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185460

TRANSPORTATION • COMMUNICATIONS
INTERNATIONAL UNION

AFL-CIO, CLC

ROBERT A. SCARDELLETTI
International President
MITCHELL M. KRAUS
General Counsel
CHRISTOPHER J. TULLY
Assistant General Counsel

LEGAL DEPARTMENT

February 2, 1998

VIA HAND DELIVERY

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

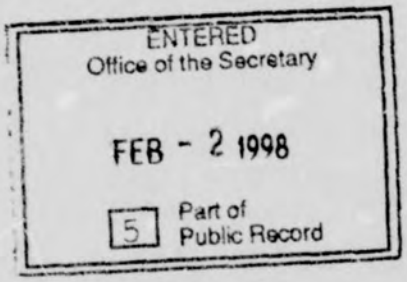
Re: Finance Docket No. 33388, CSX Corporation and CSX Transportation, Inc., Norfolk Southern Corporation and Norfolk Southern Railway Company -- Control and Operating Leases/Agreements -- Conrail Inc. and Consolidated Rail Corporation

Dear Mr. Williams:

Enclosed please find an original and twenty-five copies of Transportation• Communications International Union s Comments to Proposed Safety Integration Plans (TCU-12) and Verified Statement of H. B. Lewin (TCU-13) in the above-captioned matter.

Also enclosed is a 3.5-inch IBM compatible floppy disk containing the above documents.

Thank you for your attention to this matter.



Very truly yours,

Mitchell M. Kraus
General Counsel

MMK:fm
Enclosures
CC: The Honorable Jacob Leventhal
All Parties of Record (per Service List)

185468

TCU-12

BEFORE THE
SURFACE TRANSPORTATION BOARD

STB FINANCE DOCKET NO. 33388

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

COMMENTS OF THE TRANSPORTATION•COMMUNICATIONS INTERNATIONAL UNION TO PROPOSED SAFETY INTEGRATION PLANS

I. Introduction

The Transportation•Communications International Union (TCU) offers these Comments in response to the Safety Integration Plans (SIPs) submitted by Norfolk Southern (NS) and CSX, as required by the Board in Decision No. 52, issued on November 3, 1997. The TCU represents individuals employed in the carmen and clerical crafts on CSX, NS and Conrail. By virtue of their successful completion of an apprenticeship and journeyman program, the carmen are fully trained and qualified to conduct the freight car inspections and air brake tests mandated by federal law. Among the clerical employees the TCU represents are highly trained crew callers.

The SIPs submitted by the Applicants inadequately address the need for properly conducted freight car inspections and air brake tests with respect to: (1) the Applicants'

overreliance upon ill-trained and unqualified train crews to perform such inspections and tests; and (2) the Applicants' potential reliance upon a "block swapping" inspection procedure that is currently the subject of a joint study between the Federal Railroad Administration (FRA), Conrail, and the TCU. Further, the SIPs fail to address the concern (raised by the TCU in our earlier comments) over problems that are likely to arise from the Applicants' intent to rapidly consolidate crew calling operations.

II. The Applicants' SIP Submission Fail to Adequately Address the Need for Truly Qualified Personnel to Inspect Freight Cars and Air Brake Systems.

As noted in its initial comments in this matter, one of the TCU's primary safety-related concerns arising from this transaction is the proper inspection of freight cars utilized by CSX and NS following consummation of the transaction. In the SIPs subject to comment here, the carriers involved make assurances that they will utilize "qualified employees" to conduct the necessary air brake tests and pre-departure freight car inspections. See CSX SIP (Draft EIS Vol. 2), at 123; NS SIP (Vol. 2), at 122; CSAO SIP (Vol. 2), at 30. These assurances by the carriers beg the question of what constitutes a "qualified employee." Although train crews are permitted to conduct certain types of freight car inspections (i.e., pre-departure inspections regulated pursuant to 49 C.F.R. Part 215, Appx. D), their ability to do so is dependent upon the level of training they have received in detecting freight car defects.

FRA Director of Safety Edward English raised this very point in his Verified Statement accompanying the comments of the U.S. Department of Transportation regarding this transaction:

> FRA is also concerned that the Applicants have enough individuals with adequate qualifications to perform train air-brake tests, pre-departure inspections of freight cars, and daily locomotive inspections, as required by federal law.

Verified Statement of Edward English, at 32 (emphasis added). As the TCU noted in its prior comments on this matter, both Applicants have proposed to eliminate interchange points throughout the existing Conrail system to allow smooth "through train" operations, see CSXT Operating Plan, Application Vol. 3A, §4, at 180-256; NS Operating Plan, App. Vol. 3B, §4, at 110-194, resulting in an increased distance between interchange points. Because qualified mechanical inspectors are predominantly stationed at interchange points, the elimination of these interchanges increases the likelihood that the Applicants will increasingly seek to utilize trainmen to perform 1,000 mile and pre-departure air brake inspection procedures. See TCU-6, Verified Statement of Richard A. Johnson, at 13.

As TCU noted in its earlier comments, the labor organization that represents trainmen -- the United Transportation Union (UTU) -- has previously testified before the FRA that its members are poorly trained for and unqualified to conduct such inspections. In the section of its SIP devoted to training issues, however, NS says nothing about training conductors to perform such tests; likewise, the CSAO SIP does not refer at all to air brake test and inspection training for its train crews. Though CSX's SIP expressly refers to the portion of its current conductor training program devoted to train inspection and air brake tests, CSX SIP, at 66, it is the TCU's understanding based upon informal discussions with FRA inspectors that the FRA has recently focused significant attention on conductor inspections in Augusta, Georgia. At that facility, CSX had eliminated qualified mechanical inspector positions and substituted train crew inspections, with the result that a substantial number of freight cars moved out of that facility with numerous undetected defects. Thus, the Board needs to question the effectiveness of CSX's program to train conductors to perform air brake tests and freight car inspections.

The consequences of permitting inspections by un- or underqualified train crews are perhaps best understood in light of recent safety reports from Conrail's Oak Island yard, located in Newark, New Jersey. In June and July of 1997, in correspondence to directed to the Regional Administrators for the FRA's Regions 1 and 2, the TCU reported an alarming number of defects appearing on freight cars inspected at the Oak Island yard. See June 13, 1997, correspondence from BRC Gen Vice President H.B. Lewin to FRA Region 1 Administrator Mark McKeon; June 16, 1997, correspondence from Lewin to McKeon; July 2, 1997, correspondence from Lewin and TWU IVP John Czuczman to FRA Region 2 Administrator David Myers; July 3, 1997, correspondence from Lewin to McKeon (TCU Exhibit 1). Included among these defects were inoperative or otherwise defective air brakes, leaking train lines, burnt brake shoes, and defective hand brake brackets. These defects were detected by qualified mechanical inspectors and, had they been undetected, could very well have resulted in derailments or collisions. The potential human cost of such accidents is magnified by the fact that Oak Island is located in the heart of the "Chemical Corridor," where substantial amounts of hazardous material freight is shipped. The "Chemical Corridor" is also one of the most densely populated geographic regions in the proposed CSX-NS-CSAO system.

The use of train crews, rather than qualified mechanical inspectors, to conduct necessary air brake tests and freight car inspections raises serious fatigue and hours of service issues. For example, conducting a proper intermediate air brake test requires the individual conducting the test to walk the full length of the train on both sides and determine whether the air brakes apply and release on both sides of each and every car on the train. With large consist trains, this procedure normally requires in excess of two hours to perform. By increasing the duties allocated to train crews to incorporate conducting these air brake tests and inspections, the

applicants will place greater strain on the ability of their train crews to comply with federal hours of service laws. At the same time, these added duties will increase fatigue among those crews, increasing the risk of train accidents or incidents that arise from human error. The SIPs submitted by the applicants say nothing about how they will address the fatigue and hours of service complications that arise specifically from assigning additional inspection and air brake test duties to the core duties performed by train crews.

The above problems cannot be answered by the applicants' vague promises of compliance with federal freight car inspection and air brake test statutes and regulations. Neither the NS nor the CSAO SIP answers the question of how train crews operating in those segments of the combined system will be adequately trained to supplant qualified mechanical inspectors in performing such tests and inspections. CSX's assertions that its training program for conductors will address these problems are undermined by the problems uncovered by the FRA at the carrier's Augusta yard. These safety problems are further complicated by the fatigue and hours of service issues raised by having train crews perform these inspections. The alarming number of air brake and other freight car defects found by mechanical inspectors (whose qualifications are beyond dispute) at Oak Island and other locations within the CSX, NS and Conrail systems make clear just how high the safety stakes truly are.

The Board has an express duty to see that transactions subject to its jurisdiction are implemented safely. The SIPs submitted by the applicants are insufficient to address many of the safety issues related to freight car inspections and air brake tests, and that the Board should not approve this transaction until the SIPs are amended to adequately deal with these concerns.

III. The Applicants' SIP Submissions Also Fail to Effectively Address Inspection Concerns With Respect to "Block Swapping" of Freight Cars.

Another aspect of the SIPs under consideration that is of considerable concern to the TCU is the practice of "block swapping" which, as stated by CSX in its SIP, "is utilized by all Class 1 railroads today, including CSXT and Conrail[.]" CSX SIP (Vol. 3A), at 133. Block swapping is a carrier practice by which the carrier switches a block or several blocks of cars from one train to another. Block swapping is not prohibited per se by FRA rules; however, FRA rules do require that a pre-departure mechanical inspection must be conducted whenever a freight car or block of cars is placed on a train. 49 C.F.R. §215.13. Likewise, whenever cars or blocks of cars are added to a train, the carrier is also required to conduct an initial terminal air brake test as required by 49 C.F.R. §232.12.[1]

Based upon informal discussions with FRA inspectors, TCU understands that both CSXT and Conrail in particular have engaged in a regular practice of block swapping without complying with existing federal safety regulations. In the latter case, the FRA oversaw a joint study between Conrail and the TCU, by which alternative inspection practices would be utilized by the carrier when specified trains in the Conrail system were "block swapped." Both Applicants cite this joint study in their SIPs, though they reserve judgment on applying it pending the outcome of the study. CSX SIP, at 133; NS SIP, at 122; CSAO SIP, at 32-33. One specific

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[1] The FRA recognizes a narrow exception to this rule. Where a single, solid block of cars which has been previously tested is attached to a train, the carrier is not required to inspect the entire train, so long as the brakes on each and every car within the block have been inspected. 49 C.F.R. §232.12(a)(1)(ii). Rather, in that circumstance, the carrier need only determine that the pressure as gauged from the rear of the train is the same as that applied from the front. However, it is important to note that FRA has interpreted this exception to apply **only** when a **single** block of cars is added to a train. Further, the carrier is required to perform a pre-departure mechanical inspection of all cars in the block regardless of whether a single block or several blocks are added to a train.

requirement of these alternative procedures was that all inspections conducted pursuant to those procedures would be done by qualified mechanical inspectors, rather than by train crews. In application, however, this joint study has been unsuccessful, as a result of Conrail's failure to utilize qualified mechanical inspectors or, alternatively, merely removing trains from the list to be block swapped under the joint study procedures. As a result, the TCU has disavowed these alternative practices and it is our understanding that the FRA is likewise ready to abandon the joint study.

Both applicants state that they will perform block swap air brake inspections in accordance with FRA regulations. Regardless of whether or not such trains are "block swapped," these regulations demand that full mechanical inspections be conducted on any freight car attached to a train consist, and that full air-brake tests be conducted in all instances except when a single block of cars is attached. As noted above, TCU understands that both Conrail and CSX have engaged in block swapping without conducting the necessary inspections and tests; thus, a merely vague assertion that the Applicants will comply with federal regulations is inadequate. Indeed, the NS and CSAO SIPs specifically state that "'[b]lock swapping' inspection practices as they now exist on Conrail" will continue after the transaction is consummated. NS SIP (Draft EIS, Vol. 2(B)), at 122; CSAO SIP (Vol. 2(C)), at 33. As stated above, Conrail's prior record of compliance with federal regulations on block swapped trains is anything but encouraging.

Given the record of both CSX and Conrail with respect to complying with federal regulations in block swapping situations, as highlighted by the recent Conrail joint study experience, the TCU respectfully submits that the best way to ensure such compliance is for the Board to demand a stronger and more definitive statement from the Applicants as to how they will insure that federal safety rules will be followed in the block swapping context. Further, the

Board should condition approval of the transaction upon strict oversight by the FRA of the Applicants' compliance with such rules.

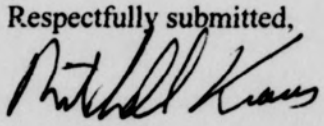
IV. The Applicants' SIPs Fail to Address TCU's Concerns With Respect to Excessive Hours Worked By Crew Callers in the CSX System.

In its October 21, 1997, comments regarding the pending transaction, the TCU expressed serious concerns with respect the excessive amounts of overtime worked by crew callers in the CSXT system. Those comments noted that regular crew management positions in the CSXT system remained unfilled and that the guaranteed extra board was staffed below the levels required by the collective bargaining agreement. See TCU-6 at 13. Those comments also cited the FRA's Safety Assurance and Compliance Program Report for CSXT, where the FRA concluded that, in the CSXT system, "The crew management staff is regularly overwhelmed given the demands of the job." Thus, we noted that the consolidation of Conrail's and CSXT's crew management systems, which under CSXT's Application was to be conducted over a seven month period, would exacerbate existing staffing problems resulting in increased fatigue among crew callers and errors in crew management which could undermine safety. The problems cited in the TCU's prior comments have not diminished since its October comments. Indeed, CSXT's crew calling operations are still understaffed by between twenty and thirty positions, and overtime problems among CSXT crew callers cited in TCU's earlier comments have not diminished.

The drastic increase in freight service that CSXT will undertake as a result of this transaction will only serve to exacerbate the current strain CSXT is experiencing with respect to crew management and, consequently, undermine the safe implementation of this transaction.

CSXT's proposed twenty-four week schedule for transferring Conrail's crew management operations to Jacksonville is far too rapid to allow for any useful assessment of how safely the transfer is being implemented. Therefore, in order to ensure that the transfer of Conrail's crew management operations is accomplished safely, the Board should condition approval of the transaction upon CSXT's adoption of an extended schedule for the transfer. Further, approval of the transaction should be conditioned upon strict FRA oversight of CSXT's crew calling operations, both during and for a reasonable period following the transfer of crew management operations.

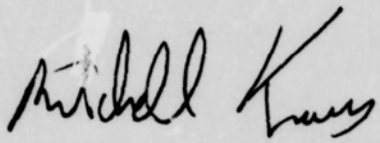
Respectfully submitted,



Mitchell M. Kraus
General Counsel
Christopher Tully
Assistant General Counsel
Transportation Communications
International Union
3 Research Place
Rockville, MD 20850
(301) 948-4910

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing Comments of the Transportation•Communications International Union to Proposed Safety Integration Plans were served on all Parties of Record via first-class mail, postage prepaid, this 2nd day of February, 1998.



Mitchell M. Kraus

Brotherhood Railway Carmen Division
TRANSPORTATION • COMMUNICATIONS
INTERNATIONAL UNION
AFL-CIO, CLC

H. B. LEWIN
General Vice President

June 13, 1997

Mr. Mark H. McKeon
Regional Administrator
Region 1
Federal Railroad Administration
55 Broadway, Room 1077
Cambridge, MA 02142

Office File: CR04-02-97-965-Oak Island.150

Dear Mr. McKeon:

Please be advised that we have received a complaint concerning the movement of defective equipment into the Conrail Oak Island, New Jersey facility from various locations on the Conrail system in violation of Power Brake and Safety Appliance Regulations.

Below is a list of defective cars which were inspected on outbound at the Oak Island facility. As you can see, there are numerous cars which contain defective conditions under 49 CFR §231, Safety Appliance , 49 CFR §232, Power Brake as well as 49 CFR §215, mechanical defects which were also discovered during inspection.

April 2, 1997

Train	Car No.	Defect	
BA-2	ADMX 29516	231	hand rail broken
ALBF	CNW 69819	232	retainer valve defective
OIAL	ATSF 524740	215	broken coupler

April 3, 1997

Train	Car No.	Defect	
OIAL	CSXT 137423	215	door
OIAL	CR 588636	231	hand hold defective
OIAL	CR 579804	231	brake step defective
OIAL	EJE 18775	232	air brakes defective
OIAL	CR 579592	231	ladder defective - AR

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April 4, 1997

Train	Car No.	Defect	
PIOI	BAR 6690	231	ladder defective
PIOI	MERX 0006	231	sill step defective
PIOI	MERX 0090	231	uncoupling lever defective
ALOI	CR 598533	215	loose backing ring
ALOI	RBOX 34737	215	draft gear
ALOI	CNW 612761	215	door

April 5, 1997

Train	Car No.	Defect	
OIAI	TTWX 570473	232	air cut out
OIAI	ATSF 622768	231	uncoupling lever defective
OIAI	SFLC 254216	215	thin flange
OIAI	FCEN 96269	215	load over
OIAI	SOU 50317	232	brake beam defective

April 6, 1997

Train	Car No.	Defect	
OI-60	GATX 20829	232	brake shoes worn and air cut out
ALBF	ACFX 44666	232	retainer valve defective
ALBF	ACFX 66681	232	angle cock defective
PIOI	GVSR 768052	215	backing ring
PIOI	PSPX 5979	231	uncoupling lever bracket defective
PIOI	GVSR 137016	231	uncoupling lever defective
PIOI	GVSR 129000	231	ladder defective - BR

April 8, 1997

Train	Car No.	Defect	
PN-1	CR 604625	231	hand hold defective
PN-1	NLG 5805	232	brake shoe worn
OIAL	TTZX 83755	232	excess piston travel
OIAL	SOU 526132	232	excess piston travel

April 9, 1997

Train	Car No.	Defect	
OIAL	ASAB 7387	215	door
OIAL	ETTX 820165	215	door
OISE	ETTX 803543	232	brake shoe burnt
NSSE	AWDX 331	215	door rail

April 10, 1997

Train	Car No.	Defect	
OIAL	CR 582153	215	load over
OIAL	DROW 60826	215	door handles
OIAL	MP 268337	232	top rod worn out
OI60	DC 11010	215	door rail
BFAL	PC 598094	231	brake step defective
OI-14	IC 563758	232	air brakes cut out
PN-1	CR 598490	231	ladder defective
PN-1	CR 604649	231	crossover board defective
CSSE	TTJX 81961	215	thin flange - L3

April 11, 1997

Train	Car No.	Defect	
PN-1	ATW 16002	231	crossover board defective - A
PN-1	QC 74868	232	air brakes cut out
PN-1	QC 76009	232	retainer valve defective
OIAL	CNIS 417095	231	end ladder defective - BR
OIAL	ADWX 60022	215	bolster and wheel
OIAL	AWDX 307	215	door
PIOI	FRDN 4125	231	ladder defective - AR
PIOI	CR 604643	231	running board defective
PIOI	GATX 3852	231	sill step defective
PIOI	GATX 13383	231	running board defective
PIOI	GATX 71776	232	brake shoe burnt
NSSE	CN 623363	215	shelled wheel

April 12, 1997

Train	Car No.	Defect	
OIAL	ASAB 7413	215	door rail
OIAL	PC 592057	231	ladder defective
OIAL	CR 585070	231	ladder defective - AR
OIAL	CP 80490	232	brake shoe burnt
OICA	CITX 27522	231	crossover board defective - B
OICA	SCU 565364	232	slack adjuster defective
OICA	SSAM 16281	215	end of cushioning device
OICA	NATX 75041	215	thin flange

April 13, 1997

Train	Car No.	Defect	
PIOI	IC 580237	215	thin flange - R3
PIOI	CR 588610	231	hand hold defective
PIOI	MERX 0105	231	hand hold defective - A
PIOI	MERX 0086	231	hand hold defective
SESA	VELX 78397	215	thin flange - R2
SESA	TTJX 80407	215	end of cushioning device
ALBF	CR 582374	231	brake step defective
BFAL	GLNX 86338	231	running board defective

April 14, 1997

Train	Car No.	Defect	
OIAL	CNW 543007	232	train line defective
OIAL	SP 292504	232	train line defective
OIAL	CR 581732	231	ladder defective
OIAL	NS 451104	215	door
OIAL	SP 247245	215	door

April 15, 1997

Train	Car No.	Defect	
OIAL	WP 64523	232	retainer valve defective
OIAL	CNIS 417095	231	ladder defective - AR
OIAL	NSHR 1273	231	ladder defective
OIAL	MTTX 472668	231	hand hold defective - BR
OI60	NW 190450	231	sill step bent - BR
OI60	CR 885191	231	sill step bent - AL
OI60	TTJX 81993	232	brake shoes burnt

April 16, 1997

Train	Car No.	Defect	
OIAL	ACFX 65008	231	sill step bent
OIAL	PC 592096	232	slack adjuster defective
OIAL	WC 83008	232	retainer valve defective
NSSE	UTLX 200084	232	retainer valve defective

April 17, 1997

Train	Car No.	Defect	
OIAL	ADMX 60044	215	thin flange
OIAL	SOU 551318	215	thin flange

April 18, 1997

Train	Car No.	Defect	
PN-1	CNIS 417177	231	crossover board bent - AB
PN-1	CR 604658	231	crossover board bent - A
OIAL	NSHR 1076	232	slack adjuster defective
OIAL	UMP 9618	232	reservoir pipe defective
OIAL	HPLX 405511	232	air brakes cut out
OIAL	GLNX 3620	231	uncoupling lever defective
OIAL	IC 151673	231	ladder defective
OIAL	HPLX 405549	215	thin flange - L4
ALBF	AMGX 4320	231	ladder defective
ALBF	AN 2004	215	draft gear
ALBF	CR 889137	215	draft gear
ALBF	AEX 5347	215	draft gear
CSSE	CN 415126	232	retainer valve defective

April 19, 1997

Train	Car No.	Defect	
OICA	LNAC 5827	232	retainer valve defective
OIAL	BAR 8826	232	no piston travel
401	TTGX 911520	232	retainer valve defective
401	TTGX 940178	215	defective coupler
401	TTGX 254888	231	uncoupling lever defective

April 20, 1997

Train	Car No.	Defect	
OI14	GVSR 530812	232	no piston travel
OICA	SM 4152	232	train line defective
ALBF	CR 231607	232	train line defective
ALBF	SOU 523859	215	door

The number of defective cars showing up in these trains simply do not all occur in route. These defects are being missed upon initial inspection or are simply not being observed for the lack of inspections or blocks are being swapped by Conrail without having been inspected.

It would be appreciated if your office would investigate these allegations to ascertain the source and advise this office as to your findings. Please refer to our office file number with regard to future correspondence. Thanking you in advance for your cooperation and assistance in this matter.

Yours truly,

H. B. Lewin
General Vice President

slm
cc: R. A. Johnson
J. J. Parry
B. Fine
J. T. Schultz
A. Wybraniec
C. Marshall Friedman

Brotherhood Railway Carmen Division
TRANSPORTATION • COMMUNICATIONS
INTERNATIONAL UNION
AFL-CIO, CLC

H. B. LEWIN
General Vice President

June 16, 1997

Mr. Mark McKeon
Regional Administrator
Region 1
Federal Railroad Administration
55 Broadway, Room 1077
Cambridge, MA 02142

Office File: CR05-07-97-965-Oak Island.150

Dear Mr. McKeon:

Please be advised that we have received a complaint concerning the movement of defective equipment into the Conrail Oak Island Yard in Newark, New Jersey, from various locations on the Conrail system in violation of Power Brake and Safety Appliance Regulations.

Below is a list of defective cars which were inspected and shopped at the Oak Island facility. There are numerous cars that contain defective conditions under 49 CFR §231, Safety Appliance, 49 CFR §232, Power Brake as well as 49 CFR §215, Mechanical Defects. We believe that these defective cars even though they had been removed from the trains for repairs, is a good indicator of the tremendous number of defective cars arriving at the Oak Island facility, either from local industry or in blocks of cars from other trains. It has become apparent that even though we continue to file complaints, Conrail has not reduced the number of defective cars which are continually arriving at numerous facilities over relatively short distances. A review of the defective equipment which was found in these trains is truly alarming.

May 7, 1997

Train	Car No.	Defect	
PIOI	WC 83508	232	brake beam
PIOI	SSW 24038	232	release rod
ME10	CNW 32921	232	air brakes defective
OIAL	AMGX 7071	215	overload
OIAL	CSXT 160442	231	uncoupling lever defective

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May 9, 1997

Train	Car No.	Defect	
SECS	CSXT 507234	215	door
SECS	CR 579786	231	sill step - AL

May 10, 1997

Train	Car No.	Defect	
PIOI	ADMX 60005	215	backing ring - L1
ML401	ETTX 700806	232	air brakes inoperative
ML401	ETTX 858716	232	air brakes inoperative
ML401	SP 516490	232	air brakes inoperative
ME10	CSXT 143384	232	dead lever bracket
ME10	TTGX 157917	215	backing ring loose
OIAL	TTAX 77089	215	high flange
OIAL	RBOX 40838	215	backing ring - L1
OIAL	SOU 549949	232	12" piston travel
OIAL	AWDX 126	232	air brakes cut out
OIAL	SP 696473	215	door
OIAL	CR 598367	231	ladder bent - B
OIAL	CR 576390	231	sill step defective - AL
OIAL	PC 598746	231	uncoupling lever defective
OIAL	CR 598363	231	ladder defective
OIAL	PC 598746	231	uncoupling lever defective - A
OIBU	CFWR 47337	231	sill step defective - BL
OIBU	GATX 14275	232	no piston travel
OICA	UTLX 68144	231	uncoupling lever missing
OI60	TTJX 80381	215	thin flange - L1
AL-OI	PC 598219	232	brake step loose
CSSE	TTJX 80381	215	thin flange - L1

May 11, 1997

Train	Car No.	Defect	
BA-2	AWDX 300	215	door
BA-2	SIR 692	215	load shift
SESA	CNA 405243	231	sill step - BR
OIBU	GATX 39075	232	air brakes defective

May 12, 1997

Train	Car No.	Defect	
PIOI	DJJX 1787	231	ladder defective - BL
PIOI	BN 733727	231	sill extended
PIOI	SOU 19236	215	door
PIOI	ADMX 25527	231	running board defective
PIOI	DJJX 4366	231	sill step - AL
CSSE	TTJX 80441	215	bent deck
CSSE	PDRR 1028	215	thin flange - L4
SESA	TTGX 993130	232	air brakes defective
SESA	SLR 1740	231	ladder defective - BL
SESA	CNA 405251	232	valve bolt missing
ME10	BN 733992	232	angle cock defective
ME10	SSW 28898	232	brake beam bent
OIBU	CR 53894	232	air brakes defective
OIBU	CR 52683	232	brake shoes defective
OIBU	CR 50693	232	no piston travel
OIBU	CR 53758	232	excess piston travel
OIBU	NS 408225	232	air brakes cut out
PN-1	ATSF 622686	232	air brakes cut out
PN-1	SOU 532160	215	door
PN-1	PC 598453	215	draft gear
OI-60	ADMX 15097	232	12" piston travel
OIAL	CR 64949	231	hand brake bracket
OIAL	ITTX 910871	231	hand brake broken
OIAL	CR 587248	231	hand brake wheel bent
OICA	AWDX 130	231	crossover board defective - A
ALOI	BN 222694	215	knuckle pin
NSSE	NATX 29702	231	sill step loose
NSSE	AWDX 328	231	ladder defective
NSSE	AWDX 107	215	door
NSSE	NATX 75303	215	draft gear - B
NSSE	AWDX 152	215	ladder defective - A R&L
NSSE	SOU 888	231	uncoupling lever defective

May 13, 1997

Train	Car No.	Defect	
ALOI	CR 527199	231	crossover board defective
ALOI	CR 364323	232	train line defective

May 13, 1997

Train	Car No.	Defect	
ALOI	VELX 78421	231	ladder defective
OIAL	SSW 27425	215	door
OIAL	CR 566223	231	hand hold defective
OIAL	CR 585307	215	load over

May 14, 1997

Train	Car No.	Defect	
CSSE	ATSF 88422	232	number 8 vent
CSSE	GATX 45067	231	uncoupling lever bracket
CSSE	UNPX 121494	231	hand hold defective
BA-2	AWDX 325	231	hand hold defective
OIAL	JTTX 930124	215	return spring
OIAL	CNW 163059	215	door
OIAL	TTPX 80982	231	hand rail defective
OIAL	TTZX 84819	231	hand hold defective
OIAL	CR 582465	231	hand hold bent - A
SESA	CAGY 7054	215	door
ALOI	EL 43672	215	loose backing ring - R3
ALOI	CNW 716008	231	ladder bent
NSSE	ACFX 82877	215	RB seal - R3
SSE	ATSF 88422	232	vent valve - No 8

May 15, 1997

Train	Car No.	Defect	
OIAL	SP 245861	215	door track
OIAL	UTLX 644736	231	hand hold defective

May 16, 1997

Train	Car No.	Defect	
OIAL	ADMX 15174	232	12" piston travel
OIAL	UPFE 455576	215	door
OICA	CR 628483	232	air brakes defective
ML401	ETTX 802404	215	thin flange - L1
NSSE	STSX 1682	232	air brakes defective
NSSE	SP 516490	232	piston travel defective
PIOI	CN 622073	231	crossover board defective

May 17, 1997

Train	Car No.	Defect	
OICA	CR 584475	231	ladder defective - B
CSSE	SOU 888	232	air hose broken
NSSE	FMLX 51031	231	ladder defective - BR
OIAL	SM 4255	215	door
OIAL	CR 368455	215	knuckle pin
OIAL	ICG 581074	215	door
OIAL	TTPX 82247	215	end of cushioning device

May 18, 1997

Train	Car No.	Defect	
OI-60	PC 592163	232	angle cock defective
OI-65	AWDX 120	215	door
SEOI	ADMX 15084	232	defective brakes - A end
NSSE	NW 189755	231	sill step - BR
OI-14	ADMX 60023	232	air brakes defective
PN-1	PC 507854	215	side bearing shin
PN-1	CR 580944	232	air brakes cut out
OICA	CR 602245	231	running board defectiv
OICA	DWC 403654	215	defective coupler

May 19, 1997

Train	Car No.	Defect	
OI-10	CN 622073	231	crossover board broken
ALOI	GATX 11702	231	sill step bolt missing
ALOI	AWDX 135	231	hand hold missing
ALOI	UTLX 65741	231	running board defective

May 20, 1997

Train	Car No.	Defect	
OIAL	PLMX 35150	232	retainer valve defective
OIAL	PLMX 3817	232	retainer valve defective
OIAL	ADMX 25356	232	4" piston travel
OIAL	ADMX 25737	232	5" piston travel
OIAL	WCRC 9190	231	ladder defective - AR
ML403X	ETTX 905898	232	air brakes cut out
ML403X	ETTX 851661	215	end door
BA-2	ADMX 29741	232	4" piston travel
OI-60	CTTX 30018	232	cut out cock broken
OI-60	PLMX 35166	232	pipe flange broken

May 20, 1997

Train	Car No.	Defect	
TV-207	SP 292868	231	ladder bent - A

May 21, 1997

Train	Car No.	Defect	
OIAL	WCRC 9190	231	ladder defective - AL
OIAL	CR 592067	232	retainer valve defective
OIAL	CR 582657	231	sill step defective
401X	ETTX 854203	232	air brakes defective
AL-OI	CR 589100	215	shelled wheel
AL-OI	CR 588455	232	angle cock defective
OI-60	CP 212413	231	ladder defective - BL
NSSE	AWDX 142	231	ladder defective
NSSE	AWDX 127	231	ladder defective

May 22, 1997

Train	Car No.	Defect	
OIPI	GATX 48330	231	ladder defective
OIPI	NPCX 6027	232	angle cock defective
OIPI	PLMX 4518	231	hand rail defective
OIAL	TOE 2651	215	end of cushioning device broken
OIAL	CAG 4539	232	5" piston travel
ME-10	IC 580651	232	excess piston travel
ALOI	GATX 47124	215	placard holder
NSSE	ECVX 844726	232	no. 8 vent valve
CSSE	UTCX 48738	232	brake shoe burnt - L1

May 23, 1997

Train	Car No.	Defect	
ALOI	CR 589041	232	retainer valve bracket
ALOI	PC 598059	231	ladder defective - BL
SEOI	CNA 404512	215	plug door

May 27, 1997

Train	Car No.	Defect	
ML403	CNA 554229	232	retainer valve defective
ML403	CCR 86458	232	retainer valve defective
ML403	NAHX 58249	232	reservoir pipe defective
OIBU	CR 169402	232	top rod defective
OIBU	BN 463672	231	hand hold defective - BR

May 27, 1997

Train	Car No.	Defect	
OIBU	ACFX 52007	232	air brakes cut out
SESA	UTLX 68135	231	end sill step bent
BUOI	STMX 525	232	retainer valve defective
PN-1	WC 24090	215	draft gear
OI-65	AWDX 167	231	ladder defective - BR
OI-65	CNW 164021	231	ladder defective

May 28, 1997

Train	Car No.	Defect	
OI-65	EPIX 91029	231	sill step - BL
401-ML	NATX 14651	215	backing ring - L3

May 29, 1997

Train	Car No.	Defect	
CSSE	GATX 40344	232	air brakes cut out
CSSE	SOU 50204	232	2" piston travel
OIBU	ABOX 50117	215	backing ring
OIBU	NW 170840	232	train line defective
OIBU	BN 463677	231	hand hold defective
SESA	ADMX 25876	231	hand hold - BL
SESA	PLMX 4216	232	slack adjuster
SESA	CN 62627	231	hand hold - AL
SESA	RUSX 15026	231	ladder defective
PIOI	KCS 152129	232	release rod missing
PIOI	CR 270172	215	no draft gear
SECS	ABOX 52114	231	ladder - BL

May 30, 1997

Train	Car No.	Defect	
OIAL	NLG 5252	215	door
OIAL	DJJX 8525	232	brake rod defective
OIAL	ACFX 57205	232	air brakes cut out
PIOI	ASAD 7377	215	high flange
PIOI	GATX 20835	215	roller bearing leaking

May 31, 1997

Train	Car No.	Defect	
OIAL	CP 522579	232	air brakes cut out
OIAL	CSXT 143476	215	thin flange

May 31, 1997

Train	Car No.	Defect	
CSSE	CSXT 139148	215	end of cushioning device
NSSE	ICG 501158	215	door
ALOI	TCTX 162	231	sill step - BR
ALOI	CSXT 407068	231	ladders - A&B

June 1, 1997

Train	Car No.	Defect	
OIAL	BERY 5584	231	uncoupling lever defective
ALOI	CR 628072	231	hand hold and hand rail defective
ALOI	CR 578056	232	brake beam
ALOI	CR 576836	215	truck bolster ring
ALOI	PC 598000	231	brake step defective
ALOI	CNW 155896	231	defective coupler
ALOI	UTLX 30424	232	angle cock handle cut out
ALOI	PRR 442455	231	hand brake bracket defective
ALOI	UTLX 30495	231	uncoupling lever defective
ALOI	AMGX 4306	215	thin flange - L1
ALOI	PLMX 35149	215	thin flange - L1
OIBU	NAHX 93360	232	no piston travel

June 2, 1997

Train	Car No.	Defect	
NSSE	AWDX 326	231	ladder defective
NSSE	EPIX 91025	215	container locks

It certainly appears to this Organization that the mechanics of the Regulation do not work in favor of Safety. The Regulation requires that cars be repaired when found to be in defective condition however, there is no requirement to have inspections performed at interchange or by qualified mechanical Inspectors, thus Appendix D train crew cursory inspections are allowed. The Regulation states that inspections performed by train crews under Appendix D (cursory inspection) does not alleviate the Carriers of liability when defective equipment is overlooked. However, unless FRA catches the defects at the point of inspection, the Carrier will simply claim that it happened in route and that FRA appears to be unable to effectively enforce the Regulations under these conditions. A review of the list of defective cars found at this one location over an eighteen day period is phenomenal and only just a fraction of what is running through this yard alone and only represents a tip of the iceberg. These defective conditions are not all happening in route and even though its been suggested that proper inspections by Carmen are being performed on some of these trains. The FRA Regional personnel are well aware that

Conrail is engaged in what is known as a "block swapping scheme" that avoids mechanical and air brake inspections. Many trains are only being partially inspected.

As you are aware, the Labor Organizations has attempted to address this so called "block swap" operation in an attempt to provide a safety equivalency for trains which "block swap" cars that are "time sensitive" in an effort to address the financial concerns of Conrail relative to time sensitive of freight. That process is being put into place over the next thirty (30) days. The Federal Railroad Administration has advised Conrail that all other trains are required to be inspected in compliance with 215 and 232 of the Regulations. There are only two time sensitive trains which are operating out of the Oak Island facility and it is obvious that with this many defects showing up on these trains at this and other locations, the Carrier can not yet be in compliance with the Regulations. We have been filing complaints with FRA relative to the defects discovered at a facility on inbound or outbound trains, but recently FRA responded by saying, "it could have happened in route". If that is the case, then it is more and more apparent that the current Regulation as written, is inadequate to address the safety concerns relative to the defective equipment being moved on our Nation's rails. If the Carrier claims that "it happened in route" every time a defect is discovered, then the Regulation as written, provides little incentive to enhance safety.

Perhaps FRA can advise us as to how the Agency intends to address this problem. Your timely response would be appreciated.

Yours truly,

H. B. Lewin
General Vice President

slm
cc: Cong. J. L. Oberstar
R. A. Johnson
J. J. Parry
B. Fine
J. Schultz
A. Wybraniec
C. Marshall Friedman

Brotherhood Railway Carmen Division
TRANSPORTATION • COMMUNICATIONS
INTERNATIONAL UNION
AFL-CIO, CLC

H. B. LEWIN
General Vice President

July 3, 1997

Mr. Mark H. McKeon
Regional Administrator
Region 1
Federal Railroad Administration
55 Broadway, Room 1077
Cambridge, MA 02142

Office File: CR06-01-97-965-Oak Island.150

Dear Mr. McKeon:

Please be advised that we have received a complaint concerning the movement of defective equipment into Conrail's Oak Island Yard in Newark, New Jersey from various locations on the Conrail system in violation of Safety Appliance and Power Brake Regulations.

Below is a list of defective cars which were inspected on outbound at the Oak Island faciltiy. There are numerous cars which contain defective conditions under 49 CFR §231, Safety Appliance as well as 49 CFR §232, Power Brake. In addition to the safety and power brake defects, we have also listed 49 CFR §215, Mechanical defects which were discovered upon inspection of these trains.

June 1, 1997

Train	Car No.	Defect	
PN-1	CR 604657	215	coupler cracked - B
PN-1	CR 588051	232	brake beam defective
PN-1	CR 597907	231	brake step defective
PN-1	CR 604511	232	air brakes inoperative
PN-1	CR 604641	232	slack adjuster defective

June 3, 1997

Train	Car No.	Defect	
OIAL	SP 697287	215	door defective
OIAL	DRGW 61269	231	sill step defective
OIAL	WLO 504542	215	door defective
		231	ladder defective

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June 4, 1997

Train	Car No.	Defect	
OIAL	AMGX 5063	231	ladder defective
OIAL	RDG 484293	232	excess piston travel
OIAL	TTPX 80163	215	coupler defective
OIAL	ATSF 622183	215	door defective

June 5, 1997

Train	Car No.	Defect	
OIAL	CGTX 20477	231	hand rail defective
OIAL	PLCX 92473	231	sill step defective
OIAL	DUPX 38283	232	retainer valve defective
OIAL	MTTX 102028	215	door defective
NSSE	RBOX 32038	231	uncoupling lever defective
NSSE	PLCX 221847	231	running board loose
NSSE	BN 463817	231	sill step defective
NSSE	SCOX 1631	232	brake shoe defective
NSSE	TTLX 160006	231	running board defective
NSSE	GATX 61643	232	piston travel 11"
NSSE	ACFX 64575	232	trainline leaking
OI-65	AWDX 341	232	angle cock defective
OI-65	MP 357658	215	door defective

June 6, 1997

Train	Car No.	Defect	
AL-OI	PC 598110	231	sill step defective
AL-OI	ASAB 7332	215	end of cushioning device
AL-OI	GATX 47128	232	angle cock defective
AL-OI	GATX 90969	231	running board defective
AL-OI	MERX 0033	231	hand hold defective
AL-OI	NS 463970	232	brake shoe burnt
AL-OI	CR 600513	231	sill step - AL
BA2	GVSR 765086	232	3" piston travel
BA2	AWDX 177	231	ladder defective
BA2	SP 292605	233	2" piston travel
ME10	CSXT 259366	231	crossover board defective
ME10	ACFX 220316	231	uncoupling lever defective
ME10	GATX 11151	231	sill step - BL
CSSE	ETTX 802857	232	air brakes inoperative
CSSE	TTGX 991039	231	uncoupling lever
CSSE	ETTX 803256	215	wheel - R1

June 9, 1997

Train	Car No.	Defect	
OIAL	CR 522752	231	hand hold defective
OIAL	CR 576909	232	short piston travel
OIAL	CR 581112	232	air brakes inoperative

June 11, 1997

Train	Car No.	Defect	
OIAL	MB 4113	215	door off rail
OIAL	PC 592154	231	ladder - AR
OIAL	CCR 7101	231	bell crank bracket
OIAL	MNA 439	232	angle cock broken
OIAL	WC 17928	231	ladder defective

June 14, 1997

Train	Car No.	Defect	
ML401	ETTX 903532	231	uncoupling lever
ML401	ETTX 903772	232	air brakes cut out

June 15, 1997

Train	Car No.	Defect	
ML401X	TTGX 254413	215	wheel - R2
ML401X	GTW 504195	215	end of cushioning device

June 16, 1997

Train	Car No.	Defect	
OIAL	SP 697280	215	door defective
OIAL	SP 292504	215	door defective
OIAL	GATX 61183	232	angle cock cut out

June 18, 1997

Train	Car No.	Defect	
OIAL	WC 83029	215	knuckle pin defective
OIAL	LNAC 5621	232	excess piston travel
OIAL	AMGX 7071	231	sill step - AL
OIAL	CR 588268	231	hand hold defective

June 19, 1997

Train	Car No.	Defect	
OIAL	AMGX 7071	231	sill step - AL
OIAL	ATW 62000	215	door defective

June 19, 1997

Train	Car No.	Defect	
OIAL	HMJX 10286	232	retainer valve defective
OIAL	HMJX 10130	231	sill step bolt missing

June 20, 1997

Train	Car No.	Defect	
OIAL	MP 36793	232	excess piston travel
OIAL	EJE 88572	215	yoke broken
OIAL	ACFX 75973	215	seal loose - R1
OIAL	CACX 73190	232	slack adjuster defective
OIAL	CR 516169	232	excess piston travel
OIAL	CR 578306	231	uncoupling lever defective
OIAL	MEC 20000	231	uncoupling lever defective
OIAL	BN 624370	231	ladder defective - AL
OIAL	GAGX 1058	231	ladder defective - BL
OIAL	DUPX 38247	232	retainer valve defective
OIAL	ACFX 75973	215	backing ring - R1
OIAL	AWDX 1154	231	ladder defective - BR
OIAL	AWDX 1168	232	valve gasket defective
OIAL	SP 292549	215	door defective

June 24, 1997

Train	Car No.	Defect	
OIAL	NAHX 94559	231	sill step loose
OIAL	GATX 12408	232	branch pipe defective
OIAL	AWDX 173	231	ladder defective - A
OIAL	TEIX 2342	215	wheel - L4
OIAL	SOU 726	215	thin flange wheel - R1
OIAL	SUNX 60252	231	hand hold defective
OIAL	CR 588275	231	uncoupling lever - A
OIAL	CR 576690	231	ladder - AR
OIAL	CR 889278	231	sill step defective

June 25, 1997

Train	Car No.	Defect	
OIAL	SOU 529852	215	door defective
OIAL	PC 598276	231	ladder defective
		232	air brakes cut out
OIAL	CAGY 3025	231	sill step - BL
OIAL	CR 581729	231	sill step - AR

June 25, 1997

Train	Car No.	Defect	
OIAL	BN 321778	232	train line defective - A
OIAL	AWDX 110	215	door defective

June 27, 1997

Train	Car No.	Defect	
NSSE	CR 240961	231	crossover board defective
NSSE	CR 237319	232	air brakes inoperative
NSSE	TTZX 855235	231	ladder defective
NSSE	CPWX 604008	23[illegible]	hand brake defective
NSSE	UTLX 66789	231	running board defective
NSSE	GATX 15087	231	hand hold defective
NSSE	CPWX 606012	232	air brakes cut out

It would be appreciated if your office would investigate these allegations, ascertain the source of the problem and advise this office as to your findings. Please refer to our office file number with regard to future correspondence. Thanking you in advance for your assistance concerning this matter.

Yours truly,

H. B. Lewin
General Vice President

slm
cc: R. A. Johnson
J. J. Parry
J. T. Schultz
A. Wybraniec
C. Marshall Friedman

Brotherhood Railway Carmen Division
TRANSPORTATION • COMMUNICATIONS
INTERNATIONAL UNION
AFL-CIO, CLC

H. B. LEWIN
General Vice President

July 2, 1997

Mr. David R. Myers
Regional Administrator
Region 2
Federal Railroad Administration
International Plaza Two
Philadelphia, PA 19113-1563

Office File: CR06-01-97-2025-Bayview Yard.TWU

Dear Mr. Myers:

Please be advised that we have received a complaint concerning the movement of defective equipment into Conrail's Bayview facility in Baltimore, Maryland, from various locations on the Conrail system in violation of Safety Appliance and Power Brake Regulations.

Below is a list of defective cars which were inspected on outbound at the Bayview yard. It is our understanding that inbound inspections are not performed at this facility. As you can see, there are numerous cars which contain defective conditions under 49 CFR §231, Safety Appliance and 49 CFR §232, Power Brake. In addition to the safety and power brake defects, we have listed 49 CFR §215, Mechanical defects which were discovered upon inspection of these trains.

June 1, 1997

Train	Car No.	Defect	
ULK79E	GCCX 4284	215	shelled wheel
ULK79E	CR 491586	232	air brakes inoperative
ULK79E	CR-489622	232	air brakes inoperative

June 5, 1997

Train	Car No.	Defect	
XSG14D	CR 503143	232	top ladder tread bent - AR
XSG14D	CR 504495	215	snubber spring defective
XSG14D	CR 503224	231	top and bottom ladder treads bent
XSG14D	CR 503468	232	air brakes inoperative

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June 5, 1997

Train	Car No.	Defect	
XSG14D	CR 505735	215	draft gear
XSG14D	CR 506872	215	draft gear
XSM79B	CR 506828	232	brake beam
XSM79B	CR 487482	215	draft gear
XSM79B	CR 503754	232	12" piston travel
XSM79B	CR 489469	231	top ladder tread bent
XSM79B	CR 488863	231	top ladder tread bent
XSM79B	ETCX 1033	232	air brakes inoperative
XSM79B	CR 283830	215	coupler - no clearance
BAEL6	KEYX 2244	231	ladder bent
BAEL6	CTTX 35523	232	angle cock bracket broken
BAEL6	ATSF 622526	232	angle cock broken
BAEL6	ATSF 621975	232	train line bracket broken

June 7, 1997

Train	Car No.	Defect	
XSM59E	CR 489716	232	air brakes inoperative
XSM59E	CR 492089	215	roller bearing broken
XSM59E	CR 489729	215	spread coupler
XSM31D	CR 504901	231	uncoupling lever
		215	lock lift
XSM31D	CR 505048	232	air brakes inoperative
XSM31D	CR 504636	215	shelled wheel
XSM31D	CR 503024	232	retainer pipe

June 10, 1997

Train	Car No.	Defect	
BAEL	CR 585028	231	brake step bent and bell crank broken
BAEL	CR 487482	215	draft gear
BAEL	CR 503410	215	center plate bolts
BAEL	ITTX 912352	232	hand brake
BAEL	ITTX 942085	232	train line trolley
XFH51B	CR 490758	231	ladder bracket
XFH51B	CR 487684	231	hand hold broken
XFH51B	CR 476053	231	top ladder tread bent - no clearance

XFH51B	CR 487989	215	thin flange wheel
XFH51B	CR 491656	232	retainer pipe broken
XFH51B	CR 487105	232	air brakes inoperative
XFH51B	CR 490157	231	ladder bracket broken
XFH51B	CR 490298	231	ladder bracket broken
XFH51B	CR 489090	231	top ladder tread - no clearance

June 11, 1997

Train	**Car No.**	**Defect**	
ULK87C	GCCX 83104	232	air brakes inoperative
ULK87C	GCCX 83097	215	coupler broken
ULK87C	GCCX 83094	215	backing ring loose
XSG61D	CR 507283	215	snubber spring defective
XSG61D	CR 505211	215	snubber spring defective
XSG61D	CR 504687	215	snubber spring defective
XSG61D	CR 505375	215	snubber spring defective
XSG61D	CR 503071	215	snubber spring defective
BAEL	EJE 87591	231	ladder bent
BAEL	CR 577826	215	center plate bent
BAEL	NSHR 1254	232	train line
BAEL	CR 283832	215	coupler low

June 14, 1997

Train	**Car No.**	**Defect**	
BAEL5	CR 279285	232	cut out angle cock broken
BAEL5	PRR 260397	215	broken coupler
BAEL5	NECR 4174	215	door off rail
BAEL5	CR 576366	232	air brakes inoperative

June 15, 1997

Train	**Car No.**	**Defect**	
WPUA01	CR 584089	232	angle cock broken
WPUA01	CR 597917	231	sill step bent
WPUA01	NS 169146	231	uncoupling lever bracket bent

It would be appreciated if your office would investigate these allegations, ascertain as to the source of the problem and advise the office of General Vice President Lewin as to your findings. Please refer to our office file number with regard to future correspondence.

Thanking you in advance for your assistance concerning this matter.

Yours truly,

H. B. Lewin
General Vice President

J. Czuczman
International Vice President
Transport Workers Union

slm
cc: R. A. Johnson
J. J. Parry
J. T. Schultz
C. Moneypenny
C. Marshall Friedman

STB FD 33388 1-28-98 D 185424

185424

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January 16, 1998

SURFACE TRANSPORTATION BOARD
1925 K Street, N.W.
Washington, DC 20423-0001

Attn: Honorable Vernon A. Williams
Secretary

Re: STB Finance Docket 33388

Dear Secretary Williams:

In accordance with STB Finance Docket No. 33388, Decision No. 57, dated December 3, 1997, I hereby certify that the following parties who have been added to the service list have been served this date with a copy of our pleadings in this proceeding:

MC CARTHY, SWEENEY & HARKAWAY, P.C.
1750 Pennsylvania Avenue, N.W. - Suite 1105
Washington, D.C. 20006
Attn: John M. Cutler, Jr.

JONES, DAY, REAVIS & POGUE
11450 G Street, N.W.
Washington, D.C. 20005-2088
Attn: Clark Evans Downs, Esq.

MC HUE & SHERMAN, ESQS.
20 Exchange Place
New York, New York 10005
Attn: John F. McHue, Esq.

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OPENHEIMER, WOLFF & DONNELLY
1020 19th Street, N.W. - Suite 400
Washington, D.C. 20036
Attn: Kevin M. Sheys, Esq.

Ten copies of this Certificate of Service are enclosed.

Very truly yours,

EARL L. NEAL & ASSOCIATES

By: Richard F. Friedman
Attorneys for ILLINOIS INTERNATIONAL PORT AUTHORITY

RFF/ck
Enclosures

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185410

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January 27, 1998

By Hand Delivery

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

Re: CSX Corporation and CSX Transportation, Inc., Norfolk Southern Corporation and Norfolk Southern Railway Company -- Control and Operating Leases/Agreements -- Conrail Inc. and Consolidated Rail Corporation FD 33388

Dear Secretary Williams:

Enclosed for filing please find an original and 25 copies of Applicants' Reply To Petition By Northeast Ohio Four County Regional Planning & Development Organization On Behalf of Metro Regional Transit Authority To File Supplemental Comments. Also enclosed is a diskette containing the text of this document in WordPerfect 5.1 format.

Respectfully submitted,

Gerald P. Norton

Counsel for Conrail Inc. and Consolidated Rail Corporation

cc: Service List

185410

CSX/NS-198

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' REPLY TO PETITION BY NORTHEAST OHIO FOUR COUNTY REGIONAL PLANNING & DEVELOPMENT ORGANIZATION ON BEHALF OF METRO REGIONAL TRANSIT AUTHORITY TO FILE SUPPLEMENTAL COMMENTS

Applicants[1] hereby submit their reply to the Petition by Northeast Ohio Four County Regional Planning & Development Organization ("NEFCO") on behalf of METRO Regional Transit Authority ("MRTA") to file Supplemental Comments (which include new evidence) in reply to Applicants' Rebuttal (MRTA-3).

I. BACKGROUND

On October 21, 1997, NEFCO filed a "Request for Condition" seeking conditional operating rights for METRO for certain commuter operations that METRO may consider in the future (MRTA-1). NEFCO's filing did not purport to be, and was not, a responsive application. Its cover clearly labelled it a "Request

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

for Condition." On December 15, 1997, Applicants filed their Rebuttal in support of their Primary Application, including their responses to the comments, requested conditions and other opposition evidence and arguments of NEFCO, METRA and all other parties, thereby closing the evidentiary record on that Application. See CSX/NS-176, 177, 178.

Applicants' Rebuttal noted several basic points: that NEFCO had not shown that its conditions were required because the Transaction will cause harm to existing or future commuter operations; that its request claimed only that there may be "potential harm" to future operations on a Conrail line being considered by NEFCO for such commuter operations; that NEFCO and METRO had no prior agreement with Conrail about future development of commuter operations over the line in question (in fact, quite the contrary); that such future development should be the subject of negotiations with NS, which would be responsible for operations over the line, not Board-imposed conditions; and that "NS is willing to continue" the dialogue about such possible operations that NEFCO conceded NS had begun (CSX/NS-176 at 283-85).

NEFCO seeks leave to file what it calls "Supplemental Comments," including new evidence in the form of a verified statement, which purports to respond to certain statements made in Applicants' December 15 Rebuttal. The Supplemental Comments and new verified statement do not contradict Applicants' basic propositions noted above. Instead, they focus on subordinate

details in the rebuttal verified statement of a Conrail official concerning the past discussions and relationships between Conrail and the commuter rail parties involved in exploring possible future commuter operations.

NEFCO recognizes that a commenting party who has not filed a responsive application has no right to file further evidence in response to Applicants' Rebuttal. Nevertheless, NEFCO claims a right to submit its further evidentiary filing because "new evidence" has become available to it (MRTA-3 at 2), citing only Applicants' Rebuttal as the "new evidence." In addition to this transparent bootstrapping, NEFCO asserts that it did not file its response earlier because doing so was not convenient under NEFCO's own meeting schedule, but such untimeliness is academic, since it was not entitled to file at all. These unusually weak excuses for a plainly unauthorized and untimely filing should be rejected. Since NEFCO has identified no other, special reason for allowing it to file its Supplemental Comments, its Petition should be denied.

II. ARGUMENT

A. Under Decision No. 6, Parties Filing Requests for Conditions Are Not Authorized to Submit Rebuttal Evidence

The NEFCO October 21 filing was not a responsive or inconsistent application -- it was a "Request for Condition" (MRTA-3, Exh. A), and NEFCO has not claimed otherwise. Nor does NEFCO claim that, having submitted a request for conditions on October 21, it has the right to submit a "reply" to Applicants'

Rebuttal. Indeed, it acknowledges that Decision No. 6, served by the Board on May 30, 1997, establishes the governing procedures and requirements for submission of evidence in this proceeding, and explicitly provides that parties submitting comments or requests for conditions are not authorized to submit evidence in response (or otherwise reply) to the Primary Applicants' Rebuttal:

> We will not allow parties filing comments, protests, and requests for conditions to file rebuttal in support of those pleadings. Parties filing inconsistent and/or responsive applications have a right to file rebuttal evidence, while parties simply commenting, protesting, or requesting conditions do not.

Finance Docket No. 33388, CSX/NS, Decision No. 6, Slip Op. at 6 (served May 30, 1997) (citing Finance Docket No. 32760, Union Pac. Corp. -- Control and Merger -- Southern Pac. Rail Corp., Decision No. 6, Slip Op. at 7-8 (served Oct. 23, 1995); Finance Docket No. 32549, Burlington N., Inc. -- Control and Merger -- Santa Fe Pac. Corp., Decision No. 16, Slip Op. at 11 (served April 20, 1995)). Therefore, NEFCO was not authorized to file evidence with the Board in response to Applicants' Rebuttal evidence.

B. Decision No. 6's Prohibition on Submission of Rebuttal Evidence By Parties Filing Requests for Conditions is Consistent with Board and ICC Precedent and Sound Policy

Beyond Decision No. 6, the Board's practice is clear that NEFCO may not introduce evidence in response to Applicants' Rebuttal. The Board and its predecessor, the Interstate Commerce

Commission ("ICC"), have consistently held that applicants, whether primary, responsive or inconsistent, are entitled to submit the final evidence and close the record on the merits of their respective applications. See Finance Docket No. 32133, Union Pac. -- Control -- Chicago & N.W. Transp. Co., Decision No. 17, Slip Op. (served July 11, 1994); BN/SF, Decision No. 34, Slip Op. at 3 (served June 23, 1995) ("Responsive applicants have the right to close the record on their cases, while parties requesting conditions do not."). Accord, UP/CNW, Decision No. 20, Slip Op. (served Sept. 12, 1994).

This important line drawn between parties who participate as responsive applicants and those who do not has been consistently observed in the two most recent major control proceedings. See UP/SP, Decision No. 31, Slip Op. at 2 (served April 19, 1996) (movants proceeded with awareness that "under the procedural schedule, only inconsistent and responsive applicants are entitled to file rebuttal evidence"); BN/SF, Decision No. 34 at 3 (holding that ICC "would not permit rebuttal filings from parties before [the ICC] requesting conditions, but [which] are not responsive applicants. Responsive applicants have the right to close the record in their cases, while parties requesting conditions do not."). In keeping with this authority, the ICC denied commenters' requests to file rebuttal evidence, similar to NEFCO's request. See BN/SF, Decision No. 34 (denying the motions of several commenters for leave to submit rebuttal filings).

NEFCO is neither a responsive nor inconsistent applicant in this proceeding. Accordingly, under governing precedent and sound policy, the Applicants have the right to close the record on the Primary Application with respect to parties such as NEFCO who came to the Board requesting conditions with regard to that Application.

C. Applicants' Rebuttal Does Not Constitute "New Evidence" Permitting NEFCO to File Supplemental Comments

NEFCO cites UP/SP, Decision No. 44, Slip Op. at 52 n.64 (served Aug. 12, 1996), for the proposition that "commenting parties may submit subsequent evidentiary filings if new evidence becomes available to them" (MRTA-3 at 2). In UP/SP the Board permitted the submission of a new tariff (already on file with the Board) that had not been issued when the party had made its filing. To treat Applicants' Rebuttal as "new evidence" would cause the exception completely to swallow the rule, and would nullify the settled law precluding responses to the Primary Applicants' rebuttal by parties who filed comments or requests for conditions. NEFCO has not offered any rationale for permitting it to invoke the "new evidence" exception it cites that would not apply to every party who filed comments or requests for conditions. Indeed, under NEFCO's novel reading of "new evidence," Applicants would be equally entitled to respond to NEFCO's Supplemental Comments because such a submission would equally constitute "new evidence." Such a point-counterpoint process would have no apparent conclusion, or purpose.

As a matter of precedent, sound policy, and fairness to Primary Applicants, who would be deprived of their right to close the evidence on their Application, the Primary Applicants' Rebuttal cannot be treated as "new evidence" within the meaning of that limited exception to the basic rules.[2]

III. CONCLUSION

The Board should deny NEFCO's petition for leave to file "Supplemental Comments."

Respectfully submitted,

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MARK G. ARON
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CSX Corporation

[2]Nor, in this case, does NEFCO identify anything in Applicants' Rebuttal as constituting "new evidence" in the sense used in UP/SP. The assertions in Applicants' Rebuttal on which NEFCO seeks to comment concerned historical facts and events that predated the filing of NEFCO's request for conditions.

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Counsel for CSX Corporation
and CSX Transportation, Inc.

January 27, 1998

CERTIFICATE OF SERVICE

I hereby certify that I have, this 27th day of January, 1998, caused the foregoing Applicants' Response To Petition By Northeast Ohio Four County Regional Planning & Development Organization On Behalf of Metro Regional Transit Authority To File Supplemental Comments (CSX/NS-198), to be served on all parties who have entered an appearance in Finance Docket No. 33388 by sending a copy by first-class mail, postage prepaid, and by hand delivery on the parties listed below:

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

Gerald P. Norton

STB FD 33388 1-26-98 D 185356

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International President

BYRON A. BOYD, JR.
Assistant President

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January 23, 1998

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Vernon A. Williams, Secretary
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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:

Please find enclosed an original and twenty-five (25) copies of United Transportation Union Notice of Its Support of Railroad Control Transaction to be filed in connection with the above-named matter. We have also enclosed a WordPerfect disk in 5.1 format.

Thank you for your cooperation.

Very truly yours,

Clinton J. Miller, III
General Counsel

Enclosure

BEFORE THE
SURFACE TRANSPORTATION BOARD

Finance Docket No. 33388

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

UNITED TRANSPORTATION UNION NOTICE OF ITS SUPPORT OF RAILROAD CONTROL APPLICATION

As stated in United Transportation Union's Comments submitted to the Board pursuant to 49 C.F.R. § 1180.4 and the Board's Decision No. 12, served July 23, 1997, United Transportation Union ("UTU") now respectfully advises the Board of its conditional support of the application, as the on-going discussions with the Applicants have resulted in satisfactory commitments from them as to how the labor protective conditions required to be imposed herein by 49 U.S.C. § 11326 will be applied, thereby changing UTU's prior conditional opposition to the Railroad Control Application pending the outcome of those discussions.[1]

---

[1] UTU has reserved its right to maintain its position with regard to labor protection for employees on the Delaware & Hudson Railway Company discussed more fully in Section II of the Comments of the United Transportation Union.

I. INTRODUCTION AND SUMMARY

The UTU is the duly authorized representative for the purposes of the Railway Labor Act ("RLA") (45 U.S.C. §§ 151, et seq.) of various crafts or classes of operating employees employed by Applicants. The UTU and Applicants are parties to various collective bargaining agreements covering those employees. The UTU is headquartered at 14600 Detroit Avenue, Cleveland, Ohio 44107. While UTU is in support of the proposed transaction as discussed herein, UTU respectfully requests the Board, pursuant to its authority under 49 U.S.C. § 11324(c) of the Interstate Commerce Act, to note that UTU's support is contingent upon the commitment(s) of the Applicants to methods of applying the labor protection conditions in such a way that will help mitigate the adverse impact of job loss, dislocation and income loss on its members, and UTU asks the Board to condition the approval of the Railroad Control Application upon said commitments, pursuant to its authority under 49 U.S.C. § 11324(c).

The Verified Statement of UTU International President Charles L. Little will accompany UTU's Brief to be filed herein on February 23, 1998, detailing and attaching these commitments in applying the New York Dock protective conditions, which is the basis for UTU's conditional support of the proposed transaction.

II. RELIEF REQUESTED

Pursuant to 49 U.S.C. § 11324(c), the Board's regulations at 49 C.F.R. Part 1180, the procedural orders issued in this docket by the Board, and decisions of the Board in rail control transactions, UTU notes that Conrail, CSXT and NS have voluntarily committed to UTU to the application of the labor protective conditions involved herein in the manner described below. Those commitments include:

(1) The automatic certification as adversely affected by the merger to the 461 train service employees, and the 25 UTU represented yardmasters projected to be adversely affected in the Labor Impact Exhibit, and to all other train service employees and UTU-represented yardmasters and hostlers identified in any Section 4 Notice, and automatic certification to any engineers adversely affected by the transaction who are working on properties where engineers are represented by the UTU. Moreover, the Applicants will supply UTU with the names and TPA's of such employees as soon as possible upon implementation of the approved transaction.

(2) NS, CSXT and Conrail committed to the foregoing on the basis of UTU's agreement to utilize its best efforts to negotiate agreements implementing the Operating Plans and the related Appendices A's before the date that the transaction is orally approved by the Surface Transportation Board, contingent on Board approval. In the event implementing agreements have not been reached prior to the Board's approval, the parties will meet within five (5) days of such approval date in an effort to conclude the necessary implementing agreements. Should the parties fail to reach agreement, arbitration will commence within ten (10) days of receipt of the Board's written decision. In order to facilitate that arbitration, the parties will either agree on an arbitrator or arrange for the immediate appointment of an arbitrator by the National Mediation Board and will schedule the arbitration hearing for as soon as practicable after the anticipated approval date.

(3) In any Section 4 Notice served in this transaction, NS and CSXT will only propose those changes in existing collective bargaining agreements that are necessary to implement operational changes that will produce a public transportation benefit not based solely on savings achieved by agreement change(s).

(4) If at any time the International President of the UTU (or his designated representative) believes that NS, CSXT or Conrail's application of the New York Dock conditions is inconsistent with Applicants' commitments, UTU and NS, CSXT and Conrail personnel will meet within five (5) days of notice from the UTU International President (or his designated representative) and agree to expedited arbitration with a written agreement within ten (10) days after the initial meeting if the matter is not resolved, which agreement will contain, among other things, the full description for neutral selection, timing of hearing, and time for issuance of Award(s).

(5) Also, with regard to rights accruing to eligible Conrail employees represented by UTU who currently have "flowback" opportunities to and/or from Amtrak pursuant to Section 1165 of the 1981 Northeast Rail Service Act, NS, CSXT and Conrail agree that these rights, subject to their terms and conditions, will continue to be available to eligible Conrail employees if they either continue coverage under the Conrail-UTU collective bargaining agreement or become subject to coverage under either CSXT or NS collective bargaining agreements as a consequence of the approval and implementation of Finance Docket No. 33388. The same is true with respect to the more limited one-time moves to Conrail from Metro North Commuter Railroad and New Jersey Transit Rail Operations, and yardmasters' agreements covering the same general matters.

(6) Regarding the use of leases and/or trackage rights to implement the transaction(s) covered in said finance docket and the manner in which the Applicants intend to implement the Conrail transaction, the Applicants have committed to reach an implementing agreement to effectuate the transaction as described in the CSXT, NS and SAA three-year Operating Plans

under the New York Dock conditions. This commitment is entirely without prejudice to the Applicants' continued position that the appropriate protective conditions for leases and trackage rights are the labor protective conditions set out in (1) Mendocino Coast Railway Inc. -- Lease and Operate -- California Western Railway, 360 I.C.C. 653 (1980) and (2) Norfolk and Western Ry. Co. -- Trackage Rights -- BN,354 I.C.C. 605 (1978), as modified in Mendocino Coast Ry., Inc. -- Lease and Operate, 360 I.C.C. 653 (1980), respectively, and they shall be applicable to any trackage rights or leases subsequent to the initial implementing agreement.

In view of these commitments from NS, CSXT and Conrail, UTU agreed to support this application.

III. COMMENTS IN SUPPORT OF THE APPLICATION

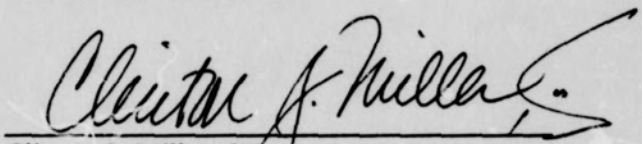
The UTU has as members more than 79,000 transportation industry workers. The UTU represents a significant percentage of the unionized work force of CSXT, NS and Conrail. UTU submits these comments in conditional support of the proposed merger of CSXT, NS and Conrail, as described hereinabove.

UTU is the largest labor organization in the rail industry. As such, its chief responsibility is to protect the economic interests of the UTU members, whose work makes possible the efficient functioning of the nation's transportation system. As the Board is aware, labor has been very concerned about, and very critical of, mega-rail transactions because of the significant impact on employees. In that connection, it should be noted that UTU supports the proposed CSXT/NS/Conrail transaction only because the Applicants have committed to a number of conditions in applying the New York Dock conditions, described hereinabove, that will help mitigate the adverse impact of implementation on its members.

IV. CONCLUSION

For the foregoing reasons, UTU urges the Surface Transportation Board to approve the NS, CSXT and Conrail Railroad Control Application with the conditions NS, CSXT and Conrail have committed to with UTU described hereinabove imposed.

Respectfully submitted,



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CERTIFICATE OF SERVICE

I, Clinton J. Miller, III, certify that, on this 23rd day of January, 1998, I caused a copy of the foregoing United Transportation Union Notice of Its Support of Railroad Control Transaction to be served by first-class mail, postage prepaid, or by a more expeditious manner of delivery, on all parties of record.

Clinton J. Miller, III

STB FD . 33388 1-23-98 D . 185363

CHARLES L. LITTLE
International President

BYRON A. BOYD, JR.
Assistant President

ROGER D. GRIFFETH
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January 23, 1998

FAX and UPS Next Day Air

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III. COMMENTS IN SUPPORT OF THE APPLICATION

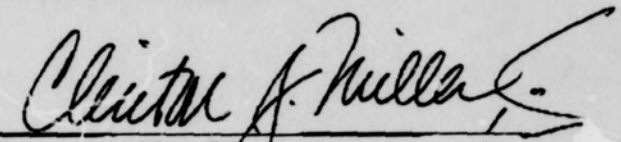
The UTU has as members more than 79,000 transportation industry workers. The UTU represents a significant percentage of the unionized work force of CSXT, NS and Conrail. UTU submits these comments in conditional support of the proposed merger of CSXT, NS and Conrail, as described hereinabove.

UTU is the largest labor organization in the rail industry. As such, its chief responsibility is to protect the economic interests of the UTU members, whose work makes possible the efficient functioning of the nation's transportation system. As the Board is aware, labor has been very concerned about, and very critical of, mega-rail transactions because of the significant impact on employees. In that connection, it should be noted that UTU supports the proposed CSXT/NS/Conrail transaction only because the Applicants have committed to a number of conditions in applying the New York Dock conditions, described hereinabove, that will help mitigate the adverse impact of implementation on its members.

IV. CONCLUSION

For the foregoing reasons, UTU urges the Surface Transportation Board to approve the NS, CSXT and Conrail Railroad Control Application with the conditions NS, CSXT and Conrail have committed to with UTU described hereinabove imposed.

Respectfully submitted,



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Daniel R. Elliott, III
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United Transportation Union
14600 Detroit Avenue
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(216) 228-9400
FAX (216) 228-0937

CERTIFICATE OF SERVICE

I, Clinton J. Miller, III, certify that, on this 23rd day of January, 1998, I caused a copy of the foregoing United Transportation Union Notice of Its Support of Railroad Control Transaction to be served by first-class mail, postage prepaid, or by a more expeditious manner of delivery, on all parties of record.

Clinton J. Miller, III

CHARLES L. LITTLE
International President

BYRON A. BOYD, JR.
Assistant President

ROGER D. GRIFFETH
General Secretary and Treasurer

united transportation union

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MICHAEL W. PIOTROWSKI
Assistant General Counsel

TELECOPIER COVER LETTER

TO: Vernon A. Williams, Secretary
Surface Transportation Board

Telecopier Number: (202) 565-9004

Date: 1/23/98

FROM: C. J. Miller, III

UNITED TRANSPORTATION UNION

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185326

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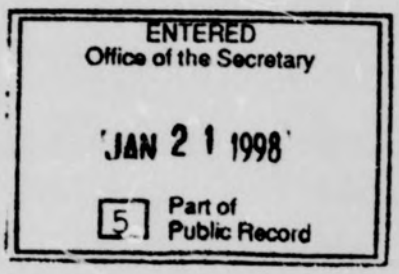
January 21, 1998

VIA HAND DELIVERY

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



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

Dear Secretary Williams:

Enclosed are the original and 25 copies of Applicants' Party by Party Index to Applicants' Rebuttal Filing for filing in the above-referenced proceeding. Also enclosed is a 3.5" diskette containing the document in WordPerfect format.

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

Very truly yours,

Drew A. Harker

Drew A. Harker

Counsel for CSX Corporation
and CSX Transportation, Inc.

Enclosure

cc: Service List (w/Enclosure)

CSX/NS-194

BEFORE THE
SURFACE TRANSPORTATION BOARD

Finance Docket No. 33388

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

PARTY BY PARTY INDEX TO APPLICANTS' REBUTTAL FILING

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Counsel for Conrail Inc. and Consolidated Rail Corporation

January 21, 1998

PARTY BY PARTY INDEX TO APPLICANTS' REBUTTAL FILING

NOTE: Applicants are providing this index as a guide primarily to Volume I of Applicants' Rebuttal, CSX/NS-176, for the purpose of assisting the Board and other parties in locating Applicants' discussion of the points made in the comments and responsive applications filed by other parties. While Applicants have endeavored to identify the major points made by all parties and where they are addressed in the Rebuttal, they cannot guarantee that this index is complete or free from errors or omissions.

All page references are to the Highly Confidential version of Volume 1 of the Rebuttal, except that where reference is made to a Rebuttal Verified Statement ("RVS") those page references are to the Highly Confidential version of Volume 2 of the Rebuttal.

Allied Rail Unions (ARU-23 through ARU-26)

Alternative Distribution System

Shared Assets Area Related Conditions

Other Competition and Service Conditions

Respectfully submitted,

JAMES C. BISHOP, JR.
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Counsel for Conrail Inc. and Consolidated Rail Corporation

January 21, 1998

CERTIFICATE OF SERVICE

I, Drew A. Harker, certify that on January 21, 1998, I have caused to be served by first-class mail, postage prepaid, or by more expeditious means, a true and correct copy of the foregoing CSX/NS-194, Applicants' Party by Party Index to Applicants' Rebuttal Filing, on all parties that have appeared in STB Finance Docket No. 33388 and by hand delivery on:

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

Drew A. Harker

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185284

RICHARD A. ALLEN

January 20, 1998

Via Hand Delivery

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

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

Dear Secretary Williams:

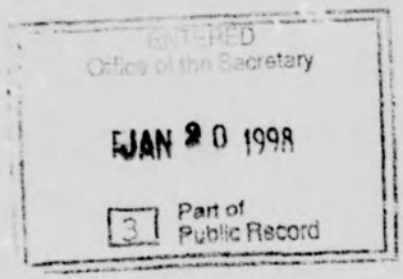
Enclosed for filing is an original and twenty-five copies of CSX/NS-195, "Additional Errata to Applicants' Rebuttal." Also enclosed is a 3-1/2" computer disk containing the filing in Wordperfect 5.1 format, which is capable of being read by Wordperfect for Windows 7.0.

Should you have any questions regarding this, please call.

Sincerely,

Richard A. Allen

Counsel for Norfolk Southern Corporation and Norfolk Southern Railway Company



Enclosures

BEFORE THE
SURFACE TRANSPORTATION BOARD

STB FINANCE DOCKET NO. 33388

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

ADDITIONAL ERRATA TO APPLICANTS' REBUTTAL

Applicants CSX Corporation and CSX Transportation, Inc. (collectively, "CSX"), Norfolk Southern Corporation and Norfolk Southern Railway Company (collectively, "NS") and Conrail Inc. and Consolidated Rail Corporation (collectively, "Conrail") hereby submit these supplemental errata to CSX/NS-176, CSX/NS-177 and CSX/NS-178 ("Applicants' Rebuttal"):

Volume 2B (CSX/NS-177)

Page	Line	Change
William W. Whitehurst, Jr. RVS:		
662	2-3	Change "This figure was less than the total purchase price plus assumed liabilities and transaction fees ($17,242 million).[13]" to "This figure, plus the adjusted value of other Conrail assets evaluated separately from those covered by the Price Waterhouse preliminary fair value estimate for road and equipment property ($2,776 million), was less than the total purchase price

plus assumed liabilities and transaction fees ($20,018 million).[13]"

Respectfully submitted,

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William C. Wooldridge
J. Gary Lane
James L. Howe III
Robert J. Cooney
George A. Aspatore
Roger A. Petersen
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(202) 973-7600

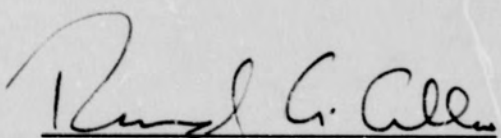
Counsel for Conrail Inc. and Consolidated Rail Corporation

DATED: January 20, 1997

CERTIFICATE OF SERVICE

I hereby certify that, on this 20th day of January, 1998, I served the foregoing CSX/NS-195, "Additional Errata to Applicants' Rebuttal" by causing a copy thereof to be served by first-class mail, postage prepaid, or by more expeditious means, on all parties that have appeared in STB Finance Docket No. 33388 and by hand delivery on the following:

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



Richard A. Allen

STB FD 33388 1-16-98 D 185259

185259

EFM-14

BEFORE THE

Surface Transportation Board

WASHINGTON, D.C. 20423

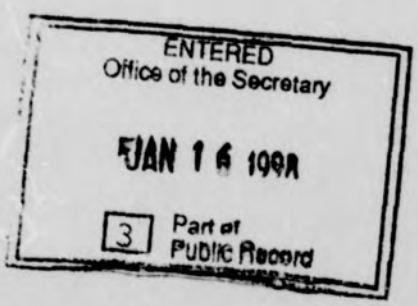
CSX CORPORATION AND CSX TRANSPORTATION, INC.
NORFOLK SOUTHERN CORPORATION AND
NORFOLK SOUTHERN RAILWAY COMPANY
--COMPANY AND OPERATING LEASES/AGREEMENTS--
CONRAIL INC. AND CONSOLIDATED RAIL CORPORATION

STB FINANCE DOCKET NO. 33388

REPLY OF EIGHTY-FOUR MINING COMPANY TO CSX'S APPEAL FROM DECISION OF PRESIDING ADMINISTRATIVE LAW JUDGE ORDERING APPLICANTS TO MAKE REBUTTAL WITNESSES AVAILABLE FOR DEPOSITION BY COMMENTING PARTIES

Eighty-Four Mining Company (EFM) respectfully submits the following Reply to the Appeal filed by CSX from the decision of the presiding Administrative Law Judge ordering applicants to make rebuttal witnesses available for deposition by commenting parties.[1]

EFM itself filed an Appeal from the ruling of the presiding Judge, addressing the limitation on discovery concerning the rebuttal verified statements of applicants solely to



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1 CSX-137.

depositions.[2] In its Appeal, EFM addressed the issue of whether commenting parties have a right to discovery and to file impeachment evidence with their briefs concerning applicants' rebuttal testimony. EFM will not belabor the record by repeating those arguments. EFM submits this Reply to offer the following additional comments specifically addressing the CSX Appeal:

(i) CSX alone among applicants takes appeal from the presiding Administrative Law Judge's ruling. In response to the EFM discovery, NS had offered to make its rebuttal witnesses available for deposition.[3] To the extent the presiding Administrative Law Judge directed NS to honor its representation, EFM respectfully submits that CSX lacks standing to appeal from the ruling as it pertains to NS and not to itself.

(ii) EFM's Appeal now pending before the Board primarily addresses the issue of whether discovery intended to test the rebuttal testimony is limited to depositions, or also includes the other discovery tools available under the Board's regulations. EFM notes that CSX agrees with EFM, stating,

---

[2] EFM-13. The Erie-Niagara Rail Steering Committee (ENRS) also has appealed from the January 8, 1998 ruling. The issues presented by EFM and ENRS are similar, and EFM supports the ENRS appeal for the reasons stated herein and in EFM-13.

[3] In its appeal, CSX states that "Applicants objected to these requests on the basis that the procedural schedule and applicable Board precedent made clear that...commenters do not have the right to submit surrebuttal evidence." CSX-137 at 1-2. This is inaccurate: applicants conceded in their initial objections, and NS conceded at the discovery conference, that STB and ICC precedent supports cross-examination by commenters of rebuttal witnesses and citation of that testimony on brief. *See* EFM-13 at 5-6 and record citations contained therein at notes 13-15.

"Decision No. 6 makes no distinction between testimonial and other types of evidence, the distinction on which the ALJ appears to rely."[4]

(iii) CSX takes the position in its Appeal that responsive applicants, but not commenters, have a right to test the accuracy and reliability of the rebuttal testimony of the primary applicants. The primary applicants previously attempted to curtail the evidentiary rights of parties in this proceeding, seeking to limit the right to file responsive applications only to rail carriers operating on their own behalf. The Board rejected that position in Decision No. 55 (Nov. 20, 1997). Were the Board to accept the CSX position on the instant appeal, it would truly create procedural unfairness by allowing only responsive applicants to test the primary applicants' rebuttal testimony through discovery, and denying the same right to all commenting parties.

(iv) CSX argues that primary applicants have the absolute right to close the record, and that their last testimony is not capable of being tested through the normal means. CSX's position is akin to being in a trial in court where the defendant is denied the opportunity to cross-examine plaintiff's rebuttal witnesses. Such a contention is antithetic to all notions of due process.

---

[4] CSX-137 at 7.

(v) The distinction drawn by CSX to the UP/SP procedural order and the procedural order governing the Conrail acquisition is unfounded. The "omitted language" (*i.e.*, the language in the UP/SP order which was not carried forward to the procedural order in this case) referred to the prior ICC practice of holding hearings for the cross-examination of witnesses. As reflected in UP/SP Decision No. 6, deposition transcripts serve the role of cross-examination at hearing; and the Board merely eliminated this redundant and somewhat archaic reference in the current procedural order. Under prior practice, cross-examination was preceded by the opportunity for discovery, consistent with common trial practice.

(vi) The issue before the Board in UP/CNW Decision No. 17, discussed by CSX at pages 20-21 of its Appeal, arose out of the Chicago, Central and Pacific Railroad Company (CCP) having taken no discovery until after it submitted its responsive application. It then sought discovery related to issues which should have been raised in the responsive application and which were beyond the scope of its rebuttal submission (any by extension, not relating to the opposition or rebuttal filed by the primary applicants). As set forth in the EFM Appeal, applicants herein have conceded that EFM's discovery is directed specifically at the rebuttal testimony; and accordingly, there is no issue of whether the discovery exceeds the proper scope for impeachment purposes.

In conclusion, based upon the authority and rationale in EFM-13 and herein, supported by NS to the effect that agency practice allows impeachment of rebuttal testimony to be included and argued in commenters' briefs, and supported by CSX to the effect that there is no distinction between deposition and other discovery tools, EFM respectfully submits there is no basis in practice, governing orders or regulations, or policy in support of applicants' objections to discovery of the rebuttal witnesses.

WHEREFORE, THE PREMISES CONSIDERED, Eighty-Four Mining Company respectfully urges the Surface Transportation Board to either dismiss or deny the CSX Appeal, and to grant the EFM Appeal regarding the opportunity for discovery to test the primary applicants' rebuttal testimony.

Respectfully submitted,

Martin W. Bercovici
Keller and Heckman LLP
1001 G Street, NW, Suite 500 West
Washington, DC 20001
(202) 434-4100

Attorney for Eighty-Four Mining Company

January 16, 1998

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Reply has been served on this 16th day of January, 1998, by first-class mail, postage prepaid, upon All Parties on the Restricted Service List, and by facsimile, upon:

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Christopher P. Datz, Esquire
Susan Cassidy, Esquire
Arnold & Porter
555 12th Street, NW
Washington, DC 20004-1202

Martin W. Bercovici

STB FD 33388 1-16-98 D 185274

185274

ORIGINAL

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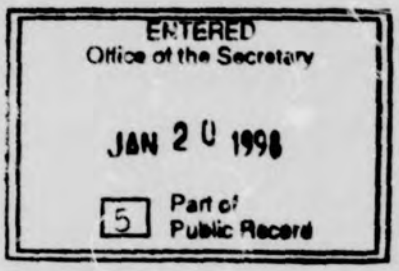
LOUIS E. GITOMER
OF COUNSEL
(202) 466-6532

January 16, 1998

BY HAND



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

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

Dear Secretary Williams:

Enclosed are the original and 25 copies of the Response of APL Limited to CSX's Appeal from Decision of Presiding Administrative Law Judge Ordering Applicants to Make Rebuttal Witnesses Available for Deposition by Commenting Parties and Appeal of Eighty-Four Mining Company from Denial of Motion to Compel Responses to Discovery, APL-13, along with file APL.13 on a 3.5-inch IBM-compatible floppy diskette in WordPerfect 5.1.

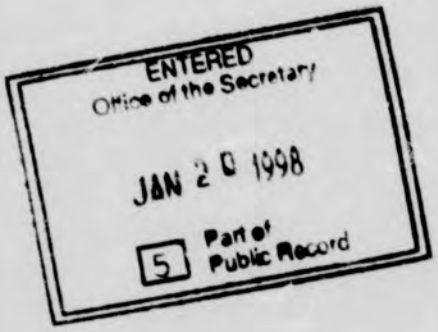
Please time and date stamp the extra copy of this letter and the accompanying Response. Thank you for your assistance. If you have any questions, please call me.

Sincerely yours,

Louis E. Gitomer
Attorney for APL Limited

Enclosures

185274



BEFORE THE
SURFACE TRANSPORTATION BOARD

Finance Docket No. 33388

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

RESPONSE OF APL LIMITED TO CSX'S APPEAL FROM DECISION OF PRESIDING ADMINISTRATIVE LAW JUDGE ORDERING APPLICANTS TO MAKE REBUTTAL WITNESSES AVAILABLE FOR DEPOSITION BY COMMENTING PARTIES AND APPEAL OF EIGHTY-FOUR MINING COMPANY FROM DENIAL OF MOTION TO COMPEL RESPONSES TO DISCOVERY

APL Limited ("APL") responds to two appeals from rulings by Administrative Law Judge Jacob Leventhal (the "Judge"): (1) CSX'S Appeal from Decision of Presiding Administrative Law Judge Ordering Applicants to Make Rebuttal Witnesses Available for Deposition by Commenting Parties (the "CSX Appeal"); and (2) The Appeal of Eighty-Four Mining Company from Denial of Motion to Compel Responses to Discovery (the "Eighty-Four Mining Appeal"). APL opposes the CSX Appeal and supports the Eighty-Four Mining Appeal.

The CSX Appeal seeks to overturn the Judge's decision which ordered CSX Corporation and CSX Transportation, Inc. (both referred to as "CSX") to produce witnesses who presented testimony as part of CSX's rebuttal evidence for deposition. The Eighty-Four Mining Appeal seeks to overturn the Judge's ruling that denied Eighty-Four Mining

Company's ("Eighty-Four Mining") motion to compel responses to written interrogatories from CSX and Norfolk Southern Corporation and Norfolk Southern Railway Company (both referred to as "NS") with regard to their rebuttal evidence.[1]

APL'S INTEREST

APL filed a Notice of Deposition, APL-11, on January 7, 1998 seeking to depose Mr. Peter A. Rutski, Vice President, Business Planning, CSX Intermodal, Inc., on January 21, 1998, with regard to the rebuttal verified statement he submitted as part of CSX's filing on December 15, 1997, on pages 365-404 of CSX/NS-177. Mr. Rutski has not previously testified in this proceeding. APL intends to depose Mr. Rutski as to his testimony, particularly as to his statement of the discussions between CSX and APL. However, at 7:31 p.m.[2] on January 14, 1998, APL was served with CSX-138, CSX's Motion to Quash the Deposition of Peter A. Rutski. In that motion, CSX argues at page 2 that "commenters such as APL have no right to pursue discovery at this late stage of the proceeding"[3]. The Surface Transportation Board's (the "Board") ruling on the CSX Appeal will affect APL's ability to depose Mr. Rutski.[4]

---

[1] CSX and NS are jointly referred to as "Applicants."

[2] Service of the motion was made after the close of the fifth business day, out of time according to the Discovery Guidelines in Section 16 of Decision No. 10, served June 27, 1997, which requires objections to be stated "within five business days," not after the close of business on the fifth day. Since the Discovery Guidelines were initially proposed by Applicants, any ambiguity must be construed against the Applicants.

[3] APL notes that it deposed Mr. L.I. Prillaman of NS on January 13, 1998, without objection from NS.

[4] CSX waited until after the last minute to move to quash the deposition. While it is true that counsel for CSX and APL discussed the possibility of moving the date of Mr. Rutski's deposition, no agreement was reached, and as far as APL is concerned, neither the motion by

On January 13, 1998, APL filed APL-12, APL Limited's Second Set of Interrogatories and Document Requests to CSX Corporation, CSX Transportation, Inc., Norfolk Southern Corporation, Norfolk Southern Railway Company, Conrail Inc., and Consolidated Rail Corporation. APL-12 seeks data relating to the number of rail transportation contracts that may be affected by section II. C. of the settlement between CSX, NS and the National Industrial Transportation League ("NITL").[5] Without this information, neither APL nor the Board will be able to determine the impact, if any, of section II. C. APL is also seeking documents relating to the allocation of the South Kearny, NJ terminal facility, which is within the North Jersey Shared Asset Area ("NJSAA"), to CSX. On rebuttal, CSX, for the first time, raised concerns about its investment in the South Kearny terminal if it is not allocated APL traffic. CSX had earlier sought discovery on this issue from APL even though it was not raised in the Primary Application or in APL's Response. APL seeks to determine the assumptions under which CSX sought allocation of the South Kearny terminal, instead of leaving it as part of the NJSAA. No mention of this was made in the Primary Application, and APL had no basis to consider CSX's concern.

CSX nor the CSX Appeal serve to postpone Mr. Rutski's deposition. CSX well knows that it could have moved to quash the deposition in time to present the issue for hearing before the Judge on January 15, 1998.

[5] Despite the protestations of Applicants that they be allowed to close the evidentiary portion of this proceeding, on January 13, 1998, NITL sought leave to file and did file supplemental comments, which NITL claims are required by its agreement with CSX and NS. The Board should not permit a double standard for Applicants. It must also be noted that Applicants have presented no witnesses to support the agreement with NITL, so that even under the Judge's interpretation of discovery, there is no witness to depose.

APL has an interest in the Board's rulings on the CSX Appeal and the Eighty-Four Mining Appeal. APL urges the Board to deny the CSX Appeal and grant the Eighty-Four Mining Appeal on due process grounds.

THE PROCEDURES THAT PRECEDED THIS PROCEEDING

APL believes that the Judge failed to look at the development of procedures in railroad consolidation cases by the Board and its predecessor, the Interstate Commerce Commission (the "ICC"), in ruling on the discovery issues presented by CSX and Eighty-Four Mining. Had the Judge had the benefit of this history, his ruling would have provided due process for all parties, while maintaining the expedited schedule sought by CSX and NS.[6]

As the Board and parties well know, railroad consolidation proceedings once were the subject of lengthy oral hearings for the purpose of the presentation of direct testimony and cross-examination. In an effort to expedite railroad consolidation proceedings, the ICC required the filing of direct testimony in the form of verified statements and used the oral hearing solely for the purpose of cross-examining witnesses. See Finance Docket No. 28583 (Sub-No. 1), *Burlington Northern, Inc.--Control and Merger--St. Louis-San Francisco Railway Company* (not printed) served April 6, 1978 at 3. Typically, the ICC would schedule four

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[6] It should be noted that CSX has ignored the meaning to be given to the Board's decisions by the statute governing the timing of this proceeding, 49 U.S.C. § 11325(b)(3) which requires a decision to be issued by the 90th day after the date on which it concludes the evidentiary proceedings. Adopting CSX's logic would have completed the evidentiary proceeding on January 14, 1997, requiring a decision by April 14, 1998. However, the Board has stated that it will issue the decision on July 23, 1998. If July 23, 1998 is 90 days after the close of the evidentiary proceedings, the evidentiary record in this proceeding cannot close until at the earliest May 9, 1998. Contrary to CSX, the Board provided substantial time in this proceeding to complete the testing of Applicants' rebuttal within the evidentiary period.

rounds of cross-examination for the following phases: the primary application, opposition to the primary application and responsive applications, rebuttal in the primary application and opposition to responsive applications, and finally, rebuttal for responsive applications.[7] See ICC Finance Docket No. 30400, *Santa Fe Southern Pacific Corporation-Control-Southern Pacific Transportation Company* (not printed), served July 31, 1984, ALJ-1 (copy attached for convenience). The procedures for each evidentiary stage was presented by Administrative Law Judge Hopkins ("Judge Hopkins") in a decision served on June 14, 1984 (copy attached). There Judge Hopkins set forth the process for cross-examination. It required that "**[d]iscovery as to each stage should be completed 10 days prior to the commencement of hearings as to that stage...**" and in the Hearing Procedures, he stated that "Parties will be expected to make every effort to consolidate positions and interests to minimize the need for cross-examination through...**[s]elf-help through informal discovery, in which cooperation will be expected from parties sponsoring witnesses**" (emphasis added).

These schedules preserved the rights of the applicants to open and close their case, while at the same time permitting opponents to test applicants' case at all stages through cross-examination following discovery. Indeed, the Judge's power at these hearings was such that additional documents could be admitted into the record. See 49 C.F.R. § 1113.13. An integral part of applicants' rebuttal case was discovery and cross examination of their witnesses. This was not surrebuttal as argued by CSX.

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[7] On occasion, a fifth round of hearings would be held to cross-examine government witnesses.

The ICC began moving toward the use of depositions instead of cross-examination in Finance Docket No. 32133, *Union Pacific Corporation, Union Pacific Railroad Company and Missouri Pacific Railroad Company--Control--Chicago and North Western Holdings Corp. and Chicago and North Western Transportation Company* (not printed), served January 28, 1993, Decision No. 4; and Decision No. 5 served February 26, 1993. Each of these decisions had the same schedule, and permitted applicants' rebuttal (to be filed on day F+210) to be cross-examined (on day F+261) and subject to depositions, which would be received in the record in lieu of cross-examination. Decision No. 4 at 5 and Decision No. 5 at 8-9. Indeed, the Federal Rules of Civil Procedure permit the use of depositions, interrogatories, and document production prior to hearing in order to assist in cross-examination. Rules 32, 33, and 34.

Today, to accommodate the requests of Applicants for expeditious handling, the Board has replaced oral hearings for the purpose of cross-examination with informal discovery and depositions. However, the purpose is the same, to test the evidence submitted, whether by an applicant or a protestant. Allowing discovery and cross-examination of an applicant's rebuttal witnesses in the past was not considered another evidentiary phase, but merely the culmination of applicant's rebuttal phase where witnesses were placed in the crucible of cross-examination.

ARGUMENT

The ICC always allowed the testing of evidence through discovery (which included interrogatories, document production, admissions, and depositions) and cross-examination. The Board should continue to allow the testing of evidence through discovery, be it interrogatories, document production, admissions, or depositions. However, CSX now takes

the position that its evidence need not be tested, even where CSX and NS have presented testimony from 30 witnesses who have not previously testified. It appears that in the Primary Application, CSX and NS presented testimony from 42 witnesses. The Rebuttal contained testimony from 46 witnesses, of which 30 had not testified before. Under the CSX theory of no discovery on rebuttal witnesses, no one will be able to determine if these 30 new witnesses are alive or if they even know that a verified statement was filed in their name with the Board. APL is not advocating an open fishing expedition, but reasonable discovery has always been part of testing of evidence. The CSX syllogism is in error. CSX argues that parties who are not permitted to file additional evidence are therefore not permitted discovery.[8] Discovery serves two purposes, to obtain information and to test the testimony of witnesses. CSX has ignored the second reason for discovery. The ICC however, allowed discovery as an important part of the rebuttal phase of railroad consolidation cases. In ICC proceedings the opponent could obtain discovery prior to cross examination, and the transcript of the cross examination became part of the record, including the references to interrogatories and documents used on the cross examination. This is not the evil surrebuttal which CSX appears to fear,[9] but a testing of its witnesses. APL does not intend to file surrebuttal, but is interested in helping to develop an accurate record for the Board.

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[8] This raises the question as to why CSX would not object to placing documents in its depository with respect to its rebuttal filing. Under the CSX theory this information cannot be presented to the Board. Therefore, what can its purpose be?

[9] The irony of NITL's January 13, 1998 filing in support of CSX should not be ignored since it is so glaringly inconsistent with CSX's position here.

CSX also contends that parties can make arguments in response to CSX's evidence. Even a novice practicing before the Board would not want to counter evidence with merely argument. The Board has rightfully concluded in numerous cases that valid evidence outweighs argument. APL is merely seeking to present to the Board CSX's own answers to depositions, interrogatories, and document requests in support of APL's argument. APL does not intend to present new witnesses.

CSX also has misinterpreted past Board decisions concerning the use of depositions and discovery after applicants have filed rebuttal. As an example, Decision No. 35 in *Union Pacific/ Southern Pacific* does not stand for the proposition that discovery is not allowed. That decision denied discovery because no clear need had been shown, not for any other reason. Indeed, the Board allowed other information to be filed and would have allowed transcripts of depositions to be filed as a substitute for cross examination on oral hearing.

CONCLUSION

CSX has not shown that the Judge's ruling permitting depositions of rebuttal witnesses by parties that did not file inconsistent applications is a clear error of judgment or that overturning the Judge's ruling is needed to prevent manifest injustice. On the other hand, the Judge's ruling prohibiting discovery other than by deposition was a clear error of judgment and Board action overturning that ruling is required to prevent a manifest injustice. Were the Board to rule otherwise, in order to provide due process it would have to either extend the schedule in this proceeding to permit cross examination of CSX's witnesses or strike all rebuttal testimony filed by Applicants that has not been subjected to discovery.

APL requests the Board to deny the CSX Appeal and to grant the Eighty-Four Mining Appeal.

Respectfully submitted,

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Attorneys for:
APL LIMITED

Dated: January 16, 1998

CERTIFICATE OF SERVICE

I hereby certify that I have caused the foregoing document to be served by facsimile on all parties to the Highly Confidential and Confidential Restricted Service List in STB Finance Docket No 33388.

Louis E. Gitomer
January 16, 1998

OH

INTERSTATE COMMERCE COMMISSION
Washington, DC

SERVICE DATE
JUN 14 1984

Finance Docket No. 30400*

SANTA FE SOUTHERN PACIFIC CORPORATION
-CONTROL-SOUTHERN PACIFIC TRANSPORTATION COMPANY

June 11, 1984

NOTICE TO THE PARTIES:

In the decision accepting the primary applications in these proceedings served April 20, 1984, the Commission stated that this Administrative Law Judge has been designated to manage and conduct the evidentiary portion of the proceedings. After a review of the comments received, the petition filed by the applicants on June 1, 1984 and the responses to that petition, I believe that the time is now opportune for the setting of a preliminary hearing conference.

A prehearing conference will therefore be convened at 9:30 a.m., on July 25, 1984 in Hearing Room A, Interstate Commerce Commission, 12th & Constitution Avenue, N.W., Washington, DC 20423.

It is expected that the parties will come to the conference prepared to indicate their intentions to proceed to hearings in a speedy fashion. It is also expected that prior to the prehearing conference the parties attempt to work out a common agenda for the completion of the evidentiary phase of these proceedings, well within the statutory time frame required for the completion of the evidentiary record.

The Judge would suggest as a matter for discussion at the prehearing conference, that the hearings for cross-examination of applicant's witnesses begin on August 14, 1984, with requests for cross-examination of applicants' witnesses to be filed by July 30, 1984. Requests for cross-examination should indicate why cross-examination is necessary or desired for the proper development of the record. Evidence in opposition to the applications would be filed by September 17, 1984. A tentative procedural schedule for the remaining aspects of the proceedings will be considered at the prehearing conference. The parties should be prepared to cooperate with each other and the Commission in reaching an agreement on the future procedural schedule.

The attached worksheets will be used at the pre-hearing conference.

James E. Hopkins

JAMES E. HOPKINS
Administrative Law Judge

JAMES H. BAYNE
Secretary

(SEAL)

*Embraces F.D. Nos. 30400 (Sub-No.s 1-7) and MC-F-15628.

F.D. No. 20400

SUGGESTED MANNER OF PROCEEDING THROUGH THE EVIDENTIARY STAGE:

All direct evidence in this proceeding should be submitted in written form. Discovery as to each stage should be completed at least 10 days prior to commencement of hearings as to that stage, subject to waiver by the Administrative Law Judge or agreement by the parties. Parties should cooperate in completing informally the process of discovery. Public hearings or dates for submission of written testimony will not be postponed because of discovery problems. The parties must cooperate in this regard or face Commission sanction. If matters lend themselves to agreed stipulations the parties should attempt to reach such agreements. The Administrative Law Judge is available for telephone conferences if preliminary matters cannot be resolved by the parties themselves. The parties though should only resort to such action in those circumstances where they have exhausted negotiations between themselves.

The following is a general outline of the proposed progression of the evidentiary stages herein.

I. Applicants' case-in-chief presentations. Lead applications and all embraced applications including the environmental impact.

II. Opposition to the application.

A. Negotiated agreements.

B. Evidence in opposition to grants of lead application as well as all embraced applications.

C. Responsive applicants' including inconsistent applications-complete case-in chief presentation.

1. Purchase or controls applications.

2. Trackage right applications.

3. Inclusion applications.

4. Other applications or petitions seeking affirmative relief.

5. Public bodies positions.

D. Applicants' opposition to responsive applications.

E. Rebuttal to applicants' opposition.

III. Applicants' rebuttal.

IV. Oral hearings are expected to move speedily to completion.

Parties are free to suggest additions, deletions or alternatives to the suggestions herein.

HEARING PROCEDURES:

1. Hearing will be restricted to the cross-examination and related redirect examination of witnesses.

2. Lists and schedules of witnesses at each stage will be compiled by the parties after requests for cross-examination have been informally arranged by the parties. Parties desiring to cross-examine witnesses sponsored by applicants concerning their case-in-chief should commence discussing these matters with counsel prior to the pre-hearing conference on July 25, 1984. Other requests will be required at stated times during the other stages of these proceedings.

3. In making requests for cross-examination, the requesting party shall make clear the purpose of the cross-examination. These matters, among others, shall be considered.

   a) Is there a relevant, material fact in dispute?
   b) Is there a public need to test the credibility of the witnesses?
   c) Does the intended cross-examination involve an attack upon the weight of the evidence rather than upon the admissibility of the evidence or the credibility of th witnesses?
   d) Cross-examination for the purpose of arguing, harassing, or "discussing" matters with witnesses will not be tolerated.

4. Parties will be expected to make every effort to consolidate positions and interests to minimize the need for cross-examination through:

   a) Stipulation;
   b) Self-help through informal discovery, in which cooperation will be expected from parties sponsoring witnesses;
   c) Motions to strike or to amend; and
   d) Combinations of the above and other means.

5. Repetitious cross-examination shall not be tolerated. Parties having parallel or similar interests in a witness are encouraged to elect a single cross-examiner to act for all. Objections to repetitious questions may be expected to be sustained.

6. All documents to be utilized at the hearing shall be numbered in advance pursuant to a predetermined schedule. (See Attachment 1).

7. Use of publications or other item as stipulated by the parties (See Attachment 2).

ATTACHMENT 1

NUMBERING

ICC regulations 49 C.F.R. 1180.4(a)(2), require that each party to a proceeding choose a unique acronym of up to four letters to identify itself and that all documents filed in this proceeding be numbered consecutively prefixed by the chosen acronym. Applicants have selected SFSP. Other parties who have not already selected such an acronym should select an appropriate one.

Counsel's exhibits, those not sponsored by a witness, should be identified with the letter "C" following the selected acronym and numbered sequentially. For example, the first exhibit sponsored by applicants counsel should be numbered SFSP-C-1, the next SFSP-C-1, and continue. The numbering of counsels' exhibits is independent of the numbering of other documents and does not affect the numbering of verified statements, briefs, or other material as required by the regulations.

ATTACHMENT 2

USE OF PUBLICATIONS

Numerous publications, documents and other items may prove useful in presenting evidence in this proceeding. The Administrative Law Judge encourages stipulation as to the use of such items, as currently available, up to the close of the record, without challenge to their authenticity, but without agreement as to accuracy, competency, relevency or materiality. Such stipulations will help reduce time spent in unproductive discussion and help the Commission meet the statutory timeframes imposed upon this proceeding. Following is a partial list of items and documents which may be the object of such stipulations:

1. Annual reports to stockholders of any carrier or affiliate of a carrier subject to I.C.C. jurisdiction.

2. Proxy statements issued to stockholders by the management of any carrier or affiliate of any carrier subject to I.C.C. jurisdiction, and statements of information in connection with exchange offers and other public stockholder solicitation material.

3. Moody's Transportation Manual.

4. Standards & Poor's Security Owner.

5. Bank and Quotation Record, National News Service, Inc., Publisher.

6. Other printed, publicly available, and readily obtained statistical material.

7. Annual Reports of the Interstate Commerce Commission to the Congress of the United States of America.

8. Any report regularly made to the I.C.C. or any governmental agency by any carrier pursuant to law or valid regulations.

9. All tariffs filed with the I.C.C. by, or on behalf of, any carrier.

10. All regularly published publications of the Interstate Commerce Commission of its Offices or Bureaus.

11. The Official Railway Guide.

12. The Official Rail Equipment Register.

13. Reports of the I.C.C. and courts of competent jurisdiction.

14. Economic Reports of the President of the United States of America.

15. Annual Reports of the Securities and Exchange Commission to the Congress of the United States of America.

16. All regularly published reports of the United States Department of Transportation and United States Department of Energy.

Parties are encouraged to reach stipulations regarding any other material to be used in their presentations.

OH ALJ

INTERSTATE COMMERCE COMMISSION
Washington, DC

Finance Docket No. 30400*

SANTA FE SOUTHERN PACIFIC CORPORATION
CONTROL-SOUTHERN PACIFIC TRANSPORTATION COMPANY

Decided: July 26, 1984

At a prehearing conference in these proceedings held on July 25, 1984, a procedural schedule for the handling of the evidential phase of these proceedings was agreed upon by the parties and the Judge.

It is therefore ordered, that the procedural schedule shall be as follows:

PROCEDURAL SCHEDULE

ITEM	DATE	MERGER CASE	RESPONSIVE APPLICATION CASES
1	July 19, 1984		File responsive applications.
2	Sept. 10. 1984		File completed responsive applications.
3	Sept. 17, 1984	File requests for cross-examination of Applicants' witnesses.	
4	Oct. 1 - Oct. 26, 1984	Cross-examination of Applicants' witnesses.	
5	Nov. 19, 1984	Non-government parties file opposition evidence.	
6	Jan. 7, 1985 - Feb. 1, 1985.	Cross-examination of Protestants' witnesses.	Cross-examination of witnesses supporting responsive applications.

* Embraces F.D. Nos. 30400 (Sub-No. 1-7) and MC-F-15623.

ITEM	DATE	MERGER CASE	RESPONSIVE APPLICATION CASES
7	Feb. 18, 1985		Non-government parties file opposition evidence.
8	Mar. 18, 1985	Governmental parties file their evidence.	Governmental parties file their evidence.
9	Apr. 8- Apr. 26, 1985		Cross-examination of non-governmental parties' witnesses opposing responsive applications.
10	Apr. 29 - May 3, 1985	Cross-examination of governmental parties.	Cross-examination of governmental parties.
11	May 27, 1985		File rebuttal evidence supporting responsive applications.
12	June 17-21, 1985		Cross-examination of rebuttal witnesses.
13	July 1, 1985	Primary Applicants file rebuttal evidence.	
14	July 22 - Aug. 9, 1985	Cross-examination of Applicants' rebuttal witnesses.	

The initial hearing for the cross-examination of applicants' witnesses will begin as shown above at 9:30 A.M. on October 1, 1984, in Hearing Room A. Interstate Commerce Commission, 12th & Constitution Avenue, N.W. Washington, DC 20423.

As stated by the Judge at the prehearing conference, requests for cross-examination of applicants' witnesses should be made by notifying the applicants and the Commission on or before September 17, 1984. Such requests should generally indicate the purpose of such cross-examination. Applicants should notify the parties and the

Commission on or before September 24, 1984, of the proposed order of presentation of applicants' witnesses. It is the Judge's desire that where possible notification of the request for cross-examination be made as soon as such intent to request cross-examination is reached by the protestants and other parties.

Mr. Robert N. Kharasch will act as coordinator for protestants and requests for cross-examination of applicants witnesses, and of the order by which the Attorneys will cross-examine applicants' witnesses. The protestants and governmental parties should cooperate by informing Mr. Kharasch of their requests for cross-examination and also cooperate with him in coordinating the order of cross-examination.

At later stages of hearings in these proceedings the same rules concerning requests for cross-examination, order of presentation of such witnesses etc., as stated herein will be in effect unless later changed by decision of the Judge.

As discussed at the prehearing conference bifurcation of certain parts of the proceedings such as cross-examination of shipper witnesses and of witnesses in the responsive applications might be feasible and will be discussed and decided upon at a later date.

The Administrative Law Judge wishes to compliment the parties on their cooperative actions up to this date in attempting to arrive at a completion of the evidential phase of these proceedings well within the statutory time limits.

For administrative purposes the Administrative Law Judge will begin numbering his decisions with this decision.

James E. Hopkins

James E. Hopkins
Administrative Law Judge

James H. Bayne
Secretary

Interstate Commerce Commission
Office of the Secretary - Service Section
Washington, D.C. 20423

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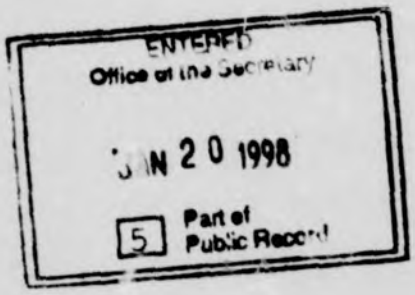
ENRS-14



ORIGINAL

BEFORE THE
SURFACE TRANSPORTATION BOARD

Finance Docket No. 33388

CSX CORPORATION AND CSX TRANSPORTATION, INC.,
NORFOLK SOUTHERN CORPORATION
AND NORFOLK SOUTHERN RAILWAY COMPANY

—CONTROL AND OPERATING LEASES/AGREEMENTS—

CONRAIL INC. AND CONSOLIDATED RAIL CORPORATION

REPLY OF ERIE-NIAGARA RAIL STEERING COMMITTEE TO
APPEAL OF CSX CORPORATION ET AL.

Pursuant to the Surface Transportation Board's ("STB" or "Board") General Rules of Practice 49 C.F.R. §1115.1, the provisions of the procedural order in this proceeding (Decision No. 6, served on May 30, 1997) and the Discovery Guidelines contained in the decision served on June 27, 1997 (Decision No. 10), Erie-Niagara Rail Steering Committee ("ENRS") respectfully submits its reply to the appeal of CSX Corporation et al. (CSX-137) from a discovery ruling of the Administrative Law Judge on January 8, 1998.[1]

THERE ARE NO GROUNDS FOR GRANTING THE APPEAL

The ALJ, in a ruling made at a discovery conference held under the Discovery Guidelines, directed CSX to make its rebuttal witness, Mr. Christopher P. Jenkins, available for discovery deposition by ENRS. CSX contends that this

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[1] The other Applicants to this proceeding, Norfolk Southern Corporation, et al. and Conrail, Inc., et al., have not joined in this appeal.

ruling is in error on the grounds that ENRS, a commenting party (not a responsive applicant) has no right to provide any additional facts for the record before the Board for decision in this matter, other than those submitted at the time it filed its comments on October 21, 1997. That contention, if it finds any support in Board or ICC precedent (which it does not), is contrary to the requirements of law. The appeal should be denied, because the ALJ has not committed a clear error of judgment, nor does his ruling cause manifest injustice to CSX.

CSX and the other applicants are seeking approval of this transaction by the Board under the provisions of 49 U.S.C. §11321-11327. Those provisions include a specific requirement for a "public hearing" when rail carriers are involved in the proposed transaction. 49 U.S.C. §11324(a).[2] The Administrative Procedure Act provides that any agency proceeding conducted a such a statutory requirement for hearing be conducted in accordance with the procedural requirements of 5 U.S.C. §556. That statute contains very important requirements that are directly applicable to the issue raised by CSX's appeal.

The statutory provision states:

> Any oral or documentary evidence may be received .... A party is entitled to present his case or defense by oral or documentary evidence, *to submit rebuttal evidence, and to conduct such cross-examination as may be required for a full and true disclosure of the facts.* In rule making ... and agency may, when a party will not be prejudiced thereby, adopt procedures for the submission of all or part of the evidence in written form.

5 U.S.C. §556(d) (emphasis added).[3]

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[2] The prior statute contained a similar provision. Prior 49 U.S.C. §11344(a) and 49 U.S.C. App. §5(2)(b). All of these provisions permitted the agency to determine "that a public hearing is not necessary in the public interest." No such determination has been made by the Board in this proceeding.

[3] This proceeding is a "formal rule making" under the APA, 5 U.S.C. §553(c)3

In fulfillment of these requirements, the Board's procedural order in this proceeding explicitly requires that:

> Immediately upon each evidentiary filing, the filing party will ... make its witnesses available for discovery deposition.

Decision No. 6, slip op. at 9.

CSX now claims that this requirement for witnesses to be made available for deposition is only for the benefit of those parties who have the right to file rebuttal in support of a responsive application. A party such as ENRS is not required to file a responsive application because it is only seeking affirmative relief in the form of conditions on the principal application under 49 U.S.C. §11324(c) that do not seek authority for that party or a nominee to enter into a transaction within the scope of 49 U.S.C. §11323. *Cf.* Decision 54 at 12 and Decision 55 at 2-3. Nonetheless, under the APA, ENRS and any other commenting party seeking affirmative relief in the form of conditions is entitled to a full and fair hearing in accordance with the APA's requirements. ENRS and any other commenting party is entitled to conduct discovery, such as the depositions required by the ALJ's ruling, to test the validity of the factual assertion made by Applicants' rebuttal witnesses.

The reason Mr. Jenkin's deposition was required by the ALJ is that two agreements were entered into on or about October 21, 1997, by CSX separately with the two Canadian railroads, Canadian Pacific ("CP") and Canadian National ("CN"). These agreements were specifically relied on by Applicants in their rebuttal filing on December 15, 1997. Applicants specifically relied on the terms of these agreements as a basis for urging the Board to deny the relief sought by ENRS, by contending that "the position of shippers in the Niagara/Buffalo area will be improved by new agreements negotiated by CSX with both CN and CP." Applicants' Rebuttal

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, is subject to the procedural and evidentiary requirements of 5 U.S.C. §556 and 557.

Narrative, at VIII–27 and 28, contained in Vol. 1 at 129-130. See also the rebuttal verified statement of CSX witness Jenkins at 16-17, contained in Vol. 2 of Applicants' Rebuttal at 224-225.[4]

The ALJ has ruled that CSX does not have to produce the unredacted agreements (a ruling under appeal by ENRS). However, he did rule that CSX has to make its witness Jenkins available for deposition on request, and that CSX cannot object to questions asking Mr. Jenkins about any portion of the agreements, including the redacted portion, on the grounds that it is "commercially sensitive" and cannot even be protected under the "Highly Confidential" designation of the protective order adopted by the Board in this proceeding in Decision No. 1, served April 16, 1997. Discovery Conference Transcript at 128-129.

The central and controlling issue raised by this appeal is whether a commenting party such as ENRS has the right in this proceeding to pursue discovery with respect to Applicants' rebuttal filing on December 15, 1997. Decision No. 6 provides the answer, and demonstrates that the ALJ's ruling granting ENRS the right to depose Mr. Jenkins on request must be upheld. Decision No. 6 plainly provides that "upon each evidentiary filing, the filing party ... will make its witnesses available for discovery deposition." Decision No. 6 at 9, Note.

The decision also provides that all of the provisions of the Board's discovery rules are available to the parties, subject only to two limitations: (1) discovery guidelines that may be adopted by the ALJ, and (2) the ALJ is "not authorized to make adjustments to, or to modify, the dates in the procedural schedule." Therefore, subject to these two limitations, neither of which are applicable here,[5] ENRS and all other commenting parties have the right under

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[4] Copies of these pages were attached to ENRS' appeal, ENRS-13

[5] Nothing in the discovery guidelines precludes discovery directed to the rebuttal filing made by Applicants on December 15. There is no discovery to be conducted between October 6 and 21,

Decision No. 6 and the Board's Rules of Practice to test the assertions contained in Applicants' rebuttal by use of all of the discovery procedures and means set out in those Rules. See 49 C.F.R. Part 1114.

The mere fact that, as suggested by CSX, that the note to the procedural schedule in Decision 6 omits language specifically referring to cross-examination that appeared in previous versions of such orders in other proceeding is not grounds for reversing the ALJ's ruling. If such omission was anything other than an oversight, it would be inappropriate, in light of the explicit requirement for cross-examination in the APA, for the Board to deprive a commenting party such as ENRS of the opportunity to cross-examine a rebuttal witness such as Mr. Jenkins. Such a denial would be particularly unfair and unlawful in light of the fact that Mr. Jenkins relied on two agreements that were not even executed until the very day that ENRS and other parties were filing their comments. ENRS was thus deprived of any opportunity to conduct discovery or otherwise learn of these new facts. CSX should not be allowed to twist the Board's procedures to "blind-side" commenting parties with new facts and circumstances.[6]

The Board's rules of practice specifically state the procedure for submitting discovery materials into the record. 49 C.F.R. §1114.28. Such discovery materials have been accepted and received into the record by the Board and the ICC in rail merger proceedings conducted under the special rules, including by being attached to briefs and similar documents filed as part of the record. Under the procedural schedule, the record for decision does not close

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1997. ¶19, Decision 10 at 10. Otherwise, the guidelines reiterate the provisions of the Note in Decision 6 requiring all witnesses to be made available for discovery depositions. ¶11, Decision 10 at 5.

[6] These facts strongly suggest that, at least in ENRS' case, the decision discussed in the CSX' appeal in footnote 5 at page 11 is applicable. ENRS is not suggesting that CSX is deliberately "sand-bagging" ENRS, but it did create new facts and circumstances and then relied on those facts in its rebuttal.

until oral argument is held. Decision 6 at 9.

The Administrative Procedure Act, Decision No. 6 and the Board's discovery rules on depositions, taken together, allow ENRS to conduct a deposition of Mr. Jenkins upon request, and to submit the results, if necessary and appropriate, into the record for consideration by the Board.

CONCLUSION

For all of the foregoing reasons, Erie-Niagara Rail Steering Committee respectfully urges the Board to deny the appeal of CSX in CSX-137 from the ruling of Judge Leventhal requiring CSX to produce its rebuttal witness Jenkins for deposition upon request in accordance with the requirements of Decision No. 6.

Respectfully submitted,

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Attorneys for Erie-Niagara Rail Steering Committee

DATE: January 16, 1998

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing REPLY OF Erie-Niagara Rail Steering Committee has been served by facsimile transmission to Applicants' counsel, to Judge Leventhal, and to all other persons on the Restricted Service List in this proceeding on the 16th day of January, 1998.

Frederic L. Wood

STB FD 33388 1-16-98 D 185275

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RICHARD A. ALLEN

January 16, 1998

Via Hand Delivery

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

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

Dear Secretary Williams:

On behalf of the Applicants, I submit an original and twenty-five copies of CSX/NS-193, Applicants' Response to the Appeals of Eighty-Four Mining Company and the Erie-Niagara Rail Steering Committee from Denial of Motion to Compel Responses to Discovery. Also enclosed is a 3 1/2" computer disk containing the pleading in Wordperfect 5.1 format, which is capable of being read by Wordperfect 7.0.

Should you have any questions regarding this, please call.

Sincerely,

Richard A. Allen

Counsel for Norfolk Southern Corporation and Norfolk Southern Railway Company

Enclosures

cc: The Honorable Jacob Leventhal
All Parties of Record

185275

CSX/NS-193

BEFORE THE
SURFACE TRANSPORTATION BOARD

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

STB FINANCE DOCKET NO. 33388

APPLICANTS' RESPONSE TO THE APPEALS OF EIGHTY-FOUR MINING COMPANY AND THE ERIE-NIAGARA RAIL STEERING COMMITTEE FROM DENIAL OF MOTION TO COMPEL RESPONSES TO DISCOVERY

Eighty-Four Mining Company ("EFM") and the Erie-Niagara Rail Steering Committee ("ENRS") have appealed a ruling by the Administrative Law Judge ("ALJ") holding that EFM and ENRS may not conduct written discovery at this time against Applicants[1] because EFM and ENRS no longer have the right to submit evidentiary pleadings. EFM-13; ENRS-13. The ALJ's ruling was correct, and the appeals of EFM and ENRS should be denied.

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

INTRODUCTION

The appeals of EFM and ENRS arise from a January 8, 1998, ruling by Administrative Law Judge Leventhal that EFM and ENRS are not entitled to conduct written discovery, but may, through depositions, cross-examine any witness who submitted a rebuttal verified statement as part of Applicants' Rebuttal (CSX/NS-177 through CSX/NS-179). EFM and ENRS have appealed that ruling only to the extent that it prohibits EFM and ENRS from engaging in written discovery after Applicants have filed their rebuttal and at a time when EFM and ENRS no longer have a right to submit any evidentiary pleading.

FACTS AND SUMMARY OF ARGUMENT

EFM's appeal arises from written discovery and a request for deposition served on December 24, 1997. EFM asked Norfolk Southern to make available for deposition John William Fox, Vice President Coal Marketing for Norfolk Southern. Mr. Fox submitted a verified statement in Applicants' Rebuttal on December 15, 1997. Norfolk Southern voluntary agreed to submit Mr. Fox for deposition and that deposition was scheduled for January 16, 1998. That same day, EFM submitted over two dozen written discovery requests (including subparts) seeking an extraordinary amount of detailed information which, if available, would take an inordinate amount of time to search for, review and produce.[2/]

[2/] An example of the breadth of the EFM written discovery sought is Interrogatory No. 4 in EFM-10 which reads as follows:

> With regard to "the new utility market for Mine 84 coal on the current NS system [which] will include, at a minimum, facilities in at least five states (Virginia, Ohio, Kentucky, Tennessee and North Carolina) that in 1996 consumed a total of approximately 26 million tons of coal," (Fox RVS at 5-6),

ENRS's appeal arises from document requests served on Applicants on December 22, 1997. ENRS requested production of unredacted copies of two documents Applicants had already produced in response to document requests of other parties. ENRS-12.

Applicants objected to the EFM and ENRS written discovery requests on the grounds that past STB and ICC practice would not permit EFM and ENRS discovery through interrogatories and document production at this stage in this proceeding. CSX/NS-186 at 2; CSX/NS-183 at 3.[3] Applicants noted in their response to EFM that NS had voluntarily offered to make available witnesses for cross-examination deposition.[4] Id. Both EFM and ENRS asked for a hearing before the Administrative Law Judge to compel responses to their written discovery, and EFM submitted a motion to compel in which it argued that "[t]he

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please:

(i) Identify each facility comprising the approximate total of 26 million tons of coal, by name, owner or operator and location, and the quantity of coal consumed at each facility in 1996;

(ii) For each of the facilities identified in Interrogatory 4(i) above, state the origin location, mine, mine operator and volume of coal moving to each destination; and

(iii) For each coal mine identified in Interrogatory 4(ii) above, state the heat content and the sulphur content of the coal produced by that mine.

The written discovery requests in EFM-10 are attached to EFM's appeal, and are not reproduced here.

[3] Applicants' Initial Objections to Eighty Four Mining Company, Inc.'s Third Set of Interrogatories and Document Requests to Applicants (CSX/NS-186) are attached to EFM's appeal, and are not reproduced here. Applicants' Initial Objections to Erie Niagara Rail Steering Committee's Third Set of Requests for Production of Documents (CSX/NS-183) are not attached to ENRS appeal, so it is attached hereto as Exhibit A.

[4] That issue was not relevant to the ENRS written discovery.

discovery sought by EFM . . . is necessary in order that EFM can address the rebuttal arguments of applicants in its brief."[5/]

The ALJ ruled that under the procedural schedule and prior Board and ICC decisions, parties like EFM and ENRS are not entitled to pursue written discovery through interrogatories and document requests at this stage of the proceeding. That is so because, under the procedural schedule, applicants (including responsive applicants) are entitled to close the evidence pertinent to their applications and because parties like EFM and ENRS, which only filed comments and requests for conditions, have no right at this stage of the proceeding to file further evidence.[6/] Tr. at 130-31.[7/]

The ALJ, however, concluded that there was a distinction for these purposes between

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[5/] EFM Letter Motion to Compel, attached as Exhibit 3 to EFM's appeal, at 3.

[6/] Twice during oral argument and in EFM's appeal, EFM suggested that if commenting parties are denied the right to take discovery with regard to Applicants' Rebuttal, it "would send a signal to applicants in future railroad proceedings that their witnesses are entitled to distort and misrepresent with impunity in their rebuttal statements." EFM 13 at 7; see also Discovery Conference, January 8, 1998, Transcript at 26, 113 ("the applicant can now lie with impunity in their rebuttal and then say ha, ha, ha you can't test us, you can't do anything about it. You can't find out that we've lied through discovery. And if you do find out, you can't use it.") EFM's argument in this respect is no more than a red herring, and is inflammatory to the extent it implies that any of Applicants' witnesses have lied in their statements. The Board's rules require all witnesses submitting statements in this proceeding to verify, under penalty of perjury, that the witness' statement is true and accurate to the best of the witness' knowledge. Thus, any witnesses who lied in their statements to the Board would be subject to prosecution for perjury. Furthermore, no showing whatsoever has been made which would bring into question the veracity of Applicants' witnesses. In any case, the Board's procedures are adequate for dealing with such a hypothetical situation without providing for post-rebuttal written discovery as of right to all parties who submitted comments in the proceeding.

[7/] References to "Tr." are references to the transcript of the discovery hearing on January 8, 1998, at which the ALJ made the ruling being appealed. Cited pages are attached to this Response as Exhibit B.

written discovery and the right to cross-examine Applicants' offered rebuttal witnesses on their rebuttal verified statements through depositions. He ruled that neither the procedural schedule nor STB and ICC decisions preclude such examination through deposition and that all parties, including EFM and ENRS, have the right to depose CSX and NS offered rebuttal witnesses. Id. CSX has appealed the ALJ's ruling regarding depositions; CSX contends that commentors have no right at this stage to pursue either written discovery or depositions.

The appeals of EFM and ENRS present no issue regarding the ALJ's ruling respecting depositions. With respect to written discovery, all Applicants agree with ALJ Leventhal that the procedural schedule and the Board's precedents establish that such discovery is not available to parties like EFM and ENRS who have no right to make further evidentiary submissions.

ARGUMENT

The arguments of EFM and ENRS on appeal fail to meet the stringent requirements that the Board's rules and decisions place on parties appealing discovery rulings. As the Board stated in Decision No. 6: "Such appeals are not favored; they will be granted only in exceptional circumstances to correct a clear error of judgment or to prevent manifest injustice."[8] CSX Corp., et al., Norfolk Southern Corp., et al. -- Control and Operating

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[8] Unlike ENRS, EFM argues that the Board should make a decision on the appeal on a de novo basis. Because EFM is only appealing a ruling which denies it written discovery at this stage in the proceeding, de novo review is neither necessary nor proper. The Board appointed Judge Leventhal to rule on discovery disputes in the first instance, Finance Docket No. 33388, Decision No. 1, served April 16, 1997, at 2, and EFM's displeasure with a discovery ruling is not now reason for it to be granted a new hearing on the merits of its argument. Decision No. 42 in this proceeding, cited by EFM, offers no contrary support.

Leases/Agreements -- Conrail Inc., et al., Finance Docket No. 33388 ("CSX/NS/Conrail"), Decision No. 6, served May 30, 1997, at 7.

EFM's claim that, without the written discovery it seeks, it will be prejudiced in the proceeding should not be given weight by the Board. EFM argues that "denying EFM interrogatory and document production discovery techniques would be a manifest injustice impeding EFM's ability to truly test the rebuttal verified statements of applicants' witnesses." EFM-13 at 3. Past Board decisions, however, have declined to grant relief such as that requested by EFM and ENRS, to parties that chose to participate in control proceedings as commentors. As the Board has stated previously, EFM and ENRS "chose their means of presenting their arguments with knowledge of the restriction on rebuttal filings [and both] are aware that under the procedural schedule only inconsistent and responsive applicants are entitled to file rebuttal evidence. . . ." UP/SP, Decision No. 31 at 2.

In any event, to the extent that the ALJ's ruling related to EFM's and ENRS' written discovery requests, the ALJ was clearly correct. For purposes of evidentiary submissions and the right to discovery, the Board's prior decisions have drawn a clear distinction between applicants (including responsive and inconsistent applicants) and parties who only file comments and requests for conditions. See, e.g., id. at 6; Union Pacific Corp., et al. -- Control and Merger -- Southern Pacific Rail Corp., et al., Finance Docket No. 32760 ("UP/SP"), Decision No. 31, served April 19, 1996, at 3; UP/SP, Decision No. 6, served October 19, 1995, at 7-8; Burlington Northern Inc., et al. -- Control and Merger -- Santa Fe Pacific Corp., et al., Finance Docket No. 32549 ("BN/Santa Fe") Decision No. 16, served April 20, 1995, at 11. Consistent with longstanding practice in rail consolidation cases, the

procedural schedule established in this case gives applicants the right to close the evidence with respect to their applications.[9] See, e.g., UP/SP, Decision No. 37, served May 9, 1996, at 4. Accordingly, Applicants filed their rebuttal evidence on December 15, 1997, and commentors subsequently have no right to submit further evidence with respect to the Primary Application.[10] All parties may file briefs on February 23, 1998, but those briefs may not include new evidence. See UP/SP, Decision No. 31 at 16-17.

For these reasons, the Board and the ICC have squarely held that, since the purpose of written discovery is to adduce further evidence for a party's next scheduled evidentiary filing, the only written discovery that may be pursued after the primary applicants have filed their rebuttal is discovery by responsive applicants which is in support of their responsive applications. For example, in the Union Pacific/Chicago and North Western Control Proceeding, the Chicago, Central and Pacific Railroad Company ("CC&P") filed written discovery on the primary applicants. The primary applicants objected on the ground that CC&P's discovery was too late because the primary applicants had submitted their rebuttal

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[9] EFM apparently recognizes that any submission of new evidence with respect to the Primary Application would deny Applicants' right to close the evidentiary record on the merits of its application, and thus EFM attempts to redefine Applicants' right as "the right to the closing principal evidentiary submission," a term newly-minted by EFM. EFM-13 at 2 n.1 (emphasis added). EFM has no basis for its distinction between the "right to close the evidentiary record" and the "right to the closing principal evidentiary submission," and offers no support for its argument that an applicants' right is confined to the latter. Indeed, the Board and its predecessor have consistently held that applicants' right in this respect is much broader. See, e.g., BN/SF, Decision No. 16 at *1 ("Traditionally, applicants, whether primary or responsive applicants, have the right to close the evidentiary record on their case. . . . Allowing [commenting] parties to file rebuttal evidence would deprive the primary applicants of their right to close the evidentiary record on their case.").

[10] Responsive applicants filed rebuttal evidence in support of their responsive applications on January 14, 1998.

evidence on March 30, 1994 in support of the primary application and in opposition to CC&P's responsive application. In hearings on CC&P's motion to compel held after the filing of the primary applicants' rebuttal but before CC&P's rebuttal was due to be filed, Administrative Law Judge Cross ruled that CC&P could only pursue discovery that would be pertinent to its own rebuttal filing; it could not pursue discovery in support of its opposition to the primary application.

The ICC approved those rulings on CC&P's appeal. It stated:

> Parties have the right to submit the final evidence and close the record on the merits of their application. But, there are limits on the type of evidence which is appropriate for rebuttal and thus there are limits on the latitude for discovery. In preparing [its own rebuttal filing], CC&P may properly present evidence rebutting only that portion of Applicants' March 30, 1994 filing which was in reply to [CC&P's] responsive application.

UP/CNW Decision No. 17, 1994 ICC LEXIS 112 at *24. The ICC noted with approval that the ALJ had ruled that "CC&P's discovery would be limited to that appropriate to its rebuttal filing," and affirmed his decision denying CC&P's discovery on issues that merely pertained to CC&P's opposition to the primary application. Id. It stated:

> It would hardly be appropriate to allow CC&P to conduct discovery on those issues now because the record has closed on Applicants' case-in-chief.

Id.

The same principle applies squarely to EFM's and ENRS' discovery that the ALJ denied in this case and requires his decision to be affirmed. EFM and ENRS have no right at this time to discovery on issues pertaining to its opposition and comments on the Primary

Application.[11]

The foregoing principle was also applied in the Union Pacific/Southern Pacific control proceeding. In that case, Kansas City Southern Railroad ("KCS"), a commentor in the Union Pacific/Southern Pacific control proceeding, asked the Board to require the applicants to amend the primary application to reflect the settlement agreement with Chemical Manufacturers Association ("CMA") or to permit parties to conduct discovery and submit further evidence to the Board. In response, the applicants offered their witnesses for cross-examination deposition and to have the resulting testimony appended to the commentors' brief. UP/SP-237 at 8-9 (attached hereto as Exhibit C); UP/SP, Decision No. 35, served May 9, 1996, slip op. at 3. The Board denied request of KCS for written discovery, but permitted the offered cross-examination depositions to go forward. Id.; see also, UP/SP, Decision No. 37, served May 22, 1996, at 5; UP/SP, Decision No. 38, served May 31, 1996, at 5; UP/SP, Decision No. 40, served June 13, 1996, at 5.[12]

In its request to the ALJ to compel discovery, at oral argument and its appeal, EFM

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[11] ALJ Leventhal concluded that the cases recognize an exception to this general principle with respect to the right of all parties to cross-examine applicants' witnesses through deposition. That issue is raised by CSX' appeal. As noted earlier, however, the EFM and ENRS' appeals do not present this issue.

[12] EFM claims that UP/SP, Decision No. 40 supports its position because the Board did not specifically state what types of discovery were available to KCS at the time (the day briefs were due). EFM-13 at 10-11. The KCS discovery at issue was renewed document requests that had been first served early in the proceeding at a time when KCS' right to written discovery was not proscribed. As a result, the issue of new discovery was not before the Board for it to decide. The Board did, however, reiterate that "because applicants had stated their willingness to allow parties to depose their witnesses and BNSF's witnesses who addressed the CMA settlement agreement in the April 29 filings, we permitted [in Decision No. 37] such discovery to take place and information gained in such depositions to be included in the June 3 briefs." UP/SP, Decision No. 40 at 5.

consistently attempts to distinguish its contemplated evidentiary submission as "impeachment" evidence, rather than "rebuttal" evidence. EFM's attempted distinction, however, is supported neither by Board precedent nor by logic. Applicants find no case, and EFM has cited no case, where this distinction is drawn. EFM acknowledges that its purpose in propounding the written discovery at issue in EFM's appeal is to "evaluate [for] itself" the NS agreements with Canadian Pacific Railway Company ("CP") and Guilford Transportation ("GTI") to determine "whether the agreements achieve the described results" EFM-13 at 12, and to submit its evaluation on brief. Such a submission, however, would not constitute "impeachment," as that term is commonly used in the rules of evidence. See F.R.E. 607; see also, Black's Law Dictionary (impeachment of witness defined as "to call in question the veracity of a witness . . . or the adducing of proof that a witness is unworthy of belief."). EFM seeks to introduce into the record its own evaluation, or more likely that of an expert, of the effect of the agreements. Such a submission would undeniably introduce into the record evidence which, heretofore, has not been introduced. Thus, whether EFM chooses to label its contemplated submission "impeachment evidence," "rebuttal evidence," or even "old evidence," the fact remains that it is new evidence, not entered into the record prior to Applicants' Rebuttal, and is thus explicitly prohibited by Decision No. 6.

ENRS' argues that it is entitled to conduct written discovery because "As in prior rail merger proceedings conducted by the Board and its predecessor, commenting parties are entitled to conduct discovery directed to Applicants' rebuttal and to place any relevant evidence thereby obtained into the record for consideration by the Board in reaching its decision." ENRS-13 at 4. This argument fails on appeal for the same reason it failed before

the Administrative Law Judge. No case cited in argument to the ALJ permitted parties to attach responses to written discovery to briefs. The ALJ specifically explained at the hearing that "no case has been cited where a document may be attached to a brief by commentors." Tr. at 131. Despite this, ENRS fails to cite any case supporting its position.

EFM and ENRS fail to carry the burden of their argument. No case cited supports a reversal of the ALJ's ruling holding that EFM and ENRS may not conduct written discovery against Applicants at this time.[13/] In fact, Board and ICC precedent are clear: EFM and ENRS are commentors; commentors have no right to further evidentiary submissions; and EFM and ENRS do not have the right to further written discovery at this stage in the control proceeding.

CONCLUSION

For all these reasons, the appeals of EFM and ENRS must be denied.

[13/] EFM and ENRS rely on a few isolated passages in the procedural schedule and the discovery guidelines requiring parties to maintain a depository and make its witnesses available for depositions to support its right to propound written discovery at this time, but that reliance is misplaced. These procedures simply expedite discovery upon the filing of the primary application and rebuttal for parties able to participate at different stages of the proceeding -- all parties upon the filing of the primary application and responsive applicants upon the filing of the rebuttal.

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Dated: January 16, 1998

EXHIBIT A

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' INITIAL OBJECTIONS TO ERIE-NIAGARA RAIL STEERING COMMITTEE'S THIRD SET OF REQUESTS FOR PRODUCTION OF DOCUMENTS

Applicants[1] hereby submit their initial objections to Erie-Niagara Rail Steering Committee's ("ENRS") Third Set of Requests for Production of Documents (ENRS-12). These initial objections are filed pursuant to Paragraph 16 of the Discovery Guidelines adopted by Decision No. 10, served June 27, 1997, which provide that "[a] responding party shall, within five business days after receipt of service, serve a response stating all its objections to any discovery request as to which the responding party has then decided it will be providing no affirmative response. . . ." Applicants reserve the right to answer

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

or object to each and every discovery request, definition and instruction set forth in ENRS-12 within the time frame set forth in Paragraph 16.

On November 25, 1997, in response to a request for production by the State of New York, Administrative Law Judge Leventhal ordered that CSX produce the CP/CSX Settlement Agreement, also entitled "Rate Making Agreement" dated October 20, 1997, allowing "reasonable redactions" of "commercially sensitive" and/or "highly confidential" information. Discovery Conference, Nov. 25, 1997, Transcript at 29, 32, 35 (emphasis added). Pursuant to Judge Leventhal's ruling, CSX produced the CP/CSX Settlement Agreement, with minimal redactions, and placed it in Applicants' depository with identifying numbers CSX 69 HC 000101-000110.

Subsequent to filing their Rebuttal on December 15, 1997, Applicants placed the CN/CSX Settlement Agreement, entitled "CN-CSX Interchange and Through Rate Agreement," dated October 23, 1997, with commercially sensitive rate and certain other limited information redacted, in Applicants' depository as a workpaper with identifying numbers CSX 75 HC 000101-000110. On December 17, 1997 Applicants furnished a courtesy copy of the Agreement to ENRS.

On December 22, 1997, ENRS served its Third Set of Requests for Production of Documents (ENRS-12) requesting production of *unredacted* copies of the "(a) CP/CSX Settlement Agreement, also entitled 'Rate Making Agreement' dated October 20, 1997 [and] (b) CN/CSX Settlement Agreement, also entitled 'CN-CSX Interchange and Through Rate Agreement,' dated October 23, 1997."

Applicants object to the production of unredacted copies of these agreements. The Board and Judge Leventhal have consistently held that, "Disclosure of

extraordinarily sensitive information should not be required without a careful balancing of the seeking party's need for the information, and its ability to generate comparable information from other sources, against the likelihood of harm to the disclosing party." See Decision 34 at 2. This standard has been used by Judge Leventhal to justify various "reasonable redactions" and, specifically, the redaction of just the type of commercially sensitive information that ENRS seeks production of in this instance. See Discovery Conference, November 20, 1997, Transcript at 62, Discovery Conference, November 25, 1997, Transcript at 35; Discovery Conference, December 4, 1997, Transcript at 45-46.

Applicants further object to ENRS-12 on the basis that the deadlines have passed for evidentiary filings or discovery by ENRS. Because ENRS's opposition filing consists of comments, and is not a responsive or inconsistent application, ENRS is not entitled to file rebuttal or any additional evidence in this proceeding and therefore has no basis for propounding document production requests at this late date. Since there is no legitimate purpose for ENRS's discovery requests at this time, ENRS is not entitled to such discovery. See, e.g., Union Pacific Corp., et al. – Control – Chicago and North Western Trans. Co. – Trackage Rights Overt Certain Lines of Union Pacific Rr. Company, et al., Finance Docket No. 32133, Decision No. 17 (served July 11, 1994).

For these reasons, Applicants should not be required to respond to these requests.

Respectfully submitted,

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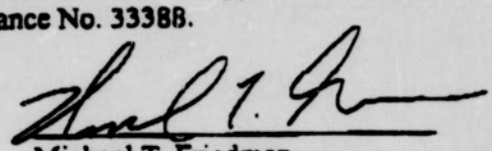
Counsel for Conrail Inc. and Consolidated Rail Corporation

Dated: December 31 1997

CERTIFICATE OF SERVICE

I, Michael T Friedman, certify that on December 31, 1997, I caused to be served by facsimile service a true and correct copy of the foregoing CSX/NS-183, Applicants' Initial Objections to Erie-Niagara Rail Steering Committee's Third Set of Requests for Production of Documents on all parties that have submitted to the Applicants a request to be placed on the restricted service list in STB Finance No. 33388.



Michael T. Friedman

December 31, 1997

EXHIBIT B

They have subsequently filed objections and said they will not respond to the written interrogatories.

They contend in their various pleadings, both their answers and their pleadings that they filed last night, Your Honor, that they don't have any obligation to comply with discovery with regard to their rebuttal-verified statements. What they're really saying, Your Honor, is that they have the right in their rebuttal statement to lie with impunity.

We are not seeking the right to file rebuttal evidence. We're not contemplating sponsoring a witness at any point in time, in our brief or otherwise, and filing rebuttal statements, rebuttal evidence, challenging, contesting, taking issue with their statements. What we do want to do is test the basis for the statements that their witnesses offer in the rebuttal.

They said: Well, we are giving you a deposition. Well, the Commission's rules specifically are incorporated. The Board's rules are incorporated in Discovery Guideline Number 2. It said they will apply except as modified by the Board or by these

to tell the Board only they can interject evidence into the record at oral argument? We are back to common law pleadings 200 years ago, pleadings by ambush. Whereas I said before and he hasn't tried to answer that the applicants can now lie with impunity in their rebuttal and then say ha, ha, ha you can't test us, you can't do anything about it. You can't find out that we've lied through discovery. And if you do find out, you can't use it.

And that's what they are telling you here today. There is a distinction that all of the cases they have cited deal with people who wanted to make their own affirmative rebuttal cases. And those are every one of those decisions.

There is one other decision I will call to your attention. UP SP 40, if I may I'd like to give you a copy, your Honor.

JUDGE LEVENTHAL: Yes.

MR. BERCOVICI: This was at the -- the date of the decision it was after briefs were filed. Kansas City Southern was seeking documents, documentary report from Burlington Northern who was

the previous discovery. However, NS has offered to produce witnesses for deposition and I am ruling that they are now required to do so.

With respect to ERSN, Mr. Woods' motion is likewise denied, subject to a notice on the part of ERSN for CSX to produce its rebuttal witnesses for deposition. As we have previously discussed, I have already ruled upon the highly confidential objection to production of this material and parties cannot use that objection on any deposition, any other objections made on deposition and subject to ruling, if I am requested to make such at the appropriate time.

All right.

MR. WOOD: Thank you, Your Honor.

JUDGE LEVENTHAL: All right. Off the record. We'll stand in recess a half hour for lunch.

(Whereupon, at 1:29 a.m., the hearing was recessed, to reconvene at 2:04 p.m., Thursday, January 8, 1998.)

A-F-T-E-R-N-O-O-N S-E-S-S-I-O-N

(2:04 p.m.)

JUDGE LEVENTHAL: All right, the conference will come back to order. In the direction of our recess, I'm concerned that perhaps my ruling with respect to the last motion is not specifically clear.

Let the record note that Mr. Dowd and -- I'm sorry, strike that. Mr. Wood and Mr. Bercovici have been excused and are not present in the hearing room at this time.

But for purposes of appeal, if the movants so intend, I would like to clarify the reasons behind my ruling.

Essentially, I have adopted the argument made by both Mr. Harker and Mr. Edwards. I find that our schedule does not permit the commenters to file rebuttal testimony. I find that written replies to discovery cannot have a reasonable use. There's a difference between a document supplied in response to a discovery request and the cross examination of the rebuttal witness by deposition. The cases cited to me

by the movants deal with the ability to attach a deposition to a brief by commenters, but no case has been cited where a document may be attached to a brief by the commenters. In this respect, there is a major difference between a documentary response from the oral cross examination of a witness under deposition.

All right, we're now ready to hear argument on the motion of Transtar, Elgin Joliet and Eastern Railway Company and I & M Railroad link and I guess LLC?

MR. HEALEY: LLC stands for Limited Liability Corporation.

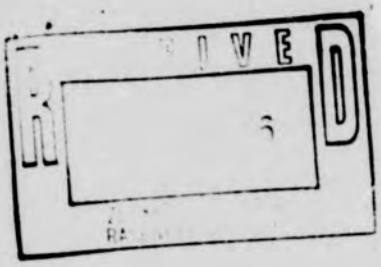
JUDGE LEVENTHAL: All right. Now do I understand your argument, Mr. Healey, dealing only with the verification of the discovery request?

MR. HEALEY: No, I'm sorry, Your Honor. If that was your understanding --

JUDGE LEVENTHAL: That's not my understanding. I'm inquiring --

MR. HEALEY: That's not my position. All four of the interrogatories -- all of the document production requests are at issue.

EXHIBIT C



UP/SP-237

BEFORE THE
SURFACE TRANSPORTATION BOARD

Finance Docket No. 32760

UNION PACIFIC CORPORATION, UNION PACIFIC RAILROAD COMPANY
AND MISSOURI PACIFIC RAILROAD COMPANY
-- CONTROL AND MERGER --
SOUTHERN PACIFIC RAIL CORPORATION, SOUTHERN PACIFIC
TRANSPORTATION COMPANY, ST. LOUIS SOUTHWESTERN RAILWAY
COMPANY, SPCSL CORP. AND THE DENVER AND
RIO GRANDE WESTERN RAILROAD COMPANY

APPLICANTS' REPLY TO KCS' MOTION TO REQUIRE
AMENDMENT TO APPLICATION OR ADDITIONAL DISCOVERY

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April 30, 1996

UP/SP-237

BEFORE THE
SURFACE TRANSPORTATION BOARD

Finance Docket No. 32760

UNION PACIFIC CORPORATION, UNION PACIFIC RAILROAD COMPANY
AND MISSOURI PACIFIC RAILROAD COMPANY
-- CONTROL AND MERGER --
SOUTHERN PACIFIC RAIL CORPORATION, SOUTHERN PACIFIC
TRANSPORTATION COMPANY, ST. LOUIS SOUTHWESTERN RAILWAY
COMPANY, SPCSL CORP. AND THE DENVER AND
RIO GRANDE WESTERN RAILROAD COMPANY

APPLICANTS' REPLY TO KCS' MOTION TO REQUIRE
AMENDMENT TO APPLICATION OR ADDITIONAL DISCOVERY

Union Pacific Corporation ("UPC"), Union Pacific Railroad Company ("UPRR"), Missouri Pacific Railroad Company ("MPRR"),[1] Southern Pacific Rail Corporation ("SPR"), Southern Pacific Transportation Company ("SPT"), St. Louis Southwestern Railway Company ("SSW"), SPCSL Corp. ("SPCSL"), and The Denver and Rio Grande Western Railroad Company ("DRGW"),[2] collectively, "Applicants," hereby reply to KCS' "Motion to Require Amendment to Application or in the Alternative to Allow Parties to Conduct Discovery and Submit Evidence Relating to Applicants' Settlement Agreement With CMA" (KCS-49).

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[1] UPC, UPRR and MPRR are referred to collectively as "Union Pacific." UPRR and MPRR are referred to collectively as "UP."

[2] SPR, SPT, SSW, SPCSL and DRGW are referred to collectively as "Southern Pacific." SPT, SSW, SPCSL and DRGW are referred to collectively as "SP."

KCS has repeatedly tried, without success, to delay this proceeding, and this is its latest attempt. See KCS-3, filed Sept. 18, 1995, p. 7 (arguing for a two-and-a-half year schedule); KCS-17, filed Jan. 24, 1996 (supporting motion of Western Shippers Coalition to enlarge the procedural schedule); Decision No. 6, served Oct. 19, 1995 (setting procedural schedule); Decision No. 10, served Jan. 25, 1996 (denying request for delay and affirming original procedural schedule). This attempt, like the others, should be rejected.

Unlike KCS and some of the other strident opponents of the merger, the Chemical Manufacturers Association ("CMA") indicated in its March 29, 1996 filing that it would no longer oppose the UP/SP merger if the concerns it laid out in that filing were met. Applicants worked hard to meet those concerns, and succeeded in doing so in a settlement agreement executed on April 18. See UP/SP-219. This mooted a long list of issues put forward not just by CMA, but by opponents like KCS and Conrail.

The mooting of these concerns through settlement may displease KCS, but it does not mean that the Board has been presented with a new "transaction," or that KCS needs more discovery or another round of evidence. Rather, the settlement with CMA addresses the precise issues on which KCS and a variety of other parties had months of discovery and submitted extensive evidence on March 29, 1996. The

settlement raises no new issues for decision by the Board; instead, it eliminates issues.

For example:

- KCS, Conrail and others argued that BN/Santa Fe would be hampered in competing because it would operate "against the flow" of traffic on UP/SP lines to be operated directionally. They deposed many of Applicants' and BN/Santa Fe's witnesses on this issue,[3] and they filed evidence addressing it on March 29. The CMA settlement eliminates the issue as a concern by granting BN/Santa Fe the right to operate "with the flow" of traffic, and the additional trackage rights necessary to do so.

- Various opponents of the merger, including Conrail, argued that BN/Santa Fe would be at a disadvantage in competing for Houston-St. Louis traffic because its own line from Memphis to St. Louis is circuitous and does not allow it to reach Eastern carriers at St. Louis as efficiently as UP/SP will. Conrail and other parties deposed Applicants' witnesses on this issue and filed evidence addressing it on March 29. The CMA settlement eliminates the issue as a concern by extending BN/Santa Fe's Houston-Memphis trackage rights to St.

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[3] KCS' statement that "relatively few depositions were taken" (p. 2) is amusing. No fewer than 30 of Applicants' and BN/Santa Fe's witnesses were deposed, consuming a total of 45 deposition days. Only KCS, which demanded that depositions "grow geometrically" (Letter from A. Lubel to A. Roach, Jan. 25, 1996), could consider this "relatively few."

Louis, and putting BN/Santa Fe on a par with UP/SP at St. Louis.

- Various merger opponents criticized the trackage rights compensation fees provided for in the BN/Santa Fe settlement agreement, arguing that they exceeded UP/SP costs and that the adjustment mechanism (70% of RCAF(U)) would render BN/Santa Fe non-competitive over time. Parties pursued extensive discovery on these issues, including depositions of Applicants' w tnesses. The CMA settlement eliminates these issues as concerns by granting BN/Santa Fe the option of using traditional joint facility billing, under which it would pay UP/SP a usage-based share of actual M&O costs, taxes and interest rental (calculated as depreciated book value times the current cost of capital), and by substituting for the prior adjustment mechanism a mechanism based on actual year-to-year changes in the relevant UP/SP cost components.

- Various merger opponents claimed that UP/SP would "discriminate" against BN/Santa Fe in dispatching BN/Santa Fe's trackage rights trains. They pursued extensive discovery on this issue. The CMA settlement eliminates it as a concern by providing for the adoption of a detailed written protocol to govern the dispatching of BN/Santa Fe trains.

These are only examples. Full details of the steps that Applicants agreed to in their settlement with CMA, as well as of other steps that Applicants have taken to address

issues raised by various parties (e.g., extending to BN/Santa Fe the right to build in to a Union Carbide facility at North Seadrift, Texas, thereby addressing the issue raised by Union Carbide in its March 29 comments), and of how these steps address issues raised by merger opponents, are set forth at pages 12-21 of the Narrative portion of Applicants' April 29 Rebuttal (UP/SP-230), and in a number of the verified statements in that Rebuttal filing (see UP/SP-231 and 232, passim). The pertinent point is that parties like KCS have had very extensive discovery on these issues, and have submitted evidence very fully addressing them.

KCS' argument implies that whenever, in the course of a merger proceeding, the applicants arrive at settlements to resolve issues of concern raised by parties to the case, the applicants in effect must submit an entire new application, the clock on the proceeding must be set back, and there must be renewed discovery and additional rounds of evidence. It is hard to imagine a process that would more effectively discourage settlements. The policy of the ICC, and thus of its successor, this Board, is to the contrary. That policy is to "encourage agreements between parties to a consolidation proceeding in order to encourage expeditious resolution of matters of serious concern." Norfolk Southern Corp. -- Control -- Norfolk & Western Ry. & Southern Ry., 366 I.C.C. 171, 240 (1982) ("Norfolk Southern") (emphasis added); Union

Pacific Corp., Pacific Rail System, Inc. & Union Pacific R.R. -- Control -- Missouri Pacific Corp. & Missouri Pacific R.R., 366 I.C.C. 459, 601 (1982), aff'd in part & remanded in part sub nom. Southern Pacific Transportation Co. v. ICC, 736 F.2d 708 (D.C. 1984), cert. denied, 469 U.S. 1208 (1985) ("UP/MP/WP").

KCS does not point to any specific matter in the CMA settlement on which it needs more information, either by way of a substantially amended application or by way of renewed discovery. It simply lists all the topics that are to be addressed in a merger application (pp. 4-5). But every issue treated in the CMA settlement was addressed in the application, and in discovery, and in the March 29 filings. KCS' motion seeks delay for delay's sake.

Certainly there are details of the application that might have been different had the terms of the CMA settlement been in place before the application was prepared. But KCS makes no showing that those details are so fundamental as to require the filing of a completely new or amended application. The thrust of the CMA settlement is to confirm that BN/Santa Fe will be a fully effective competitor using the trackage rights and other rights agreed to in Applicants' settlement with BN/Santa Fe. That is what the application already assumed, so it can hardly be argued that the CMA settlement fundamentally changes the parameters of the application. Any

issues that remain are ones the parties have already addressed in their prior filings.

Moreover, as the Board is aware, a number of parties have had no difficulty in providing comments on the CMA settlement without the need for refiling of the application, pursuit of new discovery, or the opportunity to file a new round of evidence. On April 29, Applicants were served with a number of comments on the CMA settlement, including filings by Dow, SPI, Conrail, and others. See Comments of Arizona Chemical Company, filed Apr. 29, 1996; Further Comments of Consolidated Rail Corporation in Response to the "CMA Settlement Agreement," CR-37; Comments on the Applicants' Settlement Agreement with the Chemical Manufacturers' Association Submitted on Behalf of the Dow Company, DOW-19; Further Comments of Montell USA, Inc., MONT-5; Verified Statement of Thomas L. Moranz, QCC-4; Further Comments of the Society of the Plastics Industry, Inc., SPI-16. KCS was equally capable of commenting on the settlement without imposing further delay.

This is not, as KCS weakly claims, the UP/CNW case, where the Commission called for a supplemental filing to clarify whether major developments -- the sale of a controlling interest in CNW stock by Blackstone, the investment bank that then controlled CNW -- mooted a hotly-contested dispute over whether any concrete "transaction" was

presented for decision at all. See Union Pacific Corp., Union Pacific R.R. & Missouri Pacific R.R. -- Control -- Chicago & North Western Holdings Corp. & Chicago & North Western Transportation Co., 9 I.C.C.2d 939 (1993). Rather, the settlement with CMA is like important settlements entered into during the course of many prior merger cases, which resolved particular competitive or other issues that parties had raised in the course of the proceeding, and which did not precipitate any requirement that the applicants re-file their application or that there be new rounds of discovery and evidence. See, e.g., Finance Docket No. 32549, Burlington Northern Inc. & Burlington Northern R.R. -- Control & Merger -- Santa Fe Pacific Corp. & The Atchison, Topeka & Santa Fe Ry., Decision served Aug. 23, 1995, pp. 88-92 (settlements with SP, UP and others); Union Pacific Corp., Union Pacific R.R. & Missouri Pacific R.R. -- Control -- Missouri-Kansas-Texas R.R., 4 I.C.C.2d 409, 480 (1988), petition for review dismissed sub nom. RLEA v. ICC, 883 F.2d 1079 (D.C. Cir. 1989) (settlement with SP); UP/MP/WP, 366 I.C.C. at 601 (settlement with CNW); Norfolk Southern, 366 I.C.C. at 240 (settlement with Conrail, MKT and others).

Applicants fully address the CMA settlement in their April 29 Rebuttal, and BN/Santa Fe also addresses that settlement in its April 29 submission. To the extent cross-examination may be needed to resolve material issues of

disputed fact, as KCS suggests, KCS is free to depose all the Applicant witnesses and BN/Santa Fe witnesses who address the CMA settlement. In addition, it is free to advance in its June 3 brief any arguments it may have about that settlement. Requiring a resubmission or amendment of the application, or authorizing renewed discovery at this late stage of this

expedited proceeding, would serve no purpose except KCS' purpose -- delay. The KCS motion should be denied.

Respectfully submitted,

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April 30, 1996

CERTIFICATE OF SERVICE

I, Michael A. Listgarten, certify that, on this 30th day of April 1996, I caused a copy of Applicants' Reply to KCS' Motion to Require Amendment to Application or Additional Discovery (UP/SP-237) to be served by first-class mail, postage prepaid, or by a more expeditious manner of delivery on all parties of record in Finance Docket No. 32760, and on

Director of Operations
Antitrust Division
Room 9104-TEA
Department of Justice
Washington, D.C. 20530

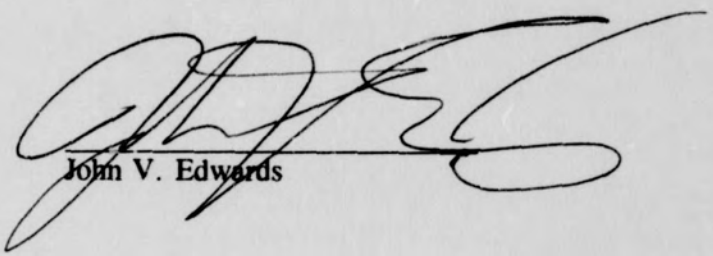
Premerger Notification Office
Bureau of Competition
Room 303
Federal Trade Commission
Washington, D.C. 20580

Michael A. Listgarten

CERTIFICATE OF SERVICE

I, John V. Edwards, certify that on January 16, 1998, I have caused to be served by first class mail, postage prepaid, or by more expeditious means a true and correct copy of the foregoing CSX/NS-193, Applicants' Response to the Appeals of Eighty-Four Mining Company and the Erie-Niagara Rail Steering Committee from Denial of Motion to Compel Responses to Discovery, on all parties that have appeared in STB Finance Docket No. 33388 and by hand delivery on the following:

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



John V. Edwards

Dated: January 16, 1998

STB FD 33388 1-14-98 D 185227

EXPEDITED ACTION REQUESTED **ENRS-13**

ORIGINAL

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 ERIE-NIAGARA RAIL STEERING COMMITTEE

Pursuant to the Surface Transportation Board's ("STB" or "Board") General Rules of Practice 49 C.F.R. §1115.1, the provisions of the procedural order in this proceeding (Decision No. 6, served on May 30, 1997) and the Discovery Guidelines contained in the decision served on June 27, 1997 (Decision No. 10), Erie-Niagara Rail Steering Committee ("ENRS") respectfully submits its appeal from a discovery ruling of the Administrative Law Judge on January 8, 1998.

GROUNDS FOR APPEAL

The ALJ denied ENRS' motion to compel production by CSX of the unredacted provisions of two agreements previously produced in redacted form by CSX. The request for production had been made by ENRS in a request served on December 22, 1997 (ENRS-12, a copy of which is attached).

The agreements involved were entered into by CSX separately with the two

Canadian railroads, Canadian Pacific ("CP") and Canadian National ("CN"). These agreements were specifically relied on by Applicants in their rebuttal filing on December 15, 1997. Applicants specifically relied on the terms of these agreements as a basis for urging the Board to deny the relief sought by ENRS, by contending that "the position of shippers in the Niagara/Buffalo area will be improved by new agreements negotiated by CSX with both CN and CP." Applicants' Rebuttal Narrative, at VIII–27 and 28, contained in Vol. 1 at 129-130 (a copy of the relevant pages from the public version is attached). See also the rebuttal verified statement of CSX witness Jenkins at 16-17, contained in Vol. 2 of Applicants' Rebuttal at 224-225 (a copy of the relevant pages from the public version are also attached).

Although the agreements were produced by CSX, it has redacted from the documents all of the essential price and rate terms relating to the Niagara Frontier area (see CSX-69-HC-000104 and 000105; and CSX 75-HC-000106 and 000107). It is thus impossible for ENRS to evaluate the validity of CSX's claim that "the position of shippers in the Niagara/Buffalo area will be improved" by these agreements. These redacted terms are thus highly relevant to the issues in this proceeding.

The ALJ has ruled that CSX does not have to produce the unredacted agreements. However, he did rule that CSX has to make its witness Jenkins available for deposition on request, and that CSX cannot object to questions asking Mr. Jenkins about any portion of the agreements, including the redacted portion, on the grounds that it is "commercially sensitive" and cannot even be protected under the "Highly Confidential" designation of the protective order adopted by the Board in this proceeding. Decision No. 1, served April 16, 1997.

The ALJ's ruling was premised on the mistaken notion that, because ENRS and other similarly situated were commenters (and not responsive applicants), they had no

opportunity to make use of any discovery responses (other than deposition transcripts).[1] Transcript of January 8, 1998 discovery conference at 128-131.

The central and controlling issue raised by this appeal is whether a commenting party such as ENRS has the right in this proceeding to pursue discovery with respect to Applicants' rebuttal filing on December 15, 1997. Decision No. 6 provides the answer, and demonstrates that the ALJ's ruling denying ENRS' motion to compel must be reversed in order to prevent manifest injustice. Decision No 6 plainly provides that "upon each evidentiary filing, the filing party ... will make its witnesses available for discovery deposition." Decision No. 6 at 9, Note.

The decision also provides that all of the provisions of the Board's discovery rules are available to the parties, subject only to two limitations: (1) discovery guidelines that may be adopted by the ALJ, and (2) the ALJ is "not authorized to make adjustments to, or to modify, the dates in the procedural schedule." Therefore, subject to these two limitations, neither of which are applicable here,[2] ENRS and all other commenting parties have the right under Decision No. 6 and the Board's Rules of practice to test the assertions contained in Applicants' rebuttal by use of all of the discovery procedures and means set out in those Rules. See 49 C.F.R. Part 1114. This includes requests for production of documents under 49 C.F.R. §1114.30.[3]

ENRS-12 was narrowly drawn and directed specifically to determining the basis for the assertions by CSX' witness Jenkins in Applicants' rebuttal. The

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1 A similar appeal was filed on January 13, 1998, by Eighty-Four Mining Company (EFM-13). ENRS adopts and supports the reasoning contained in EFM-13, and respectfully requests the Board to consider and decide both appeals together.

2 Nothing in the discovery guidelines precludes discovery directed to the rebuttal filing made by Applicants on December 15. There is no discovery to be conducted between October 6 and 21, 1997. ¶19, Decision 10 at 10. Otherwise, the guidelines reiterate the provisions of the Note in Decision 6 requiring all witnesses to be made available for discovery depositions. ¶11, Decision 10 at 5.

3 As amended by Ex Parte No. 527, 61 Fed. Reg. 52713 (Oct. 8, 1996), requests for production of documents no longer require prior authorization by the Board.

effect of the ALJ's ruling is to require ENRS to seek to obtain information regarding the basis for Mr. Jenkins' assertions by putting both sides to the trouble and expense of conducting a deposition.[4] Under the provisions of Decision 6, the record in this proceeding is not closed until the date of the oral argument. As in prior rail merger proceedings conducted by the Board and its predecessor, commenting parties are entitled to conduct discovery directed to Applicants' rebuttal and to place any relevant evidence thereby obtained into the record for consideration by the Board in reaching its decision.

CONCLUSION

For all of the foregoing reasons, Erie-Niagara Rail Steering Committee respectfully requests the Board to grant this appeal, and to require CSX to produce the documents requested in ENRS-12 in unredacted form.

Respectfully submitted,

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Attorneys for Erie-Niagara Rail Steering Committee

DATE: January 13, 1998

CERTIFICATE OF SERVICE

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[4] ENRS is now fully prepared to go forward with Mr. Jenkins' deposition whether or not this appeal is granted.

I hereby certify that a copy of the foregoing APPEAL OF Erie-Niagara Rail Steering Committee has been served by facsimile transmission to Applicants' counsel, to Judge Leventhal, and to all other persons on the Restricted Service List in this proceeding on the 13th day of January, 1998.

Frederic L. Wood

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

THIRD SET OF REQUESTS FOR PRODUCTION OF DOCUMENTS OF ERIE-NIAGARA RAIL STEERING COMMITTEE TO APPLICANTS

Pursuant to the Surface Transportation Board's ("STB" or "Board") General Rules of Practice, 49 C.F.R. §§ 1114.21 to 1114.31, and the Discovery Guidelines contained in the decision served on June 27, 1997, the Erie-Niagara Rail Steering Committee ("ENRS") submits the following third set of requests for production of documents to Applicants. ENRS requests that Applicants comply with these discovery requests within fifteen days of service of the requests upon the Applicants. In accordance with the Discovery Guidelines established in this proceeding, ENRS further requests that Applicants notify the undersigned of any objections they may have to these requests within five business days so that an attempt may be made to resolve such objections informally and expeditiously.

DEFINITIONS

1. "Applicants" or "Applicant" means CSX Corporation, CSX Transportation, Inc., Norfolk Southern Corporation, Norfolk Southern Railway Company, Conrail Inc. and Consolidated Rail Corporation, individually and collectively, together with any parent, subsidiary or affiliated corporation, partnership or other legal entity, including all predecessor railroads.

2. "Application" means the control and operating leases/agreements application filed by applicants in Finance Docket No. 33388, on June 23, 1997.

3. "Conrail" means Consolidated Rail Corporation and Conrail, Inc., and all predecessor railroads.

4. "CSX" means CSX Corporation and CSX Transportation, Inc., and all predecessor railroads.

5. "Document" means any writings or other compilations of information, whether handwritten, typewritten, printed, recorded, or produced or reproduced by any process, including but not limited to, intracompany or other communications, business records, agreements, contracts, correspondence, telegrams, memoranda, studies, projections, summaries of records of telephone or personal conversations of interviews, reports, diaries, log books, notebooks, forecasts, photographs, maps, tape recordings, computer tapes, disks, diskettes, cartridges, and CD-ROM, computer programs, computer printouts, computer models, statistical or financial statements, graphs, charts, sketches, plans, drawings, minutes or records of summaries of conferences, expressions or statements or policy, lists of persons attending meetings or conferences, opinions or reports or summaries of negotiations or investigations, brochures, opinions or reports of consultants, pamphlets, advertisements, circulars, trade or other letters, press releases, drafts, revisions of drafts, invoices, receipts, and

original or preliminary notes. Further, the term "document" includes:

a) Both basic records and summaries of such records (including computer runs) and both paper versions and versions on any form of electronic media;

b) Both original versions and copies that differ in any respect from original versions; and

c) Both documents in the possession of Applicants and documents in the possession of consultants, counsel, or any other person that has assisted Applicants.

6. "ENRS" means an ad hoc committee currently comprised of the following members: Erie County Industrial Development Agency; County of Erie; County of Niagara; Niagara Business Alliance; Greater Buffalo Partnership; New York State Electric & Gas; Niagara Mohawk Power Corporation; and General Mills, Inc.

7. The term "identify":

a) When used with reference to an individual means to state the name, last known business address, or home address where the business address is not known, telephone number, and last known job title for such person.

b) When used with reference to a corporation, partnership or other entity means to state the full name and the address and telephone number of the principal place of business.

c) When used with reference to a document, means to state its title or other identifying data; the kind of document; its present location and custodian; its date or approximate date; the identity of the author, originator,

sender, and each person who received the document, and the general subject matter.

8. "NS" means Norfolk Southern Corporation and Norfolk Southern Railway Company, and all predecessor railroads.

9. "Official," "officer," "employee," "representative," or "agent" includes any natural or corporate person, including attorneys.

10. "Person" means any natural person, business entity (whether partnership, association, cooperative, joint venture, proprietorship, or corporation), or governmental or other public entity, department, administration, agency, bureau or political subdivision thereof, or any other form of organization or legal entity, and all their officials, officers, employees, representatives and agents, including consultants.

11. "Produce" means to make legible, complete and exact copies of the responsive documents, which are to be made available for inspection and copying at the document depository established pursuant to the Discovery Guidelines in this proceeding, and to identify the precise location of the documents in the depository by bates number.

12. "Rebuttal" means the contents of the evidence and argument served and filed by Applicants in this proceeding on December 15, 1997.

13. "Relating to," "referring to," or "regarding" a subject means making a statement about, discussing, describing, reflecting, dealing with, consisting of, constituting, comprising, or in any way concerning, in whole or in part, the subject.

14. "Studies, analyses, and reports" include studies, analyses, and reports in whatever form, including letters, memoranda, tabulations, and computer printouts of data selected from a database.

INSTRUCTIONS

1. The time period encompassed by these requests, unless otherwise stated, is January 1, 1995 to the present, and shall extend to the end of this proceeding. These discovery requests are continuing in nature and are required to be supplemented or corrected where appropriate in accordance with 49 C.F.R. § 1114.29.

2. All uses of the conjunctive include the disjunctive and vice versa. Words in the singular include the plural and vice versa. "Each" shall be construed to include "all," and the present tense shall include the past tense and vice versa.

3. If any information or document or any part of a document is withheld on the claim that such document is privileged or confidential, Applicants are to:

(a) Identify the nature of the document;

(b) Identify the subject matter of the document, *i.e.*, briefly describe the contents of the document;

(c) Identify the author and all addressees or recipients of the document;

(d) Identify the date of the document; and

(e) State the nature of the privilege or protection claimed and the basis therefor.

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

4. If any document called for by these requests is not available or accessible, provide a statement to that effect and an explanation of the reasons therefor, identify the unavailable or inaccessible document(s), and describe the disposition of such document(s).

5. If precise or exact information cannot be provided, state the best estimate or approximation of the information sought.

6. If any information or document called for is available in computerized format, produce the document or information in that format, along with a description of the software utilized, instruction books, and all other material necessary to translate the documents or information from computerized to hard copy format.

7. Where any interrogatory or document request refers to "Applicants" or to any "Applicant," and the response for one applicant would be different from the response for other applicants, give separate responses for each applicant.

8. These discovery requests are intended to be non-duplicative of previously requested discovery in this proceeding of which ENRS has been served copies. If you consider a discovery request included herein to be duplicative, provide a statement as to the particular request that is believed to be duplicative and refer ENRS to the specific documents or answers produced in response to such prior discovery.

9. If a particular discovery request, either in whole or in part, is objected to provide all information or documents that are not objected to and specifically state the request, in whole or in part, that is objectionable and the grounds therefor.

10. In responding to a document request made herein, provide specific references to any responsive document produced in the Depository, including the document number.

DOCUMENT REQUESTS

1. Produce complete and unredacted copies of each of the following

documents referred to and/or included in the Applicants' Rebuttal:

a. CP/CSX Settlement Agreement, also entitled "Rate Making Agreement" dated October 20, 1997.[1]

b. CN/CSX Settlement Agreement, also entitled "CN-CSX Interchange and Through Route Agreement," dated October 23, 1997.[2]

Respectfully submitted,

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Attorneys for Erie-Niagara Rail Steering Committee

DATE: December 22, 1997

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1 This agreement was previously produced in redacted form, and placed in Applicants' depository with identifying numbers CSX 69 HC 000101-000110. (It is also contained in Vol. 3D of the Applicants' Rebuttal, at 386-395.) The last page of Exhibit A of the Agreement was not produced.

2 This agreement was also produced in redacted form, and placed in Applicants' depository with identifying numbers CSX 75 HC 000101-000110. Applicants stated in their rebuttal narrative (Applicants' Rebuttal Vol. 1 at 129) that this agreement was included in Vol. 3 of their rebuttal filing; however it is not found in any of the four books of Vol. 3.

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing THIRD REQUEST FOR PRODUCTION OF DOCUMENTS OF ERIE-NIAGARA RAIL STEERING COMMITTEE TO APPLICANTS has been served by facsimile transmission to Applicants' counsel, to Judge Leventhal and to all other persons on the Restricted Service List this 22nd day of December, 1997.

Frederic L. Wood

PUBLIC—REDACTED

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

RAILROAD CONTROL APPLICATION

APPLICANTS' REBUTTAL
VOLUME 1 OF 3

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December 1997

offer additional service to the East and South and to compete with CSX. Id. Historically, NS has served Buffalo only from the West. Since Conrail had two alternative lines from New York City to Buffalo and preferred the line that will be used by CSX, use of the 1995 waybill data, as the ENRS's traffic witness did, provides a misleading analysis. Id. New connections and operating practices designed to reduce congestion and costs will be introduced by the Transaction, (See CSX/NS-20, Vol. 3A, Orrison VS at 52-53) as acknowledged by the ENRS consultant: "NS plans to reroute traffic from this area . . . should eliminate the potential bottleneck at CP Draw." ENRS-6, Fauth VS at 56.

NS' presence at Ashtabula Dock, combined with the presence of water shipment options, will also increase the opportunities for competitively priced movements of coal, the region's largest incoming rail commodity. Niagara Mohawk Power Corporation (NIMO), the area's largest rail user, will receive significant benefits from delivery to Lake Erie of rail originated for Monongahela and other Pittsburgh seam coal, NIMO's coal of choice, coming into Ashtabula and other Docks and moving via water to the Huntley and Dunkirk plants. Sansom RVS at 40, 44. While the Niagara Mohawk filing attempts to minimize the importance of water shipment on Lake Erie to Niagara Mohawk, a Niagara Mohawk witness, in the filing made by the Bessemer & Lake Erie Railroad ("B&LE") stresses the critical importance of this rail/lake route as a competitive option for NIMO. BLE-8, Bonnie VS at 69. And the statistics show substantial use of coal delivered by vessel to Niagara Mohawk's Dunkirk Plant as recently as 1996, and historically to its Huntley Plant. Sansom RVS at 41, 45.

In addition, the position of shippers in the Niagara/Buffalo area will be improved by new agreements negotiated by CSX with both CN and CP. Jenkins RVS at 16-17. They provide the

area with increased commercial access between the United States and Canadian markets for new truck-competitive traffic at mutually agreeable charges. Jenkins RVS at 16.

Specifically, CSX's settlement agreement with CP provides that, through special traffic interchange and joint line marketing arrangements, rail customers located in the Buffalo/Niagara area will receive effective access to and from CP/D&H served markets. The settlement agreement provides effective commercial access for traffic which will be diverted from motor carriers and for certain other categories of rail traffic as well. Id. at 17.

ENRS compares the Buffalo area with the other Shared Assets Areas, using various self-selected tests, and contends that this area is as worthy of Shared Assets Area status as the others. ENRS-6 at 42-43. Statistical and demographic analysis is, of course, not the test. The perceived need by the two competitors to have such an area, as opposed to competing in another fashion, is the touchstone in a regime where rail combinations are effected through private ordering subject to regulatory review, rather than by governmental planning. We note that some parties, on the other hand, contend that the creation of Shared Assets Areas poses grave risks of organizational and operational failure, and should not be attempted at all; this, at last roll-call, was the position of the Port of New York and New Jersey. NYNJ-14 at 5. While this is not so, certainly it would be wrong to require the Applicants to create and maintain a Shared Assets Area where they believe it is not necessary for their operations and where they have not made any plans to operate one. Moreover, as to Buffalo, they have negotiated a solution, satisfactory to themselves and which more than meets the tests taught by the Board's precedents, not simply to maintain the existing level of competition in the Buffalo area but to increase it by not only substituting CSX service for Conrail, but by greatly increasing the presence of NS in the area.

PUBLIC — REDACTED

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

RAILROAD CONTROL APPLICATION

APPLICANTS' REBUTTAL
VOLUME 2A OF 3

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December 1997

REBUTTAL VERIFIED STATEMENT OF CHRISTOPHER P. JENKINS

My name is Christopher P. Jenkins. I am Vice President, Chemical Marketing for CSX Transportation. I previously submitted a verified statement as part of the June 23, 1997 Application in this proceeding. My background and work experience are described in that statement.

The purpose of this rebuttal verified statement is to address various commercial issues raised by commenting parties in the October 21, 1997 filings in this proceeding and to evaluate certain specific requests for conditions.

Commercial Issues Related to Implementation

The Chemical Manufacturers Association and the Society of the Plastics Industry, Inc. (CMA/SPI) have asked the Board to impose two different conditions that involve the commercial implementation of the proposed Transaction. One of these deals with certain Conrail contracts involving movements to, from or within Shared Assets Areas. CMA/SPI want shippers to have an "open season" to test service from both carriers under these contracts. It wants the shippers to have the right to determine which carrier will ultimately assume the legal responsibility to perform the contract. And it wants each shipper to have the right to "reopen," i.e. get out of, its Conrail contracts involving movements to, from or within Shared Assets Areas.

The Applicants' proposal for the allocation of Conrail contracts, including

served by CP/D&H and CN. CSX will handle the traffic for these other roads to and from its connections with these carriers -- Albany in the case of CP/D&H and Buffalo or Montreal in the case of CN. A similar agreement is in place with P&W, allowing them to use CSX's services between New Haven and an interchange with New York & Atlantic at New York City. The agreements allow these carriers to quote rates for movements via CSX without obtaining our prior consent.

These agreements permit these other railroads to offer to provide transportation services to shippers in New York City and Long Island for general merchandise truckload traffic, and are specifically designed to attract truck-competitive freight business off the roads and on to rail. The agreements permit shippers in New York City or Long Island, in many circumstances, to solicit independent competitive bids from at least two railroads. To ensure coordinated dispatching and other operational efficiencies, CSX will move the cars for the carrier selected.[1]

Buffalo/Erie-Niagara

The agreements with CN and CP/D&H will benefit shippers in the Buffalo/Niagara area by providing increased commercial access between the Niagara Frontier and Canadian markets for new truck-competitive traffic at mutually agreeable charges.

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[1]With respect to intermodal service to the east side of the Hudson, the final portion of the Oak Point Link has not yet been fully completed, and there is no intermodal rail terminal currently available at the Harlem Yard. Therefore the agreements with CN and CP/D&H roads do not at this time contain similar commercial access provision to that location. CSX will be willing to discuss modifications of its arrangements with other railroads to permit similar commercial access to any newly constructed intermodal terminal at Harlem Yard, for the marketing of new joint line intermodal service to that location.

Specifically, CSX's settlement agreement with CP provides that, through special traffic interchange and joint-line marketing arrangements, rail customers located in the Buffalo/Niagara area will receive effective access to and from CP- and D&H-served markets. The settlement agreement provides effective commercial access for traffic which will be diverted from motor carriers and for certain other categories of rail traffic as well. The CN agreement contains a similar provision to allow CN to convert traffic currently moving by truck to rail movements.

The benefits for Buffalo/Niagara area shippers flowing from the CN and CP settlement agreements are among the many reasons why the Erie-Niagara Rail Steering Committee is wrong in suggesting that Buffalo/Niagara area shippers will be harmed by the proposed Transaction. Just the opposite is true. I have already explained why the benefits of enhanced rail competition in the Shared Assets Areas are likely to carry over to customers located on CSX who compete in their businesses with rail shippers in the Shared Assets Areas. An additional benefit of the Transaction is the improved access that NS will have to Buffalo via the former Conrail Southern Tier route. Historically, NS has served Buffalo only from the West. Now it will have the opportunity to handle Buffalo/Niagara area traffic to and from the East and to compete with CSX on many such movements. The 1995 traffic data relied upon by Erie-Niagara's witness Fauth does not reflect NS's improved access to Buffalo following the Transaction.

New England

CSX's recent agreement with the P&W will benefit the New England area by allowing shippers using the P&W a rail option not previously available. The P&W