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**STAY AND EXPEDITED CONSIDERATION REQUESTED**

September 22, 1997

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



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

Dear Mr. Williams:

Enclosed please find CSX/NS-81 (Applicants' Petition for Stay and Appeal from Decision of Presiding Administrative Law Judge Concerning Production of Masking Factors Used in ICC/STB Waybill Sample) to be filed in the above-referenced docket. This appeal also embraces a request that the Board stay ALJ Leventhal's decision at issue beyond 5:00 p.m. today to give the Board an opportunity to act on this appeal. The ALJ has stayed his decision through that date and time. Exhibits A and B are highly confidential and are being submitted separately under seal.

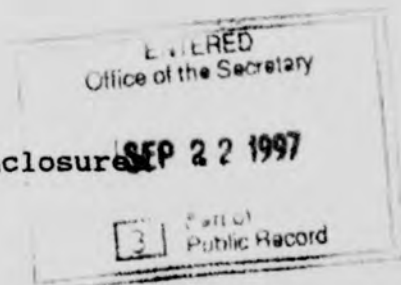
Accompanying this letter are 25 copies of CSX/NS-81, as well as a formatted WordPerfect diskette.

Thank you for your assistance in this matter. Please contact me (202-973-7605) if you have any questions.

Sincerely,

Gerald P. Norton

Enclosure **SEP 22 1997**



**EXPEDITED ACTION AND STAY REQUESTED**

BEFORE THE  
SURFACE TRANSPORTATION BOARD

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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

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STB FINANCE DOCKET NO. 33388

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APPLICANTS' PETITION FOR STAY AND APPEAL FROM  
DECISION OF PRESIDING ADMINISTRATIVE LAW JUDGE  
CONCERNING PRODUCTION OF MASKING FACTORS  
USED IN ICC/STB WAYBILL SAMPLE<sup>1</sup>

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Applicants<sup>2</sup> submit this joint brief in support of their petition for stay and expedited appeal from an unprecedented decision of Presiding Administrative Law Judge Leventhal ("ALJ") requiring them to produce a category of uniquely confidential information as to which there are strong public policy reasons for confidentiality: the "masking factors" used by Applicants in reporting revenue as part of the Board's Waybill Sample program. These factors have been used for over a decade to protect the competitively sensitive, highly confidential, deregulated rates

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<sup>1</sup>This Appeal embraces a request to continue the stay of the ruling under appeal beyond Monday September 22 at 5:00 p.m., through which time the Presiding Administrative Law Judge stayed his own ruling, pending a Board decision on this Appeal.

<sup>2</sup>Applicants are CSX Corporation and CSX Transportation, Inc. ("CSX"), Norfolk Southern Corporation and Norfolk Southern Railway Company ("NS") and Conrail Inc. and Consolidated Rail Corporation ("Conrail").

in contracts between shippers and rail carriers. They are not relevant to any legitimate issue in this control proceeding, and their forced disclosure would seriously harm an important element of the Board's efforts to gather useful transportation data while protecting the security of highly confidential, statutorily protected, shipper-railroad contract rate and revenue data.

The ALJ has imposed a stay of his decision only until 5:00 p.m., Monday, September 22. Applicants request that the Board stay the ALJ's ruling for the limited period required to consider this appeal and issue a decision.<sup>3</sup> As explained below, failure to do so could result in irreparable harm to Applicants, to third parties whose confidential rate information would be put at risk, and to the public interest, for there is no effective way to "unring the bell." Applicants also have a strong likelihood of prevailing on the merits. On the other side ACE Utilities waited months before seeking this discovery and will not be substantially harmed by the brief delay involved. Cf. STB Finance Docket No. 32760, Union Pac. Corp., -- Control and Merger -- Southern Pac. Corp., Slip Op. at 3 n.8 (served Sept. 27, 1996) (citations omitted) (request for stay pending request for judicial review of a Board decision).

In the interests of expedition, Applicants incorporate by reference and rely substantially on the brief they filed in

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<sup>3</sup>The decision from which this appeal is taken was issued orally after discovery conferences on September 17 and 19, 1997. Relevant pages from the transcript of those conferences are attached as Exhs. A and B. The ALJ granted the limited stay without prejudice to any further stay request to the Board.



opposition to the motion by various jointly represented parties ("ACE Utilities")<sup>4</sup> to compel production of their broader request for all masking factors (Exh. F), which the ALJ granted in part and denied in part.

For the reasons discussed below and in our brief to the ALJ, the ALJ's decision reflects a clear error of judgment, and results in manifest injustice, because it requires disclosure of extraordinarily confidential information integral to the efficacy of an important Board program, without any showing of relevance. ACE Utilities already can themselves produce the functional equivalent of the data the ALJ compelled, and have shown no need for the further precision that the masking factors would provide, conceding that they would be only "marginally helpful" in confirming analyses they have done themselves.

#### I. BACKGROUND

##### A. The ICC/STB Waybill Sample

This appeal concerns a threat to the integrity of the Board's important Waybill Sample program. The ICC usefully described the Waybill Sample:

The waybill sample is a source for reliable and comprehensive information on rail carload freight traffic flow and characteristics. As a result, it has multiple users and usages.<sup>2</sup> The Commission uses the waybill sample data for many projects and studies. Moreover, the Commission takes official notice of the waybill data in agency proceedings. 49 C.F.R.

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<sup>4</sup>The ACE Utilities group consists of Atlantic City Electric Company, American Electric Power, Delmarva Power and Light Company ("Delmarva"), Indianapolis Power and Light Company and Ohio Valley Coal Company.

1180.4(h)(6). The waybill sample is used by other Federal agencies and also by States as a major source of information for developing State transportation plans. In addition, non-government groups sometimes seek access to waybill data.

<sup>2</sup>The waybill sample has been used for many purposes which include: (1) studies of the impact of mergers and deregulation, (2) analyses of rail traffic flows and patterns, (3) studies of movements of hazardous materials, coal and other commodities, (4) development of marketing studies, (5) development of freight car manufacturing plans, (6) development of information for verified statements to be submitted in ICC proceedings, (7) development and update of State rail plans, and (8) development of information for use in academic research projects. [Ex Parte No. 385 (Sub-No. 2), Procedures on Release of Data From the ICC Waybill Sample, served Jan. 8, 1986 (footnote omitted).]

That description is still apt today:

Collected for regulatory purposes by the ICC (now the STB), the Carload Waybill Sample receives broad application of use in rate cases, development of costing systems, productivity studies, market dominance and merger studies, and deregulatory evaluations. In addition, the sample is often used as a tool for studies of rail traffic demographics. [AAR, User Guide For The 1996 Surface Transportation Board Waybill Sample 13 (1997) ("User Guide").]

In response to concerns regarding the potential release of sensitive contract rate information at a time when the ICC desired continued accuracy in revenue related data, in 1986, the ICC altered its method of contract revenue data collection: railroads were allowed to "disguise" their contract revenues by factoring them by a scalar value at the three-digit STCC level. Carriers employing this contract revenue masking technique provide the agency with a table indicating that all waybills with a "calculated rate flag" have their revenues scaled up or down by

the table factor corresponding to the waybill three digit STCC.  
Id. at 6.

These contract revenue factor tables are highly confidential -- known only between the reporting railroad and the STB. Moreover, these data are utilized by the STB only for internal analyses. These factored values are never provided to the Sample contractor and are not reflected in reported revenues in either the Master or Public Use files. [Id.]<sup>5</sup>

In other words, no one but the railroad and the Board knows the actual masking factor. Access to the Waybill Sample is governed by Board regulations imposing strict requirements for protection of the highly confidential data it includes. 49 C.F.R. 1244. Applicants understand that the agency has never disclosed a railroad's masking factors to a third party.

B. The ACE Utilities Request

This appeal involves another prong of an overreaching discovery initiative begun by ACE Utilities three months ago, which the Board itself described as "extraordinary." Decision No. 17 at 2. The first phase included, among other things, a request for Applicants' 100% traffic tapes concerning all movements of any kind since 1978.<sup>6</sup> The ALJ ruled substantially

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<sup>5</sup>"In essence, the calculated rate flag method of data security allows railroads to mask contract revenues, while allowing the STB to internally utilize the most accurate contract rate data available in its calculation of the Cost Recovery Percentage and the Productivity Adjustment Factor to the Rail Cost Adjustment Factor." User Guide at 6.

<sup>6</sup>The initial request also made an "extremely broad" demand for document production. Decision No. 17, at 2. In addition, various of the utilities included in the ACE Utilities group have also served their own substantial individual discovery requests. See ACE-7; AEP-4; Delmarva-1; Delmarva-2; Delmarva-3; IP&L-1;

against the ACE Utilities request on July 16, 1997, requiring that such traffic data be produced only with respect to movements to the ACE Utilities destinations solely served by Conrail, and for only specified portions of the past two decades, finding the traffic data requested concerning other movements insufficiently relevant to be discoverable in this proceeding.<sup>7</sup> In Decision No. 17, the Board affirmed that ruling, noting that even the information required to be produced was of "marginal relevance." Id. at 2.

Two months later, the ACE Utilities are now making another extraordinary effort to get at the revenues earned by the railroads under their confidential contracts with other shippers; they made the present discovery request for Applicants to disclose all of their masking factors used in connection with the Waybill Sample since 1978 (Exh. D).<sup>8</sup>

Applicants made an expedited, 5-day objection summarizing the substantial grounds why this unprecedented request was totally objectionable (CSX/NS-74, Exh. E). ACE Utilities filed a motion to compel, which failed to address the

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IP&L-2.

<sup>7</sup>In a separate ruling the ALJ extended this ruling to Indianapolis Power & Light, now a member of the ACE Utilities group but not a party to its original request.

<sup>8</sup>Evidently ACE Utilities and their consultants had not sought this information when they sought access to other waybill sample data from the Board pursuant to the Board's regulations concerning access to and use of Waybill Sample data in formal Board proceedings (9/17 Tr. 6-8, 11). See 49 C.F.R. § 1244.8(b)(4).



substantial issues the objection raised. Exh. C (without attachments). Applicants filed a brief in opposition to the motion, further explaining in the limited time available the substantial objections to the motion (CSX/NS-4, Exh. F).

C. The ALJ's Ruling

At hearings on September 17 and 19, 1997, ACE Utilities had to concede that the information in question was highly confidential (9/17 Tr. 12). The ALJ properly rejected the request to the extent that it sought information as to shippers other than the ACE Utilities' destinations served by Conrail (as to which his prior orders requiring production of traffic tape data had been limited) (9/17 Tr. 57-59; 9/19 Tr. 45-47).

As to movements to ACE Utilities' destinations the outcome was -- regrettably -- different, notwithstanding ACE Utilities' failure to articulate a substantial rationale for disclosure of this uniquely sensitive data. ACE Utilities counsel acknowledged that their consultants already had the actual revenue on the tapes provided in response to the ALJ's prior orders and also had the masked revenue for the waybills included in the Waybill Sample (9/17 Tr. 41-42, 46, 55). Indeed, ACE Utilities counsel indicated that the consultants had already compared the two data sets and determined the differences, which reflected the result of application of the masking factors (9/17 Tr. 41-42). Counsel also conceded that having Applicants do the same thing, or producing the masking factors, for movements to the ACE Utilities destinations for which traffic data had been

produced pursuant to the July 16 ruling (which is what the ALJ ordered), could be only "marginally helpful" to check the calculations they had already done (id. at 42). Indeed, as a logical matter, the only value that ACE Utilities could realize from securing Applicants' masking factors would be to facilitate the unmasking of revenues from shipments other than those that the ALJ had previously found relevant to this proceeding.<sup>9</sup>

Nevertheless, despite the unique nature of this highly confidential information, and without balancing the risks of disclosure against ACE Utilities' insubstantial need for the information, the ALJ required Applicants to disclose their masking factors applied to ACE Utilities movements included in both the Waybill Sample and their prior production of traffic data (9/19 Tr. 45-47, 50). In addition, because Conrail could document only the masking factors being applied currently or recently, the ALJ ordered Conrail, for the prior years back to 1988, to do the same type of comparative special study that ACE Utilities' consultants could do (and had evidently done), using the traffic data previously produced to ACE Utilities (containing some 30-40,000 waybills for each year) and the Waybill Sample (id. at 10-12). The ALJ stayed his order to produce the masking

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<sup>9</sup>The nature and frequency of changes in the masking factors over time vel non are of course themselves highly confidential items. Without disclosing the nature of the masking factors Applicants are unable prudently to address the relationship between the differences that would be derived from a comparison of the revenue numbers that would appear in the two sources of data and the masking factors themselves.



factors themselves until 5:00 p.m. Monday, September 22 (id. at 50).<sup>10</sup>

## II. ARGUMENT

The decision of the ALJ should be reversed because it reflects "a clear error of judgment" and creates a "manifest injustice." 49 C.F.R. § 1115.1(c). As explained in Decision No. 34, served Sept. 18, 1997, the ALJ was required to balance the extraordinary confidentiality of the masking factors against the absence of any legitimate basis for finding the information necessary and relevant to this proceeding. He failed to do so properly.

Only days ago, the Board restated the standard governing discovery requests seeking confidential information. Thus, Decision No. 34 states (at 2 n.9):

We note that the standard against which the relevance of commercially sensitive information should be judged may be well higher than the standard against which the relevance of less sensitive information should be judged. Disclosure of extraordinarily sensitive information should not be required without a careful balancing of the seeking party's need for the information, and its ability to generate comparable information from other sources, against the likelihood of harm to the disclosing party.<sup>11</sup>

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<sup>10</sup>The required special study by Conrail comparing the thousands of its waybills in the two data sets will take at least several days to complete. The appeal and stay request apply to that portion of the ruling as well.

<sup>11</sup>As Decision No. 34 itself indicates, this stringent standard applies even where the information sought in discovery would be subject to the protective order governing this proceeding.

The disclosure sought here involves not only extraordinarily sensitive confidential information in the form of the masking factors, but a wealth of such information about rates for particular movements for other shippers which could be revealed or put at risk by disclosure of the masking factors. Yet here, while the ALJ properly denied the ACE requests for the broader disclosure of other information, he committed a clear error of judgment in requiring disclosure of the masking factors that might relate to or disclose that information.

The ALJ did not find, and ACE Utilities have not shown, any "need" for the masking factors ordered to be disclosed. There could be no showing of a need for such data to determine more precisely the rates paid by ACE Utilities for the transportation of coal to Conrail-served plants; they know that from their own records, and Applicants have already been required to produce to them the actual traffic tape data for those movements to Conrail served destinations. Moreover, as noted, ACE Utilities have available the two data sets that permit them to compare waybill sample reported contract revenues with actual waybill revenues for their movements, and they could say no more than that having the actual masking factors or data the ALJ required to be produced might be "marginally helpful."

The only semblance of a reason proffered by ACE Utilities for disclosing the masking factors used for their movements included in the prior data production and the Waybill Sample was that one apparent discrepancy had been discovered

where the masking factor had evidently not been applied in the waybill sample (9/17 Tr. 41-42, 55; 9/19 Tr. 19, 33). The masking factors are not needed to resolve for ACE Utilities any "discrepancy" with regard to their own traffic. They have that information. They can also compare for themselves the unmasked revenues for traffic to their utilities with the masked revenues for the same traffic on the Waybill Sample. In any event, the possibility of resolving even a few such discrepancies out of thousands of waybill samples is an insufficiently substantial justification for disclosure of such uniquely sensitive information as the masking factors.

The only other apparent asserted need for the masking factors would seem to be ACE Utilities' desire for more information about the particular revenues and rates on movements to other shippers or destinations that might be subject to the same masking factor (e.g., to competing utilities for whom the same factor might have been used to mask revenue data), which would itself disclose information about their rates.<sup>12</sup> While such a "need" may have been encompassed by ACE Utilities' quest for information about how CSX and NS set their rates (9/17 Tr. 21,39-40), it is not a need that the ALJ endorsed or purported to be trying to meet. To the contrary, he repeatedly and quite properly said that he was not allowing discovery as to rates or prices to other shippers or to destinations not at issue in this

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<sup>12</sup>The precise factors and their configuration are themselves highly confidential.

proceeding (9/17 Tr. 57-59; 9/19 Tr. 17-19). And in Decision No. 17, the Board explicitly held that the ACE Utilities' "extraordinary discovery request" for data concerning the traffic of other utilities "was not justified."

Moreover, since the waybill data are filed by the terminating carrier, and the prior traffic data were required only for movements to certain destinations served by Conrail, all of the waybills included in the sample and subject to a masking factor would be movements terminating on Conrail. Yet information about Conrail's confidential contract rates to other shippers would not serve ACE Utilities' stated need for information about how CSX or NS is likely to set their rates to ACE Utilities or others if the transaction is approved even if the ALJ had endorsed that rationale rather than rejected it. The issue of how CSX and NS negotiate contract rates is not relevant to whether any particular utility would suffer competitive harm as a result of the proposed transaction. See STB Finance Docket No. 32760, Union Pac. Corp., -- Control and Merger -- Southern Pac. Corp., Slip Op. at 98-100 (served Aug. 12, 1996), (the "single and essential standard of approval" for a control transaction "is that the [Board] find the [transaction] to be 'consistent with the public interest'" by "balanc[ing] the benefits of the merger against any competitive harm that cannot be mitigated by conditions" (emphasis added)).

As to the other factors identified in Decision No. 34, ACE Utilities have the ability to "generate comparable



information from other sources," and have already done so. Their consultants also have the ability to conduct a Waybill Sample study without the need for the masking factors, as those consultants and others have done for many years in control and other types of proceedings. The Board's rules and precedents concerning the use of the Waybill Sample do not contemplate that the masking factors will be revealed to persons who request to use the Waybill Sample. The ACE Utilities consultants thus apparently did not even ask the Board staff to reveal the masking factors when they asked for the Waybill Sample under the Board's rules at 49 C.F.R. 1244.<sup>13</sup> To the contrary, what is contemplated is that the Waybill Sample will be used in its masked form for purposes of presenting evidence in Board proceedings. Precisely to ensure that the data are not unduly skewed by the use of masking factors, those factors are supplied to the Board staff in confidence.

The notion that the factors need to be revealed in order to conduct a meaningful Waybill Sample study is not only unprecedented, but contrary to the whole purpose of having masking factors in the first place. In short, the ACE Utilities' request would undermine the confidentiality policies underlying

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<sup>13</sup>The consultants may not have done so because they may have assumed that the Board staff would not grant them access to the masking factors had they requested them. The fact that the Board staff has never, to Applicants' knowledge, revealed the masking factors to any party to a Board proceeding further demonstrates that this Appeal should be granted -- parties should not be entitled to obtain through discovery that which the Board would not allow them to obtain through the section 1244 procedures.

the maintenance of the Waybill Sample and undoubtedly give rise to doubts in the railroad and shipper communities as to the ability of railroads to protect the confidential rail contract rates (which the Board and the statute recognize as being entitled to special protection) while at the same time participating in the Waybill Sample program.<sup>14</sup> Thus, important public policies underlying the Waybill Sample program are at stake here.

The discovery required here entails not only a risk of "harm to the disclosing part[ies]" but a risk of substantial harm to third parties -- competing utilities and other railroads and shippers; to an important agency program; and to the public interest. However, the ALJ's decision allowing discovery reflected no consideration or proper weighing of these important countervailing interests.<sup>15</sup> It reflects a clear error of judgment and results in manifest injustice.

#### CONCLUSION

For the reasons stated above and in Applicants' attached brief in opposition to the motion to compel, the Board

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<sup>14</sup>See 49 U.S.C. Section 11904.

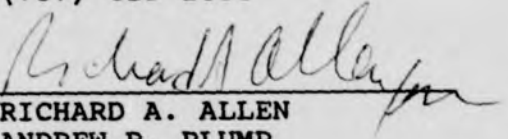
<sup>15</sup>At the outset the ALJ declined to give any consideration to whether ACE Utilities had made any request for the masking factor information from the Board pursuant to its regulations, or whether such a request, if made, had been denied (9/17 Tr. 13, 36). Thus, the ALJ evidently thought it a matter for the Board, on this appeal, to consider the relationship of this discovery request to the Board's Waybill Sample program, the role of the Board's procedures for requesting access to Waybill Sample data, and the possible adverse effect of the disclosures required on the Waybill Sample program.



should reverse the ALJ's ruling and preserve the long-standing total confidentiality of the Waybill Sample masking factors.<sup>16</sup>

Respectfully submitted,

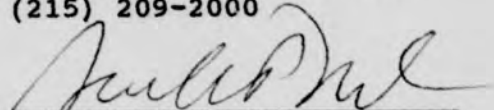
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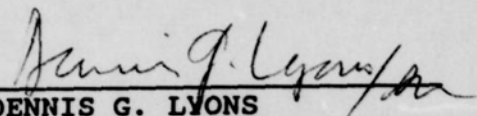
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<sup>16</sup>If the Board were to allow this discovery to proceed, it should at a minimum provide that the data disclosed may not be used to unmask revenues or rate information on movements to shippers other than the ACE Utilities' destinations for which Applicants previously produced + affic data pursuant to the ALJ's prior rulings.

  
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September 22, 1997









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A LONDON-BASED  
MULTINATIONAL PARTNERSHIP

September 12, 1997

## VIA HAND DELIVERY and FACSIMILE

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

Re: STB Finance Docket No. 33388 - Request for Discovery  
Conference on Wednesday, September 17, 1997

Dear Judge Leventhal:

On behalf of American Electric Power, Atlantic City Electric Company, Delmarva Power & Light Company, Indianapolis Power & Light Company, and The Ohio Valley Coal Company ("AEP, et al."), we hereby request a discovery conference for Wednesday, September 17 at any time convenient to Your Honor to discuss Applicants' Initial Objections (CSX/NS-74)(copy enclosed for Your Honor's convenience) to ACE, et al.'s Second Set of Interrogatories and Request for Production of Documents to Applicants (ACE, et al.-11). The reason I am requesting a discovery conference for next Wednesday is that the deposition of CSX Chairman and CEO, John W. Snow, has long been scheduled for Thursday, September 18, and I am expected to be the lead counsel to begin the deposition of Mr. Snow. I do not wish to interfere with the scheduling of that deposition.

In their second set of discovery requests, ACE, et al. propounded one interrogatory and one document request seeking the so-called "revenue masking factors" applicable to the "1% Waybill Samples" filed with the ICC/STB for the years 1978 through the most recently-filed time period for Conrail, CSX, and Norfolk Southern. The reason ACE, et al. are seeking these masking factors is because the revenues that appear on the Waybill Samples are deliberately altered because they are commercially sensitive, and thus subject to the "highly confidential" in the context of the Protective Order in this proceeding. Our experts have decided to attempt to develop their evidence by supplementing the relatively few "data points"



The Honorable Jacob Leventhal  
September 12, 1997  
Page 2

we have obtained from Applicants for our clients "origin-destination pairs" by "filling in" with data from the Waybill Samples. Use of the Waybill Samples is a time-honored approach to presenting evidence before the ICC/STB and indeed has been the basis for such evidence in literally thousands of such proceedings over the years. Indeed, that is the very purpose of maintaining the Waybill Samples. ACE, et al.'s second set of discovery requests was intended merely to provide the "revenue masking factors" so that the evidence we present to the Board about the revenues Applicants are earning is accurate. Applicants can hardly object to doing so, because they responded to our earlier discovery requests by encouraging us to rely on the Waybill Samples, instead of their own files and traffic tapes, at the July 16 oral argument before Your Honor! (Mr. Allen: "They [the Applicants' traffic tapes] provide traffic information that is certainly reflected in the Board's way bill sample, which Mr. McBride has full access to. He could go back and get the way bill sample back to 1978 and get a sampling of all these movements that way.") Tr. 106 (copy enclosed for Your Honor's convenience).

ACE, et al. requires this evidence urgently because of the looming date of October 21 for comments and evidence. Applicants' refusal to provide the "revenue masking factors" is no more legitimate than their redaction of "highly confidential" information from other documents we have been provided, which Your Honor correctly disposed of in Decision No. 26 (served September 5, 1997), the appeal from which was denied by the STB in Decision No. 32 (served today). Accordingly, we ask Your Honor to order Applicants to provide the revenue making factors by Friday, September 19, when they are due under the Discovery Guidelines.

Respectfully submitted,

*Michael F. McBride*

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Delmarva Power & Light Company,  
Indianapolis Power & Light Company,  
and The Ohio Valley Coal Company

Enclosures

cc: (w/o encls.) Restricted Service List

US OFFICE PRODUCTS

ACE, et al.-11

UNITED STATES OF AMERICA  
DEPARTMENT OF TRANSPORTATION  
SURFACE TRANSPORTATION BOARD

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Finance Docket No. 33388

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

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ATLANTIC CITY ELECTRIC COMPANY, ET AL.'S  
SECOND SET OF INTERROGATORIES AND REQUEST FOR PRODUCTION OF  
DOCUMENTS TO APPLICANTS

To: CSX	CSX
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Pursuant to 49 C.F.R. §§ 1114.21-1114.31 and the  
Discovery Guidelines entered pursuant to the order dated June 27,  
1997 ("Discovery Guidelines"), Atlantic City Electric Company,  
American Electric Power, Delmarva Power & Light Company,  
Indianapolis Power & Light Company, and The Ohio Valley Coal

Company ("ACE, et al.") hereby submit this Second Set of Interrogatories and Request for Production of Documents ("Discovery Requests") to Applicants.

DEFINITIONS AND INSTRUCTIONS

The following definitions and instructions apply and are incorporated into each Discovery Request as though fully set forth therein:

1. "Applicants," "you," or "your," CSX Corporation ("CSXC"), CSX Transportation ("CSXT"), Norfolk Southern Corporation ("NSC"), Norfolk Southern Railway Company ("NSRC"), Conrail Inc. ("CRI") and Consolidated Rail Corporation ("CRC"), individually and collectively, and any division thereof (and includes present or former directors, officers, employees and agents) together with any parent, subsidiary, or affiliated corporation, partnership, or other legal entity, including all predecessor railroads.
2. "Application" means the Railroad Control Application, Finance Docket No. 33388, filed by Applicants on June 23, 1997.
3. "Norfolk Southern" means Norfolk Southern and all of its predecessor railroads.
4. "CSX" means CSX and all of its predecessor railroads.

5. "Conrail" means Conrail and all of its predecessor railroads.

6. "Document" means any and all writings and recordings as defined in Rule 1001 of the Federal Rules of Evidence, including drafts, typings, printings, minutes, tapes, recordings, or other electronic compilations, or copies or reproductions thereof, in the possession, custody, or control of Applicants.

7. "Identify" or "identification" means:

a. With respect to a natural person, his or her name and current or last known home and business address (including street name and number, city or town, state, zip code, and telephone number), and his or her last known job title or position.

b. With respect to a person other than a natural person, its full name and type of organization, the address of its principal place of business (including street name and number, city or town, state, zip code, and telephone number), and the jurisdiction and place of its incorporation or organization.

c. With respect to a document, the type of document (e.g., letter, record, list, memorandum, report, deposition transcript), its date, title, and contents, the identification of the person who prepared the document, the



identification of the person for whom the document was prepared or to whom it was delivered, and the identification of the person who has possession, custody, or control over the document.

8. "Relate" or "relating" or "related" to a given subject matter means constitutes, contains, comprises, consists of, embodies, reflects, identifies, states, refers to, deals with, sets forth, proposes, shows, evidences, discloses, describes, discusses, explains, summarizes, concerns, authorizes, contradicts or is in any way pertinent to that subject, including, without limitation, documents concerning the presentation of other documents.

#### INSTRUCTIONS

1. Consistent with the Discovery Guidelines, these Discovery Requests are intended to be non-duplicative of previous written discovery of which ACE, et al., has been served copies. If you consider this Interrogatory and Document Request to be duplicative, you should so state and refer ACE, et al. to the specific documents or answers produced in response to such prior discovery

2. If, in responding to these Discovery Requests, you consider any part of the request objectionable, you should respond to each part of the request not deemed objectionable and



set forth separately the part deemed objectionable and the grounds for objection.

3. All documents that respond, in whole or part, to any paragraphs of a Document Request shall be produced in their entirety. Documents that in their original condition were stapled, clipped, or otherwise fastened together, shall be produced in such form. In addition, all documents are to be produced in the file folders or jackets in which they are maintained.

4. If any response to these Discovery Requests includes a reference to the Application, such response should specify the responsive volume(s) and page number(s). If any response to the Document Request includes a reference to documents on file in the Document Depository, you should denote the document number of each document as it is filed in the Depository.

5. If any of the requested documents cannot be produced in full, you are requested to produce them to the fullest extent possible, specifying clearly the reasons for your inability to produce the remainder and stating whatever information, knowledge, or belief you have concerning the unproduced portion. If you cannot produce a responsive document because it is no longer in your possession, custody, or control,

set forth separately the part deemed objectionable and the grounds for objection.

3. All documents that respond, in whole or part, to any paragraphs of a Document Request shall be produced in their entirety. Documents that in their original condition were stapled, clipped, or otherwise fastened together, shall be produced in such form. In addition, all documents are to be produced in the file folders or jackets in which they are maintained.

4. If any response to these Discovery Requests includes a reference to the Application, such response should specify the responsive volume(s) and page number(s). If any response to the Document Request includes a reference to documents on file in the Document Depository, you should denote the document number of each document as it is filed in the Depository.

5. If any of the requested documents cannot be produced in full, you are requested to produce them to the fullest extent possible, specifying clearly the reasons for your inability to produce the remainder and stating whatever information, knowledge, or belief you have concerning the unproduced portion. If you cannot produce a responsive document because it is no longer in your possession, custody, or control,

state the date on which each such document ceased being in your possession, custody, or control; describe the disposition of each such document and the reason for such disposition; and identify each person presently in possession, custody, or control of the document or a copy thereof.

6. If any privilege or protection is claimed as to any information or document, state the nature of the privilege or protection claimed (e.g., attorney-client, work product, etc.) and state the basis for claiming the privilege or protection. For each such document, provide the following information: (a) the type of document; (b) the title of the document; (c) the name, address, and title of each author; (d) the name, address, and title of each addressee; (e) all persons to whom copies were sent or distributed and all other persons to whom the document or its contents were disclosed in whole or in part; (f) the date of the document; (g) the subject matter of the document; (h) the number of pages; (i) an identification of any attachments or appendices; (j) the current location of the document and the name of the current custodian; and (k) a statement of the basis on which privilege is claimed.

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

7. If you want clarification concerning an Interrogatory or Document Request, you are instructed to contact counsel for ACE, at all reasonably in advance of the response date.

6. The Interrogatory and Document Request are continuing in nature and you are under a duty to supplement or correct any responses that are incomplete or incorrect and otherwise supplement your responses in accordance with 49 C.F.R. § 1114.29.

#### INTERROGATORY

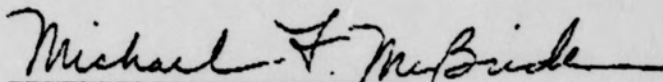
1. State the revenue masking factors applicable to the "1 $\frac{1}{2}$  Waybill Samples" filed with the ICC/STB for the years 1978 through the most recently-filed time period for Conrail, CSX, and Norfolk Southern.

#### DOCUMENT REQUEST

1. Provide all of the revenue masking factors applicable to the "1 $\frac{1}{2}$  Waybill Samples" filed with the ICC/STB for

the years 1978 through the most recently-filed time period for  
Conrail, CSX, and Norfolk Southern.

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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 INC. AND CONSOLIDATED RAIL CORPORATION

CERTIFICATE OF SERVICE

I hereby certify that I have served this 4th day of September, 1997, a copy of the foregoing "Atlantic City Electric Company et al.'s Second Set of Interrogatories and Request for Production of Documents to Applicants" by first-class mail, postage prepaid, or by more expeditious means, upon each of the following persons on the Restricted Service List:

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CSX/NS-74

BEFORE THE  
SURFACE TRANSPORTATION BOARD

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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

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STB FINANCE DOCKET NO. 33388

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APPLICANTS' INITIAL OBJECTIONS TO  
ATLANTIC CITY ELECTRIC COMPANY, ET AL.'S  
SECOND SET OF INTERROGATORIES AND  
REQUEST FOR PRODUCTION OF DOCUMENTS  
TO APPLICANTS (ACE, et al.-11)

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Applicants<sup>1/</sup> hereby submit their initial objections to Atlantic City Electric Company, et al.'s Second Set of Interrogatories and Request for Production of Documents to Applicants (ACE, et al.-11) served by Atlantic City Electric Company, et al. ("ACE Utilities") on September 4, 1997. These initial objections are filed pursuant to Paragraph 16 of the Discovery Guidelines adopted by Decision No. 10, served June 27, 1997, which provide that "[a] responding party shall, within five business days after receipt of service, serve a response stating all its objections to any discovery request as to which the responding party has then decided that it will be providing no affirmative response. . . ."

For the reasons set forth below, Applicants object to Interrogatory No. 1 and

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

Document Request No. 1 on the grounds that they seek material which is neither relevant nor likely to lead to relevant and admissible evidence, and is unduly broad.

Interrogatory No. 1 and Document Request No. 1 state:

A. Interrogatory.

Interrogatory No. 1: State the revenue masking factors applicable to the "1% Waybill Samples" filed with the ICC/STB for the years 1978 through the most recently-filed time period for Conrail, CSX, and Norfolk Southern.

B. Document Request.

Document Request No. 1: Provide all of the revenue masking factors applicable to the "1% Waybill Samples" filed with the ICC/STB for years 1978 through the most recently-filed time period for Conrail, CSX, and Norfolk Southern.

Objection to Interrogatory No. 1 and Document Request No. 1:

Applicants object to Interrogatory No. 1 and Document Request No. 1 on the ground that it seeks material that is neither relevant nor likely to lead to relevant and admissible evidence, and is unduly broad. Even if limited in some fashion it would still be fundamentally objectionable.

Part 1244 of title 49 of the Code of Federal Regulations requires that rail carriers submit the "Waybill Sample" to the agency (previously the Interstate Commerce Commission and now the Surface Transportation Board, hereinafter referred to as "ICC/STB"). As is clearly set forth in Section 1244.3, the Waybill Sample is a weighted random sample of waybills for commodity movements. These waybill samples are submitted to create a statistically sound database for the agency to use in regulatory proceedings.<sup>2/</sup>

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<sup>2/</sup> Because many commodity movements, such as coal moving to utilities, are sampled at a much higher rate than 1%, referring to a "1% Waybill Sample" is simply inaccurate. Applicants assume that the reference to a "1% Waybill Sample" is in fact a reference to the

The ACE Utilities' discovery requests seek "all of the revenue masking factors" applicable to the waybill information that Conrail, CSX and NS each submits to the ICC/STB. These "masking factors" are explained in an article attached hereto, "The Interstate Commerce Commission's Public Use Waybill File: Concerns for Mis-Interpretation," Journal of the Transportation Research Forum, 263, Volume XXXII, Number 1 (1991).

The ICC/STB requires a rail carrier to include in its waybill sample data for traffic even if it is moving under contract -- even though the contract rate and the resulting revenue is non-jurisdictional. This is also true for exempt traffic which is also non-jurisdictional. Rail carriers have submitted this information upon the assurance of the strictest confidentiality. The revenues reflect highly confidential contract rates that otherwise are not subject to disclosure nor review by any regulatory agency. See, 49 U.S.C. § 11904; 49 U.S.C. § 10709.

The agency collects the waybill data in order to fulfill its own statutory duties, and makes it available on a limited basis for use for research and regulatory proceedings. With the agency's approval, each railroad uses masking factors of its own design to disguise the revenue data it submits in order to protect the confidentiality of such data when it is sought by third parties for disclosure. The masking factors the discovery requests seek are themselves extraordinarily confidential information used to protect highly confidential information about the railroads and shippers, disclosure of which would be contrary to statute and violate the terms of their agreements. The total confidentiality of each railroad's

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"Waybill Sample" and not to any subpart thereof which may be sampled at a 1% rate.



masking factors -- known only to that railroad and a small number of agency staff members -  
- has been essential to the efficacy of this program to gather data for the agency consistent with its statutory duties. To Applicants' knowledge, no railroad has ever been required to disclose its masking factors, and the disclosure of masking factors has never even been sought in discovery in past control proceedings. Disclosure to shippers' counsel and consultants, even pursuant to the protective order, would pose a totally unacceptable risk, particularly in view of the absence of any apparent compelling need nor the strong showing of apparent relevance that would be required before production of such uniquely sensitive information could even be considered.

Finally, in tapes produced to the ACE Utilities by each of the Applicants in response to the ACE, et al.-2, 3 and 4 discovery requests, the Applicants already have provided unmasked revenue data for moves on behalf of the ACE Utilities. Such tapes contain all of the information the ALJ has determined to be even potentially relevant on these issues. The ACE Utilities' request for masking factors on the Waybill Sample falls outside the boundaries of the ALJ's prior rulings on relevance.

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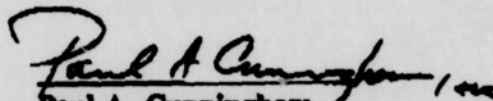
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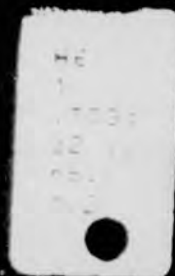


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Dated: August 6, 1997

*JOURNAL OF THE  
TRANSPORTATION  
RESEARCH FORUM*



TRANSPORTATION RESEARCH FORUM

## The Interstate Commerce Commission's Public Use Waybill File: Concerns For Mis-Interpretation\*

by N. Eric Wolfe\*\*

### INTRODUCTION

In the years since the Stagger's Act partially deregulated the railroad industry, much attention has been focused on railroad rate changes (Refer to Bahnick (1981), Babcock et al. (1985), Chow (1986), Fuller et al. (1983, 1987), and MacDonald (1987)). In many of these analyses, the Interstate Commerce Commission's (ICC) Public Use Waybill Sample (Sample) has been employed. While significant changes occurred in the Sample in 1986 with respect to the reported revenue field, these events have not been generally reflected in recent literature (see Fuller et al. 1990). The purpose of this commentary is to update earlier documentation on the Sample (Wolfe 1986) and clarify how recent changes have affected rate analyses which employ Public Use Sample data collected since 1986.

The ICC states: "The waybill sample is a source of reliable and comprehensive information on rail carload freight traffic flows and characteristics."<sup>1</sup> Although the Sample is employed in a variety of planning studies, regulatory oversight is the prime purpose behind its collection. Both the Cost Recovery Percentage, required under Section 202 of the Stagger's Act, and the output measure employed in the productivity adjustment to the Rail Cost Adjustment Factor required under Ex Parte 290 (Sub-No. 7) are calculated from the Sample.

Within regulatory proceedings, while the ICC has repeatedly allowed access to confidential Sample data, they have made it clear that the data's confidentiality must be maintained. For example, the ICC has written:

"Since 1975, the Director of the Office of Transportation (OTA) has been delegated authority to grant or deny access to waybills and statistics reported under orders of the Commission. 49 C.F.R. 101.76 and 49 Fed. Reg. 7438 (1978). OTA has established a policy for handling waybill requests under which access to waybill data, when granted, is qualified

and restrictions are imposed to preserve the confidentiality of proprietary waybill data. 48 Fed. Reg. 40325 (1983)."

More Specifically, OTA's policy limits use of the Waybill Master file (Master File), or total sample, to the Commission and other Federal agencies. Transportation consulting firms may also use data from the master file for the sole purpose of preparing verified statements in formal ICC proceedings.<sup>2</sup>

While the ICC established a "Public Use" file from the Master Waybill Sample tape, they reaffirmed the necessity to retain any and all information which is confidential:

"Finally, a Public Use File has been established which contains non-confidential waybill data and is available to anyone, and may be published, or released without prior Commission approval."<sup>3</sup>

Moreover, the ICC recognizes the potential damage which may result from the simple identification of shippers and/or railroads:

"Railroads and shippers, however, consider the data to be commercially sensitive, and thus not subject to public release. Also the Commission's statutory authority for collection of data does not require that information so obtained be made public. 49 U.S.C. 11210, see AAR v. United States, 371 Supp. 114, 116 (D.C. 1974).

Release of waybill data could arguably cause a rail carrier substantial competitive harm by release of commercially sensitive data regarding: originating and terminating freight stations, names of railroads participating in the movements, significant customers, and rates. The Interstate Commerce Act specifically protects shippers from such potential harm by prohibiting any common carrier, from disclosing traffic information from that carrier, from disclosing traffic information or [where] that information may be used to the detriment of the shipper or consignee or may disclose improperly, to a competitor the



[illegible]

To ensure the highest confidentiality, the information in Ex Parte 365, Sub No. 2 masked the data elements contained in the Public Law File. Using the IFRAT rule, a random sampling of this test would have an insignificant deviation from the true origin and destination. Due to this constraint, less than 75 percent of all Public Law File, Ex Parte 365, files have had origins and destinations listed.

Furthermore beginning in 1960, wildlife signs along combinations of the roads and at grade crossings were also removed because from the Public Use tape as were directly identifiable or damage move events. These signs disappeared for approximately 700 vehicles per year. Estimated short-term distances were also reduced to the average 20 miles where the individual car was located.

Responding to railroad industry concerns regarding the potential release of sensitive contract rate information at a time when the ICC feared continued contrary in revenue related data, led the Commission to alter its method of data collection. Beginning with the 1986 Sample, railroads were allowed to disclose their contract revenues by favoring them by a factor value at the three digit STCC level.<sup>10</sup> For example, if the actual contract revenue for a shipment of STCC 011 was \$1,000, this railroad might report revenues of \$1,100 in the Sample. This carrier would also provide the ICC with a table indicating that all commodities with a "dominated rate flag" transported under STCC 011 would have their revenues overstated by 10 percent.

Such release factors may be higher than that for some control groups. These release factors for values are highly confidential. An example between the released values and the ICC. Moreover, this data is utilized by the ICC only for internal analysis. These limited values are never provided to the SAMP construction. An example of such a table is depicted below.

SIZE                      FACTOR

0.1	1.10
0.2	1.05
0.3	0.80
0.4	1.30
1.0	1.24
1.2	1.34
4.5	2.18
4.6	0.07
4.8	1.12
5.0	0.53

Values for this table must be submitted to the ICC annually, even if the farm does no change.

In essence, the calculated rate flag method of data security allows tailroads which report their waybill samples under the Machine-Readable Input (MRI) format to mask contract revenues. At the same time, this method allows the ICC to internally utilize the most accurate contract rate data available in its calculation of the Cost Recovery Percentage (CRP) and the Productivity Adjustment Factor to the Rail Cost Adjustment Factor (RCAF).

As a result, revenue data derived from Public Use files since 1986, are generally overstated due to use of this confidentiality mechanism. Coupled with rounded millages, revenue per ton-mile figures for the period 1986 to date are not strictly comparable with those obtained from the period 1982-1985.

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Such revenue factoring may be higher or lower than the actual contract revenue. These contract revenue factor tables are highly confidential - known only between the reporting railroad and the ICC. Moreover, this data is utilized by the ICC only for internal analyses. These factored values are never provided to the Sample contractor. An example of such a table is depicted below:

HYPOTHETICAL TABLE OF  
CALCULATED RATE  
EXPANSION FACTORS

STCC	FACTOR
011	1.10
012	1.05
013	0.85
091	1.90
101	1.24
111	1.34
480	1.15
493	1.07
496	1.12
500	0.93

Values for this table must be submitted to the ICC annually - even if the factors do not change.

## CONCLUSIONS

In essence, the calculated rate flag method of data security allows railroads which report their waybill samples under the Machine-Readable-Input (MRI) format to mask contract revenues. At the same time, this method allows the ICC to internally utilize the most accurate contract rate data available in its calculation of the Cost Recovery Percentage (CRP) and the Productivity Adjustment Factor to the Rail Cost Adjustment Factor (RCAP).

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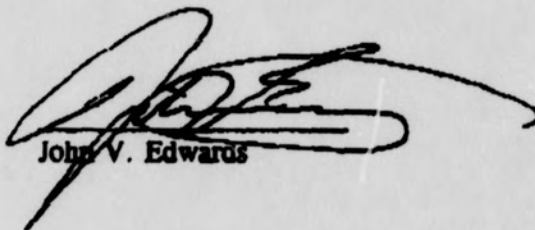
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- Wolfe, K.F., "The Carload Waybill Statistics: A Content Analysis", *Proceedings of the Transp. Res. Forum* 27 (1986): 244-256.
- Railroads, Washington, D.C. 20001. Under contract to the Interstate Commerce Commission, the author has managed the collection and processing of the Waybill Sample since 1984.
1. Fuller made use of 1983 to 1988 data (p. 267).
  2. ICC, Ex Parte 385 (Sub-No. 3) p. 1. Service date, January 31, 1990.
  3. Ex Parte 386 (Sub-No. 2), Service date January 8, 1986.
  4. Ibid pp 2-3.
  5. Ibid, p 3.
  6. Ibid, p 4.
  7. The 3 FSAC rule requires that for an origin and/or destination to appear on the Public Use File that at least three separate freight stations be listed (within the BEA) for one railroad. This number expands to four separate freight stations if two railroads serve the BEA, and five if three serve it, etc.
  8. Due to Department of Defense requirements, only the first two digits of the Standard Transportation Commodity Code (STCC) are provided in the Public Use Waybill tape.
  9. Movements which are as unique as to easily identify the shipper and railroad are excluded from the Public Use Sample. The one-time movement of a petroleum cracking tower from a fabricator to a refinery site could constitute such a unique movement.
  10. The same procedure applies to linehaul, miscellaneous, and transit revenues.
  11. The Sample's collection methodology was substantially altered in July of 1981. Data from before that time tended to exclude multiple car movements. Refer to Wolfe (1986).

## ENDNOTES

- \* The views expressed in this paper are solely those of the author and may not reflect the views of the Association of American Railroads or its members.
- \*\* The author is Director, Transportation Data and Analysis, Economics & Finance Department, Association of American

**CERTIFICATE OF SERVICE**

I, John V. Edwards, certify that on September 11, 1997 I caused to be served by facsimile service, a true and correct copy of the foregoing CSX/NS-74, Applicants' Initial Objections to Atlantic City Electric Company, et al.'s Second Set of Interrogatories and Request for Production of Documents to Applicants (ACE, et al.-11), on all parties that have submitted to the Applicants a Request to be Placed on the Restricted Service List in STB Finance Docket No. 33388.



John V. Edwards

Dated: September 11, 1997





CSX/NS-78

BEFORE THE  
SURFACE TRANSPORTATION BOARD

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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

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STB FINANCE DOCKET NO. 33388

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APPLICANTS' RESPONSE TO THE MOTION OF  
ATLANTIC CITY ELECTRIC COMPANY, ET AL.  
TO COMPEL

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The ACE Utilities'<sup>1/</sup> motion to compel seeks belatedly to obtain through the back door extensive highly confidential data about rates that they were properly denied when they first sought a more limited array of such information two months ago. The latest variation of their request should be denied for two reasons: First, it was properly denied before. Second, the form of the disclosures they now seek -- of "revenue masking factors" used by the Applicants in connection with their waybill sample data for 1978 through 1996 -- would pose a grave threat to the efficacy of an important agency data program and would undermine measures the agency has adopted to ensure compliance with the statutory mandate to preserve the confidentiality of shipper-railroad contract rates.

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<sup>1/</sup> The "ACE Utilities" consist of American Electric Power, Atlantic City Electric Company, Delmarva Power & Light, Indianapolis Power & Light Company and The Ohio Valley Coal Company.



CSX/NS-74

BEFORE THE  
SURFACE TRANSPORTATION BOARD

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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

---

STB FINANCE DOCKET NO. 33388

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APPLICANTS' INITIAL OBJECTIONS TO  
ATLANTIC CITY ELECTRIC COMPANY, ET AL.'S  
SECOND SET OF INTERROGATORIES AND  
REQUEST FOR PRODUCTION OF DOCUMENTS  
TO APPLICANTS (ACE, et al.-11)

---

Applicants<sup>1/</sup> hereby submit their initial objections to Atlantic City Electric Company, et al.'s Second Set of Interrogatories and Request for Production of Documents to Applicants (ACE, et al.-11) served by Atlantic City Electric Company, et al. ("ACE Utilities") on September 4, 1997. These initial objections are filed pursuant to Paragraph 16 of the Discovery Guidelines adopted by Decision No. 10, served June 27, 1997, which provide that "[a] responding party shall, within five business days after receipt of service, serve a response stating all its objections to any discovery request as to which the responding party has then decided that it will be providing no affirmative response. . . ."

For the reasons set forth below, Applicants object to Interrogatory No. 1 and

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

Document Request No. 1 on the grounds that they seek material which is neither relevant nor likely to lead to relevant and admissible evidence, and is unduly broad.

Interrogatory No. 1 and Document Request No. 1 state:

A. Interrogatory.

Interrogatory No. 1: State the revenue masking factors applicable to the "1% Waybill Samples" filed with the ICC/STB for the years 1978 through the most recently-filed time period for Conrail, CSX, and Norfolk Southern.

B. Document Request.

Document Request No. 1: Provide all of the revenue masking factors applicable to the "1% Waybill Samples" filed with the ICC/STB for years 1978 through the most recently-filed time period for Conrail, CSX, and Norfolk Southern.

Objection to Interrogatory No. 1 and Document Request No. 1:

Applicants object to Interrogatory No. 1 and Document Request No. 1 on the ground that it seeks material that is neither relevant nor likely to lead to relevant and admissible evidence, and is unduly broad. Even if limited in some fashion it would still be fundamentally objectionable.

Part 1244 of title 49 of the Code of Federal Regulations requires that rail carriers submit the "Waybill Sample" to the agency (previously the Interstate Commerce Commission and now the Surface Transportation Board, hereinafter referred to as "ICC/STB"). As is clearly set forth in Section 1244.3, the Waybill Sample is a weighted random sample of waybills for commodity movements. These waybill samples are submitted to create a statistically sound database for the agency to use in regulatory proceedings.<sup>2</sup>

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<sup>2</sup> Because many commodity movements, such as coal moving to utilities, are sampled at a much higher rate than 1%, referring to a "1% Waybill Sample" is simply inaccurate. Applicants assume that the reference to a "1% Waybill Sample" is in fact a reference to the

The ACE Utilities' discovery requests seek "all of the revenue masking factors" applicable to the waybill information that Conrail, CSX and NS each submits to the ICC/STB. These "masking factors" are explained in an article attached hereto, "The Interstate Commerce Commission's Public Use Waybill File: Concerns for Mis-Interpretation," Journal of the Transportation Research Forum, 263, Volume XXXII, Number 1 (1991).

The ICC/STB requires a rail carrier to include in its waybill sample data for traffic even if it is moving under contract -- even though the contract rate and the resulting revenue is non-jurisdictional. This is also true for exempt traffic which is also non-jurisdictional. Rail carriers have submitted this information upon the assurance of the strictest confidentiality. The revenues reflect highly confidential contract rates that otherwise are not subject to disclosure nor review by any regulatory agency. See, 49 U.S.C. § 11904; 49 U.S.C. § 10709.

The agency collects the waybill data in order to fulfill its own statutory duties, and makes it available on a limited basis for use for research and regulatory proceedings. With the agency's approval, each railroad uses masking factors of its own design to disguise the revenue data it submits in order to protect the confidentiality of such data when it is sought by third parties for disclosure. The masking factors the discovery requests seek are themselves extraordinarily confidential information used to protect highly confidential information about the railroads and shippers, disclosure of which would be contrary to statute and violate the terms of their agreements. The total confidentiality of each railroad's

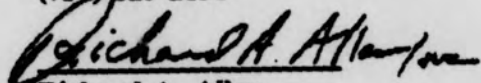
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"Waybill Sample" and not to any subpart thereof which may be sampled at a 1% rate.

masking factors -- known only to that railroad and a small number of agency staff members -  
- has been essential to the efficacy of this program to gather data for the agency consistent with its statutory duties. To Applicants' knowledge, no railroad has ever been required to disclose its masking factors, and the disclosure of masking factors has never even been sought in discovery in past control proceedings. Disclosure to shippers' counsel and consultants, even pursuant to the protective order, would pose a totally unacceptable risk, particularly in view of the absence of any apparent compelling need nor the strong showing of apparent relevance that would be required before production of such uniquely sensitive information could even be considered.

Finally, in tapes produced to the ACE Utilities by each of the Applicants in response to the ACE, et al.-2, 3 and 4 discovery requests, the Applicants already have provided unmasked revenue data for moves on behalf of the ACE Utilities. Such tapes contain all of the information the ALJ has determined to be even potentially relevant on these issues. The ACE Utilities' request for masking factors on the Waybill Sample falls outside the boundaries of the ALJ's prior rulings on relevance.

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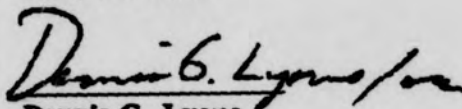
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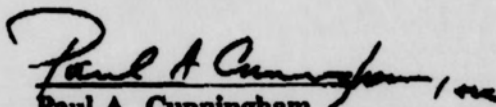
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## The Interstate Commerce Commission's Public Use Waybill File: Concerns For Mis-Interpretation\*

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# THE CONTRACT RATE-FLAG METHOD

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 CONFIDENTIAL

## THE HANDLER IN THE PUBLIC USE

The Public Use File (PUF) is a file of data on the movement of commodities by rail. It is derived from the ICC's confidential contract rate file. The PUF is a file of data on the movement of commodities by rail. It is derived from the ICC's confidential contract rate file. The PUF is a file of data on the movement of commodities by rail. It is derived from the ICC's confidential contract rate file.

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## TECHNIQUE TO MASK CONTRACT REVENUES

Sample 1982 is a sample of the revenue data for the year 1982. It is derived from the ICC's confidential contract rate file. The sample is a file of data on the movement of commodities by rail. It is derived from the ICC's confidential contract rate file. The sample is a file of data on the movement of commodities by rail. It is derived from the ICC's confidential contract rate file.

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## HYPOTHETICAL TABLE OF CALCULATED RATE EXPANSION FACTORS

TYPE	FACTOR
011	1.00
012	1.00
013	1.00
091	1.00
101	1.00
111	1.00

481	1.00
491	1.00
496	1.00
500	1.00

Values for this table should be submitted to the ICC by the end of the year 1982.

## CONCLUSIONS

The use of the calculated rate flag method of data security allows railroads which report their revenue data under the Machine-Readable Input (MRI) format to mask contract revenues. At the same time, this method allows the ICC to internally utilize the most accurate contract rate data available in its calculation of the Cost Recovery Percentage (CRP) and the Productivity Adjustment Factor (PAF) to the Rail Cost Adjustment Factor (RCAP). As a result, revenue data derived from Public Use files since 1980 are generally improved due to use of this confidentiality mechanism. Coupled with rounded mileages, revenue per ton-mile figures for the period 1982 to date are not strictly comparable with those obtained from the period 1982-1985.



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HYPOTHETICAL TABLE OF  
CALCULATED RATE  
EXPANSION FACTORS

STCC	FACTOR
011	1.10
012	1.05
013	0.85
091	1.90
101	1.24
111	1.34
460	1.15
493	1.07
496	1.12
500	0.93

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- MacDonald, J.M., "Competition and Rail Rates for the Shipment of Corn, Soybeans, and Wheat", *Rand J. Econ* 18, 1 (1987): 151-163.
- Wolfe, K.F., "The Carload Waybill Statistics: A Content Analysis", *Proceedings of the Transp. Res. Forum* 27 (1986): 244-256.
- Railroads, Washington, D.C. 20001. Under contract to the Interstate Commerce Commission, the author has managed the collection and processing of the Waybill Sample since 1984.
1. Fuller made use of 1983 to 1988 data (p. 267).
  2. ICC, Ex Parte 385 (Sub-No. 3) p. 1 Service date, January 31, 1990.
  3. Ex Parte 386 (Sub-No. 2), Service date January 8, 1986.
  4. *Ibid* pp 2-3.
  5. *Ibid*, p. 3.
  6. *Ibid*, p. 4.
  7. The 3 FSAC rule requires that for an origin and/or destination to appear on the Public Use File that at least three separate freight stations be listed (within the BEA) for one railroad. This number expands to four separate freight stations if two railroads serve the BEA, and five if three serve it, etc.
  8. Due to Department of Defense requirements, only the first two digits of the Standard Transportation Commodity Code (STCC) are provided in the Public Use Waybill tape.
  9. Movements which are as unique as to easily identify the shipper and railroad are excluded from the Public Use Sample. The one-time movement of a petroleum cracking tower from a fabricator to a refinery site could constitute such a unique movement.
  10. The same procedure applies to linehaul, miscellaneous, and transit revenues.
  11. The Sample's collection methodology was substantially altered in July of 1981. Data from before that time tended to exclude multiple car movements. Refer to Wolfe (1986).

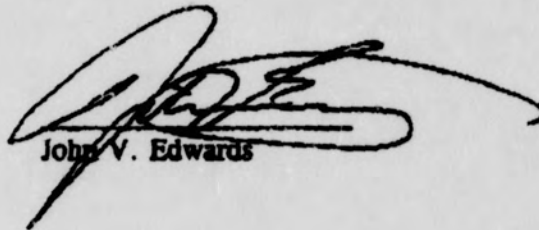
## ENDNOTES

- \* The views expressed in this paper are solely those of the author and may not reflect the views of the Association of American Railroads or its members.
- \*\* The author is Director, Transportation Data and Analysis, Economics & Finance Department, Association of American



**CERTIFICATE OF SERVICE**

I, John V. Edwards, certify that on September 11, 1997 I caused to be served by facsimile service, a true and correct copy of the foregoing CSX/NS-74, Applicants' Initial Objections to Atlantic City Electric Company, et al.'s Second Set of Interrogatories and Request for Production of Documents to Applicants (ACE, et al.-11), on all parties that have submitted to the Applicants a Request to be Placed on the Restricted Service List in STB Finance Docket No. 33388.



John V. Edwards

Dated: September 11, 1997

ANDREWS OFFICE PRODUCTS CAPITOL HEIGHTS, MD (K)

CSX/NS-78

BEFORE THE  
SURFACE TRANSPORTATION BOARD

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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

---

STB FINANCE DOCKET NO. 33388

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APPLICANTS' RESPONSE TO THE MOTION OF  
ATLANTIC CITY ELECTRIC COMPANY, ET AL.  
TO COMPEL

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The ACE Utilities'<sup>1/</sup> motion to compel seeks belatedly to obtain through the back door extensive highly confidential data about rates that they were properly denied when they first sought a more limited array of such information two months ago. The latest variation of their request should be denied for two reasons: First, it was properly denied before. Second, the form of the disclosures they now seek -- of "revenue masking factors" used by the Applicants in connection with their waybill sample data for 1978 through 1996 -- would pose a grave threat to the efficacy of an important agency data program and would undermine measures the agency has adopted to ensure compliance with the statutory mandate to preserve the confidentiality of shipper-railroad contract rates.

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<sup>1/</sup> The "ACE Utilities" consist of American Electric Power, Atlantic City Electric Company, Delmarva Power & Light, Indianapolis Power & Light Company and The Ohio Valley Coal Company.

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Further, the ACE Utilities do not, and cannot, demonstrate that they have a unique need for the masking factors to correct a data base developed and supervised by the Interstate Commerce Commission ("ICC") and continued by the Surface Transportation Board ("STB" or "Board"), a correction which neither the ICC nor the STB have ever found necessary. Permitting the requested discovery would result in an unprecedented disclosure of these masking factors protected by the STB and the ICC since the ICC first allowed their use.

Studies submitted to the STB and the ICC for evidentiary purposes in rail control proceedings have been reviewed on their merits without reference to the fact that there was no disclosure of the masking factors.<sup>2/</sup> Quite simply, the masking factors are not needed and should not be produced -- the value of the regulatory revenue reporting program and the danger of releasing this information far outweighs the minimal value, if any, of the information to the ACE Utilities.

Moreover, the ACE Utilities' request for masking factors is apparently designed to allow those parties to conduct a study of traffic handled by the Applicants for other utilities during the period 1978 through 1996 -- they do not need the masking factors relative to their

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<sup>2/</sup> See, e.g., STB Finance Docket No. 32760, Union Pacific Corporation, et al. -- Control and Merger -- Southern Pacific Rail Corporation, et al. ("UP/SP"), Decision No. 44, served August 12, 1996, slip op. at 271 (Grimm study based on Wayhill Sample that the number of independent routings affects rail rates evaluated on several basis - masking not discussed); ICC Finance Docket No. 32133, Union Pacific Corporation, et al. -- Control -- Chicago and North Western Transportation Company, et al., Decision No. 25, served March 7, 1995, slip op. at 22 and 46 (studies by Southern Pacific witnesses Nelson and Kornhauser - masking not discussed) and 87 (studies by Chicago, Central and Pacific witnesses, one of whom is the ACE Utilities' consultant Dunbar - masking not discussed); ICC Finance Docket No. 21215 (Sub-No. 1), Seaboard Air Line Railroad Company -- Merger -- Atlantic Coast Line Railroad Company; Petition to Remove Traffic Protective Conditions, 1995 ICC LEXIS 64, served March 27, 1995, at \*17 (incremental cost and revenue study by CSXT witnesses Klick and Kent - masking not discussed).



own traffic because they already have the 100% traffic tapes as to that traffic for the periods allowed. At the July 16 hearing, Your Honor determined that the ACE Utilities were entitled to information with respect to only their own traffic movements to/from Conrail-served destinations, and the Board affirmed that ruling in Decision No. 17. The current request of the ACE Utilities is plainly intended to circumvent that ruling by requiring the production of highly confidential and commercially sensitive data relevant to all other shippers, including utilities and other shippers not even served by Conrail and thus irrelevant to this proceeding.

### **BACKGROUND**

#### **The ACE Utilities' Prior Request for this Data:**

In their first discovery request, the ACE Utilities asked each of the Applicants to produce 100% traffic tapes for the years 1978 through to the present.<sup>2/</sup> Applicants objected<sup>4/</sup> and the matter was heard on July 16, 1997.

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<sup>2/</sup> ACE, et al.-2 (Document Request No. 3), ACE, et al.-3 (Document Request No. 3), and ACE, et al.-4 (Document Request No. 3).

<sup>4/</sup> NS-7, Norfolk Southern's Initial Objections to Atlantic City Electric Company, Delmarva Power & Light Company and The Ohio Valley Coal Company's First Set of Interrogatories and First Set of Requests for Production of Documents to Norfolk Southern (ACE, et al.-4), CSX-9, Initial Objections to Atlantic City Electric Company, Delmarva Power & Light Company and The Ohio Valley Coal Company's First Set of Interrogatories and First Set of Requests for Production of Documents to CSX (ACE, et al.-3), and CR-2, Preliminary Objections to First Set of Interrogatories and First Set of Requests for Production of Documents to Conrail of Atlantic City Electric Company, Delmarva Power & Light Company and The Ohio Valley Coal Company.

At one point during oral argument, counsel for Norfolk Southern pointed out that the ACE Utilities' did not need the 100% traffic tapes because the ACE Utilities had access to the Waybill Sample for each of those years.<sup>5/</sup> Counsel for the ACE Utilities responded that they needed the 100% traffic tapes to develop their evidence for the proceeding because the Waybill Sample was deficient for two reasons: 1) the Waybill Sample was a sample and there was a possibility of missed data; and 2) the Waybill Sample contained masked contract revenue data.<sup>6/</sup>

At that time, the ALJ rejected ACE's outright request for the 100% traffic tapes and instead ordered Applicants to produce data in response to a much more limited discovery request. The ACE Utilities appealed that decision,<sup>7/</sup> and the Board upheld the ALJ's ruling.<sup>8/</sup>

Background on the Waybill Sample:

The Waybill Sample is an information gathering and reporting program implemented first under the ICC and continued by the STB under which the railroads submit a sampling of

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<sup>5/</sup> See ACE Motion to Compel at 2 ("Applicants can hardly object to doing so, because they responded to our earlier discovery requests by encouraging us to rely on the Waybill samples, instead of their own files and traffic tapes, at the July 16 oral argument before Your Honor!"). See also, July 16, 1997 Discovery Conference Transcript at 106-109.

<sup>6/</sup> See *id.* at 107-109.

<sup>7/</sup> ACE, et al.,-6, Appeal of American Electric Power, Atlantic City Electric Company, Delmarva Power & Light Company, and The Ohio Valley Coal Company from the Order of the Presiding Judge Restricting Discovery, and Motion for Expedited Consideration, filed July 22, 1997.

<sup>8/</sup> Decision No. 17, served August 1, 1997.

waybills<sup>8/</sup> for shipments terminating on their lines. This is an important program to gather a sample of waybill data for individual movement of rail traffic for use as a data base for various regulatory oversight purposes.<sup>10/</sup> The ICC and the STB have also made this data base available to the public under certain limitations and as a result, the "[u]se of the Waybill Samples is a time-honored approach to presenting evidence before the ICC/STB and indeed has been the basis for such evidence in literally thousands of such proceedings over the years." ACE Motion to Compel, at 2.

A single waybill can cover anything from a single car (in the case of the movement of general commodities) to an entire unit train (in the case of the movement of coal destined for a utility). For that reason, the sample is stratified, or weighted. The STB now requires a 2 1/2% sampling for general commodities waybills, but a nearly 50% "sampling" of unit coal trains.<sup>11/</sup>

One piece of data is "masked" in the waybills submitted for inclusion in the Waybill Sample -- contract revenue, over which the agency has no jurisdiction. In 1986, in response

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<sup>8/</sup> A "waybill" is similar to a settled bill of lading. The waybill for any particular move includes data such as the originating and terminating freight stations, the participating railroads, any interchange points, the number and type of cars, the weights of movements, the commodity, and the freight revenues associated with the move. Ex Parte No. 385 (Sub No. 3). Expansion of the ICC Waybill Sample Public Use File (49 CFR Part 1244), 1990 ICC LEXIS 37 at \*1.

<sup>10/</sup> See "The Interstate Commerce Commission's Public Use Waybill File: Concerns for Mis-Interpretation," Journal of the Transportation Research Forum, Volume XXXII, Number 1, 1991, at page 263 (attached to Applicants initial objections); Ex Parte 385, 1990 ICC LEXIS at \*2.

<sup>11/</sup> Applicants have pointed out that the term "1% Waybill Sample" is both incorrect and misleading precisely for this reason. See, CSX/NS-74, Applicants' Initial Objections to Atlantic City Electric Company, et al.'s Second Set of Interrogatories and Request for Production of Documents to Applicants (ACE, et al.-11), page 2, n. 2.

to wide-spread rail carrier concern about the potential release of non-jurisdictional rates, the ICC permitted this masking. Each railroad shares its own actual masking factors with only a few agency employees so that the agency can be assured that the masking factors will not significantly skew studies based on the Waybill Sample and will not effectively disclose contract rates which could be determined were such revenue data to be made available. Thus masking allows the ICC to obtain necessary information concerning such traffic without compromising the overall accuracy, validity and usefulness of the Waybill Sample.

#### Why are Contract Revenues "Masked"?

Railroads carry freight for shippers either under publicly available common carrier rates or pursuant to confidential, negotiated contracts, the terms of which are known only to the railroad and the shipper on whose behalf the traffic is carried. Coal - the commodity that the ACE Utilities are most interested in - is virtually always transported under the terms of such confidential rail contracts. The confidentiality of rail contract rates and terms is a matter of fundamental importance to the railroads and to shippers, and Congress has so recognized in the governing statutes.

Contracts are non-jurisdictional and contract revenues are not subject to challenge before the Board. 49 U.S.C. § 10709(c)(1).<sup>12/</sup> Contracts and contract terms are not

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<sup>12/</sup> "A contract that is authorized by this section, and transportation under such contract, shall not be subject to this part, and may not be subsequently challenged before the Board or in any court on the ground that such contract violates a provision of this part." 49 U.S.C. § 10709(c)(1). The term "this part" refers to regulation of rail transportation by the Surface Transportation Board.

subject to disclosure by the STB. 49 U.S.C. § 10709(d)(2).<sup>12/</sup> And, there are civil and criminal penalties imposed for the unlawful disclosure of contract terms, including revenues. 49 U.S.C. § 11904.

Notwithstanding these facts, the public and the STB, and the ICC before it, have a legitimate need to obtain information concerning the traffic flowing over the interstate rail system, and the Waybill Sample provides that information. Because unmasked revenue data for individual movements can effectively disclose the underlying rates, however, the ICC permitted a masking which allowed for both the gathering of useful data and protection of confidential contract revenues.

Although regulatory oversight is the primary purpose behind the Waybill Sample, the Waybill Sample has also been used to present evidence before the ICC and the STB over the years. ACE Motion to Compel at 2. Thus, as the ACE Utilities admit, one of "the very purpose[s] of maintaining the Waybill Sample" is to provide a statistically reliable source of data to develop evidentiary studies for use in proceedings -- including control proceedings -- but users of the Waybill Sample have done so without having access to the masking factors which would reveal the exact contract revenue figures not otherwise subject to disclosure. Id.

The masking factors are highly confidential. Each railroad knows its own masking factors, but not those of its competitors. At the STB, only a few employees know the factors. The STB's contractor for gathering and processing the Waybill Sample data does

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<sup>12/</sup> "Documents, papers, and records (and any copies thereof) relating to a contract described in subsection (a) shall not be subject to the mandatory disclosure requirements of section 552 of title 5 [the Freedom of Information Act]." 49 U.S.C. § 10709(d)(2).



not know the factors. Shippers do not know the factors. The railroad Applicants' own consultants do not know the factors. Since the ICC first permitted masking factors to be used over a decade ago, the ICC and the STB have kept these factors extraordinarily confidential and yet now the ACE Utilities seek to force Applicants to reveal them.

In the face of these considerations, the ACE Utilities offer no explicit reason why they need the masking factor data. They simply state that their experts have decided to use the Waybill Sample data as a means of "filling in" information about traffic additional to which they have been allowed discovery, i.e., information about traffic other than their own. While the ACE Utilities are of course free to conduct such a study, they fail to explain why any such study could not rely on the publicly available waybill data. Discovery into confidential data relative to other shippers' traffic has already been denied to the ACE Utilities in Your Honor's affirmed rulings issued July 16. They offer no reason for revisiting that ruling, and clearly there is none.

### ARGUMENT

At this relatively late date in their discovery efforts, the ACE Utilities have suddenly determined that they wish to revisit an issue that was addressed to their dissatisfaction at the July 16 hearing on their initial discovery requests. Specifically, they are once again arguing that they should be given access to Applicants' confidential revenue information -- for traffic handled by Applicants for the account of utilities other than the ACE Utilities and for points beyond Conrail-served destinations (and beyond the time frames Your Honor defined at the July 16 hearing). Indeed, their request would apply to data for all shippers. As a result of

the rulings issued at that hearing, which were embodied in Decision No. 11 and affirmed in Decision No. 17, Your Honor has already determined that the ACE Utilities are entitled to traffic and contract information relative to their own shipments to Conrail-served destinations; not to such data that Applicants may have, or be able to disclose, relative to other shippers.

The Applicants have thus provided 100% traffic tapes relative to the shipments of the ACE Utilities -- their consultants need no more to study that traffic (and they do not here claim otherwise).<sup>14/</sup> On the other hand, to provide the masking factors that the ACE Utilities now seek would be the fundamental equivalent of providing the broad array of contracts and other confidential data relative to Applicants' contracts and other confidential data relative to Applicants' coal shippers that has already been denied to the ACE Utilities in the July 16 ruling. Such disclosure would undermine the purposes served by the statutory protections of rail contract confidentiality, and undermine the very purpose of using the masking factors in the first place.

Moreover, the ACE Utilities have already fought this battle and lost. In their first set of discovery requests, the ACE Utilities asked each of the Applicants to produce 100% traffic tapes for the years 1978 through 1997.<sup>15/</sup> Applicants objected on the basis of burden, confidentiality and relevance.<sup>16/</sup> ACE Utilities argued at the hearing on July 16,

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<sup>14/</sup> Further, a highly confidential 100% traffic tape for CSX and Conrail traffic for the base year of the primary application, 1995, has been located in the Applicants' depository since June 23, the date the Application was filed. This tape reflects all of the traffic of these carriers and uses no masking factors.

<sup>15/</sup> See, supra, note 3.

<sup>16/</sup> See, supra, note 4.

1997 that being required to rely on data readily available in the ICC/STB waybill sample to supplement the particular traffic tape data Applicants were being required to produce was inadequate for their analysis because, inter alia, the precise revenue figures were masked to preserve their highly confidential nature.<sup>17/</sup> At that time, ACE Utilities could also have made the very same request for disclosure of the masking factors as they have now made, and could have argued, to the ALJ or on their appeal to the Board, that the failure to disclose the masking factors was error. The ACE Utilities did not make that argument when they appealed the ALJ's decision,<sup>18/</sup> which the Board upheld.<sup>19/</sup> Now they are back seeking essentially the same ultimate information through a different source.

Indeed, the failure of the ACE Utilities to press for the masking factors then or at any other time in the past few months gives the lie to their claims of a substantial and "urgent" need for this discovery. They and their consultants have known all along about this issue, and their failure to seek this discovery before now cannot be allowed to support a self-created claim of urgency. At that time, the ALJ rejected ACE's outright request for the 100% traffic tapes and instead ordered Applicants to produce a more limited universe of documents and information.

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<sup>17/</sup> See July 16 Discovery Conference Transcript at 107-109.

<sup>18/</sup> ACE, et al.-6, Appeal of American Electric Power, Atlantic City Electric Company, Delmarva Power & Light Company, and The Ohio Valley Coal Company from the Order of the Presiding Judge Restricting Discovery, and Motion for Expedited Consideration, filed July 22, 1997.

<sup>19/</sup> Decision No. 17, served August 1, 1997.

The ACE Utilities now claim that their experts will use the Waybill Sample as the basis for a study for submission to the STB in this proceeding.<sup>20/</sup> Their belated decision to do so does not justify breaching the wall that the STB and the ICC have erected around the Waybill Sample masking factors. The Waybill Sample has formed the basis for innumerable control proceeding studies in the past -- including the traffic diversion and operations study conducted for the present proceeding by Norfolk Southern -- and to Applicants' knowledge none have required an unmasking of revenue factors. The ACE Utilities claim that they need something different from what the STB or the ICC has required in the past. Nothing the ACE utilities have or can state justify their claim.

The ACE Utilities appear to claim that: 1) they need to the masking factors because the revenues that appear on the Waybill Samples are deliberately altered; 2) the revenues that appear in the Waybill Samples are deliberately altered because they are commercially sensitive; and 3) if the masking factors were subject to disclosure and produced, the masking factors would be designated "highly confidential" under the Protective Order in this proceeding.<sup>21/</sup>

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<sup>20/</sup> The ACE Utilities claim to need "this evidence urgently because of the looming date of October 21 for comments and evidence." ACE Motion to Compel at 2. This has even less force than similar statements which have been made in nearly every oral argument. The ACE Utilities have been aware of the procedural schedule since it was issued on May 30, 1997 over three months ago. They cannot now claim prejudice on discovery their experts have just now decided to seek. Any claim that their experts have only now figured out that they will need the data is rebutted by the fact that those experts were in the ALJ's presence when he denied the ACE Utilities' request for the Applicants' 100% traffic tapes despite arguments concerning the masking factors. See, Oral Argument, July 16, 1997 (Transcript at pages 108-09).

<sup>21/</sup> The ACE Utilities claim that the reason they need, and are entitled to, the "masking  
(continued...)

The ACE Utilities have shown no need for the masking factors that the ICC and STB have themselves protected so thoroughly for so long. The masking factors have been in place for over a decade. By the ACE Utilities own count "literally thousands" of studies have been conducted and submitted to the ICC and STB by hundreds of parties and consultants -- including the ACE Utilities and their consultants. As noted above, the ICC and the STB have always accepted a Waybill Sample study presented in a control proceeding despite the masking factor. The simple fact that masking factors exist does not justify their discovery.

Moreover, the confidential contract revenues are masked because Congress specifically made them non-jurisdictional, not subject to disclosure, and protected by law. Far from justifying disclosure, this argues for continued protection. The fact that the revenues are also highly confidential does not weigh against whether a legal justification exists for their effective production through disclosure of the masking factors.

Finally, it is true that if the masking factors were subject to disclosure they would be considered highly confidential and thus would not be subject to use beyond this proceeding or to access by other than outside counsel and consultants. That is not the question. Again, the fact that the masking factors are highly confidential -- protected or not by a protective order -- is not legal justification for production otherwise not warranted.

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21/(...continued)

factors is because the revenues that appear on the Waybill Samples are deliberately altered because they are commercially sensitive, and thus subject to the 'highly confidential' in the context of the Protective Order in this proceeding." ACE Motion to Compel at 1.



Further, where there are special confidentiality concerns relevant to particular data, those concerns must be balanced against any claims of relevance in assessing whether production is appropriate. Here, the special confidentiality concerns relative to the masking factors far outweigh claims of relevance that Your Honor has already addressed and found wanting.

This is a control proceeding. The Board must determine whether to grant the Applicants approval to consummate the transaction contemplated by the primary application. Its mission and method is clear:

"The Acts' single and essential standard of approval is that the [Board] find the [transaction] to be 'consistent with the public interest.'" To determine the public interest, we balance the benefits of the merger against any competitive harm that cannot be mitigated by conditions. \* \* \* Competitive harm results from a merger to the extent the merging parties gain sufficient market power to raise rates or reduce service (or both) and to do so profitably, relative to premerger levels. In evaluating whether a merger is in the public interest, we seek to determine what competitive harm is directly and causally related to the merger and to distinguish that harm from any pre-existing, anticompetitive condition or disadvantage that other railroads, shippers or communities may have been experiencing. We attempt to ameliorate harm that is caused by the merger with conditions.

UP/SP, slip op. at 98-100 (citations omitted) (emphasis added). The mere substitution of one rail carrier for another for service to a plant is not a competitive harm — even if the new rail carrier holds a different view of rate making than the one it replaced.

The ACE Utilities claim a need for the masking factors "so that the evidence we present to the Board about the revenues Applicants are earning is accurate." ACE Motion to Compel at 2. This is patently absurd. The Board itself protects the disclosure of the masking factors from its own contractors, yet it regularly uses and accepts evidence based on the Waybill Sample in proceedings just like this one in recognition of the fact that the

masking factors do not skew evidentiary submissions so much as to require unmasking. The ICC and the Board have continued to protect the masking factors even from their own contractors for the same reason that the Presiding Judge should deny the motion to compel -- that the masking factors are not needed by the ACE Utilities or anyone else for evidentiary submissions to the Board and are not subject to disclosure.<sup>22/</sup>

### CONCLUSION

The ACE Utilities ask for an unprecedented disclosure of data which the ICC and the STB have kept confidential even from their own contractors for over a decade. The ACE Utilities have shown no relevance that might justify the disclosure, and certainly not sufficiently compelling relevance to outweigh the strong interests served by maintaining the strict confidentiality of the masking factors. The motion to compel should be denied.

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<sup>22/</sup> Several other statements in the ACE Utilities' Motion to Dismiss may add color but do not support the motion. For example, the ACE Utilities' "experts have decided to attempt to develop their evidence by supplementing the relatively few 'data points' we have obtained from Applicants for our clients 'origin-destination pairs' by 'filling in' with data from the Waybill Samples." ACE Motion to Compel at 1-2. This can be accomplished without the masking factors. The ACE Utilities suggest that "Applicants can hardly object to [providing the masking factors] because they responded to our earlier discovery requests by encouraging us to rely on the Waybill Samples. . . ." Applicants have made a timely objection to the production of the masking factors -- thus the motion to compel -- but that does not mean that the Waybill Sample is not a statistically sound data base for the presentation of evidence to the Board.

Respectfully submitted,

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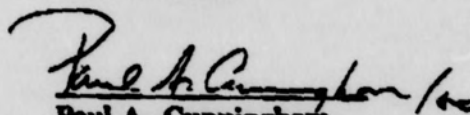
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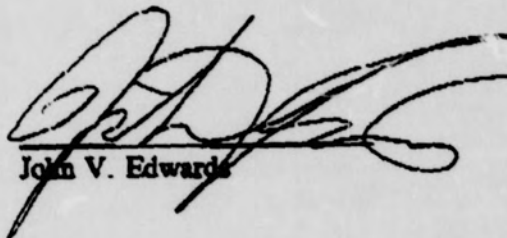
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Dated: September 16, 1997

**CERTIFICATE OF SERVICE**

I, John V. Edwards, certify that on September 16, 1997, I caused to be served by facsimile service a true and correct copy of the foregoing CEX/NS-[ ], Applicants' Response the Motion of Atlantic City Electric Company, et al. to Compel, on all parties that have submitted to the Applicants a Request to be Placed on the Restricted Service List in STB Finance Docket No. 33388.



John V. Edwards

Dated: September 16, 1997



UNITED STATES OF AMERICA

+ + + + +

SURFACE TRANSPORTATION BOARD

+ + + + +

ORAL ARGUMENT

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

Finance Docket  
No. 33388

Wednesday,  
July 16, 1997

Washington, D.C.

The above-entitled matter came on for oral argument in Hearing Room 6 of the Federal Energy Regulatory Commission, 888 First Street, N.E., at 9:30 a.m.

BEFORE:

THE HONORABLE JACOB LEVENTHAL,  
Administrative Law Judge

**NEAL R. GROSS**

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WASHINGTON, D.C. 20005-3701

1 think they're relevant. We'd consider it in the  
2 interest of compromise.

3 But beyond 1995, it is simply  
4 extraordinarily overbroad and burdensome to produce  
5 and, we submit, neither relevant to anything Mr.  
6 McBride legitimately wants or really needed by him.  
7 It would take, as we've stated in our papers, we would  
8 estimate some 1,000 man-hours to compile all these  
9 tapes and provide them and clean them up, as it were,  
10 in a way that made them producible.

11 They provide traffic information that is  
12 certainly reflected in the Board's way bill sample,  
13 which Mr. McBride has full access to. He could go  
14 back and get the way bill sample back to 1978 and get  
15 a sampling of all these movements that way.

16 But we see no basis for his request for  
17 our 100 percent traffic tapes going back to 1978 or  
18 even for the period that you've limited, which I guess  
19 is what, maybe eight or ten years?

20 To go back and compile those tapes in a  
21 way that were useful or producible would take an  
22 enormous amount of time, and the marginal probative

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1 value of those, we submit, is far outweighed by the  
2 burden that would be imposed.

3 JUDGE LEVENTHAL: Mr. McBride.

4 MR. McBRIDE: Thank you, Your Honor.

5 First of all, let me say that the way bill  
6 sample has two major problems with it, and again I'll  
7 explain this the best I can, but Mr. Crowley is the  
8 expert.

9 First of all, it's a sample. It's a one  
10 percent sample, and what happens is that if you go and  
11 only look at one out of 100 records, oftentimes  
12 there's absolutely nothing in a key segment of the  
13 data that needs to be analyzed. I mean like pulling  
14 one volume of F.3rd off out of every 100, or F.2nd,  
15 and if you didn't find any cases about the First  
16 Amendment, the sampling technique would lead you to  
17 the conclusion that there isn't a First Amendment.

18 But obviously that isn't so. So you have  
19 to deal with the problem of a sample.

20 Mr. Crowley has been through this on a  
21 number of occasions. We've discussed it before, and  
22 if you come up with a null set, then you're right back

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1 to asking for complete data. That's why we asked for  
2 the traffic tapes. So we -- and because, again, time  
3 is of the essence, we can't be relegated to the sample  
4 and then come back here in a month and have lost that  
5 amount of time, and then have some mind numbing  
6 hearing before Your Honor explaining that there's  
7 nothing in this segment and there's nothing in that  
8 segment and nothing in that segment. It's going to  
9 get very tedious.

10 The quick way to do this is to just get  
11 the tapes and get on with it. They want to get on  
12 with this proceeding. They got the Board to agree to  
13 expedite the proceeding. They ought to expedite  
14 providing us the data we need in the proceeding.

15 The second problem is this, which they  
16 haven't told you. On the way bill sample, the actual  
17 rate information is not there. They, with the Board's  
18 approval, apply some sort of a multiplication factor  
19 or adjustment factor to the actual rate base to mask  
20 it, and as a result, then any time a shipper tries to  
21 make an argument out of the one percent way bill  
22 sample, they say, "Well, you can't rely on that

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1 because that's not the actual rate."

2 So that's the other reason we went to the  
3 traffic tapes, and they estimate 1,000 man-hours. It  
4 doesn't sound like a lot compared to what they put  
5 into compile 23 volumes and 14,810 pages. But year by  
6 year, it sounds like 50 hours -- 50 man-hours worth of  
7 work.

8 So we need those traffic tapes to be able  
9 to get the actual data, not to deal with the problem  
10 of not having information in a particular category,  
11 and not having the actual rate information which is  
12 what this is about.

13 That's what our clients are concerned  
14 about, is what they're going to have to pay for this  
15 transportation as a result of the acquisition of  
16 Conrail. So that's why we need these tapes, and as  
17 you know, Conrail and CSX haven't even objected  
18 altogether to providing them, and I think we ought to  
19 just get on with it.

20 JUDGE LEVENTHAL: How about the time  
21 limit?

22 MR. MCBRIDE: Well, I have the same

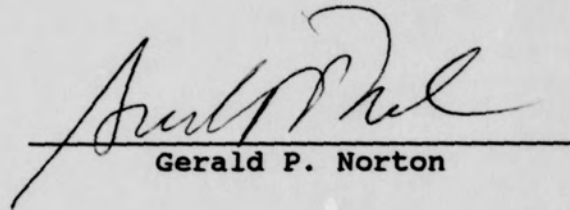
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CERTIFICATE OF SERVICE

I, Gerald P. Norton, certify that, on this 22nd day of September, 1997, I caused a copy of the foregoing document to be served by hand and/or facsimile on Michael F. McBride, counsel for Atlantic City Electric Company, Delmarva Power & Light Company, and The Ohio Valley Coal Company, at LeBoeuf, Lamb, Greene & MacRae L.L.P., 1875 Connecticut Avenue, N.W., Washington, D.C. 20009, and by first class mail, postage prepaid, on all parties appearing on the restricted service list established pursuant to paragraph 3 of the Discovery Guidelines in Finance Docket No. 33388.



Gerald P. Norton

STB

FD-33388

ID-181770

9-8-97

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181770

Durkin & Boggia, Esqs.  
Centennial House  
71 Mt. Vernon Street  
P.O. Box 378  
Ridgefield Park, New Jersey 07660



**BEFORE THE  
SURFACE TRANSPORTATION BOARD**

SEP 09 1997

**Finance Docket No. 33388**

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

**MOTION OF THE VILLAGE OF RIDGEFIELD PARK, NEW JERSEY, TO  
LATE-FILE NOTICE OF INTENTION TO PARTICIPATE IN PROCEEDINGS**

The undersigned, counsel for the Village of Ridgefield Park, New Jersey (the "Village"), respectfully requests that the Village be permitted to participate in and be designated as a party of record in these proceedings despite the expiration of the time in which to file its Notice of Intention. The reasons why the Village believes it is entitled to a relaxation of the deadline by which to file its Notice of Intention are set forth below.

(1) On or about January 17, 1997, Village Mayor George D. Fosdick wrote to Congressman Steven Rothman, voicing concerns regarding a proposed merger between CSX and Conrail, with particular reference to certain problems between the Village and the New York Susquehanna & Western Railway Corporation ("NYS&W"), with which CSX has an ongoing business relationship. (NYS&W transports freight cars to CSX's Little Ferry Yard located in the Borough of Ridgefield, which is adjacent to the Village.)

Congressman Rothman forwarded this communication to the Surface Transportation. On or about March 21, 1997, Surface Transportation Board Chairperson Linda Morgan responded to Congressman Rothman that although no formal application had as yet been received, the Village might wish to "participate in the environmental review process addressing safety issues or formally as a party of record once a CSX/Conrail merger application is filed."

Congressman Rothman forwarded Chairperson Morgan's communication to Mayor Fosdick, who wrote directly to Ms. Morgan on or about May 12, 1997 reiterating the concerns he had previously expressed.

As a result of the correspondence described above, the Village was of the belief that the appropriate time in which to raise its concerns would be upon the filing of a formal CSX/Conrail application, not in the instant proceeding. However, as described in paragraphs (2) and (3) below, certain events have occurred which have altered that situation.

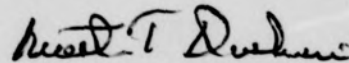
(2) On or around August 12, 1997, the Village first became aware that the Delaware Otsego Corporation, of which the is a wholly-owned subsidiary, is the subject of a proposed management buyout by Norfolk Southern Corporation, CSX Corporation and Walter G. Ric. aware Otsego's Chief Executive Officer. The realization of the management buyout would bring the CSX and Norfolk Southern railroads into the Village, and thus the application presently before the Surface Transportation Board is of immediate concern to the Village in a way which was not manifested until very recently.

(3) In addition to the foregoing, the Village was also made aware, at or around the time it learned of the proposed management buyout, that CSX Corporation or CSX Transportation, Inc. proposed, in connection with the matter currently pending before the Surface Transportation Board, to construct two cross-tracks within the Village for the purpose of connecting CSX with Norfolk Southern and facilitating the movement of

freight between the two railroads. This information was communicated to the Village as the result of a telephone call from an environmental firm to H. Douglas Hansen, the Village's Construction Official, in which Mr. Hansen was invited to advise the environmental firm of any environmental concerns the Village might have regarding the proposed construction. The proposed construction is, indeed, a concern to the Village for a number of reasons -- environmental and otherwise -- and the Village believes that it should be heard on these issues.

As set forth above, the Village's failure to meet the deadline in the instant proceeding was not the result of any dilatory behavior on its part, but rather was the result of the Village's belief that its concerns would better be raised in a proceeding as yet unfiled. Under the circumstances, the Village of Ridgefield Park, New Jersey, respectfully requests that it be permitted to late-file its Notice of Intention to Participate in the subject proceedings.

Respectfully,

A handwritten signature in cursive script, appearing to read "Martin T. Durkin".

Martin T. Durkin, Esq.

Dated: September 5, 1997



STB

FD-33388

ID-181741

9-8-97

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SARA J. FAGNILLI  
DIRECTOR OF LAW



12650 DETROIT AVENUE • 44107 • 216/529-6030 • FAX 216/228-2514

September 5, 1997

18174  
ROGER D. TIBBETTS  
ASSISTANT LAW DIRECTOR

KEVIN M. SPELLACY  
PROSECUTOR

DENIS P. DUNN  
ASSISTANT LAW DIRECTOR/  
ASSISTANT PROSECUTOR

MATTHEW J. KING  
ASSISTANT LAW DIRECTOR/  
ASSISTANT PROSECUTOR

Office of the Secretary  
Case Control Branch  
Attn: STB Finance Docket No 33388  
Surface Transportation Board  
1925 K Street, N.W.  
Washington, DC 20423-0001



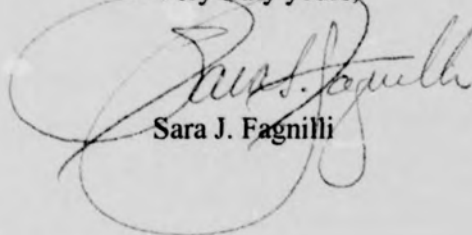
RE: CSX Corporation, et al.  
Norfolk Southern Corporation, et al. and  
Conrail, Inc. et al.

Dear Secretary Williams:

Enclosed please find the original and eleven (11) copies of a Motion for Leave to File Certificate of Service in Compliance with Decision No. 21 Instant, and a copy of the Certificate of Service. Kindly file the documents and return a file stamped copy of each to the undersigned in the enclosed self-addressed stamped envelope.

Thank you for your cooperation in this matter.

Very truly yours,



Sara J. Fagnilli

cc: The Honorable Jacob Leventhal  
All Parties of Record



Before the  
SURFACE TRANSPORTATION BOARD

STB Finance Docket No. 33388

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

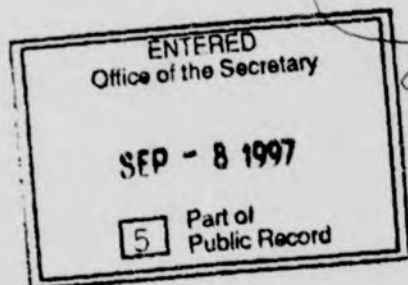


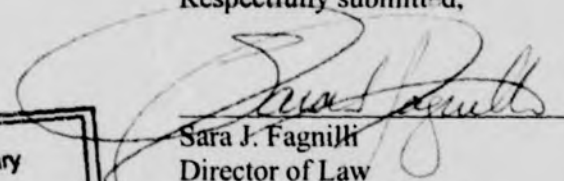
Motion for Leave to File Certificate of Service in  
Compliance with Decision No. 21 Instanter

Now comes Party of Record, City of Lakewood, Ohio and Moves for Leave to File a Certificate of Service in Compliance with Decision No. 21 and serve a copy of its only filing, the Notice of Intent to Participate, upon all other parties of record. This party was unclear that the Notice of Intent to Participate was a filing that needed to be served on all other parties since the list of parties was generated by the STB, and no other pleading had been filed by it. However, Lakewood has received numerous copies of Notices of Intent to Participate from other parties indicating that, in fact, that document does need to be served upon all other PORs.

In addition, POP Lakewood Moves for Leave to File with this Board the Certificate of Service required by Decision No. 21, a copy of which is attached hereto as Exhibit "A." This Motion is made in the interest of justice and not to interpose undue delay. Lakewood did file upon all other known PORs its Notice of Intent to Participate at the time it was filed. In compliance with Decision No. 21, POR Lakewood did file with the Secretary of the STB a correction to its address in the POR service list.

Respectfully submitted,



  
Sara J. Fagnilli  
Director of Law  
City of Lakewood, Ohio  
12650 Detroit Avenue  
Lakewood, Ohio 44107

Attorney for Party of Record  
City of Lakewood, Ohio

LAW DEPARTMENT  
CITY OF LAKEWOOD  
12650 DETROIT AVENUE  
(216) 529-6030  
FAX (216) 228-2514



# CERTIFICATE OF SERVICE

A copy of the forgoing Motion for Leave to File Certificate of Service in Compliance with Decision No. 21 Instanter was duly served upon the Honorable Administrative Law Judge Jacob Leventhal and all Parties of Record on this 5<sup>th</sup> day of September, 1997.

A handwritten signature in cursive script, appearing to read "Sara J. Fagnilli", is written over a horizontal line.

Sara J. Fagnilli  
Attorney for Party of Record  
City of Lakewood, Ohio

**EXHIBIT "A"**



Before the  
SURFACE TRANSPORTATION BOARD

STB Finance Docket No. 33388

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


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CERTIFICATE OF SERVICE

---

Now comes Party of Record, City of Lakewood, Ohio, and certifies that a copy of its Notice of Intent to Participate, the only filing submitted to date, has been served upon all other Parties of Record and upon the Honorable Jacob Leventhal on this 27-day of September, 1997.

Respectfully submitted,

  
Sara J. Fagnilli  
Director of Law  
City of Lakewood, Ohio  
12650 Detroit Avenue  
Lakewood, Ohio 44107

LAW DEPARTMENT  
CITY OF LAKEWOOD  
12650 DETROIT AVENUE  
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FAX (216) 228-2514



STB

FD-33388

ID-181398

8-22-97

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181398  
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205 NORTH MONROE STREET  
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MEDIA, PA 19063  
(610) 565-6040

ERIC M. HOCKY

August 22, 1997



**HAND DELIVERY BY COURIER**

Office of the Secretary  
Case Control Unit  
ATTN: STB Finance Docket No. 33388  
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

Dear Sir or Madam:

Enclosed for filing in the above referenced proceeding are  
the original and 25 copies of each of the following documents:

BPRR-2/ALY-2 - Description of Responsive Applications  
Anticipated By Buffalo & Pittsburgh Railroad,  
Inc. and Allegheny & Eastern Railroad, Inc.  
(Sub Docket Nos. 43-51)

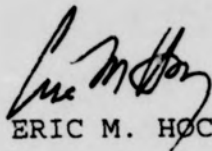
Office of the Secretary  
Case Control Unit  
August 22, 1997  
Page 2

- BPRR-3/ALY-3 - Petition of Buffalo & Pittsburgh Railroad, Inc. and Allegheny & Eastern Railroad, Inc. for Clarification and Waivers (Sub Docket Nos. 43-51)
- RSR-2 - Description of Responsive Applications Anticipated by Rochester & Southern Railroad, Inc. (Sub Docket Nos. 52 and 56)
- RSR-3 - Petition of Rochester & Southern Railroad, Inc. for Clarification and Waivers (Sub Docket Nos. 52 and 56).

Also enclosed is a diskette containing each of the four filings in a format (WordPerfect 6.1) that can be converted into WordPerfect 7.0.

Kindly time stamp the enclosed extra copy of this letter to indicate receipt and return it to me in the self-addressed envelope provided for your convenience.

Respectfully,

  
ERIC M. HOCKY

Enclosures

181398

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BEFORE THE  
**SURFACE TRANSPORTATION BOARD**  
STB FINANCE DOCKET NO. 33388



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

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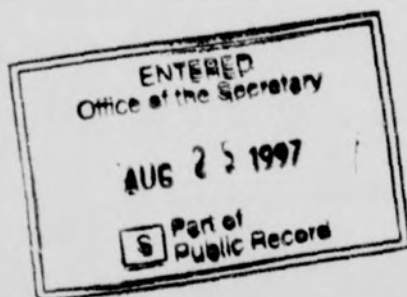
**PETITION OF  
BUFFALO & PITTSBURGH RAILROAD, INC. AND  
ALLEGHENY & EASTERN RAILROAD, INC.  
FOR CLARIFICATION AND WAIVERS**

(Sub Docket Nos. 43 -51)

---

William P. Quinn  
Eric M. Hocky  
GOLLATZ, GRIFFIN & EWING, P.C.  
213 West Miner Street  
P.O. Box 796  
West Chester, PA 19381-0796  
(610) 692-9116  
Attorneys for Buffalo & Pittsburgh  
Railroad, Inc. and Allegheny & Eastern  
Railroad, Inc.

Dated: August 22, 1997





BEFORE THE  
SURFACE TRANSPORTATION BOARD  
STB FINANCE DOCKET NO. 33388

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



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PETITION OF  
BUFFALO & PITTSBURGH RAILROAD, INC. AND  
ALLEGHENY & EASTERN RAILROAD, INC.  
FOR CLARIFICATION AND WAIVERS

(Sub Docket Nos. 43-51)

---

Buffalo & Pittsburgh Railroad, Inc. ("BPRR") and its affiliate, Allegheny & Eastern Railroad, Inc. ("ALY")<sup>1</sup>, in accordance with Decision No. 7 served May 30, 1997, and Decision No. 12 served July 23, 1997, are filing today their Description of Anticipated Responsive Applications (BPRR-2/ALY-2). In conjunction with such description, BPRR and ALY request the clarification and waivers requested below with respect to the proposed responsive applications.

INTRODUCTION

As set forth more fully in the Description of Anticipated Responsive Applications, BPRR, a Class II rail carrier operating in western Pennsylvania and New York, is predicted by the

---

<sup>1</sup> BPRR and ALY are both wholly owned subsidiaries of Genesee & Wyoming Inc. ("GWI").

Applicants to have approximately 40% of its freight revenues diverted to the Applicants as a result of the primary transaction. As a result of those diversions, BPRR would not be able to continue to operate in its current configuration. The results would be a loss of essential services and other competitive harm for its on-line shippers.<sup>2</sup> To preserve essential services, BPRR may seek to have the Board order that it be included in the primary transaction. In the alternative, BPRR and ALY may seek to restructure their operations by having BPRR abandon lines it could no longer afford to maintain, by acquiring operating rights to allow for the continued provision of essential services, and by acquiring additional rights to address other competitive harms.

## **REQUESTS**

### **A. Inclusion (Sub Docket No. 43)**

BPRR has given notice that it anticipates filing an application for inclusion in Sub Docket No. 43 (BPRR-2/ALY-2). With respect to its proposed inclusion application, BPRR seeks certain waivers and clarifications.

#### **(1) Classification as a minor transaction**

The inclusion of BPRR in the transaction could result in the acquisition of BPRR by CSXT, NS or Conrail (with resulting operations by one or both of CSXT and NS). Such a transaction would be between a Class II carrier (BPRR) and a Class I carrier. This would not be a "major" transaction under section 1180.2(a), and thus will be either a "significant" or "minor"

---

<sup>2</sup> The harm would also be felt by shippers on BPRR's affiliates in the region (ALY, Rochester & Southern Railroad, Inc. ("R&S") and Pittsburgh & Shawmut Railroad, Inc. ("PSR")).

transaction.<sup>3</sup> A transaction is significant only if it is of regional or national importance under 49 U.S.C. §11325(a)(2) and (c). Under the Board's consolidation regulations, it will determine whether a transaction is minor rather than significant by looking at whether it is clear that (1) the transaction will not have any anticompetitive effects, and (2) that any anticompetitive impacts will be outweighed by the contribution to the public interest. See 49 C.F.R. §1180.2(b). Since BPRR's inclusion will clearly have no anticompetitive impacts, its inclusion in the transaction should be considered minor.

Although BPRR is currently a Class II carrier, it only became one as of January 1, 1997. Its total freight revenues last year were approximately \$21 million.<sup>4</sup> This pales in size when compared to the multi-billion dollar freight revenues of NS and CSXT.

BPRR's major significance has been, in conjunction with NS and CSXT, to provide routes competitive with Conrail's routes between western New York (Buffalo) and points in Pennsylvania and south. With the division of Conrail between CSXT and NS giving each direct single line routes through the region, BPRR's joint line routes will be unable to provide important competition in the region. (BPRR will continue as an important transportation resource for its on-line customers.)

To the extent inclusion of BPRR would be a "parallel" transaction, the transaction will

---

<sup>3</sup> The Board has recently eliminated the presumption that responsive applications be considered significant, and has held that the determination should be made as described in 49 C.F.R. §1180.2(a) and (c). See STB Ex Parte 556, *Railroad Consolidation Procedures -- Modification of Fee Policy* (served March 4, 1997) at 3, 9 (adopting new language for Section 1180.4(d)(ii)).

<sup>4</sup> Applicants predict diversions away from BPRR of approximately \$8.3 million as a result of the primary transaction.

not reduce competition in the region since both NS and CSXT will, as a result of the primary transaction, have service rights throughout western Pennsylvania and New York. To the extent inclusion would provide access to BPRR on-line customers, the inclusion could be viewed as end-to-end, and would have no anticompetitive effects. Customers after inclusion would have additional single line routings available. Any anticompetitive effects would be outweighed by the public benefits of preserving essential services for the on-line customers of BPRR. Accordingly, the Board should find that the request for inclusion is a minor transaction under 49 C.F.R. §1180.2.

**(2) Financial, Operational and Other Supporting Information**

If the Board would for some reason determine that the inclusion application is "significant," then BPRR seeks a waiver of the requirements of 49 C.F.R. §§ 1180.6 - 1180.9 to allow BPRR to submit only such data as would be required if this were a minor transaction. For example, section 1180.7 of the consolidation regulations requires detailed market impact analyses for significant transactions. While BPRR expects to provide the Board with market information to support the inclusion application, impact analyses in the detail required by section 1180.7 would be unduly costly and burdensome for a small carrier<sup>5</sup> with respect to a transaction that is clearly limited in scope. Similarly, the proposed operating plan to be submitted under section 1180.8(a) is to be based on the foregoing impact analyses and, if the Board waives compliance with section 1180.7, a waiver of section 1180.8(a) should follow. In any event, BPRR would provide the operating data required for minor transactions under section 1180.8(b),

---

<sup>5</sup> As noted previously, although BPRR is a Class II carrier, its freight revenues last year were only approximately \$21 million, and \$8.3 million of that is predicted by Applicants to be diverted.

which should provide ample information to allow the Board to evaluate BPRR's inclusion request. BPRR acknowledges that it will need to include sufficient information to satisfy the Board's criteria for granting the relief sought.

### **(3) Filing fees**

The Board recently adopted new regulations governing fees for responsive applications. While it is clear that "responsive applications" include inclusion applications, the fee for such an application is not specifically set forth. BPRR requests that the Board clarify that the fee for its inclusion request (a minor transaction) will be \$4,700 under 49 C.F.R. §1002.2(f)(38)(iii) or (v) or (41)(iii) or (v).

In the event that the Board were to find that the inclusion application would be a "significant" transaction with a filing fee of \$177,900, then BPRR requests that the Board waive the fee and only require payment of a fee of \$4,700. To impose the higher fee on a carrier that is being substantially harmed as result of the primary transaction would be unfair (if not preclusive) and an unreasonable burden on top of the significant traffic losses that will be incurred.

### **(4) Definition of Applicant**

Under 49 C.F.R. §1180.3(a), "applicant" is defined as the parties "initiating" the transaction. BPRR will be the party initiating the inclusion request which will be limited to inclusion solely of BPRR and not any affiliates. BPRR seeks clarification or waiver that BPRR will be the only "applicant" for purposes of its inclusion request, and specifically that BPRR's corporate parent, Genesee & Wyoming Inc., a noncarrier holding company, not be an applicant. Characterizing GWI as an applicant would substantially increase the burden on BPRR without improving the Board's ability to evaluate the competitive and financial impacts of the inclusion



request, and instead will add irrelevant data to the filing. This is similar to the relief granted in ICC Finance Docket No. 32549, *Burlington Northern, Inc. -- Control and Merger -- Santa Fe Pacific Corporation ("BNSF")*, Decision No. 14 (served April 20, 1995) (relating to Illinois Central Railroad Company) and ICC Finance Docket No. 32760, *Union Pacific Corporation -- Control and Merger -- Southern Pacific Rail Corporation ("UPSP")*, Decision No. 14 (served February 15, 1996) (relating to The Texas-Mexican Railway).

**(5) Definition of Applicant carriers**

"Applicant carriers" are defined in 49 C.F.R. §1180.3(b) to include "*all carriers related to the applicant*," and all other carriers involved in the transaction." BPRR requests that the Board exclude the primary applicants from this definition since there is sufficient data on the primary applicants and their proposed operations in the primary application. Similar relief has been granted in the past. *See BNSF*, Decision No. 13 (served April 18, 1995), No. 14 (served April 20, 1995), and No. 15 (served April 20, 1995). Additionally, other carrier subsidiaries of GWI<sup>6</sup> should not be considered applicant carriers in this sub docket which relates solely to the inclusion of BPRR. Information on these other carriers would make it more difficult for the Board to focus on and analyze the effect of this transaction on BPRR and the propriety of the inclusion request.

**(6) Deferred trackage rights request**

If inclusion were to be granted, then prior to the transfer BPRR would grant overhead trackage rights to ALY to allow it to connect with PSR to replace the family connection when

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<sup>6</sup> GWI currently controls directly and indirectly 15 Class III carriers in addition to BPRR.

BPRR is included. BPRR and ALY do not intend to file for such trackage rights now since such rights are unnecessary unless inclusion is granted. At such time, they would comply with the requirements of 49 C.F.R. §1180.(2)(d)(7) and 1180.4(g). BPRR requests that the Board clarify or waive that the trackage rights need not be made part of the inclusion request. *See BNSF* Decision No. 16 (served April 20, 1995) and *UPSP* Decision No. 14 (served February 15, 1996) (allowing Southern Pacific and Tex-Mex respectively to defer filing for construction of connections that would not be necessary unless other relief were granted).

**(7) Environmental and historical reports**

BPRR does not know at this time which Applicant would be required to include it in the transaction, or how such Applicant would operate it. Applicants predict that a substantial portion of BPRR's traffic will be diverted to their single line routes and have presumably dealt with the effects of the diversion in their operating plans and environmental analysis. BPRR seeks clarification or waiver that it may presume that the essential service to on-line customers that BPRR is seeking to preserve will continue to be provided to the same extent and in the same manner as BPRR has been providing the service, and thus that there will be no environmental or historic impact.

**B. Trackage Rights and Other Relief (Sub Docket Nos. 44-51)**

If inclusion were not granted (or if BPRR would determine not to seek inclusion), then, in order to preserve its services BPRR would need to drastically restructure its operations. It would apply to abandon a portion of its lines between Buffalo and Salamanca, NY, and would seek rights (either directly or through ALY) necessary to allow continued service to its on-line

customers. The rights it would seek are described in Sub Docket Nos. 44-51 (BPRR-2/ALY-2).

With respect to its proposed requests, BPRR seeks certain waivers and clarifications.

**(1) Clarification of applicable law**

In Sub Docket Nos. 45-51, BPRR has indicated that it will seek trackage rights and the use of certain yard tracks for interchange with other carriers that already reach those yards.

BPRR requests the Board to confirm that it may seek authority for such rights in responsive applications under 49 U.S.C. §11323 or under 49 U.S.C. §10902, the section added by the ICC Termination Act of 1995 that covers intercarrier transactions by Class II and Class III carriers. *See Conference Report No. 104-422* at 180 ("Class II and Class III carriers retain the existing option ... to obtain approval of intercarrier transaction under section 11323, such as trackage rights under 11323(a)(6)").<sup>7</sup>

**(2) Classification as a minor transaction**

If BPRR determines to request the various trackage rights and use of yard tracks under 49 C.F.R. §11323, then it requests that the Board find that the requests are minor transactions. The standards for determining whether a responsive application is "minor" or "significant" are set forth in Section A.1 of this Petition. An examination of the trackage rights and use of yards for interchange purposes described in Sub Docket Nos. 45-51 shows that they clearly qualify as minor transactions.<sup>8</sup>

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<sup>7</sup> Of course, BPRR may alternatively request the authority for any or all of these rights pursuant to exemptions that may be available under 49 U.S.C. §10502.

<sup>8</sup> As described, the responsive applications will be made by BPRR (a Class II carrier) or possibly in some instances by ALY (a Class III carrier). Since the transactions do not involve two Class I carriers, they are not major transactions.

The trackage rights are not being sought for service to new territories, but rather attempt to preserve some of BPRR's current routing possibilities as follows: Sub Docket No. 45 will allow continued service between Buffalo and points on the ALY, BPRR and PSR after the abandonment of the Buffalo to Salamanca Line, and trackage rights to South Buffalo Railway ("SB") at Seneca Yard instead of the yard where BPRR currently interchanges with SB; Sub Docket No. 46 will also allow for preservation of service to and from Buffalo, and with the local service in Franklinville will allow continued service to a customer that currently trucks material from Franklinville to a loading center on BPRR's affiliate RSR at Machias, New York (a point on the line that will be abandoned); Sub Docket No. 47 seeks optional trackage rights in the future to allow BPRR and ALY to interline traffic with WLE, a privilege they currently enjoy at New Castle, PA (which WLE reaches via haulage over CSXT);<sup>9</sup> and Sub Docket No. 50 would connect BPRR with its affiliate RSR in lieu of haulage rights RSR currently has via Delaware and Hudson Railway.<sup>10</sup> The use of yards described in Sub Docket Nos. 49 and 51 are similarly limited and seek only to allow incidental use of tracks in the yards for interchange with carriers other than CSXT that already reach the yards. These rights are designed to preserve routes and to allow more efficient access between carriers and are not anticompetitive. Since the proposed rights will not provide for any substantial new local service -- shipper access and the competitive balance between carriers will not be affected. *See Railroad Consolidation Procedures - Trackage*

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<sup>9</sup> BPRR may also seek a condition to the primary application to have the haulage extended to Erie, PA.

<sup>10</sup> The only exception are the rights sought in Sub Docket No. 48 to reach two additional plants. BPRR had rights to serve these plants that were discontinued in 1993. Currently these plants receive almost all of their coal from on-site mines or by motor carrier.

*Rights Exemption*, 1 ICC 2d 270, 272, n.3 (1985). All of the requests should be considered minor.

### **(3) Financial, Operational and Other Supporting Information**

If the Board would for some reason determine that the inclusion application is "significant," then BPRR seeks a waiver of the requirements of 49 C.F.R. §§ 1180.6 - 1180.9 to allow BPRR to submit only such supporting information as would be required if this were a minor transaction. For example, section 1180.7 of the consolidation regulations requires detailed market impact analyses for significant transactions. While BPRR expects to provide the Board with market information to support the inclusion application, impact analyses in the detail required by section 1180.7 would be unduly costly and burdensome for a small carrier with respect to a transaction that is clearly limited in scope. Similarly, the proposed operating plan to be submitted under section 1180.8(a) is to be based on the foregoing impact analyses and, if the Board waives compliance with section 1180.7, a waiver of section 1180.8(a) should follow. In any event, BPRR would provide the operating data required for minor transactions under section 1180.8(b), which should provide ample information to allow the Board to evaluate BPRR's inclusion request. BPRR acknowledges that it will need to include sufficient information to satisfy the Board's criteria for granting the relief sought.

### **(4) Consolidated Operating Plan**

The various rights sought by BPRR and ALY are intended to address the harm that will be caused to them and their shippers by the primary transaction. While not directly interrelated, they form the basis for the restructuring that will need to occur if BPRR is going to be able to continue to operate. Thus, BPRR and ALY seek clarification or waiver to allow them to present



a unified operating plan and other supporting information presenting the effects of all of the applications described in Sub Docket Nos. 45-51.

**(5) Filing fees**

The Board recently adopted new regulations governing fees for responsive applications. While it is clear that "responsive applications" include trackage rights and the incidental use of tracks, the applicable fee is not clear. If the applications are filed under section 11323, the fee would appear to be \$4,700 under 49 CFR §1002(f)(40)(iii). However, if they are filed under section 10902, BPRR and ALY are not clear whether the fee would be \$4,700 under 49 CFR §1002(f)(40)(v) or \$3,700 under 49 CFR §1002(f)(14)(i) (or \$1,100 if the class exemption is used). The abandonment described in Sub Docket No. 44 is presumably subject to a filing fee of \$13,200 under 49 CFR §1002(f)(21)(i) (unless an exemption is sought) or \$4,700 as a responsive application for which there is no fee specifically provided. BPRR and ALY accordingly request that the Board clarify the fees that will be applicable to its various requests.

In the event that the Board were to find that any of the applications would be a "significant" transaction with a filing fee of \$177,900, then BPRR and ALY requests that the Board waive the fee and only require payment of a fee of \$4,700. To impose the higher fee on a carrier that is being substantially harmed as result of the primary transaction would be unfair and an unreasonable burden on top of the significant traffic losses that will be incurred.

**(4) Definition of Applicant**

Under 49 C.F.R. §1180.3(a), "applicant" is defined as the parties "initiating" the transaction. BPRR or ALY will be the party initiating the various requests which will each seek relief for only one carrier (although the relief may benefit others in the corporate family). BPRR

and ALY seek clarification or waiver that the party requesting the relief in the respective sub docket will be the only "applicant" for purposes of that responsive application. Further, they specifically request that their corporate parent GWI not be an applicant. Characterizing GWI as an applicant would substantially increase the burden on the responsive applicant without improving the Board's ability to evaluate the competitive and financial impacts of the inclusion request, and instead will add irrelevant data to the filing. This is similar to the relief granted in *BNSF*, Decision No. 14 (served April 20, 1995) (relating to Illinois Central Railroad Company) and *UPSP*, Decision No. 14 (served February 15, 1996) (relating to The Texas-Mexican Railway).

**(5) Definition of Applicant carriers**

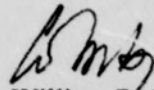
"Applicant carriers" are defined in 49 C.F.R. §1180.3(b) to include "*all carriers related to the applicant*, and all other carriers involved in the transaction." BPRR and ALY request that the Board exclude the primary applicants from this definition since there is sufficient data on the primary applicants and their proposed operations in the primary application. Similar relief has been granted in the past. *See BNSF*, Decision No. 13 (served April 18, 1995), Decision No. 14 (served April 20, 1995) and Decision No. 15 (served April 20, 1995). Additionally, other carrier subsidiaries of GWI should not be considered applicant carriers in the respective sub dockets unless they will be affected by either the primary transaction or the relief requested. On this basis, BPRR and ALY expect that RSR, PSR and possibly Genesee & Wyoming Railroad, Inc. might be considered applicant carriers. However, other affiliates that operate in such remote areas as Louisiana, Florida, Texas, Oregon, and Illinois should not be considered applicant carriers. Information on additional carriers in the corporate family would hinder the Board's

ability to analyze the effect of the primary transaction and the propriety of the anticipated responsive applications.

### CONCLUSION

For the reasons given, BPRR and ALY request that the Board grant the requested requests for clarification and waivers.

Respectfully submitted,



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Dated: August 22, 1997

## CERTIFICATE OF SERVICE

I hereby certify that on this date a copy of the foregoing document was served by first class mail on the following persons and on Parties of Record listed in Decision No. 21:

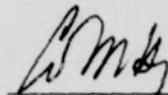
Administrative Law Judge Jacob Leventhal  
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Dated: August 22, 1997



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STB

FD-33388

ID-181585

8-22-97

I



181585

CP-11

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

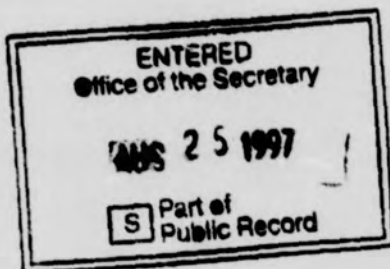
CANADIAN PACIFIC PARTIES'  
PETITION FOR WAIVER OR CLARIFICATION OF  
RAILROAD CONSOLIDATION PROCEDURES

*Filed*  
*8-22-97*

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Hudson Railway Company, Inc.,  
Soo Line Railroad Company, and  
St. Lawrence & Hudson Railway  
Company Limited



August 22, 1997

BEFORE THE  
SURFACE TRANSPORTATION BOARD

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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

---

CANADIAN PACIFIC PARTIES'  
PETITION FOR WAIVER OR CLARIFICATION OF  
RAILROAD CONSOLIDATION PROCEDURES

Pursuant to 49 C.F.R. §§ 1180.3(d)-(e) and § 1180.4(f) and the Board's Decision No. 6, Canadian Pacific Railway Company ("CPR"), Delaware and Hudson Railway Company, Inc. ("D&H"), Soo Line Railroad Company ("Soo"), and St. Lawrence & Hudson Railway Company Limited ("StL&H") (collectively "Canadian Pacific Parties" or "CP") hereby petition the Board <sup>1/</sup> for waiver or clarification of certain requirements of 49 C.F.R. Part 1180 ("Railroad Consolidation Procedures") that may be applicable to the responsive application D&H anticipates filing in this proceeding.

CPR is one of the two major Canadian railroads. It operates a rail network that serves most of the principal centers

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<sup>1/</sup> "Board" refers to the Surface Transportation Board and its predecessor, the Interstate Commerce Commission.

of Canada, as well as, through its own properties and those of its wholly owned subsidiaries D&H, Soo, and StL&H, certain major centers in the midwestern and northeastern United States. CPR acquired the assets of D&H, the nation's oldest transportation company, out of bankruptcy in 1991, and has committed substantial resources in an effort to make D&H a viable competitive force in the northeastern United States.

The proposed transaction -- pursuant to which CSX Corporation and CSX Transportation, Inc. ("CSX") on the one hand, and Norfolk Southern Corporation and Norfolk Southern Railway Company ("NS") on the other, propose to acquire joint control of Conrail Inc. ("CRI") and to divide the assets of Consolidated Rail Corporation ("Conrail") into certain assets to be leased to them individually, certain assets to be sold to them individually, and certain assets to continue to be owned and operated by Conrail -- will threaten the ability of D&H to continue to provide competitive service, and as a consequence will diminish the competitive options available to shippers and the public generally.

To ameliorate the adverse competitive impact of the proposed transaction and its effects on D&H, D&H anticipates filing a responsive application seeking the relief described in Canadian Pacific Parties' Description of Anticipated Responsive Application (CP-10) being filed with the Board today. CP believes that certain information that the Board's Railroad Consolidation Procedures require or may require, as set forth

below, is not necessary for the Board and the parties fully to evaluate D&H's responsive application. Accordingly, CP requests that the Board waive the requirements for providing that information or clarify that the information is not required.

(1) Definition of "Applicant". Section 1180.3(a) 2/ defines "applicant" as one of the "parties initiating a transaction." CP requests a waiver or clarification that D&H is the only "applicant" in regard to the responsive application which D&H anticipates filing in this proceeding. As explained in the accompanying Description of Anticipated Responsive Application (CP-10), that application will seek conditions which pertain only to D&H. The requested reciprocal switching rights, elimination of restrictions in existing D&H trackage rights over Conrail lines, and trackage rights on both the East and West sides of the Hudson River between New York and Albany, would only be exercised by D&H and not by any of the other Canadian Pacific Parties. D&H is a Delaware corporation headquartered in Clifton Park, New York. It has 600 employees and conducts operations over 600 miles of owned track and 900 miles of trackage rights. Although D&H is an integral part of the CP rail system, it is an independent corporate entity which, if competitive rail service is to continue to be provided over its lines, must operate profitably. The proposed transaction threatens D&H's ability to

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2/ All section references are to the Railroad Consolidation Procedures.

continue to provide competitive rail service; the relief to be sought in D&H's responsive application will be designed to ameliorate this threat and the adverse competitive impact of the proposed transaction.

(2) Definition of "Applicant Carriers".

Section 1180.3 defines "applicant carriers" as the "applicant" and "all carriers related to the applicant, and all other carriers involved in the transaction." (Emphasis in original.) CP requests a waiver or clarification that the only "applicant carriers" for purposes of D&H's responsive application are CPR, D&H, Soo, and StL&H, and those Board-regulated rail carriers in which any of the Canadian Pacific Parties have an interest greater than 50%; and further, that "applicant carriers" do not include any rail carriers, apart from the four CP entities identified immediately above, that are not subject to the Board's jurisdiction because they are located entirely in a foreign country.

CP owns a less-than-majority interest in various rail carriers (typically, terminal, switching and shortline railroads that maintain their own records) which are operated and managed independently of CP. It would be significantly burdensome for CP to provide information required for "applicant carriers" in regard to these carriers, and this information would not be of any relevant use in this proceeding. The same is true of rail carriers which are not subject to the Board's jurisdiction.



CP seeks waiver or clarification excluding from "applicant carriers" its motor carrier and water carrier affiliates. 3/ Since Board approval of common control of rail carriers and motor/water carriers is no longer required (by virtue of amendments effected under the ICC Termination Act of 1995), information related to motor/water carriers would be of no relevance to this proceeding.

CP seeks waiver or clarification excluding from "applicant carriers" the Primary Applicants in this proceeding to the extent that D&H's responsive application would involve any of them or their properties.

CP also seeks clarification or waiver that information required under the Railroad Consolidation Procedures may be submitted on a consolidated basis to the extent that in the normal course of business CP maintains its information on that basis. To the extent that information is separately maintained for CPR, D&H, Soo, and StL&H in the normal course of business, it will be provided; such separate information will also be provided to the extent that it is specifically relevant to this proceeding and the conditions being sought by D&H. This will minimize the burden on CP of providing the information, and will afford all

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3/ CP's water carrier affiliates are CP Ships, Inc. and its subsidiaries Canada Maritime Limited and CP Containers (Bermuda) Limited ("CAST"). CAST owns a trucking subsidiary, C-Truck Company.

the information necessary for consideration of D&H's responsive application.

3. Signature of Controlling Persons. Section 1180.4(c)(2)(i) provides that "[a]ny person controlling an applicant shall also sign the application." CPR is a wholly owned subsidiary of Canadian Pacific Limited ("CPL"). CP requests a waiver or clarification that D&H's responsive application need not be accompanied by a signature on behalf of CPL. This signature would serve no useful purpose, and obtaining it would pose an unnecessary administrative burden on CP.

4. Employee Impact Data. Section 1180.6(a)(2)(v) requires an applicant to address "[t]he effect of the proposed transaction upon applicant carriers' employees 'by class or craft', the geographic points where the impact will occur, the time frame of the impact (for at least 3 years after consolidation), and whether any employee protection agreements have been reached." CP requests waiver or clarification that it may use the same breakdown of class or craft as that employed by the Primary Applicants. 4/

5. Minor Transaction. CP requests clarification that D&H's responsive application constitutes a minor transaction. Under Section 1180.2(c), "[a] minor transaction is one which involves more than one railroad and which is not a major,

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4/ The breakdown is set forth in Appendices A and B to the Board's Decision No. 7 in this proceeding.

significant, or exempt transaction." (Emphasis in original.)

The relief to be sought in D&H's responsive application does not meet the definition of either a major (Section 1180.2(a)) or an exempt (Section 1180.2(d)) transaction, and does not constitute a significant (Section 1180.2(b)) transaction because it does not seek relief "that is of regional or national transportation significance as that phrase is used in 49 U.S.C. 11325(a)(2) and (c)." 5/ Moreover, the relief being sought "clearly will not have any anticompetitive effects," and even if there were any anticompetitive effects (there would not be), they would "clearly be outweighed by the transaction's anticipated contribution to the public interest in meeting significant transportation needs." Section 1180.2(b).

The reciprocal switching rights being sought by D&H are in terminal areas through which D&H already operates; the removal of restrictions in existing Conrail trackage rights simply seeks to make D&H's service, utilizing those existing rights, more competitive; and the trackage rights being sought between New York and Albany relate to areas already generally served by D&H, albeit via routings substantially less direct and with access to substantially fewer shippers than would be the case under the proposed trackage rights. Under any definition, the rights being sought constitute a minor transaction.

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5/ 49 U.S.C. §§ 11325(a)(2) and (c) merely use the phrase "regional or national transportation significance," and do not define it.

6. Corporate Information and Reports (Alternative to Request No. 5). To the extent that D&H's responsive application is deemed to constitute a significant transaction, CP requests waiver or clarification of the following requirements of Section 1180.6(b) :

(a) Section 1180.6(b)(3) requires applicants to indicate any change in officers not indicated in the most recent annual report Form R-1. If D&H is deemed the only applicant, this requirement will not present a problem; but CP has a large number of officer positions that might conceivably be within the scope of this requirement, and hence any broadening of applicant status beyond D&H would present a significant difficulty in this regard. Compilation of a complete list of CP officer changes would be very burdensome and of no practical use in this proceeding. CP seeks waiver or clarification that, if D&H is not deemed the only applicant, CP be required to list only the principal five officers of each of the Canadian Pacific Parties.

(b) Section 1180.6(b)(6) requires submission of a corporate chart "indicating all relationships between applicant carriers and all affiliates and subsidiaries and also companies controlling applicant carriers directly, indirectly or through another entity. . . ." CP seeks partial waiver or clarification of this requirement, so as to allow meaningful and non-burdensome information to be provided to the Board. CP proposes to list only those officers and directors who are common as between

(i) any of the Canadian Pacific Parties (including their majority

owned subsidiaries) and (ii) either any of the Primary Applicants (including their majority owned subsidiaries) or any carrier outside of the corporate families of the Primary Applicants (including their majority owned subsidiaries).

(c) Section 1180.6(b)(8) requires disclosure of certain intercorporate or financial relationships between applicant carriers or affiliated persons and other carriers or any persons affiliated with them. CP seeks waiver or clarification that this requirement pertains only to significant intercorporate or financial relationships. CP requests that it be permitted to describe only those relationships involving ownership by CP or its affiliates of more than 5% of a non-affiliated carrier's stock, including those relationships in which a group affiliated with CP owns more than 5% of a non-affiliated carrier's stock.

7. Operating Plan (Alternative to Request No. 5). To the extent that D&H's responsive application is deemed to constitute a significant transaction, CP requests waiver or clarification of the requirements of Section 1180.8 so that D&H will be permitted to submit operating plan information required pursuant to Section 1180.8(b), which prescribes operating plan requirements for minor transactions, rather than being required to satisfy the substantially more burdensome requirements of Section 1180.8(a), which establishes the operating plan requirements for major and significant transactions. The relief to be sought in D&H's responsive application will be limited in



scope. The reciprocal switching rights and elimination of restrictions in existing Conrail trackage rights will not involve any complex operating changes. Each of the two trackage rights requests between New York and Albany will initially involve only one train a day each way. The exhaustive operating information required under Section 1180.8(a) is unnecessary to allow a complete assessment of the operating issues associated with D&H's responsive application; the less burdensome information required under Section 1180.8(b) would be more than sufficient to allow such an assessment.

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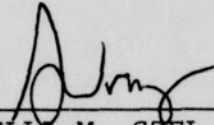
In Decision No. 7, the Board granted waiver/clarification requests submitted by Primary Applicants which were similar to those set forth above in paragraphs 2, 4, and 6. As for the requests set forth in paragraphs 1, 3, 5 and 7, the Board granted similar requests in, among other decisions, Finance Docket No. 32760, Union Pacific Corp. et al. -- Control and Merger -- Southern Pacific Rail Corp., et al., Decision No. 14 (served February 15, 1996).

. . .

Conclusions

For the reasons set forth above, CP requests that the waivers and clarifications sought herein be granted.

Respectfully submitted,



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Soo Line Railroad Company, and  
St. Lawrence & Hudson Railway  
Company Limited

August 22, 1997

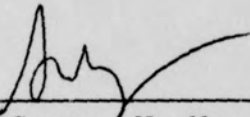
CERTIFICATE OF SERVICE

I hereby certify that on this 22nd day of August, 1997, I served by the means indicated below a copy of the foregoing Canadian Pacific Parties' Petition for Waiver or Clarification of Railroad Consolidation Procedures on the following:

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

Counsel for Applicants  
(by hand or first-class mail)

Counsel for all parties of record (certain such counsel, identified for the first time in the Board's recently published service list, will be served within 10 days of the service date of such service list)  
(by first-class mail)



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George W. Mayo, Jr.

STB

FD-33388

ID-181372

8-22-97

I

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August 22, 1997

**VIA HAND DELIVERY**

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

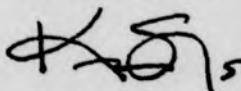
**Re: Finance Docket No. 33388, CSX Corporation and CSX Transportation, Inc.,  
Norfolk Southern Corporation and Norfolk Southern Railway Company --  
Control and Operating Leases/Agreements -- Conrail Inc. and Consolidated  
Rail Corporation -- Transfer of Railroad Line by Norfolk Southern Railway 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

Dear Secretary Williams:

Enclosed you will find an original and 25 copies of the Description of Anticipated Responsive Application of New Jersey Transit Corporation (NJT-3) and the Petition for Clarification or Waiver of New Jersey Transit Corporation (NJT-4). Also enclosed is a 3.5 inch diskette containing the filings in WordPerfect 5.1.

Please contact the undersigned if you have any questions regarding this matter.

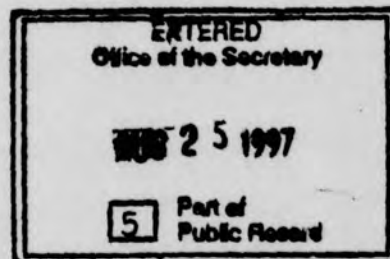
Respectfully submitted,



Kevin M. Sheys

Enclosures

cc: All Parties of Record on Service List



Chicago

Detroit

Geneva

Irvine

Los Angeles

Minneapolis

New York

Paris

Saint Paul

San Jose

Washington, D.C.



181372

BEFORE THE  
SURFACE TRANSPORTATION BOARD

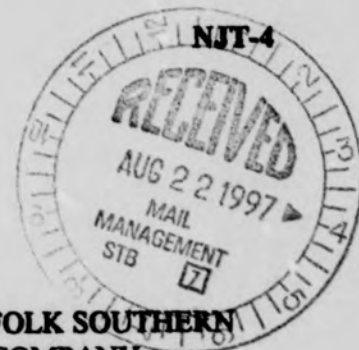
Finance Docket No. 33388

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

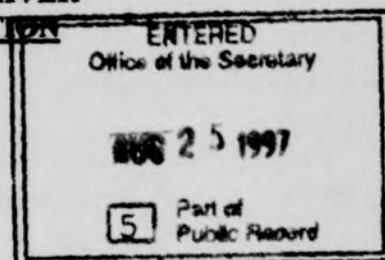
Finance Docket No. 33388 (Sub-No. 38)

NEW JERSEY TRANSIT CORPORATION  
-- OPERATING RIGHTS --  
LINES OF CONSOLIDATED RAIL CORPORATION

**PETITION FOR CLARIFICATION OR WAIVER  
OF NEW JERSEY TRANSIT CORPORATION**



I



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(202) 293-6300

Counsel for New Jersey Transit Corporation

Dated: August 22, 1997

**BEFORE THE  
SURFACE TRANSPORTATION BOARD**

---

**Finance Docket No. 33388**

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

**Finance Docket No. 33388 (Sub-No. 38)**

**NEW JERSEY TRANSIT CORPORATION  
-- OPERATING RIGHTS --  
LINES OF CONSOLIDATED RAIL CORPORATION**

---

**PETITION FOR CLARIFICATION OR WAIVER  
OF NEW JERSEY TRANSIT CORPORATION**

Pursuant to 49 C.F.R. § 1180.4(f) and Decision Nos. 6 and 12 herein, served on May 30, 1997 and July 23, 1997, respectively, New Jersey Transit Corporation ("NJT") hereby submits this petition for clarification that certain conditions to be sought by NJT in connection with any Surface Transportation Board approval of the Primary Application herein do not require the filing of a responsive application under 49 C.F.R. § 1180.4(d)(4). Alternatively, NJT requests clarification or waiver of certain informational requirements contained in the Board's Railroad Consolidation Procedures, 49 C.F.R. § 1180, which would otherwise govern any responsive application filed in this proceeding by NJT.

NJT is a corporation and an instrumentality of the State of New Jersey exercising public and essential services. N.J.S.A. § 27:25-4(a). New Jersey Transit Rail Operations, Inc. ("NJTRO"), an operating subsidiary of NJT, operates approximately 591 commuter rail trains



each weekday over 972 miles of rail line in the State of New Jersey owned by NJT and by Consolidated Rail Corporation ("Conrail"), a Primary Applicant in this proceeding. NJT is participating in this proceeding as a party of record with the New Jersey Department of Transportation ("NJDOT"). As is explained more fully in NJT's Description of Anticipated Responsive Application (NJT-3) filed concurrently herewith, NJT will seek operating rights for NJT's commuter service on several Conrail line segments in New Jersey as a condition to any approval of the Primary Application.

Because the commuter rail operating rights which NJT will seek would not ordinarily require Board authorization or approval, NJT does not believe that a responsive application is necessary to seek those rights as conditions in this proceeding. NJT requests that the Board confirm this understanding. If a responsive application is required, NJT believes that certain information and data required by the Board's Railroad Consolidation Procedures would not materially assist the Board or other parties in evaluating such an application and would be an undue burden on NJT to prepare. NJT would thus request that the Board waive or clarify those information requirements in the manner suggested below.

1. Need for Responsive Application

Under the Board's Railroad Consolidation Procedures, a responsive application is necessary when the relief or condition sought in response to a Primary Application would require Board authorization if accomplished voluntarily outside of a control or merger context:

Responsive applications include inconsistent applications, inclusion applications, and any other affirmative relief that requires an application, petition, notice, or any other filing to be submitted to the Board (such as trackage rights, purchases, constructions, operation, pooling, terminal operations, abandonments, and other types of proceedings not otherwise covered).

49 C.F.R. § 1180.3(h) (as revised by Railroad Consolidation Procedures -- Modification of Fee Policy, Ex Parte No. 556 (STB served March 4, 1997 and May 5, 1997)). Decision No. 12 in this proceeding likewise provides that descriptions of responsive applications "must state that the commenting railroad intends to file an application seeking affirmative relief that requires an application to be filed with the Board (e.g., divestiture, purchase, trackage rights, inclusion, construction or abandonment) . . . ." Decision No. 12 (STB served July 23, 1997) at 20.<sup>1</sup> Phrased differently, where the Board would not otherwise have jurisdiction over the transaction encompassed within a proposed condition, a responsive application is not necessary.

Here, NJT will seek operating rights on several Conrail lines for the purpose of conducting commuter rail operations. Under the ICC Termination Act of 1995 ("ICCTA"), Pub. L. No 104-88, 109 Stat. 803, the Board "does not have jurisdiction under this part over mass transportation provided by a local governmental authority." 49 U.S.C. § 10501(c)(2). The terms "local governmental authority" and "mass transportation" are defined in Section 10501(c)(1)(A) and (B), respectively, largely by cross-reference to 49 U.S.C. § 5302(a). The definitions in Section 5302(a), in turn, plainly encompass NJT as a "local governmental authority" and encompass NJT's commuter rail service as "mass transportation."<sup>2</sup>

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<sup>1</sup> The recent revisions to the railroad consolidation fee policy confirm this relationship between responsive applications and transactions normally requiring Board approval by providing that "[t]he fee for any other types of responsive applications [i.e., that are not inconsistent applications] is the fee for the particular type of proceeding set forth in 49 CFR 1002.2(f)." 49 C.F.R. § 1180.4(d)(4)(ii).

<sup>2</sup> 49 U.S.C. § 5302(a)(6) provides that "local governmental authority" includes a political subdivision of a state, an authority of at least one state and a public corporation, board, or commission established under the laws of a state. 49 U.S.C. § 5302(a)(7) defines "mass transportation" as "transportation by a conveyance that provides regular and continuing general or special transportation to the public, but does not include schoolbus, charter or sightseeing transportation."

The Conference Report accompanying the ICCTA explained that Congress "change[d] the statement of agency jurisdiction [in new Section 10501] to reflect curtailment of regulatory jurisdiction in areas such as passenger transportation," and further explained that "local governmental authorities are to be excluded from economic regulation (rates, fares, entry and exit) under the amended statute." H.R. Conf. Rep. No. 422, 104th Cong., 1st Sess. 167, 184.<sup>3</sup> In decisions issued since enactment of the ICCTA, the Board has acknowledged the absence of jurisdiction under Section 10501 over commuter rail operations. See Commuter Rail Division of the Regional Transportation Authority of Northeast Illinois, d/b/a Metra -- Exemption -- Tariff Filing Requirements, No. 41506 (STB served March 29, 1996).

Even before ICCTA's passage, the Interstate Commerce Commission had consistently held that grants of "trackage rights" to commuter rail operators were not subject to the agency's jurisdiction and did not require ICC approval. Orange County Transp. -- Exempt. -- Atchison, T. & S.F. Ry. Co., 10 I.C.C.2d 73, 90 (1994); Southern Pac. Transp. Co. -- Aban. -- L.A. County, CA, 9 I.C.C.2d 385, 391-392 (1993); see also Los Angeles County Transportation Commission -- Petition for Exemption -- Acquisition from Union Pacific Railroad Company, Finance Docket No 32374, et al. (STB served July 23, 1996). Particularly given the reinforcement of this law by the ICCTA, NJT believes that its request for commuter rail operating rights on several Conrail line segments would not otherwise require Board authorization and therefore need not be the subject of a responsive application herein.

<sup>3</sup> In describing the Senate's prior, similar version of the legislation, the Conference Report stated that "[t]he Board's rail jurisdiction would be limited to freight transportation, because rail passenger transportation today [other than Amtrak] is now purely local or regional in nature and should be regulated (if at all) at that level." H.R. Conf. Rep. No. 422, 104th Cong., 1st Sess. 167.



NJT thus respectfully requests that the Board clarify that NJT is not required to file a responsive application in this proceeding. If this request is granted, NJT will pursue its anticipated request for conditions in its comments and evidentiary submission due on October 21, 1997.

2. Market Impact Analyses

If the Board denies the foregoing request and requires NJT to file a responsive application, NJT alternatively seeks waiver of the informational requirements of 49 C.F.R. § 1180.7, so that NJT will not need to provide market impact analyses in connection with its responsive application. As the regulation itself makes clear, these analyses relate to freight traffic and competitive considerations, and would not be relevant to the commuter rail operating rights that NJT intends to seek.<sup>4</sup> A requirement that NJT provide such information would be burdensome and confusing, and would not assist the Board and other parties in evaluating the merits of NJT's responsive application. Waiver of the information specified in Section 1180.7 is reasonable and appropriate under the circumstances.

3. Definition of "Applicant Carriers"

49 C.F.R. § 1180.3(b) defines "applicant carriers" to include the "[a]pplicant, all carriers related to the applicant, and all other carriers involved in the transaction" (emphasis omitted). NJT seeks clarification or waiver of Section 1180.3(b) to exclude the Primary Applicants from the definition of "applicant carriers," so that NJT will not need to provide separate information on the Primary Applicants in connection with its responsive application.

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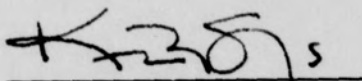
<sup>4</sup> See 49 C.F.R. § 1180.7 ("[A]pplicants shall submit analyses of the impacts of the proposed transaction -- both adverse and beneficial -- on inter- and intramodal competition for freight surface transportation in the regions affected by the transaction . . .").

Provision of such information would be burdensome to NJT and would not materially assist the evaluation of NJT's responsive application. Furthermore, sufficient information regarding the Primary Applicants should already be available in the Primary Application.

The Board and its predecessor have consistently granted prior requests for similar waiver or clarification. E.g., Union Pacific Corporation, Union Pacific Railroad Company and Missouri Pacific Railroad Company -- Control and Merger -- Southern Pacific Rail Corporation, Southern Pacific Transportation Company, St. Louis Southwestern Railway Company, SPCSL Corp. and The Denver and Rio Grande Western Railroad Company, Finance Docket No. 32760, Decision No. 14 (STB served February 15, 1996) at 3; Union Pacific Corporation, Union Pacific Railroad Company and Missouri Pacific Railroad Company -- Control -- Chicago and North Western Holdings Corp. and Chicago and North Western Transportation Company, Finance Docket No. 32133, Decision No. 7 (ICC served June 8, 1993) at 1. Such relief is warranted here as well.

WHEREFORE, NJT respectfully requests that the Board determine that a responsive application is not required for the commuter rail operating conditions which NJT anticipates seeking herein, or alternatively that the Board grant waiver or clarification of its Railroad Consolidation Procedures as specified above.

Respectfully submitted,



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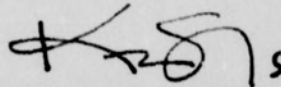
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(202) 293-6300

Counsel for New Jersey Transit Corporation

Dated: August 22, 1997

**CERTIFICATE OF SERVICE**

I hereby certify that on this 22nd day of August, 1997, a copy of the foregoing **Petition for Clarification or Waiver of New Jersey Transit Corporation (NJT-4)** was served by first class mail, postage prepaid, upon Administrative Law Judge Jacob Leventhal and all Parties of Record on the Service List.

A handwritten signature in black ink, appearing to read 'K. Sheys', is written above a horizontal line.

Kevin M. Sheys

STB

FD-33388

ID-181370

8-22-97

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181370

BEFORE THE  
SURFACE TRANSPORTATION BOARD

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FINANCE DOCKET No. 33388

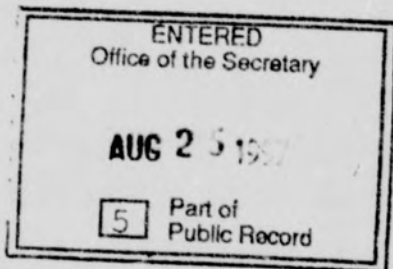
CSX CORPORATION AND CSX TRANSPORTATION, INC., NORFOLK  
SOUTHERN CORPORATION AND NORFOLK SOUTHERN RAILWAY COMPANY  
-- CONTROL AND OPERATING LEASES/AGREEMENTS --  
CONRAIL INC. AND CONSOLIDATED RAIL CORPORATION

FINANCE DOCKET NO. 33388 (SUB-NO. 63)

R.J. CORMAN RAILROAD COMPANY/WESTERN OHIO LINE  
-- PURCHASE OR TRACKAGE RIGHTS --  
LINE OF CONSOLIDATED RAIL CORPORATION

---

**PETITION FOR CLARIFICATION OR  
WAIVER OF R.J. CORMAN PARTIES**



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Thomas J. Litwiler  
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Suite 400  
Washington, DC 20036  
(202) 293-6300

**ATTORNEYS FOR R.J. CORMAN PARTIES**

Dated: August 22, 1997

BEFORE THE  
SURFACE TRANSPORTATION BOARD

FINANCE DOCKET NO. 33388

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

FINANCE DOCKET NO. 33388 (SUB-NO. 63)

R.J. CORMAN RAILROAD COMPANY/WESTERN OHIO LINE  
-- PURCHASE OR TRackage RIGHTS --  
LINE OF CONSOLIDATED RAIL CORPORATION

**PETITION FOR CLARIFICATION OR  
WAIVER OF R.J. CORMAN PARTIES**

Pursuant to 49 C.F.R. § 1180.4(f) and Decision Nos. 6 and 12 herein, served on May 30, 1997 and July 23, 1997, respectively, the R.J. Corman Parties<sup>1</sup> hereby submit this petition for clarification or waiver of certain requirements of the Board's Railroad Consolidation Procedures, 49 C.F.R. § 1180, which might otherwise apply to the responsive application which R.J. Corman Railroad Company/Western Ohio Line ("RJCW") intends to file in this proceeding on or before October 21, 1997.

<sup>1</sup> R.J. Corman Railroad Corporation ("RJCR"), R.J. Corman Railroad Company/Memphis Line ("RJCM"), R.J. Corman Railroad Company/Western Ohio Line ("RJCW"), R.J. Corman Railroad Company/Cleveland Line ("RJCC"), R.J. Corman Railroad Company/Pennsylvania Lines Inc. ("RJCP"), R.J. Corman Railroad Company/Allentown Lines, Inc. ("RJCN") and R.J. Material Sales Company are collectively referred to herein as the "R.J. Corman Parties" or "RJC."



RJCW is a Class III railroad which operates a rail line between Lima, Ohio and the Ohio/Indiana border. RJCW also operates a 30-mile rail line between Lima and Glenmore, Ohio pursuant to a modified certificate of public convenience and necessity. RJCW is controlled by Richard J. Corman, who also controls six other rail carriers. As is explained in the R.J. Corman Parties' Description of Anticipated Responsive Application (RJC-2), filed concurrently herewith, RJCW expects that it will file a responsive application seeking to purchase or acquire trackage rights over a \_\_-mile rail line in Lima owned by Consolidated Rail Corporation ("Conrail").

RJCW believes that certain information and data required by the Board's Railroad Consolidation Procedures would not materially assist the Board or other parties in evaluating RJCW's responsive application, and that preparation of such information would be unduly burdensome on RJCW. RJCW thus respectfully requests that the Board waive or clarify those information requirements in the following manner:

1. Minor Transaction. RJCW seeks clarification that its anticipated responsive application involves a "minor" transaction as defined in 49 C.F.R. § 1180.2(c). The Board's regulations previously provided a rebuttable presumption that responsive applications which were not major transactions were considered significant transactions. Former 49 C.F.R. § 1180.4(d)(4)(ii) (1996); see also 49 C.F.R. § 1180.4(d)(4)(iv). The Board recently eliminated that presumption, specifically noting that "under current Board practice, responsive applications may also be found to be minor transactions." Railroad Consolidation Procedures -- Modification of Fee Policy, Ex Parte No. 556 (STB served March 4, 1997) at 3. A responsive application proposing a minor transaction must contain the information specified in 49 C.F.R. § 1180.6(a) and the operational data required by 49 C.F.R. § 1180.8(b). Significant transactions require additional information, including market analyses (49 C.F.R. § 1180.7), more detailed operational

data (49 C.F.R. § 1180.8(a)) and information relating to corporate ownership, function and relationships (49 C.F.R. § 1180.5(c)).

The responsive application that RJCW anticipates filing clearly is not a major transaction, because it does not involve the control or merger of two or more Class I railroads. It is therefore necessarily either a significant transaction or a minor transaction. 49 C.F.R. § 1180.2(a), (b) and (c). Section 1180.2(b) provides that a significant transaction is one of national or regional transportation significance, and that a transaction is not significant if it clearly will not have any anticompetitive effects. Here, RJCW seeks to acquire about 2.3 miles of trackage or trackage rights in a single city from Conrail. The proposed transaction will ensure the continuation of effective rail service to shippers on RJCW's Lima-Glenmore line, and clearly will have no anticompetitive effect. Given the limited scope of the relief which it intends to seek, RJCW believes its anticipated responsive application should be considered a minor transaction.

The Board has previously granted similar requests involving more extensive responsive applications than that contemplated by RJCW here. Union Pacific Corporation, Union Pacific Railroad Company and Missouri Pacific Railroad Company -- Control and Merger -- Southern Pacific Rail Corporation, Southern Pacific Transportation Company, St. Louis Southwestern Railway Company, SPCSL Corp. and The Denver and Rio Grande Western Railroad Company, Finance Docket No. 32760 ("UP/SP"), Decision No. 13 (STB served February 15, 1996) at 3 (responsive applications involving requests for trackage rights on 375 miles and 178 miles of line found to be "minor"); UP/SP, Decision No. 14 (STB served February 15, 1996) at 5 (responsive application involving request for approximately 350 miles of trackage rights found to be "minor"). The Board should make a similar finding with respect to RJCW's anticipated responsive application herein.

2. Definition of "Applicant Carriers"

49 C.F.R. § 1180.3(b) defines "applicant carriers" to include the "[a]pplicant, *all carriers related to the applicant*, and all other carriers involved in the transaction" (emphasis in original). RJCW seeks clarification or waiver of this definition of "applicant carrier" to exclude the other six other carriers controlled by Richard J. Corman. These carriers are operated independently of RJCW, and none connect with RJCW. RJCR owns and operates a 20-mile rail line between Bardstown Junction and Wickland, Kentucky. RJCM owns and operates 72 miles of rail line in Tennessee and Kentucky. RJCC owns, leases and operates 50 miles of rail line between Warwick and Uhrichsville in eastern Ohio. RJCP operates 230 miles of rail line in central Pennsylvania. RJCN operates rail lines in and around Allentown, Pennsylvania. The Clearfield & Mahoning Railway Company ("C&M") owns approximately 7 miles of trackage in central Pennsylvania which is leased to and operated by RJCP.

In each instance, these carriers are unrelated both physically and functionally to the subject matter of RJCW's anticipated responsive application. RJCW's purchase of or acquisition of trackage rights over the Conrail Lima segment will neither affect nor be affected by the common ownership of these other carriers. Requiring RJCW to provide the information required of "applicant carriers" for RJCR, RJCM, RJCC, RJCP, RJCN and C&M would be unduly burdensome on RJCW and would not materially assist the evaluation of RJCW's anticipated responsive application.

RJCW's request to exclude these carriers from the definition of "applicant carrier" is consistent with numerous waivers or clarifications granted in prior proceedings also involving the operationally-independent carrier subsidiaries or sister companies of an applicant. E.g., Union Pacific Corporation, Union Pacific Railroad Company and Missouri Pacific Railroad Company --



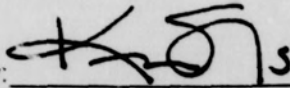
Control and Merger -- Southern Pacific Rail Corporation, Southern Pacific Transportation Company, St. Louis Southwestern Railway Company, SPCSL Corp. and The Denver and Rio Grande Western Railroad Company, Finance Docket No. 32760 ("UP/SP"), Decision No. 14 (STB served February 15, 1996) at 4. A similar clarification or waiver of the 49 C.F.R. § 1180.3(b) definition of "applicant carriers" as it relates to the RJCW's affiliated carriers is reasonable and warranted under the circumstances.

RJCW also seeks clarification or waiver of Section 1180.3(b) to exclude the Primary Applicants as "applicant carriers," so that RJCW will not need to provide separate information on the Primary Applicants in connection with its responsive application. Provision of such information would be burdensome to RJCW and is not necessary for a proper evaluation of its responsive application. Furthermore, sufficient information regarding the Primary Applicants should already be available in the Primary Application.

The Board and its predecessor have consistently granted prior requests for similar waivers or clarification. E.g., UP/SP, Decision No. 14 at 3; Union Pacific Corporation, Union Pacific Railroad Company and Missouri Pacific Railroad Company -- Control -- Chicago and North Western Holdings Corp. and Chicago and North Western Transportation Company, Finance Docket No. 32133, Decision No. 7 (ICC served June 8, 1993) at 1. Such relief is warranted here as well.

WHEREFORE, the R.J. Corman Parties respectfully request that the Board grant waiver or clarification of its Railroad Consolidation Procedures to the extent specified above.

Respectfully submitted,

By:  \_\_\_\_\_

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**ATTORNEYS FOR R.J. CORMAN PARTIES**

Dated: August 22, 1997

**CERTIFICATE OF SERVICE**

I hereby certify that on this 22nd day of August, 1997, a copy of the foregoing **Petition for Clarification or Waiver of F. J. Corman Parties (RJC-3)**, was served by first class mail, postage prepaid, upon Administrative Law Judge Jacob Leventhal and all Parties of Record on the Service List.

  
\_\_\_\_\_  
Kevin M. Sheys

STB

FD-33388

ID-181367

8-22-97

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Chicago

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New York

Paris

Saint Paul

Washington, D.C.

August 22, 1997



**VIA HAND DELIVERY**

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

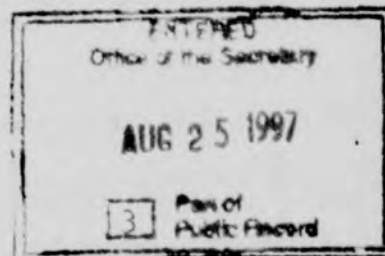
Re: **Finance Docket No. 33388**  
**CSX Corporation and CSX Transportation, Inc.,**  
**Norfolk Southern Corporation and Norfolk**  
**Southern Railway Company -- Control and**  
**Operating Leases/Agreements -- Conrail Inc.**  
**and Consolidated Rail Corporation**

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

Dear Secretary Williams:

Enclosed for filing in the above-captioned proceeding are an original and twenty-five copies of the **Description of Anticipated Responsive Application of Transtar, Inc. and Elgin, Joliet and Eastern Railway Company (EJE-3)** and the **Petition for Clarification or Waiver of Transtar, Inc. and Elgin, Joliet and Eastern Railway Company (EJE-4)**, both dated August 22, 1997. A computer diskette containing the text of these filings in WordPerfect 5.1 format also is enclosed.

In accordance with the Board's recently-issued service list, copies of EJE-3 and EJE-4 have been served by first class mail, postage prepaid, on all designated parties of record in this proceeding.



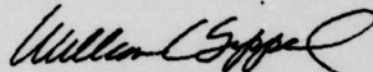


OPPENHEIMER WOLFF & DONNELLY

Mr. Vernon A. Williams  
August 22, 1997  
Page 2

If you have any questions regarding this filing, please feel free to contact me. Thank you for your assistance on this matter.

Respectfully submitted,



William C. Sippel  
Attorney for Transtar, Inc.  
and Elgin, Joliet and Eastern  
Railway Company

WCS:tjl

Enclosures

cc: Parties on Certificate of Service

181367

BEFORE THE  
SURFACE TRANSPORTATION BOARD

FINANCE DOCKET NO. 33388

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

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

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

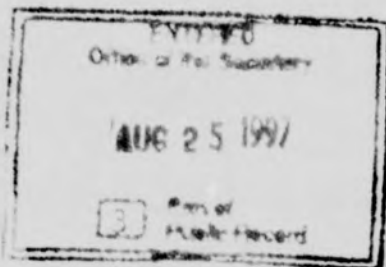
**PETITION FOR CLARIFICATION OR WAIVER OF TRANSTAR, INC.  
AND ELGIN, JOLIET AND EASTERN RAILWAY COMPANY**

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180 North Stetson Avenue  
Chicago, Illinois 60601  
(312) 616-1800

**ATTORNEYS FOR TRANSTAR, INC.  
AND ELGIN, JOLIET AND EASTERN  
RAILWAY COMPANY**

Dated: August 22, 1997



BEFORE THE  
SURFACE TRANSPORTATION BOARD

---

FINANCE DOCKET NO. 33388

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

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

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

---

**PETITION FOR CLARIFICATION OR WAIVER OF TRANSTAR, INC.  
AND ELGIN, JOLIET AND EASTERN RAILWAY COMPANY**

Pursuant to 49 C.F.R. § 1180.4(f) and Decision Nos. 6 and 12 herein, served on May 30, 1997 and July 23, 1997, respectively, Transtar, Inc. ("Transtar") and Elgin, Joliet and Eastern Railway Company ("EJE") hereby submit this petition for clarification or waiver of certain requirements of the Board's Railroad Consolidation Procedures, 49 C.F.R. § 1180, which might otherwise apply to the responsive application which Transtar and EJE expect to file in this proceeding on or before October 21, 1997.

Transtar is a transportation holding company that controls EJE and seven other rail carriers. EJE is a Class I railroad which owns or operates approximately 196 miles of mainline and branchline trackage in northwest Indiana and northern Illinois. As is more fully explained in the Description

of Anticipated Responsive Application (EJE-3) filed concurrently herewith, Transtar and EJE expect that they will file a responsive application seeking to acquire control of the Indiana Harbor Belt Railroad Company ("IHB").<sup>1</sup> IHB provides intermediate switching and other terminal services on approximately 100 miles of rail line in and around the Chicago switching district. IHB currently is controlled by Consolidated Rail Corporation ("Conrail"), a Primary Applicant herein, through ownership of 51% of IHB's stock. Transtar and EJE intend to seek divestiture of Conrail's interest in IHB as a condition to any approval of the Primary Application.

Transtar and EJE believe that certain information and data required by the Board's Railroad Consolidation Procedures would not materially assist the Board or other parties in evaluating the Transtar/EJE responsive application, and that preparation of such information would be unduly burdensome on Transtar and EJE. Transtar and EJE thus respectfully request that the Board waive or clarify those information requirements in the following manner:

Definition of "Applicant carriers"

49 C.F.R. § 1180.3(b) defines "applicant carriers" to include the "[a]pplicant, all carriers related to the applicant, and all other carriers involved in the transaction" (emphasis in original). Transtar and EJE seek clarification or waiver of this

<sup>1</sup> Transtar Holdings L.P. ("Holdings"), which owns 51% of the stock of Transtar, and Holdings' controlling general partner, Blackstone Transportation Company, Inc., also will join as parties to the responsive application to the extent necessary.

definition of "applicant carrier" to exclude the seven carriers besides EJE that are controlled by Transtar.<sup>2</sup> These carriers are operated independently of EJE, and none connect with EJE or IHB. BLE, MKC and URR operate rail lines in western Pennsylvania, with BLE's line extending into northeast Ohio.<sup>3</sup> DMIR handles primarily iron ore traffic on rail lines in northeast Minnesota and northwest Wisconsin. BS and LT provide switching services in and around Birmingham, Alabama and Lorain, Ohio, respectively. P&C operates a rail/water dock facility at Conneaut, Ohio.

In each instance, these carriers are unrelated both physically and functionally to the subject matter of Transtar/EJE's anticipated responsive application. Divestiture of Conrail's existing ownership interest in the IHB to Transtar or EJE will neither affect nor be affected by Transtar's ownership of these other carriers. Requiring Transtar to provide the information required of "applicant carriers" for BLE, BS, DMIR, LT, MKC, P&C and URR would be unduly burdensome on Transtar and EJE and would not materially assist the evaluation of Transtar/EJE's anticipated responsive application.

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<sup>2</sup> Bessemer and Lake Erie Railway Company ("BLE"), Birmingham Southern Railroad Company ("BS"), Duluth, Missabe and Iron Range Railway Company ("DMIR"), The Lake Terminal Railroad Company ("LT"), McKeesport Connecting Railroad Company ("MKC"), The Pittsburgh & Conneaut Dock Company ("P&C") and Union Railroad Company ("URR").

<sup>3</sup> BLE is a party of record in this proceeding and with Transtar anticipates separately filing a responsive application seeking trackage rights over certain NSR and former Conrail lines in southwestern Pennsylvania. See Finance Docket No. 33388 (Sub-No. 61), BLE-3. The relief sought by BLE and EJE are not related.



Transtar/EJE's request to exclude these carriers from the definition of "applicant carrier" is consistent with numerous waivers or clarifications granted in prior proceedings also involving the operationally-independent carrier subsidiaries or sister companies of an applicant. E.g., Union Pacific Corporation, Union Pacific Railroad Company and Missouri Pacific Railroad Company -- Control and Merger -- Southern Pacific Rail Corporation, Southern Pacific Transportation Company, St. Louis Southwestern Railway Company, SPCSL Corp. and The Denver and Rio Grande Western Railroad Company, Finance Docket No. 32760 ("UP/SP"), Decision No. 14 (STB served February 15, 1996) at 4; Union Pacific Corporation, Union Pacific Railroad Company and Missouri Pacific Railroad Company -- Control -- Chicago and North Western Holdings Corp. and Chicago and North Western Transp. Co., Finance Docket No. 32133 ("UP/CNW"), Decision No. 7 (ICC served June 8, 1993) at 2.<sup>4</sup> A similar clarification or waiver of the 49 C.F.R. § 1180.3(b) definition of "applicant carriers" as it relates to Transtar's carrier subsidiaries (other than EJE) is reasonable and warranted under the circumstances.

Transtar and EJE also seek clarification or waiver of Section 1180.3(b) to exclude the Primary Applicants as "applicant carriers," so that Transtar/EJE will not need to provide separate information on the Primary Applicants in connection with their

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
<sup>4</sup> While these decisions have generally involved rail carriers in which the applicants possessed a minority interest or carriers of another mode (such as motor carriers), their rationale applies equally here. As in these prior cases, the other carriers which Transtar controls have no material relevance to the relief sought in or issues associated with Transtar/EJE's anticipated responsive application.

responsive application. Provision of such information would be burdensome to Transtar and EJE and is not necessary for a proper evaluation of their responsive application. Furthermore, sufficient information regarding the Primary Applicants should already be available in the Primary Application.

The Board and its predecessor have consistently granted prior requests for similar waivers or clarification. E.g., UP/SP, Decision No. 14 at 3; UP/CNW, Decision No. 7 at 1. Such relief is warranted here as well.

WHEREFORE, Transtar and EJE respectfully request that the Board grant waiver or clarification of its Railroad Consolidation Procedures to the extent specified above.

Respectfully submitted,

By: William C. Sippel   
Robert N. Gentile  
Colette Ferris-Shotton  
Transtar, Inc.  
135 Jamison Street  
P.O. Box 68  
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(412) 829-6890

William C. Sippel  
Kevin M. Sheys  
Oppenheimer Wolff & Donnelly  
Two Prudential Plaza, 45th Floor  
180 North Stetson Avenue  
Chicago, Illinois 60601  
(312) 616-1800

**ATTORNEYS FOR TRANSTAR, INC.  
AND ELGIN, JOLIET AND EASTERN  
RAILWAY COMPANY**

Dated: August 22, 1997

CERTIFICATE OF SERVICE

I hereby certify that on this 22nd day of August, 1997, a copy of the foregoing Petition for Clarification or Waiver of Transtar, Inc. and Elgin, Joliet and Eastern Railway Company (EJE-4) was served by first class mail, postage prepaid, upon:

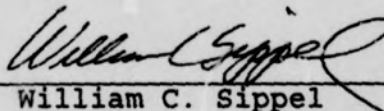
Dennis G. Lyons, Esq.  
Arnold & Porter  
555 12th Street, N.W.  
Washington, DC 20004-1202

Richard A. Allen, Esq.  
Zuckert, Scoutt & Rasenberger, L.L.P.  
888 Seventeenth Street, N.W.  
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Washington, DC 20006-3939

Paul A. Cunningham, Esq.  
Harkins Cunningham  
1300 Nineteenth Street, N.W.  
Suite 600  
Washington, DC 20036

Hon. Jacob Leventhal  
Administrative Law Judge  
Federal Energy Regulatory Commission  
888 First Street, N.E., Suite 11F  
Washington, DC 20426

and upon all parties of record appearing on the Surface Transportation Board's official service list in this proceeding, served August 19, 1997.

  
\_\_\_\_\_  
William C. Sippel

STB

FD-33388

ID-181661

8-22-97

I

181661

CN-9

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.

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CANADIAN NATIONAL RAILWAY COMPANY'S  
PETITION FOR WAIVER OR CLARIFICATION OF RAILROAD  
CONSOLIDATION PROCEDURES

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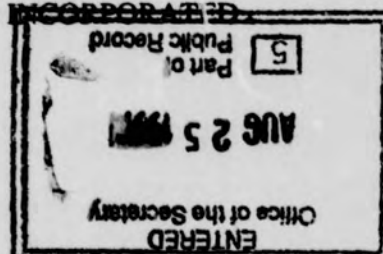


Jean Pierre Ouellet  
Chief Legal Officer and Corporate  
Secretary  
Canadian National Railway Company  
935 de La Gauchetiere Street West  
16th Floor  
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H3B 2M9  
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L. John Osborn  
Douglas E. Rosenthal  
Elizabeth A. Ferrell  
Sonnenschein Nath & Rosenthal  
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Suite 600 East  
Washington, D.C. 20005  
(202) 408-6351

Attorneys for:  
CANADIAN NATIONAL RAILWAY COMPANY  
GRAND TRUNK WESTERN RAILROAD INCORPORATED

Dated: August 22, 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.

---

CANADIAN NATIONAL RAILWAY COMPANY'S  
PETITION FOR WAIVER OR CLARIFICATION OF RAILROAD  
CONSOLIDATION PROCEDURES

---

Canadian National Railway Company ("CN") and Grand Trunk Western Railroad Incorporated ("GTW")<sup>1</sup> today notifying the Board of their intention to file a responsive application or applications seeking affirmative relief as a conditions to approval of the proposed acquisition and breakup of Conrail by        and NS.<sup>2</sup> See Comments and Description of Anticipated Responsive Applications (CN-8) ("CN's Description "). Pursuant to 49 C.F.R. § 1180.4(f), CN hereby seeks waiver or clarification of certain

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<sup>1</sup> Except where the context indicates otherwise, CN as used herein will embrace CN's wholly-owned subsidiary Grand Trunk Corporation ("GTC") and its subsidiary GTW.

<sup>2</sup> Unless the context indicates otherwise, "CSX" will embrace both CSX Corporation and CSX Transportation, Inc., "NS" will embrace both Norfolk Southern Corporation and Norfolk Southern Railway Company, and "Conrail" will embrace both Conrail Inc. and Consolidated Rail Corporation.

requirements of the Board's Railroad Consolidation Procedures, 49 C.F.R. Part 1180, Subpart A.

**A. Minor Transactions**

As described more fully in CN's Description, CN intends to seek certain limited trackage rights in the Detroit, Chicago and Buffalo areas. Although each of the proposed trackage rights requests is important and, particularly in the case of the proposed "paired track" arrangement at Detroit, will provide significant public benefits, CN believes that the transactions proposed by each of these responsive applications will be minor in scope. Cf. Finance Docket No. 32760, Union Pacific Corp. -- Control and Merger -- Southern Pacific Rail Corp., Decision Nos. 13 and 14, served Feb. 15, 1996 (unprinted).

CN requests confirmation that the proposed transactions will be minor transactions within the meaning of the Consolidation Procedures.<sup>3</sup> CN is aware that, despite the minor nature of the proposed transactions, CN will be required to submit sufficient evidence to justify a grant of its responsive applications.

**B. Definition of "Applicant Carriers"**

CN seeks waiver or clarification of § 1180.3(b) to confirm that "applicant carriers" excludes (1) the Primary Applicants, (2) other carriers in which CN or its subsidiaries possess a 50% or less interest.

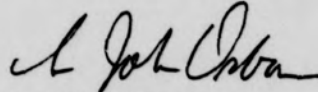
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<sup>3</sup> CN believes that the characterization of the proposed transactions as minor is so clearly appropriate that there is no need to burden the Board with precautionary waiver requests to cover the remote possibility that they would be characterized differently. Should any of them nevertheless be deemed to be "significant," CN would respectfully seek leave to request any necessary waivers.

**CONCLUSION**

For the foregoing reasons, CN respectfully requests that the Board grant the waivers and clarifications specified in this petition.

Respectfully submitted,



L. John Osborn  
Douglas E. Rosenthal  
Elizabeth A. Ferrell  
Sonnenschein Nath & Rosenthal  
1301 K Street, N.W.  
Suite 600 East  
Washington, D.C. 20005  
(202) 408-6351

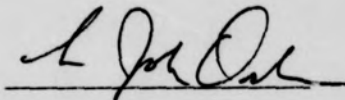
Jean Pierre Ouellet  
Chief Legal Officer and Corporate  
Secretary  
Canadian National Railway Company  
925 de La Gauchetiere Street West  
16th Floor  
Montreal, Quebec  
H3B 2M9  
(514) 399-2100

Attorneys for:  
CANADIAN NATIONAL RAILWAY COMPANY  
GRAND TRUNK WESTERN RAILROAD INCORPORATED

Dated: August 22, 1997

**Certificate of Service**

The undersigned hereby certifies that on this 22nd day of August, 1997, he served a true copy of the foregoing on counsel for all known parties by first-class mail, postage prepaid.



L. John Osborn

STB

FD-33388

ID-181360

8-22-97

I

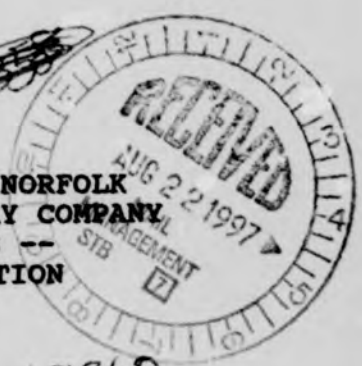
I 181360

WC-3

BEFORE THE  
SURFACE TRANSPORTATION BOARD

FINANCE DOCKET NO. 33388

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



FINANCE DOCKET NO. 33388 (SUB-NO. 59)

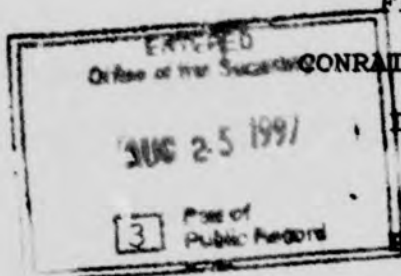
WISCONSIN CENTRAL LTD.  
-- PURCHASE AND RELATED TRACKAGE RIGHTS --  
LINES OF THE BALTIMORE & OHIO CHICAGO TERMINAL  
RAILROAD COMPANY AND CONSOLIDATED RAIL CORPORATION

-181360

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

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

-181361



PETITION FOR CLARIFICATION OR WAIVER  
OF WISCONSIN CENTRAL LTD.

Pursuant to 49 C.F.R. § 1180.4(f) and Decision Nos. 6 and 12 herein, served on May 30, 1997 and July 1, 1997, respectively, Wisconsin Central Ltd. ("WCL") hereby submits this petition for clarification or waiver of certain requirements of the Board's Railroad Consolidation Procedures, 49 C.F.R. § 1180, which might otherwise apply to the responsive application which WCL expects to file in this proceeding on or before October 21, 1997.

WCL is a Class II carrier which owns or operates approximately 2000 route miles of rail line in the states of Wisconsin, Illinois, Michigan and Minnesota. WCL is a wholly-owned subsidiary of Wisconsin Central Transportation Corporation,



and is affiliated with Fox Valley & Western Ltd. and the Sault Ste. Marie Bridge Company. As is more fully explained in WCL's Description of Anticipated Responsive Application (WC-2), filed concurrently herewith, WCL expects that it will file a responsive application in this proceeding seeking to acquire from the Primary Applicants certain rail lines and related trackage rights in Chicago and also seeking the divestiture by Consolidated Rail Corporation ("Conrail") of its 51% ownership interest in the Indiana Harbor Belt Railroad Company. WCL also will request a condition on any approval of the Primary Application requiring that the The Baltimore & Ohio Chicago Terminal Railroad Company ("B&OCT") be merged into its parent, CSX Transportation, Inc. ("CSXT"). In connection with those anticipated requests, WCL respectfully seeks the following clarifications or waivers of the requirements of the Board's Railroad Consolidation Procedures:

1. CSXT/B&OCT Merger

WCL seeks clarification that its request for a condition requiring the merger of B&OCT into CSXT does not require the filing of a responsive application by WCL. Such a transaction, if required as a condition of the Board's approval of the Primary Application, would be subject to Board jurisdiction and authorization. See 49 C.F.R. § 11323(a)(1). Presumably, CSXT would seek appropriate authority for the merger (perhaps via a notice of exemption for an intracorporate family transaction pursuant to 49 C.F.R. § 1180.2(d)(3)) prior to consummation of the primary transaction. Alternatively, the Board could authorize the merger transaction pursuant to Section

11323(a)(1) at the time it grants the Primary Application subject to a merger condition.

In any event, unlike the normal responsive application situation, WCL would require no separate Board authority for implementation of the condition which it seeks. It thus does not appear that the filing of a responsive application is necessary for WCL to pursue that condition. WCL requests that the Board confirm this understanding.

Should the Board determine that a responsive application for the requested merger condition is necessary, WCL respectfully requests that this request for clarification be deemed adequate notice and description of the anticipated responsive application, in compliance with the requirements of Decision Nos. 6 and 12 herein.

2. Definition of "Applicant carriers"

49 C.F.R. § 1180.3(b) defines "applicant carriers" to include the "[a]pplicant, all carriers related to the applicant, and all other carriers involved in the transaction" (emphasis omitted). WCL seeks clarification or waiver of Section 1180.3(b) to exclude the Primary Applicants from the definition of "applicant carriers," so that WCL will not need to provide separate information on the Primary Applicants in connection with its responsive application. Provision of such information would be burdensome to WCL and would not materially assist the evaluation of WCL's responsive application. Furthermore, sufficient information regarding the Primary Applicants should already be available in the Primary Application.

The Board and its predecessor have consistently granted prior requests for similar waivers or clarification. E.g., Union Pacific Corporation, Union Pacific Railroad Company and Missouri Pacific Railroad Company -- Control and Merger -- Southern Pacific Rail Corporation, Southern Pacific Transportation Company, St. Louis Southwestern Railway Company, SPCSL Corp. and The Denver and Rio Grande Western Railroad Company, Finance Docket No. 32760, Decision No. 14 (STB served February 15, 1996) at 3 and cases cited therein. Such relief is warranted here as well.

WHEREFORE, WCL respectfully requests that the Board grant clarification or waiver of its Railroad Consolidation Procedures to the extent specified above.

Respectfully submitted,

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

ATTORNEY FOR  
WISCONSIN CENTRAL LTD.

Dated: August 22, 1997

**CERTIFICATE OF SERVICE**

I hereby certify that on this 22nd day of August, 1997, a copy of the foregoing Petition for Clarification or Waiver of Wisconsin Central Ltd. (WC-3) was served by first class mail, postage prepaid, upon:

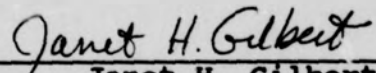
Dennis G. Lyons, Esq.  
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555 12th Street, N.W.  
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Richard A. Allen, Esq.  
Zuckert, Scoutt & Rasenberger, L.L.P.  
888 Seventeenth Street, N.W.  
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Paul A. Cunningham, Esq.  
Harkins Cunningham  
1300 Nineteenth Street, N.W.  
Suite 600  
Washington, DC 20036

Hon. Jacob Leventhal  
Administrative Law Judge  
Federal Energy Regulatory Commission  
888 First Street, N.E., Suite 11F  
Washington, DC 20426

and upon all parties of record appearing on the Surface Transportation Board's official service list in this proceeding, served August 19, 1997.

  
\_\_\_\_\_  
Janet H. Gilbert

STB

FD-33388

ID-181553

8-28-97

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181573

**ULMER & BERNE LLP**  
ATTORNEYS AT LAW

Internet Address  
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**INAJO DAVIS CHAPPELL**  
Direct Dial (216) 902-8930

Bond Court Building  
1300 East Ninth Street, Suite 900  
Cleveland, Ohio 44114-1583  
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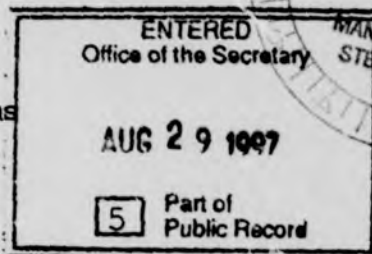
(216) 621-8400

August 27, 1997

Columbus Office  
88 East Broad Street, Suite 1980  
Columbus, Ohio 43215-3506  
Fax (614) 228-8561  
Telephone (614) 228-8400

**VIA OVERNIGHT MAIL**

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 Co. -- Control and Operating Leases/ Agreements - Conrail Inc. and Consolidated Rail Corporation

Dear Secretary Williams:

Enclosed for filing the above-captioned docket are an original and twenty-five (25) copies of Ashta Chemicals Inc. Request For Leave To Late File (ASHT-5). A 3.5-inch disk containing the text of this pleading in WordPerfect 5.1 format is provided. I have also enclosed twenty-four (24) copies of Ashta Chemicals Inc. Description of Responsive or Inconsistent Application (ASHT-4) which pleading was received by your office on August 26th.

Copies of Ashta Chemicals Inc. Request For Leave to Late File (ASHT-5) are being served via first-class mail, postage prepaid on the Honorable Jacob Leventhal and All Counsel of Record, including counsel for Applicants. Please date-stamp the enclosed extra copy of each pleading and return them in the enclosed self-addressed envelope. If you have any questions, please contact me at (216) 902-8930. Thank you.

Very truly yours,  
*Inajo Davis Chappell*  
Inajo Davis Chappell

114:diw

181553

ASHT-5



BEFORE THE  
SURFACE TRANSPORTATION BOARD

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Finance Docket No. 33388

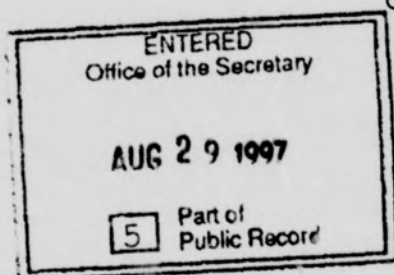
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CSX CORPORATION AND CST TRANSPORTATION, INC.  
NORFOLK SOUTHERN CORPORATION AND  
NORFOLK SOUTHERN RAILWAY COMPANY  
--CONTROL AND OPERATING LEASES/AGREEMENTS--  
CONRAIL INC. AND CONSOLIDATED RAIL CORPORATION

---

ASHTA CHEMICALS INC.  
REQUEST FOR LEAVE TO LATE FILE

By: Christopher C. McCracken, Esq.  
Inajo Davis Chappell, Esq.  
Ulmer & Berne  
1300 East Ninth Street, Suite 900  
Cleveland, Ohio 44114-1583  
(216) 621-8400



Date: August 27, 1997

BEFORE THE  
SURFACE TRANSPORTATION BOARD

---

Finance Docket No. 33388

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

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ASHTA CHEMICALS INC.  
REQUEST FOR LEAVE TO LATE FILE

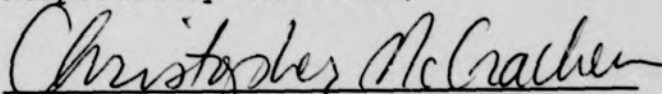
ASHTA Chemicals Inc. hereby requests leave to late file its ASHTA Chemicals Inc. Description of Responsive or Inconsistent Application (ASHT-4). As a result of inadvertence, our ASHT-4 pleading was not submitted on or before the Friday, August 22, 1997 deadline. As soon as we realized the August 22, 1997 deadline had passed, we promptly routed Ashta Chemicals Inc. Description of Responsive or Inconsistent Application (ASHT-4) for filing via overnight mail service. Our ASHT-4 pleading was received by the Surface Transportation Board on Tuesday, August 26, 1997 -- two business days after the filing deadline. We were advised yesterday, August 26th, 1997, by the Office of Procedures that we should formally request leave to late file our pleading.

Accordingly, request is hereby made that leave be given for ASHTA Chemicals, Inc. to late file its Ashta Chemicals Inc. Description of Responsive or Inconsistent Application (ASHT-4) and that the ASHT-4 pleading be accepted for filing as of August 26, 1997.

The late filing does not operate to prejudice any of the parties in this proceeding. The parties have received adequate notice and statement of what Ashta anticipates will be included in any responsive application or request for conditions it may submit in this proceeding.

Based on the foregoing, we respectfully request that leave be granted to late file Ashta Chemicals Inc. Description of Responsive or Inconsistent Application (ASHT-4), and that the ASHT-4 pleading be accepted for filing by the Board.

Respectfully submitted,



CHRISTOPHER C. McCRACKEN, ESQ.

INAJO DAVIS CHAPPELL, ESQ.

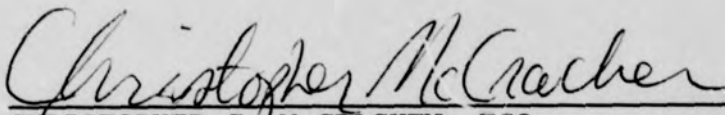
ULMER & BERNE

1300 East Ninth Street -Ste.900

Cleveland, Ohio 44114-1563

**CERTIFICATE OF SERVICE**

I hereby certify that copies of the foregoing Ashta Chemicals Inc. Request For Leave To Late File have been served this 27th day of August, 1997, by first-class mail, postage prepaid on the Honorable Jacob Leventhal and on All Counsel of Record in Finance Docket No. 33388.



CHRISTOPHER C. McCRACKEN, ESQ.

One of the Attorneys for Ashta Chemicals Inc.

STB

FD-33388

ID-181551

8-28-97

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181551

ARNOLD & PORTER

555 TWELFTH STREET, N.W.  
WASHINGTON, D.C. 20004-1206

PAUL T. DENIS  
(202) 942-5035

(202) 942-5000  
FACSIMILE (202) 942-5999

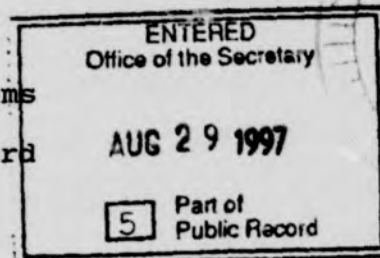
NEW YORK  
DENVER  
LOS ANGELES  
LONDON

CSX-20  
ACE, et al.-9

August 28, 1997

By Hand Delivery

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



Dear Mr. Williams:

On August 25, 1997, American Electric Power, et al.<sup>1</sup> (collectively, "ACE et al.") filed an appeal from the August 20, 1997 order of the Presiding Judge restricting discovery, and a motion for expedited consideration (ACE, et al., -8). The Presiding Judge had ruled that CSX need not produce to ACE et al. certain information redacted from two documents.

Subsequent to the filing of ACE, et al.-8, CSX discovered that, through an inadvertent error, the material redacted from those documents was produced to appellants in another document. This information was brought to the attention of counsel for ACE et al. yesterday afternoon.

CSX and ACE et al. agree, in light of this development, that the appeal and motion of ACE, et al.-8 are moot. ACE et al. has agreed to withdraw the appeal and motion in ACE, et al.-8. This agreement does not affect

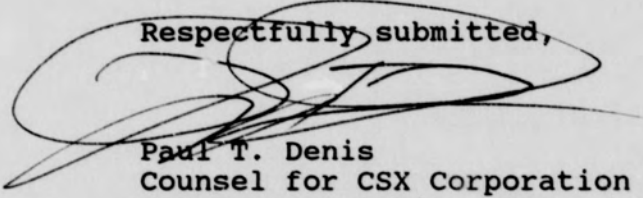
<sup>1</sup> Appealing parties include American Electric Power, Atlantic City Electric Company, Delmarva Power & Light Company, Indianapolis Power & Light Company, and The Ohio Valley Coal Company.

ARNOLD & PORTER

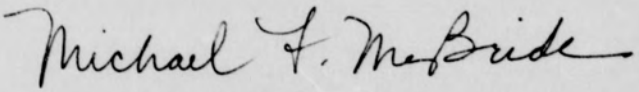
Honorable Vernon A. Williams  
August 28, 1997  
Page 2

other issues currently before the Presiding Judge regarding the redaction of other CSX documents. CSX and ACE et al. also request that the Presiding Judge or the Board vacate as moot that portion of his order that was the subject of ACE, et al.-8.

Respectfully submitted,



Paul T. Denis  
Counsel for CSX Corporation and  
CSX Transportation, Inc.



Michael F. McBride  
Counsel for American Electric  
Power, Atlantic City Electric  
Company, Delmarva Power & Light  
Company, Indianapolis Power &  
Light Company, and The Ohio  
Valley Coal Company

cc: Honorable Jacob Leventhal  
Restricted Service List

STB

FD-33388

ID-181347

8-22-97

I

OPPENHEIMER WOLFF & DONNELLY

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180 North Stetson Avenue  
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William C. Sippel  
(312) 616-5874

August 22, 1997



181347

Brussels  
Chicago  
Minneapolis  
New York  
Paris  
Saint Paul  
Washington, D.C.

**VIA HAND DELIVERY**

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

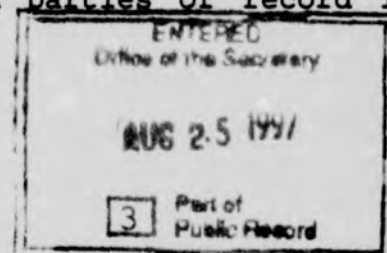
Re: **Finance Docket No. 33388**  
**CSX Corporation and CSX Transportation, Inc.,**  
**Norfolk Southern Corporation and Norfolk**  
**Southern Railway Company -- Control and**  
**Operating Leases/Agreements -- Conrail Inc.**  
**and Consolidated Rail Corporation**

**Finance Docket No. 33388 (Sub-No. 61)**  
**Bessemer and Lake Erie Railroad Company --**  
**Trackage Rights -- Lines of CSX Transportation,**  
**Inc. and Pennsylvania Lines, LLC**

Dear Secretary Williams:

Enclosed for filing in the above-captioned proceeding are an original and twenty-five copies of the Description of Anticipated Responsive Application of Transtar, Inc. and Bessemer and Lake Erie Railroad Company (BLE-3) and the Petition for Clarification or Waiver of Transtar, Inc. and Bessemer and Lake Erie Railroad Company (BLE-4), both dated August 22, 1997. A computer diskette containing the text of these filings in WordPerfect 5.1 format also is enclosed.

In accordance with the Board's recently-issued service list, copies of BLE-3 and BLE-4 have been served by first class mail, postage prepaid, on all designated parties of record in this proceeding.



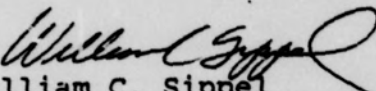
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OPPENHEIMER WOLFF & DONNELLY

Mr. Vernon A. Williams  
August 22, 1997  
Page 2

If you have any questions regarding this filing, please feel free to contact me. Thank you for your assistance on this matter.

Respectfully submitted,

  
William C. Sippel  
Attorney for Transtar, Inc.  
and Bessemer and Lake Erie  
Railroad Company

WCS:tjl

Enclosures

cc: Parties on Certificate of Service



181347

BEFORE THE  
SURFACE TRANSPORTATION BOARD



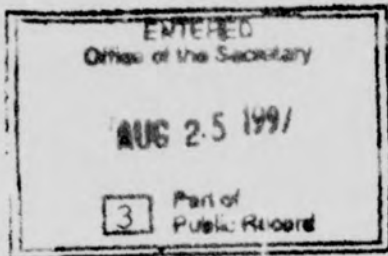
FINANCE DOCKET NO. 33388

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

FINANCE DOCKET NO. 33388 (SUB-NO. 61) *del*

BESSEMER AND LAKE ERIE RAILROAD COMPANY  
-- TRACKAGE RIGHTS --  
LINES OF CSX TRANSPORTATION, INC.  
AND PENNSYLVANIA LINES LLC

PETITION FOR CLARIFICATION OR WAIVER OF TRANSTAR, INC.  
AND BESSEMER AND LAKE ERIE RAILROAD COMPANY



Robert N. Gentile  
Colette Ferris-Shotton  
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William C. Sippel  
Kevin M. Sheys  
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180 North Stetson Avenue  
Chicago, Illinois 60601  
(312) 616-1800

ATTORNEYS FOR TRANSTAR, INC.  
AND BESSEMER AND LAKE ERIE  
RAILROAD COMPANY

Dated: August 22, 1997

BEFORE THE  
SURFACE TRANSPORTATION BOARD

---

FINANCE DOCKET NO. 33388

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

FINANCE DOCKET NO. 33388 (SUB-NO. 61)

BESSEMER AND LAKE ERIE RAILROAD COMPANY  
-- TRACKAGE RIGHTS --  
LINES OF CSX TRANSPORTATION, INC.  
AND PENNSYLVANIA LINES LLC

---

**PETITION FOR CLARIFICATION OR WAIVER OF TRANSTAR, INC.  
AND BESSEMER AND LAKE ERIE RAILROAD COMPANY**

Pursuant to 49 C.F.R. § 1180.4(f) and Decision Nos. 6 and 12 herein, served on May 30, 1997 and July 23, 1997, respectively, Transtar, Inc. ("Transtar") and Bessemer and Lake Erie Railroad Company ("BLE") hereby submit this petition for clarification or waiver of certain requirements of the Board's Railroad Consolidation Procedures, 49 C.F.R. § 1180, which might otherwise apply to the responsive application which Transtar and EJE expect to file in this proceeding on or before October 21, 1997.

Transtar is a transportation holding company that controls BLE and seven other rail carriers. BLE is a Class II railroad which owns or operates approximately 150 route miles of rail line between North Bessemer, Pennsylvania and Conneaut, Ohio on Lake Erie. As is more fully explained in the Description of Anticipated Responsive Application (BLE-3) filed concurrently

herewith, Transtar and BLE expect that they will file a responsive application seeking trackage rights over lines of railroad of CSX Transportation, Inc. or Pennsylvania Lines LLC (former Consolidated Rail Corporation ("Conrail")) for the purpose of transporting coal from origins on the former Monongahela Railway Company ("MGA") to the Conneaut Dock at Conneaut, Ohio.

Transtar and BLE believe that certain information and data required by the Board's Railroad Consolidation Procedures would not materially assist the Board or other parties in evaluating the Transtar/BLE responsive application, and that preparation of such information would be unduly burdensome on Transtar and BLE. Transtar and BLE thus respectfully request that the Board waive or clarify those information requirements in the following manner:

Definition of "Applicant carriers"

49 C.F.R. § 1180.3(b) defines "applicant carriers" to include the "[a]pplicant, all carriers related to the applicant, and all other carriers involved in the transaction" (emphasis in original). Transtar and BLE seek clarification or waiver of this definition of "applicant carrier" to exclude five of the eight carriers (besides BLE) that are controlled by Transtar.<sup>1</sup> Each of

<sup>1</sup> Birmingham Southern Railroad Company ("BS"), Duluth, Missabe and Iron Range Railway Company ("DMIR"), Elgin, Joliet and Eastern Railway Company ("EJE"), The Lake Terminal Railroad Company ("LT") and McKeesport Connecting Railroad Company ("MKC"). Transtar also controls the Pittsburgh & Conneaut Dock Company ("P&C") and the Union Railroad Company ("URR"). As is explained further below, Transtar and BLE do not seek to exclude P&C and URR from applicant carrier status.

these carriers is operated independently of BLE, and none connect with BLE.<sup>2</sup> DMIR handles primarily iron ore traffic on rail lines in northeast Minnesota and northwest Wisconsin. EJE owns and operates approximately 196 miles of mainline and branchline trackage in northern Illinois and in northwest Indiana.<sup>3</sup> BS and LT provide switching services in and around Birmingham, Alabama and Lorain, Ohio, respectively.

In each instance, these carriers are both physically and functionally distinct from BLE and the subject matter of Transtar/BLE's anticipated responsive application. The preservation of competitive service, routing and rate options for MGA origin coal is unrelated to Transtar's ownership of BS, DMIR, EJE, LT and MKC. Requiring Transtar to provide the information required of "applicant carriers" for each of these subsidiaries would be unduly burdensome on Transtar and BLE and would not materially assist the evaluation of Transtar/BLE's anticipated responsive application.

Transtar/BLE's request to exclude these five carriers from the definition of "applicant carrier" is consistent with numerous waivers or clarifications granted in prior proceedings

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<sup>2</sup> MKC connects with URR, which in turn connects with BLE. However, MKC's switching operations in McKeesport, Pennsylvania are unrelated to the transaction proposed by Transtar/BLE or to the movement of coal from MGA origins to the Conneaut Dock at Conneaut, Ohio.

<sup>3</sup> EJE is a party of record in this proceeding and anticipates separately filing a responsive application seeking the divestiture of Conrail's 51% ownership share in the Indiana Harbor Belt Railroad Company to Transtar, EJE or another affiliate. See Finance Docket No. 33388 (Sub-No. 36), EJE-3. The relief sought by EJE and BLE are not related.



also involving the operationally-independent carrier subsidiaries or sister companies of an applicant. E.g., Union Pacific Corporation, Union Pacific Railroad Company and Missouri Pacific Railroad Company -- Control and Merger -- Southern Pacific Rail Corporation, Southern Pacific Transportation Company, St. Louis Southwestern Railway Company, SPCSL Corp. and The Denver and Rio Grande Western Railroad Company, Finance Docket No. 32760 ("UP/SP"), Decision No. 14 (STB served February 15, 1996) at 4; Union Pacific Corporation, Union Pacific Railroad Company and Missouri Pacific Railroad Company -- Control -- Chicago and North Western Holdings Corp. and Chicago and North Western Transportation Company, Finance Docket No. 32133 ("UP/CNW"), Decision No. 7 (ICC served June 8, 1993) at 2.<sup>4</sup> A similar clarification or waiver of the 49 C.F.R. § 1180.3(b) definition of "applicant carriers" as it relates to BS, DMIR, EJE, LT and MKC is reasonable and warranted under the circumstances.

Transtar and BLE do not seek waiver of "applicant carrier" status for P&C and URR, since those carriers would participate in the movement of coal from MGA origins to the Conneaut Dock and thus are not wholly unrelated to the subject matter of Transtar/ BLE's anticipated responsive application. P&C operates the Conneaut Dock at Conneaut, Ohio, while URR provides

---

<sup>4</sup> While these decisions have generally involved rail carriers in which the applicants possessed a minority interest or carriers of another mode (such as motor carriers), their rationale applies equally here. As in these prior cases, the six subsidiaries for which Transtar seeks waiver have no material relevance to the relief sought in or issues associated with Transtar/BLE's anticipated responsive application.



a line between BLE at North Bessemer, Pennsylvania and connections with other railroads south of Pittsburgh.

Transtar and BLE also seek clarification or waiver of Section 1180.3(b) to exclude the Primary Applicants as "applicant carriers," so that Transtar/BLE will not need to provide separate information on the Primary Applicants in connection with their responsive application. Provision of such information would be burdensome to Transtar and BLE and is not necessary for a proper evaluation of their responsive application. Furthermore, sufficient information regarding the Primary Applicants should already be available in the Primary Application.

The Board and its predecessor have consistently granted prior requests for similar waivers or clarification. E.g., UP/SP, Decision No. 14 at 3; UP/CNW, Decision No. 7 at 1. Such relief is warranted here as well.

WHEREFORE, Transtar and BLE respectfully request that the Board grant waiver or clarification of its Railroad Consolidation Procedures to the extent specified above.

Respectfully submitted,

By: William C. Sippel (S)

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Colette Ferris-Shotton  
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(312) 616-1800

**ATTORNEYS FOR TRANSTAR, INC.  
AND BESSEMER AND LAKE ERIE  
RAILROAD COMPANY**

Dated: August 22, 1997

CERTIFICATE OF SERVICE

I hereby certify that on this 22nd day of August, 1997,  
a copy of the foregoing Petition for Clarification or Waiver of  
Transtar, Inc. and Bessemer and Lake Erie Railroad Company  
(BLE-4) was served by first class mail, postage prepaid, upon:

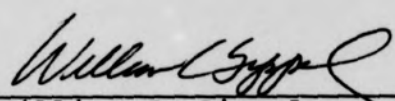
Dennis G. Lyons, Esq.  
Arnold & Porter  
555 12th Street, N.W.  
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Richard A. Allen, Esq.  
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Paul A. Cunningham, Esq.  
Harkins Cunningham  
1300 Nineteenth Street, N.W.  
Suite 600  
Washington, DC 20036

Hon. Jacob Leventhal  
Administrative Law Judge  
Federal Energy Regulatory Commission  
888 First Street, N.E., Suite 11F  
Washington, DC 20426

and upon all parties of record appearing on the Surface  
Transportation Board's official service list in this proceeding,  
served August 19, 1997.

  
\_\_\_\_\_  
William C. Sippel

STB

FD-33388

ID-181415

8-22-97

I

**GOLLATZ, GRIFFIN & EWING, P.C.**  
ATTORNEYS AT LAW

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205 NORTH MONROE STREET  
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MEDIA, PA 19063  
(610) 565-6040

ERIC M. HOCKY

August 22, 1997



**HAND DELIVERY BY COURIER**

Office of the Secretary  
Case Control Unit  
ATTN: STB Finance Docket No. 33388  
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

Dear Sir or Madam:

Enclosed for filing in the above referenced proceeding are  
the original and 25 copies of each of the following documents:

BPRR-2/ALY-2 - Description of Responsive Applications  
Anticipated By Buffalo & Pittsburgh Railroad,  
Inc. and Allegheny & Eastern Railroad, Inc.  
(Sub Docket Nos. 43-51)



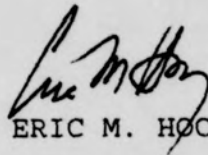
Office of the Secretary  
Case Control Unit  
August 22, 1997  
Page 2

- BPRR-3/ALY-3 - Petition of Buffalo & Pittsburgh Railroad, Inc. and Allegheny & Eastern Railroad, Inc. for Clarification and Waivers (Sub Docket Nos. 43-51)
- RSR-2 - Description of Responsive Applications Anticipated by Rochester & Southern Railroad, Inc. (Sub Docket Nos. 52 and 56)
- RSR-3 - Petition of Rochester & Southern Railroad, Inc. for Clarification and Waivers (Sub Docket Nos. 52 and 56).

Also enclosed is a diskette containing each of the four filings in a format (WordPerfect 6.1) that can be converted into WordPerfect 7.0.

Kindly time stamp the enclosed extra copy of this letter to indicate receipt and return it to me in the self-addressed envelope provided for your convenience.

Respectfully,



ERIC M. HOCKY

Enclosures

181415

*[Handwritten mark]*

BEFORE THE  
**SURFACE TRANSPORTATION BOARD**  
STB FINANCE DOCKET NO. 33388



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

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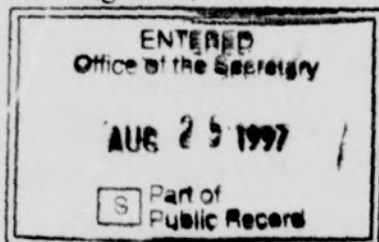
**PETITION OF  
ROCHESTER & SOUTHERN RAILROAD, INC.  
FOR CLARIFICATION AND WAIVERS**

(Sub Docket Nos. ~~52~~ and 56) *Edley*

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William P. Quinn  
Eric M. Hocky  
GOLLATZ, GRIFFIN & EWING, P.C.  
213 West Miner Street  
P.O. Box 796  
West Chester, PA 19381-0796  
(610) 692-9116  
Attorneys for Rochester & Southern  
Railroad, Inc.

Dated: August 22, 1997



BEFORE THE  
**SURFACE TRANSPORTATION BOARD**  
STB FINANCE DOCKET NO. 33388



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

---

**PETITION OF  
ROCHESTER & SOUTHERN RAILROAD, INC.  
FOR CLARIFICATION AND WAIVERS**

(Sub Docket Nos. 52 and 56)

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Rochester & Southern Railroad, Inc. ("RSR")<sup>1</sup>, in accordance with Decision No. 7 served May 30, 1997, and Decision No. 12 served July 23, 1997, is filing today a Description of Anticipated Responsive Applications (RSR-3). In conjunction with such description, RSR requests the clarification and waivers requested below with respect to the proposed responsive applications.

**INTRODUCTION**

As set forth more fully in the Description of Anticipated Responsive Applications, RSR, a Class II rail carrier operating in western New York, in response to the effects of the primary application anticipates seeking authority to use certain yard tracks of CSXT for interchange with another carrier, and to abandon approximately 10 miles of rail line.

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<sup>1</sup> RSR is a wholly owned subsidiary of Genesee & Wyoming Inc. ("GWI").

## REQUESTS

### (1) Clarification of applicable law

In Sub Docket No. 52, RSR has indicated that it will seek authority to use tracks in CSXT's yard in Genesee Junction, New York to allow RSR to directly interchange with another Class III carrier, Livonia, Avon and Lakeville Railroad ("LAL"). Such use would be incidental to the access to the yard that RSR and LAL now each separately enjoy for interchange with Conrail. RSR requests that the Board confirm that it may seek authority for such rights in a responsive application under 49 U.S.C. §11323 or under 49 U.S.C. §10902, the section added by the ICC Termination Act of 1995 that covers intercarrier transactions involving Class III carriers. *See Conference Report No. 104-422* at 180 ("Class II and Class III carriers retain the existing option ... to obtain approval of intercarrier transaction under section 11323, such as trackage rights under 11323(a)(6).")<sup>2</sup>

### (2) Classification as a minor transaction

If RSR determines to request the use of yard tracks under 49 C.F.R. §11323, then it requests that the Board find that the application would be a minor transaction. The proposed transaction would be between a Class III carrier (RSR) and a Class I carrier. This would not be a "major" transaction under 1180.2(a), and thus will be either a "significant" or "minor" transaction.<sup>3</sup> A transaction is significant only if it is of regional or national importance under 49

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<sup>2</sup> Of course, RSR may alternatively request the authority for any or all of these rights pursuant to exemptions that may be available under 49 U.S.C. §10502.

<sup>3</sup> The Board has recently eliminated the presumption that responsive applications be considered significant, and has held that the determination should be made as described in 49 C.F.R. §1180.2(a) and (c). See STB Ex Parte 556, *Railroad Consolidation Procedures* --

U.S.C. §11325(a)(2) and (c). Under the Board's consolidation regulations, it will determine whether a transaction is minor rather than significant by looking at whether it is clear that (1) the transaction will not have any anticompetitive effects, and (2) that any anticompetitive impacts will be outweighed by the contribution to the public interest. *See* 49 C.F.R. §1180.2(b). The proposed use of yard tracks for interchange purposes described in Sub Docket No. 52 clearly qualifies as a minor transaction.

The rights merely seek to allow two Class III carriers to connect with each other in a yard that they both already reach. Direct interchange (without the requirement of an intermediate switch and charge) will make it more efficient and economical so that traffic is more likely to be handled between RSR and LAL. Shippers will enjoy additional routing options, and the amount of traffic that would be affected surely will not affect the competitive balance in the region. *See Railroad Consolidation Procedures - Trackage Rights Exemption*, 1 ICC 2d 270, 272, n.3 (1985). Thus, the proposed application should be considered minor.

### **(3) Financial, Operational and Other Supporting Information**

If the Board would for some reason determine that the application is "significant," then RSR seeks a waiver of the requirements of 49 C.F.R. §§ 1180.6 - 1180.9 to allow RSR to submit only such supporting information as would be required if this were a minor transaction. For example, section 1180.7 of the consolidation regulations requires detailed market impact analyses for significant transactions. While RSR expects to provide the Board with market information to support the application, impact analyses of the detail required by section 1180.7

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*Modification of Fee Policy* (served March 4, 1997) at 3, 9 (adopting new language for Section 1180.4(d)(ii)).



would be unduly costly and burdensome for a small carrier with respect to a transaction that is clearly limited in scope. Similarly, the proposed operating plan to be submitted under section 1180.8(a) is to be based on the foregoing impact analyses and, if the Board waives compliance with section 1180.7, a waiver of section 1180.8(a) should follow. In any event, RSR would provide the operating data required for minor transactions under section 1180.8(b), which should provide ample information to allow the Board to evaluate RSR's request. RSR acknowledges that it will need to include sufficient information to satisfy the Board's criteria for granting the relief sought.

#### **(4) Definition of Applicant**

Under 49 C.F.R. §1180.3(a), "applicant" is defined as the parties "initiating" the transaction. In Sub Docket No. 52, RSR will be the party asking for the right to connect to LAL and the relief does not affect other affiliates. RSR seeks clarification or waiver that if it seeks authority under 49 U.S.C. §11323, RSR will be the only "applicant" for purposes of this application, and specifically that RSR's corporate parent, Genesee & Wyoming Inc., a noncarrier holding company, not be an applicant. Characterizing GWI as an applicant would substantially increase the burden on RSR without improving the Board's ability to evaluate the competitive and financial impacts of the rights to be requested, and instead will add irrelevant data to the filing. This is similar to the relief granted in ICC Finance Docket No. 32549, *Burlington Northern, Inc. -- Control and Merger -- Santa Fe Pacific Corporation ("BNSF")*, Decision No. 14 (served April 20, 1995) (relating to Illinois Central Railroad Company) and ICC Finance Docket No. 32760, *Union Pacific Corporation -- Control and Merger -- Southern Pacific Rail Corporation ("UPSP")*, Decision No. 14 (served February 15, 1996) (relating to The Texas-

Mexican Railway).

**(5) Definition of Applicant carriers**

"Applicant carriers" are defined in 49 C.F.R. §1180.3(b) to include "*all carriers related to the applicant*, and all other carriers involved in the transaction." RSR requests that the Board exclude the primary applicants from this definition in connection with any application filed in Sub Docket No. 52 since there is sufficient data on the primary applicants and their proposed operations in the primary application. Similar relief has been granted in the past. *See BNSF*, Decision No. 13 (served April 18, 1995), No. 14 (served April 20, 1995), and No. 15 (served April 20, 1995). Additionally, other carrier subsidiaries of GWI<sup>4</sup> should not be considered applicant carriers in this sub docket which relates solely to the use of tracks by RSR.

Information on these other carriers would make it more difficult for the Board to focus on and analyze the effect of this transaction on RSR and the propriety of the inclusion request.

**(6) Filing fees**

The Board recently adopted new regulations governing fees for responsive applications. While it is clear that "responsive applications" include the incidental use of tracks, the applicable fee is not clear. If the application is filed under section 11323, the fee would appear to be \$4,700 under 49 C.F.R. §1002(f)(40)(iii).<sup>5</sup> However, if it is filed under section 10902, RSR is not clear

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<sup>4</sup> GWI currently controls directly and indirectly one Class II and 14 Class III carriers in addition to RSR.

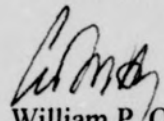
<sup>5</sup> In the event that the Board were to find that the application in Sub Docket No. 52 is a "significant" transaction with a filing fee of \$177,900, then RSR requests that the Board waive the fee and only require payment of a fee of \$4,700. To impose the higher fee on a small Class III carrier would be preclusive.

whether the fee would be \$4,700 under 49 C.F.R. §1002(f)(40)(v) or \$3,700 under 49 C.F.R. §1002(f)(14)(i) (or \$1,100 if the class exemption is used). The abandonment described in Sub Docket No. 56 is presumably subject to a filing fee of \$13,200 under 49 C.F.R. §1002(f)(21)(i) (unless an exemption is sought) or \$4,700 as a responsive application for which there is no fee specifically provided. RSR accordingly requests that the Board clarify the fees that will be applicable to its requests.

### CONCLUSION

For the reasons given, RSR requests that the Board grant the requested requests for clarification and waivers.

Respectfully submitted,



William P. Quinn  
Eric M. Hocky  
GOLLATZ, GRIFFIN & EWING, P.C.  
213 West Miner Street  
P.O. Box 796  
West Chester, PA 19381-0796  
(610) 692-9116  
Attorneys for Rochester & Southern  
Railroad, Inc.

Dated: August 22, 1997

. . . . .

**CERTIFICATE OF SERVICE**

I hereby certify that on this date a copy of the foregoing document was served by first class mail on the following persons and on Parties of Record listed in Decision No. 21:

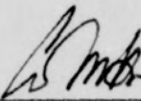
Administrative Law Judge Jacob Leventhal  
Federal Energy Regulatory Commission  
888 First Street, NE, Suite 11F  
Washington, DC 20426

Dennis G. Lyons, Esq.  
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555 12th Street, N.W.  
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Richard A. Allen, Esq.  
Zuckert, Scoutt & Rasenberger, L.L.P.  
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Paul A. Cunningham, Esq.  
Harkins Cunningham  
1300 Nineteenth Street, NW, Suite 600  
Washington, DC 20036

Dated: August 22, 1997

  
\_\_\_\_\_  
Eric M. Hocky

STB

FD-33388

ID-181344

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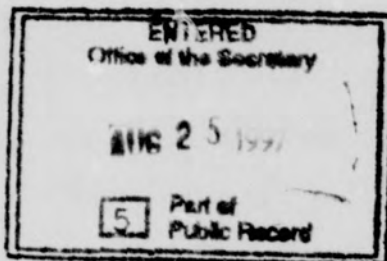


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ISRR-2 I

BEFORE THE  
SURFACE TRANSPORTATION BOARD

STB FINANCE DOCKET NO. 33388

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



DESCRIPTION OF ANTICIPATED  
RESPONSIVE APPLICATIONS

PETITION FOR  
CLARIFICATION OR WAIVER

181344



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INDIANA SOUTHERN  
RAILROAD, INC.

Dated: August 22, 1997

BEFORE THE  
SURFACE TRANSPORTATION BOARD

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STB FINANCE DOCKET NO. 33388

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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

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DESCRIPTION OF ANTICIPATED  
RESPONSIVE APPLICATIONS

PETITION FOR  
CLARIFICATION OR WAIVER

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Indiana Southern Railroad, Inc. ("ISRR"), pursuant to 49 U.S.C. § 11323-25, Decision No. 6 (served May 30, 1997) and Decision No. 12 (served July 23, 1997), hereby submits its Description of Anticipated Responsive Applications and Petition for Clarification or Waiver.

DESCRIPTION OF CONDITIONS

In accordance with the Surface Transportation Board's ("Board") Decision Nos. 6 and 12, ISRR describes below those conditions it anticipates seeking in this proceeding that require responsive applications. Conditions that do not require responsive applications are not described.

As the term is used below, "local" trackage rights include: (1) the right to operate trains over the lines described; (2) the right to interchange with all carriers (including shortlines) at all

junctions on the lines described; and (3) the right to serve all shippers, sidings and team tracks located on the lines described.

1. Indianapolis

Overhead trackage rights between MP 5.0 on ISRR's Petersburg Secondary in Indianapolis, Indiana and Indianapolis Power & Light's Perry K facility in Indianapolis, Indiana over the Consolidated Rail Corporation ("CRC") rail line to be acquired by CSX Transportation, Inc. ("CSXT").

2. Indianapolis

Overhead trackage rights between MP 6.0 on ISRR's Petersburg Secondary in Indianapolis, Indiana and Indianapolis Power & Light's Stout facility located on the Indiana Railroad ("INRD") over a segment of CRC rail line to be acquired by CSXT and a segment of INRD's rail line.

3. Indianapolis

Local trackage rights over CRC's Indianapolis Belt Line in Indianapolis, Indiana to be acquired by CSXT.

4. Indianapolis - Terre Haute

Local trackage rights between Indianapolis, Indiana and Terre Haute, Indiana over CRC's rail line to be acquired by CSXT.

5. Indianapolis - Shelbyville

Local trackage rights between Indianapolis, Indiana and Shelbyville, Indiana over CRC's rail line to be acquired by CSXT.

6. Indianapolis - Crawfordsville

Local trackage rights between Indianapolis, Indiana and Crawfordsville, Indiana over CRC's rail line to be acquired by CSXT.

7. Indianapolis - Frankfort

Local trackage rights between Indianapolis, Indiana and Frankfort, Indiana over CRC's rail line to be acquired by CSXT.

8. Indianapolis - Muncie

Local trackage rights between Indianapolis, Indiana and Muncie, Indiana over CRC's rail line to be acquired by CSXT.

PETITION FOR CLARIFICATION  
OR WAIVER

ISRR is a class III rail carrier providing rail service over approximately 176 miles of track between Evansville, Indiana and Indianapolis, Indiana. ISRR's anticipated responsive application merely includes trackage rights over eight segments of rail line, totalling approximately 300 miles in length. Accordingly, ISRR requests that its application be considered a minor transaction or, alternatively, that the Board waive certain regulatory provisions otherwise applicable to significant transactions.

The responsive application ISRR anticipates filing is clearly not a major transaction since it does not involve the control or merger of two or more class I railroads. See 49 C.F.R. § 1180.2 (a). Pursuant to the Board's rules, responsive applications which are not major transactions are presumed to be significant transactions. See 49 C.F.R. § 1180.4 (d) (4) (ii). The limited trackage rights ISRR anticipates seeking, however, do not fall within the Board's definition of significant

transaction. A significant transaction is one of regional or national transportation significance. A transaction is not significant if it "clearly will not have any anticompetitive effects...." 49 C.F.R. § 1180.2 (b). The conditions ISRR intends to seek merely involve approximately 300 miles of trackage rights. Moreover, the conditions clearly will have no anticompetitive effects. Rather, the conditions are procompetitive and are intended to eliminate certain anticompetitive effects of the Primary Application in this proceeding. Accordingly, ISRR urges the Board to consider its anticipated responsive application as a minor transaction.

Alternatively, ISRR requests the Board to waive the following filing requirements that are otherwise applicable to significant transactions:

49 C.F.R. § 1180.6 (b) (3)	Change in control
49 C.F.R. § 1180.6 (b) (5)	Issues
49 C.F.R. § 1180.6 (b) (6)	Corporate chart
49 C.F.R. § 1180.6 (b) (7)	Noncarrier applicant
49 C.F.R. § 1180.6 (b) (8)	Intercompany relationships
49 C.F.R. § 1180.7	Market analyses
49 C.F.R. § 1180.8 (a)	Operational data for major or significant transactions

These filing requirements applicable to significant transactions are totally irrelevant to the limited conditions ISRR anticipates seeking, would provide the Board with information that is totally useless in assessing the merits of ISRR's responsive application, and would impose an onerous and unnecessary burden on ISRR. ISRR is aware of the Board's criteria for imposing conditions on the Primary Application and that ISRR must meet those criteria to justify a grant of



its responsive application. The filing requirements ISRR seeks to have waived would neither diminish ISRR's ability to meet its burden of proof nor impede the Board's ability fully to assess the merits of ISRR's requested conditions.

In summary, ISRR respectfully urges the Board to clarify that ISRR's anticipated responsive application is minor or, alternatively, to grant the requested waiver of filing requirements.

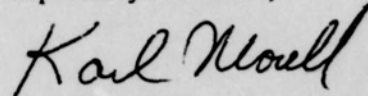
ISRR also requests the following two specific clarifications or waivers:

1. ISRR seeks clarification or waiver of the definition of "applicant" in 49 C.F.R. § 1180.3 (a) to exclude RailTex, Inc. ("RailTex"). ISRR does not believe that RailTex, its noncarrier parent, is properly characterized as "initiating [the proposed] transaction[s]". In any event, requiring RailTex to file as an applicant would impose unnecessary burdens on ISRR without enhancing the Board's ability to evaluate the competitive and financial impacts of the conditions ISRR anticipates seeking.

2. ISRR seeks clarification or waiver of the definition of "applicant carrier" in 49 C.F.R. § 1180.3 (b) to exclude all of ISRR's affiliated carriers in the RailTex family. RailTex currently controls 22 class III railroads, including ISRR, operating in 22 states, as well as three rail carriers that operate in Canada. Those carriers are operated autonomously under separate management, independently of ISRR, and would not be affected by the trackage rights ISRR anticipates seeking in its responsive application. Characterizing these affiliated carriers as "applicant carriers" would impose significant burdens on ISRR, without materially enhancing the

Board's ability to evaluate the competitive and financial effects of the transactions to be proposed by ISRR.

Respectfully submitted,

A handwritten signature in cursive script, appearing to read "Karl Morell".

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Dated: August 22, 1997

# CERTIFICATE OF SERVICE

I hereby certify that on this 22nd day of August, 1997, I caused a copy of the foregoing Descriptions of Anticipated Responsive Applications and Petition for Clarification or Waiver to be served by first class mail, postage prepaid, on Administrative Law Judge Jacob Leventhal and the following parties:

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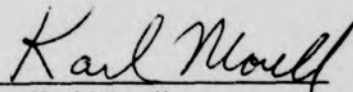
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