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BEFORE THE
SURFACE TRANSPORTATION BOARD

ARU-15

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Finance Docket No. 33388

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

NOTICE OF SERVICE OF PLEADINGS

Pursuant to Decision No. 21 in this proceeding, the Allied Rail Unions hereby give notice that they have served all parties of record with copies of the following previously filed ARU pleadings:

Petition Of Allied Rail Unions For Declaratory Order Regarding Existing Acquisition Of Control Of Conrail By NS and CSX

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Dated: August 27, 1997

CERTIFICATE OF SERVICE

I hereby certify that I have caused to be served one copy of the foregoing Notice Of Service Of Pleadings, by first-class mail, postage prepaid, to the offices of the parties on the attached list.

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BEFORE THE
SURFACE TRANSPORTATION BOARD

Finance Docket No. 33388

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

PETITION OF ALLIED RAIL UNIONS FOR DECLARATORY ORDER REGARDING EXISTING ACQUISITION OF CONTROL OF CONRAIL BY NS AND CSX

The Allied Rail Unions represent various crafts and classes of railroad workers, including employees of Conrail, Inc. (CRR or Conrail), CSX Transportation, Inc. (CSXT), and Norfolk Southern Railway Company (NSR).[1/] CSX Corporation (CSXC), CSXT, Norfolk Southern Corporation (NSC), NSR, CRR and Consolidated Rail Corporation (CRC), collectively "Applicants" have filed a joint Railroad Control Application (the "application") pursuant to 49 U.S.C. §§ 11321-25 for authorization of the acquisition of control by CSX and NS of Conrail, and for the division of the use and operation of

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[1] The Allied Rail Unions represents the American Train Dispatchers Department/BLE; Brotherhood of Locomotive Engineers; Brotherhood of Maintenance of Way Employes; Brotherhood of Railroad Signalmen; Hotel Employees and Restaurant Employees International Union; International Brotherhood of Boilermakers, Iron Ship Builders, Blacksmiths, Forgers and Helpers; International Brotherhood of Electrical Workers; The National Conference of Firemen & Oilers/SEIU; and Sheet Metal Workers' International Association.

Conrail's assets between them.[2/]

NS's and CSX's acquisition of control of Conrail will have adverse consequences for employees of Conrail and for employees of NS and CSX through reductions in work opportunities and consolidation of work; and it is likely to have similar adverse consequences for employees of competitors of Conrail, NS, and CSX. In this regard, 49 U.S.C. § 11327 expressly provides that in any transaction which must be approved under Section 11323, the Surface Transportation Board ("STB") must condition its approval on arrangements for the protection of employees of the carriers involved who may be adversely affected by the transaction. If CSX and NS are permitted to acquire control over Conrail without prior STB approval under Section 11323, then members of the Allied Rail Unions will be subject to effects of that transaction without having the protections guaranteed by law.

As set forth below, the evidence shows that through the purchase of 100% of Conrail stock and the execution of formal agreements relating to the acquisition, CSX and NS have, notwithstanding the existence of a voting trust, already acquired control of Conrail without prior STB approval. Accordingly, the Allied Rail Unions respectfully request the STB to order divesture. Alternatively, if the STB determines that it is in the public interest for the STB to consider the control application that CSX and NS have filed, the STB must at the very least declare that the Merger Agreement, as amended,

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[2] This petition uses the same acronyms used in the Application. Thus, CSXC and CSXT are referred to collectively as "CSX," NSC and NSR as "NS" and CRR and CRC as "Conrail." Unless otherwise indicated, references to a company include its wholly-owned subsidiaries.

and the accompanying acquisition of 100% of CRR stock, the creation of CRR Holdings LLC ("CRR Holdings"), and the merger of Green Merger Corporation with and into CRR, results in control of Conrail by NS and CSX, notwithstanding the creation of the voting trust, and therefore, preliminary approval is required, which must be subject to employee protections.

FACTUAL BACKGROUND

On October 14, 1996, CRR and CSXC and its subsidiary, Green Acquisition Corporation, entered into an Agreement and Plan of Merger (Merger Agreement), pursuant to which CRR and CSXC would merge as equals. Conrail, Inc. Form 10-K Annual Report at 31-32. On October 24, 1996, NSC attempted to purchase all outstanding CRR voting stock at $100 a share. *Id. at 2.* For the next several months, CSXC and NSC engaged in a bidding war for Conrail. *Id.* at 32. During this time period, CSXC and CRR entered into a Second and Third Amendment of their merger agreement. *Id.* at 32.

The battle over Conrail culminated on April 8, 1997, when CRR, CSX, and Green Acquisition Corporation entered into a Fourth Amendment to the Merger Agreement "in order to, among other things, facilitate entering into the CSX/NSC Letter Agreement and consummating the transactions contemplated thereby." Third Supplement at page 2. That same day CSXC and NSC entered into a Letter Agreement providing for the joint acquisition of Conrail, consistent with CSX's October 14, 1996 Merger Agreement, as amended through the Fourth Amendment (collectively referred to as the "Merger Agreement, as amended"). Vol. 6a at 350-399. Through the Merger Agreement, as

amended, CSX and NS placed numerous and significant binding limitations upon CRR's actions until the date of control. *See, e.g.*, Vol. 8a at 216-219, 222-223, 224-225, 226-227, 237, 243.

Pursuant to the terms of the April 8, 1997 letter agreement, CSXC and NSC, through their respective subsidiaries, Green Acquisition Corporation and Atlantic Acquisition Corporation, made a joint tender offer on April 10, 1997 of all shares of CRR stock not already owned by them. Vol. 1 at 29; Vol. 8a at 350. On May 21, 1997, CSXC and NSC formed CRR Holdings LLC (CRR Holdings) and concurrently contributed all of their shares of CRR stock to CRR Holdings. Vol. 1 at 29. CRR Holdings is governed by the Limited Liability Company Agreement of CRR Holdings LLC (CRR Holdings Agreement). Vol. 8a at 400. In exchange for their stock contributions, CSXC holds a 42% equity interest and NSC holds a 58% equity interest in CRR Holdings. Vol. 1 at 30. As a result of these transactions, CSXC and NSC hold the same percentage equity interests in CRC. *Id.*

Under the CRR Holdings Agreement, the interests are divided into three classes, Classes A, B, and C. Vol. 1 at 31. CSX owns all of the Class A interest and NS owns all of the Class B interest. *Id.* Classes A and B interests have identical rights and collectively have all management and voting rights in CRR Holdings. *Id.* Class C has no voting rights and is owned in proportionate amounts according to each carrier's equitable interests. *Id.* Therefore, CSXC owns 42% and NSC owns 58% of the Class C interests. The Class C interests receive any allocation of profits or losses and distributions. *Id.*

The CRR Holdings Board manages the business and affairs of CRR Holdings. Vol. 1 at 32. The Board consists of six directors, divided into two equal classes. One class consists of three directors designated by CSXC and the other class consists of three directors designated by NSC. Each of the six directors *must* be a director, officer, or employee of NSC or CSXC, depending on whether the director is selected for Class A or B. *Id.* All matters except for the election of directors must be approved by the unanimous vote of both classes of directors. *Id.* The CSXC directors are John W. Snow, Paul R. Goodwin, and Mark G. Aron. The NSC directors are David R. Goode, Henry Wolf, and Stephen Tobias. *Id.*

The officers of CRR Holdings are likewise divided equally between CSXC and NSC, with each selecting a co-chairman and co-chief executive officer. Vol. 1 at 32. John W. Snow is the CSXC co-chairman and co-chief executive officer and David R. Goode is the NSC co-chairman and co-chief executive officer. *Id.*

On April 8, 1997, CSXC, NSC, CRR Holdings,[3] Tender Sub(Green Acquisition Corporation), and Deposit Guaranty National Bank entered into an Amended and Restated Voting Trust Agreement ("Voting Trust Agreement") for the purpose of turning over all stock to a Trustee during the pendency of the Application before the STB. Vol. 8a at 323-349. Under the Voting Trust Agreement, the Trustee must exercise all voting rights in favor of any proposal or action that is necessary or desirable or consistent with the effectuation of NS's and CSX's acquisition of control. Vol. 8a at 328. Moreover, the

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[3] According to the Application, CRR Holdings was not formed until May 21, 1997. Vol. 8a at 405.

Trustee must vote against any "proposed merger, business combination or similar transaction" that involves CRR but not NS or CSX. *Id.* at 328-329. Finally, the Trustee must exercise voting rights in favor of disposing of the Trust Stock in accordance with Paragraph 5 of the Voting Trust Agreement. *Id.* at 329. With the exception of these three specific instructions, the Trustee must exercise all voting rights in accordance with the majority of directors of CRR. *Id.* Only if there are no persons qualified to give instructions may the Trustee exercise its own discretion and then it must exercise its voting rights with "due regard for the interests" of CSX and NS. *Id.*

On June 2, 1997, Green Merger Corporation ("GMC"), a wholly owned subsidiary of Green Acquisition Corporation ("GAC"), which in turn is a wholly-owned subsidiary of CSXC and sometimes referred to as "Tender Sub", was merged with and into CRR. Vol. 1 at 29, 61. *See also* Vol. 8a at 437-445. By the terms of the merger, GMC ceased to exist and CRR became the surviving corporation in the merger. Vol. 8a at 442.

At the time of the merger, the remaining shares of CRR stock was either canceled or converted into the right to receive $115 in cash. Vol. 8a at 442-443. At the time of the merger, GMC had 100 shares of stock owned by GAC, which as a result of the merger became stock of the surviving corporation, CRR. Vol 8a at 441, 442-443. The bylaws and articles of incorporation of GMC became the bylaws and articles of incorporation of the surviving corporation. *Id.* CRR's directors and officers of continued as the directors and officers of the Surviving Corporation. *Id.*

The surviving corporation, CRR, is a wholly owned subsidiary of CRR Holdings, which is equally owned by CSX and NS. Vol. 1 at 31, 61. CRR also is a wholly-owned

subsidiary of GAC. Vol. 1 at 61.[4]

SUMMARY OF ARGUMENT

As a result of the acquisition of one hundred percent of CRR's stock and the consummation of the Merger Agreement, as amended, CSX and NS have, notwithstanding the creation of the Voting Trust, acquired control over CRR. Accordingly, the STB must immediately order divesture or, alternatively, temporarily approve this unauthorized acquisition of control and impose employee protective conditions as of April 10, 1997, when NS and CSX acquired 100% of CRR's stock.

An examination of the many agreements contained in Volume 8 of the Application, including the Voting Trust Agreement, reveals that CSX and NS already wield significant control over CRR. Thus, although the stock of CRR Holdings was put into a Voting Trust, the Voting Trust Agreement essentially directs the Trustee in the manner in which it can vote the stock. Besides directing that the Trustee must vote the stock in a manner that effectuates and is consistent with the merger, the Voting Trust Agreement directs the Trustee to vote all other matters in accordance with the instructions of the majority of the Directors of CRR . CRR is a wholly owned subsidiary of CRR Holdings and, therefore, CRR's directors are subject to the commands of CRR Holdings' directors. Similarly, CRR's directors are bound by the bylaws and articles of

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[4] The April 8, 1997 Letter Agreement states that following the stock contributions GAC and GMC will be subsidiaries of CRR Holdings. Vol. 8a at 352. However, the Letter Agreement does not explain how these two subsidiaries of CSX become subsidiaries of CRR Holdings. If the contribution of stock is the basis for subsidiary status, then AAC should also be a subsidiary of CRR Holdings. It is unclear how GAC and its subsidiary GMC ceased becoming subsidiaries of CSXC.

incorporation that were created for Green Merger Corporation, a subsidiary created by CSX solely for the purpose of merging with CRR. In short, the Trustee must vote the Trust Shares either in accordance with three specific directions set forth in the Trust Agreement or pursuant to the directors of CRR, whose authority is circumscribed by any command from CRR Holdings. Under these circumstances, the Voting Trust Agreement clearly does not insulate Conrail from the control of NS and CSX.

The control does not stop with the Voting Trust Agreement. CSX and NS have effectively restricted CRR, including its directors, officers, and employees, in the actions that it may take by structuring this transaction through the purchase of 100% of CRR's stock and a Merger Agreement, as amended, which is binding on CRR. The Merger Agreement, as amended, specifies and limits the actions that CRR may take during the pendency of the Application, and thereby gives CSX and NS effective control of CRR's day-to-day operations. Moreover, by binding CRR to the actions it may take, CSX and NS have effectively controlled the instructions that the directors of CRR may give to the Trustee.

The control that CSX and NS exert through the Merger Agreement, as amended, is extraordinary. Besides giving CSX sole authority over the sale of CRR assets, including trackage rights, and providing for the establishment of a transition team that may include the chief executive officer of CRR, the Merger Agreement enumerates at least fifteen specific actions that CRR "shall not" take without the consent of CSX and

NS.[5]

In addition to the specific terms and conditions relating to the voting trust and the merger, the fiduciary obligations of the Trustee and the directors to CSX and NS ensure that CSX and NS have acquired control of CRR. Moreover, by acquiring 100% of CRR's stock, practicalities of business relationship and human nature ensure that CSX and NS have acquired control of CRR.

ARGUMENT

I. CORPORATIONS THAT CONTROL CARRIERS MAY NOT ACQUIRE CONTROL OVER CARRIERS WITHOUT PRIOR ICC APPROVAL

Section 11345 (a)(5) of the ???ICA expressly provides that corporations that control carriers may not acquire control of additional carriers without prior approval from the STB. This requirement has been broadly construed by the Supreme Court because of the clear language of the statute and because of the repeated, explicit expressions of Congress that transactions involving the control of multiple carriers must be approved by the ICC, regardless of the manner in which such control is effected.

Furthermore, the language of the statute is quite clear, direct and expansive with respect to what actions constitute acquisitions of control of carriers under Section

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[5] Although the Third and Fourth Amendments refer only to CSX's consent, the April 8, 1997 letter states that "immediately upon execution of this Agreement, NSC effectively will posses joint participation and decision-making on an equal footing with CSX in providing any consents under Section 4.1 of the Merger Agreement. Vol. 8a at 354. Moreover, NS and CSX agreed that they would not without the prior agreement of the other, among other things, agree to any modifications of the terms and conditions of the Merger Agreement as amended including under "Section 4.1 of the Merger Agreement." Vol. 8a at 354.

11343[?]. Section 10102(7) of the ICA, 49 U.S.C. §10102(7)[???], defines "control" as including "actual control, legal control and the power to exercise control, through or by (A) common directors, officers, stockholders, ***a voting trust***, or **a holding or investment company**, or (B) ***by any other means***" (emphasis added). In *Gilbertville Trucking Co. v. U.S.*, 371 U.S. at 125, the Supreme Court stated that the predecessor to current Section 10102(7) "encompass[es] every type of control in fact." In reaching that conclusion, the Court also referred to the Senate Report on the Emergency Transportation Act of 1933 amendments to former Section 5 the ICA as follows:

> The Committee reports on these sections prior to their passages in the Emergency Railroad Transportation Act of 1933 stated their purposes as follows:
>
> "These paragraphs have been planned in the light of what has already been done through myriad devices without commission supervision and in defiance of the will of Congress. . . . The provisions of paragraph [(4)] . . . would be of little effect unless the language contained therein were construed to include control or management effectuated or exercised **indirectly through the use of legal devices such as holding companies, *voting trusts*, and combinations of affiliated interests.** It is therefore intended by the provisions of paragraphs [(5)], [(6)] . . . to make sure that paragraph [(4)] . . . covers such types of control and management." S Rep No. 87, 73d Cong, 1st Sess, pp. 9-10; HR Rep No. 193, 73d Cong, 1st Sess, pp. 16-17.

371 U.S. at 124 n.6 (emphasis added, ellipses and brackets in original).[6/] Accordingly, if a corporation that controls railroads acquires sufficient stock of another railroad to

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6/ Former Section 5(2) of the ICA was the predecessor to current Section 11343; recodification of the statute in 1976 was done without change to the substance of the statute.

control that railroad, the purchaser has acquired control of a carrier under the ICA.

The Supreme Court has consistently held that both the requirement for former Interstate Commerce Commission ("ICC" or "Commission") approval for transactions involving acquisition of control over carriers and the statutory definition of control must be broadly construed and aggressively applied.

In *United States v. Marshall Transport*, 322 U.S. 31 (1944), the Court stated that the statute "makes it unlawful, without the approval of the Commission as provided by §5(2)(a) for a person which is not a carrier and which has control of one or more carriers to acquire control of another carrier through ownership of its stock or otherwise" (*id.* at 37), and that the statute "has in the broadest terms prohibited the effectuating of 'control or management . . . however such result is attained, whether directly or indirectly, by use of common directors, officers, stockholders, a holding company . . . or in any other manner whatsoever'" (*id.* at 38, ellipses in original).

In *Alleghany Corp. v. Breswick & Co.*, 353 U.S. 151, 164-69 (1957), the Court relied upon *Marshall Transport*'s broad reading of Section 5 in holding that a non-carrier which previously had indirect control of a carrier, but which increased its control of that carrier through the merger of that carrier and a subsidiary, was required to seek ICC authorization for its increased control of the previously indirectly controlled carrier. The Court rejected a narrow construction of the term control and held that "[n]ot labels but the nature of the changed relation is crucial in determining whether a rearrangement within a railroad system constitutes an 'acquisition of control' under Section 5(2)." *Id.* at 166. The Court concluded by stating, "In other words, a non-carrier may not gain

'control' over carriers free of Commission regulation merely by operating through subsidiaries." *Id.* at 169. Thus, *Alleghany v. Breswick* made it quite clear that the Commission must review any type of transaction in any form which involves control of multiple carriers.

In *Gilbertville Trucking Co., supra.*, the Court held that the ICA required strict enforcement of the requirements of Section 5, and that the ICC must act affirmatively to enforce that provision such that it was required to treat all transactions as governed by Section 5 if they amounted to the exercise of control of one carrier over another, either directly or indirectly. 371 U.S. at 123. The Court stated that former Section 5 was a "comprehensive legislative scheme designed to place ownership, management and operational control over common carriers within the regulatory jurisdiction of the Commission" and that the Act had been amended to "reach[] the elaborate corporate devices used to centralize control over the railroads 'without Commission supervision and in defiance of the will of Congress.;" *Id.* at 124. The Court rejected a view of that provision which would limit its reach to specific corporate devices; rather it was designed to cover all practices involving control of carriers, "to encompass every type of control in fact"-"not just corporate and legal devices but control effectuated' in any other manner whatsoever.'" *Id.* at 125.

It is therefore clear from controlling precedent that the statutory requirement for prior STB approval of control transactions, and the statutory definition of control, must be construed broadly and applied aggressively; and that the acquisition of control of a carrier by a corporation which controls carriers is violative of the ICA?? unless the STB

grants prior authorization for such control.

II. CSX'S AND NS'S PURCHASE OF 100% OF CONRAIL STOCK CONSTITUTES AN ACQUISITION OF CONTROL, WHICH ALONG WITH THE VOTING TRUST AGREEMENT, SHOULD HAVE BEEN AND MUST NOW BE APPROVED BY THE STB AS AN INITIAL STEP IN THE ACQUISITION OF CONTROL PROCESS

STB's predecessor, the former ICC, has in the past allowed carriers and corporations which controlled carriers to obtain control over additional carriers through stock purchases where the acquired stock was put into voting trusts pending former Commission approval of the control relationships. The former Commission allowed such acquisitions of control on the assumption that the voting trusts would prevent the exercise of such control during the pendency of ICC proceedings. It was believed that the voting trust permitted the former Commission to accommodate the needs and realities of the market place without sacrificing the public transportation interests which it must protect.

The Allied Rail Unions respectfully submit that experience has shown that assumption to be erroneous. In *Santa Fe Southern Pacific Corp.--Control--Southern Pacific Transp. Co.*, F.D. No. 30400, the ICC actually affirmatively approved a voting trust as a method of preventing the unauthorized exercise of control over ATSF while the merger application was pending. The voting trust in that case contained specific protections against SFSP's actual exercise of control over Southern Pacific Transportation Company. However, the former Commission subsequently determined that the trust arrangement, which appeared by its terms to be adequate to protect against the unlawful exercise of control, had been seriously and repeatedly breached by

SFSP. *Santa Fe Southern Pacific Corp.--Control--Southern Pacific Transp. Co.*, F.D. No. 30400 (Served February 27, 1987) (unpublished). The Allied Rail Unions respectfully submit that the former Commission's experience with the SFSP merger demonstrates that the STB is overly optimistic to assume that a voting trust will effectively prevent a controlling entity from exercising control during the pendency of STB proceedings, and that the facts here demonstrate that the voting trust created in this case has not prevented CSX and NS from exercising control.

An examination of the actions taken by NS and CSX and the provisions contained in the Merger Agreement, as amended, and the Voting Trust Agreement shows that CSX and NS have already acquired control of CRR's operations without the prior authorization of the STB. Second, the fiduciary obligations of the Voting Trustee and the directors to the shareholders, CSX and NS, coupled with the practical realities of human nature in the context of running a business, prevent the voting trust from providing adequate protection from the unlawful exercise of control.

A. The Voting Trust Agreement

Although the Voting Trust Agreement delegates the voting powers to the Trustee, the Voting Trust Agreement unequivocally controls the manner in which the Trustee may vote the Trust Stock. Thus, the Trust Agreement directs the Trustee to vote the Trust Stock "to approve and effect the Merger, and in favor of any proposal or action necessary or desirable to effect, or consistent with the effectuation of [NS's and CSX's] acquisition of the Company." And in the event of two slates of nominees for directors, the Trustee must vote for the slate that supporting the effectuation not only of the

Merger but of "the transactions contemplated by the CSX/NS Agreement." Vol. 8a at 328. Second, the Trustee must vote against "any other merger, business combination or similar transaction . . . " involving the Company but not involving CSX or NS or one of their affiliates or subsidiaries. *Id.* Third, the Trustee "shall take all actions reasonably requested" by NS and CSX , including voting the Trust Stock, in favor of or consistent with the disposition of the Trust Stock.

In short, under these three specific directives, the Trustee must vote in favor of actions that are either necessary or desirable to effectuate the merger or are consistent with CSX's and NS's acquisition of CRR. On the other hand, the Trustee must vote against any type of business combination or transaction that involves CRR but not CSX or NS. These terms standing alone ensure that the interests of NS and CSX are paramount for the Trustee may act in the best interests of CRR only if CRR's interests are best fostered by the effectuation of the Merger Agreement, as amended, and CSX's and NS's acquisition of CRR.

The Trustee's authority to vote the Trust Stock is not controlled simply by the three specific instructions discussed in the preceding paragraphs. Rather, with the exception of the specific instructions discussed above, the Trustee must vote the stock in accordance with the majority of the directors of CRR. Even then, however, the Trustee "may not vote the Trust Stock in favor of taking or doing any act which violates the Merger Agreement or would violate the CSX/NS Agreement or impede its performance or which if taken or done prior to the consummation of the Merger would have been a violation of the Merger Agreement." Vol. 8a at 329. Only if there are no

directors to give instructions may the Trustee vote the Trust Stock in his sole discretion, but in the exercise of his discretion he must have "due regard for the interests of the [NS and CSX]." *Id.*

As these provisions show, the Voting Trust does not insulate CRR from control by CSX and NS. The directives governing the manner in which the Trustee must vote the Trust Stock shows that the Trustee's must vote in favor of actions that promote and effectuate the Merger Agreement and NS's and CSX's acquisition of control of CRR *whether or not those actions are in the best interests of CRR*. And even though, except for three specific directives, the Trustee must vote in accordance with the instructions of the Directors of CRR, the Trustee may not vote according to the instructions of CRR's directors if to do so would violate the Merger Agreement or impede its performance.

In any event, any insulation from control that might normally result from directing the Trustee to vote according to the directions of the CRR's directors is merely superficial in this case. One notable reason is that CRR is a wholly owned subsidiary of CRR Holdings. There can be little doubt that generally a parent corporation has the authority to direct the actions of its subsidiary, and there are no facts that suggest otherwise in this case.[7] Thus, the directors that give instructions to the Trustee are subject to the commands of its parent CRR Holdings, a company owned equally by CSX and NS.

A second reason for the ineffectiveness of requiring CRR's directors to instruct

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[7] As will be discussed in the following section, it is not the shareholders but the directors of a corporation that control the day-to-day operations of a corporation.

the Trustee concerns the merger of Green Merger Corporation ("GMC"), a direct subsidiary of GAC and an indirect subsidiary of CSX, with and into CRR on June 2, 1997. Vol. 8a at 441-445. As a result of the merger, GMC ceased to exist as a separate entity and CRR is the surviving company with the name Conrail, Inc. Vol. 3a at 442, Art. I.[8] All of CRR stock existing prior to the merger was either converted into the right to receive $115 in cash or was canceled. Vol. 8a at 442-443, Art. III. The only remaining stock in the surviving company is the 100 shares of stock held by GMC prior to the merger which as a result of the merger have become shares of CRR. Vol. 8a at 442, Art. III. Under the Plan of Merger, the articles of incorporation and the by-laws of GMC became the articles of incorporation and by-laws of the surviving corporation, CRR. Vol. 8a at 442, Art. II. The directors and officers of CRR continue as the directors and officers in the surviving corporation. Vol. 8a at 442, Art. I.

Since Section 4.1 (a) of the Merger Agreement, as amended, prohibits CRR from amending "its (or any subsidiary's) articles of incorporation, bylaws or other comparable organizational documents," this means that the Trustee has no ability to vote the Trust Shares to amend the articles of incorporation or the bylaws that were established by a subsidiary of CSX. Moreover, the CRR directors who may instruct the Trustee how to vote are operating under bylaws and articles of incorporation of a CSX subsidiary

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[8] As a result of the merger, CRR is a "direct wholly-owned subsidiary of Tender Sub." Vol. 1 at 61. Tender Sub is the name sometimes used to refer to Green Acquisition Corporation, which is a subsidiary of CSX. Vol. 8a at 8, 137, 152, 202, 239. In other words, it appears that since June 2, 1997, CRR has been a subsidiary of CSX. Moreover, CRR is a wholly-owned subsidiary of CRR Holdings, which is controlled equally by CSX and NS. Vol. 1 at 61.

formed for the specific and sole purpose of merging with CRR.

Finally, if the Trustee is ever able to vote in its sole discretion, its discretion must be guided by the bests interests of CSX and NS. Given that the Trustee's voting power is unambiguously guided by the goal of effectuating the merger and the acquisition of CRR by CSX and NS, there can be very little doubt that the Voting Trust is virtually useless in terms of insulating NS and CSX from control over Conrail.

In short, by the terms of the Trust Agreement, the Trustee is absolutely and unequivocally precluded from voting the Trust Shares in the best interests of CRR if to do so would in any way violate the Merger Agreement or impede its performance.

B. The Merger Agreement, As Amended

The restrictive conditions contained in the Merger Agreement, as amended, adds yet a dual layer to the Voting Trust's inability to insulate CSX and NS from control of CRR. The first of these dual layers is created by the fact that CRR is a party to the Merger Agreement, as amended, and, therefore, all the terms of that agreement are binding on CRR. Thus, the CRR's directors and officers must operate the railroad so as to comply with the Merger Agreement, as amended. By including provisions in the Merger Agreement, as amended, that limit the actions that CRR may take during the pendency of CSX's and NS's Application, CSX and NS have effectively asserted control over CRR during the pendency of their Application. That this is the intent of the Merger Agreement, as amended, cannot be more clearly stated than in the April 8, 1997 Letter Agreement (Vol. 8a at 360, ¶ 9):

CSX and NSC, as provided above, each having a 50% voting interest in

[CRR Holdings] (which following the Merger, will own 100% of the Surviving Corporation [CRR]) following the stock contributions, will cause the Surviving Corporation to honor all commitments of the Surviving Corporation under the Merger Agreement.

The second aspect of control created by the Merger Agreement, as amended, is that in making the Merger Agreement, as amended, an essential part of this transaction and thereby binding CRR to the provisions therein, CSX and NS have effectively circumvented the discretion normally vested in CRR's directors and have thereby assured that the directions the directors of CRR may give to the Voting Trustee will comply with the directives in the Merger Agreement, as amended. In short, the unavoidable truth is that CSX and NS have structured this transaction in a manner that ensures that CRR will be operated in their interests and not in the interests of CRR, which should be that of an independent rail carrier until the STB authorizes an acquisition of control.[9]

An initial step in CSX's and NS's control of CRR was to seize control of the Application process before the STB. Thus, under Section 5.5(b) of the Merger Agreement, as amended, CRR and its subsidiaries must among other things cooperate in the preparation of all filing and other presentations before the STB or any other federal, state, or local body and join with CSX in opposing any objections, appeals, or other petitions to reconsider or reopen. Vol. 8a at 224-225.

Similarly, the Merger Agreement, as amended, gives CSX sole authority over

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[9] The Allied Rail Unions submit that CRR is no longer an independent rail carrier because as a result of CSX's and NS's acquisition of 100% of CRR's stock at record prices CRR's interests are now aligned with those of CSX and NS.

certain critical Conrail operations. For example, CSX has the sole authority to conduct and participate in any conversations or discussions and enter into any agreement or arrangement with any other company engaged in the operation of railroads (including Norfolk Southern Corporation) regarding the acquisition of by such company of any securities or assets of CRR or its subsidiaries or any trackage rights or other concessions relating to the assets or operations of CRR and its subsidiaries or CSX and its subsidiaries.[10/] Vol. 8a at 222, Section 4.3. CRR is required to "use reasonable efforts to cooperate and assist with [CSX's] efforts relating such conversations, discussions or negotiations (including subject to the other provisions hereof, by providing access and information)." *Id.* In short, as amended Section 4.3 demonstrates, CSX retains complete control of all conduct regarding the sale or other concessions relating to CRR's assets or operations, including agreements regarding trackage rights.

Significantly, the Merger Agreement, as amended, also provides that CSX and CRR shall establish a transition team upon consummation of the merger, which according to the Application, occurred on May 2, 1997. Vol. 8a at 237. The leadership of such team may include the current Chief Executive Officer or other senior executives of Conrail and CSX[11/] and would plan for "actions and operations to be undertaken form and after the Control Date." *Id.* Although the Merger Agreement, as amended, states that the transition team shall not control CRR's or its subsidiaries' day-to-day railroad

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[10] This "control" is unlimited except to the extent CRR is expressly permitted to take any such action without the consent of CSX pursuant to Section 4.1(a) or as set forth in Section 4.1 of the Conrail Disclosure Schedule.

[11] It is unclear whether NS is also a part of this transition team.

operations prior to the Control Date, it is unrealistic to assume that current operations will not be affected by the decisions made regarding the path that future operations will take. This is particularly true since the membership of the transition team includes the chief executive officer of CRR, the person charged with ultimate decision-making authority about the day-to-day operations of CRR.

The control that CSX and NS exert through the Merger Agreement does not stop here. Indeed, the actions that the Merger Agreement, as amended, prohibit CRR or its subsidiaries from taking, without CSX's and NS's consent, is astounding and underscores the level of control the applicants already have over CRR. For example, CRR shall not: (1) sell, lease, or otherwise encumber any of its assets or properties except in transactions in the ordinary course of business consistent with past practice a and not involving rail lines, yards and other fixed railroad operating property (Vol. 8a at 218); (2) make or agree to make acquisition or capital expenditure, except for agreements and commitments made through March 1, 1997 in conformity with this agreement (*id.*); (3) enter into contracts or modify, amend, or terminate existing contracts except in the ordinary course of business and any contract entered into in the ordinary course of business shall not bind CRR or any successor after the control date (*id.* at 218-219); and (4) enter into any agreement limiting the ability to compete which would bind CRR or its successor or grant any concessions or rights to any railroad or other person with respect to the use of CRR's rail lines, yards or other fixed railroad property (*id.* at 219). By requiring CRR to operate the railroad in the normal course of business, not make any changes, and not enter into contracts that would bind its

successor, CSX and NS have virtually tied CRR's corporate hands as far operating the railroad and prevented CRR from taking actions that might be in the best interest of CRR as an entity operating competitively in the marketplace without any consideration of NS and CSX's interests.[12] NS and CSX have similarly assured that the Trustee must vote the Trust Stock consistent with these restrictions.

In addition to limiting CRR's ability to enter into contracts, lease or sell assets, the purchase documents also provide that CRR shall not (except with the consent of CSX): (1) declare, set aside, or pay dividends (Vol. 8a at 217); (2) issue or sell stocks or rights to acquire stock (*id.*); (3) make any different tax elections (Vol. 8a at 218); (4) limits payments, discharge, or settlement of material claims, liabilities or obligations except in the ordinary course of business (*id.*); (5) change its accounting methods, principles or practices (Vol. 8a at 219); (6) enter into or terminate any benefit plan (*id.*); (7) increase the compensation of any director, execute officer or other key employee or pay benefit not required as of date of this Agreement (*id.*); (8) take no action in connection with the application before the STB without CSX's consent (including meetings with public officials and making public statements) (Vol. 8a at 224-225); (9) declare or pay any dividend on CRR's capital stock with a record date on or prior to May 30, 1997 (Vol. 8a at 243); (10) change the date set for its 1997 Annual Meeting from December 19, 1997 without the prior consent of CSX in its sole discretion (Vol. 8a at 243); and (11) amend the Conrail Rights without the prior consent of CSX in its sole

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[12] An example of this control can be found in Exhibit 1, hereto, which is a newspaper article describing how CRR has apparently reneged on a contract that it had entered into in November 1996 with Matlack Bulk Intermodal Services, Inc.

discretion (Vol. 8a at 244). In addition, CRR must give NS and CSX the opportunity to participate in the defense or prosecution of any litigation relating to the Merger Agreement. Vol. 8a at 226-227.

In summary, the Voting Trust gives a false illusion that CSX and NS are divested of control of CRR. In reality and in fact, Conrail and NS already have wielded control over CRR by virtue of the numerous agreement provisions that directly control the actions of CRR's officers and directors, as well as the actions of the Voting Trust Trustee. Control clearly exists when a carrier's actions are guided, not by what it is in its own interests but what is in the interests of the owners of 100% of its stock.

C. The Relationships Among The Parties Involved, Both As A Result Of Their Fiduciary Obligations And Of Human Nature, Render the Voting Trust Inherently Inadequate As Protection Against The Unauthorized Exercise Of Control Of A Carrier

In addition to the direct control that CSX and NS have over CRR by virtue of the agreement provisions, NS and CSX have control by virtue of the legal relationships and obligations of the parties. The underlying premise of the Voting Trust seems to be that by neutralizing the voting power of the shareholders, the shareholders cannot control the corporation of which they are 100% owners. This notion ignores a more fundamental principle that the directors of a corporation, not the shareholders, actually make the decisions that affect the day-to-day operations of the carrier. *U.S. V. Wallach*, 935 F.2d 445, 462 (2d Cir. 1991) The role of the shareholders, or the Trustee acting in the place of the shareholders, "in governing the conduct of the corporation is minimal and limited to fundamental decisions such as the election of directors or the approval of

extraordinary matters like mergers, a sale of substantially all corporate assets, dissolutions and amendments of the articles of incorporation or the corporate bylaws." *Id.* In this case, one of the terms of the merger agreement is that CRR will not change the date of the annual meeting, which is currently scheduled for December 19, 1998. Vol. 8a at 243. Thus, unless some special meeting is called, the Trustee will not even get to vote on matters until December 19, 1998, approximately one-half year after the merger was consummated and the control application was filed. In short, the notion that taking away shareholders' voting power insulates the shareholders from control of a corporation ignores the principle that directors, not shareholders, control the operations of a corporation. Here, the directors of CRR Holdings are the officers and directors of CSXC and NSC. It is they, not the shareholders, who operate the corporation and it is they who need to be insulated from control, and they clearly have not been.

Moreover, the notion that a Voting Trustee can insulate the shareholders from control ignores the well settled principle that the trustee of the voting trust owes "a strict duty to the depositing shareholders." *Vincel v. White Motor Corporation*, 521 F.2d 1113, 1121 (2d Cir. 1975). And, where, as here, the Trustee acts on behalf of shareholders that own 100% of the stock, the duty owed to the shareholders is "indistinguishable" from the duty owed to the corporation. *Id.* "The trustee's duty [is] an obligation to deal responsibly with all those persons owning any interest in the company and cannot, therefore, be separated from his duty to the corporation itself." *Id.* Accordingly, although the voting trust prohibits NS and CSX from giving instructions to the Trustee, the Trustee is nevertheless required, pursuant to his fiduciary duty, to vote the shares in

the best interests of NS and CSX, and, therefore, the idea that the Trustee can vote without regard to NS's and CSX's interests is a fiction.

Second, the legal nature of other fiduciary relationships assures that NS and CSX are effectively in control of Conrail. The applicants have stated that "the business and affairs of CRR and CRC are under the control of their independent boards of directors." Vol. 1 at 33. This fact only underscores CSX's and NS's control because the directors of a Pennsylvania corporation owe their fiduciary duty to shareholders. *Walker v. Action Industries, Inc.*, 802 F.2d 703, 711 (4th Cir. 1986). *See also Foltz v U.S. News & World Report, Inc.*, 663 F. Supp. 1494, 1520 (D.D.C. 1987) (It is always the case that the directors and officers of a corporation manage the company for the benefit of its shareholders and that they owe those shareholders fiduciary duties to manage the company in an acceptable manner.); *See also Matter of Reading Co.*, 711 F.2d 509, 517 (3d Cir. 1983). As a result of the transactions all but 100 shares of pre-merger CRR stock is held by CRR Holdings and owned entirely by CSX and NS. The remaining 100 shares of premerger-CRR stock was purchased by GAC and was contributed by GMC to the surviving corporation, CRR. Thus, that stock presumably is owned by GAC, a subsidiary of CRR Holdings or CSX.[13] In light of their fiduciary duty to the shareholders, there can be no doubt that the directors of CRR, who will be managing the day-to-day operations of CRR, must act in the best interests of NS and CSX, the owners of 100% of CRR stock.

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[13] It is unclear from the Application whether GAC remains a subsidiary of CSX or is a subsidiary of CRR Holdings.

The fiduciary duties of the directors has an extraordinary impact in this case because pursuant to the Voting Trust Agreement, the Trustee is, with the exception of three specific situations, required to "vote all shares of Trust Stock in accordance with the instructions of a majority of the persons who are currently the directors of the Company, and their nominees as successors and who shall then be directors of the Company except that the Trustee shall not vote the Trust stock in favor of taking or doing any act which violates the Merger Agreement or would violate the CSX/NS Agreement or impede its performance or which if taken or done prior to the consummation of the Merger would have been a violation of the Merger Agreement." Vol. 8a at 328. Since the directors owe a fiduciary duty to the shareholders, any directions that the directors give the Trustees must, in order to fulfill their legal obligations, be in the best interest of the shareholders. As a result, by requiring the Trustee to vote according to directions of the directors, the shareholders have insured that their action of putting the shares in the Voting Trust have assured that all actions will be in the best interests of NS and CSX.

Finally, aside from the concrete evidence of control found in the provisions of the Merger Agreement and in the law regarding fiduciary duty, control must be found to exist based on the nature of human behavior. The practical realities of how businesses are run is that employees and managers will be influenced by the knowledge that their employer is really controlled by another corporation which is likely to obtain authority to exercise that control. Assigning the voting power of the shareholders to a trustee is an artificial assurance that the shareholders lack control. As stated above, the real contro

of a company is vested in its directors and officers and they can hardly be shielded from the knowledge that 100% of the stock is owned by CSX and NS. This observation arises not only from the SFSP transaction but also from the experience in this industry which gave rise to the repeated Congressional efforts to expand the Commission's obligation to review and approve control relationships. *See Gilbertville Trucking*, 371 U.S. at 124-126.

In short, the notion that the voting trust insulates NS and CSX from control ignores the realities of the fiduciary relationships and the legal obligations of both the directors and the Trustee to act in the best interests of the shareholders. Thus, the Voting Trust does not absolve the Trustee or the directors of their fiduciary duties to act in the best interests of the shareholders, and, therefore, the purchase of 100% of the shares of the corporation assures that, regardless of the fictional devices that are created to give the appearance of divesting control, the real control lies with the shareholders.

CONCLUSION

For the reasons stated above, the Allied Rail Unions respectfully submit that the STB must find that the Merger Agreement, as amended, in conjunction with the acquisition of 100% of CRR stock, and the consummation of the merger of GMC and CRR has resulted in an unauthorized acquisition of control of CRR by CSX and NS. Accordingly, the Allied Rail Unions request the STB to order NS and CSX to divest themselves of the CRR stock or alternatively, to declare that preliminary approval is required of the acquisition of CRR's stock and the subsequent merger of GMC into

CRR, which must be subject to employee protections as of the date of the acquisition of 100% of CRR's stock.

Respectfully submitted,

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Date: July 16, 1997

ARU-6

BEFORE THE
SURFACE TRANSPORTATION BOARD

Finance Docket No. 33388

7/31/97

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

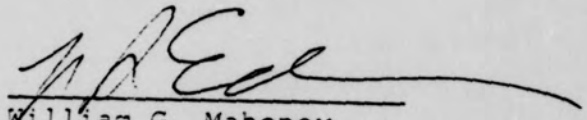
NOTICE OF INTENT TO PARTICIPATE

Pursuant to the Board's Decision No. 6 served May 30, 1997, the Railway Labor Executives' Association and its affiliated organizations,[1] the Brotherhood of Maintenance of Way Employes and the International Brotherhood of Electrical Workers state their intention to participate in these proceedings through their counsel Highsaw, Mahoney & Clarke, P.C. For purposes of this proceeding, all of these organizations will participate in this case and they will be referred to collectively herein as the "Allied Rail Unions" or "ARU". Service of filings in this case on the ARU should be provided to William G. Mahoney, Richard S. Edelman and L. Pat Wynns as counsel for the ARU and to William A.

[1] The RLEA affiliated organizations are: American Train Dispatchers Department/BLE; Brotherhood of Locomotive Engineers; Brotherhood of Railroad Signalmen; Hotel Employees and Restaurant Employees International Union; International Brotherhood of Boilermakers, Iron Ship Builders, Blacksmiths, Forgers and Helpers; International Brotherhood of Firemen & Oilers; and Sheet Metal Workers' International Association.

Bon and Donald F. Griffin for the Brotherhood of Maintenance of Way Employes.

Respectfully submitted,



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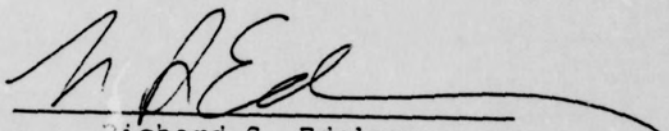
Dated: July 31, 1997

CERTIFICATE OF SERVICE

I hereby certify that I have caused to be served one copy of the foregoing Notice of Intent To Participate, by first-class mail, postage prepaid, to the offices of the parties on the attached list.

Dated at Washington, D.C. this 31st day of July, 1997.



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MANAGEMENT
STB 7

August 27, 1997

BY HAND DELIVERY

ENTERED
Office of the Secretary
AUG 28 1997
5 Part of
Public Record

The Honorable Vernon A. Williams
Secretary
Surface Transportation Board
Case Control Branch
ATTN: STB Finance Docket 33388
1925 K Street, N.W.
Washington, D.C. 20423-0001

Re: Finance Docket No. 33388
CSX Corporation 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:

Pursuant to Decision No. 21 in the above-referenced proceeding, enclosed is an original plus ten (10) copies of a certificate of service of Amvest Corporation and the Vaughan Railroad Company (AMVT/VGN).

We have included an extra copy of the certificate of service. Kindly indicate receipt by time-stamping this copy and returning it with our messenger.

Sincerely,

Donald G. Avery

Donald G. Avery
An Attorney for Amvest Corporation
and the Vaughan Railroad Company

Enclosures

cc: The Honorable Jacob Leventhal
All Parties of Record

CERTIFICATE OF SERVICE

I hereby certify that pursuant to Decision No. 21 in STB Finance Docket No. 33388, CSX Corporation and CSX Transportation Inc., Norfolk Southern Corporation and Norfolk Southern Railway Company -- Control and Operating Leases/ Agreements -- Conrail Inc. and Consolidated Rail Corporation, (decision served Aug. 19, 1997), a copy of all filings submitted so far in this proceeding by Amvest Corporation and the Vaughan Railroad Company (AMVT/VGN) were served on each Party of Record (to the extent such filings have not previously been served upon other parties) this 27th day of August, 1997, by first-class mail, postage pre-paid.

Donald G. Avery

181535

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August 27, 1997

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BY HAND DELIVERY

The Honorable Vernon A. Williams
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Surface Transportation Board
Case Control Branch
ATTN: STB Finance Docket 33388
1925 K Street, N.W.
Washington, D.C. 20423-0001

Re: Finance Docket No. 33388
CSX Corporation 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:

Pursuant to Decision No. 21 in the above-referenced proceeding, enclosed is an original plus ten (10) copies of a certificate of service of Centerior Energy Corporation (CEC).

We have included an extra copy of the certificate of service. Kindly indicate receipt by time-stamping this copy and returning it with our messenger.

Sincerely,

C. Michael Loftus

C. Michael Loftus
An Attorney for Centerior Energy Corporation

Enclosures

cc: The Honorable Jacob Leventhal
All Parties of Record

CERTIFICATE OF SERVICE

I hereby certify that pursuant to Decision No. 21 in STB Finance Docket No. 33388, CSX Corporation and CSX Transportation Inc., Norfolk Southern Corporation and Norfolk Southern Railway Company -- Control and Operating Leases/ Agreements -- Conrail Inc. and Consolidated Rail Corporation, (decision served Aug. 19, 1997), a copy of all filings submitted so far in this proceeding by Centerior Energy Corporation (CEC) were served on each Party of Record (to the extent such filings have not previously been served upon other parties) this 27th day of August, 1997, by first-class mail, postage pre-paid.

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August 27, 1997

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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:

Pursuant to Decision No. 21 in the above-referenced proceeding, enclosed is an original plus ten (10) copies of a certificate of service of the Potomac Electric Power Company (PEPC).

We have included an extra copy of the certificate of service. Kindly indicate receipt by time-stamping this copy and returning it with our messenger.

Sincerely,

C. Michael Loftus

C. Michael Loftus
An Attorney for Potomac Electric Power Company

Enclosures

cc: The Honorable Jacob Leventhal
All Parties of Record

CERTIFICATE OF SERVICE

I hereby certify that pursuant to Decision No. 21 in STB Finance Docket No. 33388, CSX Corporation and CSX Transportation Inc., Norfolk Southern Corporation and Norfolk Southern Railway Company -- Control and Operating Leases/ Agreements -- Conrail Inc. and Consolidated Rail Corporation, (decision served Aug. 19, 1997), a copy of all filings submitted so far in this proceeding by the Potomac Electric Power Company (PEPC) were served on each Party of Record (to the extent such filings have not previously been served upon other parties) this 27th day of August, 1997, by first-class mail, postage pre-paid.

C. Michael Loftus

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