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January 13, 1998

VIA HAND DELIVERY

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

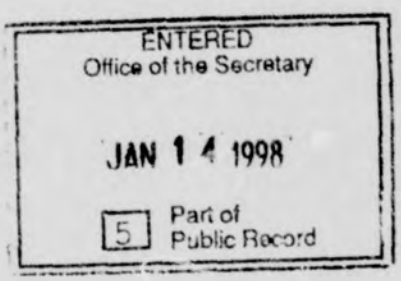
D

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

Dear Secretary Williams:

Enclosed are the original and 25 copies of CSX's Appeal From Decision of Presiding Administrative Law Judge Ordering Applicants to Make Rebuttal Witnesses Available for Deposition by Commenting Parties for filing in the above-referenced proceeding. Also enclosed is a 3.5" diskette containing the document in WordPerfect format. Finally, we have also enclosed a check in the amount of $150 to cover the cost of filing the appeal.

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.

FILED

JAN 13 1998

SURFACE
TRANSPORTATION BOARD

Enclosures

FEE RECEIVED

JAN 13 1998

SURFACE
TRANSPORTATION BOARD

cc: Service List (w/Enclosure)

BEFORE THE
SURFACE TRANSPORTATION BOARD

STB Finance Docket No. 33388

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

CSX'S APPEAL FROM DECISION OF
PRESIDING ADMINISTRATIVE LAW JUDGE
ORDERING APPLICANTS TO MAKE REBUTTAL WITNESSES
AVAILABLE FOR DEPOSITION BY COMMENTING PARTIES

On October 21, 1997, Erie-Niagara Rail Steering Committee (ENRS) and Eighty-Four Mining Company, Inc. (EFM) submitted comments and requests for conditions in response to Applicants'[1] Primary Application. Subsequent to Applicants' Rebuttal filing on December 15, 1997 in support of their Primary Application (CSX/NS-176), ENRS and EFM served discovery requests on Applicants for the purpose of submitting additional evidence regarding the Primary Application. Applicants objected to these requests on the basis that the procedural schedule and applicable Board precedent make clear that applicant parties, as opposed to

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

commenters, have the right to close the record on their applications and that commenters do not have the right to submit surrebuttal evidence. While ALJ Leventhal denied ENRS' and EFM's requests for written discovery,[2] he disregard this well established authority and ordered that CSX and NS must make their rebuttal witnesses available for deposition by ENRS and EFM, who can submit transcripts of the deposition testimony with their briefs.

This decision is clearly erroneous and results in manifest injustice to Applicants because, to the extent that it gives ENRS and EFM the right to file new evidence in the proceeding, it denies Applicants the right to close the record on the merits of their application. Accordingly, CSX respectfully requests that the Board issue an order overruling this decision, making clear that commenters do not have the authority to take additional depositions and that no party has the right to include new evidence in its brief.

I. BACKGROUND

On May 22, 1997, the Board issued Decision No. 6, establishing the governing procedural schedule and requirements governing submission of evidence in the proceeding. Decision No. 6 provides that commenters are not authorized to submit rebuttal evidence:

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[2] CSX understands that this part of the ALJ's ruling is the subject of a separate appeal to be filed today by EFM.

> We will not allow parties filing comments, protests, and requests for conditions to file rebuttal evidence 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.

CSX/NS, Finance Docket No. 33388, Decision No. 6, 1997 WL 283551 (I.C.C.) at *6 (citing Union Pacific Corporation -- Control and Merger -- Southern Pacific Rail Corporation, STB Finance Docket No. 32760, Decision No. 6 at 7-8; Burlington Northern, Inc. -- Control and Merger -- Santa Fe Pacific Corporation, STB Finance Docket No. 32549, Decision No. 16 at 11). Decision No. 6 fixed December 15, 1997 as the date for filing of rebuttal evidence in support of the Primary Application and January 14, 1998 as the date for the filing of rebuttal evidence in support of inconsistent and responsive applications. No further evidentiary filing by other parties with respect to the Primary Application is authorized by Decision No. 6. Under the schedule, the only parties permitted to file rebuttal evidence on January 14, 1998 are those that filed an inconsistent or responsive application. The schedule further provides that all parties are permitted to file briefs on February 23, 1998.

On October 21, 1997, ENRS and EFM filed Comments and Requests for Conditions with respect to the Primary Application submitted by Applicants. Neither ENRS nor EFM filed a responsive application or an inconsistent application such that either would be entitled to submit on January 14, 1998 rebuttal evidence with respect to such application.

On December 15, 1997, Applicants filed their Rebuttal in support of their Primary Application (CSX/NS-176-177-178), including their responses to comments, requested conditions and other opposition argument, which closed the evidentiary record on their Application. In that filing, Applicants made numerous arguments against the comments of both ENRS and EFM. These arguments are supported in part by Rebuttal Verified Statements of Applicants' witnesses, included in Volumes 2A and 2B of Applicants' Rebuttal (CSX/NS-177).

On December 22, 1997, ENRS served on Applicants its Third Set of Requests for Production of Documents (ENRS-12) (See Exhibit 1), seeking production of unredacted versions of (a) the CN/CSX Settlement Agreement, entitled "CN-CSX Interchange and Through Route Agreement" ("CN Settlement Agreement") and (b) the CP/CSX Settlement Agreement, entitled "Rate Making Agreement" ("CP Settlement Agreement").[3] See Exhibits 2 and 3.[4] On December 24, 1997, EFM served more than two dozen discovery requests (including subparts) (EFM-10), designed to explore rebuttal points made by two NS rebuttal witnesses, Messrs. Fox and Mohan, in their Rebuttal Verified Statements. See Exhibit 4. On the same date, EFM served a letter on NS seeking to schedule the deposition of Mr. Fox. See Exhibit 5.

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[3]A redacted copy of both of these agreements had previously been placed in Applicants' depository.

[4]All parties on the Restricted Service List, including counsel for ENRS, already have all of the exhibits attached to this appeal. Accordingly, copies of this appeal served on the Restricted Service List do not contain the exhibits.

Applicants filed initial objections to ENRS' requests on December 31, 1997 (CSX-183) on the basis that the deadlines have passed for evidentiary filings or discovery by ENRS. See Exhibit 6. On January 2, 1998, Applicants similarly objected to EFM's written discovery requests (CSX/NS-186). See Exhibit 7. NS, however, voluntarily offered to make Messrs. Fox and Mohan available to EFM for cross-examination by deposition concerning their Rebuttal Verified Statements.

On January 2, 1998, ENRS filed a letter requesting an order from the ALJ requiring production of the unredacted CP and CN Settlement Agreements. See Exhibit 8. ENRS argued that it was impossible for it to evaluate the validity of the claims made in Applicants' Rebuttal that "the position of shippers in the Niagara/Buffalo area will be improved" by the CP and CN Agreements without knowing the redacted price and rate terms relating to the Niagara Frontier area. See CSX-75-HC-000104 - 000105; CSX-69-HC-000106-000107 (attached hereto as Exhibits 2 and 3 respectively). ENRS indicated that it would submit evidence obtained through discovery in its February 23, 1998 brief to the Board. ENRS Letter, January 2, 1998 at 2 ("parties filing briefs have the right to include . . discovery materials and other evidentiary materials in those briefs to the Board").

EFM, by letter dated January 5, 1998, also requested that ALJ Leventhal compel production of the written discovery sought. See Exhibit 9. EFM argued that the discovery sought "is necessary in order that EFM can address the rebuttal arguments of

applicants in its [February 23, 1998] brief [and] it is EFM's choice, not subject to the control of applicants, as to the nature and sequence of the use of the various discovery tools in an effort to test the statements of applicants' witnesses." EFM Letter, January 5, 1998 at 3.

Applicants opposed ENRS' and EFM's requests to compel production (CSX/NS-188) (See Exhibit 10) and oral argument was held on January 8, 1998. At the argument, ALJ Leventhal denied the requests of ENRS and EFM to the extent that they involved written discovery, but ruled that CSX and NS must nevertheless produce their rebuttal witnesses for oral deposition when noticed by commenters. Discovery Conference, January 8, 1998, Transcript at 129. While NS has voluntarily offered to make Messrs. Fox and Mohan available for deposition -- and thus their depositions alone do not necessarily violate Decision No. 6 -- ALJ Leventhal's ruling held that commentors may now notice depositions as a matter of right, a clearly erroneous ruling infringing Applicants' rights, and a ruling that will extend the discovery schedule beyond that contemplated by the Board.

As demonstrated below, this ruling is "a clear error of judgement" and will result in "manifest injustice" to Applicants, because it denies to Applicants the fundamental right to close the record on their Application, a right which has been consistently recognized by the Board. 49 C.F.R. 1115.1(c). Accordingly, it should be reversed.

II. ARGUMENT

A. Under Decision No. 6 Parties Filing Comments, Protests, and Requests for Conditions Are Not Authorized to Submit Rebuttal Evidence or to Conduct Discovery in Support Thereof

As discussed above, Decision No. 6 explicitly prohibits all commenters, including ENRS and EFM, from filing rebuttal evidence, and any further evidentiary filing by these parties would directly contravene the Board's restriction on filing rebuttal evidence. Decision No. 6 makes no distinction between testimonial and other types of evidence, the distinction on which the ALJ appears to rely. Yet, both ENRS and EFM indicate that their only purpose in seeking additional discovery is to obtain surrebuttal evidence for submission to the Board. See ENRS Letter at 2; EFM Letter at 3; Discovery Conference, January 8, 1998, Transcript at 33-34, 110. While the language of Decision No. 6 did not directly address commenters' rights to take discovery in support of surrebuttal evidentiary submissions, the purpose of this discovery, as acknowledged by ENRS and EFM, is to permit them to adduce new evidence in support of their requests for conditions for submission to the Board. It is undisputed that in the absence of a right to introduce evidence in a proceeding, discovery serves no useful purpose and is not permitted. Thus, ENRS and EFM are not entitled to the discovery that they seek.

During argument and in its letter requesting the ALJ to compel production, EFM relied on language in both Decision No. 6 and in the discovery guidelines to support the proposition that commenters are entitled to engage in further discovery. EFM

Letter at 2-3; Discovery Conference, January 8, 1998 at 110-112. EFM cites the notes following the procedural schedule set out in Decision No. 6, in which the Board states, "Immediately upon each evidentiary filing . . . the filing party will make its witnesses available for discovery depositions." Discovery Conference, Jan. 8, 1998, Transcript at 111 (quoting Decision No. 6 at *9). Further, EFM relies on paragraphs 11 and 12 of the discovery guidelines which require that "a person who has submitted written testimony in this proceeding shall be made available for deposition upon request . . . [and shall not] be deposed more than one time as to any written rebuttal statements submitted by that witness." Id. at 112 (quoting Decision No. 10 at *3). According to EFM, this language permits commenters discovery with regard to Applicants' Rebuttal witnesses.

EFM's interpretation of the Board's language is incorrect. In Decision No. 10, Paragraph 1 of the Discovery Guidelines, the Board clearly states that "all discovery requests must be tailored to be consistent with the procedural schedule adopted in this proceeding." CSX/NS, Decision No. 10 at *1. As discussed above, in the procedural schedule set out in Decision No. 6, the Board explicitly rejected the notion that commenters could file surrebuttal evidence. To read the language cited above as allowing commenters the right to take discovery following Applicants' Rebuttal would render the Board's prohibition on surrebuttal evidence by commenters meaningless. The fact that Decision No. 6 generally requires any party making its witnesesses available for discovery depositions does not mean that commenters are entitled to depose applicants' rebuttal

witnesses. It merely means that such witnesses must be made available for those entitled to take discovery depositions. At this stage that means only responsive applicants, not commenters. The general language of the Discovery Guidelines did not purport to enlarge upon that scope of depositions.

B. Decision No. 6's Prohibition on Submission of Rebuttal Evidence By Parties Filing Comments, Protests and Requests for Conditions is Consistent With Board And I.C.C. Precedent

Beyond Decision No. 6, the Board's practice is clear that neither ENRS nor EFM may introduce additional evidence with respect to the Primary Application. The Board and its predecessor, the I.C.C., 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 application. Union Pacific - Control - Chicago and North Western, Finance Docket No. 32133, Decision No. 17, 1994 ICC LEXIS 112; and BN/SF, Decision No. 34, at 4 ("Responsive applicants have the right to close the record on their cases, while parties requesting conditions do not.").

Throughout the two most recent major control cases, the Board and its predecessor ruled that commenters did not have the right to submit surrebuttal evidence. The Board has drawn a strong line between parties who choose to participate in control proceedings as commenters and those who choose to participate as responsive applicants. Union Pacific Corp. -- Control and Merger -- Southern Pacific Corp., Finance Docket No. 32760, Decision No. 31 at 2 ("Movants are aware that, under the procedural schedule, only inconsistent and responsive applicants are entitled to file

rebuttal evidence . . . . Parties . . . chose their means of presenting their arguments with knowledge of the restriction on rebuttal filings.")

For instance, in BN/SF, Decision No. 16, the I.C.C. squarely addressed the question of whether a commenting party was entitled to file rebuttal evidence. In that case, Southern Pacific Transportation Company (SP), a non-applicant requesting conditions, argued that it had the right to submit rebuttal as to any challenge the primary applicants made to the scope and feasibility of SP's proposed conditions. BN/SF, Decision No. 16 at 10. SP claimed that to reject SP's rebuttal evidence simply because of the form in which SP presented its requested conditions would serve no public policy interest. Id. The Commission, in rejecting SP's request to file rebuttal evidence as a commenter, clearly distinguished the respective rights of commenting parties on the one hand and responsive applicants on the other, stating that commenters did not have the right to submit rebuttal evidence:

> The relief responsive applicants seek is different from the relief that parties simply requesting conditions seek. Traditionally, applicants, whether they are primary or responsive applicants, have the right to close the evidentiary record on their case. Therefore, responsive applicants can answer arguments made in opposition to their application in rebuttal filings. Parties seeking conditions, on the other hand, come to the Commission as part of and in opposition to the primary application, and the primary applicants respond to those parties in their rebuttal in support of the primary application. Allowing the parties to file rebuttal evidence would deprive the primary applicants of their right to close the evidentiary record on their case. We see no necessity for such filings, and believe

> that the current procedural schedule will allow the Commission to fully comprehend and evaluate all issues that the parties seeking conditions will raise in this proceeding.

BN/SF, Decision No. 16 at *1. In denying the commenters' right to submit rebuttal evidence, the Board did not distinguish between testimonial and written or documentary evidence, the distinction on which ALJ Leventhal appeared to rely.

In BN/SF, Decision No. 34, the I.C.C. also denied the motions of several commenting parties for leave to submit rebuttal filings on grounds similar to those relied on in Decision No. 16.[5] Illinois Central Railroad Company ("IC") and Southern California Regional Rail Authority ("SCRRA"), for example, argued that because the primary applicants submitted evidence and testimony in opposition to their respective requests for conditions, the I.C.C. should allow the commenters to file

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[5] In Decision No. 34, the I.C.C. did partially grant the motion of one commenting party, Phillips Petroleum Company (PPC), to file rebuttal evidence, but only because the primary applicants had failed to make PPC aware of an alleged fact during discovery. BN/SF, Decision 34 at *3. Specifically, a witness for the primary applicants had submitted a verified statement in support of the primary application and had been deposed prior to the date for filing comments and requests for conditions and, both in his verified statement and in his deposition, had stated an estimated cost for a proposed build-out project. Motion of PPC for Leave to File Rebuttal Verified Statement of Fred E. Watson (PPC-9) at 2. In their comments and request for conditions, PPC relied on that witness' estimated cost of the build-out. Id. In the primary applicants' rebuttal filing, however, the same witness, for the first time admitted that, in his previous statements, he had mistakenly underestimated the total cost of the build-out by half. Id. In an effort to address PPC's concern that the primary applicants had used this evidence to "sandbag" PPC, the Commission allowed PPC's rebuttal filing, but only to the limited extent that it pertained to the "newly discovered evidence." BN/SF, Decision No. 34 at 3-4. PPC's situation is clearly distinguishable from that of ENRS and EFM, who have made no claims that Applicants have improperly withheld any evidence during discovery or attempted to "sandbag" either ENRS or EFM.

additional factual information directly responsive to issues the primary applicants raised in their rebuttal. Id. at *2. The I.C.C. flatly rejected these requests to file additional evidence, restating the general rule that the I.C.C. "would not permit rebuttal filings from parties before [the Commission] 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." Id. at *4.

Tucson Electric Power Company (TEP) similarly argued in BN/SF, Decision No. 34, that it needed to submit rebuttal evidence to clarify the record on two particular technical points, arguing that there was no reason for treating differently parties filing requests for conditions and parties filing responsive applications. TEP relied on the fact that prior versions of the procedural schedule had provided parties seeking conditions with the opportunity to submit rebuttal filings, but the Commission had eliminated that opportunity in the final schedule.[6] The Commission also rejected this argument, noting that "the absence of a provision in the final procedural schedule allowing rebuttal filings by parties requesting conditions that are not in the form of responsive applications was not the result of Commission oversight." Id. at *1.[7]

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[6] This is an indication that, when the Board and its predecessor intended to give commenters the substantive right to file rebuttal evidence, they have done so explicitly, and the absence of any direct authorization, as in the present case, evidences the Board's intent that such parties do not have such rights.

[7] Similarly, Decision No. 6 makes clear that the Board in this case did not inadvertently overlook including a commenter's right to file rebuttal evidence.

Accordingly, Applicants have the right to close the record on the Primary Application. Commenters do not have the right to submit any additional evidence regarding the Primary Application, including evidence obtained through depositions. Thus, they have no right to discovery in support of such evidentiary submissions and the ALJ's decision should be reversed.

C. ENRS and EFM May Not Include New Evidence in Their February 23, 1998 Briefs to the Board

1. Briefs are not Appropriate Vehicles for Submitting New Evidentiary Material

ENRS argues that "all parties have the right to file briefs to the Board on February 23, 1998," as support for its position that it has the right to submit surrebuttal evidence and hence take further discovery. While Applicants agree that ENRS and all other parties in the proceeding have the right to submit a brief, the brief may not contain new evidence.

In UP/SP, the Board clarified the extent to which a non-applicant party may make evidentiary submissions in response to comments filed by another party. UP/SP, Decision No. 31 at 3. The Board made it clear that the briefs were to contain no additional evidence:

> [P]arties may file briefs . . . but these briefs *may not contain new evidence* in the proceeding. The purpose of the briefs is for parties to present legal arguments succinctly and to marshal previously filed evidence favorable to their position. Thus, parties that did not file inconsistent or responsive applications may not file rebuttal evidence concerning responses to their March 29 filings [October 21, 1997 filings in this case] which may be filed on April 29, 1996 [December 15, 1997 filings in this case]. Inappropriate evidentiary material will be stricken.

Id. (emphasis added). Accordingly, the February 23 briefs to be filed in this proceeding should not include any additional evidence, and thus ENRS' and EFM's discovery at this late stage is inappropriate.[8]

2. ENRS and EFM Can Comment on Applicants Rebuttal Without Introducing New Evidence

EFM argues that "the only way [to] argue to the Board on brief that [Applicants'] rebuttal should be disregarded" is to take further discovery in order "to dig beneath the surface" of what EFM calls "the superficial and generalized comments that

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[8] To the extent that ENRS and EFM attempt to distinguish their right to file a separate evidentiary rebuttal from their right to include new evidentiary material in their brief, such attempt is unavailing. The language cited above from Decision No. 6 would be rendered a nullity if it were read to permit commenters to file rebuttal evidence in their briefs.

EFM also attempts to draw the distinction between "rebuttal" evidence, which it claims it will not submit, and "impeachment" evidence, which EFM claims it has the right to submit in its brief. Discovery Conference, January 8, 1998 at 27 ("We're not seeking rebuttal evidence. We are seeking impeachment. We are seeking to test the validity of the witness' statement from the standpoint of possible impeachment of whether or not he has a basis for making those statements and those bases are credible.") The fact is, however, that this is a distinction without meaning, and one that has not been recognized in any of the applicable precedents. Impeachment attacks the credibility of the witness, not the substance of the opinions or the facts offered. EFM seeks to introduce evidence which has not heretofore been introduced into the record, in order to support its position. The February 23 briefs of all parties, including Applicants, are to be filed simultaneously. Thus, should either EFM or ENRS be permitted to introduce new evidence in their briefs, whether termed "impeachment" evidence or otherwise, Applicants' right to close the evidentiary record on the Primary Application would be denied.

It is difficult to conceive how ENRS, in particular, would use the information that it seeks unless it was planning on adducing additional rebuttal evidence. Perhaps ENRS will offer a witness or some other new evidence for the proposition that neither CN nor CP can effectively compete with CSX because of the rates that they improvidently agreed to in the Agreements. Clearly, this goes beyond mere impeachment.

they have made to find out if they have any support for it." Discovery Conference, January 8, 1998 at 115 (emphasis added). If, however, Applicants' argument is as superficial and generalized as EFM claims, that fact in itself is what should be argued in EFM's brief. EFM is free to argue that Applicants' rebuttal witnesses have offered insufficient or incomplete bases for their conclusions, without improperly offering new evidence into the proceeding and depriving Applicants of their right to close the record on the merits of their application. To permit ENRS and EFM to file additional evidence would mean that those parties and not Applicants would submit the final evidence on the Primary Application.

3. EFM's Reliance on UP/SP Decision No. 35 Is Misplaced

In its letter to the ALJ and in oral argument, EFM relied on Decision No. 35 in UP/SP for the proposition that it may now take discovery and include the new evidence it adduces in its February 23 brief to the Board. EFM Letter, January 5, 1998 at 2; Discovery Conference, January 8, 1998 at 110. EFM's reliance on Decision No. 35, however, is misplaced.

In that case, Kansas City Southern Railway Company (KCS), a commenting party, filed a motion requesting the Board, inter alia, to allow KCS to conduct discovery and submit evidence relating to a settlement agreement entered into by the Primary Applicants subsequent to the filing of KCS' comments in the case. In support of its interpretation of Decision No. 35, EFM states that "The Board [noted] that UP/SP [rebuttal] witnesses would be available for discovery . . . and that discovery information

relating to the rebuttal may be included in [the parties'] briefs," EFM letter, January 5, 1998 at 2, as support for the proposition that the Board has previously compelled discovery of the sort EFM seeks. EFM materially misdescribes Decision No. 35, however.

In fact, the Board carefully noted that the applicants in that case had voluntarily made their witnesses available to KCS for cross-examination by oral deposition to resolve material issues of disputed fact, and had voluntarily allowed KCS to include information gained at those depositions in its brief. UP/SP, Decision No. 35 at *2.

Indeed, the Board denied KCS' request for the Board to allow discovery. The Board in Decision No. 35 only approved the discovery that the applicants voluntarily agreed to produce. Contrary to EFM's concern that the Board would be incapable of assessing UP's evidence without assistance from KCS, the Board believed itself capable of evaluating the evidence without any further evidentiary submission by KCS. Id. at *3.

ENRS' and EFM's claim that the Board in UP/SP allowed parties to attach deposition transcripts to briefs for purposes of cross-examination does not support their argument that the parties in the present case are permitted to do so or have any right to depositions or other discovery in aid of such submissions. Indeed, important differences in the procedural schedules of the UP/SP case and the present one indicate that the Board intentionally rejected the notion of accepting deposition transcripts in this case. In UP/SP, Decision No. 6, the Board included the following "Notes" at the end of the procedural

schedule:

> Immediately upon each evidentiary filing, the filing party will place all documents relevant to the filing (other than documents that are privileged or otherwise protected from discovery) in a depository open to all parties, and will make its witnesses available for discovery depositions. Access to documents subject to protective order will be appropriately restricted. Parties seeking discovery depositions may proceed by agreement. Relevant excerpts of transcripts will be received in lieu of cross-examination, unless cross-examination is needed to resolve material issues of disputed fact. Discovery on responsive and inconsistent applications will begin immediately upon their filing. The Administrative Law Judge assigned to this proceeding will have the authority initially to resolve any discovery disputes.

UP/SP, Decision No. 6 at *7 (emphasis added). Thus, the Board in UP/SP explicitly permitted the submission of deposition transcripts when used for cross-examination, if needed to resolve material issues of disputed fact.

In the present case, the Board also included "Notes" at the end of the procedural schedule. Decision No. 6 at *9. The Board's language in Decision No. 6 of the present case is exactly the same as the language in the "Notes" to the procedural schedule in UP/SP, except that the sentence in the middle of the paragraph which reads, "Relevant excerpts of transcripts will be received in lieu of cross-examination . . .," does not appear. Id. The clear import of this omission is that the Board did not intend to receive excerpts of transcripts for purposes of cross-examination. Moreover, the UP/SP schedule decision contemplated receipt of deposition excerpts only if cross-examination were needed to resolve material issues of disputed fact. Decision 6

at 16. This language related to the narrow grounds on which an oral hearing might be required or appropriate.[9] Yet such hearings are rarely justified, and only upon a showing that there is some identifiable factual dispute that is so material that it needs to be resolved through cross-examination. Past practice and common sense indicate that a like showing must be made in order for any other party to depose a witness beyond the extent to which a responsive applicant is entitled to a discovery deposition at this stage. Neither ENRS nor ESM has made such a showing.

The Board has shown that when it intends to receive such submissions it provides for them explicitly. There is no indication in the present case that the Board inadvertently dropped the sentence which appears in the middle of the paragraph. Thus, ENRS' and EFM's contention that the Board's decision to accept deposition transcripts in UP/SP supports their right to do so in this case is incorrect.[10]

D. ENRS' and EFM's Requests Stand the Board's Procedural Schedule on its Head

As is clear from the above discussion, responsive and inconsistent applicants are given preferred status by the Board relative to non-applicant parties such as commenters. Responsive and inconsistent applicants alone, among non-primary applicant

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[9] The possibility of "an oral hearing to resolve issues of disputed fact" was recognized in the UP/SP schedule decision (Dec. 6 at 9), as it was in the similar schedule decision in BN/SF. Decision No. 10.

[10] Even to the extent that the omitted language from the UP/SP schedule was found to apply in this case, neither ENRS nor EFM have identified a "material issue of disputed fact" requiring cross-examination by them.

parties in the proceeding, are given the right to file rebuttal evidence. Consequently, responsive and inconsistent applicants are able to close the record on their applications, and thus have the last word on the merits of their case. The Board's procedural schedule, however, establishes a deadline for submission of rebuttal regarding responsive and inconsistent applications. In the instant case, the deadline for submission of rebuttal evidence on responsive and inconsistent applications is January 14, 1998.

Under ENRS' and EFM's theory, however, it is commenters and not responsive applicants who are given preferred status. ENRS' and EFM's apparent position is that, even though the Board explicitly gave responsive applicants the right to file rebuttal evidence, while at the same time imposing a deadline for the filing of such evidence, it intended that commenters also have the right to file rebuttal evidence in support of their comments and requests for conditions.[11] According to ENRS' and EFM's position, however, the commenters' right to file rebuttal is unconstrained by the kinds of deadlines, such as January 14, 1998, imposed on responsive applicants. Such a theory, which gives commenters preferred status over all applicants in the

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[11] ENRS and EFM do not specify how the Board manifested this alleged intent. EFM/ENRS noted before the ALJ the fact that the schedule set forth in Decision No. 2 here includes a parenthetical reference to "close of record" as of the oral argument. This cryptic, unexplained reference surely was not intended to overturn the settled and sensible practice of allowing applicants to close the record on their own applications. It is quite apparent that it indicates no more than that upon oral argument the evidentiary proceeding is concluded and ready for decision, thus triggering the new 90-day deadline for such a decision set forth in 49 U.S.C. §11325(c)(3).

case, stands the Board's procedural schedule on its head and ignores the Board's clear intent that applicants have the opportunity to close the evidentiary record on their applications.

Additionally, responsive applicants, who are permitted to take discovery subsequent to the Applicants' Rebuttal filing, are constrained in the scope of the discovery they may seek. In UP/CNW, Decision No. 17, the Board held that "there are limits on the type of evidence that is appropriate for rebuttal and thus there are also limits on the latitude for discovery." UP/CNW, Decision No. 17 at *2. In that case, Chicago, Central, and Pacific Railroad Company (CCP) filed a responsive application and filed evidence opposing the primary application. Subsequent to these filings, but prior to the filing of primary applicants' rebuttal, CCP sought discovery from primary applicants as to both its opposition to the primary application and its rebuttal in support of its responsive application. Primary applicants objected to CCP's discovery and the ALJ heard argument on CCP's motion to compel. The ALJ ruled that CCP could propound discovery but stated that CCP "should focus its discovery on the necessary rebuttal material that it must file [to its responsive application] according to the procedural schedule." UP/CNW, Decision No. 17 at *2.

Primary applicants subsequently provided discovery responses but objected to several requests. CCP consequently filed a second motion to compel alleging, inter alia, that primary applicants had instructed witnesses not to answer questions in depositions and had not responded to certain discovery requests.

The ALJ denied CCP's motion, holding that CCP's discovery would be limited to that appropriate for its rebuttal filing, and CCP appealed to the Board.

The Board upheld the ALJ's ruling that CCP's discovery was limited to the scope of its rebuttal filing. Id. at *25. The Board held that responsive applicants were limited in the scope of their rebuttal filing to "evidence rebutting only that portion of [Primary] Applicants' March 30, 1994 filing [the equivalent of the December 15 filing in this case] which was in reply to the responsive application." Id. at *24 (citing 49 C.F.R. 1112.6, which states that "[r]ebuttal statements shall be confined to issues raised in reply statements to which they are directed"). The Board stated that it expected "responsive applicants to confine their rebuttal materials to those within the proper scope of rebuttal." Id. at n.14. CCP was thus precluded from submitting rebuttal evidence in response to the primary applicants' arguments regarding CCP's initial evidence in opposition to the primary application, id. at n. 13, and their discovery requests were denied as being "outside the proper scope of discovery at this stage of the proceeding." Id. at *27.

The position of ENRS and EFM, however, stands in stark contrast to the Board's ruling in UP/CNW, Decision No. 17, limiting the scope of rebuttal and discovery at this stage of the proceeding. Neither ENRS nor EFM has submitted a responsive application for which they could file rebuttal evidence on January 14. Both ENRS and EFM acknowledge that the evidence that they wish to submit would relate to the Primary Application or to the Applicants' response to ENRS' and EFM's evidence in

opposition to the Primary Application. Yet the Board's ruling in UP/CNW, Decision No. 17, makes clear that any such evidentiary submission would be inappropriate even if undertaken by a responsive applicant. Similarly, discovery by a responsive applicant on matters related to the primary applicants' rebuttal filing would likewise be improper.

Neither ENRS nor EFM has indicated any reason why the scope of their discovery, as commenters, should be broader than that of a responsive applicant. Indeed, the Board clearly intended to distinguish the position of responsive and inconsistent applicants to that of commenters, by granting procedural preference to the former. Yet to allow ENRS and EFM the discovery they seek would turn that distinction upside-down. Thus, the proper scope of ENRS' and EFM's discovery should be similarly limited to the scope of their rebuttal. Since neither has a right to make any rebuttal filing whatsoever, under Board precedent, ENRS and EFM are prohibited from obtaining any discovery at this stage in the proceeding.

* * *

This is a complex case with over a 160 parties and it is imperative that the Board adhere to its original schedule for evidentiary submissions. Permitting ENRS and EFM, as well as other parties, to file evidence with their briefs is unfair to the Applicants and will overwhelm the Board with unnecessary evidentiary submissions on February 23. On these bases the decision of ALJ Leventhal should be overruled and ENRS' and EFM's requests for discovery at this late part of the proceeding should be denied, and the Board should be made clear that no party has

the right to file new evidence with their briefs.

Respectfully submitted,

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Counsel for CSX Corporation and CSX Transportation, Inc.

Dated: January 13, 1998

CERTIFICATE OF SERVICE

I, Michael T. Friedman, certify that on January 13, 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-137, CSX's Appeal From Decision of Presiding Administrative Law Judge Ordering Applicants To Make Rebuttal Witnesses Available For Deposition By Commenting Parties, 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, Suite 11F
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Washington, D.C. 20426

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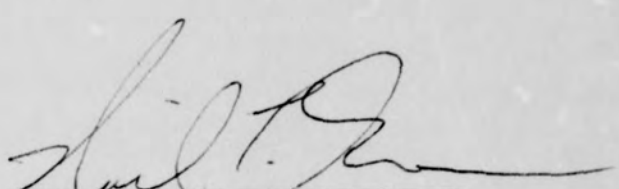

Michael T. Friedman

January 13, 1998

US OFFICE PRODUCTS

ENRS-12

BEFORE THE
SURFACE TRANSPORTATION BOARD

Finance Docket No. 33388

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

—CONTROL AND OPERATING LEASES/AGREEMENTS—

CONRAIL INC. AND CONSOLIDATED RAIL CORPORATION

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

CN-CSX

Interchange and Through Route Agreement

This Agreement ("Agreement") is entered into this 23rd day of October, 1997 between CSX Corporation ("CSXC") and CSX Transportation ("CSXT"), herein referred to collectively as "CSX" having its headquarters in Richmond, Virginia and Jacksonville, Florida, United States of America, on the one hand, and Canadian National Railway Company ("Canadian National") having its headquarters in the City of Montreal, Province of Quebec, Canada, on the other hand, concerning the proposed acquisition of control by CSX for the division of the use and operation of the rail lines and properties of Conrail Incorporated ("CRR") pursuant to an application to be filed by CSX with the Surface Transportation Board.

Whereas CSX and Canadian National have signed a Memorandum of Understanding ("MOU") on August 22, 1997 and have agreed to enter into a Definite Agreement in the matter set out in the said MOU;

NOW, THEREFORE, in consideration of their mutual promises and in the interest of preserving and promoting rail service competition, CSX and Canadian National agree as follows:

1. General Purpose

CSX and Canadian National are entering the herein commercial relationship with the view to making both railroads more market competitive in terms of service and freight rates and to regaining modal competitive market shares.

2. Rail Rates

2.1. The parties undertake to maintain existing CRR revenue requirements for joint line movements via the Buffalo and

Huntingdon gateways, destined to NYC points, or overhead movements via NYC gateways to roads other than NS, by adopting the following course of action:

2.2 Maintain Existing Conrail Revenue Requirements

2.2.1. Canadian National will provide to CSX a summary listing of all joint line rates [including those contained in Confidential Transportation Agreements] in effect as of August 22, 1997 between Canadian National and CRR for all traffic, excluding finished vehicles, auto parts and intermodal trailers and containers, moving between points in Canada and points located on that portion of CRR being acquired by CSX, including Shared Assets points served by CSX (hereinafter collectively referred to as "NYC Points"), such list to specify both Canadian National and CRR portions of the total rate on a per ton basis. The parties hereby acknowledge that Norfolk Southern Corporation ("NS") will also serve points located in the Shared Assets area and that nothing contained in this Agreement shall pertain to any rate making by NS or between NS and Canadian National, or involve current CN/CRR/NS agreements.

2.2.2. CSX and CN will retain an independent third party to develop a detailed list of all rates contained in the summary of rates. This detailed list will set forth the existing CN and CRR portions of the total rate ("Revenue Requirement") as established by contracts, tariffs or other price making mechanisms in effect on the effective date of the Memorandum of Understanding for movements via the Buffalo and Huntingdon gateways to specific NYC Points by customer, by origin/destination and by commodity. The existing CN and CRR Revenue Requirement will become the maximum CN and CSX Revenue Requirement for these rail movements. If the Revenue Requirements are currently contained in a confidential contract, the escalation provisions of that contract will continue in effect until the expiration of the contract.

2.2.3. The parties acknowledge that the rates can be adjusted by mutual agreement of the parties and therefore CSX and Canadian National agree to use reasonable commercial efforts to achieve rate adjustments based on prevailing market conditions, it being understood however, that:

2.2.3.1. the parties will not take any unilateral action to raise their revenue requirement above the revenue requirements in place on August 22, 1997; and

2.2.3.2. either party may reduce its revenue requirement without the consent of the other party.

2.2.3.3. the parties may eliminate, change or delete commercial refunds contained in pre-existing agreements which did not involve the other party, provided that such rate action does not subvert the spirit and intent of this agreement.

The parties will be permitted to pass through any increases or decreases in third-party absorbed switch or junction settlement charges that were contained in the CN or CRR revenue requirements in place on August 22, 1997.

2.2.4. For truck competitive movements between particular points in Canada and NYC points, between which particular points no joint Canadian National, CR or CSX rail movement occurred in 1996, ("Future Movements"), the post CSX/CRR merger Revenue Requirements will be established utilizing a set of standard rate "factors". For each such Future Movement, the rate factor will be equal to the then existing average rate per ton for the same product moving in a similar lane (for example, BEA to BEA over the same gateway ("Prevailing Rate")), and the Revenue Requirements for the new movement will be equal to the then existing average Revenue Requirements for such rate factor.

The parties agree to establish a mutually-satisfactory methodology for constructing CN average rate factors (as required by this agreement), given the fact that the BEA definition does not exist in Canada.

2.2.5. The maximum Revenue Requirement for Future Movements will adjust annually based on a mutually agreeable adjustment factor(s) which are reflective of relevant market rate activity.

2.2.6. CSX and Canadian National agree not to use surcharges to subvert the spirit and intent of the agreement, and each party

may reduce its Revenue Requirements either directly or through refunds.

2.2.7. Nothing in this agreement restricts the ability of either party to abandon or sell any portion of its system. In the case of sale, this agreement does not obligate the purchaser to assume responsibility for rates established under this agreement, although the parties may do so by mutual agreement.

2.3. Joint Marketing Initiatives

2.3.1. It is the intent of the parties to jointly pursue competitive opportunities, and to regain market share lost to trucks. As an initial step, each party hereby grants the other Independent Ratemaking Authority for Future Movements in the forest products (including paper) area, under which the originating carrier will have the authority to set the entire through rate for the movement from originating point to destination point.

2.3.2. If market conditions require the originating carrier to make a competitive response for Future Movements, the originating carrier will have the unilateral right to reduce the through rate. Should the originating carrier reduce the rate, the terminating carrier's Revenue Requirement , subject to the floor below, will also be reduced by the same percentage as the percentage reduction of the through rate.

2.3.3. This minimum Revenue Requirement will be set as follows:

- To capture Future Movements originating or terminating at NYC local points (ie, NYC points other than points in the shared asset areas or NYC-PRR common points) the minimum revenue requirement can be set at no less than of the Prevailing Rate;

- To capture Future Movements originating or terminating at NYC shared asset points and NYC-PRR common points, the minimum revenue requirement can be set at no less than of the Prevailing Rate;

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- Mutually acceptable equivalent arrangements will be established for traffic from NYC points to CN points in Canada;

- These reductions in the Prevailing Rate can only be used to generate additional traffic for CN-CSX joint-line routing (new business development), and cannot be used to divert volume from existing market-competitive routes (such as CN-CRR movements of the same commodities moving via other gateways). Prior to implementing these reduced rates, the originating carrier would be required to advise the terminating carrier of its intent.

It is the intent of the parties to jointly pursue the development of new distribution centers, designed to attract traffic from truck, vessel, or other railways. In each individual case, the parties agree to developing a joint-line rate consistent with the spirit of this agreement.

- The minimum Revenue Requirement will be adjusted annually based on a mutually agreeable factor(s) which are reflective of relevant market rate activity.

2.4. Expanded Marketing Initiatives for Future Movements

The parties agree that the Independent Ratemaking Authority they intend to use for Future Movements to increase their share of forest products business will be expanded and applied in two manners:

2.4.1. CSX and Canadian National agree to expand the Independent Ratemaking Authority utilized in forest products to cover all other commodities between points in Canada and NYC Points no later than June 30, 1998. The parties recognize that the prevailing rate, minimum revenue requirement, and the acceptable extent of independent rate-making authority may differ by commodity.

2.4.2. CSX and Canadian National agree to consider expanding geographic coverage of the Independent Ratemaking Authority to cover all historical CSX and Canadian National locations. This evaluation will commence following the first anniversary of the acquisition of Conrail by CSX.

3. Service Guarantees

Subject to market and competitive conditions, both parties agree to provide service at least equal to the existing service levels on traffic now interchanged between Canadian National and CRR, and to cooperate in achieving such future service improvements as may be required to maintain the competitiveness of such routes.

4. Terminal Opportunities

4.1. Buffalo Terminal Area

CSX and Canadian National believe that there are opportunities to provide traditional rail served customers with improved service and also to regain a significant amount of the business currently moving by truck between points in Canada and the Buffalo Terminal Area. Therefore, the parties will establish new streamlined service to their customers in the Buffalo Terminal. This will be accomplished through the following initiatives:

4.1.1. For the purpose of this clause 3.1, "CN Buffalo customers" are those industries on NYC Points within the Buffalo Terminal who are open by CRR to Canadian National as defined in Reciprocal Switch Tariff currently in effect.

4.1.2. The switch rate for CN Buffalo will be ("Minimum Volume").

4.1.3. For movements between points in Canada and CN Buffalo customers beyond the minimum volume, CSX will establish a revenue factor of per car. CSX will participate in the joint line movement as a line haul carrier, but with Canadian National bearing

4.1.4. The rate for Future Movements in Buffalo will be set by the rate setting mechanism of the agreement (standard rate factors).

4.1.5. The switch rate and revenue factor will be adjusted annually based on mutually agreeable factor(s) which are reflective of railroad costs.

MATERIAL REDACTED

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4.2. Seneca Yard

CSX will grant to Canadian National limited direct interchange access for CN trains from CP 437 in Buffalo to Seneca Yard, Station D, for direct interchange with the South Buffalo Railroad, via either (at CSX's discretion) Conrail's Chicago Line, or Conrail's Compromise Branch . The direct interchange is intended to improve service to the customers served from Seneca yard (primarily, Ford Motor) and generate new business to/from CN points in Canada currently moving via truck.

MATERIAL REDACTED

A definitive interchange access agreement will be negotiated by the parties no later than June 30, 1998.

4.3. Chicago

In an effort to create opportunities for enhanced operating arrangements in Chicago, Canadian National and CSX will pursue the following initiatives and will also consider Canadian National's continued use of IHB as such may be impacted by the following initiatives and other changes resulting from CSX's acquisition:

4.3.1. CSX may construct a cross-over north of Blue Island and a connection for parallel moves at Hayford, at CSX's expense, and operate up to three eastbound intermodal trains per day over CN's trackage from Hayford to Blue Island. This is conditional on a review of capacity related signaling costs, if any, on this approximately seven mile section.

4.3.2. CSX may construct a connection in the SW Quadrant at Thornton Junction, at CSX's expense, and operate up to one CSX intermodal train via CN in each direction between Thornton and Hayford via Blue Island. An additional one CSX intermodal train in each direction may be operated in this territory subject to the necessary extension of the Hayford Siding.

4.3.3. Train operations on these sections will be under the control of Canadian National.

4.3.4. The charge for these movements, along with other terms and conditions will be negotiated and included in trackage rights in the operating agreements.

4.3.5. CSX will agree to work with Canadian National to design and build, at Canadian National's expense and upon mutually agreeable conditions, a head-on connection into Markham by eliminating the automatic interlocking where the CSX Chicago Heights branch crosses the Canadian National, and arranging the alignments as necessary.

4.3.6. Canadian National will agree to work with CSX to study the feasibility of operating additional trains on Canadian National's track in Chicago and running CSX intermodal trains from Wellsboro, Indiana to Clearing/Bedford Park, Illinois under an appropriate operating arrangement. This assessment will be based on a satisfactory resolution of the following issues:

4.3.6.1. Construction, at CSX's expense, of connections at Wellsboro, for movements between Canadian National and CSX. These connections would facilitate both the Wellsboro trackage rights option (if Canadian National and CSX mutually agree to pursue this concept at a later date) and the possibility of CSX "overflow" rights on CN from Buffalo to Chicago, as proposed in earlier discussions;

4.3.6.2. That a thorough capacity analysis demonstrates to Canadian National's satisfaction, that the CSX trains would not negatively impact Canadian National's ability to offer consistent train service to its own customers, both present and future;

4.3.6.3. That CSX will fund all plant improvements required to support their trackage rights trains while providing the necessary service levels on Canadian National's train operations, providing the parties will negotiate terms crediting CSX for Canadian National's proportional use of the improvements;

4.3.6.4. That at CSX and Canadian National will consider commercial arrangements in the Intermodal area which would permit both companies to profit, within their own systems, from the premier nature of the integrated service route that is created by this agreement.

5. Term

This Agreement shall be effective upon execution for a term of five years, but either party will have the right to request the renewal thereof for additional periods of five years each. However, the parties may give consideration to a longer period for various elements of this Agreement.

Neither party shall be permitted to establish a rate for movements between CN and NYC points, either by tariff or confidential contract, that extends beyond the term of this agreement, without the consent of the other party.

5. Confidentiality

The parties hereby agree to keep this Agreement confidential and release thereof can be authorized only if both parties agree.

6. Exclusivity

This Agreement shall be binding upon and inure solely to the benefit of each party and their successor and permitted assignees, and is not intended to confer any rights or remedies upon any other person. Neither party may assign this Agreement without the consent of the other party, except that assignment without consent will be permitted to a controlled subsidiary or to a successor in the event of a merger, consolidation or sale of substantially all of a party's assets, provided that any such assignment shall not relieve the assigning party from the performance of its obligations under the Agreement.

7. Regulatory Process Considerations

7.1. Canadian National agrees that it will support CSX's acquisition of NYC points and will not seek any relief against CSX in the current Surface Transportation Board (STB) proceeding or elsewhere involving CSX's attempt to purchase CRR. Without CSX's prior consent, Canadian National will not seek any right of access to any NYC point for the term of this agreement, provided that the above

will not preclude Canadian National from entering into agreements with others for use or purchase of their properties rather than CSX-NYC points.

7.2. Notwithstanding the provisions of subsection 7.1 above, the parties acknowledge that (i) CN filed a request for access to Detroit Edison in Finance Docket No. 33388; (ii) consistent with previous advice to CN, CSX does not consent to such filing or access, and reserves its right to oppose any such access or filing before the STB and elsewhere; and (iii) that except for the aforesaid filing, CN will not seek any right of access to any NYC point and will comply with the provisions of subsection 7.1 hereof.

7.3. In the event that subsequent changes in regulation render section(s) of this agreement excessively burdensome on either party, the parties agree to re-open negotiations on that (those) section(s).

7.4. This agreement was negotiated in the expectation that CSX will consummate transactions for which the Primary Application in STB Finance Docket No. 33388 seeks approval, and this Agreement will have no continuing force or effect if the Surface Transportation Board does not authorize such transactions on terms acceptable to Primary Applicants.

CSX Corporation

Canadian National Railway Company

US OFFICE PRODUCTS

RATE MAKING AGREEMENT

This Rate Making Agreement (the "Agreement"), dated and effective as of October 20, 1997 is by and between CSX Transportation, Inc. ("CSXT") and CSX Intermodal, Inc. ("CSXI") on the one hand and Canadian Pacific Railway Company ("CPR"), Soo Line Railroad Company ("SOO"), Delaware and Hudson Railway Company ("DH") and St. Lawrence & Hudson Railway Company Limited ("STLH") on the other. CPR, SOO, STLH and DH are referred to jointly herein as "CPR".

WHEREAS, CSXT, in conjunction with other parties, has filed an application with the Surface Transportation Board (the "Board") in Finance Docket No. 33388 (the "Application") to acquire and/or control certain rail lines of Consolidated Rail Corporation ("Conrail"), as more specifically described in the aforementioned Application; and

WHEREAS, CPR has agreed to support the Application in exchange for the agreement of CPR, CSXT and CSXI to establish or to negotiate the establishment of revenue factors for certain joint line shipments as described herein; and

WHEREAS, the parties now desire to specify the terms of their agreement.

NOW THEREFORE, in view of the foregoing statements which form the factual basis of this Agreement and in view of other good and valuable consideration, the parties agree as follows:

1. **EFFECTIVE DATE AND TERM.**

A. This Agreement shall take effect on the date shown above, but, except for the Support of Application paragraph, the rights and obligations of the parties shall remain dormant until the first date (the "Initial Operating Date") that CSXT begins its own operations over the current Conrail lines that CSXT acquired pursuant to the Application. If the Initial Operating Date has not occurred on or before December 31, 1999, however, this Agreement shall automatically terminate.

B. Otherwise, this Agreement shall have an initial term of five (5) years after the Initial Operating Date provided that CPR may renew the Agreement for up to five (5) additional terms of five (5) years each, by giving CSXT/CSXI written notice of such renewal not less than ninety (90) days prior to the end of the existing term. This Agreement may be extended for additional term(s), if mutually agreeable to the parties, as specified in a written amendment to this Agreement.

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2. **SUPPORT OF APPLICATION**. CPR agrees to support by October 21, 1997 the acquisition of Conrail by NS and CSXT. CPR will not seek conditions against CSXT as described in CPR's Description of Anticipated Responsive Application, dated August 22, 1997 and filed with the Surface Transportation Board in Finance Docket No. 33388.

3. **PURPOSE OF AGREEMENT**. The purpose of this Agreement is to provide a framework for quickly establishing joint line rates between: (a) CSXT and/or CSXI, and (b) CPR, SOO, STLH and/or DH and is applicable only to shipments that are currently transported by truck, unless otherwise specified herein.

4. **ESTABLISHMENT OF JOINT RATES**.

A. The joint rates will be established by the railroad that originates the shipment and will be contained in a confidential railroad transportation contract.

B. The Minimum Revenue Factor(s), as defined herein, of the other railroads that participate in the joint line shipments are contained in this Agreement. The originating railroad may use the Minimum Revenue Factor(s) to establish the joint line rates without the necessity of further contact or concurrence of the other railroads unless special features such as guaranteed transit times, guaranteed car supply or assignment pools or other commitments over and above common carriage obligations are involved. In that event, the specific concurrence of each participating railroad is required.

C. All participating railroads will be included in the routing on each Bill of Lading. Each car, for car accounting purposes, shall be in the account of the railroad having possession of the car.

D. No railroad transportation contract established pursuant to this Agreement shall have a term that extends past the termination date of this Agreement.

E. All joint rates and Minimum Revenue Factors are stated in United States dollars.

F. The normal interchange point for shipments transported between the northeastern United States and eastern Canada shall be Albany, New York unless otherwise designated herein.

5. **MINIMUM REVENUE FACTORS**.

A. **MERCHANDISE SHIPMENTS**

The following minimum revenue factors ("Minimum Revenue Factors") are established:

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(i) For purposes of this Agreement, Merchandise Shipments are defined to include all rail carload shipments except the following: intermodal, coal, coke made from coal, iron ore and "set up" motor vehicles.

(ii) CSXT establishes an initial Minimum Revenue Factor of per carload on Merchandise Shipments that are interchanged by CPR/DH to CSXT at Albany, New York for delivery to or from New York City points in the Bronx or Queens or for points on Long Island that are interchanged to the New York & Atlantic at Fresh Pond Junction. Interchange between CSXT and CPR/DH is Albany, New York.

(iii) CPR/DH establishes an initial Minimum Revenue Factor of per carload for all Merchandise shipments that are interchanged from CSXT to DH at Albany, New York for delivery to points in the Montreal metropolitan area that are directly served by CPR or that are open to interswitching in Zone 1 and an initial Minimum Revenue Factor of for otherwise identical shipments that are open to interswitching in Zones 2, 3 and 4.

MATERIAL REDACTED

(iv) CSXT establishes an initial Minimum Revenue Factor of per carload for all Merchandise Shipments that are interchanged between CPR/DH and CSXT at Albany, New York and which originate or terminate on points on the Philadelphia Belt Line Railroad Company (the "PBL") in Philadelphia, Pennsylvania via a shared asset company ("SAC"), as defined in the Application, if the SAC is the lessee/operator of PBL. If the SAC is not the lessee/operator of PBL, the shipment will be interchanged between CSXT and PBL at Philadelphia.

MATERIAL REDACTED

(v) CSXT establishes an initial Minimum Revenue Factor that is identical to the Minimum Revenue Factor established in subsection (iv) above, except that the amount is per carload and the interchange point between CSXT (or the SAC) and DH is Philadelphia, Pennsylvania.

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(vi) CSXT establishes an initial Minimum Revenue Factor of per carload for Merchandise Shipments that are interchanged between CSXT and CPR/DH at Niagara Falls, New York or Buffalo, New York for transportation to and from all points on the CSXT lines acquired from Conrail in the Buffalo, New York metropolitan area that are open to reciprocal switching pursuant to CR Tariff 8001 on the day prior to the Initial Operating Date and which comply with all conditions of this subparagraph. Such Merchandise Shipments must also originate or terminate: (a) on CPR points in Canada that are not directly served by CSXT, as constituted on the effective date of this Agreement, or open to CSXT via interswitching, or (b) on SOO or DH points in the United States that are not directly served by CSXT, as constituted on the effective date of this Agreement, or open to CSXT via reciprocal switching. In addition, if in the immediately preceding calendar year, CPR/DH pays CSXT for not less than switch movements in the Buffalo, New York area pursuant to CR Tariff 8001, or its successor, as implemented by CSXT, then in the following calendar year, the aforementioned Minimum Revenue factor of per carload will apply for CPR Merchandise Shipments that are totally new or currently transported by rail, truck or water, so long as CSXT does not participate in the routing as a linehaul carrier. CPR must contact CSXT, and obtain CSXT's concurrence that CSXT does not currently participate as a linehaul carrier in such shipments, prior to implementing the Minimum Revenue Factor.

MATERIAL REDACTED

MATERIAL REDACTED

B. INTERMODAL SHIPMENTS

The Minimum Revenue Factors and other provisions for CSXI in transporting import/export marine containers between the Express Rail facility in New Jersey and Selkirk Yard, New York for transportation by CPR/DH to or from the Montreal/Toronto corridor are contained in the October 17, 1997 letter from Mr. Brian Purdy of CPR to Mr. Peter Rutski of CSXI, a copy of which is attached as Exhibit A. Notwithstanding the foregoing, references in Exhibit A to "CSX" are construed to mean "CSXI".

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CSX TRANSPORTATION

Christopher P. Jenkins
Vice President
Chemicals Marketing

500 Water Street - [illegible]
Jacksonville, FL [illegible]
(904) [illegible]
FAX (904) [illegible]

October 21, 1997

Mr. Lee I. Larson
AVP Marketing and Sales
CP Rail System
105 South 5th Street, Box 530
Minneapolis, MN 55440

Dear Lee:

This confirms our conversation this morning that some fine tuning is required to make Paragraph vi - Buffalo accurately reflect the circumstances at Buffalo.

MATERIAL REDACTED

1. The [redacted] car threshold should include both cars where CPR and affiliates purchase a reciprocal switch from CR as well as cars where CR participates as a line haul carrier. The [redacted] carload threshold will be adjusted once CPR 1997 actual volumes are determined.

2. Once the [redacted] car threshold is met, CSXT does not intend to restrict the line haul revenue factor against cars where CR is a line haul participant only between Niagara Falls and Buffalo. That is, the restriction is intended to apply to CR long haul line haul traffic, not to traffic defined as "line haul" moving only between Buffalo and Niagara Falls via CR.

3. Once traffic is diverted from truck to rail, it shall be subject to the [redacted] rate for all subsequent movements in subsequent years during the term of this agreement, subject to the escalation provisions of the agreement.

4. The [redacted] rate applies in all cases where traffic is diverted from truck.

MATERIAL REDACTED

Cc: Bill Hart
Steve Potter
Tom Schoenleben

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6. **INCREASES TO MINIMUM REVENUE FACTOR(S).**

A. The Minimum Revenue Factor(s) shall be increased once each year on each anniversary of the Initial Operating Date by the percentage increase, if any, in the Rail Cost Adjustment Factor, unadjusted for productivity (the "RCAF(u)") during the immediately preceding year. If there is a decrease or no increase in the RCAF(u), the Minimum Revenue Factor(s) will remain the same.

B. If the RCAF(u) is discontinued CSXT and CPR shall negotiate in good faith for a period of not less than thirty (30) days in an attempt to agree upon a substitute index that would most substantially contain the criteria used by the RCAF(u). If no agreement is reached, either party may refer the issue to the American Arbitration Association (the "AAA") for resolution pursuant to its commercial Arbitration Rules. Venue will be in Washington, DC unless otherwise mutually agreed. Each party will bear its own expenses and all fees and expenses of the AAA will be equally shared by the parties.

C. If any party's costs in providing transportation pursuant to this Agreement are increased by more than a total of twenty percent (20%) computed from the Initial Operating Date due to federal, state, provincial or local statutes, regulations or ordinances, excluding any such increases that are reflected in the RCAF(u), then notwithstanding the other provisions of this Agreement, that party is entitled to increases in the Minimum Revenue Factor(s) to reflect such increases. The parties shall negotiate in good faith for a period of not less than thirty (30) days in an attempt to agree upon an appropriate increase to the Minimum Revenue Factor(s). If no agreement is reached, either party may refer the issue to the AAA for resolution pursuant to the same procedures outlines in this paragraph.

D. If anytime after five (5) years the fixed divisions become unsatisfactory to either party and resolution cannot be reached, then either party may seek arbitration pursuant to Item 11 of this Agreement. The arbitrators will select a rate that puts both parties in a position most similar to the position each enjoyed when this Agreement was made and such rate shall remain in effect for the next five (5) year period. This Agreement cannot be arbitrated except on the five (5) year renewal anniversaries.

7. **CONFIDENTIALITY.** The provisions of this Agreement shall not be disclosed by either party, except to parent, subsidiary or affiliated companies or pursuant to an applicable court or regulatory order during the term of this Agreement. During the confidentiality period, any party may disclose the existence of this Agreement without disclosing the specific provisions.

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8. **DEFAULT**. Each party will provide written notice to the other parties in the event of an alleged default, specifying the nature of such default. The party against whom the alleged default is claimed shall have sixty (60) days within which to correct the default. If the default has not been corrected, or if the appropriate party has not acted with due diligence to correct a default that may still be continuing within that time, the non-defaulting party may take all legal steps (including but not limited to injunctive relief) to protect its interests.

9. **ASSIGNMENT AND SUCCESSORS**. This Agreement may not be assigned without the written consent of the other parties, except that the rights and obligations of CSXI may be assigned to CSXT upon notice. Notwithstanding the foregoing, this Agreement shall inure to the successors by merger of any of the parties.

10. **MISCELLANEOUS**.

A. This Agreement is the result of the mutual negotiation of the parties and shall not be construed against any party as the drafter.

B. If any provision of this Agreement is found to be void, illegal or otherwise unenforceable, the remaining provisions shall continue in full force and effect.

C. All notices issued between the parties must be in writing and sent via either: (i) 1st Class Mail; (ii) overnight express carriers; (iii) confirmed telefax, or (iv) other mutually agreeable method and sent to the other party at the addresses shown below or subsequent address supplied from time to time.

To CPR

To CSXT

CSX Transportation, Inc.
500 Water Street, J-880
Jacksonville, Florida 32202
Attn: Vice President-
Chemical Marketing

To CSXI

Vice President-Business
Planning
CSX Intermodal, Inc.
301 West Bay Street
Bell South Tower
Jacksonville, Florida 32202

11. **ARBITRATION**. CPR and CSXT and CSXI agree to submit to arbitration administered by the American Arbitration Association under its Commercial Arbitration Rules, any dispute, controversy, claim (except for matters left to the sole discretion of a party) arising out of this Agreement or the Exhibits to it. The

arbitrator(s) shall not have jurisdiction to award antitrust, punitive or any other damages other than actual damages and the arbitar's decision shall be given in accordance with any restrictions set out in this Agreement and the Exhibits to it. The decision of the arbitrator(s) shall be final and enforceable in any court having jurisdiction. Each party shall bear its own expenses of arbitration and fees or costs of arbitration shall be shared equally between CSXT/CSXI and CPR.

12. **ENTIRE UNDERSTANDING.** This Agreement represents the entire understanding of the parties and may not be waived except in writing or modified except by a written amendment. It has been executed by the duly authorized official of each party and shall be construed pursuant to the laws of the State of Florida.

CANADIAN PACIFIC RAILWAY COMPANY
SOO LINE RAILROAD COMPANY
DELAWARE AND HUDSON RAILWAY COMPANY
ST. LAWRENCE & HUDSON RAILWAY COMPANY LIMITED

By: _____
Title: EVP, Commercial

CSX TRANSPORTATION, INC.

By: _____
Title: VP Corporate Development

CSX INTERMODAL, INC.

By: _____
Title: _____

EXHIBIT A

904 633-1028

CANADIAN PACIFIC RAILWAY

Oct. 17, 1997

From: Brian Purdy, CPR, Monroe, CT

To: Mr. Peter A. Rutski
Vice President - Business Planning
CSXI
301 West Bay Street
Bell South Tower
Jacksonville, FL 32202
(Fax: 904-633-1020)

Dear Pete,

This refers to our phone conversations today concerning a joint CSX/CPR agreement covering import/export marine containers in the ExpressRail - Montreal/Toronto corridor.

This will confirm that CPR is agreeable to the compromise proposal for division of revenues that we discussed on the phone. The outline is as follows:

	LOADED CONTAINER	EMPTY CONTAINER
BASE VOLUME (Note 1)	MATERIAL REDACTED	
OVER BASE VOLUME (Note 2)		

MATERIAL REDACTED

Note 1: The "base" volume will be finalized once 1997 full year statistics are available. Currently we estimate this will be approximately loads and or containers empties).

CPR agrees to guarantee that CSX will receive LOADED container on base volumes during the first year of our joint service. The includes the ExpressRail lift.

MATERIAL REDACTED

Note 2: For traffic levels over and above base volumes, CSX agrees to accept a loaded division of LOADED container (including the ExpressRail lift).

CSX 69 HC
000109

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SUPPORTING INFORMATION

1) As stated in our fax message of Oct. 13, if at the end of the first year of the joint CSX/CPR service, should CSX determine that the cost of operation exceeds the agreed upon divisions, CPR would agree to negotiate in good faith increased divisions for CSX.

2) CSX's empty factor will be EMPTY CONTAINER on all empty containers moved.

MATERIAL REDAC

3) For reduced rate levels agreed to with various steamship lines, CSX will always receive its fixed divisions per the above outline. CPR will reduce its divisions on a case by case basis to get to the necessary rate levels.

4) Rate agreements (contract and exempt quotes), including divisions, will apply in both northbound and southbound directions.

5) Contracts with steamship lines will be signed by both CSX and CPR. Exempt quotes will have authorizations from both CSX and CPR.

6) CPR and CSX agree that transit times/service levels, to the extent that each can control, will not be less than current levels. Both railroads agree to work together to improve service, which includes the consideration of run through power and a dedicated equipment pool.

7) CSX operation will be on the "West Hudson" route between Express-Rail and Selkirk. CPR will handle between Selkirk and Montreal/Toronto, via the Rouses Point NY border crossing.

Pete, I trust the above is an accurate listing of the salient points of our agreement covering the movement of marine containers in the ExpressRail - Montreal/Toronto corridor. You can rest assured that we will do our part to ensure this is a mutually beneficial arrangement. Our agreement will be incorporated into the master agreement between CSX and CPR (which I understand Steve Potter is now working on with our officials).

Please let me know if you have any questions. As discussed, we would appreciate your confirmation and acceptance this afternoon.

Sincerely,

Brian Purdy
Mgr. Mktg. - U.S. East Coast
(Phone: 203-458-4435 Fax: 203-458-4437 Cellular: 201-406-9354)

CSX 69 HC
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US OFFICE PRODUCTS

EFM-10

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

EIGHTY FOUR MINING COMPANY, INC.'S THIRD SET OF INTERROGATORIES AND DOCUMENT REQUESTS TO APPLICANTS

Martin W. Bercovici
Arthur S. Garrett III
KELLER AND HECKMAN, LLP
1001 G Street, N.W.
Suite 500 West
Washington, D.C. 20001
Tel: (202) 434-4100
Fax: (202) 434-4646

Attorneys for Eighty Four Mining Company, Inc.

December 24, 1997

BEFORE THE
SURFACE TRANSPORTATION BOARD

FINANCE DOCKET NO. 33388

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

EIGHTY FOUR MINING COMPANY. INC.'S
THIRD SET OF INTERROGATORIES AND
DOCUMENT REQUESTS TO APPLICANTS

Pursuant to 49 C.F.R. Part 1114 and the Discovery Guidelines entered in this proceeding pursuant to Decision No. 10, served June 27, 1997 ("Discovery Guidelines"), Eighty Four Mining Company, Inc. ("EFM") directs the following interrogatories and document requests to CSX Corporation, CSX Transportation, Inc., Norfolk Southern Corporation, Norfolk Southern Railway Company, Conrail, Inc. and Consolidated Rail Corporation, collectively referred to as "Applicants."

DEFINITIONS

1. 'Applicants' 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.

2. 'CSX' means CSX Corporation, Inc. and 'CSXT' means CSX Transportation, Inc.

3. 'NS' means Norfolk Southern Corporation.

4. 'Conrail' means the Consolidated Rail Corporation.

5. 'STB' means the Department of Transportation's Surface Transportation Board and any predecessor or successor agency or department charged by Congress with authority over railroad mergers and combinations.

6. The 'Pittsburgh Seam' means the belt of coal mines and coal markets located in that geographical area south of Pittsburgh, Pennsylvania, along the western side of the Monongahela River to and into West Virginia. The Pittsburgh Seam extends from southwestern Pennsylvania through the West Virginia panhandle into Ohio.

7. 'Application' means the application that CSX, NS, and Conrail filed with the STB on June 23, 1997, seeking STB approval for CSX and NS to acquire control of Conrail.

8. 'Competition' includes both intramodal and intermodal competition and, where applicable, includes source competition.

9. 'Describe,' when used in relation to a discussion, meeting or other communication, means to identify the participants, the date or time period when the communication took place, the location of the participants at the time of the communication and a detailed summary of the content of the communication.

10. 'Document' means any writing or other compilation of information, whether printed, typed, handwritten, recorded, or produced or reproduced by any other process, including: intracompany communications; electronic mail; correspondence; telegrams; memoranda, contracts; instruments; studies; projections; forecasts; summaries, notes, or records of conversations or interviews; minutes, summaries, notes, or records of conferences or meetings; records or reports of negotiations; diaries; calendars; photographs; maps; tape recordings;

computer tapes; computer disks; other computer storage devices; computer programs; computer printouts; models; statistical statements; graphs; charts; diagrams; plans; drawings; brochures; pamphlets; news articles; reports; . advertisements; circulars; trade letters; press releases; invoices; receipts; financial statements; accounting records; and workpapers and worksheets. Further, the term 'document' includes:

a. both basic records and summaries of such records (including computer runs);

b. both original versions and copies that differ in any respect from original versions, including notes; and

c. both documents in the possession, custody, or control of Applicants and documents in the possession, custody, or control of consultants or others who have assisted Applicants in connection with the Transaction.

11. 'Identify,'

a. when used in relation to an individual, means to state the name, address, and home and business telephone number of the individual, the job title or position and the employer of the individual at the time of the activity inquired of, and the last-known position and employer of the individual;

b. when used in relation to a corporation, partnership, or other entity, means to state the name of the entity and the address and telephone number of its principal place of business;

c. when used in relation to a document, means to:

(1) state the type of document (e.g., letter, memorandum, report, chart);

(2) identify the author, each addressee, and each recipient; and

(3) state the number of pages, title, and date of the document;

d. when used in relation to an oral communication or statement, means to:

(1) identify the person making the communication or statement and the person, persons, or entity to whom the communication or statement was made;

(2) state the date and place of the communication or statement;

(3) describe in detail the contents of the communication or statement; and

(4) identify all documents that refer to, relate to or evidence the communication or statement;

e. when used in any other context means to describe or explain.

12. 'Including' means including without limitation.

13. 'Person' means an individual, company, partnership, or other entity of any kind.

14. 'Provide' (except where the word is used with respect to providing service or equipment) or 'describe' means to supply a complete narrative response.

15. 'Rates' include contract rates and tariff rates.

16. 'Relate to' and 'relating to' have the broadest meaning according to them and include but are not limited to the following: directly or indirectly describing, setting forth, discussing, commenting upon, analyzing, supporting, contradicting, referring to, constituting, concerning or connected in any way with the subject in question or any part thereof.

17. 'Shipper' means a user of rail services, including a consignor, a consignee, or a receiver.

18. '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.

19. References to railroads, shippers, and other companies (including Applicants) include: parent companies; subsidiaries; controlled, affiliated, and predecessor firms; divisions; subdivisions; components; units; instrumentalities; partnerships; and joint ventures.

20. Unless otherwise specified, all uses of the conjunctive include the disjunctive and vice versa, and words in the singular include the plural and vice versa.

INSTRUCTIONS

1. Unless otherwise specified, these discovery requests cover the period beginning January 1, 1994, and ending with the date of response.

2. If Applicants have information that would permit a partial answer to any interrogatory, but they would have to conduct a special study to obtain information necessary to provide a more complete response to that interrogatory, and if the burden of conducting such special study would be greater for Applicants than for EFM, then:

a. state that fact;

b. provide the partial answer that may be made with information available to Applicant;

c. identify such business records, or any compilation, abstract, or summary based thereon, as will permit EFM to derive or ascertain a more complete answer; and

d. as provided in 49 C.F.R. § 1114.26(b), produce such business records, or any compilation, abstract, or summary based thereon, as will permit EFM to derive or ascertain a more complete answer.

3. All documents responsive to a document request should be produced, including each copy of an original that differs in any way from the original, including, but not limited to, differences caused by markings on, or other additions to, such copy or deletions of parts of the original.

4. If a document responsive to a particular document request is known to have been in existence but no longer exists, state the circumstances under which it ceased to exist, and identify all persons having knowledge of the contents of such documents.

5. If the information sought in a particular interrogatory is contained in existing documents, those documents may be specifically identified, and pursuant to 49 C.F.R. § 1114.26(b), Applicants may produce legible, complete and exact copies thereof so long as the original documents are retained and will be made available if requested; however, the documents shall be produced within the fifteen-day time period provided for responding to these interrogatories and shall be identified as being responsive to that particular interrogatory. In such case, the copies should be sent by expedited delivery to the undersigned attorneys. EFM will pay all reasonable costs for duplication and expedited delivery of documents to its attorneys.

6. If Applicants' reply to any interrogatory includes a reference to the Application filed in this proceeding, such response shall specify the volume(s) and exact page number(s) of the Application where the information is contained.

7. If any information or document is withheld on the ground that it is privileged or otherwise not discoverable,

a. identify the information or document (in the manner provided in Definition 12 *supra); and*

b. state the basis for the claim that it is privi' ged or otherwise not discoverable.

8. 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.

9. In responding to any request for data regarding intermodal traffic, indicate separately data for trailers and for containers.

10. If any Applicant knows or later learns that its response to any interrogatory is incorrect, it is under a duty seasonably to correct that response. Pursuant to 49 C.F.R. § 1114.29, Applicants are under a duty seasonably to supplement their responses with respect to any questions directly addressed to the identity and locations of persons having knowledge of discoverable matters.

11. If Applicants have any questions or require any clarification concerning any interrogatory or document production request, please contact undersigned counsel to discuss and resolve any such issue.

12. For each interrogatory, identify the individual providing the responsive information, including company affiliation and job title.

INTERROGATORIES

1. For locations which post-transaction will be exclusively served by CSX, describe how NS intends to "pursue [] business to locations now on Conrail that Mine 84 currently serves" (Fox RVS at 4), including:

(i) if NS intends to offer CSX joint-line arrangements, the point of interchange and the formula or basis for division of revenue;

(ii) if NS intends to offer interchange via reciprocal switch, the switching fee;

(iii) for any other arrangement NS intends to offer to CSX, the nature of and financial basis for the arrangement; and

(iv) the means by which NS will endeavor to assure that arrangements by which Mine 84 may continue to obtain access to CSX-served locations are competitive with single-line movements by CSX from former Monongahela Railway-served coal mines.

2. Identify the anticipated "new markets for Mine 84 coal through the expanded single-line reach of the NS system" (Fox RVS at 4), including:

(i) the coal consuming customer at each location;

(ii) the route mile distance from Mine 84 to each location; and

(iii) the current coal source for each location, including mine, mine operator, quantity, heat content, sulphur content and distance from said existing coal source to each coal delivery or consumption point.

3. With regard to the expectation that "the predominance at jointly-served producers in the Monongahela region will tend to set the marketplace for that coal" and the continuing explanation that "it is not unreasonable to conclude that rates realized by EFM will be affected by the pressure of market forces established by the railroads' rates from jointly-served mines," (Fox RVS at 4-5):

(i) Is it NS' contention that transportation for coal from Mine 84 will be priced competitively with coal from the jointly-served mines, or that transportation for coal from Mine 84 may be priced competitively with the coal from jointly-served mines?

(ii) If the answer to Interrogatory 3(i) is that the transportation for coal from Mine 84 will be priced competitively with the coal from the jointly-served mines, what assurance does NS offer to Mine 84 and to the Board that said intent will be carried out, both by present and future managers responsible for coal transportation marketing by NS?

(iii) Please describe all experience of NS bearing on the "expectation" and the "not unreasonable conclusion" that transportation pricing for Mine 84 coal will be affected by the "pressure of market forces established by the railroads' rates from jointly-served mines," including identification of other markets where all but one producer/shipper are served by two or

more rail carriers, the rates offered by NS to the shipper which is served exclusively by NS, and the NS rates offered to and the rates implemented for shippers or production points which are served by NS and at least one other railroad.

4. 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), 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 such 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.

5. With regard to the metallurgical coal markets and the ability of Mine 84 through NS service "to participate in supply blends and product packaging with other NS-served coal producers," (Fox RVS at 6):

(i) Identify all metallurgical coal customers served by NS;

(ii) For each party identified in Interrogatory 5(i) above, identify each of the origin mines from which coal is shipped to those metallurgical coal

markets, the volume from each mine for 1996, and the sulphur content of the coal from each of those mines; and

(iii) For NS provided blending services, including blending of coals for export, state the product specifications for coal blended for the metallurgical markets

6. With regard to the "competitive advantage post-Transaction by virtue of the fact that EFM is closer physically to virtually all of the coal markets on the new NS system than the mines on the former Monongahela Railway," (Fox RVS at 6-7):

(i) State whether the "competitive advantage" applicable to coal markets to be acquired from Conrail is any different post-transaction than pre-transaction;

(ii) If the response to Interrogatory 6(I) is in the affirmative, state how the "competitive advantage" on the new NS system is different from the competitive advantage or position of Mine 84 on the pre-transaction Conrail with regard to each power plant, lake destination (Sandusky and Ashtabula) and ocean destination (Baltimore and Lambert's Point), including pre- and post-transaction routings;

(iii) For each destination for which EFM is asserted to be closer to the coal market post-transaction than pre-transaction, state the distance by which EFM is closer, and the post-transaction total route miles; and

(iv) Explain whether the term "rate district" in Fox RVS at pages 6-7 is utilized in the same manner as the term "rate district" is utilized in Fox

RVS at pages 4-5. If the use of the terms is not synonymous, explain the difference.

7. Explain how NS intends to establish "mutually satisfactory agreements that permit the economical movement of coal through joint-line service" with CSX (Fox RVS at 7), taking into account that CSX would serve mines on the former Monongahela Railway that produce coal comparable to, and directly competitive with, the coal produced by EFM.

8. With regard to the "some 20.6 million tons of interchanged utility and metallurgical coal traffic" handled by NS in 1996 (Fox RVS at 7):

(i) State the quantity of Pittsburgh Seam coal interchanged with Conrail, and state each destination, and the volume and origin location and mine for each destination receiving such coal handled via NS;

(ii) For each NS-served destination included within the above-quoted statement, identify the destination location, the customer, the origin of the coal to each customer, the volume for each customer from each origin, the origin carrier, the route miles, and the heat content and sulphur content characteristics of the coal;

(iii) For each NS-served origin included within the above-quoted statement, state the origin, the mine operator, each customer name and location, the volume, the destination carrier, the route miles, and the heat and sulphur content characteristics for each origin;

(iv) For each destination identified in Interrogatory 8(ii) above, identify each mine on the NS system producing coal of like heat and sulphur content

characteristics as the coal being transported in interline service to that destination, and state the route miles between each said mine and each such destination location; and

(v) For each origin identified in Interrogatory 8(iii) above, identify each mine served by the destination carrier producing a coal of like heat and sulphur content characteristics as the coal for which NS serves as the origin carrier, and provide route miles for any identified mines and the destination.

DOCUMENT PRODUCTION REQUESTS

1. Provide the agreements with the Canadian Pacific Rail System and Guilford Transportation relating to the handling of traffic between Binghamton and Albany, New York (Mohan RVS at 73).

2. Provide all documents setting forth specifications for metallurgical coal used by NS in blending coal for export or for open market domestic sales.

3. Provide all studies or other documents which support the statement that "the level of coal traffic moving between the current NS territory and the future NS portion of Conrail is expected to rise to even greater levels in later years" (Fox RVS at 8).

Respectfully submitted,

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Washington, D.C. 20001
Tel: (202) 434-4100
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Attorneys for Eighty Four Mining Company, Inc.

December 24, 1997

CERTIFICATE OF SERVICE

I hereby certify that Eighty Four Mining Company, Inc.'s foregoing Third Set of Interrogatories and Document Requests to Applicants, was served this 24th day of December, 1997, by hand delivery upon counsel for the Applicants:

Drew A. Harker, Esquire
Jodi B. Danis, Esquire
Christopher P. Datz, Esquire
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David H. Coburn, Esquire
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Honorable Jacob Leventhal
Administrative Law Judge
Federal Energy Regulatory Commission
Office of Hearings, Suite 11F
888 First Street, NE
Washington, DC 20426

and, by first-class mail, postage prepaid, upon the Restricted Service List.

Martin W. Bercovici

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cc: CSX
Railroad

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December 24, 1997

Richard A. Allen, Esquire
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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; STB Finance Docket No. 33388

Gentlemen:

In accordance with paragraph 17 of the Discovery Guidelines, we would like to arrange for the deposition of John William Fo[illegible]r., at a mutually convenient time the week of January 12 or January 19, 1998, to discuss his reb[illegible]ttal verified statement served December 15, 1997.

Contemporaneously, we are serving interrogatories and document production requests related principally to Mr. Fox's rebuttal verified statement. Based upon the responses to the interrogatories, we may be in a position to limit the deposition of Mr. Fox.

Please give me a call, at your earliest convenience, to discuss the scheduling of Mr. Fox's deposition.

Very truly yours,

Martin W. Bercovici

cc: Restricted Service List

US OFFICE PRODUCTS

CSX/NS-183

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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James L. Howe III
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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

US OFFICE PRODUCTS

CSX/NS-186

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' INITIAL OBJECTIONS TO EIGHTY FOUR MINING COMPANY, INC.'S THIRD SET OF INTERROGATORIES AND DOCUMENT REQUESTS TO APPLICANTS

Applicants[1/] hereby submit their initial objections to Eighty Four Mining Company, Inc.'s ("EFM") Third Set of Interrogatories and Document Requests to Applicants (EFM-10).

These initial objections are filed pursuant to Paragraph 16 of the Discovery Guidelines adopted by Decision No. 10, served June 27, 1997, which provides 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 that it will be providing no affirmative response. . . ." Applicants reserve the right to answer or object to each and every discovery request, definition and instruction set forth in EFM-10 within the time frame set forth in Paragraph 16.

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").

On October 21, 1997, EFM filed its Comments and Requests for Conditions (EFM-7). In that filing, EFM requested conditions based on allegations that: 1) all of EFM's competing mine operators would be receiving increased rail transportation options while EFM would not; and 2) EFM would not have single-line access to utility plants and industrial customers currently on Conrail that would be served, post-transaction, by CSX.

EFM had a full, fair and adequate opportunity to serve discovery and participate in the depositions of Applicants' witnesses during the initial discovery period (June 23, 1997 through October 21, 1997) in this proceeding, and in fact did so. Subsequent to the filing of Applicants' rebuttal, however, EFM served EFM-10, more than two dozen discovery requests (including subparts). These requests attempt to explore issues raised by two rebuttal witnesses (John William Fox, Jr. and D. Michael Mohan) in their rebuttal verified statements submitted with the Applicants' December 15, 1997 comments. Applicants voluntarily have offered to make both Mr. Fox and Mr. Mohan available to EFM and others for cross-examination concerning their rebuttal verified statements, and in fact have already scheduled for deposition at EFM's request the cross-examination deposition of Mr. Fox for January 16, 1998.

Under the procedural schedule governing this proceeding, however, EFM does not have the right to make any further evidentiary filings. Although past STB and ICC practice would permit EFM to cross-examined Applicants' offered rebuttal witnesses in such depositions, and to cite the resulting testimony in its February 23, 1998, brief, such past practice does not permit EFM discovery. Cf. Union Pacific Corp., et al. -- Control and Merger -- Southern Pacific Rail Corp., et al., Finance Docket No. 32760, Decision No. 35,

served May 9, 1996 (denying Kansas City Southern written discovery concerning applicants' settlement with the Chemical Manufacturers Association which was discussed by applicants' offered rebuttal witnesses; noting that KCS could participate in the deposition of such rebuttal witnesses).

Respectfully submitted,

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Counsel for Conrail Inc. and Consolidated Rail Corporation

Dated: January 2, 1998

CERTIFICATE OF SERVICE

I, John V. Edwards, certify that on January 2, 1998, I caused to be served by facsimile service a true and correct copy of the foregoing CSX/NS-186, Applicants' Initial Objections to Eighty Four Mining Company, Inc.'s First Set of Interrogatories and Documents Requests to Applicants (EFM-10) on all parties that have submitted to the Applicants a Request to be Placed on the Restricted Service List in STB Finance Docket No. 33388.

John V. Edwards

Dated: January 2, 1998

US OFFICE PRODUCTS

CSX IFT
cc CSX
✓ Hitchcock

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

ATTORNEYS AND COUNSELORS AT LAW
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OFFICE: (202) 371-9500

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January 2, 1998

VIA TELECOPY

Honorable Jacob Leventhal
Administrative Law Judge
Federal Energy Regulatory Commission
Washington, DC 20426

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

Dear Judge Leventhal:

On behalf of our client, the Erie-Niagara Rail Steering Committee ("ENRS"), this letter is to advise your honor and those parties to the above proceeding that are on the restricted service list that we intend to present a discovery dispute for resolution at the discovery conference already scheduled for January 8, 1998. The dispute involves the Applicants' initial objections to ENRS' Third Set of Requests for Production of Documents (ENRS-12, copy attached). The objections (which are contained in CSX/NS-183, copy attached) are similar, but not identical to those raised in Applicants' objections to a request by the State of New York ("NYS") for the same documents. The State filed today a motion to compel the production of those documents (NYS-23), and requested that argument on the motion be heard on January 8.

These documents were the subject of an earlier discovery conference before your honor on November 25, 1998, with the results stated in the State's motion, at 2-3. You will recall that the two documents involved are agreements between CSX, on the one hand, and separately with Canadian National ("CN") and Canadian Pacific ("CP"), on the other, that induced CN and CP to cease active participation in this proceeding. They were executed too late to be addressed in the ENRS Comments to the Board on October 21, 1997.

However, 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 in response to your honor's prior ruling,

Version 1/8

CSX 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.

Any concerns about the commercial sensitivity of these terms can be resolved by designating these terms as "Highly Confidential" in accordance with the protective order prepared by Applicants and adopted by the Board. Relevant facts cannot and should not be concealed from the parties and the Board claiming they are "commercially sensitive."

Finally, Applicants' contention that ENRS is not entitled to further discovery because it does not have a right to submit further evidentiary filings is incorrect. Such evidentiary filings are a regular part of the practice before the Board in rail merger proceedings. All parties have the right to file briefs to the Board on February 23, 1998. *Cf.* Decision No. 60, served Dec. 29, 1997. As in previous merger proceedings where depositions were conducted in lieu of oral hearings, parties filing briefs have the right to include, and have included, discovery materials and other evidentiary materials in those briefs to the Board. For example, in the recent UP/SP proceeding, Finance Docket No. 32760, *Union Pacific Corp., et al — Control and Merger — Southern Pacific Rail Corp., et al.* ("*UP/SP*"), both UP/SP and opposing parties included deposition transcripts (including depositions conducted *after* the filing of the applicants' rebuttal) with their briefs. *See, e.g.*, Applicants Brief, UP/SP-260, and Brief of The Dow Chemical Company, DOW-23. In addition, the applicants in that proceeding filed evidentiary material even after the filing of the briefs. UP/SP-266. The Board not only accepted such filings, it affirmatively relied on them in its decision. *UP/SP*, Decision 44 at 145, n. 177.

Sincerely yours,

Frederic L. Wood

FREDERIC L. WOOD

cc: All parties on Restricted Service List (Letter only)

E-mail: r.wood@dcwm.com

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January 5, 1998

The Honorable Jacob Leventhal
Administrative Law Judge
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888 First Street, NE, Suite 11F
Washington, DC 20426

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; STB Finance Docket No. 33388; REQUEST OF EIGHTY-FOUR MINING COMPANY FOR DISCOVERY CONFERENCE**

Dear Judge Leventhal:

The purpose of this letter is to confirm my conversation of this date with Jennifer Schmidt of your office scheduling a discovery conference at 9:30 a.m. on Thursday, January 8, for the purpose of considering Eighty-Four Mining Company's (EFM) request to compel applicants to respond to EFM's Third Set of Interrogatories. In accordance with Discovery Guideline No. 18 concerning Resolution of Disputes, this letter provides notice of the discovery in dispute.

Following receipt and review of applicants' rebuttal filing submitted December 15, 1997, running to seven volumes of approximately 4,700 pages in length, EFM propounded interrogatories and document production requests to applicants addressing, with specificity, the rebuttal testimony directed at the comments of Eighty-Four Mining Company. *See* EFM-10 (December 24, 1997.) On January 2, 1998, applicants served objections to EFM's interrogatories and document production requests. While acknowledging that EFM's discovery requests "attempt to explore issues raised by two rebuttal witnesses (John William Fox, Jr. and D. Michael Mohan) in their rebuttal verified statements submitted with the Applicants' December 15, 1997 comments," *see* CSX/NS-186 at p. 2 (January 2, 1998), applicants are stonewalling and refusing to provide responses to the written interrogatories and document production requests. In lieu of responding to the written discovery and document requests, applicants state they "voluntarily have offered to make both Mr. Fox and Mr. Mohan available to EFM and others for cross examination concerning their rebuttal verified statements..." Applicants allege that "past STB and

ICC practice would permit EFM to cross examined (sic) Applicants' offered rebuttal witnesses in such depositions, and to cite the resulting testimony in its February 23, 1998, brief," citing to Decision No. 35 of the UP/SP merger proceeding; and they argue that "such past practice does not permit EFM discovery." Id.

Applicants attempt to draw a distinction between written interrogatories and document production requests on the one hand and deposition testimony on the other, which distinction is without merit. Such a distinction is not founded in either the Discovery Guidelines governing this proceeding (Decision Nos. 10, 16 and 20), the Board's Discovery Rules (49 C.F.R. Part 1114) or in any applicable precedent.

Applicants' distinction between "discovery" and "depositions" is non-sensical. Depositions, interrogatories and document production requests all are tools of discovery, as clearly evidenced by the Board's Discovery Rules. *See* 49 C.F.R. § 1114.21-1114.30. The Board's rules specifically state that "All discovery procedures may be used by parties without filing a petition and obtaining prior Board approval," and "methods of discovery may be used in any sequence and the fact that a party is conducting discovery, whether by deposition or otherwise, should not operate to delay any party's discovery." 49 C.F.R. § 1114.21(b) and (d).

Decision No. 35 in the UP/SP merger proceeding has no relevance whatsoever to the issue of EFM's right to secure responses to written interrogatories and to the production of documents. Decision No. 35 did not deal with specific discovery requested by the Kansas City Southern Railway. Rather, KCS had requested the Board either to require applicants to amend the primary application "or, alternatively, that we allow parties to conduct discovery and submit evidence relating to the CMA settlement agreement." Union Pacific Corporation, et al. — Control and Merger — Southern Pacific Rail Corporation, et al., F.D. No. 32760, Decision No. 35 at p. 3 (May 9, 1996). In effect, KCS was seeking modification of the procedural schedule, not to compel responses to interrogatories or document production requests specifically addressed to the rebuttal verified statements. In denying the request to modify the procedural schedule, the Board noted that "KCS has made no specific showing of what additional information it intends to uncover in discovery that would be material or relevant to this proceeding." Id. The Board went on to note that UP/SP witnesses would be available for discovery (which effectively complied with the KCS request to conduct discovery) and that discovery information relating to the rebuttal may be included in the briefs. The Commission thus concluded that its "decision does not preclude additional information on the CMA settlement agreement from being filed." Id. There is nothing in the text of Decision No. 35 which serves to elevate deposition discovery over written and documentary discovery, and to approve the use of one while disapproving the use of the other discovery techniques as a means of testing the rebuttal testimony of applicants' witnesses.

Also, contradicting applicants' position that past ICC practice limits discovery tools is the ICC's Decision No. 17 in the UP/CNW merger proceeding, Finance Docket No. 32133 (served July 11, 1994), which decision is cited by applicants in initial objections to document production

requests of both the Erie-Niagara Rail Steering Committee and the State of New York, CSX/NS-183 and 184 (December 31, 1997). In the UP/CNW case, the Chicago, Central, and Pacific Railroad Company (CC&P), which did not serve discovery prior to the filing of comments and responsive applications, served discovery requests on applicants subsequent to the filing of its responsive application. In response to a motion to compel, the ICC's Chief Administrative Law Judge Cross granted the CC&P motion to compel; this decision was not appealed, and applicants in that case provided discovery responses. *See* Union Pacific Corporation, et al. — Control — Chicago and Northwestern Transp. Co., et al., F.D. No. 32133, Decision No. 17 (July 11, 1994), 1994 WL 323928 (I.C.C.), at pp. 2 and 9.[1/] Accordingly, agency precedent is that discovery in the circumstances sought by EFM is available.

The discovery sought by EFM, admitted by applicants to be focused upon the rebuttal verified statements, is necessary in order that EFM can address the rebuttal arguments of applicants in its brief. The information required is more appropriate to written response than to deposition. In any event, it is EFM's choice, not subject to the control of applicants, as to the nature and sequence of the use of the various discovery tools in an effort to test the statements of applicants' witnesses.

Copies of the discovery requests, applicants' initial objections, and the decisions cited above are enclosed herewith for your convenient reference.

Respectfully submitted,

Martin W. Bercovici

Enclosures

cc (w/out enclosure): Drew A. Harker, Esquire (by facsimile)
David H. Coburn, Esquire (by facsimile)
John V. Edwards, Esquire (by facsimile)
Gerald P. Norton, Esquire (by facsimile)
All Parties to the Restricted Service List (by facsimile)

[1/] There were disputes over certain specific discovery requests, and those were subject to a further motion to compel which were denied by the Chief ALJ. The ALJ's decision was sustained by the Commission, based upon those requests being unrelated to applicants' rebuttal testimony and therefore outside the scope of relevance and proper inquiry at the given stage of the proceeding.

US OFFICE PRODUCTS

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' OPPOSITION TO THE STATE OF NEW YORK'S, ERIE-NIAGARA RAIL STEERING COMMITTEE'S AND EIGHTY-FOUR MINING COMPANY, INC.'S REQUESTS TO COMPEL PRODUCTION OF DISCOVERY

Applicants[1] hereby reply to the January 2, 1998 requests of The State of New York (NYS) and the Erie-Niagara Rail Steering Committee (ENRS), and the January 5, 1998 request of Eighty-Four Mining Company, Inc. (EFM) to compel production of discovery from Applicants. NYS and ENRS seek production of unredacted versions of (a) the CN/CSX Settlement Agreement, entitled "CN-CSX Interchange and Through Route Agreement, and (b) the CP/CSX Settlement Agreement, entitled "Rate Making Agreement." For its part, EFM has submitted more than two dozen discovery requests

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[1] "Applicants" refers collectively to CSX Corporation and CSX Transportation, Inc. (collectively "CSX") and Norfolk Southern Corporation and Norfolk Southern Railway Company (collectively "NS"). Conrail Inc. and Consolidated Rail Corporation (collectively "Conrail") are not effected by any issues in dispute, and therefore have not joined in this opposition.

(including subparts) designed to explore issues raised by two rebuttal witnesses in their rebuttal verified statements submitted with the Applicants' December 15, 1997 Rebuttal. For the reasons set forth below, NYS', ENRS' and EFM's requests should be denied.

I. BACKGROUND

On November 7, 1997, The State of New York propounded requests to Applicants (NYS-14) seeking, inter alia, documents related to the then recently announced settlements among CSX, NS and the Canadian Pacific Railway System (CP). NS voluntarily produced a redacted version of its agreement with CP (Document NS-75-HC-00001-00011) on the basis that NS was planning to rely on the agreement in the Applicants' December 15 rebuttal filing. Because there was no issue in the case to which the CSX/CP Settlement Agreement related, CSX objected to the production of the CP/CSX Settlement Agreement.

On November 25, 1997, in response to a Motion to Compel by the State of New York (NYS-16), Administrative Law Judge Leventhal held a discovery conference to consider requiring production of the CSX/CP Settlement Agreement on NYS' Motion to Compel. At that conference, counsel for NYS argued that the CP/CSX Settlement Agreement was "relevant to New York's ability to carry its burden of persuasion on the issue of the operational feasibility if [Canadian Pacific or New York and Atlantic or both] have entered into agreements that inhibit or prohibit their ability to operate over the line in question." Discovery Conference, November 25, 1997, Transcript at 19. No mention of the need to discover commercially sensitive rate information was made by NYS' counsel.

Judge Leventhal ordered CSX to produce the CP/CSX Settlement Agreement, allowing "reasonable redactions" of "commercially sensitive" and/or "highly confidential" information. Discovery Conference, Nov. 25, 1997, Transcript at 29, 32, 35. 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 HC 000101-000110.

The CP/CSX Settlement Agreement is designed to provide a framework for efficiently establishing joint line rates between CSX and CP on certain moves, including but not limited moves from and to New York City and Buffalo, New York. The Agreement permits CP to market its services directly to customers in those areas and establishes certain "Minimum Revenue Factors" which are used to establish the joint line rates without the necessity of further contact or concurrence of the other railroad. The limited redactions made were by CSX in the following areas:

- Minimum Revenue Factors per carload for Merchandise Shipments interchanged between CP and CSX to or from New York City, Montreal, Philadelphia and Buffalo/Niagara Falls;
- The minimum car thresholds for the Minimum Revenue Factors to take effect; and
- Volume figures relating to the CP/CSX Agreement (Exhibit A to the Rate Making Agreement) covering import/export marine containers in the ExpressRail (in New Jersey) – Montreal/Toronto corridor.

No other redactions were made to the CP/CSX Agreement.

On December 15, 1997, Applicants filed their Rebuttal in this proceeding (CSX/NS-176). In that filing, Applicants make numerous arguments against the requests of both ENRS and NYS. See CSX/NS-176 at 124-42. Included in the discussion of the ENRS and NYS requests is a description of the CN/CSX and CP/CSX Settlement Agreements. Id at 129-30; 139-40. The Rebuttal only highlights that these Agreements provide CN and CP with commercial access to New York City and Buffalo, that, heretofore, CN and CP did not enjoy, and explains the mechanism by which this access is to be achieved. Id. at 129, 139. ("A mechanism has been established so that these carriers can quote a price that involves CSX in their routing without CSX's prior consent." Id. at 129). The commercial access is termed "effective" (id. at 140) because it allows shippers and receivers in New York City, Long Island Buffalo, and the other regions covered by the agreements the ability to solicit bids directly from CP and CN for general merchandise traffic, without the necessity of consulting CSX in each instance. Nowhere in the Rebuttal, however, is the redacted and commercially sensitive rate information relied upon or referenced.

Subsequent to filing their Rebuttal on December 15, 1997, Applicants voluntarily 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[2]. The redactions to the CN/CSX Settlement Agreement were made in the following areas:

- The minimum revenue requirements for "New York Central" local points in and outside of the North Jersey Shared Asset Area;
- The CSX revenue factor for CSX-CN interline moves to and from Buffalo, New York;
- The CSX revenue factor for movements between points in Canada and CN Buffalo customers beyond the minimum volume and the portion of the joint line movement that CN will bear; and
- The mechanism for accomodating CSX's loss of intermediate switching fees[3]

No further redactions were made to the CN/CSX Agreement.

At the time the CN and CP Settlement agreements were produced by CSX in redacted form, no party challenged the commercial sensitivity of the redacted material. Similarly, no party currently claims that the information now sought by ENRS and NYS is not commercially sensitive.

On December 22, 1997 ENRS and NYS each served its Third Requests for Production of Documents (ENRS-12/NYS-22) requesting production of *unredacted* copies of the CP/CSX and CN/CSX Settlement Agreements. Applicants filed initial objections to these requests (CSX-183/CSX-184), and both ENRS (by letter dated 1/2/98) and NYS (NYS-23) requested that Your Honor compel production.

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[2] ENRS incorrectly states in its January 2, 1998 request to compel production that the CN/CSX Agreement was produced by CSX in response to Judge Leventhal's November 25, 1997 ruling. In fact, that Agreement was produced voluntarily by CSX as a workpaper.

[3] Upon review, CSX is willing to unredact this portion of the agreement.

II. ARGUMENT

A. DISCLOSURE TO ENRS AND NYS OF THE COMMERCIALLY SENSITIVE INFORMATION CONTAINED IN THE SETTLEMENT AGREEMENTS SHOULD NOT BE REQUIRED

1. The Information That Was Redacted From Both Agreements is Commercially Sensitive And Meets The Standard For Redaction Set Forth In Decision No. 34 Of This Case

CSX redacted the information from the CP Agreement pursuant to Judge Leventhal's order issued November 25, 1997. 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." Decision No. 34 at 2. Under this standard, numerous "reasonable redactions" have been authorized. Specifically, the redaction of just the type of commercially sensitive information that ENRS and NYS seek production of in this instance has been approved. 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.

a. Release of The Information Sought Would Cause Competitive Harm to CSX

Applicants would suffer substantial harm if forced to produce such commercially sensitive information. No party has contended that release of the redacted information would not seriously harm CSX's competitive interests. Most of the information relates to the economic terms of carrier-to-carrier business arrangements, which could give competitors, such as motor carriers, an advantage in pricing their services in competition

with the railroads. Historically, railroads have treated revenue divisions in interline movements (which constitutes a large part of the redacted information) as very competitively sensitive, a concern that has been acknowledged by the Board. Another way in which CSX could be harmed competitively from release of this information is that the Agreements will apply prospectively, thus competitors, such as trucks, will have an advantage in terms of their own pricing behavior in the marketplace, prior to the time at which the agreements became effective. In addition, disclosure to shippers of the new rates would undermine CSX's ability to maintain commercial relations post-control. Finally, CN and CP are competitors – both in the marketplace and in their relations with CSX -- and disclosure of the economic terms of the CN and CP agreements to the other is thus not in the public interest because it could affect their ability to effectively compete and could make it more difficult for CSX to negotiate commercial arrangements with them in the future.

On this basis, the information clearly meets the standard set out in Decision No. 34 and decisions by Your Honor that permitted the redaction of commercially sensitive information. Id.

b. Neither ENRS Nor NYS Has Posited a Compelling Need for the Commercially Sensitive Information That Would Outweigh the Competitive Harm Suffered by Applicants

Balanced against this undisputed commercial harm is that neither ENRS nor NYS has posited a compelling need for the commercially sensitive information contained in the settlement agreements. For instance, ENRS argues that "it is 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 the agreements without knowing the price and rate terms

relating to the Niagara Frontier area. ENRS Letter to Judge Leventhal, January 2, 1998 at 2. NYS, which based its original motion to compel production of the CP settlement agreement (NYS-16) on the professed need to evaluate the operational feasibility of its responsive application , now similarly argues that the levels of the fixed revenue factors are necessary to evaluate "whether the overall arrangement provides CP and CN with true (as opposed to paper) access to east-of-Hudson shippers." It is not necessary, however, that this information be supplied in order to conclude that the Niagara/Buffalo and East-of-Hudson shippers will be better off as a result of these agreements. The mere fact that these shippers will be able to solicit bids directly from three (3) class I railroads indicates that their situation will be improved over the current situation. Applicants do not rely on the specific price and rate information in the agreements in their Rebuttal, but merely argue that CN and CP will have the ability "to offer to provide transportation services to shippers in New York City and Long Island" and in the Buffalo/Niagara area by quoting rates for joint movements without the necessity of obtaining prior approval from CSX. CSX/NS-176 at 130.

The gravaman of the theory that ENRS and NYS appear to be pressing with this discovery is that CN and CP both agreed to financial terms that would not, in fact, permit them to achieve their goal of increasing access to customers covered by the agreement. NYS and ENRS have offered no support for the illogical position that either CP or CN would have entered into these agreements if the financial and economic terms of the agreement would not allow them to effectively compete for rail traffic in the areas covered. The CP/CSX and CN/CSX Agreements were entered into between competitors at arms-length. CP and CN sacrificed important rights in order to enter into these

agreements. They agreed not to file responsive applications in this proceeding seeking trackage and/or other rights to serve the Buffalo/Niagara and east-of-Hudson areas, among others. Neither ENRS nor NYS has posited any theory as to why CP and CN would have done so, and sacrificed the right to seek Board redress, if the agreements did not provide them with effective and competitive access.

Without more, ENRS' and NYS' mere questioning of whether CN and CP have negotiated terms that will provide them with legitimate access to those shippers serves as no basis for discovery of commercially sensitive information. The Board has been unwilling to grant discovery of this type of commercially sensitive information when the requests are premised on such unlikely theories. See Decision No. 17, July 31, 1997, at 3.

For instance, in Decision No. 17, the Board rejected the motion of American Electric Power et al. (ACE) to compel discovery of sensitive rate information for shipments of coal. Id. at 1. ACE had sought discovery of that information in order to "determine whether the applicant railroads set their rates in order to maximize profits." Id. The Board denied ACE's Motion to Compel, holding that because the discovery was propounded with the premise of "challenging a basic principle of economics, that firms will generally attempt to maximize their profits . . . we are extremely reluctant to authorize the broad discovery of commercially sensitive information that petitioners propose." Id. at 3. In reaching its decision, the Board relied on the fact that, "Petitioners have not suggested a plausible rival economic theory to replace this one." Id.

In this case, ENRS' and NYS' discovery is similarly based on refuting a basic and common sense theory of negotiation – that CN and CP would not sacrifice important

rights in order to enter into an agreement that did not provide them with the ability to be an effective competitor in moving traffic in and out of the Buffalo/Niagara and east-of-Hudson areas. Neither ENRS nor NYS have suggested any plausible alternative to the idea that CN and CP entered into their respective agreements with CSX in good faith and with the belief that those agreements would allow them effective access to rail traffic. Thus, the discovery of the commercially sensitive information that ENRS and NYS seek is inappropriate "simply to permit movants the ability to conduct what amounts to a "fishing expedition." Decision No. 42, October 3, 1997, at 8.

2. Both ENRS and NYS Seek Discovery of Commercially Sensitive Information That is Beyond the Scope of What is Relevant to Their Filings

Finally, both ENRS and NYS seek discovery of commercially sensitive information that is well beyond the scope of what pertains to their specific claims in the case. Pragraphs 5.A.(ii) and (iii) on page 3 of the CP Agreement, relating to the Minimum Revenue Factors for shipments between Albany and Montreal and Albany and Philadelphia respectively, and Exhibit A to the CP Agreement relating to import/export containers in the ExpressRail – Montreal/Toronto corridor are unrelated to the claims of either ENRS or NYS and therefore are not discoverable by either party.

Judge Leventhal has previously limited the scope of discovery to matters that are essential to the seeking party's ability to make its case. Discovery Conference, December 4, 1997, Transcript at 45. Similarly, the Board has ruled that responsive applicants (in this case only NYS qualifies as a responsive applicant) may only submit evidence that rebuts "specific" evidence in the primary applicants' rebuttal filing in opposition to the

conditions sought by the responsive applicant. E.g., UP/CNW, Decision No. 17, served July 11, 1994, at 9 & n.13; UP/CNW, Decision No. 20, served Sept. 12, 1994 at 7, 11, 15, 16, 17, 18, and 20. To the extent that the movants seek information relating to areas other than New York City and Buffalo, such information does not meet this standard.

B. AS COMMENTERS, ENRS AND EFM ARE NOT ENTITLED TO FILE REBUTTAL EVIDENCE AND HAVE NO RIGHT TO ADDITIONAL DISCOVERY

1. Under Decision No. 6 Parties Filing Comments, Protests, and Requests for Conditions are not Authorized to Submit Rebuttal Evidence or to Conduct Discovery in Support Thereof

Decision No. 6, issued on May 22, 1997, established the governing procedural schedule and requirements governing submission of evidence in the proceeding. Decision No. 6 provides that commentors are not authorized to submit rebuttal evidence:

> 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.

CSX/NS, Finance Docket No. 33388, Decision No. 6, 1997 WL 283551 (I.C.C.) at *6 (citing UP/SP, Decision No. 6 at 7-8; BN/SF, Decision No. 16 at 11). Decision No. 6 fixed December 15, 1997 as the date for the filing of rebuttal testimony in support of the Primary Application and January 14, 1998 as the date for the filing of rebuttal testimony in support of Inconsistent and Responsive Applications. The evidentiary record on the Primary Application was closed on December 15, 1997 when Applicants filed their Rebuttal in support of the Primary Application. No further evidentiary filing by other parties with respect to the Primary Application is authorized by Decision No. 6. The only

parties permitted to file rebuttal testimony on January 14, 1998 are those that filed an inconsistent or responsive application.

On October 21, 1997, ENRS and EFM filed Comments and Requests for Conditions with respect to the Primary Application submitted by Applicants. ENRS and EFM did not file Responsive Applications or Inconsistent Applications such that either would be entitled to submit on January 14, 1997 rebuttal evidence with respect to a Responsive or Inconsistent Application. Thus they have no right to file rebuttal on January 14 and any further evidentiary filing by these parties would be improper and would directly contradict the Board's restriction on rebuttal testimony discussed above.

Both ENRS and EFM indicate that their only purpose in seeking additional discovery is to obtain surrebuttal evidence for submission to the Board. While the language in Decision No. 6 did not directly address commenters' rights to take discovery in support of surrebuttal evidentiary submissions, the purpose of this discovery, as acknowledged by ENRS and EFM, is to permit them to adduce evidence in support of their position. It is axiomatic that in the absence of a right to introduce evidence in a proceeding, discovery serves no useful purpose and is not permitted. Thus, ENRS and EFM are not entitled to the discovery that they seek.

2. Decision No. 6's Prohibition on Submission of Rebuttal Evidence By Parties Filing Comments, Protests and Requests for Conditions is Consistent With Board And I.C.C. Precedent

Beyond Decision No. 6, the Board's practice is clear that neither ENRS nor EFM may introduce additional evidence with respect to the Primary Application. The Board and its predecessor, the I.C.C., have consistently held that applicants, whether primary or

responsive, are entitled to submit the final evidence and close the record on the merits of their application. Union Pacific – Control – Chicago and North Western, Finance Docket No. 32133, Decision No. 17; Burlington Northern, Inc. – Control and Merger – Sante Fe Pacific Corporation, STB Finance Docket No. 32549, Decision No. 34, 1995 WL 374546 at 4 (I.C.C.) ("Responsive applicants have the right to close the record on their cases, while parties requesting conditions do not."); Soo Line Railroad Company – Petition for Declaratory Relief, STB Finance Docket No. 33350, 1197 WL 341879 at *6 (I.C.C.) (1997).

Throughout the two most recent major control cases, the Board and its predecessor ruled that commenters did not have the right to submit rebuttal evidence. For instance, in BN/SF, Decision No. 16, the I.C.C. squarely addressed the question of whether a commenting party was entitled to file rebuttal evidence. In that case, Southern Pacific Transportation Company (SP), a non-applicant requesting conditions, argued that it had the right to submit rebuttal as to any challenge the primary applicants made to the scope and feasibility of SP's proposed conditions. BN/SF, Decision No. 16 at 10. SP claimed that to deny SP's rebuttal evidence simply because of the form in which SP presented its requested conditions would serve no public policy interest. Id. The Commission, in rejecting SP's request to file rebuttal evidence as a commenter, clearly distinguished the respective rights of commenting parties on the one hand and responsive applicants on the other, stating that commenters did not have the right to submit rebuttal evidence:

> The relief responsive applicants seek is different from the relief that parties simply requesting conditions seek. Traditionally, applicants, whether they are primary or responsive applicants, have the right to close the

> evidentiary record on their case. Therefore, responsive applicants can answer arguments made in opposition to their application in rebuttal filings. Parties seeking conditions, on the other hand, come to the Commission as part of and in opposition to the primary application, and the primary applicants respond to those parties in their rebuttal in support of the primary application. Allowing the parties to file rebuttal evidence would deprive the primary applicants of their right to close the evidentiary record on their case. We see no necessity for such filings, and believe that the current procedural schedule will allow the Commission to fully comprehend and evaluate all issues that the parties seeking conditions will raise in this proceeding.

BN/SF, Decision No. 16 at *1.

In BN/SF, Decision No. 34, the I.C.C. denied the motions of several commenting parties for leave to submit rebuttal filings in the case.[4] Illinois Central Railroad Company ("IC") and Southern California Regional Rail Authority ("SCRRA"), for example, argued that because the primary applicants submitted evidence and testimony in opposition to

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[4] In Decision No. 34, the I.C.C. did partially grant the motion of one commenting party, Phillips Petroleum Company (PPC), to file rebuttal evidence, but only because the primary applicants had failed to make PPC aware of an alleged fact during discovery. BN/SF, Decision 34 at *3. Specifically, a witness for the primary applicants had submitted a verified statement in support of the primary application and had been deposed prior to the date for filing comments and requests for conditions and, both in his verified statement and in his deposition, had stated an estimated cost for a proposed build-out project. Motion of PPC for Leave to File Rebuttal Verified Statement of Fred E. Watson (PPC-9) at 2. In their comments and request for conditions, PPC relied on that witness' estimated cost of the build-out. Id. In the primary applicants' rebuttal filing, however, the same witness, for the first time admitted that, in his previous statements, he had mistakenly underestimated the total cost of the build-out by half. Id. In an effort to address PPC's concern that the primary applicants had used this evidence to "sandbag" PPC, the Commission allowed PPC's rebuttal filing, but only to the limited extent that it pertained to the "newly discovered evidence." BN/SF, Decision No. 34 at 3-4. PPC's situation is clearly distinguishable from that of ENRS and EFM, who have made no claims that Applicants have improperly withheld any evidence during discovery or attempted to "sandbag" either ENRS or EFM.

their respective requests for conditions, the I.C.C. should allow the commenters to file additional factual information directly responsive to issues the primary applicants raised in their rebuttal. Id. at *2. The I.C.C. flatly rejected these requests to file additional evidence, restating the general rule that the I.C.C. "would not permit rebuttal filings from parties before [the Commission] 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." Id. at *4.

Tuscon Electric Power Company (TEP) similarly argued in BN/SF, Decision No. 34, that it needed to submit rebuttal evidence to clarify the record on two particular technical points, arguing that there was no reason for treating differently parties filing requests for conditions and parties filing responsive applications. TEP relied on the fact that prior versions of the procedural schedule had provided parties seeking conditions with the opportunity to submit rebuttal filings, but the Commission had eliminated that opportunity in the final schedule.[5] The Commission also rejected this argument, noting that "the absence of a provision in the final procedural schedule allowing rebuttal filings by parties requesting conditions that are not in the form of responsive applications was not the result of Commission oversight." Id. at *1.[6]

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[5] This is an indication that, when the Board and its predecessor intend to give commenters the substantive right to file rebuttal evidence, they do so explicitly, and the absence of any direct authorization, as in the present case, evidences the Board's intent that such parties do not have such rights.

[6] Similarly, Decision No. 6 makes clear that the Board in this case did not inadvertently overlook including a commenter's right to file rebuttal evidence.

Thus, ENRS and EFM have no right to file additional comments or make any additional evidentiary submissions, and therefore have no reasonable purpose for propounding further discovery. To permit ENRS and EFM to file additional evidence would mean that those parties and not Applicants would submit the final evidence on the Primary Application.

3. Briefs are not Appropriate Vehicles for Submitting New Evidentiary Material

ENRS argues that "all parties have the right to file briefs to the Board on February 23, 1998," as support for its position that it has the right to submit surrebuttal evidence and hence take further discovery. While Applicants agree that ENRS and all other parties in the proceeding have the right to submit a brief, the brief may not contain new evidence. In UP/SP, the Board clarified the extent to which a non-applicant party may make evidentiary submissions in response to comments filed by another party. UP/SP, Decision No. 31 at 3. The Board made it clear that the briefs were to contain no additional evidence:

> [P]arties may file briefs . . . but these briefs *may not contain new evidence* in the proceeding. The purpose of the briefs is for parties to present legal arguments succinctly and to marshal previously filed evidence favorable to their position. Thus, parties that did not file inconsistent or responsive applications may not file rebuttal evidence concerning responses to their March 29 filings [October 21, 1997 filings in this case] which may be filed on April 29, 1996 [December 15, 1997 filings in this case]. Inappropriate evidentiary material will be stricken.

Id. (emphasis added). Accordingly, the February 23 briefs to be filed in this proceeding should not include any additional evidence, and thus ENRS' and EFM's discovery at this late stage is inappropriate.[7]

4. ENRS' and EFM's Requests Stand the Board's Procedural Schedule on its Head

As is clear from the above discussion, responsive and inconsistent applicants are given preferred status by the Board in the procedural schedule and in the applicable precedents relative to non-applicant parties such as commenters. They alone, among non-primary applicant parties in the proceeding, are given the right to file rebuttal evidence. Consequently, responsive and inconsistent applicants are able to close the record on their applications, and thus have the last word on the merits of their case. The Board's procedural order, however, establishes a deadline for submission for parties exercising this right to file rebuttal on their application,. In the instant case, the deadline for submission of rebuttal evidence on responsive and inconsistent applications is January 14, 1998.

Under ENRS' and EFM's theory, however, it is commenters and not responsive applicants who are given preferred status. ENRS' and EFM's apparent position is that, even though the Board explicitly gave responsive applicants the right to file rebuttal

[7] To the extent that ENRS and EFM attempt to distinguish their right to file a separate evidentiary rebuttal from their right to include new evidentiary material in their brief, such attempt is unavailing. The language cited above from Decision No. 6 would be rendered a nullity if it were read to permit commenters to file rebuttal evidence in their briefs.

evidence, while at the same time imposing a deadline for the filing of such evidence, it intended that commenters also have the right to file rebuttal.[8] According to ENRS' and EFM's position, however, the commenters' right to file rebuttal is unconstrained by the kinds of deadlines, such as January 14, 1998, required of responsive applicants. Such a theory, which gives commenters preferred status over all applicants in the case, stands the Board's procedural schedule on its head and ignores the Board's clear intent that applicants have the opportunity to close the record on their applications. On this basis, the requested discovery should be denied.

5. Applicants' Voluntary Offer of Rebuttal Witnesses for Cross-Examination By Non-Applicant Parties Does Not Require Applicants to Respond to Written Discovery Propounded by Non-Applicants

EFM attempts to justify the right to written discovery by blurring the lines between the voluntary offer of Applicants' rebuttal witnesses for cross examination and written interrogatories and document production requests. EFM claims that the distinction appears nowhere in the Discovery Guidelines governing this proceeding, the Board's Discovery Rules or in any applicable precedent. EFM is incorrect.

First, the Discovery Guidelines in this proceeding specifically state that "Any of the discovery guidelines . . . may be varied by agreement between any two or more parties (except if such a variation would adversely affect any third party)."" Discovery Guidelines at Paragraph 2. If an Applicant agrees to permit commentors to engage in a

[8] ENRS and EFM do not specify how the Board manifested this alleged intent.

cross examination deposition of that Applicants' rebuttal witnesses, but not to permit commentaries to engage in wide-ranging discovery, that is its prerogative.

Second, applicable precedent does support a distinction between cross examination depositions and written discovery following the submission of applicants' rebuttal. The Board has drawn a strong line between parties who chose to participate in control proceedings as commenters and those who chose to participate as responsive applicants. Union Pacific Corp. – Control and Merger – Southern Pacific Rail Corp., Finance Docket No. 32760, Decision No. 31 at 2 ("Movants are aware that, under the procedural schedule, only inconsistent and responsive applicants are entitled to file rebuttal evidence . . . . Parties . . . chose their means of presenting their arguments with knowledge of the restriction on rebuttal filings.") No party is permitted to submit new evidence in their brief. Id. ("[B]riefs may not contain new evidence in the proceeding. Thus, parties that did not file inconsistent or responsive applications may not file rebuttal evidence . . . .") But, the Board has permitted commentors to participate in cross examination depositions of applicants' rebuttal witnesses and to discuss any information gained from that cross examination in their briefs. Id., Decision No. 35 (denying Kansas City Southern, a commentor, the right to conduct written discovery and file a subsequent evidentiary pleading, but permitting it to participate in cross examination depositions and discuss the deposition testimony in its brief.)

EFM claims that Decision No. 35 does not draw a distinction between written discovery and cross examination depositions, but it is wrong. EFM states that "The Board went on to note that UP/SP witnesses would be available for discovery (which effectively complied with the KCS request to conduct discovery) and that discovery

information relating to the rebuttal may be included in the briefs." In fact, the Board stated flatly that "We will deny the relief KCS seeks." In doing so, the Board went on to observe that "we note that applicants have stated that their witnesses who address the CMA settlement agreement in the April 29, 1996 filings may be deposed. Such discovery may take place and information gained in such depositions may be included in the briefs, due June 3, 1996." Id. At 3 (emphasis added). In Decision No. 35, the Board made exactly the distinction EFM claims is not there: KCS was denied the right to conduct written discovery, but was granted the right to cross examine offered rebuttal witnesses.

For these reasons, ENRS', NYS' and EFM's requests to compel production should be denied.

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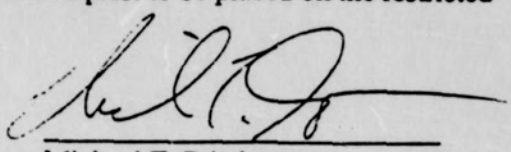
Dated: January 7, 1998

CERTIFICATE OF SERVICE

I, Michael T Friedman, certify that on January 7, 1998, I caused to be served by facsimile service a true and correct copy of the foregoing CSX/NS-188, Applicants' Opposition to the State of New York's, Erie-Niagara Rail Steering Committee's and Eighty-Four Mining Company, Inc.'s Requests to Compel the Production of Discovery on all parties that have submitted to the Applicants a request to be placed on the restricted service list in STB Finance No. 33388.



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January 7, 1998

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January 13, 1998

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Vernon A. Williams, Secretary
Attn: STB Finance Docket No. 33388
Surface Transportation Board
Mercury Building, Room 715
1925 K Street, NW
Washington DC 20423-0001

Re: 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, APPEAL OF DISCOVERY RULING — EXPEDITED CONSIDERATION REQUIRED

Dear Secretary Williams:

On behalf of Eighty-Four Mining Company, we are transmitting herewith an original and twenty-five (25) copies of the Appeal of Eighty-Four Mining Company from Denial of Motion to Compel Responses to Discovery. Also enclosed, please find a 3½x5" floppy diskette in WP7.0 format, containing the text of the Appeal and our check in the amount of $150 in payment of the requisite filing fee.

FEE RECEIVED
JAN 13 1998
SURFACE TRANSPORTATION BOARD

Very truly yours,

Martin W. Bercovici

Enclosures

FILED
JAN 13 1998
SURFACE TRANSPORTATION BOARD

cc: All Parties on the Restricted Service List

185186

APPEAL OF DISCOVERY RULING — EXPEDITED CONSIDERATION REQUIRED

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

APPEAL OF
EIGHTY-FOUR MINING COMPANY
FROM DENIAL OF MOTION TO COMPEL
RESPONSES TO DISCOVERY

Eighty-Four Mining Company (EFM) respectfully requests the Surface Transportation Board to overrule the decision of Administrative Law Judge Jacob Leventhal issued on the record of a discovery conference held January 8, 1998, denying a motion to compel applicants CSX and Norfolk Southern Corporation to provide answers to written interrogatories concerning applicants' rebuttal testimony.

I. Issues Presented

The issues presented in this Appeal are

A. WHETHER commenters and other parties in railroad control proceedings have the right on brief to submit impeachment evidence concerning applicants' rebuttal and consequently to argue the weight to be accorded to applicants' rebuttal testimony?[1]

B. WHETHER the discovery available to test the rebuttal verified statements of applicants is limited to deposition of the testifying witnesses, or whether the Board's full range of discovery techniques, *e.g.*, interrogatories, requests for admissions, requests for production of documents, etc., is available for the purpose of testing the rebuttal verified statements?

The latter issue described above is believed to be an issue of first impression. No prior decisions have been identified which specifically address the range of discovery techniques available to test rebuttal verified statements in railroad control proceedings.

The issues presented in this Appeal are pure issues of interpretation of practice and procedure before the Board, involving application of the Board's governing regulations and orders in this case. As further set forth below, there is no issue of relevance, applicants having conceded that the discovery requested by EFM specifically seeks to explore their rebuttal testimony. Nor have applicants interposed any fact-based objection. Being mindful that the Board typically applies the "stringent standard" of 49 C.F.R. 1115.1(c) to appeals from decisions issued by the presiding officer, inasmuch as the issues presented are pure issues of agency practice and procedure, and considering the precedential effect of this ruling, EFM respectfully submits that the Board should review these issues on a *de novo* basis. *Cf.*, Decision No. 42

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[1] The only evidentiary submittal on brief contemplated by EFM concerns possible impeachment evidence developed through discovery. EFM understands that applicants have the right to the closing principal evidentiary submission.

(Oct. 3, 1997, overturning a discovery order granting commenters access to the waybill masking factors)..[2]

II. Background

Following receipt and review of the December 15, 1997 rebuttal verified statements and argument submitted by applicants, Eighty-Four Mining Company propounded a limited number of interrogatories and document production requests.[3] Each of the interrogatories and document production requests specifically is related to the testimony of applicants' rebuttal witnesses. All but one reference a portion of applicants' rebuttal, by witness and page number; and the one request which does not do so is a document production request which substantively relates to a prior interrogatory.

On January 2, 1998, applicants filed initial objections to the EFM discovery.[4] In accordance with Discovery Guideline No. 16,[5] said initial objections signified applicants' position that they "will be providing no affirmative response (*i.e.*, no information or documents)..." Applicants took the position that they "voluntarily" would make their witnesses

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[2] Even under the "stringent standard," EFM respectfully submits that the decision entails a "clear error of judgment," in conflict with Board practice and regulation, and that denying EFM interrogatory and document production discovery techniques would be a manifest injustice impeding EFM's ability truly to test the rebuttal verified statements of applicants' witnesses.

[3] EFM-10, Appended hereto as Exhibit 1.

[4] CSX/NS-186, appended hereto as Exhibit 2.

[5] Decision No. 10 (decided June 26, 1997).

available for deposition,[6] and that while past practice allows commenters to cite deposition testimony rebuttal witnesses in argument on brief, "such past practice does not permit EFM *discovery*."[7] Applicants specifically acknowledge that EFM's discovery "requests attempt to explore issues raised by two rebuttal witnesses (John William Fox, Jr. and D. Michael Mohan) in the rebuttal verified statements submitted with Applicants' December 15, 1997 comments."[8]

Following EFM's notification of its intent to seek a motion to compel[9] and responsive pleading from applicants,[10] at a discovery conference on January 8, 1998, Judge Leventhal denied EFM's motion.[11] In conjunction with the denial, Judge Leventhal ordered applicants to honor the offer to make the rebuttal witnesses available for deposition.[12]

6/ Applicants CSX and NX may have different viewpoints on making rebuttal witnesses available for deposition by commenters. *See* discovery conference transcript at 37-38, appended hereto as Exhibit 5.

7/ *See* Exhibit 2 at 2, emphasis added.

8/ Id.

9/ Letter to Judge Leventhal dated January 5, 1998, appended hereto as Exhibit 3.

10/ CSX/NS-188, appended hereto as Exhibit 4.

11/ *See* extract of discovery conference transcript at pp. 128-131.

12/ Id.

III. Statement of Argument

A. Impeachment of Rebuttal Verified Statements Is Allowable Notwithstanding the Commenters Do Not Have a Right to Submit "Rebuttal" in Support of Their Pleadings.

As noted *supra* at n. 6, applicants appear to be of two minds concerning the opportunity of commenters to submit impeachment evidence concerning rebuttal testimony developed through discovery depositions. In the initial objections, applicants acknowledge that "past STB and ICC practice would permit EFM to cross-examined (sic) Applicants' offered rebuttal witnesses in such depositions, and to cite the resulting testimony [on] brief..."[13] However, in the opposition to the motion to compel, applicants take the position that parties filing comments are not authorized to submit rebuttal of any nature, including impeachment through deposition or discovery of the rebuttal witnesses' statements. Applicants rely for their position on a number of prior STB and ICC decisions; however, all of the cited decisions concern denial of the opportunity for non-applicant parties to submit evidence in rebuttal of applicant carriers' reply evidence. These decisions follow the procedural right of the party bearing the burden of persuasion to both open and close the evidentiary record. But in no case has the agency stated that rebuttal evidence is not subject to testing through the discovery process; and none of the cases cited by applicants addresses the issue of impeachment through discovery of the rebuttal witness' testimony.[14] Notwithstanding the argument in the Opposition

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[13] *See* Exhibit 2 at 2.

[14] Applicants do discuss *UP/SP Decision No. 35* (CSX/NS-188 at 19-20) wherein the Board denied a request by Kansas City Southern Railway to modify the procedural schedule to allow for discovery and for the submission of supplemental evidence on the settlement agreement with the Chemical Manufacturers Association, but in doing so, the Board noted the pending depositions

(continued...)

that commenters are absolutely barred from submitting any evidence, including impeachment through discovery, after the reply date, at the discovery conference before Judge Leventhal counsel for NS conceded that deposition testimony of applicants' rebuttal witnesses may be cited on brief.[15]

In the Opposition, applicants make several assertions which are factually incorrect. Applicants state that "the language in Decision No. 6 did not directly address commenters' rights to take discovery in support of rebuttal evidentiary submissions,"[16] and further that "The evidentiary record on the Primary Application was closed on December 15, 1997 when Applicants filed their Rebuttal in support of the Primary Application."[17] To the contrary, in the Notes to the Final Procedural Schedule adopted in Decision No. 6, the Board states, "Immediately upon *each* evidentiary filing, the filing party...will make its witnesses available for discovery depositions." (Emphasis added.) As to the latter contention, the procedural schedule itself identifies the "close of record" as occurring at oral argument.[18]

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[14](...continued)
of applicants' witnesses and the opportunity to cite that deposition testimony on brief. However, their pleading is unclear as to whether they view that decision as precedential, or whether they consider that decision was *sui generis* and that "any further evidentiary filing . . . would be improper and would directly contradict the Board's restriction on rebuttal testimony discussed above." CSX/NS-188 at 12.

[15] *See* discovery conference transcript at p. 121.

[16] Exhibit 4 at 12.

[17] Id. at 11.

[18] In the UP/SP merger decision, the Board took into account and relied upon representations made at oral argument. *See e.g. Union Pacific Corporation, et al. — Control and Merger — Southern Pacific Rail Corporation*, Finance Docket No. 32760, Decision No. 44 at (continued...)

Consistent with Decision No. 6, the Discovery Guidelines, adopted in Decision No. 10 in this proceeding, provide at paragraphs 11 and 12 for deposition of all testifying witnesses. Paragraph 11 states, "A person who has submitted written testimony in this proceeding shall be made available for deposition upon request." Paragraph 12, in addressing deposition procedure, states that "Absent agreement...(1) no witness shall be deposed more than one time as to any written initial statements or more than one time as to any written rebuttal statements submitted by that witness in this proceeding..." Thus, impeachment through discovery of rebuttal witnesses clearly is contemplated by both the Board's Decision No. 6 procedural order and the Discovery Guidelines.[19] Otherwise, the provision for depositions following rebuttal statements would constitute an exercise in futility.[20] Prior Board decisions so recognize the right to use impeachment through discovery depositions of rebuttal witnesses on brief. *See UP/SP Decision No. 35* at 3. Any holding to the contrary would send a signal to applicants in future railroad control proceedings that their witnesses are entitled to distort and misrepresent with impunity in their rebuttal statements.

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[18](...continued)
110, n. 108 (Aug. 6, 1996) (hereinafter cited as "UP/SP").

[19] The Board's procedures with regard to cross-examination of rebuttal witnesses are fully consistent with due process. To that end, the hearing provisions of the Administrative Procedure Act provide that a party is entitled "to conduct such cross-examination as may be required for a full and true disclosure of the facts." *See* 5 U.S.C. § 556(d).

[20] Applicants' contention that they have "voluntarily" offered to make their rebuttal witnesses available for deposition, CSX/NS-186 at 2 and CSX/NS-188 at 18-19, is no concession of voluntariness at all.

B. All Discovery Tools Are Available in Railroad Consolidation Proceedings.

The issue presented in this Appeal ultimately is whether commenting parties are limited to the use of depositions to test the rebuttal verified statements, or whether all of the Board's discovery tools may be utilized. As quoted in the Background discussion above, applicants in their Initial Objections seek to distinguish between "depositions" and "discovery."[21] EFM respectfully submits that there is no such distinction available either under the Board's regulations or in the governing procedural orders.

As set forth in Subpart B of Part 1114 of the Board's rules, depositions are simply one of the variety of discovery techniques. This is consistent with Rule 26(a) of the Federal Rules of Civil Procedure which describes Discovery Methods as follows:

> "Parties may obtain discovery by one or more of the following methods: depositions upon oral examination or written questions; written interrogatories; production of documents or things or permission to enter upon land or other property, for inspection and other purposes; physical and mental examinations; and requests for admission.

Commentary on the Federal Rules recognizes that "The methods of discovery are complementary, rather than alternative or exclusive. Thus, a party may take both depositions and interrogatories, as long as he is not attempting to circumvent a ruling of the court or to harass or oppress the adverse party."[22] Again, the Board's general discovery rules follow practice under the Federal Rules, specifically providing that "methods of discovery may be used in any sequence

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[21] Similarly, Judge Leventhal found "a difference between a document supplied in response to a discovery request and the cross-examination of the rebuttal witness by deposition," Discovery Tr. at 130; however, he did not explain the distinction between the two forms of evidence.

[22] 10 Fed. Proc., L. Ed. § 26:7 (1994).

and the fact that a party is conducting discovery, whether by deposition or otherwise, should not operate to delay any party's discovery." 49 C.F.R. § 1114.21(d). Moreover, the Board's rules state that "All discovery procedures may be used by parties without filing a petition and obtaining prior Board approval." 49 C.F.R. § 1114.21(b).

The Board's general discovery rules are adopted for this proceeding by Discovery Guideline No. 2, which states:

> The Board's discovery rules set forth at 49 C.F.R. pt. 1114 will apply to this proceeding except as modified by Board decision or by these discovery guidelines.

The Discovery Guidelines provide no explicit limitation on discovery techniques, other than (i) limiting depositions to once for each witness for each statement (Discovery Guideline No. 12), and (ii) imposition of a discovery moratorium in advance of the October 21 comment due date (Discovery Guideline No. 19). Had another limitation been intended, it is obvious that applicants — who initially proposed the Discovery Guidelines — knew how to expressly state such limitation. As to treating discovery differently for this proceeding than under the Board's Part 1114 rules, other than generic references to "discovery requests" and "discovery responses," the Discovery Guidelines make no specific provision with regard to interrogatories, document production requests, requests for admissions or other discovery techniques. Notwithstanding, as clearly evidenced by the decisional record in this proceeding, such techniques have been utilized by commenters and Applicants alike.[23] Moreover, there is no basis in the Discovery Guidelines or the Board's discovery rules to arbitrarily distinguish between the discovery techniques available to test the primary application and those available to test the rebuttal verified

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[23] *See* Decision Nos. 11, 26, 32 and 53 and 61.

statements. Nor is there anything in Decision No. 6 which explicitly or implicitly indicates that depositions are the exclusive means of testing verified statements, rebuttal or otherwise.

As hereinbefore indicated, EFM has found no case directly on point with the issue of whether the testing of rebuttal verified statements is limited to depositions. In *UP/SP Decision No. 35*, cited by applicants in both CSX/NS-186 and CSX/NS-188, the Board denied a request of Kansas City Southern Railway that applicants be required to amend the primary application to reflect the settlement agreement with Chemical Manufacturers Association "or, alternatively, that we allow parties to conduct discovery and submit evidence relating to the CMA settlement." *UP/SP Decision No. 35* at p. 3. While denying the request to require amendment of the primary application or to modify the procedural schedule, the Board noted the availability of the applicants' witnesses for deposition and acknowledged that "Said discovery may take place, and information gained in such depositions may be included in the briefs..." Id. at p. 3. This case did not deal with any specific discovery request, or the use of any specific discovery tools, but rather concerned modification of the procedural schedule to enable discovery — not only by KCS but rather by "all parties of record" — of an undisclosed nature to go forward.[24] In point of fact, without delaying the proceeding, a concern raised by applicants in response to the KCS motion, *Id.* at 2, KCS achieved its alternative relief through the depositions.

Additionally, *UP/SP Decision No. 40* concerned discovery at the post-rebuttal stage of proceedings. In an appeal filed on the due date for briefs in the UP/SP proceeding, KCS sought an order to compel BNSF to produce documents concerning a consultant's study performed approximately five-six years earlier. KCS was denied enforcement of its discovery

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[24] *See*, KCS-49 at 10 (April 29, 1996, UP/SP Proceeding).

based upon issues of relevance and timeliness, including the fact that it had failed to prosecute an earlier request for the same document. In upholding the decision of the presiding administrative law judge as not constituting an abuse of his discretion, the Board noted that the further discovery sought studies which "are not new studies introduced in the April 29 rebuttal filings." *Id.* at p. 5. Notably the Board did not find that KSC was limited to use of depositions for impeachment on brief, nor did it find that document production requests or other discovery techniques are not available in testing rebuttal evidence. Rather, the Board's distinguishing the KCS discovery from document discovery arising out of the rebuttal filings is supportive of EFM's position in this appeal.[25]

C. Interrogatories, Document Production Requests and Other Discovery Tools Are Both Appropriate and Necessary

As a policy matter, the ruling on appeal herein has the effect of elevating discovery depositions over the use of interrogatories, document production requests and other discovery techniques for evidentiary purposes. This is diametrically opposite of the customary practice in developing a full and complete evidentiary record. Deposition is the discovery tool of last resort, employed once the documentary record has been established.[26] Interrogatories

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[25] If carried to its logical conclusion, applicants' rationale distinguishing between deposition testimony and documentary evidence would bar commenters from including workpapers required to be produced by applicants in support of their rebuttal testimony, or deposition exhibits, as exhibits to the briefs. The illogic of applicants' position is that any such limitations could be defeated by having the witness read the subject document into the deposition record.

[26] Under the former discovery rules applicable to proceedings before the Interstate Commerce Commission, discovery depositions were available only upon petition to the agency, whereas written interrogatories and requests for admissions were available without seeking agency approval. *See*, former 47 C.F.R. 1114.21(b)(2) and 1114.22(b) and (c).

provide a means for developing and assessing factual information which may not be readily available at deposition. Indeed, applicants' preference for depositions over written interrogatories may be intended to enable applicants to avoid confronting unfavorable facts through the witness citing to limited knowledge and unfamiliarity with detailed information.[27] Moreover, documents constitute the "best evidence," as compared with a witness' recollection or characterization of what a document may contain.

The illogic of the ruling on appeal is apparent in the context of EFM's document requests. Witness Mohan, in responding to EFM concerns about route efficiency from the Monongahela region to New England of NS versus CSX, stated in his rebuttal verified statement that "NS has concluded agreements with Canadian Pacific Rail system (CP) and with Guilford Transportation (GTI) to provide for efficient handling of traffic...enabling the same type of two carrier service that a CSX/GTI routing would supply."[28] EFM requested a copy of the relevant agreements.[29] EFM itself can judge, upon review of the relevant agreements, whether the agreements achieve the described results. There is simply no reason to require applicants' consultant to travel from San Francisco for a deposition in order to characterize an agreement EFM can evaluate itself or to require EFM to have its ability to test applicants' contentions on the

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27 *See, e.g.*, the deposition testimony of Witness Fox concerning his initial verified statement, appended to EFM-7 at Tab 2. Mr. Fox, the NS coal witness, was very equivocal in his knowledge. Fox Dep. at 16, 37.

28 Mohan RVS at 73, CSX/NS-177.

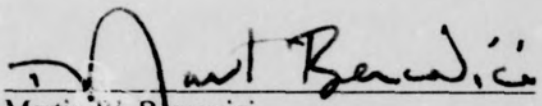
29 *See* Exhibit No. 1, Document Production Request No. 1.

effect of the agreements filtered through their witness.[30] In any event, applicants' witness already has stated his opinion of what the agreements achieve; EFM and the Board can evaluate that testimony only through review of the document itself.

The Board's interest in securing a complete and accurate record supports use of the most efficient discovery techniques designed to develop record information; and it is not applicants' prerogative to attempt to control the manner in which commenters test the verified statements of applicants' witnesses.

WHEREFORE, THE PREMISES CONSIDERED, Eighty-Four Mining Company respectfully urges the Surface Transportation Board to overrule the decision of Administrative Law Judge Leventhal and to order responses to EFM's discovery.

Respectfully submitted,



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Attorney for Eighty-Four Mining Company

January 13, 1998

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[30] *But see* n. 25, *supra*.

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Appeal of Eighty-Four Mining Company from Denial of Motion to Compel Responses to Discovery was served on this 13th day of January, 1998, by first-class mail, postage prepaid, upon All Parties on the Restricted Service List, and by hand, upon:

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Honorable Jacob Leventhal
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Service copies other than to parties receiving service by hand do not include exhibits. All discovery documents have been previously sent to the Restricted Service List. Additional copies will be provided upon request.

Martin W. Bercovici

EXHIBIT 1

EFM-10

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

EIGHTY FOUR MINING COMPANY, INC.'S THIRD SET OF INTERROGATORIES AND DOCUMENT REQUESTS TO APPLICANTS

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Attorneys for Eighty Four Mining Company, Inc.

December 24, 1997

BEFORE THE
SURFACE TRANSPORTATION BOARD

FINANCE DOCKET NO. 33388

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

EIGHTY FOUR MINING COMPANY, INC.'S
THIRD SET OF INTERROGATORIES AND
DOCUMENT REQUESTS TO APPLICANTS

Pursuant to 49 C.F.R. Part 1114 and the Discovery Guidelines entered in this proceeding pursuant to Decision No. 10, served June 27, 1997 ("Discovery Guidelines"), Eighty Four Mining Company, Inc. ("EFM") directs the following interrogatories and document requests to CSX Corporation, CSX Transportation, Inc., Norfolk Southern Corporation, Norfolk Southern Railway Company, Conrail, Inc. and Consolidated Rail Corporation, collectively referred to as "Applicants."

DEFINITIONS

1. 'Applicants' 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.

2. 'CSX' means CSX Corporation, Inc. and 'CSXT' means CSX Transportation, Inc.

3. 'NS' means Norfolk Southern Corporation.

4. 'Conrail' means the Consolidated Rail Corporation.

5. 'STB' means the Department of Transportation's Surface Transportation Board and any predecessor or successor agency or department charged by Congress with authority over railroad mergers and combinations.

6. The 'Pittsburgh Seam' means the belt of coal mines and coal markets located in that geographical area south of Pittsburgh, Pennsylvania, along the western side of the Monongahela River to and into West Virginia. The Pittsburgh Seam extends from southwestern Pennsylvania through the West Virginia panhandle into Ohio.

7. 'Application' means the application that CSX, NS, and Conrail filed with the STB on June 23, 1997, seeking STB approval for CSX and NS to acquire control of Conrail.

8. 'Competition' includes both intramodal and intermodal competition and, where applicable, includes source competition.

9. 'Describe,' when used in relation to a discussion, meeting or other communication, means to identify the participants, the date or time period when the communication took place, the location of the participants at the time of the communication and a detailed summary of the content of the communication.

10. 'Document' means any writing or other compilation of information, whether printed, typed, handwritten, recorded, or produced or reproduced by any other process, including: intracompany communications; electronic mail; correspondence; telegrams; memoranda, contracts; instruments; studies; projections; forecasts; summaries, notes, or records of conversations or interviews; minutes, summaries, notes, or records of conferences or meetings; records or reports of negotiations; diaries; calendars; photographs; maps; tape recordings;

computer tapes; computer disks; other computer storage devices; computer programs; computer printouts; models; statistical statements; graphs; charts; diagrams; plans; drawings; brochures; pamphlets; news articles; reports; . advertisements; circulars; trade letters; press releases; invoices; receipts; financial statements; accounting records; and workpapers and worksheets. Further, the term 'document' includes:

a. both basic records and summaries of such records (including computer runs);

b. both original versions and copies that differ in any respect from original versions, including notes; and

c. both documents in the possession, custody, or control of Applicants and documents in the possession, custody, or control of consultants or others who have assisted Applicants in connection with the Transaction.

11. 'Identify,'

a. when used in relation to an individual, means to state the name, address, and home and business telephone number of the individual, the job title or position and the employer of the individual at the time of the activity inquired of, and the last-known position and employer of the individual;

b. when used in relation to a corporation, partnership, or other entity, means to state the name of the entity and the address and telephone number of its principal place of business;

c. when used in relation to a document, means to:

(1) state the type of document (e.g., letter, memorandum, report, chart);

(2) identify the author, each addressee, and each recipient; and

(3) state the number of pages, title, and date of the document;

d. when used in relation to an oral communication or statement, means to:

(1) identify the person making the communication or statement and the person, persons, or entity to whom the communication or statement was made;

(2) state the date and place of the communication or statement;

(3) describe in detail the contents of the communication or statement; and

(4) identify all documents that refer to, relate to or evidence the communication or statement;

e. when used in any other context means to describe or explain.

12. 'Including' means including without limitation.

13. 'Person' means an individual, company, partnership, or other entity of any kind.

14. 'Provide' (except where the word is used with respect to providing service or equipment) or 'describe' means to supply a complete narrative response.

15. 'Rates' include contract rates and tariff rates.

16. 'Relate to' and 'relating to' have the broadest meaning according to them and include but are not limited to the following: directly or indirectly describing, setting forth, discussing, commenting upon, analyzing, supporting, contradicting, referring to, constituting, concerning or connected in any way with the subject in question or any part thereof.

17. 'Shipper' means a user of rail services, including a consignor, a consignee, or a receiver.

18. '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.

19. References to railroads, shippers, and other companies (including Applicants) include: parent companies; subsidiaries; controlled, affiliated, and predecessor firms; divisions; subdivisions; components; units; instrumentalities; partnerships; and joint ventures.

20. Unless otherwise specified, all uses of the conjunctive include the disjunctive and vice versa, and words in the singular include the plural and vice versa.

INSTRUCTIONS

1. Unless otherwise specified, these discovery requests cover the period beginning January 1, 1994, and ending with the date of response.

2. If Applicants have information that would permit a partial answer to any interrogatory, but they would have to conduct a special study to obtain information necessary to provide a more complete response to that interrogatory, and if the burden of conducting such special study would be greater for Applicants than for EFM, then:

a. state that fact;

b. provide the partial answer that may be made with information available to Applicant;

c. identify such business records, or any compilation, abstract, or summary based thereon, as will permit EFM to derive or ascertain a more complete answer; and

d. as provided in 49 C.F.R. § 1114.26(b), produce such business records, or any compilation, abstract, or summary based thereon, as will permit EFM to derive or ascertain a more complete answer.

3. All documents responsive to a document request should be produced, including each copy of an original that differs in any way from the original, including, but not limited to, differences caused by markings on, or other additions to, such copy or deletions of parts of the original.

4. If a document responsive to a particular document request is known to have been in existence but no longer exists, state the circumstances under which it ceased to exist, and identify all persons having knowledge of the contents of such documents.

5. If the information sought in a particular interrogatory is contained in existing documents, those documents may be specifically identified, and pursuant to 49 C.F.R. § 1114.26(b), Applicants may produce legible, complete and exact copies thereof s long as the original documents are retained and will be made available if requested; however, the documents shall be produced within the fifteen-day time period provided for responding to these interrogatories and shall be identified as being responsive to that particular interrogatory. In such case, the copies should be sent by expedited delivery to the undersigned attorneys. EFM will pay all reasonable costs for duplication and expedited delivery of documents to its attorneys.

6. If Applicants' reply to any interrogatory includes a reference to the Application filed in this proceeding, such response shall specify the volume(s) and exact page number(s) of the Application where the information is contained.

7. If any information or document is withheld on the ground that it is privileged or otherwise not discoverable,

a. identify the information or document (in the manner provided in Definition 12 *supra); and*

b. state the basis for the claim that it is privileged or otherwise not discoverable.

8. 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.

9. In responding to any request for data regarding intermodal traffic, indicate separately data for trailers and for containers.

10. If any Applicant knows or later learns that its response to any interrogatory is incorrect, it is under a duty seasonably to correct that response. Pursuant to 49 C.F.R. § 1114.29, Applicants are under a duty seasonably to supplement their responses with respect to any questions directly addressed to the identity and locations of persons having knowledge of discoverable matters.

11. If Applicants have any questions or require any clarification concerning any interrogatory or document production request, please contact undersigned counsel to discuss and resolve any such issue.

12. For each interrogatory, identify the individual providing the responsive information, including company affiliation and job title.

INTERROGATORIES

1. For locations which post-transaction will be exclusively served by CSX, describe how NS intends to "pursue [] business to locations now on Conrail that Mine 84 currently serves" (Fox RVS at 4), including:

(i) if NS intends to offer CSX joint-line arrangements, the point of interchange and the formula or basis for division of revenue;

(ii) if NS intends to offer interchange via reciprocal switch, the switching fee;

(iii) for any other arrangement NS intends to offer to CSX, the nature of and financial basis for the arrangement; and

(iv) the means by which NS will endeavor to assure that arrangements by which Mine 84 may continue to obtain access to CSX-served locations are competitive with single-line movements by CSX from former Monongahela Railway-served coal mines.

2. Identify the anticipated "new markets for Mine 84 coal through the expanded single-line reach of the NS system" (Fox RVS at 4), including:

(i) the coal consuming customer at each location;

(ii) the route mile distance from Mine 84 to each location; and

(iii) the current coal source for each location, including mine, mine operator, quantity, heat content, sulphur content and distance from said existing coal source to each coal delivery or consumption point.

3. With regard to the expectation that "the predominance at jointly-served producers in the Monongahela region will tend to set the marketplace for that coal" and the continuing explanation that "it is not unreasonable to conclude that rates realized by EFM will be affected by the pressure of market forces established by the railroads' rates from jointly-served mines," (Fox RVS at 4-5):

(i) Is it NS' contention that transportation for coal from Mine 84 will be priced competitively with coal from the jointly-served mines, or that transportation for coal from Mine 84 may be priced competitively with the coal from jointly-served mines?

(ii) If the answer to Interrogatory 3(i) is that the transportation for coal from Mine 84 will be priced competitively with the coal from the jointly-served mines, what assurance does NS offer to Mine 84 and to the Board that said intent will be carried out, both by present and future managers responsible for coal transportation marketing by NS?

(iii) Please describe all experience of NS bearing on the "expectation" and the "not unreasonable conclusion" that transportation pricing for Mine 84 coal will be affected by the "pressure of market forces established by the railroads' rates from jointly-served mines," including identification of other markets where all but one producer/shipper are served by two or

more rail carriers, the rates offered by NS to the shipper which is served exclusively by NS, and the NS rates offered to and the rates implemented for shippers or production points which are served by NS and at least one other railroad.

4. 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), 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 such 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.

5. With regard to the metallurgical coal markets and the ability of Mine 84 through NS service "to participate in supply blends and product packaging with other NS-served coal producers," (Fox RVS at 6):

(i) Identify all metallurgical coal customers served by NS;

(ii) For each party identified in Interrogatory 5(i) above, identify each of the origin mines from which coal is shipped to those metallurgical coal

markets, the volume from each mine for 1996, and the sulphur content of the coal from each of those mines; and

(iii) For NS provided blending services, including blending of coals for export, state the product specifications for coal blended for the metallurgical markets.

6. With regard to the "competitive advantage post-Transaction by virtue of the fact that EFM is closer physically to virtually all of the coal markets on the new NS system than the mines on the former Monongahela Railway," (Fox RVS at 6-7):

(i) State whether the "competitive advantage" applicable to coal markets to be acquired from Conrail is any different post-transaction than pre-transaction;

(ii) If the response to Interrogatory 6(i) is in the affirmative, state how the "competitive advantage" on the new NS system is different from the competitive advantage or position of Mine 84 on the pre-transaction Conrail with regard to each power plant, lake destination (Sandusky and Ashtabula) and ocean destination (Baltimore and Lambert's Point), including pre- and post-transaction routings;

(iii) For each destination for which EFM is asserted to be closer to the coal market post-transaction than pre-transaction, state the distance by which EFM is closer, and the post-transaction total route miles; and

(iv) Explain whether the term "rate district" in Fox RVS at pages 6-7 is utilized in the same manner as the term "rate district" is utilized in Fox

RVS at pages 4-5. If the use of the terms is not synonymous, explain the difference.

7. Explain how NS intends to establish "mutually satisfactory agreements that permit the economical movement of coal through joint-line service" with CSX (Fox RVS at 7), taking into account that CSX would serve mines on the former Monongahela Railway that produce coal comparable to, and directly competitive with, the coal produced by EFM.

8. With regard to the "some 20.6 million tons of interchanged utility and metallurgical coal traffic" handled by NS in 1996 (Fox RVS at 7):

(i) State the quantity of Pittsburgh Seam coal interchanged with Conrail, and state each destination, and the volume and origin location and mine for each destination receiving such coal handled via NS;

(ii) For each NS-served destination included within the above-quoted statement, identify the destination location, the customer, the origin of the coal to each customer, the volume for each customer from each origin, the origin carrier, the route miles, and the heat content and sulphur content characteristics of the coal;

(iii) For each NS-served origin included within the above-quoted statement, state the origin, the mine operator, each customer name and location, the volume, the destination carrier, the route miles, and the heat and sulphur content characteristics for each origin;

(iv) For each destination identified in Interrogatory 8(ii) above, identify each mine on the NS system producing coal of like heat and sulphur content

characteristics as the coal being transported in interline service to that destination, and state the route miles between each said mine and each such destination location; and

(v) For each origin identified in Interrogatory 8(iii) above, identify each mine served by the destination carrier producing a coal of like heat and sulphur content characteristics as the coal for which NS serves as the origin carrier, and provide route miles for any identified mines and the destination.

DOCUMENT PRODUCTION REQUESTS

1. Provide the agreements with the Canadian Pacific Rail System and Guilford Transportation relating to the handling of traffic between Binghamton and Albany, New York (Mohan RVS at 73).

2. Provide all documents setting forth specifications for metallurgical coal used by NS in blending coal for export or for open market domestic sales.

3. Provide all studies or other documents which support the statement that "the level of coal traffic moving between the current NS territory and the future NS portion of Conrail is expected to rise to even greater levels in later years" (Fox RVS at 8).

Respectfully submitted,

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Attorneys for Eighty Four Mining Company, Inc .

December 24, 1997

CERTIFICATE OF SERVICE

I hereby certify that Eighty Four Mining Company, Inc.'s foregoing Third Set of Interrogatories and Document Requests to Applicants, was served this 24th day of December, 1997, by hand delivery upon counsel for the Applicants:

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Honorable Jacob Leventhal
Administrative Law Judge
Federal Energy Regulatory Commission
Office of Hearings, Suite 11F
888 First Street, NE
Washington, DC 20426

and, by first-class mail, postage prepaid, upon the Restricted Service List.

Martin W. Bercovici

EXHIBIT 2

CSX/NS-186

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' INITIAL OBJECTIONS TO
EIGHTY FOUR MINING COMPANY, INC.'S THIRD SET OF INTERROGATORIES
AND DOCUMENT REQUESTS TO APPLICANTS

Applicants[1/] hereby submit their initial objections to Eighty Four Mining Company, Inc.'s ("EFM") Third Set of Interrogatories and Document Requests to Applicants (EFM-10).

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 that it will be providing no affirmative response. . . ." Applicants reserve the right to answer or object to each and every discovery request, definition and instruction set forth in EFM-10 within the time frame set forth in Paragraph 16.

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").

On October 21, 1997, EFM filed its Comments and Requests for Conditions (EFM-7). In that filing, EFM requested conditions based on allegations that: 1) all of EFM's competing mine operators would be receiving increased rail transportation options while EFM would not; and 2) EFM would not have single-line access to utility plants and industrial customers currently on Conrail that would be served, post-transaction, by CSX.

EFM had a full, fair and adequate opportunity to serve discovery and participate in the depositions of Applicants' witnesses during the initial discovery period (June 23, 1997 through October 21, 1997) in this proceeding, and in fact did so. Subsequent to the filing of Applicants' rebuttal, however, EFM served EFM-10, more than two dozen discovery requests (including subparts). These requests attempt to explore issues raised by two rebuttal witnesses (John William Fox, Jr. and D. Michael Mohan) in their rebuttal verified statements submitted with the Applicants' December 15, 1997 comments. Applicants voluntarily have offered to make both Mr. Fox and Mr. Mohan available to EFM and others for cross-examination concerning their rebuttal verified statements, and in fact have already scheduled for deposition at EFM's request the cross-examination deposition of Mr. Fox for January 16, 1998.

Under the procedural schedule governing this proceeding, however, EFM does not have the right to make any further evidentiary filings. Although past STB and ICC practice would permit EFM to cross-examined Applicants' offered rebuttal witnesses in such depositions, and to cite the resulting testimony in its February 23, 1998, brief, such past practice does not permit EFM discovery. Cf. Union Pacific Corp., et al. -- Control and Merger -- Southern Pacific Rail Corp., et al., Finance Docket No. 32760, Decision No. 35,

served May 9, 1996 (denying Kansas City Southern written discovery concerning applicants' settlement with the Chemical Manufacturers Association which was discussed by applicants' offered rebuttal witnesses; noting that KCS could participate in the deposition of such rebuttal witnesses).

Respectfully submitted,

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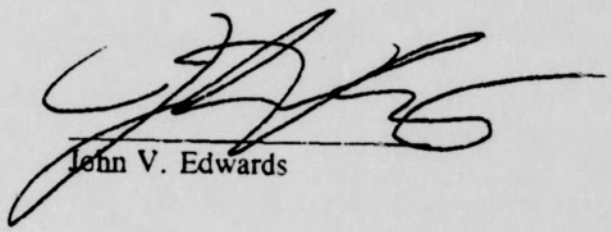
Counsel for Conrail Inc. and Consolidated Rail Corporation

Dated: January 2, 1998

CERTIFICATE OF SERVICE

I, John V. Edwards, certify that on January 2, 1998, I caused to be served by facsimile service a true and correct copy of the foregoing CSX/NS-186, Applicants' Initial Objections to Eighty Four Mining Company, Inc.'s First Set of Interrogatories and Documents Requests to Applicants (EFM-10) on all parties that have submitted to the Applicants a Request to be Placed on the Restricted Service List in STB Finance Docket No. 33388.



John V. Edwards

Dated: January 2, 1998

EXHIBIT 3

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January 5, 1998

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

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; STB Finance Docket No. 33388; REQUEST OF EIGHTY-FOUR MINING COMPANY FOR DISCOVERY CONFERENCE

Dear Judge Leventhal:

The purpose of this letter is to confirm my conversation of this date with Jennifer Schmidt of your office scheduling a discovery conference at 9:30 a.m. on Thursday, January 8, for the purpose of considering Eighty-Four Mining Company's (EFM) request to compel applicants to respond to EFM's Third Set of Interrogatories. In accordance with Discovery Guideline No. 18 concerning Resolution of Disputes, this letter provides notice of the discovery in dispute.

Following receipt and review of applicants' rebuttal filing submitted December 15, 1997, running to seven volumes of approximately 4,700 pages in length, EFM propounded interrogatories and document production requests to applicants addressing, with specificity, the rebuttal testimony directed at the comments of Eighty-Four Mining Company. *See* EFM-10 (December 24, 1997.) On January 2, 1998, applicants served objections to EFM's interrogatories and document production requests. While acknowledging that EFM's discovery requests "attempt to explore issues raised by two rebuttal witnesses (John William Fox, Jr. and D. Michael Mohan) in their rebuttal verified statements submitted with the Applicants' December 15, 1997 comments," *see* CSX/NS-186 at p. 2 (January 2, 1998), applicants are stonewalling and refusing to provide responses to the written interrogatories and document production requests. In lieu of responding to the written discovery and document requests, applicants state they "voluntarily have offered to make both Mr. Fox and Mr. Mohan available to EFM and others for cross examination concerning their rebuttal verified statements..." Applicants allege that "past STB and

ICC practice would permit EFM to cross examined (sic) Applicants' offered rebuttal witnesses in such depositions, and to cite the resulting testimony in its February 23, 1998, brief," citing to Decision No. 35 of the UP/SP merger proceeding; and they argue that "such past practice does not permit EFM discovery." Id.

Applicants attempt to draw a distinction between written interrogatories and document production requests on the one hand and deposition testimony on the other, which distinction is without merit. Such a distinction is not founded in either the Discovery Guidelines governing this proceeding (Decision Nos. 10, 16 and 20), the Board's Discovery Rules (49 C.F.R. Part 1114) or in any applicable precedent.

Applicants' distinction between "discovery" and "depositions" is non-sensical. Depositions, interrogatories and document production requests all are tools of discovery, as clearly evidenced by the Board's Discovery Rules. *See* 49 C.F.R. § 1114.21-1114.30. The Board's rules specifically state that "All discovery procedures may be used by parties without filing a petition and obtaining prior Board approval," and "methods of discovery may be used in any sequence and the fact that a party is conducting discovery, whether by deposition or otherwise, should not operate to delay any party's discovery." 49 C.F.R. § 1114.21(b) and (d).

Decision No. 35 in the UP/SP merger proceeding has no relevance whatsoever to the issue of EFM's right to secure responses to written interrogatories and to the production of documents. Decision No. 35 did not deal with specific discovery requested by the Kansas City Southern Railway. Rather, KCS had requested the Board either to require applicants to amend the primary application "or, alternatively, that we allow parties to conduct discovery and submit evidence relating to the CMA settlement agreement." Union Pacific Corporation, et al. — Control and Merger — Southern Pacific Rail Corporation, et al., F.D. No. 32760, Decision No. 35 at p. 3 (May 9, 1996). In effect, KCS was seeking modification of the procedural schedule, not to compel responses to interrogatories or document production requests specifically addressed to the rebuttal verified statements. In denying the request to modify the procedural schedule, the Board noted that "KCS has made no specific showing of what additional information it intends to uncover in discovery that would be material or relevant to this proceeding." Id. The Board went on to note that UP/SP witnesses would be available for discovery (which effectively complied with the KCS request to conduct discovery) and that discovery information relating to the rebuttal may be included in the briefs. The Commission thus concluded that its "decision does not preclude additional information on the CMA settlement agreement from being filed." Id. There is nothing in the text of Decision No. 35 which serves to elevate deposition discovery over written and documentary discovery, and to approve the use of one while disapproving the use of the other discovery techniques as a means of testing the rebuttal testimony of applicants' witnesses.

Also, contradicting applicants' position that past ICC practice limits discovery tools is the ICC's Decision No. 17 in the UP/CNW merger proceeding, Finance Docket No. 32133 (served July 11, 1994), which decision is cited by applicants in initial objections to document production

requests of both the Erie-Niagara Rail Steering Committee and the State of New York, CSX/NS-183 and 184 (December 31, 1997). In the UP/CNW case, the Chicago, Central, and Pacific Railroad Company (CC&P), which did not serve discovery prior to the filing of comments and responsive applications, served discovery requests on applicants subsequent to the filing of its responsive application. In response to a motion to compel, the ICC's Chief Administrative Law Judge Cross granted the CC&P motion to compel; this decision was not appealed, and applicants in that case provided discovery responses. *See* Union Pacific Corporation, et al. — Control — Chicago and Northwestern Transp. Co., et al., F.D. No. 32133, Decision No. 17 (July 11, 1994), 1994 WL 323928 (I.C.C.), at pp. 2 and 9.[1/] Accordingly, agency precedent is that discovery in the circumstances sought by EFM is available.

The discovery sought by EFM, admitted by applicants to be focused upon the rebuttal verified statements, is necessary in order that EFM can address the rebuttal arguments of applicants in its brief. The information required is more appropriate to written response than to deposition. In any event, it is EFM's choice, not subject to the control of applicants, as to the nature and sequence of the use of the various discovery tools in an effort to test the statements of applicants' witnesses.

Copies of the discovery requests, applicants' initial objections, and the decisions cited above are enclosed herewith for your convenient reference.

Respectfully submitted,

Martin W. Bercovici

Enclosures

cc (w/out enclosure): Drew A. Harker, Esquire (by facsimile)
David H. Coburn, Esquire (by facsimile)
John V. Edwards, Esquire (by facsimile)
Gerald P. Norton, Esquire (by facsimile)
All Parties to the Restricted Service List (by facsimile)

1/ There were disputes over certain specific discovery requests, and those were subject to a further motion to compel which were denied by the Chief ALJ. The ALJ's decision was sustained by the Commission, based upon those requests being unrelated to applicants' rebuttal testimony and therefore outside the scope of relevance and proper inquiry at the given stage of the proceeding.

EXHIBIT 4

CSX/NS-188

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' OPPOSITION TO THE STATE OF NEW YORK'S, ERIE-NIAGARA RAIL STEERING COMMITTEE'S AND EIGHTY-FOUR MINING COMPANY, INC.'S REQUESTS TO COMPEL PRODUCTION OF DISCOVERY

Applicants[1] hereby reply to the January 2, 1998 requests of The State of New York (NYS) and the Erie-Niagara Rail Steering Committee (ENRS), and the January 5, 1998 request of Eighty-Four Mining Company, Inc. (EFM) to compel production of discovery from Applicants. NYS and ENRS seek production of unredacted versions of (a) the CN/CSX Settlement Agreement, entitled "CN-CSX Interchange and Through Route Agreement, and (b) the CP/CSX Settlement Agreement, entitled "Rate Making Agreement." For its part, EFM has submitted more than two dozen discovery requests

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[1] "Applicants" refers collectively to CSX Corporation and CSX Transportation, Inc. (collectively "CSX") and Norfolk Southern Corporation and Norfolk Southern Railway Company (collectively "NS"). Conrail Inc. and Consolidated Rail Corporation (collectively "Conrail") are not effected by any issues in dispute, and therefore have not joined in this opposition.

(including subparts) designed to explore issues raised by two rebuttal witnesses in their rebuttal verified statements submitted with the Applicants' December 15, 1997 Rebuttal. For the reasons set forth below, NYS', ENRS' and EFM's requests should be denied.

I. BACKGROUND

On November 7, 1997, The State of New York propounded requests to Applicants (NYS-14) seeking, inter alia, documents related to the then recently announced settlements among CSX, NS and the Canadian Pacific Railway System (CP). NS voluntarily produced a redacted version of its agreement with CP (Document NS-75-HC-00001-00011) on the basis that NS was planning to rely on the agreement in the Applicants' December 15 rebuttal filing. Because there was no issue in the case to which the CSX/CP Settlement Agreement related, CSX objected to the production of the CP/CSX Settlement Agreement.

On November 25, 1997, in response to a Motion to Compel by the State of New York (NYS-16), Administrative Law Judge Leventhal held a discovery conference to consider requiring production of the CSX/CP Settlement Agreement on NYS' Motion to Compel. At that conference, counsel for NYS argued that the CP/CSX Settlement Agreement was "relevant to New York's ability to carry its burden of persuasion on the issue of the operational feasibility if [Canadian Pacific or New York and Atlantic or both] have entered into agreements that inhibit or prohibit their ability to operate over the line in question." Discovery Conference, November 25, 1997, Transcript at 19. No mention of the need to discover commercially sensitive rate information was made by NYS' counsel.

Judge Leventhal ordered CSX to produce the CP/CSX Settlement Agreement, allowing "reasonable redactions" of "commercially sensitive" and/or "highly confidential" information. Discovery Conference, Nov. 25, 1997, Transcript at 29, 32, 35. 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 HC 000101-000110.

The CP/CSX Settlement Agreement is designed to provide a framework for efficiently establishing joint line rates between CSX and CP on certain moves, including but not limited moves from and to New York City and Buffalo, New York. The Agreement permits CP to market its services directly to customers in those areas and establishes certain "Minimum Revenue Factors" which are used to establish the joint line rates without the necessity of further contact or concurrence of the other railroad. The limited redactions made were by CSX in the following areas:

- Minimum Revenue Factors per carload for Merchandise Shipments interchanged between CP and CSX to or from New York City, Montreal, Philadelphia and Buffalo/Niagara Falls;
- The minimum car thresholds for the Minimum Revenue Factors to take effect; and
- Volume figures relating to the CP/CSX Agreement (Exhibit A to the Rate Making Agreement) covering import/export marine containers in the ExpressRail (in New Jersey) – Montreal/Toronto corridor.

No other redactions were made to the CP/CSX Agreement.

On December 15, 1997, Applicants filed their Rebuttal in this proceeding (CSX/NS-176). In that filing, Applicants make numerous arguments against the requests of both ENRS and NYS. See CSX/NS-176 at 124-42. Included in the discussion of the ENRS and NYS requests is a description of the CN/CSX and CP/CSX Settlement Agreements. Id at 129-30; 139-40. The Rebuttal only highlights that these Agreements provide CN and CP with commercial access to New York City and Buffalo, that, heretofore, CN and CP did not enjoy, and explains the mechanism by which this access is to be achieved. Id. at 129, 139. ("A mechanism has been established so that these carriers can quote a price that involves CSX in their routing without CSX's prior consent." Id. at 129). The commercial access is termed "effective" (id. at 140) because it allows shippers and receivers in New York City, Long Island Buffalo, and the other regions covered by the agreements the ability to solicit bids directly from CP and CN for general merchandise traffic, without the necessity of consulting CSX in each instance. Nowhere in the Rebuttal, however, is the redacted and commercially sensitive rate information relied upon or referenced.

Subsequent to filing their Rebuttal on December 15, 1997, Applicants voluntarily 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[2]. The redactions to the CN/CSX Settlement Agreement were made in the following areas:

- The minimum revenue requirements for "New York Central" local points in and outside of the North Jersey Shared Asset Area;
- The CSX revenue factor for CSX-CN interline moves to and from Buffalo, New York;
- The CSX revenue factor for movements between points in Canada and CN Buffalo customers beyond the minimum volume and the portion of the joint line movement that CN will bear; and
- The mechanism for accomodating CSX's loss of intermediate switching fees[3]

No further redactions were made to the CN/CSX Agreement.

At the time the CN and CP Settlement agreements were produced by CSX in redacted form, no party challenged the commercial sensitivity of the redacted material. Similarly, no party currently claims that the information now sought by ENRS and NYS is not commercially sensitive.

On December 22, 1997 ENRS and NYS each served its Third Requests for Production of Documents (ENRS-12/NYS-22) requesting production of *unredacted* copies of the CP/CSX and CN/CSX Settlement Agreements. Applicants filed initial objections to these requests (CSX-183/CSX-184), and both ENRS (by letter dated 1/2/98) and NYS (NYS-23) requested that Your Honor compel production.

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[2] ENRS incorrectly states in its January 2, 1998 request to compel production that the CN/CSX Agreement was produced by CSX in response to Judge Leventhal's November 25, 1997 ruling. In fact, that Agreement was produced voluntarily by CSX as a workpaper.

[3] Upon review, CSX is willing to unredact this portion of the agreement.

II. ARGUMENT

A. DISCLOSURE TO ENRS AND NYS OF THE COMMERCIALLY SENSITIVE INFORMATION CONTAINED IN THE SETTLEMENT AGREEMENTS SHOULD NOT BE REQUIRED

1. The Information That Was Redacted From Both Agreements is Commercially Sensitive And Meets The Standard For Redaction Set Forth In Decision No. 34 Of This Case

CSX redacted the information from the CP Agreement pursuant to Judge Leventhal's order issued November 25, 1997. 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." Decision No. 34 at 2. Under this standard, numerous "reasonable redactions" have been authorized. Specifically, the redaction of just the type of commercially sensitive information that ENRS and NYS seek production of in this instance has been approved. 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.

a. Release of The Information Sought Would Cause Competitive Harm to CSX

Applicants would suffer substantial harm if forced to produce such commercially sensitive information. No party has contended that release of the redacted information would not seriously harm CSX's competitive interests. Most of the information relates to the economic terms of carrier-to-carrier business arrangements, which could give competitors, such as motor carriers, an advantage in pricing their services in competition

with the railroads. Historically, railroads have treated revenue divisions in interline movements (which constitutes a large part of the redacted information) as very competitively sensitive, a concern that has been acknowledged by the Board. Another way in which CSX could be harmed competitively from release of this information is that the Agreements will apply prospectively, thus competitors, such as trucks, will have an advantage in terms of their own pricing behavior in the marketplace, prior to the time at which the agreements became effective. In addition, disclosure to shippers of the new rates would undermine CSX's ability to maintain commercial relations post-control. Finally, CN and CP are competitors – both in the marketplace and in their relations with CSX -- and disclosure of the economic terms of the CN and CP agreements to the other is thus not in the public interest because it could affect their ability to effectively compete and could make it more difficult for CSX to negotiate commercial arrangements with them in the future.

On this basis, the information clearly meets the standard set out in Decision No. 34 and decisions by Your Honor that permitted the redaction of commercially sensitive information. Id.

b. Neither ENRS Nor NYS Has Posited a Compelling Need for the Commercially Sensitive Information That Would Outweigh the Competitive Harm Suffered by Applicants

Balanced against this undisputed commercial harm is that neither ENRS nor NYS has posited a compelling need for the commercially sensitive information contained in the settlement agreements. For instance, ENRS argues that "it is 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 the agreements without knowing the price and rate terms

relating to the Niagara Frontier area. ENRS Letter to Judge Leventhal, January 2, 1998 at 2. NYS, which based its original motion to compel production of the CP settlement agreement (NYS-16) on the professed need to evaluate the operational feasibility of its responsive application , now similarly argues that the levels of the fixed revenue factors are necessary to evaluate "whether the overall arrangement provides CP and CN with true (as opposed to paper) access to east-of-Hudson shippers." It is not necessary, however, that this information be supplied in order to conclude that the Niagara/Buffalo and East-of-Hudson shippers will be better off as a result of these agreements. The mere fact that these shippers will be able to solicit bids directly from three (3) class I railroads indicates that their situation will be improved over the current situation. Applicants do not rely on the specific price and rate information in the agreements in their Rebuttal, but merely argue that CN and CP will have the ability "to offer to provide transportation services to shippers in New York City and Long Island" and in the Buffalo/Niagara area by quoting rates for joint movements without the necessity of obtaining prior approval from CSX. CSX/NS-176 at 130.

The gravamen of the theory that ENRS and NYS appear to be pressing with this discovery is that CN and CP both agreed to financial terms that would not, in fact, permit them to achieve their goal of increasing access to customers covered by the agreement. NYS and ENRS have offered no support for the illogical position that either CP or CN would have entered into these agreements if the financial and economic terms of the agreement would not allow them to effectively compete for rail traffic in the areas covered. The CP/CSX and CN/CSX Agreements were entered into between competitors at arms-length. CP and CN sacrificed important rights in order to enter into these

agreements. They agreed not to file responsive applications in this proceeding seeking trackage and/or other rights to serve the Buffalo/Niagara and east-of-Hudson areas, among others. Neither ENRS nor NYS has posited any theory as to why CP and CN would have done so, and sacrificed the right to seek Board redress, if the agreements did not provide them with effective and competitive access.

Without more, ENRS' and NYS' mere questioning of whether CN and CP have negotiated terms that will provide them with legitimate access to those shippers serves as no basis for discovery of commercially sensitive information. The Board has been unwilling to grant discovery of this type of commercially sensitive information when the requests are premised on such unlikely theories. See Decision No. 17, July 31, 1997, at 3.

For instance, in Decision No. 17, the Board rejected the motion of American Electric Power et al. (ACE) to compel discovery of sensitive rate information for shipments of coal. Id. at 1. ACE had sought discovery of that information in order to "determine whether the applicant railroads set their rates in order to maximize profits." Id. The Board denied ACE's Motion to Compel, holding that because the discovery was propounded with the premise of "challenging a basic principle of economics, that firms will generally attempt to maximize their profits . . . we are extremely reluctant to authorize the broad discovery of commercially sensitive information that petitioners propose." Id. at 3. In reaching its decision, the Board relied on the fact that, "Petitioners have not suggested a plausible rival economic theory to replace this one." Id.

In this case, ENRS' and NYS' discovery is similarly based on refuting a basic and common sense theory of negotiation – that CN and CP would not sacrifice important

rights in order to enter into an agreement that did not provide them with the ability to be an effective competitor in moving traffic in and out of the Buffalo/Niagara and east-of-Hudson areas. Neither ENRS nor NYS have suggested any plausible alternative to the idea that CN and CP entered into their respective agreements with CSX in good faith and with the belief that those agreements would allow them effective access to rail traffic. Thus, the discovery of the commercially sensitive information that ENRS and NYS seek is inappropriate "simply to permit movants the ability to conduct what amounts to a "fishing expedition." Decision No. 42, October 3, 1997, at 8.

2. Both ENRS and NYS Seek Discovery of Commercially Sensitive Information That is Beyond the Scope of What is Relevant to Their Filings

Finally, both ENRS and NYS seek discovery of commercially sensitive information that is well beyond the scope of what pertains to their specific claims in the case. Pragraphs 5.A.(ii) and (iii) on page 3 of the CP Agreement, relating to the Minimum Revenue Factors for shipments between Albany and Montreal and Albany and Philadelphia respectively, and Exhibit A to the CP Agreement relating to Import/export containers in the ExpressRail – Montreal/Toronto corridor are unrelated to the claims of either ENRS or NYS and therefore are not discoverable by either party.

Judge Leventhal has previously limited the scope of discovery to matters that are essential to the seeking party's ability to make its case. Discovery Conference, December 4, 1997, Transcript at 45. Similarly, the Board has ruled that responsive applicants (in this case only NYS qualifies as a responsive applicant) may only submit evidence that rebuts "specific" evidence in the primary applicants' rebuttal filing in opposition to the

conditions sought by the responsive applicant. E.g., UP/CNW, Decision No. 17, served July 11, 1994, at 9 & n.13; UP/CNW, Decision No. 20, served Sept. 12, 1994 at 7, 11, 15, 16, 17, 18, and 20. To the extent that the movants seek information relating to areas other than New York City and Buffalo, such information does not meet this standard.

B. AS COMMENTERS, ENRS AND EFM ARE NOT ENTITLED TO FILE REBUTTAL EVIDENCE AND HAVE NO RIGHT TO ADDITIONAL DISCOVERY

1. Under Decision No. 6 Parties Filing Comments, Protests, and Requests for Conditions are not Authorized to Submit Rebuttal Evidence or to Conduct Discovery in Support Thereof

Decision No. 6, issued on May 22, 1997, established the governing procedural schedule and requirements governing submission of evidence in the proceeding. Decision No. 6 provides that commentors are not authorized to submit rebuttal evidence:

> 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.

CSX/NS, Finance Docket No. 33388, Decision No. 6, 1997 WL 283551 (I.C.C.) at *6 (citing UP/SP, Decision No. 6 at 7-8; BN/SF, Decision No. 16 at 11). Decision No. 6 fixed December 15, 1997 as the date for the filing of rebuttal testimony in support of the Primary Application and January 14, 1998 as the date for the filing of rebuttal testimony in support of Inconsistent and Responsive Applications. The evidentiary record on the Primary Application was closed on December 15, 1997 when Applicants filed their Rebuttal in support of the Primary Application. No further evidentiary filing by other parties with respect to the Primary Application is authorized by Decision No. 6. The only

parties permitted to file rebuttal testimony on January 14, 1998 are those that filed an inconsistent or responsive application.

On October 21, 1997, ENRS and EFM filed Comments and Requests for Conditions with respect to the Primary Application submitted by Applicants. ENRS and EFM did not file Responsive Applications or Inconsistent Applications such that either would be entitled to submit on January 14, 1997 rebuttal evidence with respect to a Responsive or Inconsistent Application. Thus they have no right to file rebuttal on January 14 and any further evidentiary filing by these parties would be improper and would directly contradict the Board's restriction on rebuttal testimony discussed above.

Both ENRS and EFM indicate that their only purpose in seeking additional discovery is to obtain surrebuttal evidence for submission to the Board. While the language in Decision No. 6 did not directly address commenters' rights to take discovery in support of surrebuttal evidentiary submissions, the purpose of this discovery, as acknowledged by ENRS and EFM, is to permit them to adduce evidence in support of their position. It is axiomatic that in the absence of a right to introduce evidence in a proceeding, discovery serves no useful purpose and is not permitted. Thus, ENRS and EFM are not entitled to the discovery that they seek.

2. Decision No. 6's Prohibition on Submission of Rebuttal Evidence By Parties Filing Comments, Protests and Requests for Conditions is Consistent With Board And I.C.C. Precedent

Beyond Decision No. 6, the Board's practice is clear that neither ENRS nor EFM may introduce additional evidence with respect to the Primary Application. The Board and its predecessor, the I.C.C., have consistently held that applicants, whether primary or

responsive, are entitled to submit the final evidence and close the record on the merits of their application. Union Pacific – Control – Chicago and North Western, Finance Docket No. 32133, Decision No. 17; Burlington Northern, Inc. – Control and Merger – Sante Fe Pacific Corporation, STB Finance Docket No. 32549, Decision No. 34, 1995 WL 374546 at 4 (I.C.C.) ("Responsive applicants have the right to close the record on their cases, while parties requesting conditions do not."); Soo Line Railroad Company – Petition for Declaratory Relief, STB Finance Docket No. 33350, 1197 WL 341879 at *6 (I.C.C.) (1997).

Throughout the two most recent major control cases, the Board and its predecessor ruled that commenters did not have the right to submit rebuttal evidence. For instance, in BN/SF, Decision No. 16, the I.C.C. squarely addressed the question of whether a commenting party was entitled to file rebuttal evidence. In that case, Southern Pacific Transportation Company (SP), a non-applicant requesting conditions, argued that it had the right to submit rebuttal as to any challenge the primary applicants made to the scope and feasibility of SP's proposed conditions. BN/SF, Decision No. 16 at 10. SP claimed that to deny SP's rebuttal evidence simply because of the form in which SP presented its requested conditions would serve no public policy interest. Id. The Commission, in rejecting SP's request to file rebuttal evidence as a commenter, clearly distinguished the respective rights of commenting parties on the one hand and responsive applicants on the other, stating that commenters did not have the right to submit rebuttal evidence:

> The relief responsive applicants seek is different from the relief that parties simply requesting conditions seek. Traditionally, applicants, whether they are primary or responsive applicants, have the right to close the

> evidentiary record on their case. Therefore, responsive applicants can answer arguments made in opposition to their application in rebuttal filings. Parties seeking conditions, on the other hand, come to the Commission as part of and in opposition to the primary application, and the primary applicants respond to those parties in their rebuttal in support of the primary application. Allowing the parties to file rebuttal evidence would deprive the primary applicants of their right to close the evidentiary record on their case. We see no necessity for such filings, and believe that the current procedural schedule will allow the Commission to fully comprehend and evaluate all issues that the parties seeking conditions will raise in this proceeding.

BN/SF, Decision No. 16 at *1.

In BN/SF, Decision No. 34, the I.C.C. denied the motions of several commenting parties for leave to submit rebuttal filings in the case.[4] Illinois Central Railroad Company ("IC") and Southern California Regional Rail Authority ("SCRRA"), for example, argued that because the primary applicants submitted evidence and testimony in opposition to

[4] In Decision No. 34, the I.C.C. did partially grant the motion of one commenting party, Phillips Petroleum Company (PPC), to file rebuttal evidence, but only because the primary applicants had failed to make PPC aware of an alleged fact during discovery. BN/SF, Decision 34 at *3. Specifically, a witness for the primary applicants had submitted a verified statement in support of the primary application and had been deposed prior to the date for filing comments and requests for conditions and, both in his verified statement and in his deposition, had stated an estimated cost for a proposed build-out project. Motion of PPC for Leave to File Rebuttal Verified Statement of Fred E. Watson (PPC-9) at 2. In their comments and request for conditions, PPC relied on that witness' estimated cost of the build-out. Id. In the primary applicants' rebuttal filing, however, the same witness, for the first time admitted that, in his previous statements, he had mistakenly underestimated the total cost of the build-out by half. Id. In an effort to address PPC's concern that the primary applicants had used this evidence to "sandbag" PPC, the Commission allowed PPC's rebuttal filing, but only to the limited extent that it pertained to the "newly discovered evidence." BN/SF, Decision No. 34 at 3-4. PPC's situation is clearly distinguishable from that of ENRS and EFM, who have made no claims that Applicants have improperly withheld any evidence during discovery or attempted to "sandbag" either ENRS or EFM.

their respective requests for conditions, the I.C.C. should allow the commenters to file additional factual information directly responsive to issues the primary applicants raised in their rebuttal. Id. at *2. The I.C.C. flatly rejected these requests to file additional evidence, restating the general rule that the I.C.C. "would not permit rebuttal filings from parties before [the Commission] 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." Id. at *4.

Tuscon Electric Power Company (TEP) similarly argued in BN/SF, Decision No. 34, that it needed to submit rebuttal evidence to clarify the record on two particular technical points, arguing that there was no reason for treating differently parties filing requests for conditions and parties filing responsive applications. TEP relied on the fact that prior versions of the procedural schedule had provided parties seeking conditions with the opportunity to submit rebuttal filings, but the Commission had eliminated that opportunity in the final schedule.[5] The Commission also rejected this argument, noting that "the absence of a provision in the final procedural schedule allowing rebuttal filings by parties requesting conditions that are not in the form of responsive applications was not the result of Commission oversight." Id. at *1.[6]

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[5] This is an indication that, when the Board and its predecessor intend to give commenters the substantive right to file rebuttal evidence, they do so explicitly, and the absence of any direct authorization, as in the present case, evidences the Board's intent that such parties do not have such rights.

[6] Similarly, Decision No. 6 makes clear that the Board in this case did not inadvertently overlook including a commenter's right to file rebuttal evidence.

Thus, ENRS and EFM have no right to file additional comments or make any additional evidentiary submissions, and therefore have no reasonable purpose for propounding further discovery. To permit ENRS and EFM to file additional evidence would mean that those parties and not Applicants would submit the final evidence on the Primary Application.

3. Briefs are not Appropriate Vehicles for Submitting New Evidentiary Material

ENRS argues that "all parties have the right to file briefs to the Board on February 23, 1998," as support for its position that it has the right to submit surrebuttal evidence and hence take further discovery. While Applicants agree that ENRS and all other parties in the proceeding have the right to submit a brief, the brief may not contain new evidence. In UP/SP, the Board clarified the extent to which a non-applicant party may make evidentiary submissions in response to comments filed by another party. UP/SP, Decision No. 31 at 3. The Board made it clear that the briefs were to contain no additional evidence:

> [P]arties may file briefs . . . but these briefs *may not contain new evidence* in the proceeding. The purpose of the briefs is for parties to present legal arguments succinctly and to marshal previously filed evidence favorable to their position. Thus, parties that did not file inconsistent or responsive applications may not file rebuttal evidence concerning responses to their March 29 filings [October 21, 1997 filings in this case] which may be filed on April 29, 1996 [December 15, 1997 filings in this case]. Inappropriate evidentiary material will be stricken.

Id. (emphasis added). Accordingly, the February 23 briefs to be filed in this proceeding should not include any additional evidence, and thus ENRS' and EFM's discovery at this late stage is inappropriate.[7]

4. ENRS' and EFM's Requests Stand the Board's Procedural Schedule on its Head

As is clear from the above discussion, responsive and inconsistent applicants are given preferred status by the Board in the procedural schedule and in the applicable precedents relative to non-applicant parties such as commenters. They alone, among non-primary applicant parties in the proceeding, are given the right to file rebuttal evidence. Consequently, responsive and inconsistent applicants are able to close the record on their applications, and thus have the last word on the merits of their case. The Board's procedural order, however, establishes a deadline for submission for parties exercising this right to file rebuttal on their application,. In the instant case, the deadline for submission of rebuttal evidence on responsive and inconsistent applications is January 14, 1998.

Under ENRS' and EFM's theory, however, it is commenters and not responsive applicants who are given preferred status. ENRS' and EFM's apparent position is that, even though the Board explicitly gave responsive applicants the right to file rebuttal

[7] To the extent that ENRS and EFM attempt to distinguish their right to file a separate evidentiary rebuttal from their right to include new evidentiary material in their brief, such attempt is unavailing. The language cited above from Decision No. 6 would be rendered a nullity if it were read to permit commenters to file rebuttal evidence in their briefs.

evidence, while at the same time imposing a deadline for the filing of such evidence, it intended that commenters also have the right to file rebuttal.[8] According to ENRS' and EFM's position, however, the commenters' right to file rebuttal is unconstrained by the kinds of deadlines, such as January 14, 1998, required of responsive applicants. Such a theory, which gives commenters preferred status over all applicants in the case, stands the Board's procedural schedule on its head and ignores the Board's clear intent that applicants have the opportunity to close the record on their applications. On this basis, the requested discovery should be denied.

5. Applicants' Voluntary Offer of Rebuttal Witnesses for Cross-Examination By Non-Applicant Parties Does Not Require Applicants to Respond to Written Discovery Propounded by Non-Applicants

EFM attempts to justify the right to written discovery by blurring the lines between the voluntary offer of Applicants' rebuttal witnesses for cross examination and written interrogatories and document production requests. EFM claims that the distinction appears nowhere in the Discovery Guidelines governing this proceeding, the Board's Discovery Rules or in any applicable precedent. EFM is incorrect.

First, the Discovery Guidelines in this proceeding specifically state that "Any of the discovery guidelines . . . may be varied by agreement between any two or more parties (except if such a variation would adversely affect any third party)."" Discovery Guidelines at Paragraph 2. If an Applicant agrees to permit commentors to engage in a

[8] ENRS and EFM do not specify how the Board manifested this alleged intent.

cross examination deposition of that Applicants' rebuttal witnesses, but not to permit commentaries to engage in wide-ranging discovery, that is its prerogative.

Second, applicable precedent does support a distinction between cross examination depositions and written discovery following the submission of applicants' rebuttal. The Board has drawn a strong line between parties who chose to participate in control proceedings as commenters and those who chose to participate as responsive applicants. Union Pacific Corp. – Control and Merger – Southern Pacific Rail Corp., Finance Docket No. 32760, Decision No. 31 at 2 ("Movants are aware that, under the procedural schedule, only inconsistent and responsive applicants are entitled to file rebuttal evidence . . . . Parties . . . chose their means of presenting their arguments with knowledge of the restriction on rebuttal filings.") No party is permitted to submit new evidence in their brief. Id. ("[B]riefs may not contain new evidence in the proceeding. Thus, parties that did not file inconsistent or responsive applications may not file rebuttal evidence . . . .") But, the Board has permitted commentors to participate in cross examination depositions of applicants' rebuttal witnesses and to discuss any information gained from that cross examination in their briefs. Id., Decision No. 35 (denying Kansas City Southern, a commentor, the right to conduct written discovery and file a subsequent evidentiary pleading, but permitting it to participate in cross examination depositions and discuss the deposition testimony in its brief.)

EFM claims that Decision No. 35 does not draw a distinction between written discovery and cross examination depositions, but it is wrong. EFM states that "The Board went on to note that UP/SP witnesses would be available for discovery (which effectively complied with the KCS request to conduct discovery) and that discovery

information relating to the rebuttal may be included in the briefs." In fact, the Board stated flatly that "We will deny the relief KCS seeks." In doing so, the Board went on to observe that "we note that applicants have stated that their witnesses who address the CMA settlement agreement in the April 29, 1996 filings may be deposed. Such discovery may take place and information gained in such depositions may be included in the briefs, due June 3, 1996." Id. At 3 (emphasis added). In Decision No. 35, the Board made exactly the distinction EFM claims is not there: KCS was denied the right to conduct written discovery, but was granted the right to cross examine offered rebuttal witnesses.

For these reasons, ENRS', NYS' and EFM's requests to compel production should be denied.

Respectfully submitted,

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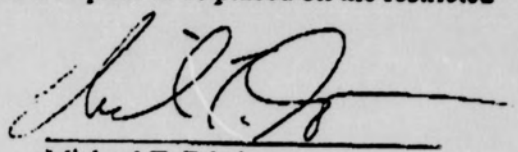
Dated: January 7, 1998

CERTIFICATE OF SERVICE

I, Michael T Friedman, certify that on January 7, 1998, I caused to be served by facsimile service a true and correct copy of the foregoing CSX/NS-188, Applicants' Opposition to the State of New York's, Erie-Niagara Rail Steering Committee's and Eighty-Four Mining Company, Inc.'s Requests to Compel the Production of Discovery 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

January 7, 1998

UNITED STATES OF AMERICA

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SURFACE TRANSPORTATION BOARD

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DISCOVERY CONFERENCE

CSX CORPORATION AND CSX TRANSPORTATION, INC., NORFOLK SOUTHERN CORPORATION AND NORFOLK SOUTHERN RAILWAY COMPANY -- CONTROL AND OPERATING LEASES/ AGREEMENTS -- CONRAIL INC. AND CONSOLIDATED RAIL CORPORATION -- TRANSFER OF RAILROAD LINE BY NORFOLK SOUTHERN RAILWAY COMPANY TO CSX TRANSPORTATION, INC.	Finance Docket No. 33388

Thursday,
January 8, 1998

Washington, D.C.

The above-entitled matter came on for a oral argument in Hearing Room 4 of the Federal Energy Regulatory Commission, 888 First Street, N.E. at 9:30 a.m.

BEFORE: THE HONORABLE JACOB LEVENTHAL
Administrative Law Judge

available for deposition by any party other than a responsive applicant. Indeed, as we speak, a responsive applicant is taking the deposition of a CSX witness.

It has been NS that has had a number of commenters ask for depositions of rebuttal-verified statement givers. And it's been NS that has made the decision to voluntarily make witnesses available.

I just want to say at this point we have not been asked to make a witness available. And I don't have any instructions from my client as to whether or not a witness would be made available for deposition if it was noticed by a commenter.

JUDGE LEVENTHAL: On Page 18 of your answer, you had in your Argument Number 5, "Applicants voluntarily offer rebuttal witnesses." Do I take it that that applies only to NS and not to CSX?

MR. HARKER: Well, at this point, it's only been NS that has been requested to make people available. And they have taken the position that they will make them voluntarily available.

All I'm saying, Your Honor, is -- and I'm

not trying to play games. All I'm saying is that no witness of CSX has been noticed for deposition by a commenter until late last night.

And I have not yet had -- believe me, I have been talking to the client extensively about discovery during this period of time. And I expected at some point we would face the issue of a commenter and only a commenter noticing one of our witnesses for deposition. And we just haven't come to a resolution on that.

NS has faced that issue. And they have decided that they will make their people available.

JUDGE LEVENTHAL: The big problem here, we don't have much time. This is January 7th, and briefs have to be filed on January 14th.

MR. HARKER: Your Honor, let me correct that. What is due January 14th under the Board's procedural schedule is a rebuttal filing by only about a dozen or so parties.

JUDGE LEVENTHAL: How about briefs? When are briefs due?

MR. HARKER: February 23rd. So we've got

deposed, not the written discovery that KCS was looking for, but they may participate in the depositions. Such discovery, such a discovery tool may take place, information may be included in the briefs.

So in fact, the Decision No. 35 which EFM claims supports their position stands for exactly the opposite position and that is that they were denied the written discovery. They were permitted to engage in the cross examination deposition and that's all EFM is looking for is written discovery here. They have got the right to depose Mr. Fox. They can ask him the questions. If Mr. Fox doesn't know, then they can cite that as a, you know, going to the weight and sufficiency of Mr. Fox's statement.

JUDGE LEVENTHAL: I have a copy of Decision No. 35 in that case. Let me ask you a question. How do you think they could use whatever discovery they can get on brief?

Suppose they depose your witnesses. How can they use whatever information they have on brief?

MR. EDWARDS: In the UP -- in past

witness comes up and says gee, somebody told me this. I don't know any of this for a fact. We are now deprived by Mr. Edwards' distinction here, deprived of getting the facts that form the basis for the argument in rebuttal.

And we don't think that this is a game of trying to hide the -- trying to hide the chit somewhere and gamesmanship. We think it's a matter of trying to get the facts on the record so the Board can then make an informed decision.

JUDGE LEVENTHAL: Let's go off the record.

(Off the record.)

JUDGE LEVENTHAL: In our off the record discussion, I indicated that I was about to rule and rather than repeat what I said in our off-the-record discussion, I'll say it on the record now. Of course, whenever I go off the record and whenever I make any comments, parties are free to put into the record anything I said off the record.

Is that understood?

All right, I'll deny the motion of EFM and ENRS to unredact material redacted from the answers to

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.