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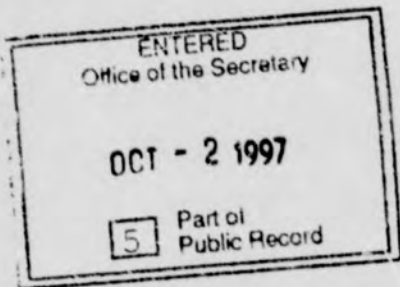
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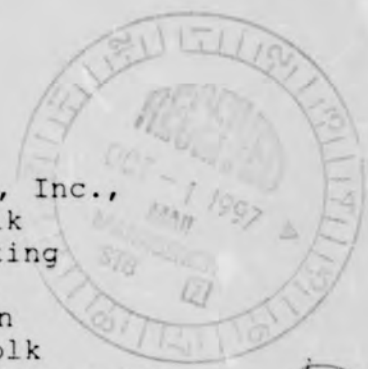
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BEFORE THE  
SURFACE TRANSPORTATION BOARD

ARU-21

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.

**RESPONSE OF ALLIED RAIL UNIONS  
CONCERNING ENVIRONMENTAL REPORT**

The Allied Rail Unions<sup>1</sup> submit this memorandum in response to the Board's notice regarding the Environmental Review Process in the above-captioned proceeding.

In this memorandum the ARU will comment on several (Environmental Impact Statement ("EIS")) issues pertaining to the safety of railroad operations. However, there are also procedural questions regarding the entire environmental review process in this case. Who will review the environmental filings and who will conduct the EIS investigation. From the Board's July 3, 1997 notice, it would appear that such review would be

<sup>1</sup> "Allied Rail Unions" means the American Train Dispatchers Department/BLE ("ATDD"); Brotherhood of Locomotive Engineers ("BLE"); Brotherhood of Maintenance of Way Employees ("BMWE"); Brotherhood of Railroad Signalmen ("BRS"); International Brotherhood of Boilermakers, Iron Ship Builders, Blacksmiths, Forgers and Helpers ("IBF"); International Brotherhood of Electrical Workers (IBEW); The National Conference of Firemen & Oilers/SEIU ("NCFO"); and Sheet Metal Workers' International Association ("SMWIA").

conducted by the Board itself. However, the Application in this proceeding states that the Board is using outside third party consultants to do this work. The ARU has attempted to ascertain whether the consultants were selected by the Applicants but the response of the Section of Environmental Analysis to ARU's September 17 request for information did not answer ARU's inquiry. Specifically, the letter did not state whether a third party consultant was being used or whether the consultant had been designated by the Applicants. See Attachment A hereto. The ARU has therefore filed a Freedom of Information Act request on this subject. In the meantime this memorandum will raise ARU's objection to an EIS process which is to be conducted by use of third party consultants designated by the Applicants.

**I. IMPLEMENTATION OF THE TRANSACTION AS PLANNED WILL HAVE SIGNIFICANT ADVERSE EFFECTS ON THE SAFETY OF RAILROAD OPERATIONS**

Applicants have repeatedly expressed their commitment to safe railroad operations, but review of their proposed Operating Plans (Application Volumes 3A and 3B), and their responses to ARU discovery requests, indicates that if those plans are implemented, there are likely to be adverse effects on the safety of rail operations, particularly with respect to train accidents and derailments. Applicants' plans call for significant reductions in employment even though there will be virtually no reductions in the numbers of lines operated by CSX, NS and

Conrail, and even though the Applicants forecast significant increases in traffic over those lines. Applicants also plan to significantly increase the size of employee seniority districts; this will require more movement of employees, create greater irregularity on the jobs to which employees are assigned, increase employee travel time and time away from home and reduce the frequency with which employees work in familiar territory. Applicants also plan to centralize and consolidate various functions. The ARU submits that all of these aspects of the Applicants proposed Operating Plans are likely to adversely affect the safety of their operations.

The Applicants plan to reduce maintenance of way employment by over 500 employees (Labor Impact Exhibit) even though there will be virtually no reduction in the miles of tracks that will have to be maintained, and even though Applicants project significant increases in traffic over those rail lines and in the yards (Application Vol. 1 p. 5, 16-19). It seems obvious that if Applicants projections are correct they will need to do even more track, right of way and structure work than is being performed at the present time, such that maintenance of way employment should increase or at least not decline. Applicants plans for small reductions in signal work forces (Labor Impact Exhibit) also are inconsistent with safe operations over a busier network of lines and yards. Applicants plans suggest a need for more, not less,



maintenance of way and signal work and their plans as to post transaction employment in these crafts are not consistent with safe operations. Applicants have also stated that they plan to use very large seniority districts for maintenance of way and signal employees and that they would not be receptive to using smaller districts (Application Vol. 3A at 490, 494; Vol. 3B at 365-370, 372.) See also Applicants' answers to ARU Interrogatories Nos. 63-74, 86-89. This would mean that maintenance of way and signal employees would be more frequently assigned far away from home and less frequently assigned in familiar work locations. Having regularly assigned forces regularly working the same territory is obviously a benefit in terms of effective track and signal maintenance but Applicants' plans ignore that benefit.

The ARU has sought answers from Applicants as to how they will maintain essentially the same amount of lines and yards with more and longer trains moving at higher speeds with a reduced number of signalmen and a substantially reduced number of maintenance of way employees. Applicants' response has been merely to offer blithe assurances that they will be able to use their remaining workers more efficiently and to expand their use of programmed maintenance of way gangs and signal construction gangs. *Id.* Applicants have not demonstrated that they will actually be able to adequately maintain their new combined and

busier systems with fewer maintenance of way employees and signalmen. Moreover, it must be recognized that programmed maintenance gangs and signal construction gangs are not responsible for the day-to-day maintenance, inspection and correction of track and signal problems but instead are responsible for large pre-scheduled construction and upgrade projects.

Additionally, CSX and NS plan to abandon use of the Conrail signal trouble desk in Ohio. Application Vol. 3A at 494. This desk is a valuable resource with respect to responding to problems and providing assistance to signalmen assigned to correct problems; CSX says that it will consolidate all of this work in Jacksonville far from the acquired Conrail lines where the work will be handled by an office dealing with all of the CSXT system; NS does not have an analogue to the Conrail trouble desk. Applicants Answers to ADJ Interrogatories Nos. 55 and 60.

CSX plans to consolidate all of its dispatching work in Jacksonville, Florida, (Application Vol. 3A at 504-505) thus moving the dispatchers for the Conrail territory acquired by CSX far from the territory that they will be dispatching. CSX says that this consolidation is necessary to efficient operations (*id.*), but NS is maintaining separate dispatching offices (Application Vol. 3B at 375-377). Both CSX and NS state that they plan to realize efficiency benefits by common supervision of

their dispatchers. Applicants Answers to ARU Interrogatory No. 27. And both CSX and NS state that they will change the collective bargaining agreements covering the former Conrail dispatchers in part so that managers can supervise dispatchers responsible for all of the lines operated by the post-Transaction carriers. *Id.* The ARU submits that the centralization of dispatching work in Jacksonville will increase the likelihood of dispatcher mistakes, and that the consolidation of dispatching forces with increased flexibility for management in the assignment of dispatchers will decrease rather than increase dispatcher familiarity with the territories that they dispatch. And common supervision of dispatchers offers no dispatching benefits and leads to the possibility that supervisors will be responsible for dispatchers whose territories are not familiar to the supervisors.

Both CSX and NS state that they plan to consolidate the acquired Conrail lines with their existing lines and to create very large seniority districts for engineers which will allow a great deal of flexibility in assignment of engineers throughout those districts; indeed they indicate that engineers may be required to exercise their seniority within the large districts to any place that they are needed. Application Vol. 3A at 486-488, Vol. 3B at 357-358. In response to questions about the possibility of using smaller districts the Applicants have stated

that such districts would be incompatible with their plans. The use of such large districts and the planned methods of assignment of engineers within those districts means that engineers are likely to be assigned anywhere that a need arises, and certainly that engineers will not be working familiar territory as much as possible. While engineers will presumably will be given the opportunity for pilot runs on new territory, that clearly is not as beneficial as becoming familiar with a territory by virtue of regular assignments within that territory. Additionally, the types of assignments that are envisioned by the Applicants make it likely that engineers will be traveling far from their homes and they will be transported to different locations in order to begin assignments. Moreover, the emphasis on flexible assignments within large districts suggests a likelihood that Applicants will rely on movement of engineers and use of overtime rather than full staffing within smaller districts.

It must also be noted that Applicants plan to reduce overall employment among the shopcraft employees who maintain, repair and overhaul locomotives and cars. Employee Impact Exhibit. However, Applicants also anticipate a net increase in rail cars and greater utilization of rail cars and locomotives. Application Vol. 1 at 4, 16, 23. These plans suggest that there will be more, rather than less, locomotive and car maintenance work. However, Applicants do not plan to increase the shopcraft

forces; indeed they plan a significant decrease in employment among carmen and smaller reductions in the other shopcrafts.

Applicants have asserted that they will be able to adequately maintain their locomotives and cars through more efficient operations but they have not substantiated those claims.

Applicants' Answers to ARU Interrogatories Nos. 113, 117, 118, 129-131, 135, 142, 147. And even if one were to accept that it was possible to maintain an increased car fleet and more heavily utilized cars and locomotives with the same number of shopcraft workers, that does not suggest that it is reasonable to assume that it is possible to do so with fewer shopcraft workers.

Accordingly, ARU submits that Applicants plans for implementation of the proposed Transaction present a number of significant safety concerns that should be investigated in the environmental review process.

Applicants may scoff at these concerns as merely speculative, but these concerns are not only self-evident, they are supported by actual experience. In reading the Applicants' proposed Operating Plans and their responses to discovery requests concerning those plans, persons who participated in the Union Pacific--Southern Pacific case can not help but be struck by a sense of *deja vu*; many of the assertions made by the Applicants echo similar assertions that were made by UP with respect to the alleged benefits of savings from significant



reductions in forces, consolidation and centralization of facilities and work, larger seniority districts, and increased flexibility in assignment of employees. However, UP's rosy promises are yet to be fulfilled. Moreover, the tangible results of the actions that it has taken have included not only significant delays, but also safety problems so serious that the Federal Railroad Administration ("FRA") organized a special investigation of UP's operations; the FRA's report concluded that there had been a "fundamental breakdown in basic railroad operating procedures and practices essential to a safe operation." The FRA made recommendations for major changes in UP's operations and UP accepted those recommendations and made significant personnel moves to address the problems cited by the FRA. Attached hereto as Attachment B is a copy of the FRA's summary of its investigation (a formal report has not yet been released).

The FRA criticized UP crew utilization where operating employees were working excessive hours with erratic schedules and were required to travel to various work locations. Such a situation is a likely outcome of Applicants' plans to implement large engineer territories with engineers required to work all over those territories. The FRA also heavily criticized UP's centralized dispatching center, thus indicating that, contrary to the belief of CSX, centralization of dispatching is not



inherently beneficial. And the FRA also criticized the fact that dispatchers were supervised by managers who were unfamiliar with the territories that their supervisors dispatched; however, both CSX and NS have cited common supervision of dispatchers as one of the key reasons why they needed to eliminate the Conrail collective bargaining agreement for dispatchers. Additionally, the FRA found that 57% of the UP locomotive fleet was defective. UP's Operating plan, like Applicants' plans here called for a consolidation and centralization of shop work and reductions in shop craft employees in the face of projected increases in locomotive and car utilization. The ARU submits that the UP experience supports their assertions that Applicants' plans for implementation of the Transaction present serious safety concerns which should be addressed in the environmental review process.

Accordingly, the ARU respectfully submits that there will be significant safety problems if Applicants obtain STB approval for this Transaction and it is implemented as described in their respective Operating Plans.

## **II. IT APPEARS THAT THE ENVIRONMENTAL REVIEW PROCESS FOR THIS APPLICATION IS FUNDAMENTALLY FLAWED**

The National Environmental Policy Act ("NEPA"), 42 U.S.C. §4332, requires that the Board identify and assess the environmental consequences of the transaction proposed by CSX and NS, and the primary method for making this assessment is preparation of an Environmental Impact Statement of the proposed

Transaction. In order to comply with this requirement, the STB has established certain procedures for this process. See 49 C.F.R. §1105.10 and *Ex Parte No. 55 Implementation of Environmental Laws (Sub-No. 22A)*, 7 I.C.C.2d 807 (1991). The procedures adopted by the STB permit an approach by which a neutral third-party consultant, who is compensated by the Applicants but subject to STB Section of Environmental Analysis ("SEA") direction, acts on behalf of the Board and prepare the environmental report. 7 I.C.C.2d at 817. Indeed, the Board actually "encourage[s] the use of third-party consultants because they expedite and facilitate environmental analysis." *Id.* See also 49 C.F.R. §1105.10(d).

In this case, the Board will be assisted by DeLeuw Cather & Company and HDR Engineering (Application Vol. 6A Art. 1 at 16); however no information is available as to how these consultants were selected or as to how they are being compensated. As is noted above, the ARU asked the Board to provide information about the use of third-party consultants in this case and to provide information on how the consultants were selected. See Attachment A. As of the date of this filing, the ARU has not received an answer to its requests. The SEA's letter, which purported to respond to the ARU's query, did not provide the requested information. Instead, the SEA letter merely described the environmental review process. Indeed, the SEA letter did not

even mention DeLeuw Cather & Company or HDR Engineering. If the Applicants had no role in the selection of these consultants, the SEA's letter surely would have so stated. Thus the record is unclear as to how the consultants were selected or are being paid and the non-responsive response of the SEA heightens concerns about the legitimacy of the environmental review process in this case. However, it is clear that the selection or designation of a third-party environmental consultant by the Applicants is contrary to the Council on Environmental Quality ("CEQ") regulations and the STB decision promulgating its own regulations.

The CEQ regulations, which are applicable to all government agencies and departments and on which the ICC's own regulations are based (7 I.C.C.2d at 817, n.27) clearly state that a regulated party may not select the third-party consultant in order to prevent conflicts of interests, both actual and apparent. The CEQ regulations state that "it is the intent of these regulations that the [third party consultant] be chosen solely by the lead agency or by the lead agency in cooperation with cooperating agencies or, where appropriate by a cooperating agency, to avoid any conflict of interest." 40 C.F.R. §1506.5(c), emphasis added. The STB's decision establishing its own regulations to implement NEPA and the CEQ regulations appears to be more narrowly drawn than the CEQ regulations and states

that "to avoid any impermissible conflict of interest (i.e., essentially any financial or other interest in the outcome of the railroad sponsored project), the railroad may not be responsible for the selection or control of independent contractors." 7 I.C.C.2d at 817, emphasis added.

Furthermore, the CEQ and STB regulations prohibiting the applicant from selecting the third party consultants are designed to avoid the potential for conflicts of interest, but the Applicant's selection of the consultant necessarily raises a conflict of interest concern as to whether the consultant can truly act independently. The consultants selected for this proceeding were presumably selected from a list of consultants approved in advance by the STB. There are numerous consultants on that list, and there is thus substantial competition for STB environmental consulting work. A consultant in such a competitive environment could not ignore the possibility that, if its report is adverse to the applicant, the applicant will be dissatisfied and communicate its dissatisfaction to other potential applicants who will, in future applications, select other consultants who are more likely to produce a favorable report.<sup>2</sup>

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<sup>2</sup> Indeed, in this regard it is significant that the consultant designated for CSXT, Dames & Moore, was selected by Canadian Pacific to be the third party environmental consultant for the ICC in *Canadian Pacific Ltd.--Abandonment--Lines Between Skinner and Vanceboro, ME*, Finance Docket No. AB-213 (Sub. No.

Since rail carriers are parties to a number of industry-wide groups (e.g., Association of American Railroads, Regional Railroads Association and American Short Line Railroads Association) which frequently share information, legal briefs and arbitrator evaluations and participate jointly in litigation and lobbying, it is highly likely that the carriers share information regarding environmental consultants. To assume that no such system, whether formal or informal, does not exist would be naive. And it must be remembered that the regulations are designed to prevent not only actual conflicts of interest but also potential conflicts of interest.

It may be argued that SEA has control over the process and can prevent conflicts of interest because it approves the list of consultants, but being on a large list of approved consultants does not provide any particular consultant with any security that it will continue to receive work from applicant carriers if it writes a report which is adverse to a particular applicant's interests. After an adverse report, the consultant may remain on the list; however, if it is blackballed because of an unfavorable

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4). One must wonder whether CSX would have selected Dames & Moore for this work if Dames & Moore had submitted a report in *Canadian Pacific Ltd.* which was adverse to the carrier's interest. The entire process by which an environmental consultant can be an advocate for a carrier in one case and then a consultant for the STB designated by a carrier in another case is inherently problematic from both due process and government ethics perspectives..



report, it may never work again in this area if the applicants are permitted to select the consultants off the approved list. This may cause consultants to consciously or subconsciously shade their reports in favor of the applicants. This bias is precisely the result that the CEQ and ICC regulations were designed to avoid.

It may also be argued that the consultants are to work under the direction of the SEA and that the SEA's supervision will assure a fair, accurate, and balanced report. But such an argument would seriously undervalue the role played by the consultants. The SEA acts in a supervisory, not investigative, role and, therefore, cannot consider information available to the consultant but ignored by the consultant or information obtained but not included in the consultant's report. Furthermore, if SEA oversees every piece of information considered by the consultant and every judgment call made by the consultant or reviews the entire report de novo then there is no need for the consultant. And the entire point of encouraging the use of consultants is that SEA cannot effectively prepare the necessary reports in full detail and must depend on the consultants to do the bulk of this work. Accordingly, despite the SEA's supervision of consultants, the consultants necessarily have a significant independent impact on the information gathering process and the formal fact-finding and conclusions involved in the final report. The ARU submits



that SEA supervision of the consultants cannot cure the defects in this process.

Nor is it sufficient that third-party consultants designated by Applicants would be formally approved and designated by SEA. The SEA's approval cannot be characterized as a selection. Selection from among a group of one is not a selection.

If CSX and NS have selected the third-party consultants to examine the proposed transaction, environmental review process in this case would fail to comply with the applicable CEQ and STB regulations and this entire proceeding would be colored by serious conflict of interest concerns; in such a situation, the environmental review process in this case would be fundamentally and fatally flawed and no valid conclusions could be drawn from these flawed procedures.

#### **CONCLUSION**

The ARU respectfully submits that the Application presented by CSX and NS raises significant safety concerns, and that if the Operating Plans of Applicants are implemented as described in the Application, safety of rail operations will be compromised. The ARU further submits that if the third party consultants selected to aid SEA in this case were designated by Applicants, then the integrity of the entire environmental review process would also be compromised.

Respectfully submitted,

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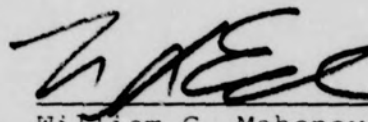
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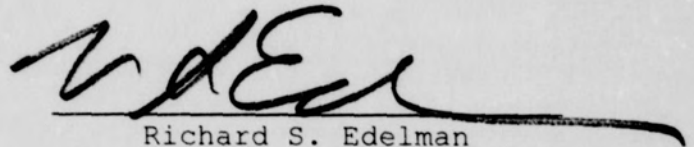
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**CERTIFICATE OF SERVICE**

I hereby certify that I have caused to be served one copy of the foregoing Response Of Allied Rail Unions' Concerning Environmental Report by first-class mail to all parties on the attached list.

Dated at Washington, D.C. this 1<sup>st</sup> day of October, 1997.



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# **ATTACHMENT A**

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September 17, 1997

Office of the Secretary  
Case Control Unit  
STB Finance Docket No. 33388  
Surface Transportation Board  
1925 K Street, N.W.  
Washington, D.C. 20423-0001

Attention: Elaine K. Kaiser  
Chief, Section of Environmental Analysis  
Environmental Filing

Re: CSX Corp. etc., Norfolk Southern Corp., etc.--  
Control And Operating Leases/Agreements--Conrail,  
Inc., etc.

Dear Ms. Kaiser:

I am writing with regard to the above-referenced proceeding ("Proceeding") concerning the CSX Corp. and Norfolk Southern Corp. ("Applicants") acquisition of control and division of lines of Conrail, Inc. ("Transaction") and the Environmental Impact Statement ("EIS") to be prepared in this Proceeding. Highsaw, Mahoney & Clarke, P.C. is representing a number of rail unions in this Proceeding referred to collectively for convenient description as the Allied Rail Unions ("ARU").

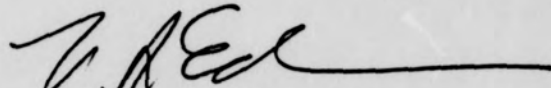
The purpose of this letter is to obtain information about the EIS process in this Proceeding. By notice served July 3, 1997 the STB issued a Notice of Intent to prepare an Environmental Impact Statement ("EIS") and Request For Comments On Proposed Scope which stated that SEA will prepare an EIS in this Proceeding and which sought comments on the scope of the EIS. However, the July 3 notice did not describe the method by which the EIS will be completed. Specifically, the notice did not state whether a consulting firm selected and/or paid for by the Applicants will have any role in the EIS process as has been done in some other ICC and STB proceedings. Accordingly, we request that you advise us as to: 1) whether any consulting firm/ consultant/expert witness/contractor or person outside the

Office of the Secretary  
ATTN: Elaine K. Kaiser

September 17, 1997  
Page 2

STB that has been selected by the Applicants and/or will be compensated by the Applicants will be involved in preparation of the EIS; 2) the identity of any such consulting firm/consultant/expert witness/contractor/outside person; and 3) the methods used for the selection and compensation of any such consulting firm/consultant/expert witness/contractor/outside person. We believe that this inquiry is properly directed to you under the July 3 Notice; if SEA believes that the information requested by AKU should be obtained by some other method, please advise us of that method. Thank you.

Sincerely,

A handwritten signature in dark ink, appearing to read 'R. Edelman', with a long horizontal line extending to the right.

Richard S. Edelman

cc: Parties on Restricted  
Service List



SURFACE TRANSPORTATION BOARD  
Washington, DC 20423

SEP 30 1997

*Section of Environmental Analysis*

September 29, 1997

Mr. William G. Mahoney  
Allied Rail Unions  
c/o Highsaw, Mahoney & Clarke, P.C.  
1050 17th Street, N.W., Suite 200  
Washington, DC 20036

Dear Mr. Mahoney:


Thank you for your recent comments concerning the proposed Conrail acquisition. I would like to take this opportunity to highlight the Surface Transportation Board's (Board) environmental review process.

The Board's Section of Environmental Analysis (SEA) has initiated the environmental review process to carefully investigate environmental issues associated with the proposed acquisition and its related actions, such as abandonments, constructions and increased rail traffic over existing rail lines. After careful consideration of all the comments, independent environmental analysis, and review of all available information, SEA will prepare, and issue in late-November, 1997 a *Draft* Environmental Impact Statement (DEIS) that analyzes the potential environmental impacts associated with the proposed acquisition. The DEIS also will recommend appropriate environmental mitigation to eliminate or reduce any potential environmental impacts. SEA will provide 45 days for the public to review and comment on the DEIS.

Once the public comment period is complete, SEA will develop the *Final* EIS (FEIS), which will include additional analysis of the potential environmental impacts associated with the proposed acquisition, and SEA's final environmental mitigation recommendations to the Board to eliminate or reduce any potential environmental impacts. SEA expects to complete the FEIS in late-March or early-April, 1998.

We appreciate your concerns, are considering them, and have formally placed your comments in the public record. If you have any additional questions regarding environmental issues or the environmental review process for the proposed acquisition, please call SEA's toll-free Environmental Hotline at 1-888-869-1997. Additional information is available on the Internet at SEA's "Conrail Acquisition Web Page" at [www.conrailmerger.com](http://www.conrailmerger.com). Thank you again for your comments.

Sincerely yours,

  
Elaine K. Kaiser  
Chief

Section of Environmental Analysis



# **ATTACHMENT B**

SEP 10 1997

**SUMMARY**  
**Federal Railroad Administration**  
**Union Pacific Railroad**  
**Safety Assurance Assessment**

**Background**

During the eight week period between June 22 and August 21, 1997, three collisions occurred on the Union Pacific Railroad (UP) that resulted in five railroad employee fatalities and two trespasser fatalities. Two subsequent collisions in Wyoming and California, while fortunately not resulting on loss of life or serious injury, further demonstrated an alarming safety trend. Additionally, thus far in 1997, four UP train service employees were killed in yard switching accidents.

**FRA Response**

The Federal Railroad Administration (FRA) already had a number of safety initiatives underway on the UP, including a train riding safety review in Region 7. However, after the Devine, TX, collision, FRA escalated efforts with the issuance of Safety Directive 97-1 to all railroads. This directive addressed dispatching procedures in non-signalized territory, and raised questions about the adequacy of railroad quality controls necessary to accomplish the objectives of operational testing and inspection programs.

Beginning August 23, FRA increased its intervention on UP. Conducting an initial review of the circumstances surrounding the five collisions and the four yard incidents, FRA came to the conclusion that there is a fundamental breakdown in basic railroad operating procedures and practices essential to a safe operation. Additionally, due to the varying corporate cultures that exist within the now merged Southern Pacific (SP), Chicago and Northwestern (CNW), and UP railroads, FRA believes this breakdown can be directly or indirectly attributed to the issue of corporate culture.

In order to further determine the magnitude and extent of the problem, FRA initiated a comprehensive system-wide safety assurance review of the UP's operation. This safety assurance project differed from past projects because it sought not only to identify impediments to good safety processes and effective communications within UP, but also to identify ways to correct those impediments. It is FRA's judgment that this approach will ensure a permanent solution to the current systemic safety shortcomings as long as all fully participate.

FRA would like to thank Mr. Jerry Davis, President and Chief Operating Officer, Union Pacific Railroad, as well as the many thousands of UP employees who participated in and contributed to this Safety Assurance Assessment. Over the last 17 days, FRA has worked closely in partnership with labor and management. Both groups have assured FRA and each other their absolute cooperation to resolve the safety critical issues identified on the UP. To their credit, both have already begun to address many of the following areas of concern.

Below is a summary of FRA's key findings:

### **1. Crew utilization**

FRA found significant evidence of ineffective crew utilization which leads directly to crew fatigue, stress, a lowering of morale, violations of the hours of service law, and a reduced ability to comply with operating rules. Crews are needlessly working longer hours without getting time off.

Cumulative fatigue erodes train and engine service employee ability to perform their duties safely. When crews work erratic schedules for days on end, their ability to read and follow instructions, identify and comply with signals, react appropriately in emergency situations and make safety critical decisions and act on those decisions is lost. The end effect is train accidents and employee fatalities. UP has agreed to participate in the SACP process.

**Action:** Teams with representatives from FRA, labor, and management will address job fatigue and will study all aspects of work/rest cycles including crew scheduling. FRA recommends that UP require crew transportation contractors provide an adequate number of vans and drivers, or arrange alternate transportation, to ensure the safety of train crews.

### **2. Supervision - Workload**

FRA found that in virtually all management levels supervisors perform a multitude of tasks that are not directly related to their supervisory responsibilities. The inability of supervisors to monitor and evaluate the performance of those they supervise contributes to a breakdown in safety processes.

**Action:** The UP will hire 16 additional field managers immediately, and will reevaluate field management requirements.

### **3. Supervision - Training**

FRA found that some supervisors in the Harriman Dispatching Center (HDC) are unfamiliar with the territories of the dispatchers that they supervise. Consequently, some supervisors are unable to readily determine whether or not the employees they supervise are complying with applicable carrier rules.

**Action:** FRA recommends that the UP reevaluate its training program for Corridor Managers to provide corridor managers with hands on experience.

### **4. Dispatcher Workload**

FRA found evidence of heavy dispatcher workload and resultant stress at the HDC that when combined with inexperienced supervisors, places additional stress on dispatchers, and could lead to increased instances of rule violations.





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FRA found that the UP has an incredible amount of support among the labor unions, both in the international and regional officers. At the same time, local union people feel that safety is still a lower priority than corporate profits "at any cost." It is widely held that while selected senior management, especially President Jerry Davis, may be serious about safety, but they are insulated by their staffs from the real state of the railroad. Union people do not believe that they are valued members of the safety program, but are involved only when expedient to advance a program developed by management. This means that UP has the seeds of a collaborative relationship with their employees, but they don't seem to "walk the talk" when it comes time to truly involve the unions in a needs assessment of the work force or in establishing formal safety programs.

**Action:** UP's President has committed to FRA all safety issues will be addressed at the top of the organization. UP has established an "800" number for employees to report safety issues and concerns. The reports are being reviewed each day by the UP's President. UP has committed to embracing the full processes of SACP. On September 17, a meeting will be held with FRA, UP senior management and the Presidents of the labor organizations who deal directly with UP to discuss these processes.



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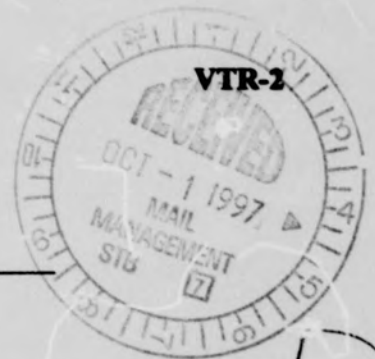
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**BEFORE THE  
SURFACE TRANSPORTATION BOARD**



**Finance Docket No. 33388**

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

**NOTICE OF INTENT OF  
VERMONT RAILWAY, INC.  
TO PARTICIPATE IN PROCEEDING**

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Oppenheimer Wolff & Donnelly  
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Washington, D.C. 20036  
202-293-6300**

**Counsel for Vermont Railway, Inc.**

**Dated: October 1, 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 --  
TRANSFER OF RAILROAD LINE BY NORFOLK SOUTHERN RAILWAY COMPANY TO  
CSX TRANSPORTATION, INC.

NOTICE OF INTENT OF  
VERMONT RAILWAY, INC.  
TO PARTICIPATE IN PROCEEDING

Vermont Railway, Inc. ("VTR") hereby provides notice to the Surface Transportation Board and Primary Applicants of its intent to participate as a party of record in this proceeding. Accordingly, please place the named attorneys, at the address provided, on the service list to receive all pleadings and decisions in this proceeding. Simultaneously herewith, VTR has filed a motion for leave to make this late-filed Notice of Intent to Participate.

Respectfully submitted,

Paul M. Laurenza

Edward J. Fishman

Oppenheimer Wolff & Donnelly

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Washington, D.C. 20036

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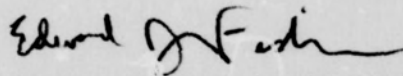
Fax: 202-293-6200

Counsel for Vermont Railway, Inc.

Dated: October 1, 1997

**CERTIFICATE OF SERVICE**

I hereby certify that on this 1st day of October, 1997, a copy of the foregoing  
**Notice of Intent of Vermont Railway, Inc. To Participate in Proceeding (VTR-2)** was served  
by first class mail, postage prepaid, upon all Parties of Record on the Service List.



---

Edward J. Fishman

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DONALD E. CROSS (1923-1986)



October 1, 1997

Office of the Secretary  
Surface Transportation Board  
1925 K Street, N. W.  
Washington, DC 20423-0001

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

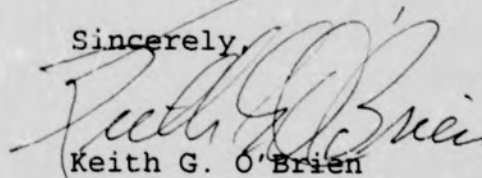
**Ohio Rail Development Commission/Public Utilities  
Commission of Ohio  
Notice of Appearance of Counsel**

Dear Secretary Williams:

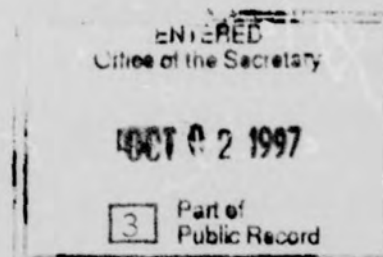
Please enter the appearance of the undersigned as  
counsel for the Ohio Rail Development Commission and Public  
Utilities Commission of Ohio. The involved parties jointly  
entered timely notice of intent to participate in this docket on  
August 6, 1997.

Thank you for your attention to this matter.

Sincerely,

  
Keith G. O'Brien

cc: Parties of Record  
Mr. Thomas M. O'Leary  
Mr. Alfred P. Agler  
Daniel A. Malkoff, Esq.



STB

FD

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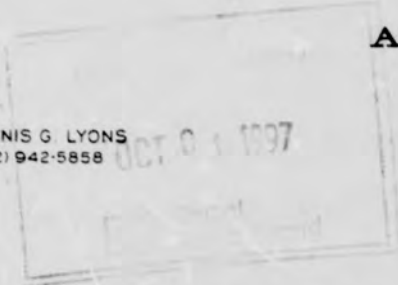
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September 30, 1997



**BY HAND DELIVERY**

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



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

Dear Secretary Williams:

Enclosed are an original and twenty-five (25) copies of the confidential version and twenty-five (25) copies of the public version of CSX/NS-88, the Response of Applicants CSX Corporation, CSX Transportation, Inc., Norfolk Southern Corporation, Norfolk Southern Railway Company, Conrail Inc. and Consolidated Rail Corporation To Motion of Port Authority of New York and New Jersey To Supplement the Primary Application, for filing in the above-captioned proceeding.

The Confidential Version is contained in the attached sealed package which has been marked with the word "Confidential" and the Docket number and document number of the filing.

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

Please note that copies of these filings are also enclosed on a 3.5-inch diskette in WordPerfect 6.1 format.

ARNOLD & PORTER

Hon. Vernon A. Williams  
September 30, 1997  
Page 2

Thank you for your assistance in this matter. Please contact me  
(202-942-5858) or Drew A. Harker (202-942-5022) if you have any questions.

Respectfully yours,

ARNOLD & PORTER

By 

Dennis G. Lyons  
*Counsel for CSX Corporation and  
CSX Transportation, Inc.*

Enclosures

cc: Hon. Jacob Leventhal  
Confidential Version to  
Restricted Service List  
(by FAX)  
Public Version to  
Service List

BEFORE THE  
**SURFACE TRANSPORTATION BOARD**

Finance Docket No. 33388

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



**RESPONSE OF APPLICANTS CSX CORPORATION,  
CSX TRANSPORTATION, INC., NORFOLK SOUTHERN  
CORPORATION, NORFOLK SOUTHERN RAILWAY COMPANY,  
CONRAIL INC. AND CONSOLIDATED RAIL CORPORATION  
TO MOTION OF PORT AUTHORITY OF NEW YORK AND  
NEW JERSEY TO SUPPLEMENT THE PRIMARY APPLICATION**

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Counsel for CSX Corporation and  
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(202) 973-7600

Counsel for Conrail Inc. and  
Consolidated Rail Corporation



CSX/NS-88

**Public Version**

BEFORE THE  
SURFACE TRANSPORTATION BOARD

FINANCE DOCKET NO. 33388



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

**RESPONSE OF APPLICANTS CSX CORPORATION,  
CSX TRANSPORTATION, INC., NORFOLK SOUTHERN  
CORPORATION, NORFOLK SOUTHERN RAILWAY COMPANY,  
CONRAIL INC. AND CONSOLIDATED RAIL CORPORATION  
TO MOTION OF PORT AUTHORITY OF NEW YORK AND  
NEW JERSEY TO SUPPLEMENT THE PRIMARY APPLICATION**

**INTRODUCTION AND SUMMARY**

Applicants CSX Corporation ("CSXC"), CSX Transportation ("CSXT"),<sup>1</sup> Norfolk Southern Corporation ("NSC"), Norfolk Southern Railway Company ("NSRC"),<sup>2</sup> Conrail Inc. ("CRI") and Consolidated Rail Corporation ("CRC")<sup>3</sup> hereby oppose the Motion of the Port Authority of New York and New Jersey ("Port Authority") to require Applicants to supplement their primary application in this proceeding.<sup>4</sup>

<sup>1</sup> CSXC and CSXT are referred to collectively as "CSX."

<sup>2</sup> NSC and NSRC are referred to collectively as "NS."

<sup>3</sup> CRI and CRC are referred to collectively as "Conrail."

<sup>4</sup> The Motion is denominated as NYNJ-13. For simplicity, it will be cited here as "Motion."

Over three months after the filing of the Primary Application in this case on June 23, 1997, and over two months after its acceptance by the Board, the Port Authority has evidently concluded that the Application did not contain the level of detail on certain matters which the Port Authority would have wished. It seeks an order from the Board that the Application be supplemented. While disclaiming any "desire to delay the final disposition of this proceeding" (Motion at 7), the Port Authority nonetheless urges that the record be left open on certain issues and that at some stage the three Applicants be ordered to file "their respective" plans and sets of supporting verified statements with the Board summarizing their progress in developing work plans for the day-to-day minutiae of operations in the Shared Assets Areas. These filings are then to be the subject of a period of deposition discovery by the Port Authority and presumably by the avowed opponents of the Transaction. Next the Port Authority and the opponents are to file their responses, presumably followed by a rebuttal from the Applicants; all this on its own schedule while the remainder of the case is to proceed on the Board's schedule.

The Motion should be denied:

The Application fulfills all requirements of the Board's rules and the specific requirements of Decision No. 7, decided May 29, 1997.

The Motion apparently claims to seek a missing "operating plan" (or, apparently, three such plans) within the meaning of 49 C.F.R. § 1180.8.<sup>5</sup> In

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<sup>5</sup> The pertinent provisions of § 1180.8 are the preamble of subsection (a) and item 1 of its specifications, which read as follows:

**§ 1180.8 Operational data.**

(a) For *major* and *significant* transactions:  
Operating plan (exhibit 13). Submit a summary of the  
proposed operating plan changes, based on the impact

[Footnote continued on next page]

fact, what it seeks are the minutiae of the handling of switching operations, organization of forces, dispatching, etc., which are part of the evolving process of running a railroad's yard and similar activities, a process that changes over time and is continuously adapted to changing conditions. It does not seek the basic patterns of service on a line-haul basis that are contemplated by the regulations. These all have been furnished, to the Port Authority's apparent satisfaction.

The Application contains voluminous information concerning the governance and workings of the Shared Assets Areas and detailed operating agreements for the Shared Assets Areas, including one specifically tailored to the North Jersey Shared Assets Area, about which the Port Authority expresses concern.

The Motion seeks to involve the Board in the micromanagement of a private business in an inappropriate way and to require forthwith a definitive

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[Footnote continued from previous page]

analyses, that will result from the transaction, and their anticipated timing, allowing for any time required to complete rehabilitation, upgrading, yard construction, or other major operational changes following consummation of the proposed transaction. The plan should make clear the gains in service, operating efficiencies, and other benefits anticipated from the merger. The plan should include:

(1) The patterns of service on the properties, including the proposed principal routes, proposed consolidations of main-line operations, and the anticipated traffic density and general categories of traffic (including number of trains) on all main and secondary lines in the system. Identify all yards expected to have an increase in activity greater than 20 percent. Changes in operations may be summarized in a *pro forma* density chart.

(The other specifications of § 1180.8(a) are even more remote from what the Port Authority seeks.)

"plan" or "plans" for what is essentially a process that all railroads must go through on an ongoing and continuing basis to run their daily activities.

The Motion contradicts the approach of informal cooperation and consultation advocated on the record by the Port Authority's counsel at the close of the deposition of CSX's Chief Executive Officer, John Snow. It seeks to substitute for it a forensic process which is ill-adapted for the fine-tuning of day-to-day operations in the Shared Assets Areas.

Finally, under the claim of not wishing to affect the ultimate decision in the case, the Motion seeks to launch a separate adjudicative process on a set of issues which can only complicate the procedural progress of the case and have a potential for delaying its outcome.

#### **STATEMENT OF FACTS**

On June 23, 1997, the Applicants filed their Application in this matter, covering eight volumes contained in over 20 separate books. The Application contained, in two separate books with a total of more than 1000 pages, the operating plans and sponsoring verified statements of both CSX and NS, one in each of the two books. There is no issue raised that these operating plans were in any way not fully responsive to the text of Section 1180.8. (*See* note 5 above; Vols. 3A and 3B, *passim*.)<sup>6</sup> The third applicant, Conrail, submitted no operating plan. While Conrail is to have certain continuing operations as a railroad following approval and consummation of the Transaction, the Application made it plain that following the Transaction, it would have operations in three defined shared assets areas, but those operations would be performed for the account of

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<sup>6</sup> "Vol." references are to the Volumes of the Application, CSX/NS-18 through 25.

CSX and NS, to facilitate their service to the public. Vol. 1 at 58; Transaction Agreement, § 11.13, Vol. 8B at 76.

The three shared assets areas are the North Jersey Shared Assets Area, as to which the Port Authority expresses its particular concern; the South Jersey/Philadelphia Shared Assets Area; and the Detroit Shared Assets Area. These Shared Assets Areas were developed on the basis of negotiations between CSX and NS largely because they are areas where both parties needed to have access in order to provide the public the level of competition that the Application contemplated and because of the infeasibility of separation of trackage between the two. (Snow V.S., Vol. 1 at 314-15, McClellan V.S., Vol. 1 at 514.)

The Application made it plain that Conrail is not to be dissolved as part of the Transaction that the Application contemplated. Vol. 1 at 7-9, 31-42, 43, 45-49, 55-58, and 61-62. Instead its corporate existence was to be preserved. Vol. 1 at 7-9, 31-35, and 55-58. Indeed, it would continue to own, either directly or through subsidiaries, substantially all of its present assets; most in two subsidiaries, NYC and PRR, which would, respectively, enter into long-term operating agreements with CSX and NS. Vol. 1 at 7-9, 34-42, 44-45, and 56. The Shared Assets Areas would be among the assets that Conrail itself would retain. Vol. 1 at 8, 41-42, 45-49. While to some extent each of CSX and NS could conduct operations directly in the Shared Assets Areas (and while all operations in those areas would be for the account of one or the other of them), Conrail is to serve as operator in the three Shared Assets Areas. (See North Jersey Shared Assets Area Operating Agreement, Vol. 8C, § 3, at 75-79 see also, Vol. 1 at 43 and 45-49.)

Applicants moved, in their Petition for Waiver or Clarification (CSX/NS-2), that the filing of certain pro forma financial statements for Conrail



in the Application be waived. In response to this, as indicated by the Motion, the Board in Decision No. 7 (at page 12) said that it agreed that:

separate statements for Conrail on a freestanding basis would not be meaningful and would not contribute to the analysis of the Control Transaction. Applicants should be advised, however, that we expect that the primary application will fully describe the post-transaction Conrail, its structure, its management, and its operations, and, in particular, will address the concerns raised by the Port Authority (the nature of applicants' operations in the NY/NJ Metro Area, the competitive impact and economic effect of those operations, the investment CSX and NS anticipate making in the NY/NJ Metro Area, and the level of competition that the NY/NJ Metro Area will experience following the proposed transaction.

The Application covered these matters fully. The structure and continuing functions of Conrail were fully described. This included its governance (See Vol. 1 at 33); the organization of NYC and PRR, its Subsidiaries; the disposition of Conrail's assets and liabilities (id. at 34-42); and the function of the Shared Assets Areas (id. at 46-49). Detailed descriptions, virtually by metes and bounds, and detailed maps of the Shared Assets Areas were submitted. See Vol. 1 at 46-49, Exhibit 1 (Map B), Letter Agreement of April 18, 1997, Exhibit A, Vol. 8A at 368, 370-71, 388-89, 392-96; Vol. 8B, Attachment (Map B). See also Tobias V.S., Vol. 1 at 481-82; Finkbiner V.S., Vol. 2B at 37-40; Wilkins V.S., Vol. 2B at 342-44; Orrison V.S., Vol. 3A at 68; CSX Operating Plan Vol. 3A at 213-52, 299 and 343-49 (see also CSX/NS-33, Errata to Primary Application ("Errata"), substitute page 343); Mohan V.S., Vol. 3B at 20-28 (see also, Errata, substitute page 21); NS Operating Plan Vol. 3B at 95, 111-23, 328, 390-98; and Vol. 6A at 28-29, 65-67; CSX/NS-54, Errata and Supplemental Environmental Report to Volume 6 (Environmental Report) of the Primary Application at 2, changes to page 65 and 67), 69;

The detailed agreements governing the structure, governance and operations of the continuing Conrail, including the Shared Assets Areas, were submitted in the Application. See April 8, 1997, Letter Agreement, Vol. 8A at 350-399; the LLC Agreement, providing for the governance of CRR Holdings LLC, the jointly-owned entity through which joint control of the continuing Conrail would be exercised (Vol. 8A at 400-36); Transaction Agreement and Schedules, Vol. 8B at 1-121. The agreements presented included the Shared Assets Operating Agreements for each of the three Shared Assets Areas (see Vol. 8C at 57-176).

The Operating Agreement for the North Jersey Shared Assets Area, the focus of the Port Authority's concern, is among those presented and is found at Vol. 8C at 57-96. It covers numerous details concerning the governance and operations of that Shared Assets Area including the function of the CRC Board; the functions and qualifications of the General Manager; the status of the employees; the responsibilities and duties of CRC (Section 2, id. at 73-74); the six independent rights of operation of CSX and NS; the qualification of crews; the grant of certain reciprocal operating rights; the performance of switching and yard services; provisions establishing that all work in the area is to be done for the accounts of CSX or NS; a prohibition on the sharing of CSX's waybill information with NS and vice versa; the responsibilities for dispatching, weighing, freight claims, freight car repairs, train services, wrecking services, and access to the area (Section 3, id. at 75-79); the responsibilities as to furnishing operating equipment and effecting locomotive servicing and repairs, and for various types of maintenance, routine and program, and maintenance standards (Sections 4 and 5, id. at 79-81); the responsibilities for capital

improvements of varying kinds (Section 6, *id.* at 82-85);<sup>7</sup> accounting; costs and budgets; and the formula for cost sharing (Sections 7, 8 and 9, *id.* at 85-90). Other provisions completed the Agreement, which in total, was designed to provide a structure which would permit the two carriers to make use of the Shared Assets Areas on an impartial basis, while preserving their competitive identities, and while giving each of them an incentive to use the Shared Assets Areas by providing for the payment of established "interest rentals" which would be "sunk costs" so that the cost of each shared assets area to CSX and NS would be dependent only in part on their respective usage. *See id.* at 68, 90-96; Vol. 1 at 57, 622-23; Vol. 8B at 50 (§ 4.5).

A joint verified statement of finance officers of CSX and NS, Messrs. Sparrow and Romig, provided additional details as to the continuing Conrail and as to the interest rentals, usage fees and other aspects of the Shared Assets Areas. *See* Vol. 1 at 619-27. The Port Authority took the deposition of these gentlemen and asked them questions on a variety of subjects. Sparrow/Romig Depo. at 40-86.

In addition, the operating plans of CSX and NS, contained in Volumes 3A and 3B of the Application, provide a great deal of information about "the nature of applicants' operations in the NY/NJ Metro area," in full compliance with Section 1180.8 and Decision No. 7. The contemplated principal routes and patterns of service described by CSX and NS include routes through or terminating in the Shared Assets Areas, including the North Jersey Shared Asset

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<sup>7</sup> The Port Authority seems not to have reviewed this Agreement. In their examination of the witnesses Sparrow and Romig, the Port Authority insisted on asking the witnesses their understanding of the responsibilities for capital improvements as if the agreement did not exist, and without putting the agreement before them; thereby substituting a memory contest for an examination on the implementation or interpretation of the agreement. Sparrow/Romig Depo. at 79-85.

Area. See Vol. 3A at 117-19, 124-32, 141-52, 343-48; Vol. 3B at 95, 113-16. The operating plans specifically describe the contemplated train service to, from and through the North Jersey Shared Asset Area. Vol. 3A at 177, 343-44; Vol. 3B at 135-164, 446-450. Specific train schedules were placed in the document depository and, pursuant to Decision No. 19, later filed with the Board and provided to requesting parties. Contemplated yard and terminal changes and consolidations in the Shared Assets Areas, including North Jersey, are described in detail. See Vol. 3A at 213-53; Vol. 3B at 179-223. Major changes in the number of cars handled in North Jersey terminals are described at Vol. 3A at 429-33 and Vol. 3B at 264. Changes in anticipated traffic densities on all line segments, including those in Shared Assets Areas, are detailed in Vol. 3A at 429-33 and Vol. 3B at 453-482.

Furthermore, the effects of the Shared Assets Areas, including the North Jersey area, in promoting competition are discussed at length in the verified statements of Applicants' economic experts and in the statements of other officers of the Applicants. See Kalt V.S., Vol. 2A at 7, 21-22, 60-63; Harris V.S., Vol. 2B at 15-21. See also Tobias V.S., Vol. 1 at 481-82; and McClellan V.S., Vol. 1 at 514-23.

Like all railroad control applications, the Application described the basic structure and principal effects of the proposed transaction, including the operating matters required by the Board's rules, and, in this case, by Decision No. 7 concerning the continuing Conrail. The Application did not detail the minutiae of day-to-day implementation. However, because the transaction involved cooperative efforts in certain respects between two staunch competitors who propose to remain competitive with each other, it had to establish bright lines defining what they could do and could not do. Thus it contained three

heavy books full of agreements (Vols. 8A, 8B and 8C), some of which we have addressed above, memorializing the division of operating responsibilities and competences between the two competitors and the continuing Conrail, for their implementation in the ownership and division of Conrail and in the Shared Assets Areas. In this regard, the Application reaches a level of structural detail we believe no preceding rail control application has reached.

That detail is said not to suffice. Despite the 40-page Shared Assets Area Operating Agreements and the other material identified above -- said to be only "some very general statements regarding how each [Shared Assets Areas] will operate" -- the Motion says that there is not enough. The Port Authority, however, does not say precisely what more it wants than is described in the Application and in the materials included in it.

The quotations from Messrs. Orrison, Snow and Mohan in the Motion (pp. 4, 5, 6) make it plain that CSX and NS are presently engaged in working out the details of the Day One operations within the Shared Assets Areas. The Port Authority wishes to cast this ongoing business process into a concrete mold by asking the Board to order that the three Applicants each submit to the Board operating "plans" (why three plans is not explained), apparently freezing their planning activities at some date certain, and submit to examination on verified statements regarding them.

#### **REASONS FOR DENYING THE MOTION**

The Motion is deficient on many bases and should be denied.



**I.        The Application Meets the Requirements of  
the Board's Regulations and Those of Decision No. 7**

As indicated in the Statement of Facts, there can be no issue that the Application fails to present any information called for by § 1180.8 or, indeed, any specific regulation of the Board for the preparation of railroad control applications in major cases. It also meets the requirements of Decision No. 7: The Statement of Facts outlines the places in the Application where Conrail's structure, its governance and its continuing operations are spelled out. As to the Shared Assets Areas, the roles of Conrail and of the two acquiring carriers are described in detail in the three Shared Assets Areas operating agreements. The line-haul movements that begin and end in the Shared Assets Areas are described, in at least the level of detail required by Section 1180.8(a)(1), in the two operating plans of CSX and NS. The competitive impact of those operations is plain from the Application. The level of competition in the shared assets areas themselves is plainly set out: the areas and facilities which serve or are served by the two carriers in common are delineated, as are those which are set aside for the exclusive use of one or the other. Other carriers presently having access within the Shared Assets Areas will have their rights preserved. Those investments that are contemplated for improvements in the Shared Assets Areas are discussed. (Vol. 3B at 89, 92.) There has been no default in compliance with the Board's regulations and order.

**II. The Motion Seeks to Involve the Board in an Unprecedented Micromanagement of Day-to-Day Railroad Activities**

The Motion thus calls for the Applicants to produce a document -- or three documents<sup>8</sup> -- presumably describing the nuts-and-bolts of the daily activities in the North Jersey Shared Assets Area. While in real life the organization of those activities will be a continuing effort, both in the planning stage and with course corrections as implementation takes place, under the Motion the description of the day-to-day activities is presumably to be frozen at a particular moment of its development and submitted to the Board as part of the Application. It is plain from the Motion that the descriptions thus filed are to be an integral part of what the Board is to approve or disapprove. (Motion at 6.) The extent to which adjustments could be made after the Board's approval is not clear; nor is it clear how such adjustments might be practically carried out, if the Application is deemed premised on a highly detailed and specific description of the details of administration of the Shared Assets Areas.

The Board will presumably be seen as putting its imprimatur on the specifics of the methods of implementation of the basic plan, currently presented in the Application, by receiving and passing on the detailed implementation information requested by the Port Authority. Indeed, that seems to be the point of the Motion. This appears to be contrary to the basic premises of the statutes administered by the Board and by its predecessor and by their approach to the

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<sup>8</sup> The Motion calls for the Applicants to submit "their respective" plans. (Motion at 1.) It expresses concerns that three rail carriers will operate in the area. (*Id.* at 3.) We are at a loss to imagine how the present, independent, Conrail is to produce an individual plan as to how the continuing Conrail will operate in the Shared Assets Areas. The present Conrail is independent of CSX and NS. It runs a common carrier railroad operation throughout the northeastern quadrant of the United States. The continuing Conrail will be controlled by CSX and NS. It will perform railroad operations within the three Shared Assets Areas solely for the account of CSX and NS to assist them in rendering service to the public.

administration of those regulatory statutes. In railroad combinations, the railroads involved submit a plan, in a specified level of detail -- not as minute as that contemplated by the Port Authority -- to the Board. If the Board proceeds to find the Application consistent with the public interest, the parties are authorized to carry it out. The nuts and bolts of how they carry it out is left up to them and they are responsible for how they carry out the transaction if it is consummated.

The Board has the task of regulator, not that of manager. It is the task of the private companies to manage and they are responsible for the outcomes of their management. To be sure, the Board has, on at least one occasion, imposed monitoring conditions on rail combinations. *See UP/SP* at 146-47, 279-80, Appendix G, § 22b-a, § 23b-d. These have taken the form of the requirement of periodic reports, with the possibility of special reports, and of public comment and a retention of the Board's jurisdiction. They have not taken the form of requiring preapproval of the Board for activities in the ordinary course of business of the combination which the Board has found to be in the public interest. If the reports indicate a situation which the Board feels needs correction, or if such a situation is reported to the Board in the monitoring process by comments of the public, the Board, within the limits of its jurisdiction and its lawfully-imposed conditions, can step in and order a correction. This is a far step from Board examination of prospective implementing arrangements following a forensic process, which is what the Port Authority seeks. The Motion, which proposes this, thus appears to be both unprecedented, contrary to the consistent administrative interpretation and implementation of the governing statutes and contrary to sound principles of regulatory oversight.

**III. The Approach of the Motion Contradicts the Principles Espoused by the Port Authority on the Record of this Proceeding**

The deposition of John Snow, Chief Executive Officer of CSX, was taken on September 18, 1997, and the Port Authority, through its present counsel, were among the parties questioning. At the end of those questions, labelling it the "\$64 Question," the Port Authority's counsel, speaking about the implementing process in the North Jersey Shared Assets Area said that the Port Authority

Mr. Snow replied that

The Port Authority's counsel commented on the answer, without objection, as follows:

The preference of the Port Authority for an informal but meaningful consultative process, expressed on the record in the presence of the Port Authority's in-house Deputy General Counsel (Snow Depo. at 5), has now changed into pouring matters best suited to railroad decisionmaking after informal consultation into the mold of forensic process. This, despite a willingness to have informal discussions on the part of the Applicants; Mr. Snow had met on several occasions with the senior officials at the Port Authority before the Port Authority's counsel made the remarks quoted. In addition, several senior operations, transportation and strategic planning officers of NS have met on several occasions with representatives of the Port Authority to keep it apprised on the issues raised in the Motion. The Applicants cannot understand why a preference for a formal treatment of these details, rather than an informal consultative approach, is now being pursued by the Port Authority.

**IV.      The Inevitable Result of Granting the Motion Would be To Delay and Obstruct the Orderly Prosecution and Consideration of the Application**

The Port Authority states that it is not attempting to delay the schedule promulgated by the Board in this matter. At the present time, discovery from the Applicants will be completed in October and parties opposing the transaction, seeking conditions, making comments on it, or filing inconsistent or responsive



applications, are to do so by October 21, 1997. The Applicants are to file rebuttals and responses to those filings by December 15, 1997; and replies by the parties filing inconsistent and responsive applications are due by January 14, 1998. Briefing is to take place by February 23, 1998, oral argument, at the Board's discretion, on April 9, 1998, and the Board's decision, by June 8, 1998. A schedule for the Environmental Impact Statement relating to the Primary Application is interlaced with the schedule just mentioned.

According to Mr. Snow's testimony, as quoted by the Port Authority, the details for the implementation of the integration are currently being worked on; the planning must involve

Instead of proceeding deliberately with planning and implementation, the Port Authority urges that the Applicants ought to "develop and file these plans promptly," so that there "should be no delay in the final decision of the Board." (Motion at 8.)

Following the "hurry up" call for filing of the detailed implementation arrangements, which of course must be satisfactory to both CSX and NS (a point

which the Motion overlooks), the Motion contemplates a period of the taking of the depositions of the persons sponsoring the supplemental filings. Following that, the nonapplicant parties are to file comments. Presumably some time would be allotted for replies by the Applicants.

Obviously, even if the filings contemplated by the Motion were to be effected in haste -- not an appropriate method -- the result would be a segment of the case that would be going through its procedural steps some months behind the rest of the case. The Motion makes no proposal to change the October 21, 1997, date altogether. How the two parts of the case would be put together is not explained; for how one is to "catch up" to the other, the Port Authority has no operating plan.

It is thus apparent that if the Board were to grant the Motion, it would either compel CSX and NS to make hasty, premature implementing decisions so they could be written up and filed, or force a delay in the decision date or, most likely, do both. The distraction of the parties by these activities from their roles in the rest of the case must also be considered. The scenario proposed by the Motion involves the Applicants taking the depositions of the nonapplicants' witnesses while the nonapplicants take the depositions of the Applicants' witnesses sponsoring the implementation filing. This could be followed by the two sides filing comments at the same time on varying pieces of each other's cases. The Motion suggests no practical way of doing this and overcoming this problem.

### **CONCLUSION**

The Applicants agree that the North Jersey Shared Assets Area -- and the other Shared Assets Areas -- are of importance in the Application they have

filed with the Board and to the new competitive services and new single-line services that they propose to introduce. The Applicants have submitted in their Application a very substantial amount of material on that and the other Shared Assets Areas and on the structure and operations of the continuing Conrail. The day-to-day implementation of the activities to be conducted in the Shared Assets Areas is receiving the attention of CSX and NS, as the record cited by the Motion itself demonstrates. Working out those details is the responsibility of the Applicants with appropriate consultation with interested parties, not a matter to be the subject of a lawyers' forensic process. Unfortunately, the Motion overlooks this and its grant could only result in an inappropriate micromanagement and a delay of the consideration of the Application.

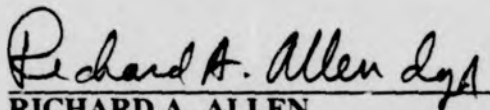
For the reasons stated, the Motion should be denied.

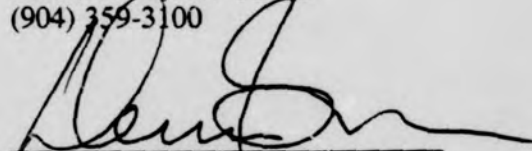
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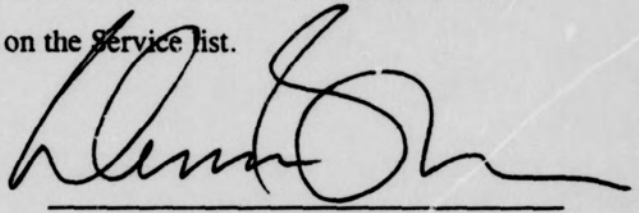
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September 30, 1997

**CERTIFICATE OF SERVICE**

I, Dennis G. Lyons, certify that on September 30, 1997, I have caused to be served a true and correct copy of the foregoing CSX/NS-88, Response of Applicants CSX Corporation, CSX Transportation, Inc., Norfolk Southern Corporation, Norfolk Southern Railway Company, Conrail Inc. and Consolidated Rail Corporation to Motion of Port Authority of New York and New Jersey To Supplement the Primary Application (Public Version), on all parties that have appeared in Finance Docket No. 33388, by first-class mail, postage prepaid, or by more expeditious means, as listed on the Service list.



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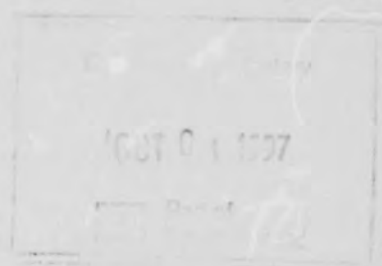
Sandra L. Brown

202-274-2959

September 30, 1997

The Honorable Vernon A. Williams  
Secretary  
Surface Transportation Board  
1200 K Street, NW  
Room 711  
Washington, D.C. 20423

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:

On behalf of New York State Electric and Gas in the above captioned docket and pursuant to Decision No. 27, please find the enclosed original and ten copies of the Certificate of Service Pursuant to Decision No. 27 in Finance Docket No. 33388.

Please date stamp the enclosed extra copy of the pleading and return it to the messenger for our files.

Sincerely yours,

Sandra L. Brown  
Attorney for New York State Electric & Gas

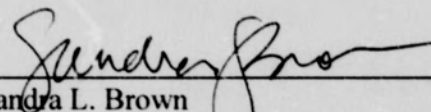
Enclosures

cc: The Honorable Jacob Leventhal  
All Parties of Record

. . .

CERTIFICATE OF SERVICE  
PURSUANT TO DECISION NO. 27 IN FINANCE DOCKET NO. 33388

I hereby certify that a true and complete copy of all filings previously submitted by the New York State Electric & Gas was served this 30<sup>th</sup> day of September, 1997, by first class mail to Robert J. Cooper, General chairperson, United Transportation Union.

  
\_\_\_\_\_  
Sandra L. Brown  
Attorney for New York State Electric & Gas