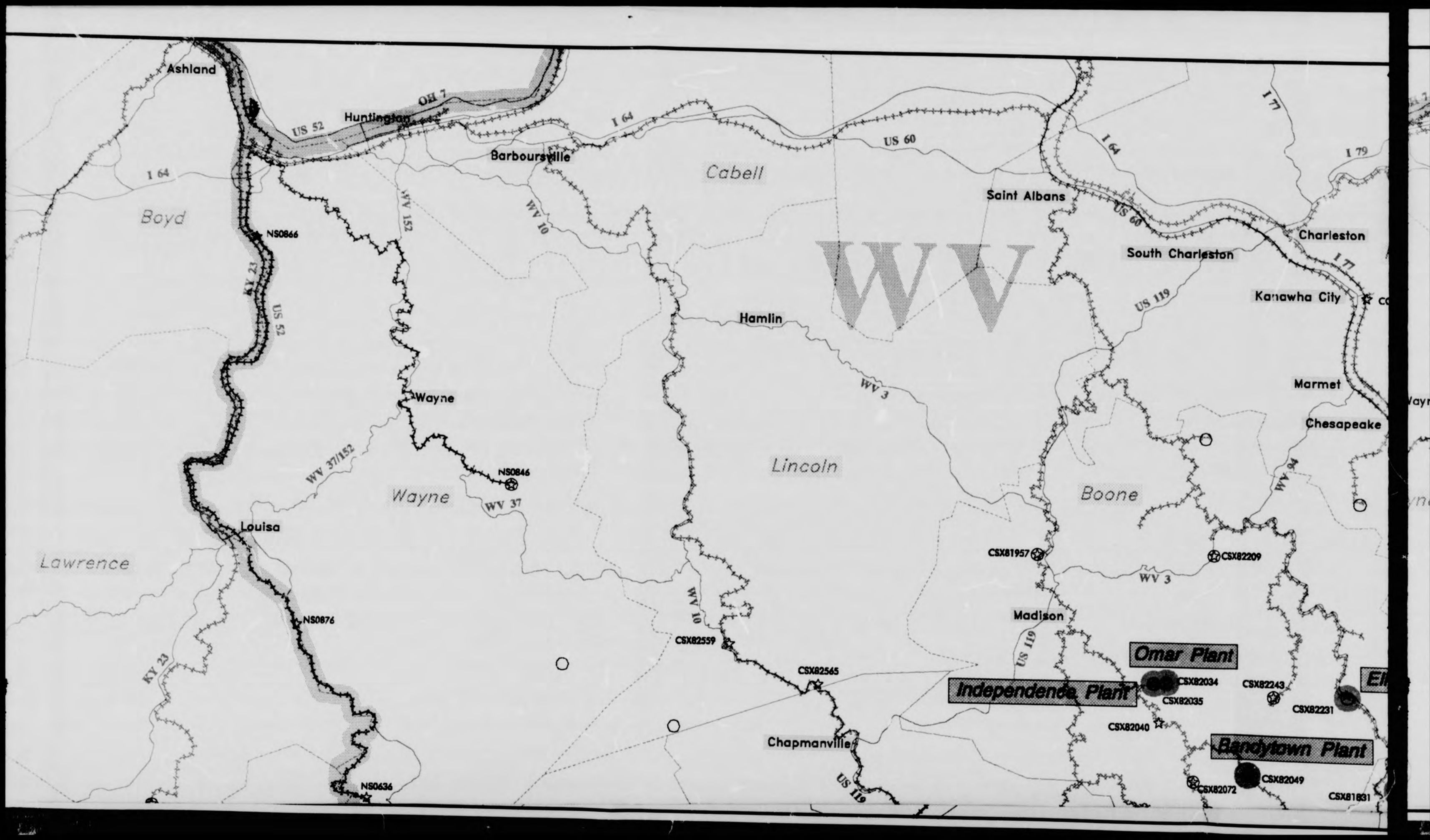


CERTIFICATE OF SERVICE

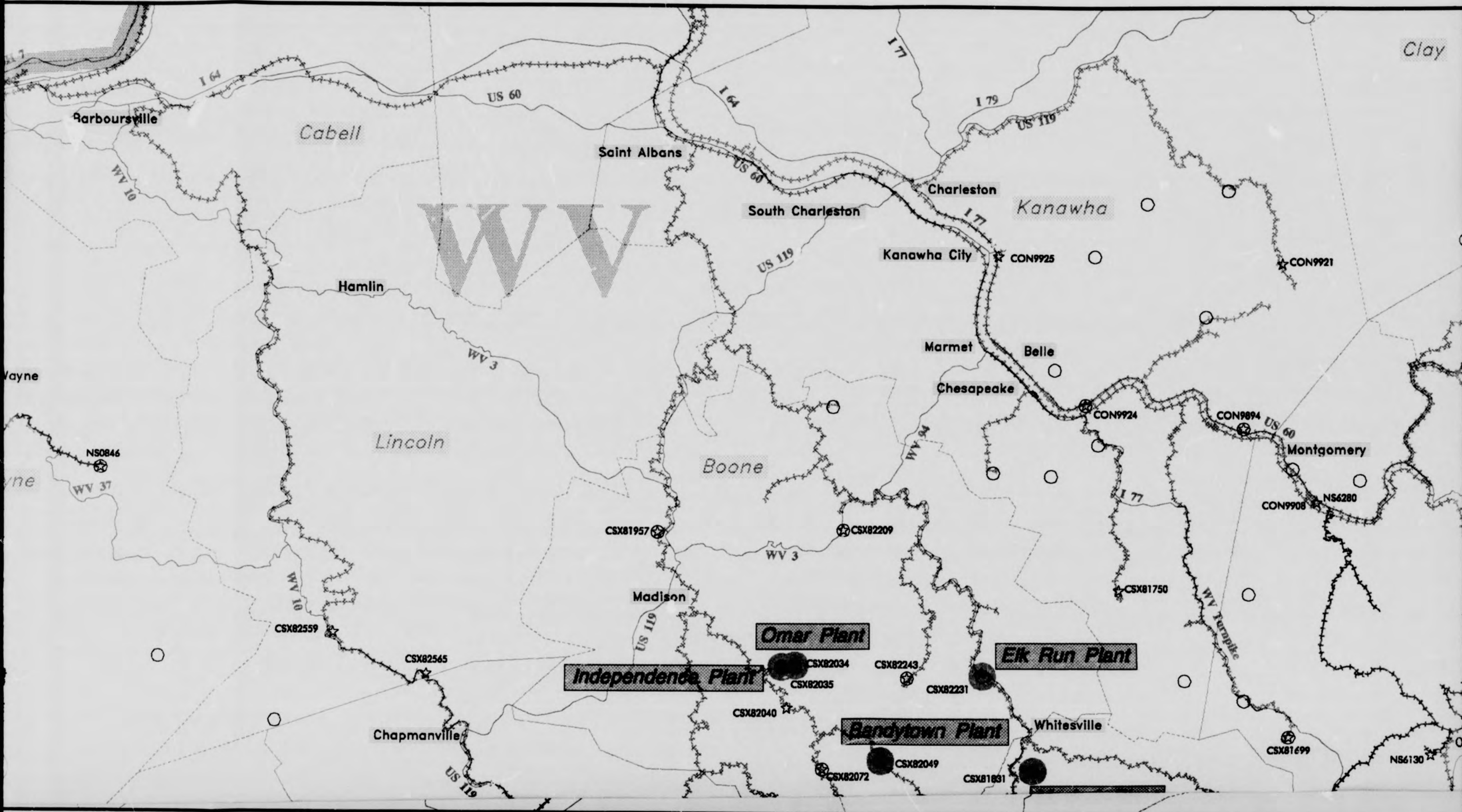
I, William P. Jackson, Jr., hereby certify that on this 21st day of October, 1997, I have served a copy of the foregoing Argument of A. T. Massey, Inc., in Support of Request for Imposition of Conditions upon all parties of record in this proceeding, by first class mail, postage prepaid.

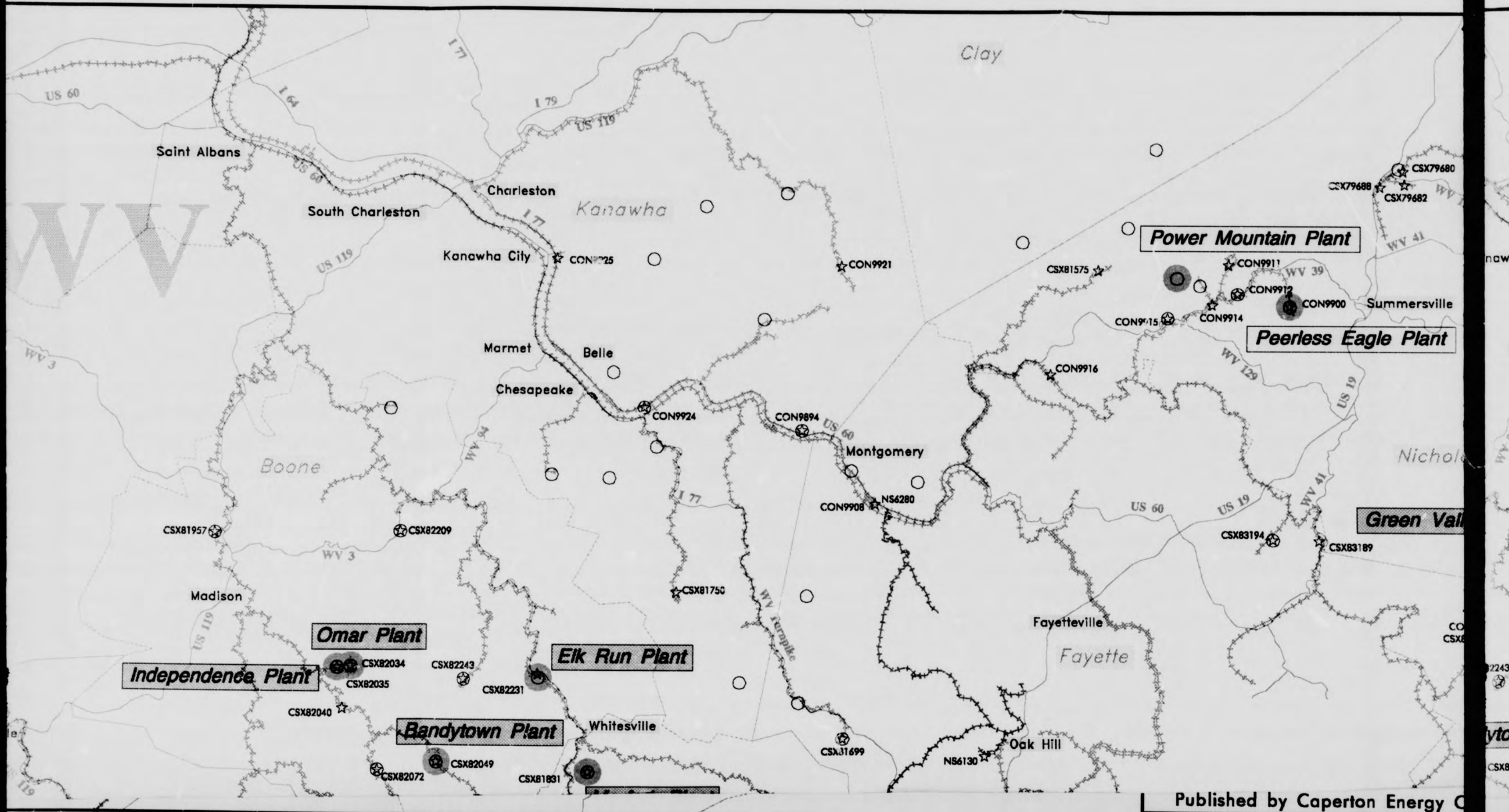
  
William P. Jackson, Jr.



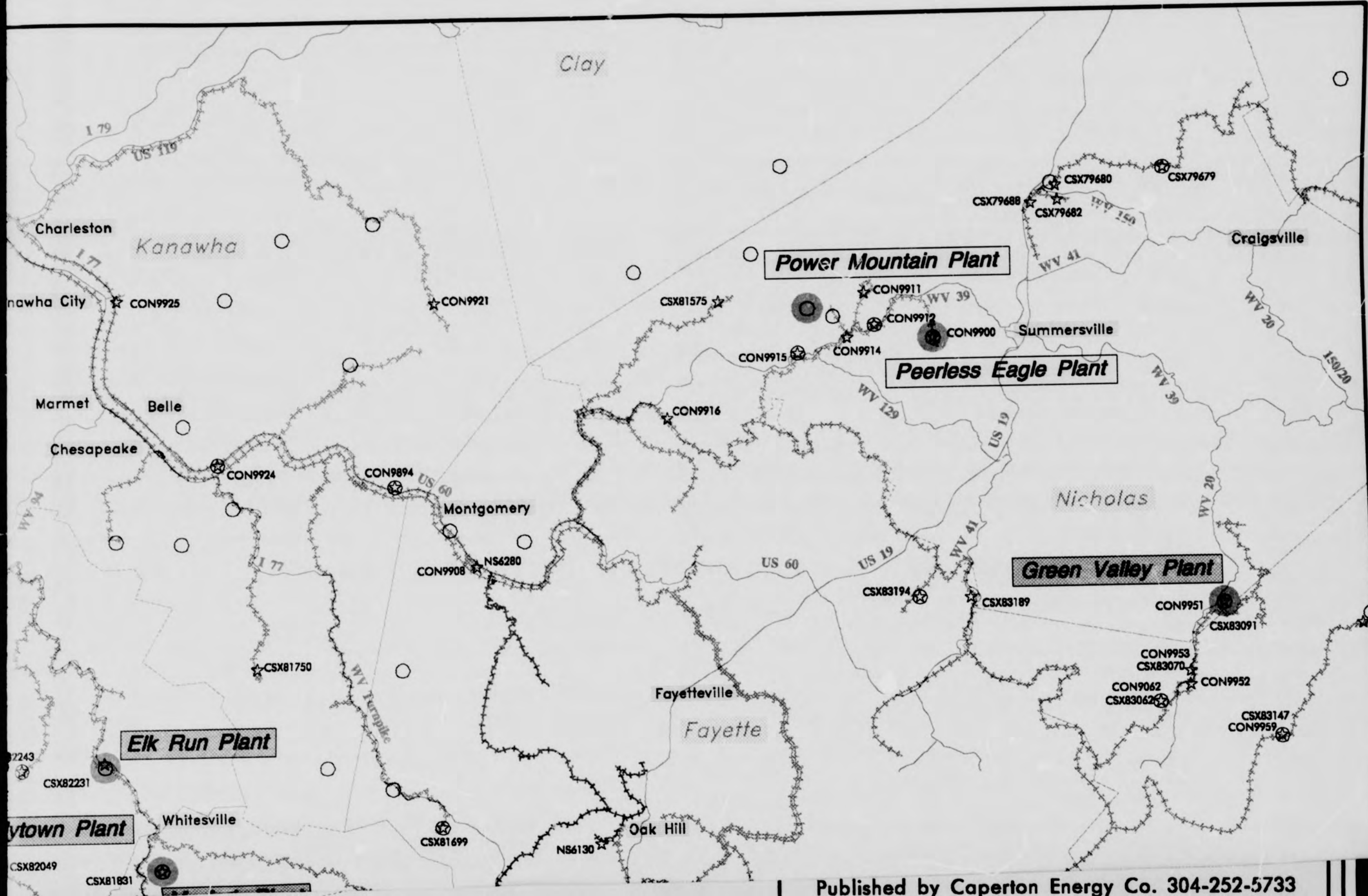




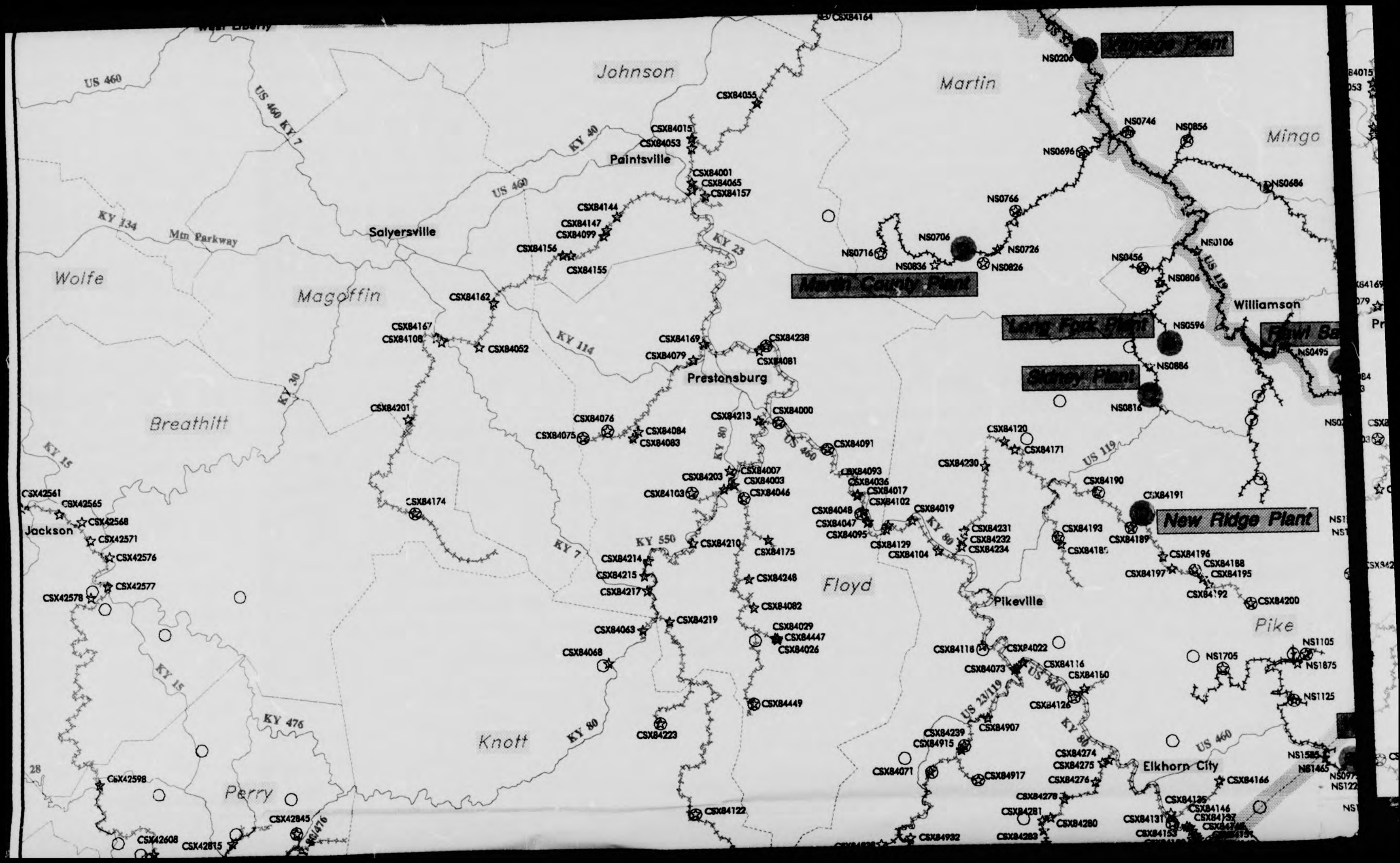




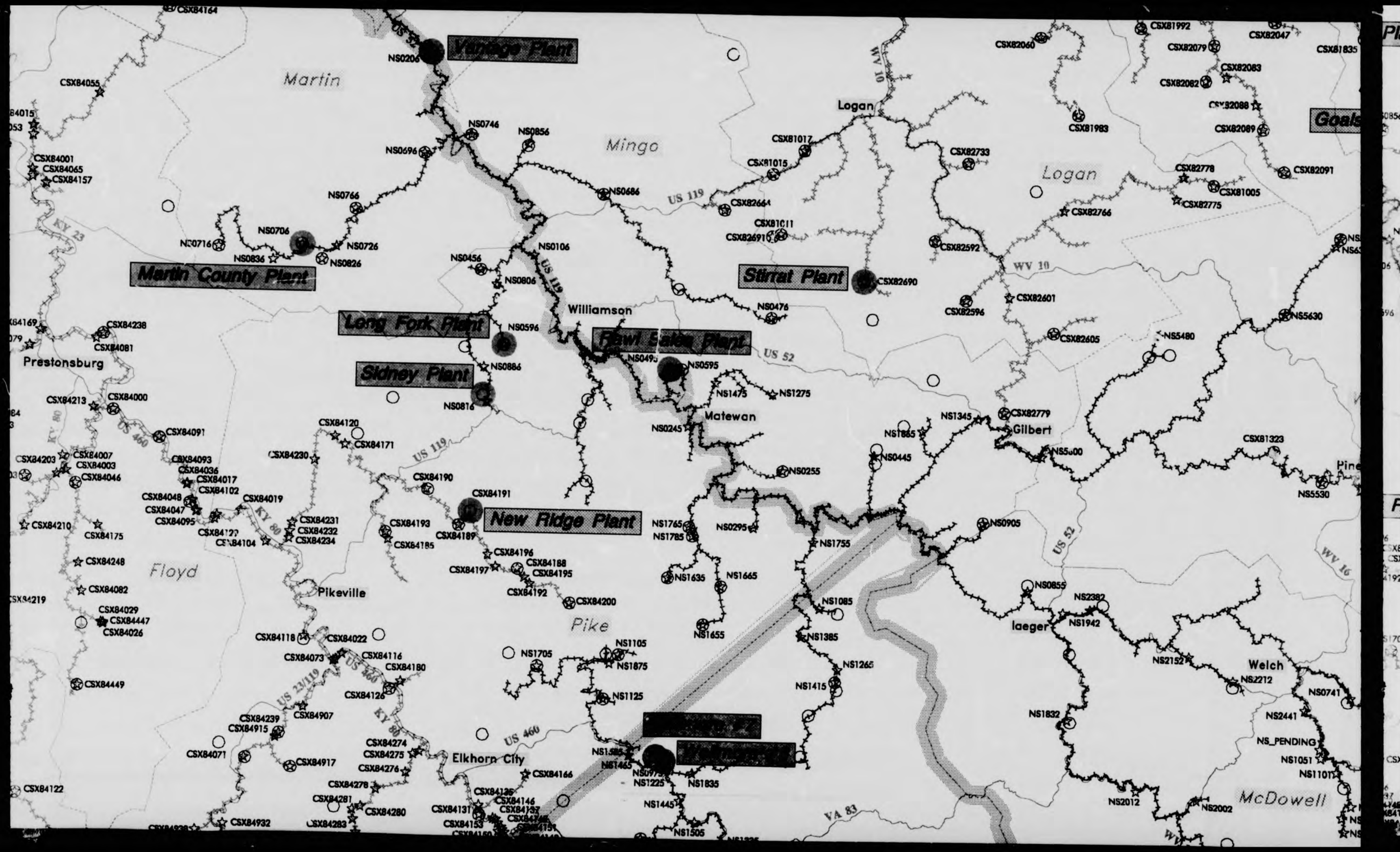














**Plant**

## Goals Plant

### Stirrat Plant

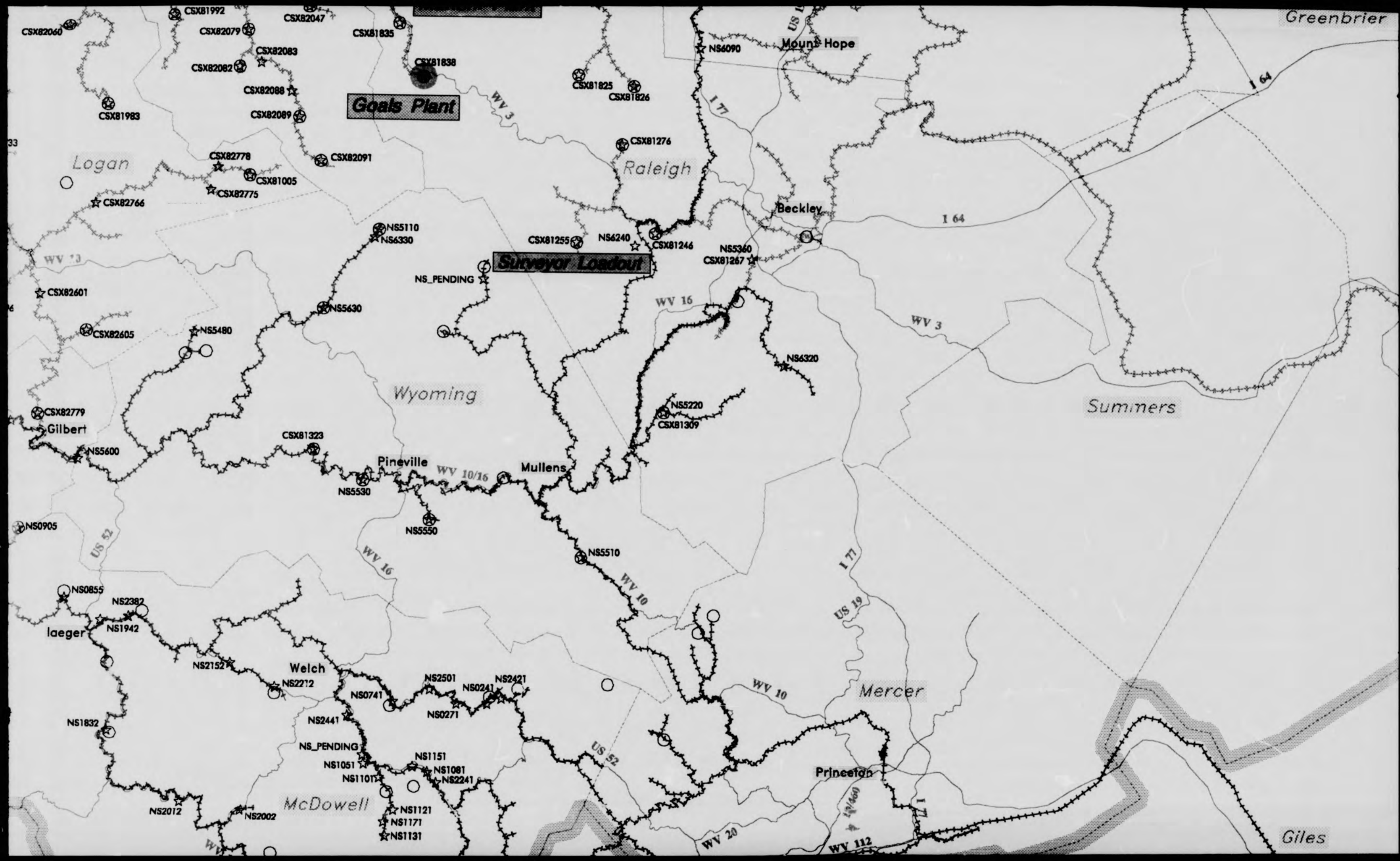
## Surveyor Loadout

**Rawl Sales Plant**

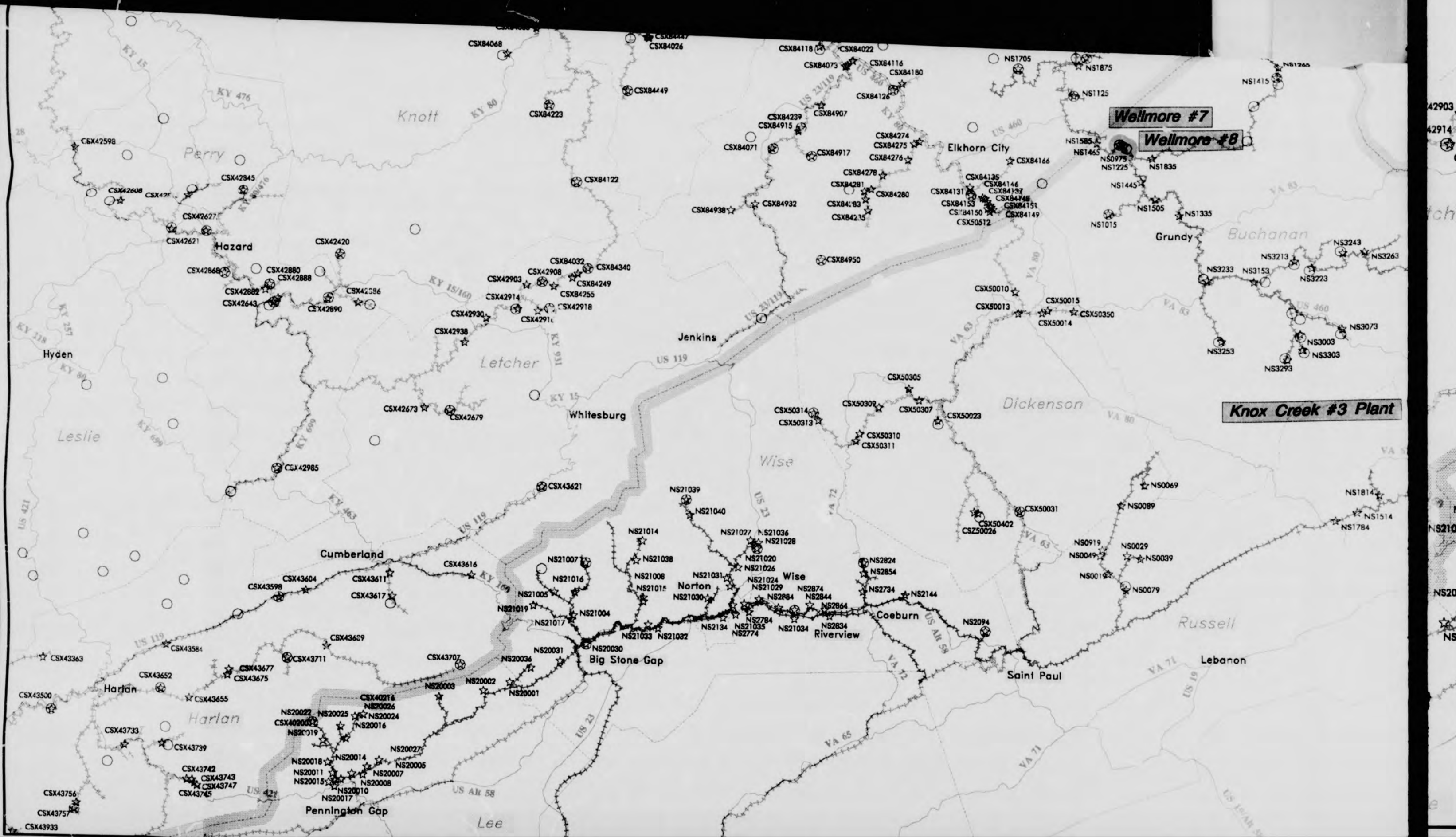
### Ridge Plant

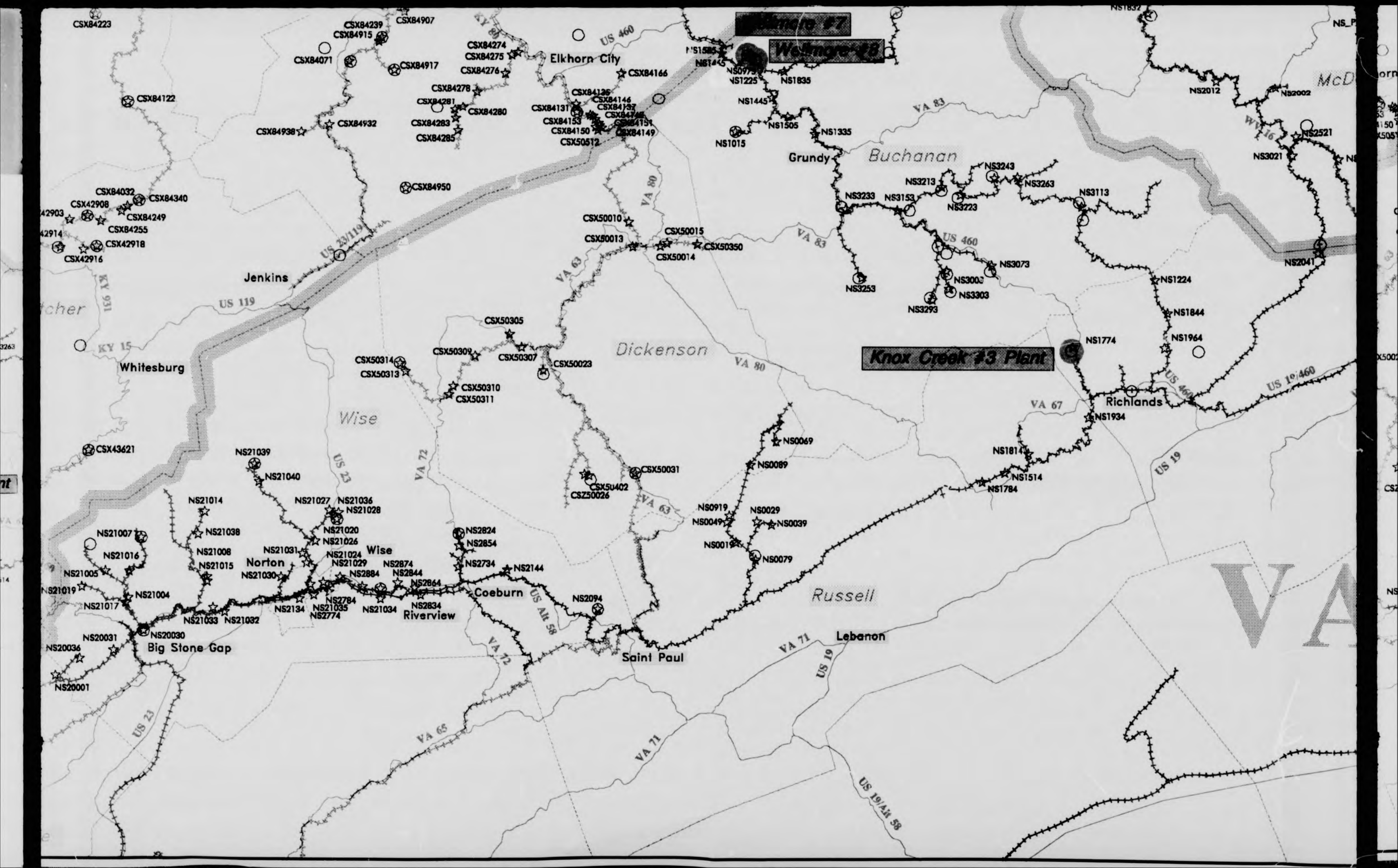
**Wellmore #7**

**Wellmore #8**

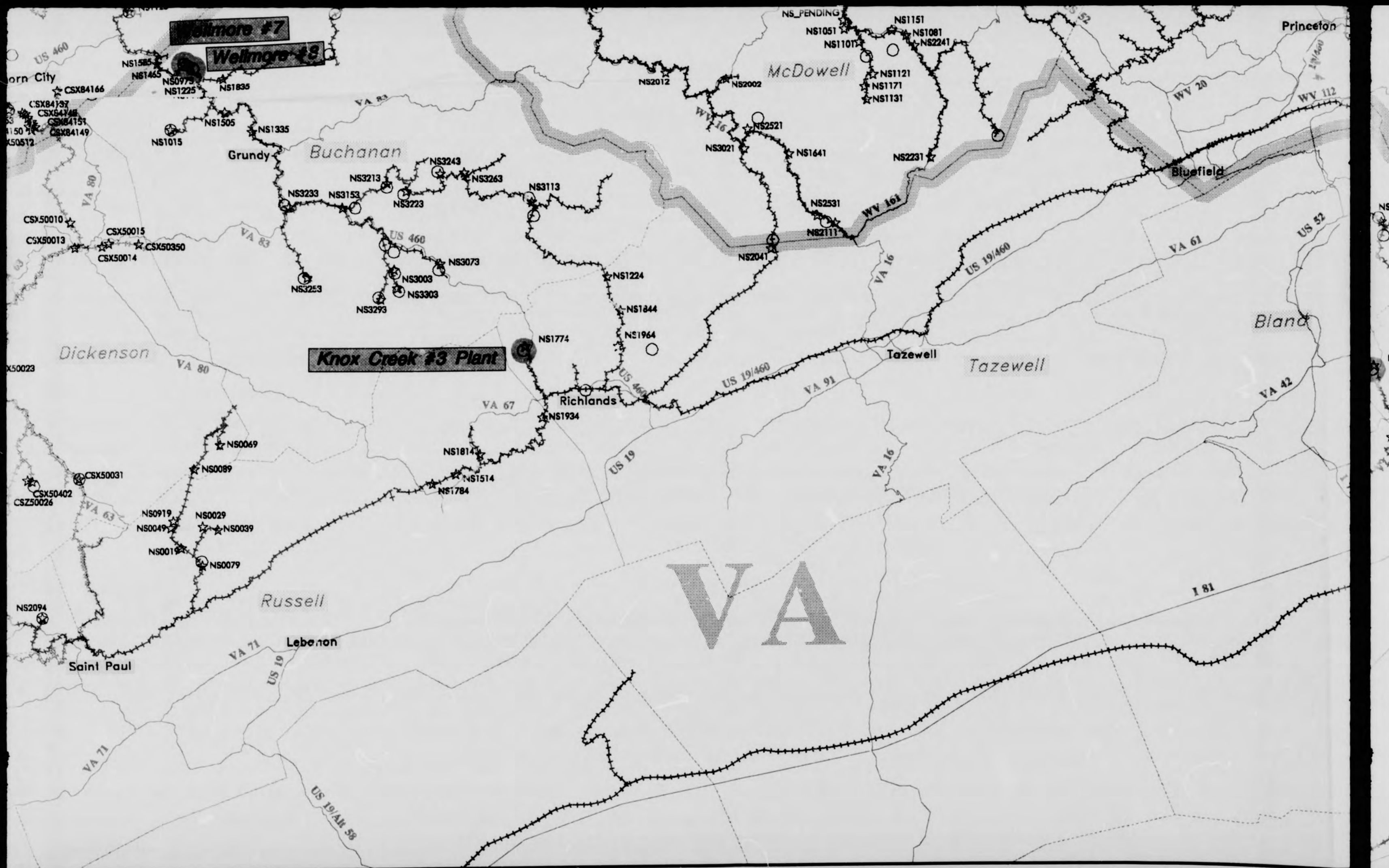


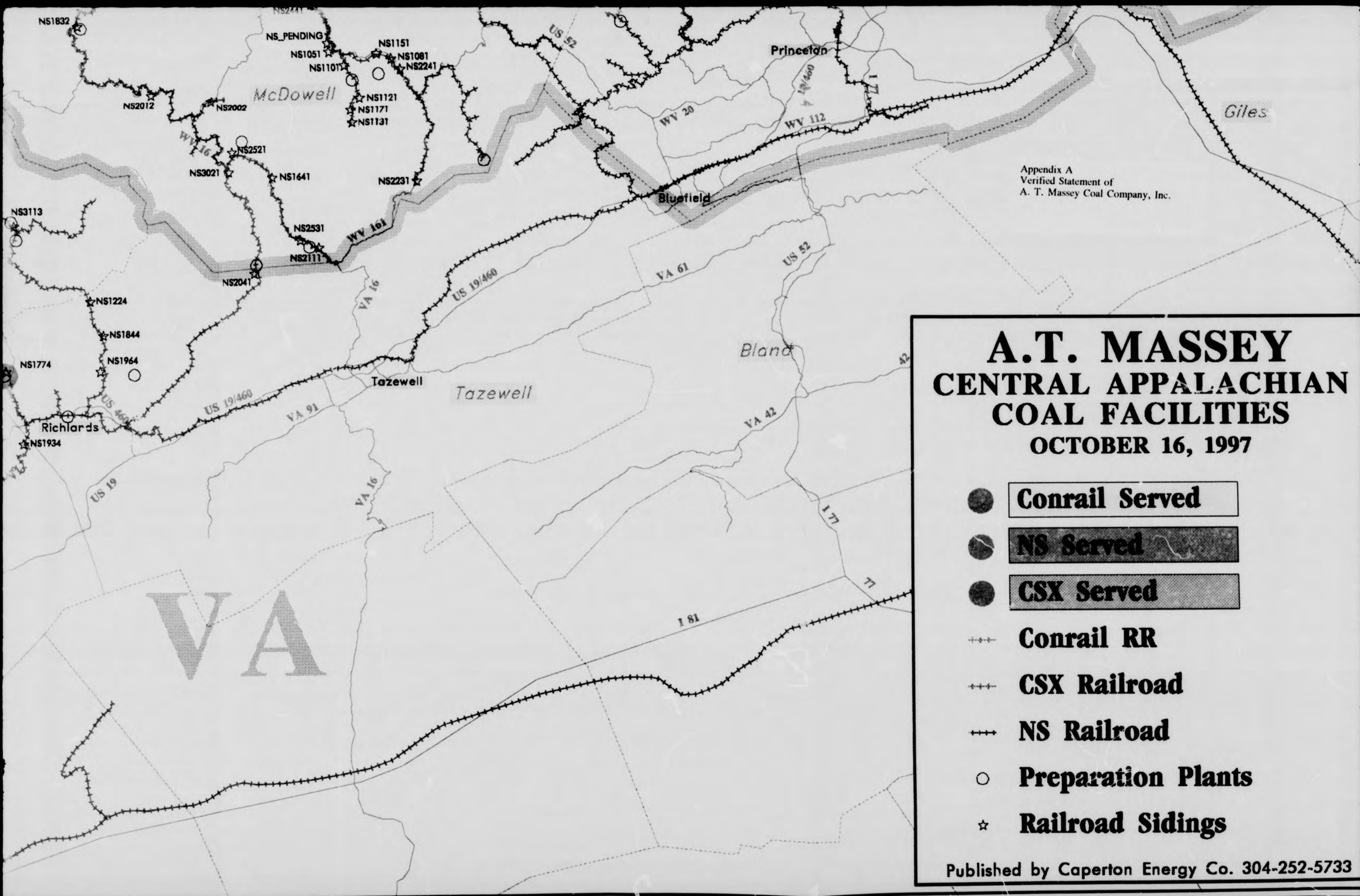












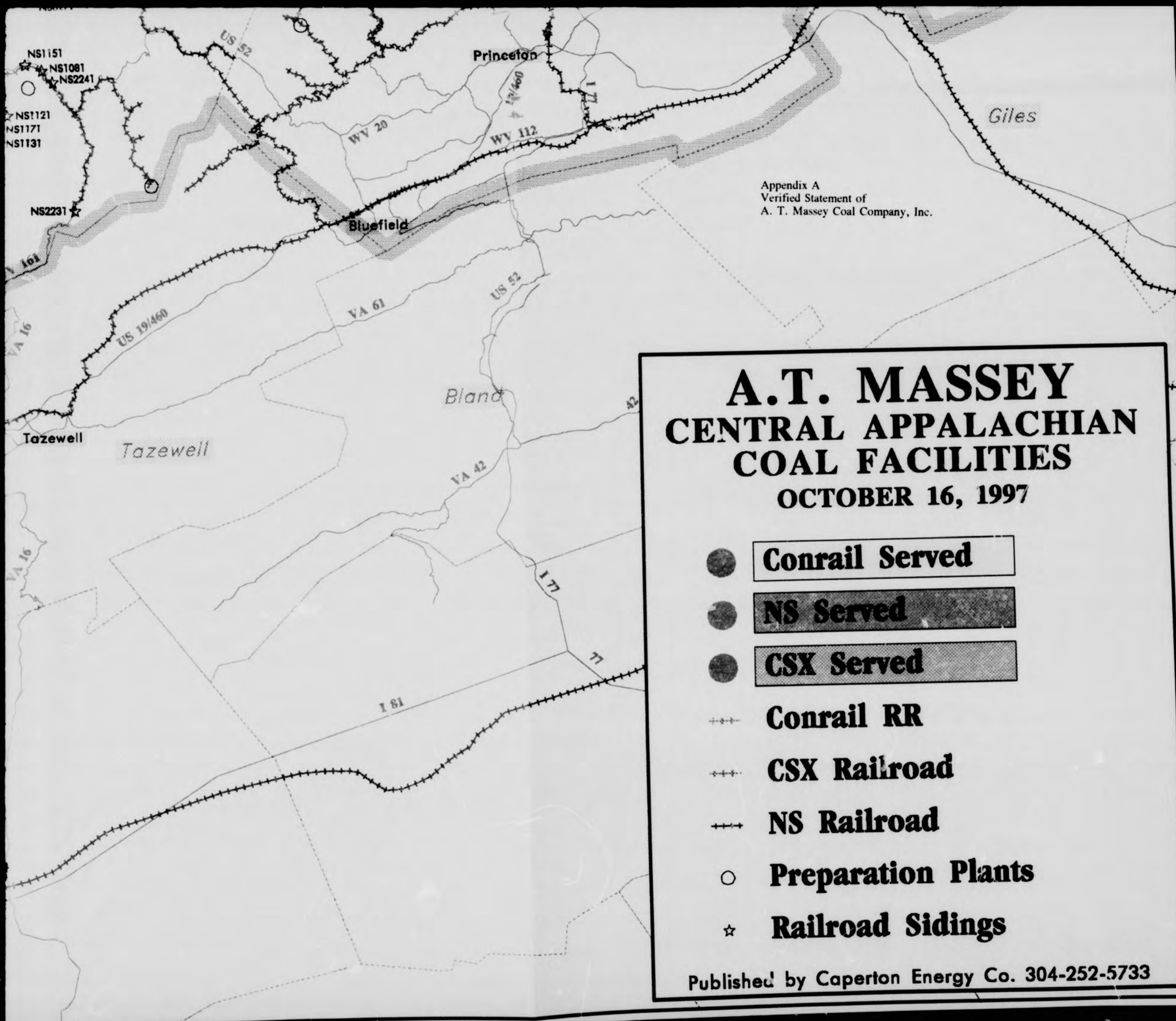
Appendix A  
Verified Statement of  
A. T. Massey Coal Company, Inc.

# A.T. MASSEY CENTRAL APPALACHIAN COAL FACILITIES

OCTOBER 16, 1997

- Conrail Served
- NS Served
- CSX Served
- Conrail RR
- CSX Railroad
- NS Railroad
- Preparation Plants
- ☆ Railroad Sidings





Appendix A  
Verified Statement of  
A. T. Massey Coal Company, Inc.

# A.T. MASSEY CENTRAL APPALACHIAN COAL FACILITIES

OCTOBER 16, 1997

- **Conrail Served**
- **NS Served**
- **CSX Served**
- +---+--- **Conrail RR**
- +---+--- **CSX Railroad**
- +---+--- **NS Railroad**
- **Preparation Plants**
- ☆ **Railroad Sidings**

Published by Caperton Energy Co. 304-252-5733

STB

FD

33388

10-22-97

D

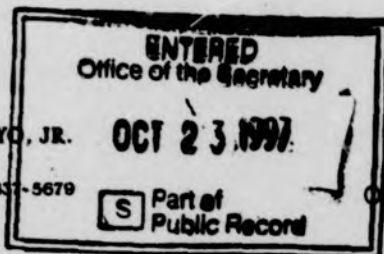
183062

183062

HOGAN & HARTSON  
LLP.

183062

GEORGE W. MAYO, JR.  
PARTNER  
DIRECT DIAL (202) 637-5679



October 22, 1997

183062

COLUMBIA SQUARE  
555 THIRTEENTH STREET, NW  
WASHINGTON, DC 20004-1109  
TEL (202) 637-5600  
FAX (202) 637-5910

BY HAND DELIVERY

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



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

Dear Secretary Williams:

On Tuesday, October 21, 1997, the Canadian Pacific Railway Company, Delaware and Hudson Railway Company, Inc. ("D&H"), Soo Line Railroad Company, and St. Lawrence & Hudson Railway Company Limited (collectively, the "Canadian Pacific Parties") concluded a settlement with the Applicants in this proceeding, Norfolk Southern Corporation and Norfolk Southern Railway Company (collectively, "NS"), and CSX Corporation and CSX Transportation, Inc. ("CSX").

As a consequence of the settlement, the Canadian Pacific Parties now support Board approval of the Primary

BRUSSELS LONDON MOSCOW PARIS\* PRAGUE WARSAW

BALTIMORE, MD BETHESDA, MD COLORADO SPRINGS, CO DENVER, CO MCLEAN, VA

\\DC - 64673/1 - 0377213.11

\*Affiliated Office

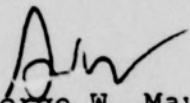
HOGAN & HARTSON LLP

The Hon. Vernon A. Williams  
October 21, 1997  
Page 2

Application, and will not seek protective conditions related to that Application.

Thank you for your assistance.

Sincerely,

  
George W. Mayo, Jr.  
Attorney for Canadian  
Pacific Railway Company,  
Delaware and Hudson  
Railway Company, Inc., Soo  
Line Railroad Company, and  
St. Lawrence & Hudson  
Railway Company Limited

GWM:jms

cc: All Parties of Record



STB

FD-33388

10-21-97

D

ID-182757

182757

REDACTED - PUBLIC

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

**COMMENTS AND SUPPORTING EVIDENCE OF  
THE CITY OF INDIANAPOLIS IN OPPOSITION TO  
THE APPLICATION OF CSX CORPORATION, et al.,  
UNLESS COMPETITIVE CONDITIONS ARE IMPOSED**

CSX Corporation ("CSXC"), CSX Transportation, Inc. ("CSXT") (CSXC and CSXT collectively "CS"), Norfolk Southern Corporation ("NSC"), Norfolk Southern Railway Company ("NSR") (NSC and NSR collectively "NR"), Conrail, Inc. ("CRR") and Consolidated Rail Corporation ("CRC") (CRR and CRC collectively "CR"), (CSX, NR and CR collectively "Applicants"), pursuant to 49 U.S.C. §§ 11321-25 and 49 CFR Part 1180, have requested the Surface Transportation Board ("Board") to authorize the acquisition of the control and operation of CRR by CSX and NSC ("Proposed Transaction"). The Applicants have also requested authorization for certain operating agreements, the construction of new connections, the granting of trackage rights and other related matters in connection with the Proposed Transaction. It is the Applicants' position that the Proposed Transaction will "hold enormous public benefits, the greatest of these being increased competition, single-line

efficiency, and fresh opportunities for improved transportation options and resulting economic growth." Application Vol. 1, p. 2. Whatever public benefits the Proposed Transaction might yield for the rest of the northeast and the midwest, these benefits will not be realized for the City of Indianapolis without, at a minimum, the adoption of the conditions outlined below. Rather than increased competition for Indianapolis, the Proposed Transaction will mean a decrease in competition. Rather than single-line efficiency for Indianapolis, the Proposed Transaction will mean inefficient and costly trackage and switching arrangements. Rather than fresh opportunities for improved transportation options and resulting economic growth for Indianapolis, the Proposed Transaction will mean lost opportunities for improved transportation options and resulting economic harm. It is because of the public harm posed to Indianapolis by the Proposed Transaction that the City is submitting to the Board these Comments and Supporting Evidence in opposition to the Application. The conditions outlined herein are operationally feasible and will serve to lessen the public harm that would otherwise be caused to the economic future of Indianapolis by the Proposed Transaction.

**Summary of Proposed Transaction As It  
Pertains to Indianapolis**

The Applicants identify Indianapolis as one of the markets that will go from two rail carrier service to single rail carrier service under the Proposed Transaction unless specific remedies are provided. *See, e.g.,* Application, Vol. 1, pp. 545-46. In fact, the Applicants recognize that Indianapolis is "by far the largest "2 to 1" point created by this transaction."

Application, Vol. 1, p. 546.<sup>1</sup> The reason Indianapolis is a "2 to 1" point under the Proposed Transaction is because Indianapolis is presently served by both CSX and CR but under the Proposed Transaction CSX will acquire control of all of CR's trackage in the Indianapolis area, including CR's three yard facilities. Application, Vol. 3A, pp. 109-11, 210-11. Accordingly, without more, Indianapolis would under the Proposed Transaction become a "one railroad town" served only by CSX.

The Applicants seek to "remedy" the public harm caused to Indianapolis by the Proposed Transaction by allowing NS to provide indirect rail service to "2 to 1" customers in Indianapolis by way of certain overhead trackage rights and switching agreements. The Master Trackage Rights Agreement ("TRA") proposed by the Applicants grants to NS overhead trackage rights on CSX's lines to Indianapolis from Muncie, IN, and from Lafayette, IN. NS's ability to provide rail service under the proposed TRA is severely limited, however. Specifically, the TRA provides that:

NSR shall not use any part of the subject trackage for the purpose of switching, storage or servicing of cars or equipment, or the making or breaking up of trains or service to an industry . . .

Application, Vol. 8B, p. 223.<sup>2</sup>

---

<sup>1</sup>For a description of the size and importance of Indianapolis as a major manufacturing and distribution center, see CI Ex. 2, V.S. of Mayor Goldsmith, pp. 2-3.

<sup>2</sup>Form A of the Trackage Rights Addendum sets forth even more restrictive language: "The Trackage Rights herein granted are granted for the sole purpose of NSR using the same for bridge traffic only between the endpoints of Subject Trackage and NSR shall not perform any local freight service whatsoever at any point located on Subject Trackage." Application, Vol. 8B, p. 314.

Under the TRA, then, NS will not be allowed to provide direct rail service to "2 to 1" customers in Indianapolis. Instead, it will be required to transport its cars directly into Hawthorne Yard at Indianapolis, which will be operated solely by CSX under the Proposed Transaction. Application, Vol. 3A, pp. 210-11. At Hawthorne Yard, NS will not have any contractual rights regarding access to specific trackage. Rather, the Operating Plan only provides that NS will have "sufficient tracks for the arrival, departure and make up of trains, and will have reasonable access to and from the designated tracks." Application, Vol. 3A, p. 211. Moreover, CSX will have exclusive control of the management, operation and maintenance of the trackage from Muncie and Lafayette, as well as the trackage at Hawthorne Yard. In this regard, the TRA: (1) Does not require CSX to dispatch NS' trains equally and without prejudice under all circumstances (Application, Vol. 8B, pp. 232-33); (2) does not require CSX to maintain the subject trackage at its current Track Class and Speed (Application, Vol. 8B, p. 226); (3) makes upgrading of the trackage subject to CSX's operational needs (Application, Vol. 8B, p. 227); (4) allows CSX to retire the subject trackage for economic reasons (Application, Vol. 8B, p. 229); (5) explicitly denies NS any claim against CSX for damages brought about by delay or interruption from any cause, including damages for CSX's failure to maintain or renew the subject trackage (Application, Vol. 8B, pp. 223-26); and (6) does not provide for expedited dispute arbitration or the award of monetary damages by the arbitrator (Application, Vol. 8B, pp. 246-47).

Once NS has transported its cars to Hawthorne Yard, CSX will provide switching services to NS' customers under a separate switching agreement. Application, Vol. 8C, pp. 501-25. The specific charges to NS for CSX's handling of cars under the switching



agreement have not yet been determined by the Applicants. Instead, the switching agreement provides that NS shall pay CSX a "mutually agreed upon rate" for each car switched by CSX for NS during the first six months of the Agreement. Application, Vol. 8C, pp. 505-06. After this initial six month period, CSX and NS will conduct a joint study to determine CSX's "actual costs" for switching cars in the account of NS and to determine the maintenance costs for NS' use of tracks at Hawthorne Yard. The charges to NS for CSX's switching services will thereafter be based upon the results of this joint study. Applicants do not identify conclusively what factors will be relevant to determining these "actual costs."

The number and scope of Indianapolis customers that NS will actually be allowed to serve *via* trackage rights and switching by CSX is very circumscribed. As indicated above, NS will be allowed indirect access only to those customers who qualify as "2 to 1." The definition of "2 to 1" customers for purposes of the Proposed Transaction are those presently existing customers who have the option of rail service from CSX and CR. Application, Vol. 2A, pp. 146-47. It does not include any other customers, including future customers that come into existence after the proposed transaction is consummated. The number and identity of the customers that qualify as "2 to 1" under this restrictive definition is not clear from the Application. In his Verified Statement William Hart states that: "There are 66 shippers located on Conrail lines that have traditionally had a second service option available to them through reciprocal switching service." Application, Vol. 2A, p. 147. Mr. Hart does not identify these 66 shippers. In contradiction to the foregoing Verified Statement of William Hart, Exhibit "I" to the proposed switching agreement identifies only 30 customers who would be served indirectly by NS.

Under the Proposed Transaction, then, CSX will have a monopoly for rail service to a significant number of customers, including those future customers that come into existence after the transaction is consummated.

#### **Legal Standard for the Imposition of Conditions**

The Board should not approve the proposed transaction unless it first "finds the transaction is consistent with the public interest." 49 U.S.C. § 11324(c) (1997). To determine whether the proposed transaction is consistent with the public interest, the Board must perform a balancing test, weighing the potential benefits to the Applicants and the public against the potential harms to the public:

In determining whether a transaction is in the public interest, the Board performs a balancing test. It weighs the potential benefits to the Applicant and the public against the potential harm to the public. The Board will consider whether the benefits claimed by Applicants could be realized by means other than the proposed consolidation that would result in less potential harm.

49 CFR 1180.1(c).

There are a number of criteria relevant to the determination of whether a proposed transaction is in the public good. Among these criteria is whether the proposed transaction will have an adverse effect on competition among rail carriers in a particular market. 49

U.S.C. § 11324 (1997); *See also* 49 CFR § 1180.1(c)(2).<sup>3</sup> If the Board finds an adverse impact on competition, it has broad authority under the Interstate Commerce Act to impose conditions on the transaction that will redress the harm caused by these anticompetitive effects. 49 U.S.C. § 11324(c); Union Pacific-Control-Missouri Pacific; Western Pacific, 366 I.C.C. 462, 562-65 (1982). A number of factors are relevant to determining what conditions are appropriate. The Board has summarized these factors in its Decision No. 40:

The criteria for imposing conditions to remedy anticompetitive effects were set out in Union Pacific-Control-Missouri Pacific; Western Pacific, 366 I.C.C. 462, 562-65 (1982). There, the Interstate Commerce Commission (ICC) stated that it would not impose conditions on a railroad consolidation unless it found that the consolidation may produce effects harmful to the public interest (such as a significant reduction of competition in an affected market), that the conditions to be imposed will ameliorate or eliminate the harmful effects, that the conditions will be operationally feasible, and that the conditions will produce public benefits (the reduction or elimination of possible harm) outweighing any reduction to the public benefit produced by the merger.

Even if the Applicants have proposed certain conditions in order to ameliorate the anticompetitive effects of the Proposed Transaction, the Board still has the obligation to modify or add to these conditions if it believes that the conditions proposed by the Applicants fail to fully redress these anticompetitive effects. Lamoille Valley R.R. Co. v. ICC, 711 F.2d 295, 322 (D.C. Cir. 1983).

---

<sup>3</sup>The reason this criterion is important is because consolidations that substantially reduce rail transportation alternatives to shippers are not favored under the law. 49 CFR § 1180.1(a).

**The Proposed Transaction has AntiCompetitive Effects for Indianapolis that  
Require the Imposition of Conditions**

It has already been noted that the Applicants agree the Proposed Transaction would have an anticompetitive effect on Indianapolis if certain remedies are not adopted. The remedies the Applicants suggest are to grant to NS the trackage rights and switching arrangements outlined above. These remedies will not, however, ameliorate the anticompetitive effects of the Proposed Transaction for Indianapolis. In general this is because the proposed remedies do not give NS sufficient incentive to compete with CSX in Indianapolis, and they allows CSX to have total control over the quality of services that NS can offer to customers. CI Ex. 1, V.S. of Hall, p. 5. More specifically, the remedies are inadequate because: (1) NS's overhead trackage rights under the Proposed Transaction do not address issues that can work to impede or lessen the quality of NS's service to Indianapolis customers; (2) NS will have an inadequate customer and interchange base in Indianapolis because of the narrow definition of "2 to 1" customers and its lack of access to shortline railroads; (3) the switching agreement is too vague on several key items, including the charges to be assessed NS for switching services and the time requirements for the pickup and delivery of NS' cars; (4) NS will be unable to build customer volume given that present customers of CR will not be allowed to rebid traffic to NS after the transaction is consummated; and (5) NS has no competitive way to deliver cars from Indianapolis to Chicago. Because CSX will have the highest traffic density, the shortest route structure to major markets from Indianapolis and an overwhelming physical and management presence in Indianapolis, the foregoing deficiencies will mean that NS will not be a competitor of CSX in the Indianapolis market under the Proposed Transaction. CI Ex. 1, V.S. of Hall, p. 5.



Accordingly, the Board should at minimum impose the following conditions in order to correct these deficiencies.

1. Conditions Relative to Trackage Rights

The TRA under which NS will be allowed indirect access to "2 to 1" customers in Indianapolis gives CSX excessive control of the management, operation and maintenance of the subject trackage, including the trackage at Hawthorne Yard. The TRA does not require CSX to dispatch NS' trains equally and without prejudice in all circumstances. It does not require CSX to maintain the subject trackage at its current Track Class and Speed. It makes upgrading of the trackage subject to CSX's operational needs. It allows CSX to retire the subject trackage for economic reasons. It specifically denies NS any claim against CSX for failure to maintain the subject trackage. It does not give NS any specific trackage at Hawthorne Yard. It neither provides for expedited dispute arbitration in connection with NS's use of the subject trackage, nor gives authority to the arbitrator to award monetary damages to an aggrieved party. These defects in the TRA will mean that NS's ability to compete with CSX for business can be severely impeded by CSX, resulting in a significant reduction of competition for rail service in Indianapolis.

In order to ameliorate the anticompetitive effect to Indianapolis caused by these deficits, the additions and changes set forth in Mr. Hall's Verified Statement should be incorporated into the TRA. These additions and changes are as follows: (1) The TRA should require that CSX maintain the subject trackage at its current Track Class and Speed; (2) the TRA should require CSX to dispatch NS' trains equally and without prejudice under

all circumstances, regardless of whether this will result in the most economical movement of all traffic on the lines from Muncie and Lafayette; (3) the TRA should provide for expedited arbitration of disputes between NS and CSX and should allow the arbitrator to assess monetary damages for violations of the TRA;<sup>4</sup> and (4) the TRA should provide that NS has the right to lease, buy or build trackage at Hawthorne Yard for NS' exclusive use.

As Mr. Hall notes in his Verified Statement, the foregoing additions and modifications to the TRA would lessen the anticompetitive effects of the Proposed Transaction. In particular, they would address issues that otherwise would allow CSX to seriously impede and lessen the quality of NS' service to Indianapolis customers. Not only are the proposed conditions operationally feasible, they will not result in a reduction of benefits to the public produced by the Proposed Transaction. *See* CI Ex. No. 1, Verified Statement of Hall, pp. 8-9.

2. Conditions Relative to Definition of "2 to 1" Customers.

The number of customers in Indianapolis that NS will be allowed to serve under the Proposed Transaction is severely limited. NS will be allowed indirect access only to those customers who qualify as "2 to 1"; i.e., those presently existing customers who have the option of rail service from both CR and CSX.<sup>5</sup> NS will not be allowed to compete with CSX for the business of either presently existing customers who do not fall within this definition

---

<sup>4</sup>The arbitration provision should require that the parties choose an arbitrator within 30 days of notice; that the arbitrator hear the case within 60 days of notice; and that the arbitrator make a decision within 90 days of notice.

<sup>5</sup>As indicated above, it is unclear whether these customers are 30 or 66 in number.

or customers that come into existence after the proposed transaction is consummated.

ability to develop a volume of traffic that will consistently fill the train service it provides to Indianapolis from Lafayette and Muncie will be severely hampered by this limitation because CSX will have a monopoly for the business of these customers.

In order to ameliorate the anticompetitive effects of this narrow definition of "2 to 1" customers, the Board should adopt as a condition of approval that "2 to 1" customers be defined to include all Indianapolis customers that CSX will be able to serve under the Proposed Transaction after it is consummated. CI Ex. No. 1, V.S. of Hall, p. 6. Moreover, all shortline railroads that can connect or interchange with CSX after the transaction is consummated should be allowed to connect or interchange with NS. The imposition of these conditions would lessen the anticompetitive effects of the transaction

Moreover, they would be operationally feasible and would not harm the public benefits to be realized by the Proposed Transaction. CI Ex. No. 1, V.S. of Hall, p. 8.

3. Conditions Relative to Switching Agreement

CSX will provide switching services to NS' customers under a separate switching agreement. The specific charges to NS for CSX's handling of cars have not yet been determined by the Applicants. Instead, the switching agreement provides that NS shall pay

CSX a "mutually agreed upon rate" for each car switched by CSX for NS during the first six months of the Proposed Transaction. After the initial six-month period, CSX and NS will conduct a joint study to determine CSX's "actual cost" for switching cars in the account of NS and determine the maintenance cost of NS' use of tracks at Hawthorne Yard. The charges to NS for CSX's switching services will thereafter be based on the results of this joint study, which will not be open to public, shipper or shortline audit. The switching agreement does not set forth any time requirement for CSX's pickup and delivery of NS' cars to and from customer sidings. Finally, like the TRA, there is no provision for expedited arbitration and the award of monetary damages by the arbitrator. The vagueness of the proposed switching agreement on these points is lethal to NS' ability to compete with CSX in the Indianapolis market.

The anticompetitive effects that will result from the vagueness of the switching agreement can be overcome if the Board imposes a few additions to the switching agreement. First, the Board should require CSX and NS agree to a \$130 per car switching charge, adjusted on a yearly basis for inflation/deflation. *CI Ex. No. 1, V.S. of Hall, p. 7.* The Board has found this switching charge adequate to cover cost for switching in previous mergers. Second, the Board should require that CSX and NS agree that at any time during the first ten years of the Proposed Transaction NS has a one time right to elect either to provide its own direct service to Indianapolis customers or to contract with a third party of its own choosing to provide switching services to its Indianapolis customers. If at the end of this ten-year period NS fails to exercise its right of election, CSX would again be required to perform switching services for NS at Indianapolis on a cost-based charge that will be



determined in the manner set forth in the Proposed Transaction. Third, the switching agreement should contain arbitration provisions identical to those requested for the TRA. Finally, the switching agreement should set forth a specific time requirement for CSX's pickup and delivery of NS' cars to and from customer sidings. At a minimum, this time requirement should be that NS' traffic will be given the same treatment as CSX's.

The foregoing additions and modifications to the switching agreement would help ameliorate the anticompetitive effects of the Proposed Transaction. In particular, they would address issues that might allow CSX to impede or lessen the quality of NS' service to Indianapolis customers. Moreover, the proposed conditions would be operationally feasible. Finally, the conditions would not cause a reduction of benefits to the public produced by the Proposed Transaction.

#### 4. Conditions Relative to Traffic Volume

In the usual situation, the private contracts between the customer and the rail carrier cover specific commodities moving over specific routes in specific volumes at specific rates. The term of these contracts is often for a number of years. Because under the Proposed Transaction, it appears that CSX will be assuming the contracts that currently exist between CR and the Indianapolis customers, NS will be unable to compete for those customers. Thus, NS' ability to develop a volume of traffic sufficient to maintain adequate rail service will be severely impaired. Also, under the Proposed Transaction, NS has no competitive way to deliver cars from Indianapolis to the Chicago market (unlike CSX who will have a direct

route to Chicago through Lafayette). Both of these factors will have a significant impact on NS' ability to build the traffic volumes necessary to compete with CSX at Indianapolis.

In order to ameliorate this impairment of NS' ability to compete with CSX at Indianapolis under the Proposed Transaction, CSX should be required to release all of its Indianapolis customers from those provisions of their contracts that would preclude or penalize these customer from rebidding traffic to NS after the proposed transaction is consummated. CI Ex. No. 1, V.S. of Hall, p. 6. Moreover, CSX should provide haulage for NS to the Chicago market. Finally, the Board should maintain oversight of the transaction for a period of ten (10) years with a right to impose additional conditions if a competitive situation between CSX and NS does not develop in the Indianapolis market. These required conditions would be operationally feasible and would have no adverse impact as the benefits to be realized by the Proposed Transaction.

#### **Summary of Requested Conditions**

The City of Indianapolis is opposed to the Proposed Transaction unless the following conditions are imposed by the Board:

- (1) The TRA requires that CSX maintain the subject trackage at its current Track Classes and Speed;
- (2) The TRA requires CSX to dispatch trains equally and without prejudice under all circumstances;

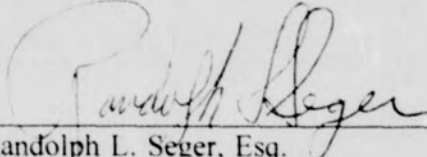
- (3) The TRA provides for expedited arbitration of disputes between NS and CSX, as well as allowing the arbitrator to assess monetary damages for violation of the TRA;
- (4) The TRA provides that NS has the right to lease, buy or build trackage at Hawthorne Yard for NS' exclusive use;
- (5) "2 to 1" customers are defined in such a way that after the transaction is consummated NS is able to provide rail service to all Indianapolis customers to which CSX is able to provide rail service;
- (6) All presently existing and future shortline railroads that can connect or interchange with CSX after the Proposed Transaction is consummated can also connect or interchange with NS and each other;
- (7) The switching agreement provides that the switching charge for CSX's switching of NS' cars is set at \$130 per car, adjusted each year according to a mutually agreed standard for inflation/deflation;
- (8) The switching agreement allows NS a one-time right to elect during the first 10 years of the Proposed Transaction to provide its own direct service to Indianapolis customers and shortlines or to contract with a third party of its own choosing to provide these switching services;
- (9) The switching agreement contains arbitration provisions similar to those requested for the TRA;

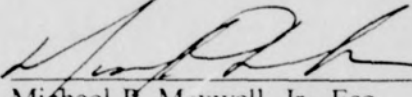


- (10) The switching agreement sets forth a specific time requirement for CSX's pickup and delivery of NS' cars to and from customer sidings in Indianapolis (at minimum that NS' traffic will be given the same treatment as CSX's);
- (11) CSX is required to release all of its Indianapolis customers from those provisions of their contracts that would preclude or penalize them from rebidding traffic to NS after the Proposed Transaction is consummated;
- (12) CSX is required to provide haulage for NS to Chicago; and
- (13) The Board maintains oversight of the transaction for a period of ten (10) years with the authority to impose further conditions if competition between CSX and NS does not develop in the Indianapolis market.

Respectfully submitted,

McHALE, COOK & WELCH, p.c.  
1100 Chamber of Commerce Building  
320 N. Meridian Street  
Indianapolis, IN 46204  
(317) 634-7588  
(317) 634-7598 - Facsimile

  
\_\_\_\_\_  
Randolph L. Seger, Esq.  
Robert B. Scott, Esq.

  
\_\_\_\_\_  
Michael P. Maxwell, Jr., Esq.

Attorneys for City of Indianapolis

UNITED STATES OF AMERICA  
DEPARTMENT OF TRANSPORTATION  
SURFACE TRANSPORTATION BOARD

---

Finance Docket No. 33388

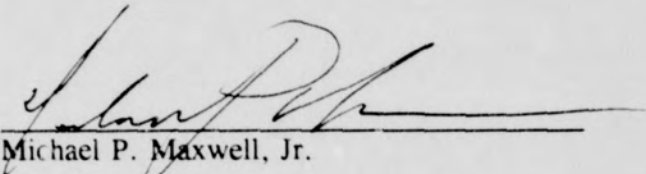
---

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

---

**CERTIFICATE OF SERVICE**

I hereby certify that I have served this 20<sup>th</sup> day of October, 1997, a copy of the foregoing Redacted Version of Comments and Supporting Evidence of the City of Indianapolis in Opposition to the Application of CSX Corporation, et al., Unless Competitive Conditions are Imposed to Applicants' attorneys and on all other persons of record in this proceeding.

  
\_\_\_\_\_  
Michael P. Maxwell, Jr.

3317 MPM J:\DOCS\MPM\Publ\1TY1\_1 85465

BEFORE THE  
SURFACE TRANSPORTATION BOARD

---

FINANCE DOCKET NO. 33388

CSX CORPORATION, ET AL.  
NORFOLK SOUTHERN CORPORATION, ET AL.  
CONRAIL INC., ET AL.

---

VERIFIED STATEMENT  
OF  
JOHN HALL



My name is John Hall. From 1961 to 1968, I was employed by the Soo Line Railroad Company. From 1968 to 1994, I was employed by the Burlington Northern Railroad Company and its predecessor, Great Northern Railway, in a succession of positions of increasing responsibility. I served as Vice President of Business Development from 1986 to 1994. During my career at Burlington Northern, I planned, negotiated, implemented and managed a number of line sales, line acquisitions, trackage rights/haulage agreements and terminal switching operations. I have served as an expert in previous acquisitions, including the UP & SP merger. I am quite familiar with the technical issues and analysis relevant to this proceeding from the perspective of both the landlord and the tenant.

CSX, Norfolk Southern ("NS") and Conrail ("CR") have submitted their Railroad Control Application to the Surface Transportation Board, Finance Docket No. 33388, requesting that CSX and NS be given control and the management of all of the assets of CR. I have been asked by the City of Indianapolis to prepare and submit these comments on various issues involved in the Application. There are several aspects of the proposed transaction that are of particular relevance to the City of Indianapolis:

1. CSX has used the CR switching tariff to define "2 to 1" customers in Indianapolis. The number of these "2 to 1" customers varies between 30 (See Exhibit "I" to the Switching Agreement, Application, Vol. 8B, p. 525) and 66 (see Mr. Hart's Verified Statement, Application, Vol. 2A, p. 147). The proposed transaction allows NS only to serve

these "2 to 1" firms, while CSX would have exclusive access to all other firms, including all new industries in Indianapolis.

2. Today, there are a number of shortline railroads that connect at Indianapolis. The proposed transaction will apparently allow only one of these shortlines, the Indiana Railroad (which is controlled by CSX), to connect with NS at Indianapolis.

3. Under the proposed transaction CSX will assume all of CR's existing transportation contracts.

4. NS will be granted overhead trackage rights from Lafayette, 85 miles to the northwest of Indianapolis, and from Muncie, 54 miles to the northeast. In addition to using these routes to reach Indianapolis, NS will be able to serve "2 to 1" customers at Crawfordsville on the line to Lafayette. These trackage rights are described as "standard, existing trackage rights fees in effect between NS and CSX for over the road movements." At Indianapolis, NS trains will originate/terminate at Hawthorne Yard. CSX will provide switching service between the "2 to 1" customer and NS for a cost-based fee.

5. NS does not have under the proposed transaction a route between Indianapolis and Chicago that is competitive with CSX's.

6. The Trackage Rights Agreement does not specify that the subject trackage shall be maintained at current levels. As a tenant, NS gets to pay .29¢ a car-mile and has no say in how the subject trackage is maintained.

7. In the Trackage Rights Agreement, CSX pledges to operate the track "without prejudice or partiality to either party and in such a manner as will afford the most economical and efficient movement of all traffic." (Emphasis added). Because CSX will have a much larger volume of traffic than NS on these routes, CSX will always have the ability to favor its own traffic.

8. The Trackage Rights Agreement provides that disputes are to be resolved by Arbitration. The arbitrator has the ability to decide issues, but not damages. While the arbitrator's decision is binding on the parties, enforcement lies in judicial action. The process is slow, expensive and time consuming, and it does not work to resolve competitive/commercial problems between tenant and landlord and clearly favors the landlord.

9. Hawthorne Yard in Indianapolis is designated as the place where NS trains will originate and terminate. The yard will be owned and controlled by CSX. NS has no right to lease, buy or build track at Hawthorne Yard for NS' exclusive use.

10. CSX will provide switching services between Hawthorne and "2 to 1" customers. The Switching Agreement does not obligate CSX to any standards of

performance or equality. CSX is apparently free to perform the service as it sees fit. NS pays the car hire and CSX receives any demurrage.

11. The charge for switching services will be "cost based" and be determined at a future date. Any dispute regarding the switching charge will be resolved by binding arbitration. The arbitration provisions are similar to those as the Trackage Rights Agreement. There are no deadlines or penalties.

Given the above, the "2 to 1" solution proposed for the City of Indianapolis will not provide the "balanced competition" envisioned by Mr. Hart in his Verified Statement. NS cannot develop a competitive presence in Indianapolis when CSX always stands between NS and its customer and to a very large measure controls the quality of transportation service NS can offer. This is made all the more difficult when:

1. NS' "2 to 1" customer base is so limited;
2. It cannot interchange traffic with connecting shortline railroads;
3. CSX will control "contracted" rail tonnage;
4. NS has vague contracts governing how its traffic will be handled;
5. Dispute resolution is slow and without consequence; and
6. A significant portion of NS' costs are unknown (switching fees).



In view of the foregoing listed points, as well as the fact that CSX will be able for the most part to control the quality of NS' service to Indianapolis customers, the proposed transaction will have to be modified in the following ways if NS is to have a meaningful opportunity to develop a competitive presence at Indianapolis:

1. "2 to 1" customer should be freed from any contractual prohibition which restricts their ability to rebid traffic between CSX and NS after the transaction is consummated;

2. "2 to 1" customers are defined to include all Indianapolis customers that CSX will be able to serve under the proposed transaction after it is consummated. New customers will be open to NS if NS pays 1/2 the cost of establishing rail service.

3. NS has the right to establish connections and interchange traffic with any shortline that CSX will have connections and interchange with after the transaction is approved.

4. For traffic moving in connection with "2 to 1" customers or originating/terminating on shortlines connecting with NS at Indianapolis, CSX will provide haulage to Chicago.

5. The Trackage Rights Agreement be modified to define the current Track Class and Speed as the Maintenance Standard.

6. The Trackage Rights Agreement be modified to state that CSX and NS trains will be dispatched and operated equally and without prejudice under all circumstances.

7. NS should have the option to lease, acquire and/or build trackage at Hawthorne Yard.

8. The Switching Agreement should be modified to state that CSX and NS traffic will be handled equally and without prejudice.

9. NS should receive demurrage.

10. The arbitration provisions of the Trackage Rights Agreement and the Switching Agreement should be consistent and modified to have:

- a. The arbitrator picked within 30 days of notice.
- b. Hearing by arbitrator within 60 days of notice.
- c. Decision of arbitrator within 90 days of notice.

- d. The arbitrator award damages when either party use the Trackage Rights Agreement or the Switching Agreement to gain a competitive advantage of the other party.

11. There should be an explicit switch charge of \$130 per car for all "2 to 1" traffic. That switch charge was found adequate by the Board to cover system average switching costs in the UP and SP merger. No variation due to commodity, car type, etc. Likewise, there should be an explicit switch charge if and when CSX performs intermediate switching between a shortline and NS. Such charges would be adjusted periodically for inflation/deflation.

12. During the first ten years of the transaction, NS would have the one time right to elect to provide its own exclusive service to "2 to 1" customers and shortline connections with their trains or through those of a designated third party.

13. In a transaction of this scope, it is difficult to anticipate potential problem areas and solutions. I believe that STB should retain oversight for 10 years.

The foregoing conditions would all be operationally feasible and would not lessen the public benefit of the proposed transaction. Instead, if imposed by the Board, these conditions would ameliorate the anticompetitive effects of the proposed transaction as it stands and


increase the chances that NS will be an effective competitor of CSX's in the Indianapolis market.

**[The rest of this page left intentionally blank.]**



## Verification

I, John Hall, affirm under penalties of perjury that the statements herein contained are true to the best of my knowledge, information and belief.

  
John Hall



STATE OF MINNESOTA )  
 ) SS:  
COUNTY OF *St Louis* )

Before me the undersigned, a Notary Public in and for said County and State, personally appeared John Hall, who acknowledged the execution of the foregoing, and who, having been duly sworn, stated that the representations therein contained are true.

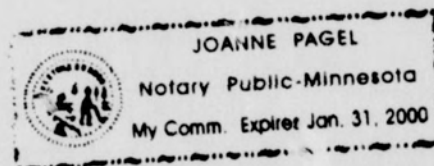
WITNESS MY HAND and Notarial Seal this 16th day of Oct, 1997

My Commission Expires. 1-31-2000

My County of Residence: St Louis

  
 Notary Public - Written  
  
 Notary Public - Printed

**NOTARY: AFFIX SEAL**



**BEFORE THE  
SURFACE TRANSPORTATION BOARD**

---

**FINANCE DOCKET NO. 33388**

**CSX CORPORATION, ET AL.  
NORFOLK SOUTHERN CORPORATION, ET AL.  
CONRAIL INC., ET AL.**

---

**VERIFIED STATEMENT  
OF  
STEPHEN GOLDSMITH  
MAYOR OF INDIANAPOLIS**

I am Stephen Goldsmith, Mayor of Indianapolis. After graduating from the University of Michigan Law School, I practiced law for 7 years before serving in the public sector as the Marion County Prosecuting Attorney from 1979-90. In 1992, I was elected Mayor and currently am in my second term.

Under my Administration, the City of Indianapolis is focused on stream-lining government, reducing regulations and reinvesting in our communities. Our city government has become more efficient largely through introducing competition to many municipal services. A smaller, more efficient government has saved taxpayer dollars and reduced the burden of government on business while simultaneously increasing service and reducing cost.

#### Introduction to Indianapolis

According to 1995 estimates of the U.S. Census Bureau, Indianapolis is the twelfth (12th) largest city in the United States with a population of 817,624 and a Metropolitan area of 1.4 Million. Of the cities served by CSX and NS east of the Mississippi, Indianapolis is the fifth (5th) largest.

Indianapolis has a diversified economy with continued strength in manufacturing and distribution while becoming a favorite site for headquarters and technical-related businesses. The Services industry employs 26% our workforce, followed by Retail Trade at 20% and Manufacturing at 16%. Some of our manufacturing industries include pharmaceuticals, automotive components and products, agricultural products, consumer products and chemicals.

Due to our industry make-up and geographic location, Indianapolis has become a major distribution center. Federal Express and U.S. Postal Service have both established distribution hubs in Indianapolis which emphasizes our importance and continued development as a distribution center. In addition, over 75 trucking firms have terminals in the Indianapolis area providing extensive truck transportation and creating a large potential intermodal market.

#### Overview

As Mayor, I am admittedly not a rail expert. Therefore, I will reserve the technical discussion for the appropriate parties. However, I do recognize that as a major manufacturing and distribution hub Indianapolis must be a marketplace that allows competitive access to transportation and distribution services. Therefore, the railroads servicing our city are very important to the local, state and national economy.

The City of Indianapolis is largely concerned regarding the CSX and NS acquisition of Conrail, and will only intervene, to the extent that the public interest is at stake. This is the case regarding the Conrail acquisition. From an economic development perspective, communities will be placed at a severe competitive and comparative disadvantage if held captive to a single railroad. I believe the acquisition of Conrail by CSX and NS, as currently structured, does not create a competitive rail environment in Indianapolis. Indianapolis will become captive to a single railroad in which competitive market forces will be eliminated.



At a minimum, the competitive presence of two Class-one railroads in Indianapolis must be maintained. It seems very unlikely NS will be in a position to establish any degree of presence, let alone compete, through the ability to only serve one industry directly and without owning any assets.

#### Situational Overview

Currently, two class one railroads, CSX and Conrail, own and operate track in our city. Three shortline railroads offer service directly to Indianapolis: The Indiana Railroad Company, Indiana Southern Railroad, The Louisville & Indiana Railroad. At a minimum, 66 individual industries are open to both CSX and Conrail. These businesses employ approximately 40,238 workers, ship over 4 Million tons of materials which is over 65,000 car loads, and generate well over \$64 Million in revenue for the railroads. These figures do not account for traffic already captive to a single carrier, the market value of these goods, or the volume of traffic with moves through Indianapolis.

Under the proposed CSX/NS acquisition of Conrail, CSX will get all Conrail assets in Indianapolis, leaving it the exclusive provider of Class I rail service. To remedy this problem, CSX proposes to let NS serve existing customers in Indianapolis that are served by CSX and Conrail (2 to 1 customers). NS will enter Indianapolis on trackage owned and controlled by CSX via trackage rights. NS will be assigned interchange tracks at Hawthorne Yard, also owned and controlled by CSX. CSX will provide switching services at 2 to 1 firms for a "to be determined" cost-based charge.

### City's Actions

Due to the importance of railroad transportation to our city's economy and the large presence of Conrail, the City of Indianapolis began monitoring the acquisition in January 1997. Once it became apparent CSX and NS would jointly file with the STB to acquire Conrail, the city conducted a forum on May 15 to allow CSX and NS the opportunity to present their preliminary plan and hear comments of local businesses. Through a number of subsequent formal meetings, telephone calls and written comments, the consensus emerged that the current competitive situation within Indianapolis is in jeopardy. In addition, Indianapolis could further become a marketplace captive to one railroad.

In order to most accurately assess the acquisitions effects, we requested information from both NS and CSX. These requests were never responded to in a satisfactory manner with pertinent information. As a result, the city filed discovery and participated in the deposition proceedings established by the Surface Transportation Board.

Indy-ACTS (Association for Competitive Transportation Services) was formed to more efficiently share information and formalize a consensus position. The groups membership consisted of local shippers, shortlines, real estate developers and economic development organizations. John Hall, a former Vice President of Burlington Northern, was hired as a consultant.

The City continued to express its concern as did many members of the Indiana Congressional Delegation. I invited John Snow, Chairman CSX, to Indianapolis to meet with me. Written statements from United States Senator's Richard Lugar and Dan Coats, United States Representatives Dan Burton, Julia Carson and David McIntosh expressed their concern and encouraged an agreement to be reached between CSX and the City of Indianapolis. Despite Congressional and Mayoral objection to the plan in Indianapolis, and our desire to negotiate a reasonable agreement, to date, CSX and the City have not reached an agreement to effectively correct the problems in Indianapolis under the proposed transaction.

#### Conclusion

The City has made extensive efforts to gain information and reach a settlement with CSX and NS that would meet our mutual needs. These efforts have not been successful to date. The City of Indianapolis is formally opposed to the proposed CSX and NS acquisition of Conrail unless the conditions outlined by our expert John Hall are adopted by the Board. I ask that the STB strongly consider the recommendations of John Hall.

[The rest of this page left intentionally blank.]

Verification

I, Stephen Goldsmith, Mayor of the City of Indianapolis, Indiana, affirm under penalties of perjury that the statements herein contained are true to the best of my knowledge, information and belief.



Stephen Goldsmith  
Mayor, City of Indianapolis, Indiana

STATE OF INDIANA       )  
                                  )SS:  
COUNTY OF MARION     )

Before me the undersigned, a Notary Public in and for said County and State, personally appeared Stephen Goldsmith, Mayor of the City of Indianapolis, Indiana, who acknowledged the execution of the foregoing, and who, having been duly sworn, stated that the representations therein contained are true.

WITNESS MY HAND and Notarial Seal this 17<sup>th</sup> day of October, 1997

My Commission Expires:

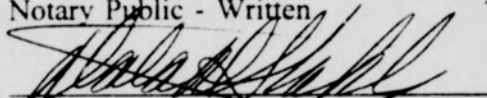
11-28-97

My County of Residence:

Marion

DALA D. STAHLEY

Notary Public - Written



Notary Public - Printed

**NOTARY: AFFIX SEAL**



STB

FD

33388

10-21-97

D

182767



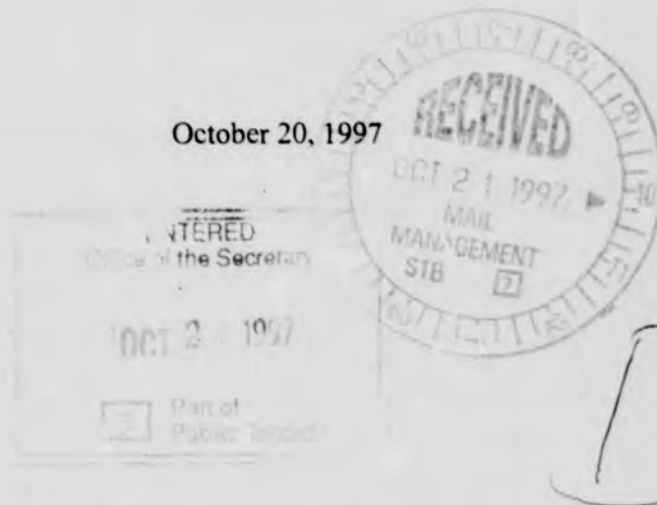
Conservation Law Foundation

182767

October 20, 1997

BY OVERNIGHT COURIER

Mr. Vernon Williams  
Office of the Secretary  
Surface Transportation Board  
1925 K Street, N.W., Room 700  
Washington, DC 20423



Re: STB Finance Docket No. 33388 (Conrail Merger)

Dear Mr. Williams:

The Conservation Law Foundation ("CLF") appreciates the opportunity to submit comments on the proposed merger involving the division of Conrail between Norfolk-Southern and CSX Corp. (the "Conrail merger").

CLF is New England's oldest environmental organization, with offices in Massachusetts, Vermont, New Hampshire and Maine. CLF's mission is to solve the environmental problems that threaten the people, natural resources, and communities of New England, using law, economics and science to design and implement strategies that conserve natural resources, protect public health, and promote vital communities in our region. CLF has long supported rail as an environmentally and economically sensible alternative to endless highway expansion and resulting urban sprawl and air pollution.

CLF has two general comments at this time, in anticipation of more detailed comments on the draft Environmental Impact Statement due to be released next month. If the Surface Transportation Board ("STB") ultimately approves the merger application, CLF respectfully requests that the STB impose the following two conditions:

1. CSX must cooperate with the Massachusetts Bay Transportation Authority ("MBTA") and Amtrak in the provision of improved, faster passenger rail service and increased access between Boston, Massachusetts and Albany, New York; and
2. CSX must make every effort to improve freight rail service east of the Hudson River -- especially from New York City and the ports of New Jersey to New England.

62 Summer Street, Boston, Massachusetts 02110-1016 • (617) 350-0990 • FAX (617) 350-4030

120 Tillson Avenue, Rockland, Maine 04841-3415 • (207) 596-5900 • FAX (207) 596-7706

21 East State Street, Montpelier, Vermont 05602-3010 • (802) 223-5992 • FAX (802) 223-0060

PRINTED ON  
RECYCLED PAPER

## Conservation Law Foundation

Mr. Vernon Williams, Secretary  
Surface Transportation Board  
October 20, 1997  
page 2

Passenger service between Boston and Albany is hampered by the low speed limits imposed by Conrail. Although the track is Class Five and could accommodate speeds of 90 miles per hour, Conrail has mandated that no train exceeds 60 m.p.h. In order to attract passengers away from their cars -- where they can travel on a highway that has a speed limit of 65 m.p.h. -- passenger trains must be able to take advantage of the full speed capacity of the track infrastructure. CSX should make every effort to facilitate such improved service.

Similarly, CSX should expand its provision of freight service between New York and New England to reduce the dependence on highway trucking--currently, Interstate 95 in Connecticut is heavily stressed by truck traffic, a situation that is inefficient, unsafe and uneconomic.

Trains have important economic and environmental benefits, such as:

- **Efficiency:** Passenger trains are three times as energy-efficient as commercial air and six times as efficient as a car with one occupant. Freight trains are up to nine times more efficient than trucks. Switching only five per cent of U.S. highway driving to electrified rail would save more than one-sixth the amount of oil imported from the Middle East.
- **Air pollution:** Compared to heavy trucks, freight trains emit one-third the carbon dioxide and nitrogen oxide and one-tenth the hydrocarbons and diesel particulates.
- **Land use:** Trains can encourage more compact land-use patterns and concentrate economic development around town centers, rather than contributing to urban sprawl, as highways invariably do. More rail also translates into less traffic congestion and paved-over land; one railroad track can carry as many people per hour as eight lanes of highway.
- **Revitalization:** Trains can help revitalize old downtown areas that were originally built around rail. By adding a new travel option, rail increases tourism and economic development. A recent study of Virginia Metrorail concluded that the state had realized a \$1.2 billion net gain in tax revenues alone from its investment in trains. Other studies have shown that residential property values go up with access to rail.

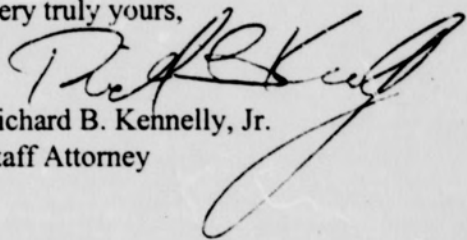
## Conservation Law Foundation

Mr. Vernon Williams, Secretary  
Surface Transportation Board  
October 20, 1997  
page 3

For these and other reasons, CLF urges the STB to impose the two conditions specified above should the STB approve the merger.

Thank you for giving CLF the opportunity to comment on the Conrail merger.

Very truly yours,

  
Richard B. Kennelly, Jr.  
Staff Attorney





STB

FD

33388

10-21-97 D

182762

182768

FINA-2

BEFORE THE SURFACE TRANSPORTATION BOARD

Finance Docket No. 33388

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



COMMENTS OF:

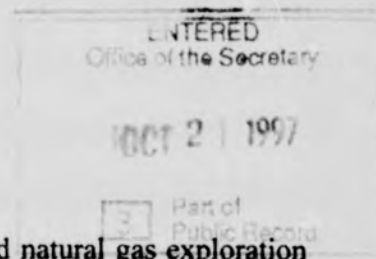
FINA OIL AND CHEMICAL COMPANY

D

Fina Oil and Chemical respectfully opposes the Control Application. Fina is concerned about the potential service disruptions created by this acquisition and the financial commitment made by the Applicants for this Control. Fina believes that the Applicant's proposed transaction is not in the public interest. Fina recommends the adoption of the conditions suggested by the CMA / SPI made in their filing as a minimum condition for STB approval of this Application.

**I. Statement of Identity**

Fina Oil and Chemical Company engages in crude oil and natural gas exploration and production; petroleum products refining, supply and transportation, and marketing; and chemicals manufacturing and marketing. Fina relies heavily on the rail



transportation industry to deliver its products such as polystyrene, polypropylene, polyethylene, asphalt and other chemical products, to a variety of customers located across the United States, Canada and Mexico. Fina's production facilities are located predominately along the Texas and Louisiana Gulf Coast.

## **II. Statement of Interest**

Rail transportation accounts for over 80 percent of Fina's chemical deliveries and is responsible for over 20 percent of the cost of finished petrochemical products. Fina is involved in these merger proceedings to ensure that Fina's interest in transportation are stated. Fina expects benefits to be achieved in the merger process in terms of service levels and costs and ensure that these benefits are realized. Fina is concerned that the problems experienced by recent mergers may be repeated in this Conrail break-up.

## **III. Discussion of Concerns:**

### **A. Payment of the Transaction Depends on Revenue Growth**

Due to the bidding war developed by the Applicants, the price paid for the transaction has far exceeded the expectations of Conrail's market value. In order to achieve an acceptable return for this transaction, the Applicants are depending on traffic growth, while simultaneously cutting costs. Fina is concerned that if this growth is not realized to its magnitude, the existing shipping community may be asked to bear the costs of the acquisition in the form of increased rates.

- B. **The service resulting from the integration of large railroads could lead to decreased service levels in the short term, as well as the long term.**

1. **Day One Operations**

Fina believes that the operational aspects defined for the takeover date need to be flawless for a smooth operation. This Control Application differs from the previous railroad mergers in that one railroad is being divided among two carriers.

2. **Integration of former Conrail Lines**

Fina has experienced severe congestion and service disruptions in the Western railroad mergers, Union Pacific / Southern Pacific and Burlington Northern / Santa Fe. Fina is concerned that the same disruptions may also occur in this Application. The Application does address the situation in great detail, but prior experience indicates that detail plans may not be sufficient for success.

3. **Operation of Shared Asset Areas**

One key ingredient in the operating plan is the operations of the Shared Asset Areas. Our experience with switching railroads has not been favorable at best. Even after long periods of operation, the dual ownership of lines lead to the increased confusion among the owners and hampered service levels. There are instances where the owners can not agree on strategic or tactical solutions to problems. The Application does not adequately explain the operation of the Shared Asset Areas, and thus



shippers might realize poor service. Fina does acknowledge that the Shared Asset Areas should provide economical benefits to the shipper.

**4. Additional Costs Incurred as a Result of Implementation**

In periods of combination of operations and organizations, problems do occur where additional costs are incurred by the shipper. Fina expects the additional costs to be borne by the company who caused these costs. For example, if a railroad loses a railcar due to system integration problems, that railroad should be responsible for incurring charges which occurred as a result of the problem.

**C. Potential of Gateway Reroutes**

The Application does not adequately address the potential shifts to alternate gateways for existing business. The Applicants mention that more efficient gateways will be examined. They did not address any potential economic impact to the shippers as a result of the revenue requirements of the connecting carriers.

**IV. Support of CMA / SPI Conditions**

Fina recommends the adoption of the conditions indicated by the CMA/SPI filing. Fina is a member of both the Chemical Manufacturers Association (CMA) and the Society of Plastics Industry (SPI). The granting of these conditions would help in alleviating Fina's concerns.

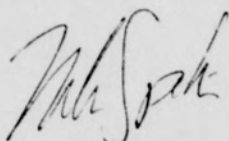
**V. Oversight Proceedings:**

Fina believes in the continued oversight of the merger and strongly encourages the Board to implement Oversight Proceedings for this Application. Fina believes that the oversight process is essential in this rail merger due to rail transportation's critical importance to the company. Fina believes that the oversight process established in the Union Pacific case has been critical in monitoring the implementation of the merger.

**VI. Conclusion**

For the foregoing reasons, Fina opposes the Control Application. If the Application continues for approval, Fina urges the Board to condition the approval on the CMA / SPI conditions set forth in their application.

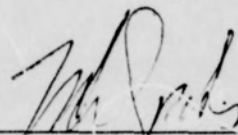
Respectfully submitted,



Mike Spahis  
Fina Oil and Chemical Company  
Manager of Logistics and Distribution  
8350 North Central Expressway, Suite 1620  
Dallas, TX 75206  
(214) 750-2898

CERTIFICATE OF SERVICE

I hereby certify that copies of the comments of Fina Oil and Chemical Company, in accordance with the Board's Decisions in this proceeding, have been served this 20th day of October, 1997 by next day air to the Surface Transportation Board, Administrative Law Judge Jacob Leventhal, Dennis G. Lyons, Richard A. Allen, and Paul A. Cunningham, and by first-class mail, postage prepaid on all parties of record in Docket No. 33388.



---

Mike Spahn  
Fina Oil and Chemical Company  
Manager of Logistics and Distribution  
8350 North Central Expressway,  
Suite 1620  
Dallas, TX 75206  
(214) 750-2898

STBO

FD

33388

10-21-97

D

182768



# SCHIFF HARDIN & WAITE

A Partnership Including Professional Corporations

7200 Sears Tower, Chicago, Illinois 60606-6473  
Telephone (312) 876-1000 Facsimile (312) 258-5600

Sheldon A. Zabel  
(312) 258-5540  
Email: szabel@schiffhardin.com

Chicago  
Washington  
New York  
Peoria  
Merrillville

October 20, 1997

## VIA FEDERAL EXPRESS

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

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

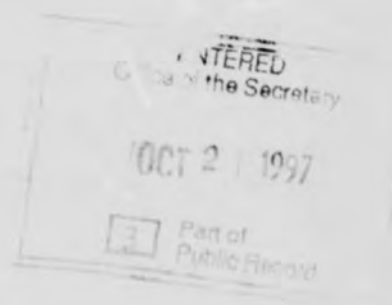
**Finance Docket No. 33388 (Sub-No. 36)**  
**Transtar, Inc. and Elgin, Joliet and Eastern**  
**Railway Company -- Control -- Indiana Harbor**  
**Belt Railroad Company**

**Finance Docket No. 33388 (Sub-No. 60)**  
**Conrail Inc. and Consolidated Rail Corporation --**  
**Divestiture of Control -- Indiana Harbor Belt**  
**Railroad Company**

**Finance Docket No. 33388 (Sub-No. 68)**  
**Conrail Inc. and Consolidated Rail Corporation --**  
**Divestiture of Control -- Indiana Harbor Belt**  
**Railroad Company**

Dear Secretary Williams:

On behalf of Northern Indiana Public Service Company, enclosed for filing in the above-captioned proceeding are an original and twenty-five copies of the comments of Northern Indiana Public Service Company (NIPS-1). As you will note, we have designated this as NIPS-1 and will use the "NIPS" acronym on future filings. A computer diskette containing the text of these filings in WordPerfect 6.1 format is also enclosed.



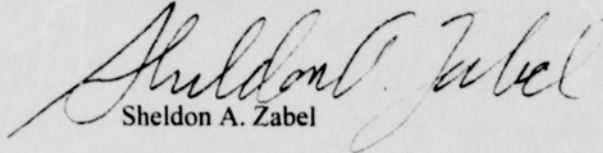
SCHIFF HARDIN & WAITE

Mr. Vernon A. Williams  
October 20, 1997  
Page 2

As required, copies of NIPS-1 have been served by first class mail, postage prepaid on all parties of record listed on the Board's service list.

If you have any questions on this matter, please contact the undersigned.

Very truly yours,

A handwritten signature in cursive script, reading "Sheldon A. Zabel". The signature is written in dark ink and is positioned above the printed name.

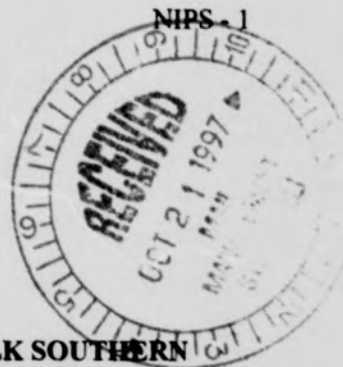
Sheldon A. Zabel

SAZ/mjt  
Enclosures

cc: The Honorable Jacob Leventhal (w/enci.)  
All Parties on Service List

182768

**BEFORE THE  
SURFACE TRANSPORTATION BOARD**



---

**FINANCE DOCKET NO. 33388**

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

---

**FINANCE DOCKET NO. 33388 (SUB-NO. 36)**

**TRANSTAR, INC. AND ELGIN, JOLIET AND EASTERN RAILWAY COMPANY  
-- CONTROL --  
INDIANA HARBOR BELT RAILROAD COMPANY**

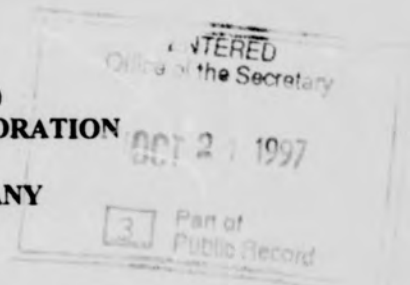
---

**FINANCE DOCKET NO. 33388 (SUB-NO. 60)**

**CONRAIL AND CONSOLIDATED RAIL CORPORATION DIVESTITURE OF CONTROL -  
INDIANA HARBOR BELT RAILROAD COMPANY**

---

**FINANCE DOCKET NO. 33388 (SUB-NO. 68)  
CONRAIL, INC. AND CONSOLIDATED RAIL CORPORATION  
-- DIVESTITURE OF OWNERSHIP --  
INDIANA HARBOR BELT RAILROAD COMPANY**



---

**COMMENTS OF NORTHERN INDIANA PUBLIC SERVICE COMPANY**

Sheldon A. Zabel  
Schiff Hardin & Waite  
7200 Sears Tower  
Chicago, Illinois 60606  
(312) 258-5540

Dated: October 20, 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**

---

**FINANCE DOCKET NO. 33388 (SUB-NO. 36)**

**TRANSTAR, INC. AND ELGIN, JOLIET AND EASTERN RAILWAY COMPANY  
-- CONTROL --  
INDIANA HARBOR BELT RAILROAD COMPANY**

---

**FINANCE DOCKET NO. 33388 (SUB-NO. 60)**

**CONRAIL AND CONSOLIDATED RAIL CORPORATION DIVESTITURE OF CONTROL -  
INDIANA HARBOR BELT RAILROAD COMPANY**

---

**FINANCE DOCKET NO. 33388 (SUB-NO. 68)  
CONRAIL, INC. AND CONSOLIDATED RAIL CORPORATION  
-- DIVESTITURE OF OWNERSHIP --  
INDIANA HARBOR BELT RAILROAD COMPANY**

---

**COMMENTS OF NORTHERN INDIANA PUBLIC SERVICE COMPANY**

**INTRODUCTION:**

Northern Indiana Public Service Company ("NIPS") submits the following comments on the transactions proposed in the above-referenced proceeding by CSX Corporation ("CSXC"),



CSX Transportation ("CSXT"), Norfolk Southern Corporation ("NSC"), Norfolk Southern Railway ("NSR"), Conrail Inc. ("CRI") and Consolidated Rail Corporation ("CRC").<sup>1</sup>

NIPS is a regulated electric and natural gas utility operating in the northern portion of the state of Indiana. NIPS owns and operates four coal-fired electric generating stations - the Bailly Generating Station in Chesterton, Indiana ("Bailly"); the Michigan City Generating Station in Michigan City, Indiana ("Michigan City"); the Dean H. Mitchell Generating Station in Gary, Indiana ("Mitchell"); and the R.M. Schahfer Generating Station in Wheatfield, Indiana ("Schahfer"). All four stations obtain their coal supplies virtually exclusively by rail.

The sole destination carriers for the Mitchell Station is the Elgin, Joliet and Eastern Railway Company ("EJE") and for the Bailly Station is the Chicago SouthShore and South Bend Railroad ("CSS"); Michigan City is served by CSS and Conrail. Schahfer Station is served exclusively by Conrail on what is referred to in the application as the Streator line and which will, if the transactions are approved, become an NS line.

NIPS moves approximately 8.5 million tons per year of coal into its four stations. All of NIPS long-term coal supplies, and the overwhelming majority of the coal it purchases, originates in the West or in Southern Illinois. The Schahfer Station, with four coal-fired generating units aggregating about 1,625 megawatts of net electric generating capacity, represents about 53% of NIPS coal-fired capacity. The Schahfer units utilize both high sulfur coal from Southern Illinois and low sulfur coal from the Powder River and Hanna Basins in Wyoming. Schahfer burns approximately 5 million tons, or 59% of NIPS total coal purchases each year, about 3.4 million tons

---

<sup>1</sup> CSCX and CSXT will be collectively referred to as CSX; NSC and NSR as NS; CRI and CRC as Conrail. All of them together will be referred to as Applicants.

of western coal and 1.6 million tons of Southern Illinois coal. The Southern Illinois coal currently can originate on either the Illinois Central ("IC") or the Union Pacific ("UP"), interchanging with the Streator line without entering the Chicago area. The Powder River Basin coals can originate on either the UP or the Burlington Northern ("BN"), but the Hanna Basin coal can originate only on the UP. The majority of all the Wyoming coal currently originates on the UP. Although it might be possible for this coal not to pass through the Chicago area, currently almost all of it does.

Bailly, Michigan City and Mitchell Stations (collectively referred to as the Lake Stations) also burn both western low sulfur coal and Illinois Basin high sulfur coal. Except for some spot purchases, the contract supplies for the Lake Stations, and the rail origins for them are the same as for the Schahfer Station. In the aggregate the Lake Stations annually burn about 2.2 million tons of western coal and 1.3 million tons of high sulfur coal. All of this coal currently moves through and must interchange through the Chicago area.

### **SERVICE QUALITY**

NIPS is especially concerned that the approval of the transactions proposed in this proceeding, assuming that they are approved, not result in any further deterioration in the quality of service. The Surface Transportation Board ("STB") has already indicated its concern that service may have deteriorated on the UP since its merger with the Southern Pacific ("SP") by initiating its Docket Ex Parte No. 573. Similar concerns have arisen following the merger of the BN with the Santa Fe ("SF"). The transactions proposed here, basically the elimination of Conrail as a separate entity and the consolidation of its different pieces with the CSX and NS, is substantially the same kind of transaction in its effect as were the UP-SP and BN-SF mergers, and the adverse results may be similar.

NIPS' particular concern results from both past and current serious service difficulties in obtaining its necessary coal deliveries, especially into the Schahfer Station. NIPS needs to have about 40 unit trains delivered to Schahfer Station per month but has rarely, if ever, been able to obtain that level or quality of service under its contracts with the carriers. Historically much of the problem came from Conrail's service deficiencies in picking up trains at the junctions on the Streator line, or in the Chicago area or in picking up empties at the Schahfer Station. The overwhelming majority of the coal moves in NIPS owned cars. Conrail has informed NIPS that it should be able to deliver coal from Chicago to Schahfer in eight hours. It has also indicated that it should pick up empties at the station within eight hours of being notified that they are ready for pick up. Conrail has rarely, if ever, been able to achieve that level of service and NIPS is deeply concerned that the transactions proposed here not result in further degradation of its service, in the kind of deterioration of service occurring on the UP-SP and BN-SF.

NIPS concern with the potential for service deterioration is not based merely on second hand indicators of what has happened as result of those other transactions but, unfortunately, is based on first hand experience. As indicated above, NIPS moves by contract a significant volume of coal over the UP and has, since the UP-SP merger, experienced first hand a drastic decline in the quality of service. Right now, as of October 10, 1997, NIPS has only a 5 day supply of low sulfur coal at the Schahfer Station while NIPS endeavors to maintain at least a 30-45 day supply. Certain of the units at Schahfer Station, under applicable environmental laws, can only burn low sulfur coal so the inability to obtain an adequate supply could force NIPS to shut down those units. The problem is directly attributable to the inability or failure of the UP, with whom NIPS contracted to move 95% of its western coal supply, to efficiently and effectively move that coal. Trains, both loaded and

empty, have just been left sitting in various places between Wyoming and Indiana because of the lack of crews or locomotives on the UP. For example, for the months of June through September NIPS scheduled deliveries of 98 unit trains of western coal into Schahfer; NIPS has the cars to accomplish this; NIPS coal suppliers have the capability to produce and load that quantity for NIPS; but the UP was able to move only 78 trains into the station.

NIPS can not definitively state that the transactions proposed here will result in the same deterioration of service that NIPS has experienced with the UP and that NIPS understands also has occurred with the BN-SF. Nonetheless, in light of that experience the STB has the duty to thoroughly and adequately investigate now, not after the fact as it apparently is doing in the UP-SP case, the impact of the proposed transactions on the quality of service that will result, and take all necessary steps to assure that the transactions, if approved, are approved in such a manner as to assure that there will be adequate quality of service and to impose or adopt appropriate mechanism to allow for the prompt identification and correction of any resulting inadequacy in the quality of service.

**INDIANA HARBOR BELT RAILROAD COMPANY:**

The Indiana Harbor Belt Railroad Company ("IHB") is one of the major terminal/belt carriers in the Chicago switching district. Currently Conrail owns 51% of the stock of IHB and after the transaction proposed here, if approved, the CSX and NS would control the IHB. As already indicated, NIPS ships a major portion of its coal purchases through the Chicago district. Not only does virtually all of the western coal destined for the Schahfer Station pass through Chicago but virtually all the coal, western and Illinois Basin, destined for the Lake Stations also passes through Chicago. Thus NIPS is vitally interested in maintaining and promoting adequate competition within



Chicago. Related to that, NIPS is also seriously concerned that a dominating position in the Chicago district could be used as leverage, outside the Chicago district, to the detriment of shippers (and, for that matter, other railroads) who must move freight through the Chicago area.

NIPS understands that if the proposed transactions are approved, CSX and NS will effectively control the three major terminal/belt carriers in the Chicago switching district. That monopolistic concentration of power, even if uncombined with anything else, is on its face anti-competitive and should not be approved by the STB. It would obviously give the CSX and NS the ability to charge rates for the switching, belt movements and terminal services in the Chicago district that would be almost unconstrained by competition and, because of the insurmountable evidentiary burden of challenging a rate in that setting, would be unassailable before the STB. Beyond the issue of rates, this control would also give CSX and NS a clear opportunity to favor their own lines against movements entering and/or leaving the Chicago area on competing lines, thereby pressuring shippers to utilize the CSX or NS to the fullest extent possible to get efficient movement through the highly congested Chicago area.

Of course, CSX and NS are unlikely to provide rates just for the services within the Chicago area, at least to the extent either is able to provide a greater portion of any particular movement. Considering the control of the Chicago area, in terms of both rates and efficiency of service, together with principles set in the STB's so-called "bottleneck" decisions and these two carriers, if we assume they will act rationally, will almost certainly offer to a shipper only the greatest through service with a through or joint rate that is possible for any movement. The Chicago portion would then be legally unchallengeable and the entire rate would be, for practical and evidentiary reasons, equally unassailable. CSX and NS would be able, through this mechanism, to utilize the control

they would acquire within the Chicago district for anti-competitive purposes outside that district, where there otherwise would be competition.

Obviously this concern is not unique to NIPS. At least three other participants in this proceeding have expressed their concerns with the anti-competitive effects of the proposal and indicated that they will be filing Responsive Applications proposing alternative handling for the 51% interest in IHB that Conrail currently holds. Transtar, Inc. ("Transtar") and the EJE in Sub-No. 36 (see EJE-3) indicated that they would file a Responsive Application proposing the divestiture of Conrail's 51% interest in IHB to Transtar, EJE or another of their corporate affiliates.

The Wisconsin Central Ltd. ("WCL") in Sub-No. 60 (see WC-2) stated that it would file a Responsive Application on this matter. Expressing similar concerns with the anti-competitive effect of the proposal for CSX and NS to acquire control of the IHB, WCL indicated that its Responsive Application would propose the divestiture of Conrail's 51% interest in IHB to a carrier or consortium of non-eastern carriers that could include the WCL.

Finally, the Illinois Central Railroad Company ("IC") in Sub-No. 68 (see IC-2) indicated that it would file a Responsive Application proposing an alternative handling of the 51% interest in IHB. IC stated that it believes all or a portion of the stock should be divested and that a neutral carrier or group of carriers should acquire the stock and be responsible for non-discriminatory dispatching of rail traffic over the IHB.

As none of these Responsive Applications has yet been filed (they are due the same date as these Comments), NIPS obviously has not yet had an opportunity to review the specific details of any of them to determine if any or all of them are acceptable or which might be preferable. Nonetheless, NIPS believes, on the limited information currently available, that any of these

proposals for the disposition of Conrail's 51% interest in IHB would be preferable to the Applicants' proposal. NIPS intends to review those proposals when they are received and comment on them in its next filing.

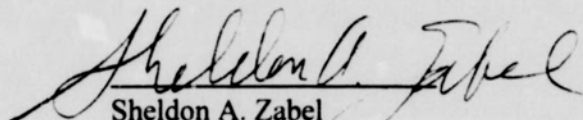
If the STB should reject all of the alternatives that are proposed and approve the acquisition of control of IHB by CSX and NS, that approval then must be subject to appropriate conditions to avoid or minimize the anti-competitive effects of that acquisition. Those conditions should include provisions to insure non-discriminatory dispatching of rail traffic over IHB. The conditions should also include a preclusion on the CSX and NS from quoting or utilizing joint or through rates that include service on the IHB or the other Chicago district carriers controlled by the CSX and/or the NS. At the least this would allow a shipper to know what he is paying for the Chicago area service and compare it to what limited competition might be left, although NIPS recognizes that challenging such a rate before the STB is, for all practical purposes, impossible.

### **CONCLUSION**

For the reasons set forth above, first NIPS urges the STB to thoroughly and carefully investigate the service implications of the proposed transactions and assure itself, the users of these rail services and the public generally, now, not after the transactions are completed, that approval of the proposals will not result in a deterioration of the quality of service and, if need be, impose appropriate restrictions and mechanism to insure that result. Second, NIPS believes that the STB should reject the portion of the proposal that would give the CSX and NS control of the IHB and should approve an alternate proposal. However, should the STB approve the Applicants' proposal with respect to the IHB, then it should at the least condition its approval so as to assure non-discriminatory dispatch of rail traffic over the IHB and to prevent the market dominance that CSX

and NS would have in the Chicago district from being used to undermine competition both in and outside the district.

Respectfully submitted,

A handwritten signature in cursive script, reading "Sheldon A. Zabel". The signature is written in dark ink and is positioned above the printed name and address.

Sheldon A. Zabel  
Schiff Hardin & Waite  
7200 Sears Tower  
Chicago, Illinois 60606  
(312) 258-5540  
Counsel for Northern Indiana  
Public Service Company

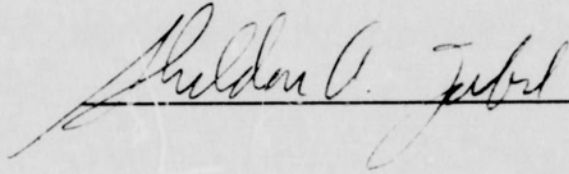
CHI3:150085.1 10.20.97 09.17



. . . . .

**CERTIFICATE OF SERVICE**

I, Sheldon A. Zabel, certify that on October 20, 1997, I have caused to be served a true and correct copy of the foregoing NIPS-1, Comments of Northern Indiana Public Service Company, on all parties listed on the Surface Transportation Board's service list in Finance Docket No. 33388, by first-class mail, postage prepaid.

  
\_\_\_\_\_

STB

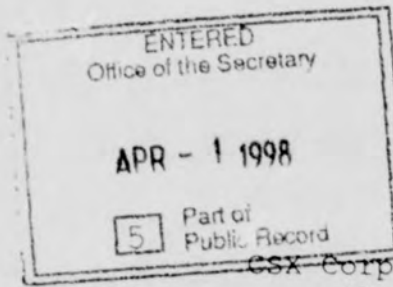
FD-33388

3-31-98

D

ID-186804

186804



BEFORE THE  
SURFACE TRANSPORTATION BOARD

ARU-35

Finance Docket No. 33388



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

**NOTICE OF THE ALLIED RAIL UNIONS OF THEIR INTENT  
TO PARTICIPATE IN ORAL ARGUMENT AND REQUEST FOR ARGUMENT TIME**

Pursuant to Decision No. 70 in the above-captioned proceeding, the Allied Rail Unions ("ARU")<sup>1</sup> hereby give notice that they intend to participate in the oral argument scheduled for June 4, 1998.

**I. REQUEST FOR ARGUMENT TIME**

A. Time Requested By Unions Opposed To The Transaction

Counsel for ARU and counsel for the other unions which oppose the subject Transaction (Transportation Communications International Union, International Association of Machinists and United Railway Supervisors Association) have conferred and agreed

<sup>1</sup> Allied Rail Unions refers to the American Train Dispatchers Department/BLE ("ATDD"); Brotherhood of Maintenance of Way Employees ("BMWE"); Brotherhood of Railroad Signalmen ("BRS"); International Brotherhood of Electrical Workers (IBEW); The National Conference of Firemen & Oilers/SEIU ("NCFO"); Sheet Metal Workers' International Association ("SMWIA"); and Transport Workers Union ("TWU").

to request that their arguments be presented together in a single block of time to be allocated among them as they see fit. Counsel for the unions opposed to the Transaction believe that a co-ordinated presentation by the labor opposition will focus consideration of the issues these unions have raised, and will facilitate the Board's consideration of those issues. Indeed this effort is consistent with the Board's request in Decision No. 70 (at 2) that parties consolidate and coordinate their presentations. In order to effectively make such a presentation ARU, TCU, IAM and URSA respectfully request that they be granted 40 minutes of argument time.

In support of this request, these unions note that they are among the few parties in outright opposition to the transaction. Accordingly, they will present arguments against Board approval of the Transaction, as well as alternative arguments for conditions in the event that approval is granted. Additionally, although there is some commonality among the arguments of these unions that will allow for co-ordinated presentations, they have also made separate requests for conditions that must be addressed separately by their different attorneys.

ARU, TCU, IAM and URSA also note that they have raised important, and as yet unresolved, legal issues, some of which have been a major source of litigation before this agency, its predecessor, and the courts, for many years so that it is



appropriate to allocate a reasonable amount of time for argument on those issues. In this regard, it is significant that approximately 20% of Applicants' rebuttal to the various Comments and responsive Applications filed in this proceeding was devoted to answering to arguments raised by these unions, thus indicating Applicants' recognition of the importance of the issues raised by these unions relative to the other issues before the Board.

ARU, TCU, IAM and URSA also note that they have an especially significant stake in this Transaction because of their importance to this Transaction. If it is approved, rail workers will be the principal, albeit involuntary, financiers of the transaction. Applicants' own summary of benefits indicates that approximately half of the savings that they attribute to the Transaction would flow from the elimination of jobs. Savings will also come from consolidations of work and work forces that will necessitate relocation of many workers. Finally, in this regard, these unions note that the Federal Railroad Administration and the Applicants have recognized that a safe and effective integration of CSX-Conrail, NS-Conrail and CSX/NS-SAA operations will depend in large part on good morale and high levels of productivity of the workers who will be responsible for the day-to-day running of these railroads. Approval of the Transaction is without provision for meaningful presentations by the unions that represent many of those workers will only further impair employee

morale and productivity.

B. Apportionment Of Argument Time Among  
Opponents And Supporters Of The Transaction

In apportioning argument time, it is important to note that labor, like other parties is not monolithic with respect to opinions on approval of the transaction, rejection of the Application or appropriate conditions if the Transaction is approved. The United Transportation Union has expressed support for the Transaction so long as certain conditions accepted by the Applicants are imposed by the Board and it seeks 20 minutes of argument time to state its position. There are other classes of interests such as other railroads, shippers, and state and local governments where some parties support the Transaction or support it if conditions accepted by the Applicants are imposed in any approval; whereas other parties in the same classes of interests oppose the Transaction or seek conditions that are opposed by the Applicants. In each such class of interests there are likely to requests for argument time from individual parties who have divergent positions with respect to the transaction. The two Applicants will have a substantial amount of time for each of their presentations with the opportunity to co-ordinate common responses by dividing certain issues between them. They will also have the ability to refer to the parties that support the Transaction and the arguments of those parties that are congruent with the arguments of the Applicants. By contrast, the parties

that oppose the Transaction and/or who seek conditions opposed by the Applicants will necessarily have comparatively little time to present their arguments. It is important that the time allotted to those in opposition or seeking opposed conditions not be diminished by allocation of argument time to those who support the Transaction. Indeed, since Applicants will presumably make zealous arguments in favor of approval of the Transaction, arguments by those who favor the Transaction will merely provide additional support to the Applicants. It would therefore be appropriate to allocate time to those who favor the Transaction from the time provided to the Applicants, not from the time provided to those who oppose the Transaction or who seek opposed conditions.

Accordingly, the ARU, TCU, IAM and URSA will not comment on the amount of time sought by UTU, but they do urge the Board to recognize that UTU (and any other similarly situated union) will speak in support of the Transaction and for conditions accepted by the Applicants, whereas these unions will speak in opposition to the transaction and for conditions opposed by the Applicants. They therefore submit that the argument of UTU (and of any other union supporting Transaction) should not be grouped with that of these unions, and that whatever time is allocated to UTU should not diminish the argument time granted to these unions.

## **II. ARGUMENTS TO BE PRESENTED BY ARU**

ARU intends to present arguments opposing the Transaction and arguments seeking imposition of certain conditions requested previously by ARU in the event that the Application is approved.

Matters to be addressed by ARU in connection with its opposition to the Transaction include: 1) the adverse effects of the Transaction on employees who will lose their jobs; 2) the evidence demonstrating the conflict between Applicants' plans and their obligations under both the Railway Labor Act and Article I §2 of the *New York Dock* conditions; 3) the Board's obligation to give due consideration to the policies of the Railway Labor Act in deciding whether to grant the Application; 4) the failure of the Applicants to demonstrate that the Transaction is in the public interest given the adverse effects on employees and the speculative nature of the transportation benefits asserted by the Applicants. Matters to be addressed by ARU in connection with the possibility that the Board may approve the Transaction will include argument that the Board should condition any approval of the Transaction on issuance of the declarations sought by ARU in its Comments and briefs that: 1) rates of pay, rules and working conditions under current collective bargaining agreements must be preserved; 2) that the record before the Board demonstrates that Applicants have not shown any necessity for overriding the terms of current agreements; 3) that mere showings of convenience or expedience are not sufficient to permit any overriding of CBA

rights and 4) that STB approval of the Transaction would not constitute explicit or implicit approval of agreement changes outlined in the Application.

Respectfully submitted,

Of Counsel:  
William A. Bon  
General Counsel  
Brotherhood of Maintenance of  
Way Employes  
26555 Evergreen Road  
Suite 200  
Southfield, MI 48076  
(248) 948-1010

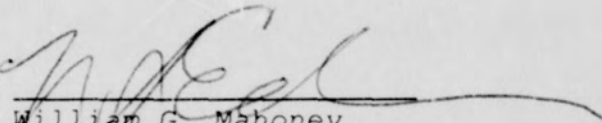
Donald F. Griffin, Esq.  
Brotherhood of Maintenance of  
Way Employes  
10 G. Street, N.E.  
Suite 460  
Washington, D.C. 20001-1511  
(202) 638-2135

Counsel for Brotherhood of  
Maintenance of Way Employes

David Rosen  
O'Donnell Schwartz Glanstein & Rosen  
60 East 42<sup>nd</sup> Street, Suite 1022  
New York, NY 10165

Counsel for Transport Workers Union of America

Dated: March 31, 1998

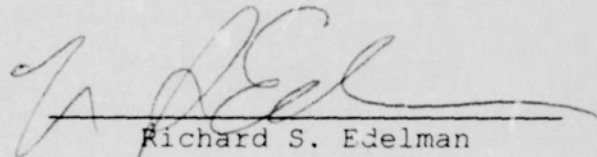
  
William G. Mahoney  
Richard S. Edelman  
L. Pat Wynns  
HIGHS AW, MAHONEY & CLARKE, P.C.  
1050 17th Street, N.W.  
Suite 210  
Washington, D.C. 20036  
(202) 296-8500



**CERTIFICATE OF SERVICE**

I hereby certify that I have caused to be served one copy of the foregoing Notice of the Allied Rail Unions of Their Intent to Participate in Oral Argument and Request for Argument Time by first-class mail, postage prepaid, to the offices of the parties on the service list.

Dated at Washington, D.C. this 31st day of March, 1998.



Richard S. Edelman

STB

FD-33388

3-27-98

D

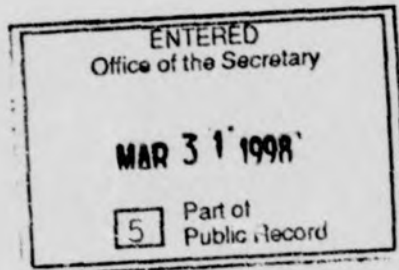
ID-186748

186748

EDWARD J. RODRIGUEZ  
ATTORNEY AT LAW  
67 MAIN STREET  
POST OFFICE BOX 298  
CENTERBROOK, CONNECTICUT 06409

ADMITTED IN CONNECTICUT  
AND MASSACHUSETTS

TEL: (860) 767-9629  
FAX: (860) 767-7419



March 26, 1998



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

Re: STB Finance Docket No. 33388 Oral Argument

Ladies and Gentlemen:

This letter will serve as notice that I wish to participate in oral argument on behalf of Housatonic Railroad Company, Inc. My argument will support the Primary Application provided that conditions requested by Housatonic Railroad are imposed.

The argument will address the conditions requested by Housatonic Railroad, will support those conditions, and will focus upon the principal reasons that the requested conditions are necessary to address transaction related harms. The argument will show that the conditions are required to advance the goals and purposes of the Transaction. The oral argument will also address any questions which Board members may have concerning the HRRC position.

Housatonic Railroad Company, Inc., requests 9 minutes of speaking time for oral argument.

Thank you.

Very truly yours,

Edward J. Rodriguez

EJR/swf

STB

FD-33388

3-20-98

D

ID-186549

186549

LAW OFFICES  
McCARTHY, SWEENEY & HARKAWAY, P.C.  
1750 PENNSYLVANIA AVE., N. W.  
WASHINGTON, D. C. 20006  
TELEPHONE (202) 393-5710  
TELECOPIER (202) 393-5721  
email: msh@mshpc.com  
http://www.mshpc.com

WILLIAM I. HARKAWAY  
COUNSEL

LAWRENCE W. BIERLEIN  
DOUGLAS M. CANTER  
JOHN M. CUTLER, JR.  
ANDREW P. GOLDSTEIN  
STEVEN J. KALISH  
KATHLEEN L. MAZURE  
HARVEY L. REITER  
DANIEL J. SWEENEY

March 19, 1998

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



Re: STB Finance Docket No. 33388 Oral Argument

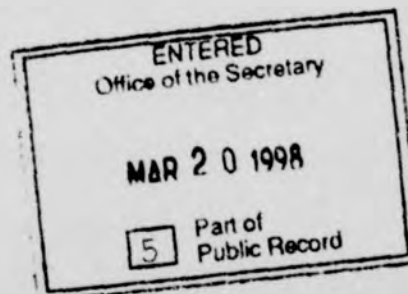
Gentlepersons:

Pursuant to Decision No. 70, served March 12, 1998, Bay Village, Rocky River, and Lakewood, Ohio ("BRL") hereby advise the Board of their wish to participate in the June 4, 1998 oral argument. In response to the Board's request for information, BRL state as follows:

1) BRL's oral argument will address (a) the Norfolk Southern ("NS") proposal to increase traffic on its Cleveland to Vermilion line segment from 13.5 trains per day to 34.1 trains per day; (b) the environmental impacts of that increase; (c) BRL's proposed mitigation conditions; and (d) the sufficiency of the mitigation proposed in the to-be-issued Final Environmental Impact Statement ("FEIS").

2) BRL support the environmental mitigation conditions discussed in their February 23, 1998 brief, BRL-7. BRL reserve the right to support or oppose environmental mitigation conditions proposed by the FEIS.

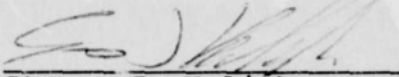
3) BRL request five minutes of speaking time at the oral argument. BRL are willing to coordinate with other intervenors in the event that the total requested speaking time for





intervenors exceeds the three hours contemplated by Decision No. 70.

Respectfully submitted,

---

Steven J. Kalish

Attorney for:  
City of Bay Village  
City of Rocky River  
City of Lakewood

cc: All Parties

STB

FD-33388

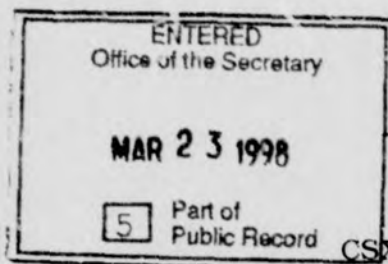
3-20-98

D

ID-186555

186555

D



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

Finance Docket No. 33388

CSX Corporation and CSX Transportation Inc.,  
Norfolk Southern Corporation and  
Norfolk Southern Railway Company  
-- Control and Operating Leases/Agreements --  
Conrail Inc. and Consolidated Rail Corporation



**CERTIFICATE OF SERVICE**

I hereby certify that on March 20, 1998, a copy of the foregoing letter from Mayor Michael R. White, dated March 19, 1998 to Chairman Linda Morgan, Surface Transportation Board, was served by hand delivery upon the following:

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

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

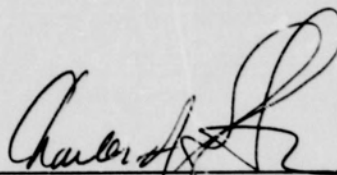
Samuel M. Sipe, Jr.  
Steptoe & Johnson L.L.P.  
1330 Connecticut Avenue, N.W.  
Washington, D.C. 20036-1795

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

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

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

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

A handwritten signature in dark ink, appearing to read "Charles A. Spitulnik", written over a horizontal line.

Charles A. Spitulnik



City of Cleveland  
Michael R. White, Mayor

Cleveland City Hall  
601 Lakeside Avenue  
Cleveland, Ohio 44114  
216/664-2220

March 19, 1998

Linda Morgan, Chairman  
Surface Transportation Board  
1925 K Street, N.W., Suite 820  
Washington, D.C. 20423

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

Dear Chairman Morgan:

I have received and reviewed the Board's Decision No. 71 issued in this proceeding on March 17, 1998. I am puzzled and concerned by the Decision. As you know, the impact of this proposed transaction on the health, safety, lives and living conditions of the people in Cleveland's neighborhoods has been at the forefront of all of the materials filed by the City in this proceeding.

- Unprecedented increases in train frequencies through residential neighborhoods ranging from 1.4% to 1,188%
- Life-threatening delays for Police, Fire and Emergency Medical Service at thirteen grade crossings on the affected rail lines
- One of the largest increases in hazardous materials transportation nation-wide, from 7,000 to 81,000 car loads per year through Cleveland's premier cultural district and the surrounding neighborhoods
- Up to a three-fold increase in noise for homes, schools, hospitals and businesses near certain tracks

The process in which the Section of Environmental Analysis (SEA) is now engaged, as I understand it, is to take a careful, detailed study of the potential impacts of the transaction, based on information SEA and its consultants gather from every possible source with knowledge of those impacts. The City has filed extensive Comments on the Draft



Environmental Impact Statement (EIS) that I hope you have had a chance to review. We have documented the impacts of increasing train frequencies and proposed solutions in an attempt to engage the railroads in serious discussions about ways to reduce these impacts.

Now, the SEA is in the process of gathering its own information about these impacts. That is its job as it works to create the Final EIS. In the limited contacts that my staff and counsel have had with SEA and its consultants, SEA has been nothing but objective and entirely neutral - they have been forthright that all they want or are able to do at this time is listen and analyze, in order to gain a better understanding of our concerns, the potential impacts and the possible solutions to the serious problems the proposed transactions will create for the people who live, work, raise children and plan their futures in our neighborhoods.

SEA also offered to mediate discussions between Cleveland and the railroads, a function that appeared to the City to be entirely appropriate for the Board. This is particularly important, because in more than a dozen meetings with the railroads, there has been NO PROGRESS on the core issue of the need to reduce train frequencies in our residential neighborhoods in order to mitigate the communities' concerns with noise, safety, hazardous materials transportation, property values and environmental justice. At a time when the railroads were refusing to engage in any meaningful dialogue about the horrendous situation their proposal created and the solutions we proposed to address it, SEA's willingness to listen and its offer to mediate were a welcome change from the terse responses we had been getting in private meetings with the railroads, notwithstanding the many "feel good", "we can work this out" letters we continue to receive from the railroad companies. Decision No. 71 appears to cut the SEA staff and consultants off from being able to do their jobs fully.

Please do not misunderstand my reason for writing. We in Cleveland are eager to have a meaningful, substantive discussion with the railroads about real solutions to the fundamental problem of increased train frequencies. We have tried before to meet with the railroads, but they have not demonstrated any real willingness to find a meaningful way to address our fundamental problem with their plan - the railroads are proposing to route too many freight trains through our residential neighborhoods when viable alternative routes exist in industrial corridors and around Cleveland. In fact, I personally have told Mr. Snow and Mr. Goode that I believe the best resolution would come from intense, good faith negotiations among the railroads and the affected communities, and that the City of Cleveland stands ready and willing at any

time and any where to engage in serious, meaningful negotiations with the railroads.

Unfortunately, rather than working with the affected communities to devise a routing plan that serves both the business interests of the railroads and the human needs of the people of this community, the railroads have attempted to isolate us from our neighboring communities by attacking our alternative proposals, and attempting to buy off our neighbors one by one. This is particularly disturbing because the proposed train frequencies will cause the greatest damage in the neighborhoods of Cleveland in terms of complexity and severity. We remain convinced, however, that if the railroads would use their expertise to work with us to find a mutually acceptable, long term regional solution - rather than expending their vast resources to attack us for trying - together we would find a way to resolve our differences.

Chairman Morgan, it is important to me that you understand that I am happy to meet and talk with Mr. John Snow of CSX - again. Over the past six months, I personally have met with Mr. Snow twice, spoken with him by telephone at least four times, and have met with CSX Chief Operating Officer Carl Taylor twice. In addition, key members of my Cabinet and Executive staff have participated in numerous meetings and telephone conferences with CSX staff.

I also am happy to meet and talk with Mr. David Goode of NS - again. While my staff has had ongoing meetings and telephone conversations with NS staff, Mr. Goode came to Cleveland to meet with me for the first time last week. While I would have expected Mr. Goode to come to meet with me much earlier in this process, I believe we had a productive meeting. On that same day, key members of my staff met with NS staff to hear their preliminary thoughts regarding environmental mitigation for the first time. The next day, NS engineers met with our planners and consultants to discuss the railroads' concerns with the Cleveland alternatives.

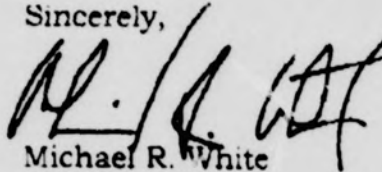
To date, the railroads have offered no meaningful solution to the problem of train frequencies in our neighborhoods. Now that the Board has issued Decision No. 71, I hope that our ongoing discussions with the railroads will be productive and that both CSX and Norfolk Southern will come to these meetings prepared to think creatively about solutions to the problems their transaction will create for the people of Cleveland and the surrounding communities. I hope that they will participate in these discussions with an open mind. I hope that we will be able to come to you together on April 15 with a report that we have reached an agreement about a plan for mitigation of the harm to Cleveland's people and neighborhoods. I also hope, however, that if we

are not able to reach an agreement, that SEA will have been able to gather the information it needs to complete the analysis of the situation here and of possible remedies for it.

In closing, I want you to know that it is not my desire to fight the railroads. My clear preference is to achieve a negotiated settlement. However, if the railroads continue to refuse to directly deal with the core issue of train frequencies in our neighborhoods, I believe they will leave this community with no choice but to do everything within our means to fight this plan before the Board, and if necessary, the courts. No matter what the ultimate outcome - win or lose - the people of the City of Cleveland are worth the fight.

Thank you for your attention to this important matter.

Sincerely,

A handwritten signature in dark ink, appearing to read "M. R. White", with a stylized flourish at the end.

Michael R. White  
Mayor

cc: Secretary Rodney Slater, Department of Transportation  
Congressman Louis Stokes  
Congressman Dennis Kucinich  
Vice Chairman Gus A. Owen, Surface Transportation Board  
Governor George V. Voinovich  
Thomas O'Leary, Ohio Rail Development Commission  
Mr. John Snow  
Mr. David Goode

STB

FD-33388

3-19-98

D

ID-1866530

# WEINER, BRODSKY, SIDMAN & KIDER

ATTORNEYS AT LAW

PROFESSIONAL CORPORATION

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

WASHINGTON, D.C. 20005-4797

(202) 628-2000

TELECOPIER (202) 628-2011

RICHARD J. ANDREANO, JR.  
JAMES A. BRODSKY  
JENNIFER A. COHN  
JO A. DeROCHE  
CYNTHIA L. GILMAN  
KAREN R. GUSTAVSON\*  
DON J. HALPERN  
MICHAEL W. KARDASH\*  
MITCHEL H. KIDER  
SUSAN L. KORYTKOWSKI  
SHERRI L. LEDNER  
TODD A. NEWMAN\*  
MARK H. SIDMAN  
RUGENIA SILVER  
JOHN D. SOCKNAT\*  
HARVEY E. WEINER  
ROSE-MICHELE WEINRYB\*  
JOSEPH F. YENOUSKAS

\*NOT ADMITTED IN D.C.



March 19, 1998

## BY HAND

Honorable Vernon A. Williams  
Secretary  
Surface Transportation Board  
1025 K Street, N.W.  
Washington, D.C. 20423-0001

NYAR NO. 4

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

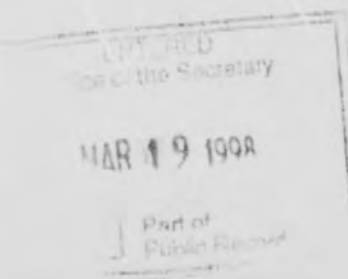
Dear Secretary Williams:

Enclosed for filing with the Surface Transportation Board (the "Board") in the above-reference proceeding are an original and 25 copies of New York & Atlantic Railway's Motion for Leave to File Reply and Reply to Brief of Congressional Delegation (the "Reply"). In accordance with Decision No. 6, dated May 30, 1997, issued by the Board in this proceeding, also enclosed is a 3.5-inch disk containing this Reply formatted in Word Perfect. This Reply and the accompanying disk are designated as NYAR No. 4, in accordance with 49 C.F.R. § 1180.4(a)(2).

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

Very truly yours,

*Rose Michele Weinryb*  
Rose-Michele Weinryb





**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**

---



**MOTION FOR LEAVE TO FILE  
REPLY AND  
REPLY OF NEW YORK & ATLANTIC RAILWAY  
TO BRIEF OF CONGRESSIONAL DELEGATION  
IN SUPPORT OF THE INTERVENTION PETITION**

**NEW YORK & ATLANTIC RAILWAY**

**By its Attorneys,**

**Mark H. Sidman  
Rose-Michele Weinryb  
Weiner, Brodsky, Sidman & Kider, P.C.  
1350 New York Avenue, N.W.  
Suite 800  
Washington, D.C. 20005-4797  
(202) 628-2000**

**Dated: March 19, 1998**

BEFORE THE  
SURFACE TRANSPORTATION BOARD

Finance Docket No. 33388

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



MOTION FOR LEAVE TO FILE  
REPLY AND  
REPLY OF NEW YORK & ATLANTIC RAILWAY  
TO BRIEF OF CONGRESSIONAL DELEGATION  
IN SUPPORT OF THE INTERVENTION PETITION

**I. MOTION OF NEW YORK & ATLANTIC RAILWAY FOR LEAVE TO FILE**

The procedural schedule issued by the Surface Transportation Board (the "Board") in Decision Numbers 6 and 12 in the above-reference proceeding does not contemplate replies to the briefs filed with the Board in this proceeding. Because the Brief (the "Brief") of Congressional Delegation ("Congressional Delegation") in Support of the Intervention Petition<sup>1</sup> (the "Petition") contains factual misrepresentations concerning New York & Atlantic Railway ("NYAR"), NYAR urges the Board to make an exception to the procedural schedule and accept its reply (the "Reply") to the Brief. The Reply will be limited solely to the correction of the erroneous factual assertions made in the Brief that directly concern NYAR. These factual

<sup>1</sup> For purposes of identification, the full title of the Brief is: Intervention Petition of Congressman Jerrold Nadler and 23 Other Members of Congress for Inclusion of a Cross - Harbor Float Operation, the Bay Ridge Line of the Long Island Railroad, the New York Connecting Railroad, Oak Point Yard, Harlem River Yard, the New York Terminal Produce Market, 65th Street Yard and Fresh Pond Junction and the Trackage Rights on the Northeast Corridor to a Full Service Junction with the Providence and Worcester Railroad, All in the Joint Facilities Railroad and for Open Access for Trans-Hudson Intermodal Service on the Northeast Corridor Proposed by the Petitioners as

misrepresentations appear for the first time in the Brief; accordingly, NYAR did not have an opportunity to address these matters earlier, in accordance with the procedural schedule governing this proceeding. In order for the Board to have an accurate factual background on which to base any decision directly affecting NYAR, NYAR hereby respectfully submits this Reply.

## **II. REPLY**

### **A. Background**

The Petition, which was filed with the Board on October 8, 1997, requests that the Board condition approval of the primary application filed by CSX Corporation, CSX Transportation, Inc., Norfolk Southern Corporation and Norfolk Southern Railway Company on the creation of a joint facility east of the Hudson River. The Intervention Petition proposed that this new joint facility include the Bay Ridge Line, which extends 11 miles from Bush Junction in Brooklyn to Fresh Pond in Queens. See Exhibit A, Map of Bay Ridge Line. The Long Island Rail Road Company ("LIRR") owns the Bay Ridge Line. Under the terms of a November 18, 1996, operating agreement, NYAR has a 20-year *exclusive* freight franchise over the entire LIRR rail system, including the Bay Ridge Line. Although LIRR continues to provide passenger service over the majority of lines in the LIRR rail system, no passenger operations occur over the Bay Ridge Line. Thus, NYAR is the sole operator over this line.

On December 15, 1997, NYAR responded to the Petition, urging the Board to reject the forced inclusion of the Bay Ridge Line in the proposed joint facility (the "Response"). NYAR

---

a Condition of the Acquisition Requested -- Brief of the Congressional Delegation in Support of the Intervention Petition.

noted that not only would such a forced inclusion threaten NYAR's existence, but that such an action was not sanctioned under the ICC Termination Act of 1995.

## **B. Factual Errors**

1. *NYAR Does Not Endorse the Inclusion of the Bay Ridge Line.* In its Response, NYAR set forth in detail the factual and legal reasons why it opposes the proposal in the Petition for joint use of the Bay Ridge Line. Notwithstanding this unambiguous statement of NYAR's opposition to such a proposal, the Brief states:

At the request of the Congressional Delegation, *with the endorsement* of the City of New York and the State of New York, owners of all or part of the [New York Cross Harbor and NYAR], respectively, the Board has the authority under §10907(c)(1) and 11324(c) to order inclusion of these facilities within the lines under the control of the [joint facility]. (emphasis added)

See Brief at 19. The clear implication of this statement is that NYAR supports the inclusion of the Bay Ridge Line in a joint facility operation. This statement, however, is wrong; NYAR does not endorse the proposal of the Congressional Delegation, as it relates to the Bay Ridge Line, and has never indicated otherwise.

2. *The State of New York has no ownership interest in NYAR.* The statement of endorsement erroneously attributed to NYAR appears to stem from the Congressional Delegation's misunderstanding of NYAR's ownership structure. The Brief states:

At the request of the Congressional Delegation, with the endorsement of the *City of New York and the State of New York*, owners of all or part of the [New York Cross Harbor and NYAR], respectively, the Board has the authority under §10907(c)(1) and 11324(c) to order inclusion of these facilities within the lines under the control of the [joint facility]. (emphasis added)

See *id.* The State of New York does not have now, nor has it ever had, any ownership interest in NYAR. Therefore, even assuming that the State of New York endorsed the proposal regarding

inclusion of the Bay Ridge Line in a joint facility operation, such an endorsement would have no effect on NYAR's opposition to this proposed inclusion.

3. *NYAR's agreement with Queens Borough President and Metro-North regarding municipal solid waste traffic was not tied to issues of capacity.* In its Brief, the Congressional Delegation states:

Due to unreliability, the floats as presently operated have not been able to attract and hold this traffic. Because the [Consolidated Rail Corporation] service via Fresh Pond does not have sufficient capacity to handle [municipal solid waste] traffic efficiently either, the [NYAR] has entered into agreements with the Queens Borough President and Metro-North not to handle any such traffic for at least a five-year period.

*See id* at 8. This statement is incorrect on several grounds. The agreement to which the Congressional Delegation refers concerns *the methods* by which such traffic would move, not *the ability* to move the traffic. The catalyst for this agreement was the desire to minimize any disruption caused by the handling of this traffic to the surrounding communities in Queens Borough and not any capacity deficiencies of New York Cross Harbor or Consolidated Rail Corporation, as suggested by the Congressional Delegation. There simply is no agreement among NYAR, Queens Borough and Metro-North preventing NYAR from handling municipal solid waste traffic, let alone an agreement that lasts for five years.

In February 1997, at the request of the Governor of New York, NYAR did agree voluntarily to a moratorium on the transportation of municipal solid waste traffic until December 1999. This temporary moratorium exists at the request of

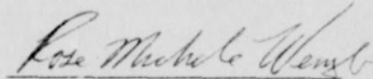


the State and not because of a lack of capacity on the part of any of the potential participating carriers to handle this type of traffic.

**C. Conclusion**

For the foregoing reasons, NYAR requests that the Board grant its motion for leave to file this Reply and enter the Reply into the record for this proceeding.

Respectfully submitted,



Mark H. Sidman  
Rose-Michele Weinryb  
1350 New York Avenue, N.W.  
Suite 800  
Washington, D.C. 20005-4797

Dated: March 19, 1998

F:\97035\001\trmw358lc\THR.doc

**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**

---

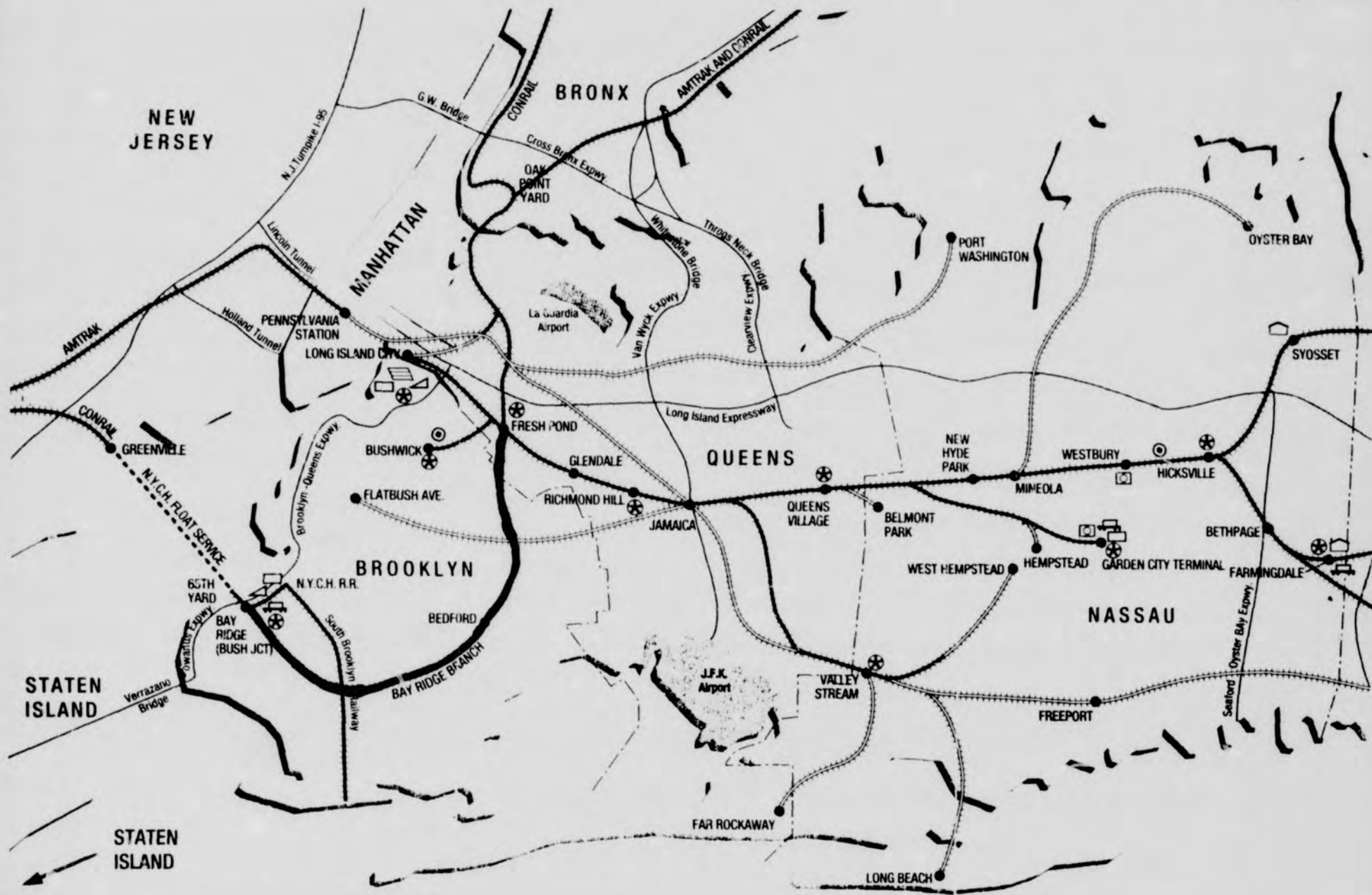
**MOTION OF FOR LEAVE TO FILE  
REPLY AND  
REPLY OF NEW YORK & ATLANTIC RAILWAY  
TO BRIEF OF CONGRESSIONAL DELEGATION  
IN SUPPORT OF THE INTERVENTION PETITION**

---

**EXHIBIT A**

---

**MAP OF BAY RIDGE LINE**

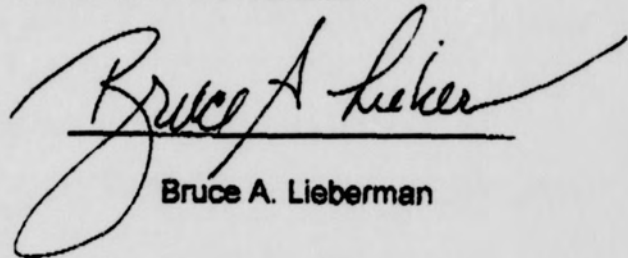


**— BAY RIDGE LINE**

VERIFICATION

I, Bruce A. Lieberman, hereby affirm and state that I have read the foregoing Motion for Leave to File Reply and Reply of New York & Atlantic Railway to Brief of Congressional Delegation, that I am personally familiar with its contents, and that the facts set forth therein are true and correct to the best of my knowledge, information, and belief.

Executed by the undersigned on this 19 day of March, 1998.

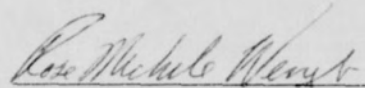


Bruce A. Lieberman

## CERTIFICATE OF SERVICE

I hereby certify that on March 19, 1998, a copy of the foregoing Motion for Leave to File Reply and Reply of New York & Atlantic Railway was served by first-class mail, postage pre-paid on:

- (i) Parties of Record
- (ii) Administrative Law Judge Jacob Leventhal  
Federal Energy Regulatory Commission  
888 First Street, NE., Suite 11F  
Washington, DC 20006-3939
- (iii) Honorable Janet Reno  
Attorney General of the United States  
Department of Justice  
950 Pennsylvania Avenue, N.W.  
Room 4440  
Washington, D.C. 20530-0001
- (iv) U.S. Secretary of Transportation  
Department of Transportation  
400 7th Street, S.W.  
Washington, D.C. 20590

  
Rose-Michele Weinryb, Esq.



STB

FD

33388

3-19-98

D

186524

CHARLES L. LITTLE  
International President

BYRON A. BOYD, JR.  
Assistant President

ROGER D. GRIFFETH  
General Secretary and Treasurer



14600 DETROIT AVENUE  
CLEVELAND, OHIO 44107-4250  
PHONE: 216-228-9400  
FAX: 216-228-0937

LEGAL DEPARTMENT

CLINTON J. MILLER, III  
General Counsel

KEVIN C. BRODAR  
Associate General Counsel

ROBERT L. McCARTY  
Associate General Counsel

DANIEL R. ELLIOTT, III  
Assistant General Counsel

March 18, 1998

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

D



Re: STB Finance Docket No. 33388 Oral  
Argument

Dear Mr. Williams:

Pursuant to Decision No. 70 in this proceeding, United Transportation Union ("UTU") wishes to participate in oral argument on June 4, 1998. UTU will address the commitments from the applicants to UTU as to how the labor protective conditions required to be imposed herein will be applied. Based on these commitments from the applicants, UTU supports the primary application. UTU asks for twenty minutes speaking time at the oral argument.

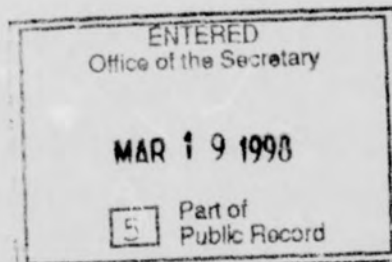
Thank you for your attention to this matter.

Very truly yours,

A handwritten signature in cursive script, appearing to read "Clinton J. Miller, III".

Clinton J. Miller, III  
General Counsel

cc: All parties of record



STB

FD

33388

3-18-98

D

186520

186520

**BALL JANIK LLP**

A T T O R N E Y S

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

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

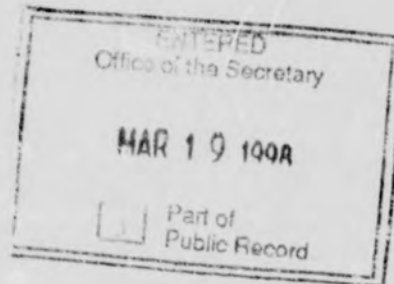
LOUIS E. GITOMER  
OF COUNSEL  
(202) 466-6532



March 18, 1998

**BY HAND**

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

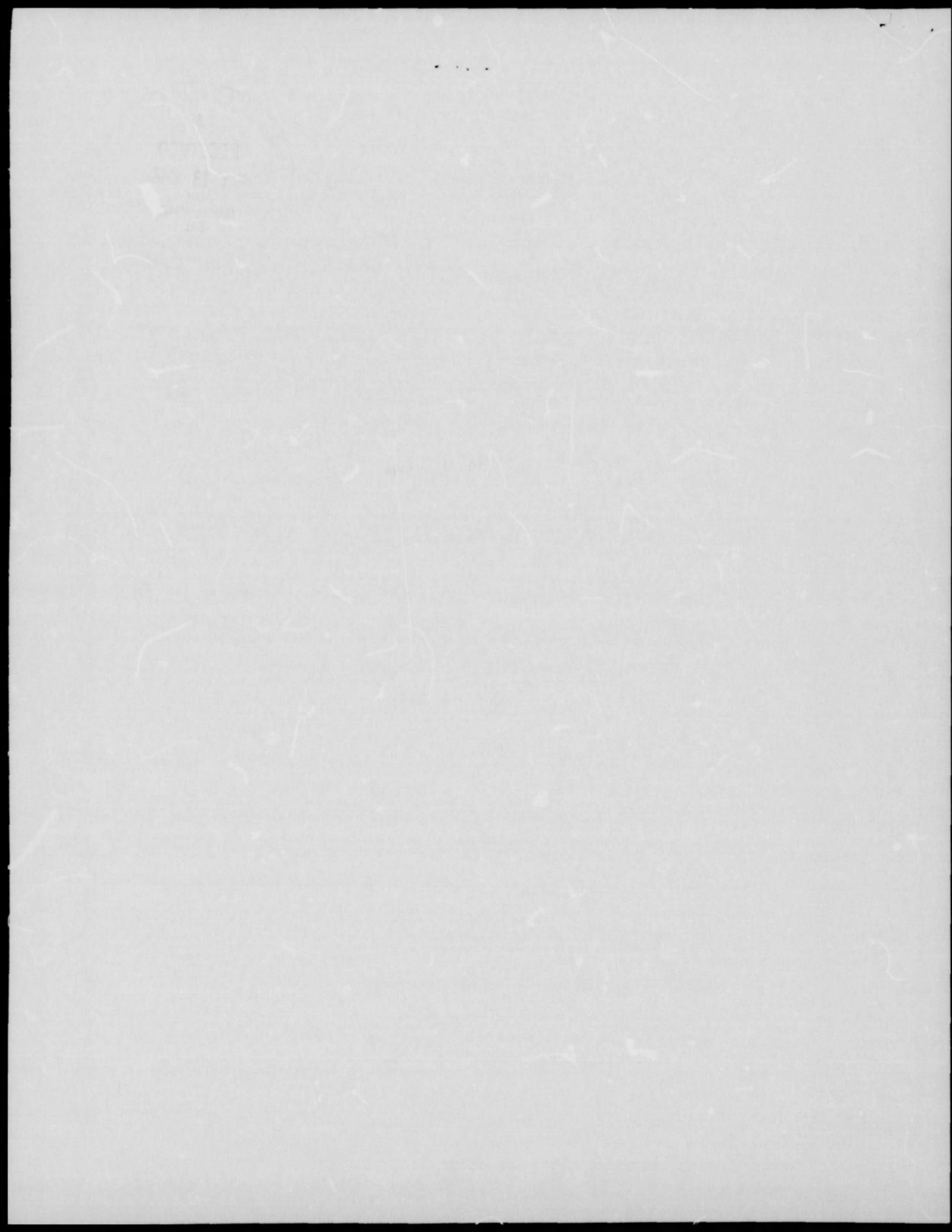


D

**Re: STB Finance Docket No. 33388 Oral Argument**

Dear Secretary Williams:

APL Limited ("APL") intends to participate at the oral argument that the Surface Transportation Board will hold in the above entitled matter on June 4, 1998. APL will address the reasons for the Board to: (1) disapprove Section 2.2(c) of the Transaction Agreement which would otherwise allocate Rail Transportation Contracts between CSX Transportation, Inc. and Norfolk Southern Railway Company; and (2) not override the terms of Rail Transportation Contracts, including non-assignment clauses. Subject to disapproval of Section 2.2(c) and not overriding any of the terms of Rail Transportation Contracts, APL would support the primary application. APL takes no position on the responsive application and other requests for conditions. APL requests 15 minutes speaking time.





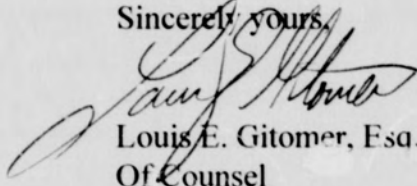
Honorable Vernon A. Williams

March 18, 1998

Page 2

Enclosed are 25 copies of this letter. Please time and date stamp the extra copy of this letter and return it with our messenger. Thank you for your assistance. If you have any questions, please call me.

Sincerely yours,

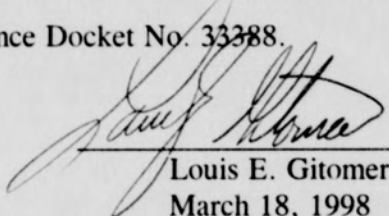


Louis E. Gitomer, Esq.  
Of Counsel

Ball Janik LLP  
1455 F Street, N.W.  
Washington, D.C. 20005  
(202) 466-6532

Ann Fingarette Hasse, Esq.  
Vice President & General Counsel  
APL Land Transport Services  
1111 Broadway  
Oakland, CA 94607  
(510) 272-7284

I hereby certify that I have caused this letter to be served by first class mail, postage pre-paid on all parties of record in STB Finance Docket No. 33388.



---

Louis E. Gitomer  
March 18, 1998

STB

FD

33388

2-24-98

D

185956

185956

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

ATTORNEYS AND COUNSELORS AT LAW

SUITE 750

1100 NEW YORK AVENUE, N.W.  
WASHINGTON, D.C. 20005-3934

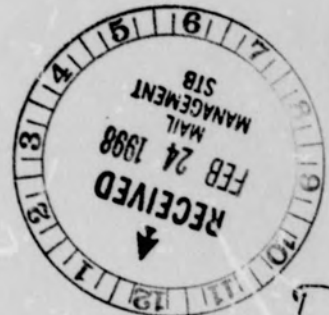
OFFICE: (202) 371-9500

TELECOPIER: (202) 371-0900

February 24, 1998

Mr. Robert Link  
Surface Transportation Board  
1925 K Street, N.W.  
Washington, D.C.

*NIT League*



Re: Certificate of Service and Service List.

Dear Mr. Link:

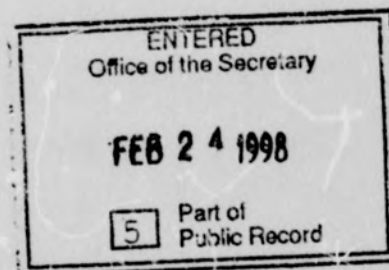
Yesterday, Monday, February 23, 1998, I sent a short letter brief filing to your office in regards to Finance Docket 33388. I inadvertently left out the Certificate of Service and the Service List.

Attached please find an original and 25 copies of the Certificate of Service and the Service List.

I apologize for the confusion.

Sincerely,

*Shannon Harris*  
Shannon R. Harris  
Secretary



CERTIFICATE OF SERVICE

I hereby certify that I have this 23rd day of February, 1998, served a copy of the foregoing letter on behalf of The National Industrial League, by first class mail, postage prepaid, upon the following:

Shannon R. Harris  
Shannon R. Harris

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

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

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

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

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

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

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

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

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

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

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

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

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

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



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

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

Mr. David L. Hall  
Commonwealth Consulting Associates  
13103 FM 1960 West, Suite 204  
Houston, TX 77065-4069

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Ms. Eileen S. Stommes  
Agricultural Marketing Service, USDA  
Post Office Box 96456  
Washington, D.C. 20090-6456

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

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

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

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

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

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

Ms. Alice C. Saylor, V.P. & Gen. Counsel  
American Short Line Railroad Ass'n.  
1120 G Street, N.W., Suite 520  
Washington, D.C. 20005-3819

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Mr. John J. Coscia  
DVPPC  
1111 South Independence Mall East  
Philadelphia, PA 19106

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

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

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

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

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

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

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

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



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

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

Mr. Peter A. Gilbertson  
Regional RRS of America  
122 C Street, N.W.  
Suite 850  
Washington, D.C. 20001

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Mr. Michael F. McBride  
LeBoeuf, Lamb & Greene  
1375 Connecticut Avenue, N.W.  
Suite 1200  
Washington, D.C. 20009

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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



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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

STB

FD

33388

2-23-98

D

185815



185815

# HOPKINS & SUTTER

(A PARTNERSHIP INCLUDING PROFESSIONAL CORPORATION(S))

888 SIXTEENTH STREET, N.W., WASHINGTON, D.C. 20006-4103 (202) 835-8000

FACSIMILE (202) 831-8136

INTERNET <http://www.hspsut.com>

CHICAGO OFFICE THREE FIRST NATIONAL PLAZA 60602-4205

DETROIT OFFICE 2800 LIVERNOIS SUITE 220 TROY, MI 48063-1220

ROBERT P. VOM EIGEN  
(202) 835-8265

February 23, 1998

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

ENTERED	
Office of the Secretary	
FEB 23 1998	
5	Part of Public Record

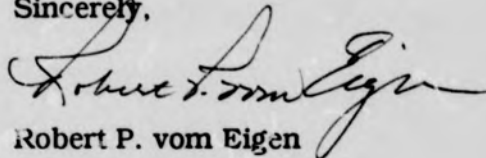


Re: CSX Corporation and CSX Transportation Inc., Norfolk Southern Corporation and Norfolk Southern Railway Company -- Control and Operating Leases/Agreements -- Conrail Inc. and Consolidated Rail Corporation, Finance Docket No. 33388

Dear Secretary Williams:

Enclosed are an original and twenty-five (25) copies of the Notice of Change in Position on Behalf of Chicago Metra (METR-8) for filing in the above-referenced proceeding. An additional copy is enclosed for file stamp and return with our messenger. Please note that a copy of this filing is also enclosed on a 3.5-inch diskette in WordPerfect 5.1 format.

Sincerely,

  
Robert P. vom Eigen

Enclosure

cc: The Honorable Jacob Leventhal  
All Parties of Record

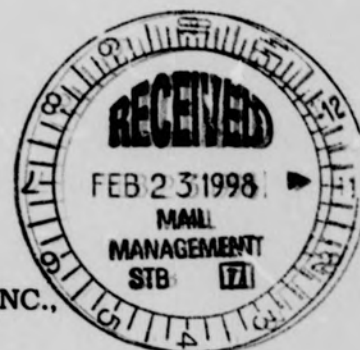
18585

METR8

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/AGREEMENT --  
CONRAIL INC. AND CONSOLIDATED RAIL CORPORATION



NOTICE OF CHANGE IN POSITION  
ON BEHALF OF  
CHICAGO METRA

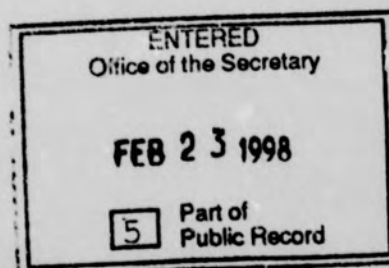
Communications with respect to this  
document should be addressed to:

Michael Noland  
General Counsel  
Metra  
547 West Jackson Boulevard  
Chicago, Illinois 60610  
(312) 322-6699

Robert P. vom Eigen  
Charles A. Spitulnik  
HOPKINS & SUTTER  
888 16th Street, N.W.  
Washington, D.C. 20006  
(202) 835-8000

Counsel for Metra

Dated and filed: February 23, 1998



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/AGREEMENT --  
CONRAIL INC. AND CONSOLIDATED RAIL CORPORATION

---

**NOTICE OF CHANGE IN POSITION  
ON BEHALF OF  
CHICAGO METRA**

---

The Commuter Rail Division of the Regional Transportation Authority of Northeast Illinois d/b/a "Metra", by its undersigned counsel, filed with this Board on October 21, 1997, its Position Statement and Request for Conditions (METRA-6) relating to control over certain junctions in the Chicago terminal area that potentially could be affected by the proposed NS/CSX acquisition of Conrail and that are key to the commuter trains operated by Metra in its Southwest Service Corridor. Metra hereby notifies the Board that it has reached a Letter Agreement with CSXT that addresses Metra's concerns at the Forest Hill interlocking, and that establishes a Joint Review Committee to address issues as they arise at the Chicago Ridge interlocking, controlled by the Indiana Harbor Belt Railway, and the Belt Junction interlocking, controlled by the Belt Railway of Chicago. A copy of the Letter Agreement is attached at Tab A.

By virtue of this Letter Agreement and CSXT's current projections concerning the level of increased traffic at the affected interlockings, Metra withdraws its request for conditions upon CSXT's acquisition of control of a portion of Conrail. Moreover, Metra states that it does not oppose CSXT's proposed acquisition of control of a portion of Conrail. Although the Letter Agreement does not result in the imposition of a formal condition upon the Board's approval of this transaction, Metra and CSXT request that the Board confirm in its decision approving the transaction the understanding of the parties that the contents of the Letter Agreement will be considered by the Board as representations to the Board that the parties will comply with the terms of the Letter Agreement. See, *Union Pacific Corporation, et al. -- Control and Merger -- Southern Pacific Railroad Company*, Finance Docket No. 32760, Decision No. 44, served August 12, 1996, at 12, n. 14.

Metra also identified its concerns and requested a condition in connection with the operation of interlocker CP-518 that has been the source of commuter delays in the past and that is to be acquired by NS in the transaction before the Board. The Applicants have represented that traffic will decrease at this interlocking as a result of the proposed Operating Plan for the Chicago Terminal. *Application*, Vol. 3B Figure D.6-1 at p. 463 and Applicants' Responses to Metra's First Set of Interrogatories (CSX/NS-108) at pp. 7-8, attached as Tab C to Stoner V.S. (METRA-7). In its rebuttal argument and testimony, NS contends that the existing delays at CP-518 are not significant, a contention to which Metra takes very strong exception. Nevertheless, NS does state:

NS will step into the shoes of Conrail once the Transaction is approved, and will be bound by existing applicable agreements between Conrail and Metra as long as they are in force -- including agreements regarding priority to be afforded commuter trains.

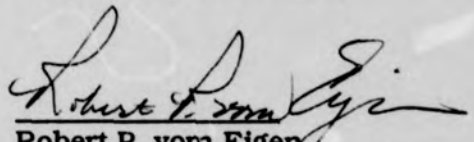
*Applicants' Rebuttal*, CSX/NS-176, Vol. 1 at p. 234. See also, *Friedmann V.S.*, CSX/NS-177, Vol. 2A at 45.

Metra has determined that based upon these projections of traffic and these commitments to assign priority to Metra's commuter trains at CP-518, and upon the agreement by NS to participate in the Joint Review Committee established under the Letter Agreement with CSXT that it will withdraw for the time being its request for a condition specifying with greater precision how the commuter train priority would be enforced at CP-518. A copy of the NS letter agreement is attached at Tab B.

Therefore, in view of the voluntary agreements reached, the understandings shared and the representations made on the record of this proceeding, Metra believes that its concerns over the impacts of the proposed transaction on the commuter operations in Chicago have been addressed, and withdraws its requests for conditions. Metra does request the Board to confirm its understanding of the status of the Letter Agreement as discussed, *supra*.

Michael Noland  
General Counsel  
Metra  
547 West Jackson Boulevard  
Chicago, Illinois 60610  
93120 322-6699

Respectfully submitted,

  
Robert P. vom Eigen  
Charles A. Spitulnik  
HOPKINS & SUTTER  
888 16th Street, N.W.  
Washington, D.C. 20006  
(202) 835-8000

Counsel for Metra

Dated and filed: February 23, 1998



TAB A



547 W. Jackson Blvd.

Chicago, Illinois 60661

Telephone: 312-322-6900

TTY# 1-312-322-6774

February 19, 1998

Mr. A. R. Carpenter  
President and CEO  
CSXT Transportation Corporation  
500 Water Street  
Jacksonville, Florida 32202

RE: CSXT Acquisition of Conrail

Dear Mr. Carpenter:

As you are aware, Metra is on record with the Surface Transportation Board ("STB") regarding its concerns over the proposed acquisition of Conrail by CSXT and Norfolk Southern ("NS") as such control relates to Metra's operation of its Southwest Service commuter line. As discussed in Metra's submission to the STB, and in correspondence and meetings with representatives of CSXT over the past several months, Metra's principal concern as to CSXT's role in the Conrail acquisition is the potential for additional delays to commuter trains occurring at the 75th Street/Forest Hill ("Forest Hill") interlocking controlled by CSXT. Metra is also concerned that additional delays will occur at the interlocking at CP-518, to be controlled by NS, the interlocking at Chicago Ridge, currently controlled by the Indiana Harbor Belt Railway ("IHB"), and the Belt Junction interlocking, currently controlled by the Belt Railway of Chicago ("BRC").

Through meetings with your staff, Metra has received repeated assurances that CSXT is committed to respect, as nearly as possible without exception, the contractual obligation contained in Section X of the Baltimore & Ohio Connecting Railroad Company crossing and interlocking expansion Agreement dated August 14, 1914 ("Agreement") governing the Forest Hill interlocking which states as follows:

"In the operation of said crossings, passenger trains shall be given precedence over freight trains..."

In furtherance of this Agreement, which CSXT acknowledges extends to cover and protect the passenger operations of Metra, CSXT specifically agrees to the following:

1. With respect to Metra's current level of service on the Southwest Service line, plus the possible addition of up to two (2) future trains to Metra's schedule, CSXT will establish an operating window of time whereby no conflicting train movement will be allowed to enter

## Metra

Mr. A.R. Carpenter

February 19, 1998

Page 2

the interlocking at Forest Hill that cannot clear the interlocking at least three (3) minutes prior to a scheduled arrival of a Metra train nor will a conflicting movement be allowed to enter the interlocking until three (3) minutes after the scheduled arrival time of a Metra train, unless that train has passed through the interlocking. If Metra advised the CSXT Operator/Dispatcher controlling the Forest Hill Interlocker sufficiently in advance that a scheduled Metra train will be late arriving, and advises a new Estimated Time of Arrival ("ETA"), the CSXT Operator/Dispatcher will do all reasonably possible to establish the same priority window around the new ETA. If, after notifying the CSXT Operator/Dispatcher of the new ETA, the Metra train arrives at the interlocking, and can not proceed through because of the presence of a conflicting movement going through the interlocking, the CSXT Operator/Dispatcher shall give the Metra train the next priority through the interlocking, once the conflicting movement is clear.

In addition, CSXT agrees to use its <sup>reasonable</sup> best efforts to encourage the IHB regarding the interlocking at Chicago Ridge and the BRC regarding the interlocking at Belt Junction, to grant Metra trains similar priority as given to Metra at the Forest Hill interlocking.

2. In order to allow for the provision of efficient Metra train operations, communication and coordination with CSXT, NS, BRC, Metra, and the IHB is essential. In recognition of this fact, CSXT and Metra shall form a Joint Review Committee ("Committee"), and will encourage the NS, the BRC and the IHB to participate as well. Among the issues to be brought before the Committee are the following:

- (i) Review, on a regular basis, operating practices in the Landers Yard/Forest Hill/Belt Junction/Chicago Ridge region.
  - (a) as part of this review, the Committee will specifically review all instances of avoidable delays to Metra trains.
- (ii) Review long term plans and solutions for improved operating efficiency in the Landers Yard/Forest Hill/Belt Junction/Chicago Ridge region.
- (iii) Ensure that the highest possible level of communication and coordination between the parties is achieved at all times.
  - (a) an item of immediate priority among the parties would be the proposal to develop and implement the remote monitoring of the operations of each party.
  - (b) if the means to accomplish the remote monitoring do not presently exist, the cost of establishing such monitoring shall be shared among the parties.

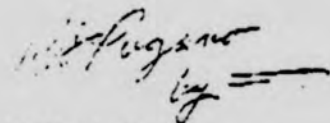
Metra

Mr. A.R. Carpenter  
February 19, 1998  
Page 3

3. As recognized in the Agreement over 80 years ago, the time might come when it is necessary to consider a grade-separated crossing at Forest Hill and Belt Junction. CSXT shall actively and positively participate in a study of such a project, and will join Metra in encouraging the NS and BRC to likewise participate. Both CSXT and Metra recognize that there are potential advantages that grade-separation can offer. Both parties agree, that if the study demonstrates that the project warrants investment, each party will consider capital contributions toward the project, commensurate with the benefits accruing to it, will join in attempting to secure financial resources from other parties benefitted by such a project, and will jointly petition state and federal agencies for additional funding if necessary.
4. CSXT and Metra will submit this Letter Agreement into the record of the proceeding at the Surface Transportation Board in Finance Docket # 33388. In this submission, CSXT and Metra will seek from the Board confirmation of these understandings, that although the attached agreement does not seek or provide for the imposition of any conditions by the Board, the submission of this agreement will be considered by the Board as a representation that they will comply with its terms. See UP/SP, Finance Docket No. 32760, Decision No. 44, served August 12, 1996, at 12, n. 14. Metra will file a statement that, based upon the undertakings contained herein and CSXT's current projections concerning the level of increased traffic at the affected interlockings, Metra has concluded that the measures outlined in the Letter Agreement address its concerns over delays at these interlockings. Moreover, Metra will state that it does not object to CSXT's acquisition of control of a portion of Conrail.

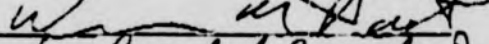
Please evidence your agreement to the terms and conditions set forth in this Letter Agreement by executing this letter below.

Sincerely,



Philip A. Pagano  
Executive Director

Acknowledged and Agreed:

By:   
Title: Vice President & Corporate Development  
Date: 20 Feb 98



## SUPPLEMENTAL AGREEMENT

1. CSXT and Metra ("the parties") are submitting a Letter Agreement into the record of the proceeding at the Surface Transportation Board ("STB") in Finance Docket #33388 which relates to concerns expressed by Metra of the potential for delays to commuter trains occurring at the 75th Street/Forest Hill interlocking controlled by CSXT. This Supplemental Agreement, while not made a part of the submittal to the STB, is nonetheless intended by the parties to be made a part of that Letter Agreement with the same commitments and obligations.

2. The Indiana Harbor Belt Railroad Company ("IHB") is an independently-managed terminal railroad in the Chicago area which controls the interlocking at Chicago Ridge which is used by Metra's Southwest Service commuter line. If the proposed acquisition of Conrail by CSX and Norfolk Southern is approved, CSX will become a major shareholder of, though will not control, IHB. CSX has no plans to seek control of IHB, however in the event that, for whatever reason, CSXT were to acquire sole control of the interlocking at Chicago Ridge, CSXT agrees that it shall grant Metra the same operating window of time as described in the Letter Agreement protecting the Forest Hill Interlocking.

Acknowledged and Agreed:

for CSX Transportation

By: [Signature]

Title: VP Corp Dev

Date: 20 Feb 98

for Metra

By: [Signature]

Title: Deputy Exec. Director

Date: 20 Feb 98



TAB B

February 20, 1998

Robert J. Cooney, Esq.  
General Solicitor  
Norfolk Southern Corporation  
Three Commercial Plaza  
Norfolk, Virginia 23510

RE: CSXT/NS Acquisition of Conrail

Dear Mr. Cooney:

This is to respond to your letter to me, dated, February 19, 1998, and to confirm the understandings which Norfolk Southern and Metra have reached in connection with this proceeding.

You have indicated that Norfolk Southern agrees to participate with Metra, CSXT, and, if they agree to participate, IHB and BRC on the Joint Review Committee established under our Letter Agreement (copy attached) executed this date with CSXT (copy attached), with the exception that Norfolk Southern would not be subject to the provisions contained in subparagraph (iii) governing the remote monitoring of operations. This exception is acceptable to Metra, and we welcome your agreement to participate in the Joint Review Committee for the limited purposes of reducing avoidable delays to Metra trains and for reviewing long term plans and solutions for improved operating efficiency through interlockings.

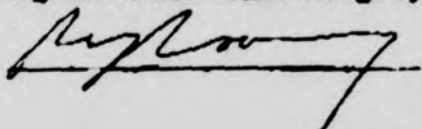
Upon receipt of your acknowledgment to these understandings, evidenced by your signature at the space provided below, we would proceed to file the Notice to the STB withdrawing Metra's request for a condition specifying greater precision how the commuter train priority would be enforced at CP-518.

If you have any questions, please call me at 312/322-6699.

Sincerely,

Michael Noland  
General Counsel

Agreed to and acknowledge by:



Date:

2/20/98



547 W. Jackson Blvd.

Chicago, Illinois 60661

Telephone 312-322-6900

TTY# 1-312-322-6774

February 20, 1998

Robert J. Cooney, Esq.  
General Solicitor  
Norfolk Southern Corporation  
Three Commercial Plaza  
Norfolk, Virginia 23510

RE: CSXT/NS Acquisition of Conrail

Dear Mr. Cooney:

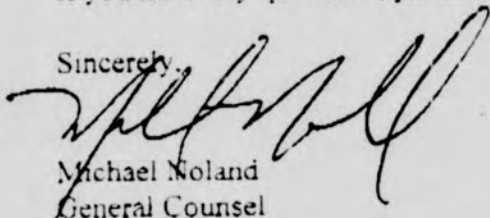
This is to respond to your letter to me, dated, February 19, 1998, and to confirm the understandings which Norfolk Southern and Metra have reached in connection with this proceeding.

You have indicated that Norfolk Southern agrees to participate with Metra, CSXT, and, if they agree to participate, IHB and BRC on the Joint Review Committee established under our Letter Agreement (copy attached) executed this date with CSXT (copy attached), with the exception that Norfolk Southern would not be subject to the provisions contained in subparagraph (iii) governing the remote monitoring of operations. This exception is acceptable to Metra, and we welcome your agreement to participate in the Joint Review Committee for the limited purposes of reducing avoidable delays to Metra trains and for reviewing long term plans and solutions for improved operating efficiency through interlockings.

Upon receipt of your acknowledgment to these understandings, evidenced by your signature at the space provided below, we would proceed to file the Notice to the STB withdrawing Metra's request for a condition specifying greater precision how the commuter train priority would be enforced at CP-518.

If you have any questions, please call me at 312/322-6699.

Sincerely,



Michael Moland  
General Counsel

Agreed to and acknowledge by:

\_\_\_\_\_ Date: \_\_\_\_\_

**CERTIFICATE OF SERVICE**

I hereby certify that on February 23, 1998, a copy of the Notice of Change in Position on Behalf of Metra (METR-8) was served by hand delivery upon the following:

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

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

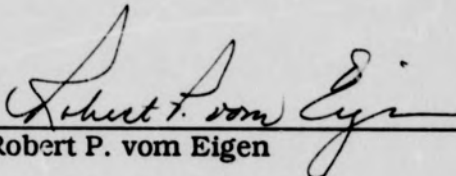
Samuel M. Sipe, Jr.  
David H. Coburn  
Steptoe & Johnson L.L.P.  
1330 Connecticut Avenue, N.W.  
Washington, D.C. 20036-1795

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

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

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

and by first class mail, postage pre-paid upon all other Parties of Record in this Proceeding.

  
Robert P. vom Eigen

STB

FD

33388

2-13-98

D

185654





AFL-CIO, CLC

# TRANSPORTATION • COMMUNICATIONS INTERNATIONAL UNION

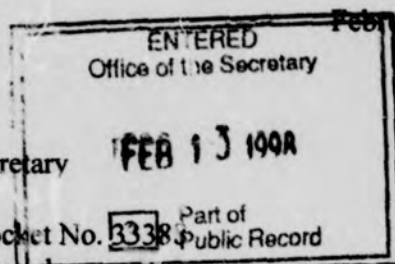
LEGAL DEPARTMENT

ROBERT A. SCARDELLETTI  
International President

MITCHELL M. KRAUS  
General Counsel

CHRISTOPHER J. TULLY  
Assistant General Counsel

185654



February 11, 1998



Vernon A. Williams, Secretary  
Case Control Branch  
ATTN.: STB Finance Docket No. 3338  
Surface Transportation Board  
1925 K Street, NW  
Washington, DC 20423-0001

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

Dear Mr. Williams:

By this correspondence, the TCU hereby moves for leave to file the enclosed as an exhibit in relation to the Transportation•Communications International Union's Comments to Proposed Safety Integration Plans (TCU-12) in the above-captioned matter. Enclosed please find an original and twenty-five copies of the exhibit and a Verified Statement of H.B. Lewin (TCU-14) certifying its authenticity.

Thank you for your attention in this matter.

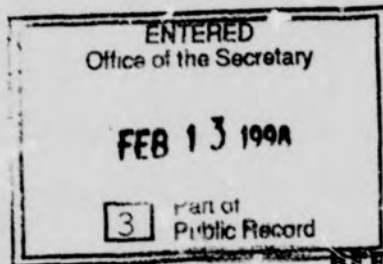
Very truly yours,

*Mitchell Kraus*

Mitchell M. Kraus  
General Counsel

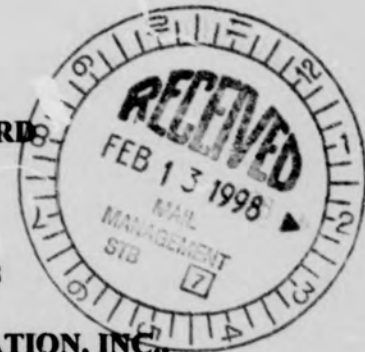
MMK:cjt  
Enclosures

cc: The Honorable Jacob Leventhal  
All Parties of Record (per Service List)



TCU-14

**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**

**TRANSPORTATION COMMUNICATIONS INTERNATIONAL UNION'S  
VERIFIED STATEMENT OF H.B. LEWIN**

I am General Vice President of the Carmen Division of the Transportation Communications International Union. My office is located at 3 Research Place, Rockville, Maryland 20850. I have held this position since September of 1991. The attached document relates to the safety issues raised by the TCU in its February 2, 1997, comments (TCU-12) on the proposed safety integration plans. I hereby certify that the correspondence attached is a true and accurate copy of a November 6, 1997 memorandum from FRA Motive Power and Equipment Inspector Larry D. Ewing to FRA Regional Administrator David Meyers, obtained pursuant to a Freedom of Information Act request submitted by the office.

  
\_\_\_\_\_  
H.B. Lewin

Dated: February 11, 1998



# Memorandum

U.S. Department  
of Transportation

Federal Railroad Administration

---

**Date:** November 6 , 1997

**Subject:** Complaint Investigation  
PB97-NS-20060

**From:** Larry D. Ewing, MP&E Safety Inspector

**To:** David Meyers - Regional Administrator

## **COMPLAINT**

This complaint was received from the Transportation Communications International Union, Brotherhood Railway Carmen Division, General Vice President H. B. Lewin. The complainant alleges the following:

- > On June 5, 1997 Norfolk Southern Trainmaster J. F. Maynard at Elmore Yard, Mullens, WV ordered train U-82 and other trains to depart the yard without receiving the required inspections and train air brake tests required by 49 CFR 215 and 232.
- > When cars are placed in trains, they receive an improper pre-departure inspection as required by 49 CFR 215.13. As the cars arrive and depart terminals they are being inspected as they roll by.
- > Cars with defective air brakes and safety appliances are being home shopped from Elmore Yard to other locations for repair and testing. Cars are also being moved to Elmore for repair from locations where repairs could be made.

## **INVESTIGATION**

This investigation consisted of several on-site equipment and records inspections as well as interviews with carrier employees, including supervisors.

The following was revealed during this investigation:

On June 5, 1997, train U-82, consisting of cars from 2 different tracks, was classified and made up. This classification required at least 10 different switches thereby changing the train consist. The train was then given an application and release air brake inspection of the rear car. In lieu of a pre-departure inspection, as required by 49 CFR 215.13, the cars were inspected in accordance with NS rule C-100 as they rolled by, departing the yard. The improper pre-departure inspection was brought to the attention of Trainmaster J.F. Maynard for correction. Evidence for prosecution was submitted for failure to perform an initial terminal air brake test on train U-82, June 5, 1997.

The other train (U-85) made intermediate stops setting cars off at mine sites. At one point the train was split and the 78 head cars and 2 locomotives were sent to a different mine site for loading under a different train symbol. The remainder of the cars and locomotives continued on to yet another mine site. The cars were never actually placed in different trains and were off air for only a few minutes while the locomotives were being removed and added.

According to the locomotive engineer and conductor, an intermediate terminal application and release inspection of the rear car was performed each time cars were removed from the train. Therefore, the proper air brake tests were performed and a pre-departure inspection was not required.

- Since the issuance of FRA Technical Bulletin MP&E 97-1, dated January 21, 1997, NS has been conducting a roll-by inspection at certain locations. This procedure is outlined in NS-1 (NS air brake rules) as a rule C-100 inspection. It is the same inspection as described in 49 CFR 215 appendix D. The major difference is that NS issues verbal instructions to perform this C-100 inspection while the train rolls by. At some locations, the inspection is done from the platform of a moving locomotive consist on an adjacent track. On numerous occasions NS officials, the corporate level included, have been informed that FRA does not recognize this
- roll-by procedure as a proper inspection and that it should cease immediately. NS officials feel that the roll-by inspection is adequate and refuses to take corrective action.

During this investigation, evidence for prosecution was gathered and will be submitted for 22 cars for failure to properly perform the required pre-departure inspection.

About 3 years ago NS ceased making air brake repairs at Elmore Yard. Within the past year, 11 of the 13 carmen were furloughed. At the time of this complaint, cars with air brake defects were tagged to other locations for repair and testing. Occasionally, they would be repaired at Elmore, depending on convenience and demand. Of the several cars alleged to have been tagged to different locations for repair, most had been repaired at Elmore and sent to other locations for testing. During this investigation 3 cars were observed departing Elmore with air brake defects, including 2 cars with their air brakes cut out. Evidence for prosecution has been submitted for these 3 violations.

On May 28, 1997, SOU 360906 was moved from Tierany to Elmore where the hand brake was replaced. This car was inspected and tagged by carmen prior to movement and was moved in accordance with the provisions of the Safety Appliance Act. The nature of the repairs required and the facilities at Tierany were determining factors in making the decision to move the car for repair. No violation occurred.

#### **Action Taken**

So far, a total of 224 violations were or will be submitted as a result of the findings of this investigation. NS officials, including the corporate level, have been notified that FRA does not view the roll-by inspection as complying with 49 CFR 215.13 or appendix D.

#### **Conclusion**

According to K. L. Grigsby, Norfolk Southern Pocahontas Division Superintendent, effective September 25, 1997, air brake defects found at Elmore will be repaired at Elmore.

FRA Headquarters is aware of Norfolk Southern's attitude regarding the willful improper pre-departure inspection procedures and enforcement action is currently in progress.

#



STB

FD

33388

2-13-98

D

185656

**OPPENHEIMER WOLFF & DONNELLY**  
(ILLINOIS)

Two Prudential Plaza  
45th Floor  
180 North Stetson Avenue  
Chicago, IL 60601-6710

(312) 616-1800  
FAX (312) 616-5800

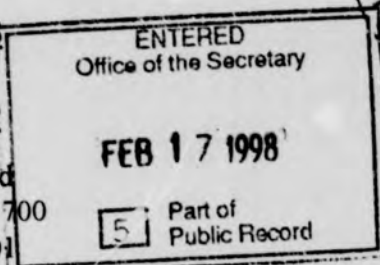
Brussels\*  
Chicago  
Geneva\*  
Irvine\*  
Los Angeles\*  
Minneapolis\*  
New York\*  
Paris\*  
Saint Paul\*  
San Jose\*  
Washington, D.C.\*

February 11, 1998



**VIA FEDERAL EXPRESS**

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



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

Dear Secretary Williams:

Yesterday, Transtar, Inc., Elgin, Joliet and Eastern Railway Company, I & M Rail Link, LLC and Wisconsin Central Ltd. filed an Appeal (EJE-18/IMRL-7/WC-17) in the above-captioned proceeding. Because that pleading contained highly confidential material, it was filed under seal. I am now enclosing an original and twenty-five copies of a redacted version of EJE-18/IMRL-7/WC-17 for placement in the public record.

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

*filed with Confidential*  
**FEE RECEIVED**

FEB 10 1998

SURFACE  
TJL:tl TRANSPORTATION BOARD

Enclosures

cc: Counsel for Primary Applicants  
Parties on Confidential Restricted Service List

Respectfully submitted,

*[Signature]*  
Thomas J. Litwiler  
Attorney for Appellants

**FILED**

FEB 13 1998

SURFACE  
TRANSPORTATION BOARD

[PUBLIC]

185656

**ORIGINAL**

EJE-18/IMRL-7  
WC-17

ENTERED	
Office of the Secretary	
FEB 17 1998	
5	Part of Public Record

BEFORE THE  
SURFACE TRANSPORTATION BOARD

FINANCE DOCKET NO. 33388



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

APPEAL OF TRANSTAR, INC.,  
ELGIN, JOLIET AND EASTERN RAILWAY COMPANY,  
I & M RAIL LINK, LLC AND WISCONSIN CENTRAL LTD.

**FILED**

EXPEDITED CONSIDERATION REQUESTED

FEB 13 1998

SURFACE  
TRANSPORTATION BOARD

Robert N. Gentile  
Colette Ferris-Shotton  
Transtar, Inc.  
135 Jamison Lane  
P.O. Box 68  
Monroeville, PA 15146  
(412) 829-6600

Janet H. Gilbert  
General Counsel  
Wisconsin Central Ltd.  
6250 North River Road, Suite 9000  
Rosemont, IL 60018  
(847) 318-4691

Robert H. Wheeler  
William C. Sippel  
Thomas J. Healey  
Thomas J. Litwiler  
Oppenheimer Wolff & Donnelly  
(Illinois)  
Two Prudential Plaza, 45th Floor  
180 North Stetson Avenue  
Chicago, IL 60601  
(312) 616-1800

ATTORNEYS FOR TRANSTAR, INC.,  
ELGIN, JOLIET AND EASTERN RAILWAY  
COMPANY, I & M RAIL LINK, LLC AND  
WISCONSIN CENTRAL LTD.

*Filed With Confidential*  
**FEE RECEIVED**

FEB 10 1998

SURFACE  
TRANSPORTATION BOARD

Dated: February 10, 1998

[PUBLIC]

EJE-18/IMRL-7  
WC-17

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

---

APPEAL OF TRANSTAR, INC.,  
ELGIN, JOLIET AND EASTERN RAILWAY COMPANY,  
I & M RAIL LINK, LLC AND WISCONSIN CENTRAL LTD.

---

EXPEDITED CONSIDERATION REQUESTED

---

Pursuant to 49 C.F.R. § 1115.1, Responsive Applicants Transtar, Inc., Elgin, Joliet and Eastern Railway Company and I & M Rail Link, LLC (collectively, the "Coalition") and Wisconsin Central Ltd. ("WCL") (the Coalition and WCL are collectively referred to herein as "Appellants") respectfully appeal from the February 5, 1998 order of Administrative Law Judge Jacob Leventhal denying Appellants' motion to compel reclassification (from "Highly Confidential" to "Public") of a short portion of a document produced by CSX Transportation, Inc. ("CSXT")<sup>1</sup> in discovery. That evidence directly addresses the key issue in this case with respect to the Chicago terminal: CSXT's post-merger market power in the terminal and its intent to use that

---

<sup>1</sup> CSXT, CSX Corporation, Norfolk Southern Corporation, Norfolk Southern Railway Company, Conrail, Inc. and Consolidated Rail Corporation are collectively referred to herein as the "Primary Applicants."

control against others. The portion of the memorandum in question reads:

See Exhibit D hereto.

CSXT's probative and frank self-appraisal of

is in no way confidential or proprietary, would be of critical interest to a variety of parties not having access to documents classified as "Highly Confidential," and should be an essential component of the Board's consideration -- on the record -- of the impact of the Primary Application on the public interest. Therefore, Judge Leventhal's ruling should be reversed, and the relevant portion of the memorandum<sup>2</sup> should be reclassified as "Public."

#### BACKGROUND FACTS

On December 18, 1997, the Coalition filed its "First Joint Set of Interrogatories and Requests to Produce Documents," EJE-16/IMRL-5, attached hereto as Exhibit A. The first interrogatory of those requests sought information relating to communications between Primary Applicants and any other railroad

---

<sup>2</sup> After originally moving for reclassification of the whole memorandum at issue, Appellants narrowed their request considerably at the discovery conference, requesting that only page two of the memorandum or portions of page two be designated as "public." This appeal is taken only with respect to Judge Leventhal's refusal to reclassify the second page of the memorandum (designated by CSXT as "CSX 92 HC 000114") or any portion thereof.



during which the subject of "operation and/or dispatching of the IHB [i.e., the Indiana Harbor Belt Railroad Company] subsequent to approval of the Application, was discussed." EJE-16/IMRL-5 at 5. Without bothering to follow the Board's guidelines concerning the provision of "five day complete objections" (see Decision No. 20, ¶ 18), on January 2, 1998, Primary Applicants responded to the Coalition's discovery requests, refusing to answer Interrogatory No. 1 under a flurry of objections, including the allegation that the discovery did not seek information relevant to the Coalition's impending rebuttal filing, and complaints that the discovery was "ambiguous", "overly burdensome", "overly broad" (allegedly because it sought information "from as early as January 1, 1997"), and otherwise sought information which was of "insufficient relevance." Primary Applicants did then provide a substantial response, indicating that "[t]o date, Applicants have not been able to determine that any such Communications have taken place." See "Applicants' Responses to the First Joint Set of Interrogatories and Request to produce Documents," attached hereto as Exhibit B.

To challenge this stonewalling, on January 8, 1998, the Coalition moved Administrative Law Judge Leventhal for an order compelling CSXT<sup>3</sup> to respond to the Coalition's discovery, including Interrogatory No. 1. During the hearing on January 8, 1998, the Coalition agreed to withdraw the majority of Interrogatory No. 1 in exchange for CSXT's averment that

---

<sup>3</sup> Because only CSXT had indicated in its reply filing that discussions with other railroads on these subjects had taken place, only CSXT was compelled to respond to Interrogatory No. 1.

questions posed during the impending deposition of its witness, John W. Orrison, regarding the issues raised in that interrogatory would not be objected to. Transcript of January 8, 1998 discovery conference (hereinafter "January 8 TR."), pp. 168-70, attached hereto as Exhibit C. However, the Coalition did not waive its request for documents responsive to Interrogatory No. 1, and CSXT agreed to provide the responsive documents. Id.

Shortly thereafter, CSXT provided certain responsive documents, including a two-page document identified as "CSX 92 HC 000113" and "CSX 92 HC 000114." See Exhibit D hereto.<sup>4</sup> That document is an internal memorandum authored by CSXT's John Booth, Director-Contracts/Joint Facilities, to William M. Hart, CSXT's Vice President for Corporate Development, discussing

Mr. Booth has been presented by CSXT as an authority on Chicago and has submitted testimony in this proceeding concerning the Chicago switching district. On page 2 of the memorandum, Mr. Booth concludes:

Because there is nothing legitimately confidential about these comments, the Coalition wrote to CSXT's counsel on January 16, 1998, seeking their concurrence in a reclassification of this document from "Highly Confidential" to "Public." See

---

<sup>4</sup> It is interesting to note that two versions of this memorandum were produced by Applicants. One version (apparently the author's file copy) was produced without the second page. CSX 92 HC 000115.

Exhibit E. When CSXT did nothing to respond to the Coalition's letter by February 2, 1998, the Coalition noticed a discovery conference before Judge Leventhal seeking reclassification of the memorandum from "Highly Confidential" to "Public." Given

, WCL joined the Coalition in the motion. During that hearing, held on February 5, 1998, Judge Leventhal denied the Coalition's request to reclassify the confidentiality of the document. In making that decision, Judge Leventhal required Appellants to establish that the level of confidentiality asserted by CSXT over the memorandum prejudiced the Appellants by precluding any use of the document -- a standard not justified by regulation or precedent and one which, if upheld, would eliminate any basis for challenging the confidentiality designation of documents. This is an appeal of that decision.

#### ARGUMENT

The Coalition is well aware that pursuant to 49 C.F.R. § 1115.1(c), appeals from Judge Leventhal's rulings are "not favored", and are "granted only in exceptional circumstances to correct a clear error of judgment or to prevent manifest injustice." Because of the critical importance of the Booth memorandum to issues central to the positions of the Coalition and WCL in this proceeding and the plain error present in Judge Leventhal's ruling, this appeal presents one such circumstance where the challenged order should be reversed.

During the February 5, 1998 discovery conference, CSXT argued that in order for a party to successfully challenge the designation of a document as "Highly Confidential", it would have to establish "prejudice." CSXT further argued that Appellants could not show prejudice in this instance, because:

the evidence is before the Board. It is there, and it has been argued. And so, again, they can cite to no prejudice with respect to this particular memorandum. They have made use of it . . . they have referenced it; they have relied on it. They are not prejudiced one iota by classifying this document as "Highly Confidential."

Transcript of February 5, 1998 discovery conference (hereinafter "February 5 Tr."), pp. 28, 31.<sup>5</sup>

Unfortunately, Judge Leventhal accepted this standard and incorporated it into his decision in denying Appellants' motion. "I don't see any prejudice to your side. You have been able to use it in your presentation. You'll be able to use the documents on it in your final brief." February 8 Tr., p. 43.

By focusing on such "prejudice" to Appellants from a "Highly Confidential" designation, CSXT set a standard -- accepted by Judge Leventhal -- which can never be met. The Board's procedures specifically contemplate that the confidentiality classification of documents produced in discovery can be challenged. See Decision No. 1 (STB served April 16, 1997), Appendix A, ¶ 9. But any party (or counsel for any party) which seeks to challenge a confidentiality designation by

---

<sup>5</sup> References are to a transcript of the February 5, 1998 discovery conference delivered to counsel for Appellants via the Internet. We have paginated that form of the transcript and attached the relevant portions as Exhibit F hereto for reference.



definition has already seen (and thus had the opportunity to utilize) the document; the Board's discovery guidelines do not allow otherwise relevant documents to be withheld because of their assertedly "highly confidential" or "confidential" nature. Access to and use of the document is thus presumed in any classification challenge, yet the ALJ's ruling relies on precisely that factor to deny the challenge. Under this standard, an improper confidentiality designation could never be overturned. Use of such a standard here was clear error and should be reversed.

The "prejudice" standard utilized by Judge Leventhal in reaching his decision was also inappropriate because it focused narrowly on the interests of those present before the Judge, to the exclusion of those who were not, and could not be, before the Judge because CSXT's "Highly Confidential" designation prevented them from learning of the contents of the document. Where, as in this case, the Board's prime mission is protection of the public interest, a broader perspective on the appropriateness of a "Highly Confidential" label is required. The public does not know about the existence of this allegedly "Highly Confidential" document; by definition, they are unable to come forward and argue for its broader distribution. The public is thus prevented from knowing the contents of the memorandum, even though they have a legitimate interest in



The need for public disclosure of the memorandum is made all the more apparent in the face of CSXT's argument that no other party came forward to support the declassification of the memorandum. (February 5 Tr., p. 32). The parties who would be most likely to come forward are prevented from doing so by the very classification chosen by CSXT. The evidentiary record in this case already contains the testimony of numerous parties (including a variety of IHB's on-line shippers, the Illinois Department of Transportation and the Wisconsin Department of Transportation) concerned about the post-transaction concentration of control over the Chicago switching district which CSXT will possess. Very few of these parties are on the "Highly Confidential" service list. Even where their attorneys may be on the list, those counsel are precluded from revealing the memorandum to their clients -- making it more difficult for them to make an informed or effective argument for memorandum's importance and dissemination. Therefore, unless Appellants are successful on this appeal, the public will be denied the ability to argue the impact of this memorandum (and the harsh light it shines on ) to the Board.

Not only is there reason to believe that there is a substantial public interest in this memorandum, but the record clearly establishes that no legitimate reason has been proffered by CSXT to explain why the second page of the memorandum should remain "Highly Confidential." During oral argument before Judge Leventhal, CSXT argued that

would be compromised by disclosure of the memorandum to the public. Whatever the merits of this argument as to the first

page of the memorandum, it clearly has no application to the second page. The page at issue (CSX 92 HC 000114) addresses the

No internal ruminations  
or other details of are  
disclosed.

To the extent that Judge Leventhal attempted a "balancing test" of the prejudice to Appellants from leaving the document "Highly Confidential" versus the prejudice to CSXT of making the second page of the memorandum "Public", not only did he make a "clear error of judgment" in focusing solely on "prejudice" to Appellants (and ignoring the public interest), but he compounded that error by finding that any cognizable business interest of CSXT would be compromised by making a public disclosure of the second page of the memorandum. CSXT has no legitimate, protectable interest in shielding the memorandum from public review, and it was error for Judge Leventhal to find otherwise.

Precedent clearly favors the classification of the second page of the document as "Public." In prior merger proceedings, the Board has consistently refused to allow a party to shield damaging admissions from public scrutiny behind a "Highly Confidential" designation. For example, in Santa Fe Southern Pacific Corp. -- Control -- Southern Pacific Transp. Co., 2 I.C.C.2d 709 (1986), The Kansas City Southern Railway Company discovered a highly damaging memorandum in discovery in which the Applicants' Chairman essentially argued for merger of two competing Western railroads in order to "achieve monopoly

power." 2 I.C.C.2d at 804-05. The railroad producing the memorandum sought to have the memorandum entered under seal, thereby shielding it from public view. The Board, however, held that, with minor exceptions, the contents of the memorandum "do not contain information which may be legitimately withheld from public scrutiny in the context of this proceeding, although we can understand why SFSP would want them to remain secret." Id. The information at issue in this case is very similar to that in SFSP: it might be highly damaging, it might directly contradict what the party producing it has unabashedly asserted to the Board and proclaimed to the public, but it is not "Highly Confidential."<sup>6</sup>

Similarly, in Union Pacific Corporation -- Control and Merger -- Southern Pacific Rail Corporation, Finance Docket No. 32760, Decision No. 39 (STB served May 31, 1996) ("UP/SP, Decision No. 39"), a presentation given to the board of directors of one of the applicants contained a damaging admission regarding the dominance which the merged entity would have in the West. The Board upheld the Administrative Law Judge's determination that the admission should be classified as "Public," finding that "(t)he information that applicants seek to suppress is not commercially sensitive in the traditional sense." UP/SP Decision No. 39, at 1. Similarly, Primary Applicants should not be

---

<sup>6</sup> As in that case, it is also difficult here to see how the Board can fairly and fully dispose of the substantial arguments made to it regarding the Chicago switching district if the agency itself is precluded from referring to the assertions in the Booth memorandum.

allowed to shield from public review the damaging admission made by Mr. Booth on a bald assertion of "proprietary information."

The overarching nature of the public interest, pervasive in any merger proceeding, factually distinguishes the cases relied upon for support by CSXT, Arizona Public Service Company v. The Atchison, Topeka and Santa Fe Railway Company, Docket No. 41185, 1997 WL 420253, and Lower Colorado River Authority and City of Austin, Texas v. Missouri-Kansas-Texas Railroad Company, Docket No. 40155, 1988 WL 226487. Arizona involved a rate reasonableness dispute; Lower Colorado was a competitive access complaint. Those cases were essentially private disputes and sought solely to establish the particular individual rights of the parties involved. Neither case involved the broad public interest -- and substantially broader public participation -- at stake in this merger proceeding.

#### CONCLUSION

This appeal presents a narrow issue: whether CSXT should be allowed to hide and conceal a single page of a damaging, "candid" (in their own words) memorandum from the public. That single page, however, is so contrary to the numerous assertions made by CSXT to the public and the Board in this proceeding that it fairly calls into question CSXT's candor in discussing their plans for Chicago. The public, which has previously weighed in its concerns about Chicago through various parties in this case, has a right to know that CSXT

in the nation's largest rail gateway. The



Board has the right -- indeed, probably the obligation -- to rely on that knowledge in rendering its judgment on the record in this proceeding. Judge Leventhal's order should therefore be reversed, and page "CSX 92 HC 000114" should be reclassified as a public document.

Respectfully submitted,

Robert N. Gentile  
Colette Ferris-Shotton  
Transtar, Inc.  
135 Jamison Lane  
P.O. Box 68  
Monroeville, PA 15146  
(412) 829-6600

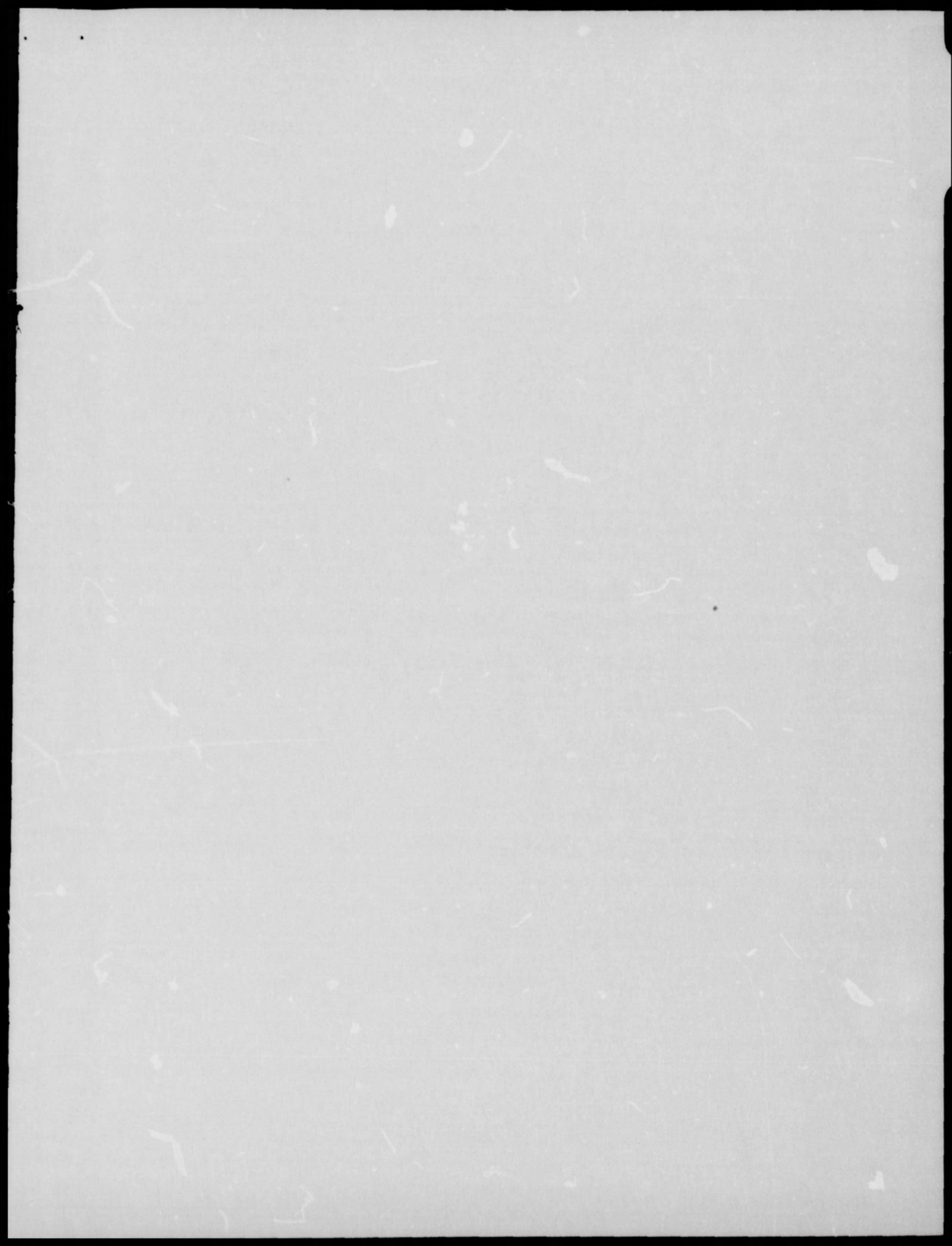
By: <sup>/s/</sup> Tom Healey *sgf*  
Janet H. Gilbert  
General Counsel  
Wisconsin Central Ltd.  
6250 North River Road, Suite 9000  
Rosemont, IL 60018  
(847) 318-4691

Robert H. Wheeler  
William C. Sippel  
Thomas J. Healey  
Thomas J. Litwiler  
Oppenheimer Wolff & Donnelly  
Two Prudential Plaza, 45th Floor  
180 North Stetson Avenue  
Chicago, IL 60601  
(312) 616-1800

ATTORNEYS FOR TRANSTAR, INC.,  
ELGIN, JOLIET AND EASTERN RAILWAY  
COMPANY, I & M RAIL LINK, LLC AND  
AND WISCONSIN CLNTRAL LTD.

Dated: February 10, 1998





EJE-16/IMRL-5

BEFORE THE  
SURFACE TRANSPORTATION BOARD

---

FINANCE DOCKET NO. 33388

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

---

FIRST JOINT SET OF INTERROGATORIES AND REQUESTS  
TO PRODUCE DOCUMENTS OF TRANSTAR, INC.,  
ELGIN, JOLIET AND EASTERN RAILWAY COMPANY  
AND I & M RAIL LINK, LLC

Robert N. Gentile  
Colette Ferris-Shotton  
Transtar, Inc.  
35 Jamison Lane  
P.O. Box 68  
Monroeville, PA 15146  
(412) 829-6600

William C. Sippel  
Thomas J. Healey  
Thomas J. Litwiler  
Christopher E.V. Quinn  
Oppenheimer Wolff & Donnelly  
Two Prudential Plaza, 45th Floor  
180 North Stetson Avenue  
Chicago, IL 60601-6710  
(312) 616-1800

ATTORNEYS FOR TRANSTAR, INC.,  
ELGIN, JOLIET AND EASTERN RAILWAY  
COMPANY AND I & M RAIL LINK, LLC

Dated: December 18, 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

---

FIRST JOINT SET OF INTERROGATORIES AND REQUESTS  
TO PRODUCE DOCUMENTS OF TRANSTAR, INC.,  
ELGIN, JOLIET AND EASTERN RAILWAY COMPANY  
AND I & M RAIL LINK, LLC

Transtar, Inc., Elgin, Joliet and Eastern Railway Company (collectively, "EJE") and I & M Rail Link, LLC ("IMRL") (EJE and IMRL are collectively referred to herein as the "Coalition") hereby submit their First Joint Set of Interrogatories and Requests to Produce Documents to Norfolk Southern Corporation and Norfolk Southern Railway Company ("NS"), CSX Corporation and CSX Transportation, Inc. ("CSXT") and Conrail, Inc. and Consolidated Rail Corporation ("Conrail"). NS, CSXT, and Conrail are collectively referred to herein as "Applicants".

In accordance with 49 C.F.R. §§ 1114.21-1114.31 and the discovery guidelines adopted for use in this proceeding by Administrative Law Judge Leventhal in his decision served June 27, 1997, Applicants are requested to answer these discovery requests within fifteen (15) days after service hereof. However, if Applicants raise a complete objection to any discovery request, such that no substantive answer or production will be

provided absent an order compelling same, then Applicants are requested to serve such objections upon the undersigned counsel within five (5) days after service thereof.

#### DEFINITIONS

As used in these discovery requests:

1. "Application" means the Railroad Control Application, filed by Applicants on June 23, 1997.
2. "Communication" means discussions, communications, correspondence or any other information transmission or exchange, whether made in person or via any media (including but limited to telephone, etc.).
3. "Description of Anticipated Responsive Application" means the document captioned "Description of Anticipated Responsive Application of Transtar, Inc. and Elgin, Joliet and Eastern Railway Company" (EJE-3), filed in this proceeding with the Surface Transportation Board on August 22, 1997.
4. "Document" means a "document" as that term is used in Fed. R. Civ. P. 34(a) and/or Fed. R. Evidence 1001, in Applicants' possession, custody or control. "Document" as used herein also encompasses electronic mail and physical things such as computer disks in Applicants' possession, custody or control, along with drafts, typings, printings, minutes, tapes, recordings and other electronic compilations, or copies or reproductions thereof, in the possession, custody or control of Applicants.
5. "IC" means Illinois Central Railroad Company.
6. "Identify," when used with reference to a document, means either to produce such document or to state its date, type of document (e.g., letter, memorandum, chart, etc.) its title or heading, the author's (or authors') full name(s), its recipient(s), the general submatter contents, number of pages, and the document's present location and custodian. If such document was, but is no longer, in Applicants' possession, custody or control, state what disposition was made of it, and briefly describe the document retention policy under which the document was disposed.
7. "Identify," when used with reference to a communication other than a document, means to state the nature of the communication (i.e., meeting, telephone call, etc.), the date and place the communication occurred, and the participants' full names, business addresses and job titles.



8. "Identify," when used with reference to an individual, means to state the full name, employer, business address(es) and job title(s) of such individual during the period covered by these discovery requests.

9. "IHB" means Indiana Harbor Belt Railroad Company.

10. "Relate to" or "relating to" means making a statement about, discussing, describing, referring to, reflecting, explaining, analyzing, or in any other way pertaining, in whole or in part, to the subject.

11. "Representatives" means employees, agents and attorneys (both in-house and outside, retained counsel).

12. "Responsive Application" means the document captioned "Responsive Application of Elgin, Joliet and Eastern Railway Company, Transtar, Inc. and I & M Rail Link, LLC" (EJE-10), filed in this proceeding with the Surface Transportation Board on October 21, 1997.

13. "UP" means Union Pacific Railroad Company.

14. "WCL" means Wisconsin Central Ltd. and Wisconsin Central Transportation Company.

#### INSTRUCTIONS

1. In the following discovery requests, all uses of the conjunctive include the disjunctive and vice versa. Words in the singular include the plural and vice versa. References to railroads, shippers, or other companies include officers, directors, employees, agents or other representatives thereof, except where the context clearly requires otherwise.

2. If Applicants object to any part(s) of a discovery request, please answer each part to which Applicants do not object, separately identify those parts of the discovery request that Applicants find objectionable, and state the grounds for each such objection.



3. If Applicants object to any discovery request on grounds of privilege, please identify the privilege and describe in detail the facts which form the basis for its application.

4. If Applicants desire clarification of any discovery request, it is requested that Applicants' counsel contact the undersigned counsel for the Coalition (either in writing or by telephone) as far in advance of the due date for answers as is reasonably practicable.

5. These discovery requests are continuing in nature, such that Applicants' responses should be supplemented whenever additional responsive information comes into Applicants' possession, custody or control.

6. Unless otherwise indicated, these discovery requests cover events occurring from and after January 1, 1995.

7. All documents that respond, in whole or in part, to any paragraph of these discovery requests should be produced in their entirety. Documents that in their original condition were stapled, clipped, or otherwise fastened together, shall be produced in such form.

8. If any response to these discovery requests includes a reference to the Application or other filing in this proceeding, such response shall specify the responsive volume(s) and page number(s). If any response to these discovery requests includes a reference to documents on file in Applicants' Document Depository, you shall denote the document number of each document as it is filed in the Document Depository.

9. If exact data cannot be supplied in answering any discovery request that calls for a numerical response, Applicants should provide their best estimate of the data called for, indicate that it has done so by the notation "(est.)" in conjunction with the response, and describe the basis upon which the estimate was made.

### INTERROGATORIES

#### INTERROGATORY NO. 1:

Have any Communications taken place after January 1, 1997 between Representatives of Applicants on the one hand and Representatives of any other common carrier by rail (or any combination of other common carriers by rail) on the other during which the ownership, control, or voting of Conrail's 51% stock interest in the IHB, or the operation and/or dispatching of the IHB subsequent to approval of the Application, was discussed? If the answer to this question is anything other than an unqualified "no", please identify:

- a) The date of each Communication;
- b) The other common carrier(s) by rail with which the Communication took place;
- c) All persons who were present for all or any part of any such Communication, regardless of whether they provided substantive participation during the Communication or not;
- d) If the Communication took place during a face-to-face meeting, and if so, the location of each meeting;
- e) The person initiating each Communication;
- f) Applicants' understanding of the purpose(s) of each Communication;

g) Any points of concern regarding the ownership, control or voting of Conrail's 51% stock interest in the IHB, or the operation and/or dispatching of the IHB subsequent to approval of the Application, raised by any party during each Communication, and identify the person raising each point of concern;

h) Any strategy, plan, action or resolution discussed during each Communication with regard to any aspect of the ownership, control or voting of Conrail's 51% stock interest in the IHB, or the operation and/or dispatching of the IHB subsequent to approval of the Application, and identify the person raising each strategy, plan, action or resolution;

i) Any strategy, plan, action or resolution agreed upon between or among the parties during each Communication with regard to any aspect of the ownership, control or voting of Conrail's 51% stock interest in the IHB, or the operation and/or dispatching of the IHB subsequent to approval of the Application; and

j) All documents relating to each Communication referenced in this Interrogatory, including but not limited to agendas, notes, outlines, summaries, or any other document reflecting any portion of the contents of each Communication.

INTERROGATORY NO. 2:

Have any Communications taken place after January 1, 1997 between Representatives of Applicants on the one hand and Representatives of any other common carrier by rail (or any combination of other common carriers by rail) on the other during which the Responsive Application, the Description of Anticipated Responsive Application, or any aspect of the potential acquisition of Conrail's 51% stock interest in IHB by EJE, WCL, IC and/or IMRL was discussed? If the answer to this question is anything other than an unqualified "no", please identify:

a) The date of each Communication;

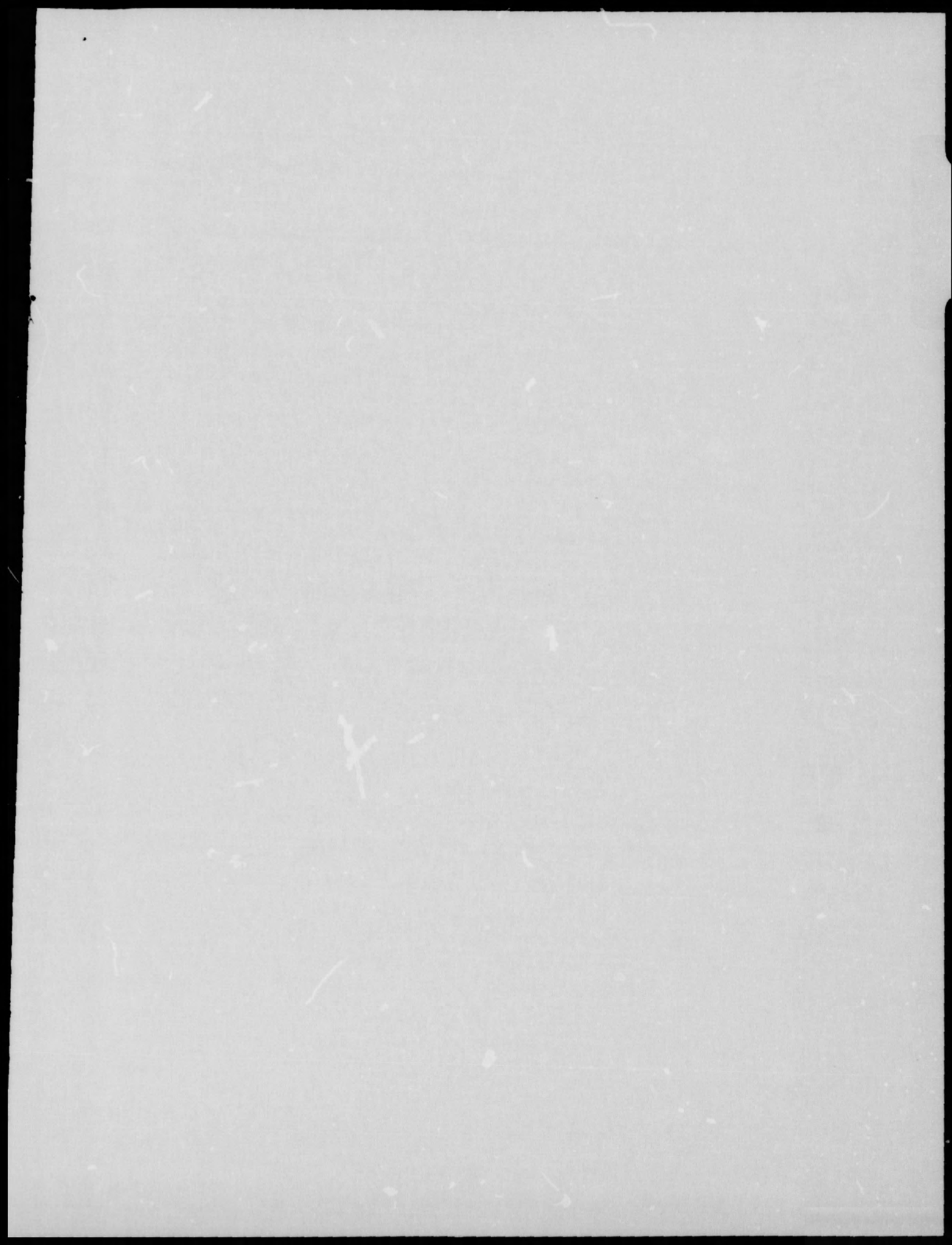




Exhibit B

CSX/NS-185

BEFORE THE  
SURFACE TRANSPORTATION BOARD

---

Finance Docket No. 33388

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

---

APPLICANTS' RESPONSES TO THE  
FIRST JOINT SET OF INTERROGATORIES  
AND REQUESTS TO PRODUCE DOCUMENTS  
OF TRANSTAR, INC., ELGIN, JOLIET AND  
EASTERN RAILWAY COMPANY, AND  
I&M RAIL LINK, LLC

---

Applicants hereby respond to the First Joint Set of Interrogatories and Requests to Produce Documents of Transtar, Inc., Elgin, Joliet and Eastern Railway Company, and I&M Rail Link, LLC (EJE-16/TMRL-5), served December 18, 1997.<sup>1</sup>

GENERAL RESPONSES

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

1. Applicants have conducted a reasonable search for responsive documents and information to respond consistent with the stated objections. Except as objections are

---

<sup>1</sup> "Applicants" refers collectively to CSX Corporation and CSX Transportation, Inc. (collectively referred to as "CSX"), Norfolk Southern Corporation and Norfolk Southern Railway Company (collectively referred to as "NS") and Conrail, Inc. and Consolidated Rail Corporation (collectively referred to as "Conrail"). Transtar, Inc., Elgin, Joliet and



noted herein, all responsive documents have been or shortly will be made available for inspection and copying in Applicants' document depository, which is located at the offices of Arnold & Porter in Washington, D.C.<sup>2</sup>

2. Where objections have been raised as to the scope of the request or interrogatory, Applicants are willing to discuss searching for and producing documents or information covered by a more limited request or interrogatory taking into account the stated objections.

3. Production of information or documents does not necessarily imply that they were relevant to this proceeding, and is not to be construed as waiving any applicable objection.

4. In line with past practice in cases of this nature, Applicants have not secured verifications for the answers to interrogatories herein. Applicants are prepared to discuss the matter with requester if this is of concern with respect to any particular answer.

#### GENERAL OBJECTIONS

The following general objections are made with respect to all of the interrogatories and document requests. Any additional specific objections are stated at the beginning of the response to each interrogatory or document request.

---

Eastern Railway Company, and I&M Rail Link, LLC are referred to as "EJE" or "requester."

<sup>2</sup> Thus, any response that states that responsive documents are being produced is subject to the General Objections, so that, for example, any documents subject to attorney-client privilege or the work product doctrine are not being produced.

1. Applicants object to production of, and are not producing, documents or information subject to the attorney-client privilege, the work product doctrine and/or the joint or common interest privilege.

2. Applicants object to production of, and are not producing, documents prepared in connection with, or information relating to, possible settlement of this or any other matter.

3. Applicants object to production of, and are not producing, readily available public documents or information, including but not limited to documents on public file at the Surface Transportation Board ("STB"), the Securities and Exchange Commission, or any other government agency or court, or that have appeared in newspapers or other public media.

4. Applicants object to the production of, and are not producing, draft verified statements and documents related thereto, in accordance with past practice in railroad control proceedings.

5. Applicants object to the production of, and are not producing, information or documents that are as readily obtainable by the requester from its own files.

6. Applicants object to the production of, and are not producing, information or documents that contain confidential or sensitive commercial information, including information subject to disclosure restrictions imposed by law, in other proceedings, or by contractual obligation to third parties, and that is of insufficient materiality to warrant production here even under a protective order.

7. Applicants object to the requests to the extent they seek documents or information in a form not maintained by Applicants in the regular course of business or

not readily available in the form requested, on the ground that such documents or information could only be developed, if at all, through unduly burdensome and oppressive special studies, which are not ordinarily required and which Applicants object to performing.

8. Applicants object to the interrogatories and requests as overbroad and unduly burdensome to the extent that they seek information or documents for periods prior to January 1, 1995.

9. Applicants object to Instruction Nos. 1-5 and 7-9 to the extent that they seek to impose requirements that exceed those specified in the applicable discovery rules and guidelines.

10. Applicants object to Instruction No. 3 to the extent it seeks detailed information regarding otherwise responsive documents that fall within the scope of a privilege. Such detailed information is not necessary, and it is unduly burdensome to provide. Such information was not required or provided in the most recent major control cases, and no showing has been made here to warrant different treatment.

11. Applicants object to Definition Nos. 4, 6-8, and 10-11, and Instruction Nos. 2 and 7-9 as unduly burdensome.

12. CSX, NS and Conrail each object to any interrogatories or document requests that seek information regarding current or future operations on, or any other plans or activities relating to, or employment on, rail lines or properties other than those that each of them currently owns or operates, or with respect to future operations. Conrail line segments that CSX or NS, respectively, will operate at the relevant future time. The

best source of information with respect to such matter is the rail carrier that owns or operates the line or property in question, or will do so at the relevant future time.

13. Applicants object to the requests insofar as they seek "all documents relating to" the matters specified, as overbroad and unduly burdensome.

### INTERROGATORIES

#### Interrogatory No. 1:

Have any Communications taken place after January 1, 1997 between Representatives of Applicants on the one hand and Representatives of any other common carrier by rail (or any combination of other common carriers by rail) on the other during which the ownership, control, or voting of Conrail's 51% stock interest in the IHB, or the operation and/or dispatching of the IHB subsequent to approval of the Application, was discussed? If the answer to this question is anything other than an unqualified "no", please identify:

- a) The date of each Communication;
- b) The other common carrier(s) by rail with which the Communication took place;
- c) All persons who were present for all or any part of any such Communication, regardless of whether they provided substantive participation during the Communication or not;
- d) If the Communication took place during a face-to-face meeting, and if so, the location of each meeting;
- e) The person initiating each Communication;
- f) Applicants' understanding of the purpose(s) of each Communication;
- g) Any points of concern regarding the ownership, control or voting of Conrail's 51% stock interest in the IHB, or the operation and/or dispatching of the IHB subsequent to approval of the Application, raised by any party during each Communication, and identify the person raising each point of concern;
- h) Any strategy, plan, action or resolution discussed during each communication with regard to any aspect of the ownership, control or voting of Conrail's 51% stock interest in the IHB, or the operation and/or dispatching of the

IHB subsequent to approval of the Application, and identify the person raising each strategy, plan, action or resolution;

i) Any strategy, plan, action or resolution agreed upon between or among the parties during each Communication with regard to any aspect of the ownership, control or voting of Conrail's 51% stock interest in the IHB, or the operation and/or dispatching of the IHB subsequent to approval of the Application; and

j) All documents relating to each Communication referenced in this Interrogatory, including but not limited to agendas, notes, outlines, summaries, or any other document reflecting any portion of the contents of each Communication.

**Response:**

Interrogatory Nos. 1-3 and Document Request Nos. 1-3 are objectionable as stated because they are not consistent with the limits on discovery by a responsive applicant in support of its rebuttal filing. In such a filing, a responsive applicant may only submit evidence that rebuts "specific" evidence in the primary applicants' rebuttal filing in opposition to the conditions sought by the responsive applicant. Id., UP/CNW, Decision No. 17, served July 11, 1994, at 9 & n.13; UP/CNW, Decision No. 20, served Sept. 12, 1994, at 7, 11, 15, 16, 17, 18, and 20. Moreover, the scope of such rebuttal by a responsive applicant is further limited in that it cannot defer until its rebuttal filing matters that it could and should have explored in earlier discovery and addressed in its case-in-chief. Id. At 8, 9, 15.

Interrogatory Nos. 1-3 and Document Request Nos. 1-3 do not meet these requirements. They are fishing expeditions for evidence that could have been sought in the initial round of written discovery and depositions, and are not in any way tailored to respond to evidence submitted by applicants in their December 15, 1997 filing.



Interrogatory Nos. 1-3 are also objectionable because they are ambiguous as to whether they seek communications on behalf of "Applicants" as a group or on behalf of any one of the primary applicants individually and as to what the following means: "substantive participation in the Communication," "points of concern regarding," "strategy, plan, action, or resolution" and "any aspect of." They are also overly burdensome in that they seek information regarding activities of Representatives of Applicants, including outside counsel and agents. The requests are also overly broad in seeking communications from as early as January 1, 1997.

Applicants also object to these interrogatories due to the insufficient relevance of discussions regarding the ownership, control or voting of Conrail's 51% stock ownership in the IHB and the insufficient relevance of the presence of persons not participating in the Communication to any substantive degree. Applicants also object to the burdensomeness of responding to Interrogatory Nos. 1-3 and each of the subparts with regard to all Communications in light of the marginal relevance to the material to be produced. See Decision No. 17, served August 1, 1997.

Subject to these objections, and the General Objections stated above, Applicants respond as follows:

To date, Applicants have not been able to determine that any such Communications have taken place.

Interrogatory No. 2:

Have any Communications taken place after January 1, 1997 between Representatives of Applicants on the one hand and Representatives of any other common carrier by rail (or any combination of other common carriers by rail) on the other during which the Responsive Application, the Description of Anticipated Responsive Application, or any aspect of the potential acquisition of Conrail's 51% stock interest in



UNITED STATES OF AMERICA

+ + + + +

SURFACE TRANSPORTATION BOARD

+ + + + +

DISCOVERY CONFERENCE

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

Thursday,  
January 8, 1998

Washington, D.C.

The above-entitled matter came on for a  
oral argument in Hearing Room 4 of the Federal  
Energy Regulatory Commission, 888 First Street, N.E.  
at 9:30 a.m.

BEFORE: THE HONORABLE JACOB LEVENTHAL  
Administrative Law Judge

**NEAL R. GROSS**  
COURT REPORTERS AND TRANSCRIBERS  
1323 RHODE ISLAND AVE., N.W.  
WASHINGTON, D.C. 20005-3701

1 (Off the record.)

2 JUDGE LEVENTHAL: Do you want to  
3 memorialize the agreement?

4 Back on the record. Our off the record  
5 discussion I think the party -- I think CSX by Mr.  
6 Harker and the coalition by Mr. Healey have reached an  
7 agreement on interrogatory 1.

8 Mr. Healey, do you want to tell us what  
9 the agreement is?

10 MR. HEALEY: Oh yes. Judge, what I offer  
11 and apparently Mr. Harker is accepting is I'm  
12 withdrawing interrogatory 1 as it's filed on the  
13 applicants in exchange for the understanding based  
14 upon our discussions off the record that there will be  
15 no objections as to the scope of questioning Mr.  
16 Oreson as to anything that would be responsive to that  
17 interrogatory as to CSX discussions with other  
18 railroads. The interrogatories worded a little more  
19 broadly, it's worded as to the applicants, but we have  
20 conceded that points we could find were relevant to be  
21 rebutted or CSX points and therefore we limit the  
22 inquiry to CSX competition or at least conversations

**NEAL R. GROSS**

COURT REPORTERS AND TRANSCRIBERS  
1323 RHODE ISLAND AVE., N.W.  
WASHINGTON, D.C. 20005-3701

1 of one or more CSX persons were present. There may  
2 have been other applicant members present and those  
3 would certainly be responsive discussion.

4 MR. HARKER: Your Honor, is it only the  
5 discussions that Oreson testified about, specifically  
6 relying on? I thought that was --

7 JUDGE LEVENTHAL: That was what I  
8 understand the interrogatory relates to. Is that  
9 correct?

10 MR. HEALEY: Yes, it does. That's  
11 correct.

12 MR. HARKER: Not any discussion that he  
13 wasn't relying on. In other words, not a meeting or  
14 a discussion that is not specifically in his head with  
15 respect to the two statements --

16 JUDGE LEVENTHAL: With respect to his  
17 testimony he's asking.

18 MR. HEALEY: For example, he says that  
19 they met with a variety of carriers regarding what  
20 they intend to do on the IHB. I tomorrow will inquire  
21 of Mr. Oreson what carriers did CSX meet with  
22 regarding the IHB. Who did you meet with? Where did

**NEAL R. GROSS**

COURT REPORTERS AND TRANSCRIBERS  
1323 RHODE ISLAND AVE., N.W.  
WASHINGTON, D.C. 20005-3701



1 you meet? Who was there? What was said? Were any  
2 notes taken?

3 JUDGE LEVENTHAL: All right. Mr. Harker,  
4 is that the agreement?

5 MR. HEALEY: I do have to make one caveat  
6 to that and it just occurred to me, Judge. The last  
7 part of the interrogatory seeks to identify documents  
8 relating to those communications, notes taken during  
9 the meetings, agendas, etcetera. As it is not a  
10 deposition duces tecum, I haven't asked the witness to  
11 bring anything with him. By waiving the interrogatory  
12 I would be unable to get those materials, so I would  
13 not want to waive the interrogatory as to those  
14 written materials requested in interrogatory 1, sub J.

15 JUDGE LEVENTHAL: Well, Mr. Harker, if  
16 there are any documents relating to these  
17 communications, will you furnish them?

18 MR. HARKER: Yes, Your Honor.

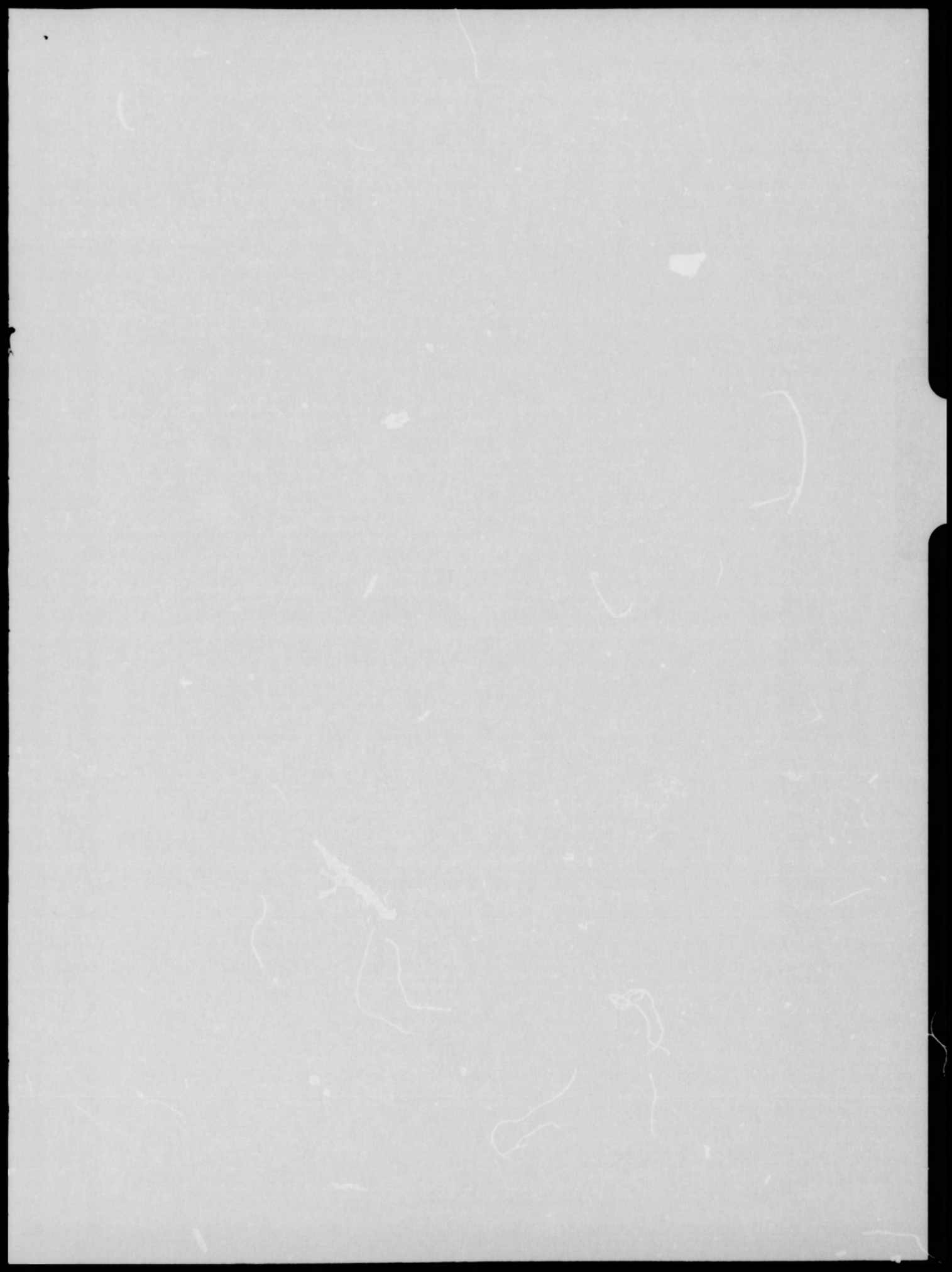
19 MR. HEALEY: I don't expect them to be  
20 furnished with the deposition.

21 JUDGE LEVENTHAL: No, of course.

22 MR. HEALEY: If you have them, I don't

**NEAL R. GROSS**

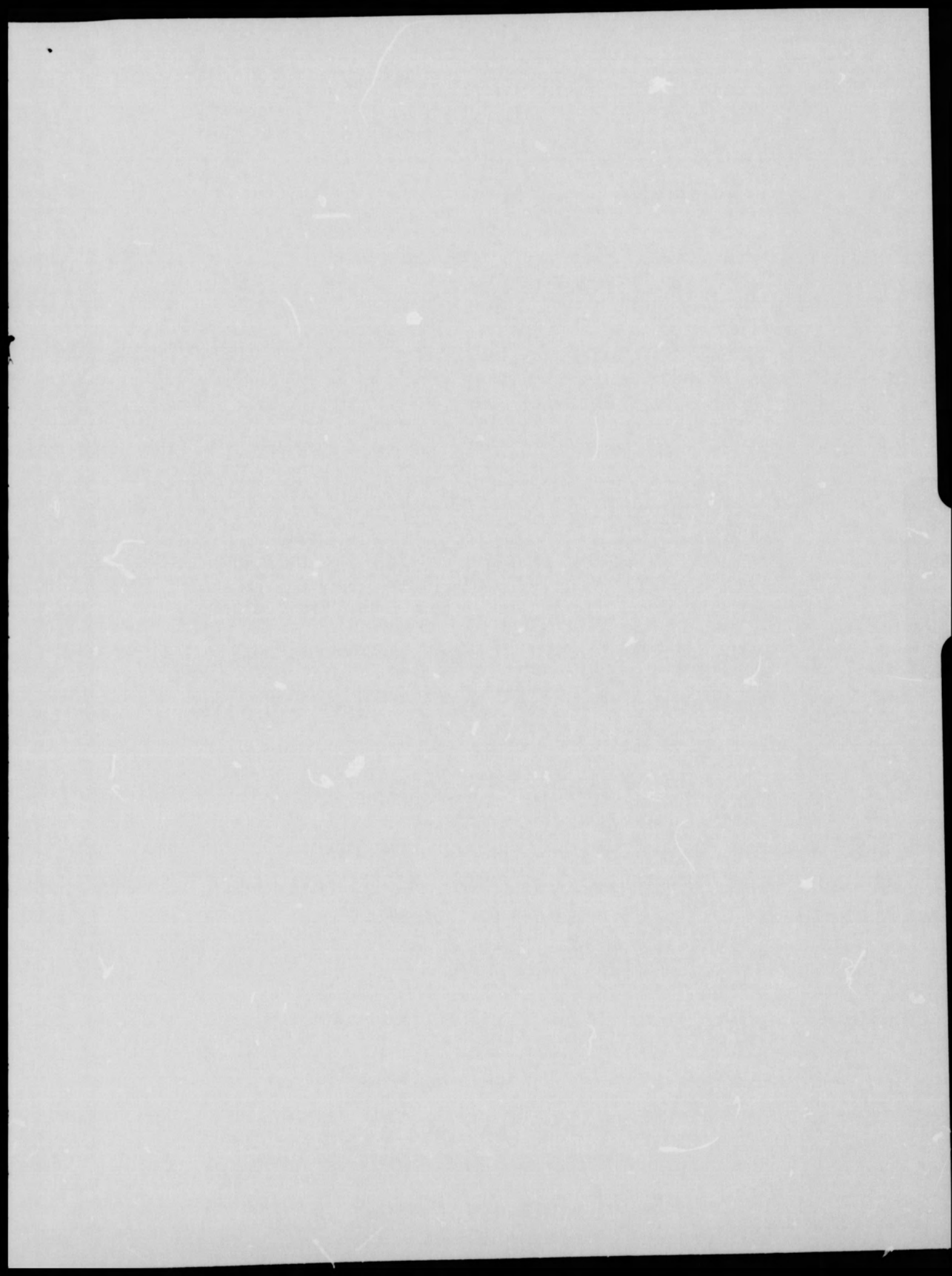
COURT REPORTERS AND TRANSCRIBERS  
1323 RHODE ISLAND AVE., N.W.  
WASHINGTON, D.C. 20005-3701



**EXHIBIT D**

**HIGHLY CONFIDENTIAL**

**REDACTED**



OPPENHEIMER WOLFF & DONNELLY

Two Prudential Plaza  
45th Floor  
180 North Stetson Avenue  
Chicago, IL 60601-6710

(312) 616-1800  
FAX (312) 616-5800

Direct Dial: (312) 616-5857

Exhibit E

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

January 16, 1998

**VIA TELEFAX (202) 942-5999**

Drew Harker, Esq.  
Arnold & Porter  
555 12th Street, N.W.  
Washington, D.C. 20004-1202

**RE: Conrail Merger Proceeding  
Finance Docket No. 33388**

Dear Mr. Harker:

Now that my clients' January 14, 1998 filings have been completed, I would like to raise a number of pending, unresolved discovery issues with you. It is my hope that these issues can be resolved without the intervention of Judge Leventhal.

During the deposition of John W. Orrison, he stated that his workpapers contained information indicating that Illinois Central trains traversed CSXT's Leewood to Aulon track in .1 hours, or 6 minutes. (Orrison Transcript, pp. 137-141). The chart provided with his testimony, however, did not contain this information, and during his deposition, he (or, more accurately, his counsel) stated that the information was contained in his workpapers. We have reviewed the workpapers and have not seen this data. Therefore, if there is some document which supports Mr. Orrison's testimony on this point, it should be produced as an element of his workpapers.

Additionally, as you may also be aware, in previous discovery responses we were provided with BOCT documents sufficient to identify the number of cars moved by BOCT in intermediate switching. From these documents, we were able to calculate the percentage of cars moved by BOCT in intermediate switching not involving CSXT. Applicants produced the requested BOCT data under a "Highly Confidential" designation, and, in our January 14, 1998 filing, we applied that designation to our own calculations derived from this information. We believe, however, that



Drew Harker, Esq.  
January 16, 1998  
Page 2

the calculations we performed are sufficiently aggregated that the "Highly Confidential" designation is not appropriate, and I request your concurrence to treat the summary calculations we performed as "Public."

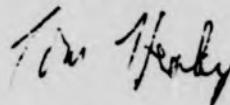
The documents produced by CSXT in discovery included a number of hand-written documents ("CSX 92 HC 000117" to "CSX 92 HC 000122") which were, to a large degree, illegible because of poor photocopying. I would appreciate it if you could determine whether better photocopies of these documents can be made. If better copies are available, we will seek to have them substituted for the poor-quality copies we were forced to use in our January 14, 1998 submission to the Board.

In addition, the documents produced by CSXT include an in-house memorandum dated August 20, 1997 by John Booth. Although CSXT has designated the document "Highly Confidential", I do not see any basis in the document to justify this designation, and would appreciate your agreement that the document may be designated "Public."

Finally, I must again raise with you the "post-it" note appended to document "CSX 92 HC 000107", referencing a letter sent to Union Pacific. As I recall, you informed me by telephone earlier this week that the referenced letter involved "other matters", but it is hard to imagine how this could be so, given the subject of the memorandum to which the post-it is appended. As you know, although I agreed to withdraw the Coalition's Interrogatory No. 1 (in favor of the right to question Mr. Orrison on those subjects), I specifically did not withdraw that portion of the interrogatory seeking documents reflecting communications between Applicants and other railroads involving "operation and/or dispatching of the IHB", a subject referenced in the document in question. I would appreciate it if you would reassess whether the referenced letter and all other document referencing the UP/CSXT communications are covered by the Interrogatory.

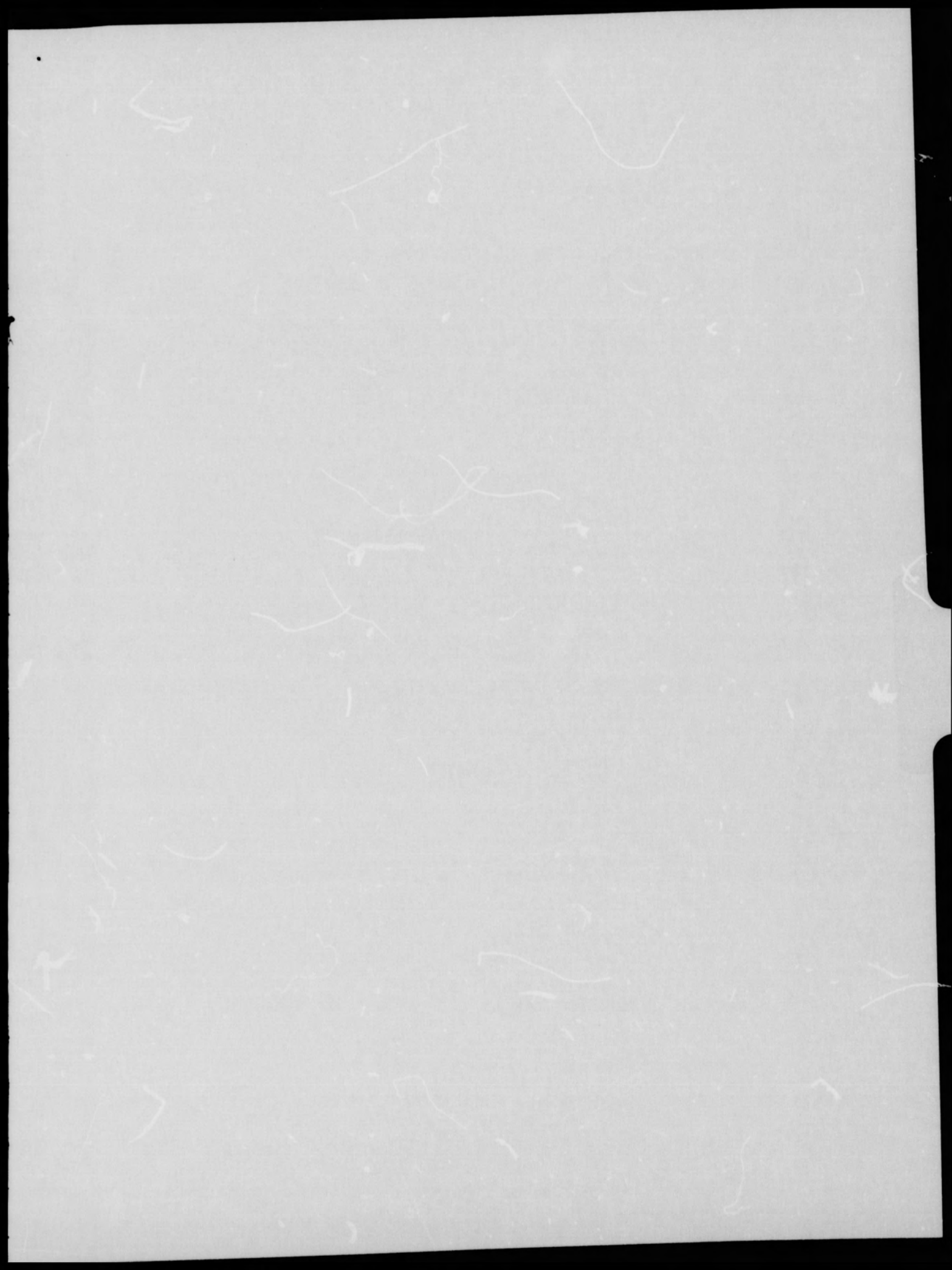
Please contact me if you have any questions.

Very truly yours,



Thomas J. Healey  
Oppenheimer Wolff & Donnelly (Illinois)

TJH/lom



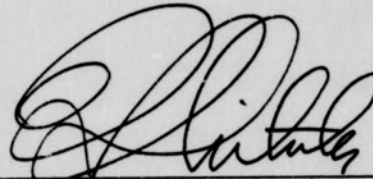
**EXHIBIT F**

**HIGHLY CONFIDENTIAL**

**REDACTED**

**CERTIFICATE OF SERVICE**

I hereby certify that on this 11th day of February, 1998, a copy of the foregoing **Appeal of Transtar, Inc., Elgin, Joliet and Eastern Railway Company, I & M Rail Link, LLC and Wisconsin Central Ltd.** (EJE-18/IMRL-7/WC-17) was served by first class mail, postage prepaid, upon all parties appearing on the confidential restricted service list in this proceeding.

A handwritten signature in dark ink, appearing to read 'T. J. Litwiler', is written over a horizontal line.

Thomas J. Litwiler

STB

FD

33388

2-4-98

D

185533



185533

# HOPKINS & SUTTER

(A PARTNERSHIP INCLUDING PROFESSIONAL CORPORATIONS)

888 SIXTEENTH STREET, N.W., WASHINGTON, D.C. 20006-4103 (202) 835-8800

FACSIMILE (202) 835-8136

INTERNET <http://www.hopsut.com>

CHICAGO OFFICE THREE FIRST NATIONAL PLAZA 60602-4205

DETROIT OFFICE 2800 LIVERNOIS SUITE 420 TROY, MI 48063-1220

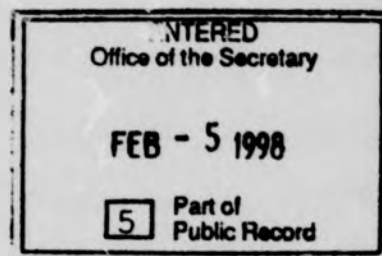


CHARLES A. SPITULNIK  
(202) 835-8169

February 4, 1998

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

Attention: Elaine K. Kaiser  
Chief, Section of Environmental Analysis  
Environmental Filing

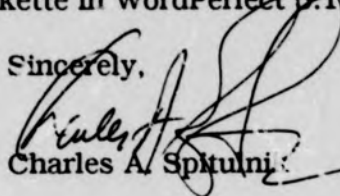


Re: CSX Corporation and CSX Transportation Inc., Norfolk Southern Corporation and Norfolk Southern Railway Company -- Control and Operating Leases/Agreements -- Conrail Inc. and Consolidated Rail Corporation. Finance Docket No. 33388

Dear Ms. Kaiser:

Enclosed are the original and twenty five (25) copies of the Errata to Comments of The City of Cleveland, Ohio on the Draft Environmental Impact Statement (CLEV-11) for filing in the above-referenced proceeding. An additional copy of this filing is enclosed for file stamp and return with our messenger. Please note that a copy of this filing is also enclosed on a 3.5-inch diskette in WordPerfect 5.1 format.

Sincerely,



Charles A. Spitulnik

Enclosure

cc: The Honorable Jacob Leventhal  
All Parties of Record

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



Finance Docket No. 33388

CSX Corporation and CSX Transportation Inc.,  
Norfolk Southern Corporation and  
Norfolk Southern Railway Company  
-- Control and Operating Leases/Agreements --  
Conrail Inc. and Consolidated Rail Corporation

**ERRATA TO  
COMMENTS OF THE CITY OF CLEVELAND, OHIO  
ON THE DRAFT ENVIRONMENTAL IMPACT STATEMENT**

On February 2, 1998, the City of Cleveland, Ohio, filed its Comments on the Draft Environmental Impact Statement ("DEIS") issued by the Section of Environmental Analysis ("SEA") on December 12, 1997. By these Errata, the City makes the following corrections to those Comments:

PAGE	LINE	CORRECTION
2	2	Delete the word "on" and replace it with the word "at"
2	12	Delete the word "have" and replace it with the word "has"
2	15	Delete the word "their" and replace it with the word "its"
4	6	Delete the word "of" between the words "explain" and "the"
5	12	Delete the word "medial" and replace it with the word "medical"
6	7	Delete "available," between the word "resources" and "to"

<b>PAGE</b>	<b>LINE</b>	<b>CORRECTION</b>
6	22	Delete the word "Redirection" and replace it with the word "Redirecting"
7	10	Add the word "million" after the number "\$148"
9	19	Delete the word "on" and replace it with the word "with"
10	20	Insert "%" after "22.4"
12	14	The word "segment" should be "segments"
12	15	Delete the word "across" after the word "increase"
19	8	The sentence "The report purports to address the localized issue of noise in the City" appears twice. Delete the second one.
19	13	The word "form" should be "from"
19	18	Delete the word "was" and replace it with the word "were"
23	9	Insert the word "that" between the words "even" and "reduction"
27	2	Insert a comma after the word "arrangements" and insert the word "is" before the word "less"
27	20	Delete the word "across" between the words "increase" and "in"
28	20	Insert the word "be" between the words "to" and "found"
29	3	Delete the word "Given" and change the "t" at the beginning of the word "this" from lower to upper case
29	6	Change the word "require" to "requires"
30	22 & 23	Delete the words "will further limit access"
31	1	Change the word "criteria" to "criterion"
31	19	insert the words "that a" between the words "indicated" and "ditch"
37	5	Change the word "affected" to "affect"
37	17	Insert a comma (",") between "1980's" and "has"
38	3	Change the "t" at the beginning of the word "the" from lower case to upper case

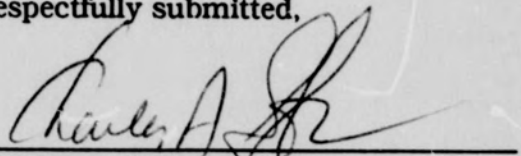
PAGE	LINE	CORRECTION
41	20	The phrase "This alternative plan would require substantial public funding" appears twice. Delete the second one
42	23	Delete the word "the" between the words "be" and "via"
44	16	Delete the word "are" and replace it with the word "is". Add an "s" to the word "provide"
48	21	The title " <u>Train Frequencies</u> " refers to the table that follows at the top of the next page and should be moved to the next page
52	16	Delete the word "more"
52	23	Delete the word "their" and replace it with the words "the railroads"
52	5	Change the word "rial" to "rail"
52	9	Substitute the symbol " $\div$ " for the words "divided by"
52	14	Delete the word "of" after the word "reduces"
52	16	Delete the word "more" after the word "they"
52	23	Delete the word "their" and replace it with the words "the railroads", then add an apostrophe after the word "railroads"

Dated: February 4, 1998

Sylvester Summers, Jr.  
Director of Law  
Richard Horvath  
Assistant Director of Law  
City of Cleveland  
Department of Law - Room 106  
601 Lakeside Avenue  
Cleveland, Ohio 44114  
(216) 664-2808

Anthony J. Garofoli  
Climaco, Climaco, Lefkowitz &  
Garofoli, L.P.A.  
Ninth Floor  
The Halls Building  
1228 Euclid Avenue  
Cleveland, Ohio 44115  
(216) 621-8484

Respectfully submitted,



Charles A. Spitulnik  
Robert P. vom Eigen  
Rachel Danah Campbell  
Hopkins & Sutter  
888 Sixteenth Street, N.W.  
Washington, D.C. 20006  
(202) 835-8000

Attorneys for The City of Cleveland,  
Ohio



**CERTIFICATE OF SERVICE**

I hereby certify that on February 4, 1998, a copy of the foregoing Errata to Comments of The City of Cleveland, Ohio on the Draft Environmental Impact Statement (CLEV-11) was served by hand delivery upon the following:

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

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

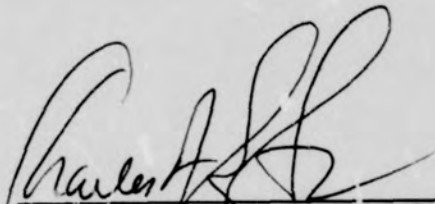
David Coburn  
Samuel M. Sipe, Jr.  
Steptoe & Johnson L.L.P.  
1330 Connecticut Avenue, N.W.  
Washington, D.C. 20036-1795

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

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

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

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

  
\_\_\_\_\_  
Charles A. Spitalnik

STB

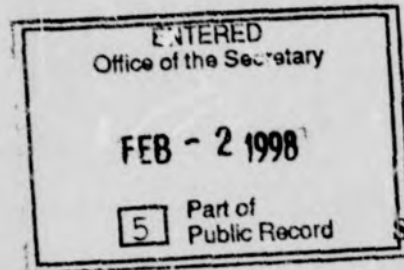
FD

33388

2-2-98

D

185461



BEFORE THE  
SURFACE TRANSPORTATION BOARD

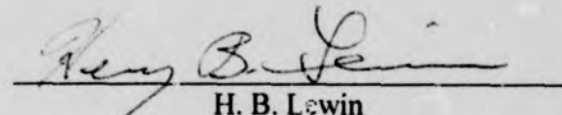
Finance Docket No. 33388

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



**TRANSPORTATION•COMMUNICATIONS INTERNATIONAL UNION'S  
VERIFIED STATEMENT OF H. B. LEWIN**

I am General Vice President of the Carmen Division of the Transportation•Communications International Union. My office is located at 3 Research Place, Rockville, Maryland 20850. I have held this position since September, 1997. I hereby certify that the correspondence attached as Exhibit 1 to TCU's Comments to Proposed Safety Integration Plans (TCU-12) are true and accurate copies of correspondence sent by me to Federal Railroad Administration Regional Administrator Mark McKeon dated June 13, 1997, June 16, 1997, and July 3, 1997; and to Federal Railroad Administration Regional Administrator David Myers dated July 2, 1997.

  
H. B. Lewin

Dated: February 2, 1998