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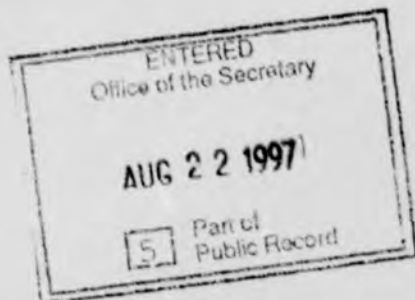
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August 14, 1997  
P.O. Box 908  
48398 Old Goose Bay Road  
Redwood, New York 13679

PHONE: 315-482-5311  
CELLULAR: 315-345-3050

Office of the Secretary  
Case Control Branch  
Attention STB Finance Docket NO. 33388  
Surface Transportation Board  
1925 "K" Street, NW  
Washington, D.C. 20423-0001



**PETITION FOR CONDITIONS  
SURFACE TRANSPORTATION BOARD DOCKET NO 33388**

Angelo J. Chick, Jr. acting on behalf and for himself and the members of Brotherhood of Locomotive Engineers Division 227 ask that the following conditions be met for this Finance Docket Number 33388:

1. Any Seniority System established for the "Northern District" on the CSX System recognize the Equities, Rights, Prior Rights and Prior-Prior Rights to the Jobs and Equities established Prior to the acquisition of Con Rail by CSX and NS Corporations.

For these reasons listed:

1. Referring to Appendix "A" Projected Seniority, Agreement and Territory Changes Required for the Operating Plan, pages 485 through 490. The "Northern District" referred to on page 487 is entirely on the present Con Rail System and does not integrate with other former rail lines. The present Con Rail Agreements are more than adequate to give CSX the latitude to establish any service that might be envisioned. Article R-s-2 pages 35 through 40 of the present agreement between Con Rail and the Brotherhood of Locomotive Engineers would give CSX the right to establish any service envisioned and a corresponding agreement is contained in the Trainmen's Agreement with Con Rail.

2. Refer to page 489, "Since the Northern District will be composed entirely of former Conrail lines and employees, the Conrail collective bargaining agreements will be applicable." The present agreements are in part the result of legislation, the "North East Rail Services Act" of 1976, which sets forth certain conditions that require that Prior Rights and Equities be met.

3. Refer to page 489, 3rd paragraph, last sentence. CSX will have an efficient rule for qualifying employees Article G-s-13 page 109 through 111, and also for their transfer from one location to another Article S-e-3 under the

Page 2 Petition for Conditions  
STB Docket NO 33388

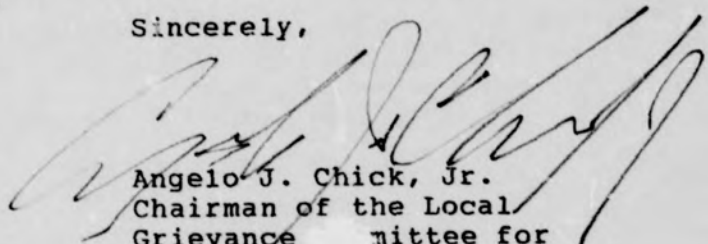
present Conrail - BLE Agreements.

4. The present Conrail Agreement with the BLE does address the question of seniority in Article S-e-1 pages 65 through 69. This article makes any reference to date of hire seniority moot. Inasmuch as the present seniority for Conrail Engineers gives all Engineers on Conrail a System Seniority date of June 1, 1980 or a date subsequent to that date if Engineers Seniority had not been established prior to that date.

5. Any Seniority System that would not address the Rights, Prior Rights, Prior-Prior Rights and Equities and only address the "Date of Hire" for Locomotive Engineers will not only violate the present Conrail - BLE Agreement and the "North East Rail Services Act" but it will also violate the Constitution and Bylaws of the Brotherhood of Locomotive Engineers, Standing Rules 33, 34 and 35.

Respectively submitted for Brotherhood of Locomotive  
Engineers Division 227,

Sincerely,



Angelo J. Chick, Jr.  
Chairman of the Local  
Grievance Committee for  
Brotherhood of Locomotive  
Engineers Division 227

### **LIST OF EXHIBITS**

For: Petition for Conditions submitted by Angelo J. Chick,  
Jr., Chairman of the Local Grievance Committee for  
Division 227, Brotherhood of Locomotive Engineers

Surface Transportation Board Docket NO 33388

Exhibit "A" Article R-s-2, agreement between Consolidated  
Rail Corporation and the Brotherhood of Locomotive  
Engineers.

Exhibit "B" Article G-s-13, agreement between Consolidated  
Rail Corporation and the Brotherhood of Locomotive  
Engineers.

Exhibit "C" Part 4 Subpart B Section 1146 and Section 411 of  
Section 1131 of Public Law 97-35  
Cited as the "Northeast Rail Services Act of 1981"



ARTICLE 3-2 - INTRASENIORITY AND INTERSENIORITY DISTRICT SERVICE

(a) Intrasecurity and intersecurity district road freight service may be established by the Corporation. Road freight service entirely within a Conrail seniority district which runs through an established home or away-from-home terminal crew change point is intrasecurity district service. Road freight service between Conrail seniority districts is intersecurity district service.

(b) Thirty days advance notice shall be given to the General Chairman when intrasecurity district road freight service is to be established by the Corporation where a prior-prior or prior right equity in the work may accrue to engineers within a Conrail seniority district or when intersecurity district road service is to be established, the total mileage of all runs in such road freight service in which the engineers of the seniority districts are entitled to participate, shall be determined, and these runs divided between the engineers of the seniority districts entitled to participate on the basis of the percentage which the mileage actually run on each of the seniority districts bears to the total mileage made in such service on the participating seniority districts.

EXHIBIT "A"

35

(c) Engineers in intersecurity district road freight service may make up to three moves as follows at each of the (1) initial terminal, (2) intermediate points and (3) final terminal in addition to picking up/yarding the train; and in connection therewith, spot, pull, couple, or uncouple cars set out or picked up by them and reset any cars disturbed. Each move may include pick-ups, set-outs, getting or leaving the train on multiple tracks, interchanging with foreign railroads, transferring cars within a switching limit, and spotting and pulling cars at industries.

(d) When computing the mileage of an intrasecurity or intersecurity district run under the provisions of paragraph (b) whose actual mileage is less than 100, such actual mileage shall be proportionately expanded to 100 miles.

EXAMPLE: Intrasecurity or intersecurity district run makes 25 miles over seniority district A, 15 miles over seniority district B, and 10 miles over seniority district C, such run making a total of 50 actual miles. In computing mileage of this run, seniority district A should be credited with 50 miles, seniority district B with 30 miles, seniority district C with 20 miles.

(e) Services covered by paragraph (b) shall each be computed and allotted separately.

(f) Where computations under paragraph (b) develop that the engineers on no one seniority district are entitled to all of a run or assignment, such run or assignment shall be considered as a rotating run or assignment to be periodically covered by the engineers of each seniority district entitled to participate in proportion to their percentage interest in such run or assignment.

In such cases, the length of time in the complete cycle or periodic occupancy may be determined by the General Chairman, but in no event shall it exceed 1 year, nor be for a shorter period than 60 days.

EXAMPLE: Intersecurity district run makes 50 miles over seniority district A, 20.4 miles over seniority district B, and 16.6 miles over seniority district C; such runs may be allotted to engineers on seniority district A for 3 months, seniority district B for 2 months, and to seniority district C for 1 month. Such cycle, however, could not be greater than 6 months to seniority district A, 4 months to seniority district B, and 2 months to seniority district C.

(g) In computing and allotting runs under paragraph (b), the mileage made over tracks within the switching limits of the initial and final terminal, or over foreign railroads, shall be considered neutral mileage to which none of the participating seniority districts are entitled to credit.

36

(h) In computing and allotting service under the provisions of paragraph (b), mileage made by extra crews shall be debited to the seniority district furnishing such extra crews in periodic checks made of such service. Such periodic check may be made as determined by the General Chairman, but in no event shall it be less often than once a year, nor more often than once in 60 days.

(i) The following conditions shall apply to intraseniority and interseniority district road service established under this article:

- (1) Runs shall be adequate for efficient operation and reasonable in regard to miles run, hours on duty and other conditions of work.
- (2) All miles operated over the number of miles comprising a basic day shall be paid for at the mileage rate established by the basic rate of pay for the first one hundred miles or less. Mileage rates of pay, for miles run in excess of the number of miles comprising a basic day, applicable to intraseniority and interseniority district runs now existing or to be established in the future shall not exceed the applicable rates as of June 30, 1986. Such rates shall be exempted from general, cost-of-living, or other forms of wage increases. Weight-on-drivers additives will apply to mileage rates calculated in accordance with this provision.
- (3) In order to expedite the movement of trains in intraseniority and interseniority district service, the Carrier shall determine the condition under which engineers may stop en route to eat. When engineers on intraseniority or interseniority runs are not permitted to stop to eat they shall be paid an allowance of \$2.00 for the trip.
- (4) Deadhead payments shall be as provided in Article G-c-1 except that on runs over two hundred miles payment for deadhead to employees with seniority in engine or train service established prior to November 1, 1985 shall be on the basis of one-half miles for the deadhead trip with not less than payment of a minimum day in separate service unless actual time consumed is greater, in which event the latter amount shall be allowed.
- (5) Engineers in intraseniority or interseniority district service cut out en route account hours of service shall be deadheaded to the destination terminal of the train.
- (6) Engineers assigned to regular assigned runs in interseniority or intraseniority district service shall not be held at the away-from-home terminal so that they cannot cover their assigned run out of the home terminal.

(7) When engineers are required to report for duty or are relieved from duty at a point other than the on and off duty point fixed for the service established hereunder, the engineer shall be furnished suitable transportation as provided in Article R-s-7.

(8) On runs which operate through an established home terminal the following additional conditions shall apply:

(A) Any engineer adversely affected either directly or indirectly as a result of establishing service under this paragraph (i) (8) shall receive the protection afforded by Sections 6, 7, 8 and 9 of the Washington Job Protection Agreement of May 1936, except that for the purposes of this paragraph (i) (8), Section 7(a) is amended to read 100% (less earnings in outside employment) instead of 60% and extended to provide period of payment equivalent to length of service not to exceed 5 years and to provide further that allowances in Section 6 and 7 be increased by subsequent general wage increases.

(B) Any engineer required to change his residence as a result of services established under this paragraph (i) (8) shall be subject to the benefits contained in Sections 10 and 11 of the Washington Job Protection Agreement and in addition to such benefits shall receive a transfer allowance of four hundred dollars and five working days instead of the "two working days" provided by Section 10(a) of said agreement. Under this paragraph, change of residence shall not be considered "required" if the reporting point to which the engineer is changed is not more than 30 miles from his former reporting point.

NOTE: If any engineer is entitled to benefits greater than those provided in paragraphs (i) (8) (A) and (B) by law such greater benefits shall apply subject to the terms and obligations of the Corporation and the engineer under such law.

#### Questions and Answers

1. Q Re (a). Intraseniority district service is defined as service within a Conrail seniority district which runs through an established home or away-from-home terminal crew

change point. Will it be necessary to readvertise engineer positions in such service?

A. No.

2. Q. Re (c). Will this paragraph apply at points where yard crews are or are not employed?

A. Yes.

3. Q. Re (g). This provides that mileage made over tracks within the switching limits of the initial and final terminal shall be considered neutral mileage to which none of the participating seniority districts are entitled to credit. In some territories the mileage from the center of the yard at the initial terminal to the center of the yard at the final terminal has been used for equity allocation purposes, will this continue?

A. The mileage traversed over tracks within the switching limits of the initial and final terminal shall be considered neutral mileage for service established under this Article.

4. Q. Re (i)(2). Are there any exceptions wherein intraseniority and interseniority district runs would be paid for miles run over 100 at other than basic rate of pay for the first one hundred miles or less?

A. No.

5. Q. Re (i)(5). Doesn't this paragraph conflict with R-s-3 (b).

A. No, paragraph (i)(5) applies to inter and intra seniority district service (operating through an established crew change point) and R-s 3 (b) applies to other road service.

6. Q. Is the over-mile rate for interdivisional runs already in effect frozen?

A. Yes, at the rate of pay in effect on June 30, 1986.

7. Q. Are local or system agreements dealing with interdivisional runs canceled or have the over-miles just been frozen?

A. Such agreements are not canceled; however, payments for miles run in excess of the number of miles encom-

passed in the basic day are frozen at the rate of pay in effect on June 30, 1986 for the first 100 miles or less.

EXHIBIT "B"

Article G-s-13 - QUALIFYING ON PHYSICAL CHARACTERISTICS

SEE OCT 19, 1996

(a) When an engineer exercises seniority to an engineer assignment which requires him to operate over territory in which he has not been qualified on the physical characteristics, he shall become qualified for service over such territory without expense to the Corporation.

(b) When an engineer is force assigned to an engineer's assignment for which no bids were received or is set up on an extra list, pursuant to paragraph (c) of Article S-e-3, which requires him or her to operate over territory in which he or she has not been qualified on the physical characteristics, the engineer shall become qualified for service over such territory and shall be compensated in accordance with paragraphs (c) and (d) of this Article.

(c) Engineers engaged in qualifying pursuant to paragraph (b) shall be compensated on an hourly basis for each day spent training to become qualified at the straight time basic through freight rate of pay, with a minimum of 8 hours.

(d) The maximum number of days an engineer engaged in qualifying pursuant to paragraph (b) may be compensated for while training to become qualified on a specific territory shall be determined by the Division Superintendent and the General Chairman of the Brotherhood of Locomotive Engineers. Any time necessary to qualify in excess of the time designated shall be at no expense to the Corporation.

(e) The manner in which an engineer receives his training to become qualified on the physical characteristics shall be determined by the Corporation.

(f) Before performing service on an assignment which requires him to operate over territory in which he has not been qualified, the engineer shall be required, without compensation therefor, to pass an examination on the physical characteristics of the territory involved. Engineers who are not examined on the physical characteristics within 48 hours after signifying they are ready for such examination

109

shall be paid 8 hours at the straight time basic rate of pay applicable to the class of service to which they are assigned for the dates their assignment is operated without them. When held off an extra list, they shall be paid 8 hours at the straight time basic rate of pay applicable to the preponderant class of service covered by that extra list for each calendar day they are withheld from the list and on which they do not perform service. Payment under this paragraph (f) shall cease if, when examined, the engineer fails to qualify.

(g) An engineer shall not be permitted to mark up on an extra list until he is qualified on the physical characteristics of all the territory accruing to that extra list.

(h) When an engineer is force assigned to an assignment in a territory where his qualification on the physical characteristics has lapsed he shall be allowed one trip or tour of duty under pay to requalify.

Questions and Answers

1. Q. Re (a). Does this apply to the voluntary exercise of seniority?

A. Yes.

2. Q. Re (a). Does this apply to prior right engineers who exercise their seniority off their prior right territory?

A. Yes, except where operations of the former railroads have been consolidated, prior right engineers will be allowed the qualifying time determined under paragraph (d) for the territory other than their prior right territory.

3. Q. Will paragraphs (b), (c), (d), (e) and (f) apply to the engineers who are on an extra list when new assignments to be covered by that extra list are established over territory on which such engineers are not qualified?

A. Yes.

4. Q. Re (d). Will engineers be provided pilots where the Superintendent and General Chairman have failed to determine qualifying time?

A. Yes, on an interim basis.

5. Q. Re (h). When pool freight service is advertised to

110



## RAIL

*Working safely requires continuous improvement.*DENNIS A. BROUCA  
VICE PRESIDENT  
LABOR RELATIONS

October 19, 1995

Mr. R. W. Godwin  
General Chairman  
Brotherhood of Locomotive Engineers  
810 Abbott Road, Suite 200  
Buffalo, NY 14220

Dear Mr. Godwin:

This refers to our continuing discussions concerning proposed amendments to the January 1, 1979 BLE Single Collective Bargaining Agreement. During the course of those discussions, we reached consensus on certain issues involving employee utilization. We agreed that a work force which is properly motivated to be qualified and reliably available serves both our interests. To further those goals we agreed to amend Article G-s-13(b), S-e-3(c) and (d), S-e-4, S-e-1, as amended, and S-e-6(b), as amended, as well as S-e-5 and S-e-4 as follows:

## I. ARTICLE G-s-13(b) is amended to read:

"When an Engineer is force assigned to an Engineer's assignment for which no bids were received or is set up on an extra list, pursuant to paragraph (c) of Article S-e-3, which requires him or her to operate over territory in which he or she is not qualified on the physical characteristics, the Engineer shall become qualified for service over such territory and shall be compensated in accordance with paragraphs (c) and (d) of this Article."

## II. ARTICLE S-e-3(c) and (d) are amended to read:

"(c) If a permanent vacancy develops for an Engineer for which no valid applications are received or if an extra list is to be increased in accordance with paragraph (c), it shall be filled in the following order:

operate over alternate routes and the service is not operated over one or more of the available routes frequently enough for the engineers to remain qualified on the physical characteristics in compliance with the Corporation Operating Rules, will the engineers in the pool, although not force assigned, be allowed the trip provided for in paragraph (h) to requalify?

A. Yes.

6. Q. In cases where an engineer can't hold a job or assignment in territory where he is qualified and he is forced to exercise seniority to another territory where he is not qualified in order to work, will he be paid to qualify?

A. If an engineer is required by other provisions of this agreement to exercise seniority to a territory in which he is not qualified in order to work, he will be subject to the provisions of paragraph (b) or (h) of this Article.

7. Q. If during qualifying time an engineer must lay over at an away from-home terminal, will he be subject to the provisions of Article G-c-4?

A. Yes.

the Railway Retirement Act of 1974 before amendment by this Act or under section 207(2) of Public Law 93-445 shall be increased only by the same percentage, or percentages, as an employee's annuity amount determined under section 3(b) of the Railroad Retirement Act of 1974 is increased under section 3(g) of the Railroad Retirement Act of 1974 on or after October 1, 1981. Section 4(g)(6) and 4(g)(6) of the Railroad Retirement Act of 1974, as amended by this Act, shall take effect on October 1, 1981.

45 USC 231c.  
45 USC 231 note.

45 USC 231b.

(g) The amendments made by sections 1118(b), 1118(g), 1120(b), 1122(a)(2), 1122(b)(1), 1122(c), 1124, 1126, and 1127 of this Act shall take effect October 1, 1981.

(h) The amendments made by sections 1117(e)(2), 1117(f), 1118(h)(2), and 1119(i)(4) shall take effect January 1, 1982.

### Subtitle E—Conrail

SEC. 1131. This subtitle may be cited as the "Northeast Rail Service Act of 1981".

Northeast Rail  
Service Act of  
1981.  
45 USC 1101  
note.

### TABLE OF CONTENTS

#### PART 1—GENERAL PROVISIONS

Sec. 1132. Findings.  
Sec. 1133. Purpose.  
Sec. 1134. Goals.  
Sec. 1135. Definitions.

#### PART 2—TRANSFER OF RAIL SERVICE RESPONSIBILITIES

##### Subpart A—Transfer of Conrail Commuter Services

Sec. 1136. End of Conrail obligation.  
Sec. 1137. Establishment of Amtrak Commuter.  
Sec. 1138. Prohibition of cross-subsidization.  
Sec. 1139. Authorization of appropriations.

##### Subpart B—Additional Financing of Conrail

Sec. 1140. Additional financing of Conrail.  
Sec. 1141. Organization and structure of Conrail.

##### Subpart C—Transfer of Freight Service Responsibilities

Sec. 1142. Transfer of freight service.

#### PART 3—PROTECTION FOR CONRAIL EMPLOYEES

Sec. 1143. Protection for Conrail Employees.  
Sec. 1144. Repeals.

#### PART 4—TERMS OF LABOR ASSUMPTION

##### Subpart A—Passenger Employees

Sec. 1145. Transfer of passenger service employees.

##### Subpart B—Freight Employees

Sec. 1146. Labor transfer.

#### PART 5—UNITED STATES RAILWAY ASSOCIATION

Sec. 1147. Organization of USRA.  
Sec. 1148. Functions of USRA.  
Sec. 1149. Access to information.

EXHIBIT C



45 USC 367.

stoppage arising out of the dispute, such employees shall not be eligible during the period of such work stoppage for benefits under the Railroad Unemployment Insurance Act.

"(g) If the emergency board selects a final offer submitted by the employees and the carrier refuses to accept such offer, the carrier shall not participate in any benefits of any agreement between carriers which is designed to provide benefits to such carriers during a work stoppage.

"(h) The provisions set forth in this section shall be the exclusive means for resolving any dispute relating to entering into an initial collective bargaining agreement between Amtrak Commuter or a commuter authority, as the case may be, and representatives of the various classes or crafts of employees to be transferred to Amtrak Commuter or such commuter authority."

#### Subpart B—Freight Employees

##### LABOR TRANSFER

Ante, p. 654.

SEC. 1146. (a) Title IV of the Regional Rail Reorganization Act of 1973, as added by this subtitle, is amended by adding at the end thereof the following new sections:

##### "LABOR TRANSFER AGREEMENTS

45 USC 769b.

"SEC. 411. (a) IMPLEMENTING AGREEMENT.—Within 30 days after the date any freight transfer agreement is entered into under this title, any Class I or Class II railroad purchasing rail properties under such agreement, including any entity that attains such status on the transfer date, and the representatives of the various crafts or classes of employees of the Corporation to be transferred to such railroad or other entity shall commence implementing agreement negotiations. Such negotiations shall—

"(1) determine the number of employees to be transferred to such railroad;

"(2) identify the specific employees of the Corporation to whom such railroad or other entity offers employment;

"(3) determine the procedure by which such employees may elect to accept employment with such railroad or other entity;

"(4) determine the procedure for acceptance of such employees into employment with such railroad or other entity;

"(5) determine the procedure for determining the seniority of such employees in their respective crafts or classes in the system of such railroad or other entity, which shall, to the extent possible, preserve their prior freight service seniority rights; and

"(6) ensure that all such employees are transferred to such railroad or other entity no later than 120 days after the date the transfer agreement is entered into under this title.

"(b) DECISION OF REFEREE.—(1) If no agreement with respect to the matters being negotiated pursuant to subsection (a) is reached within 30 days after the date such negotiations are commenced, the parties to the negotiations shall, within an additional 10 days, select a neutral referee. If the parties are unable to agree upon the selection of such a referee, the National Mediation Board shall promptly appoint a referee.

"(2) The referee shall commence hearings on the matters being negotiated pursuant to subsection (a) within 10 days after the date he is selected or appointed, and shall render a decision within 30 days

after the date of commencement of such hearings. All parties may participate in the hearings, but the referee shall have the only vote.

"(3) The referee shall resolve and decide all matters in dispute with respect to the negotiation of the implementing agreement or agreements. The referee's decision shall be final and binding to the same extent as an award of an adjustment board under section 3 of the Railway Labor Act, and shall constitute the implementing agreement or agreements between the parties. The National Mediation Board shall fix and pay the compensation of such referees.

45 USC 16

#### "LABOR CONDITIONS

"SEC. 412. (a) NEW YORK DOCK.—Employees of the Corporation who are transferred under this title shall be entitled to the labor protection benefits set forth in New York Dock Railway-Control-Brooklyn Eastern Terminal, 360 ICC 60 (1979), except as provided in subsection (b) of this section.

45 USC 769c.

"(b) ALTERNATIVES.—(1) If the entity to which such employees are transferred was a railroad under the provisions of subtitle IV of title 49, United States Code, prior to the date of transfer, and the parties are unable to reach a collective bargaining agreement under procedures referred to in subsection (a), the collective bargaining agreement in effect between such railroad and its employees shall govern.

49 USC 10101  
et seq.

"(2) If the entity to which such employees are transferred was not a railroad under the provisions of subtitle IV of title 49, United States Code, prior to the date of transfer, and the parties are unable to reach a collective bargaining agreement under procedures referred to in subsection (a), the collective bargaining agreement in effect between the Corporation and its employees prior to the date of transfer shall govern.

"(c) CLASS III EXEMPTION.—The provisions of this section shall not apply to any Class III carrier."

(b) The table of contents of the Regional Rail Reorganization Act of 1973 is amended by striking out the items relating to title IV and inserting in lieu thereof the following new items:

#### "TITLE IV—TRANSFER OF FREIGHT SERVICE

"Sec. 401. Interest of United States.

"Sec. 402. Debt and preferred stock.

"Sec. 403. Profitability determinations.

"Sec. 404. Failure to sell as entity.

"Sec. 405. Transfer plan.

"Sec. 406. Consolidation of agreements.

"Sec. 407. Public comment and congressional notification.

"Sec. 408. Performance under agreements; effect.

"Sec. 409. Assignment.

"Sec. 410. Subsidiaries.

"Sec. 411. Labor transfer agreements.

"Sec. 412. Labor conditions."

### PART 5—UNITED STATES RAILWAY ASSOCIATION

#### ORGANIZATION OF USRA

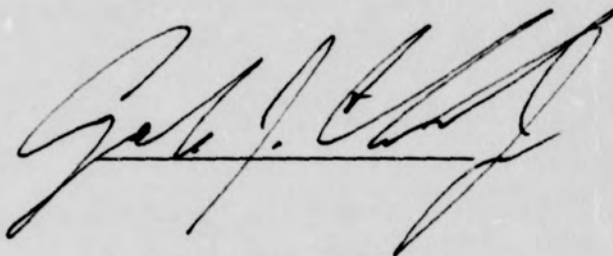
SEC. 1147. Section 201 of the Regional Rail Reorganization Act of 1973 (45 U.S.C. 711) is amended by striking out subsections (d) through (i), by redesignating subsections (j) and (k) as subsections (g) and (h), respectively, and by inserting after subsection (c) the following new subsections:

**AFFIDAVIT OF SERVICE BY MAIL**

State of New York, County of Jefferson, United States of  
America

I Angelo J. Chick, Jr., says: I am over the age of 21; I reside in the County of Jefferson, State of New York, United States of America. On this 18th day of August 1997 I served the attached **PETITION FOR CONDITIONS AND LIST OF EXHIBITS AND EXHIBITS**, 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., 600, 888 Seventeenth Street, N.W., Washington, DC 20006-3939; and Paul A. Cunningham, Esq., Harkins Cunningham, Suite 600, 1300 Nineteenth Street, N.W., Washington, DC 20036, by depositing a true copy of same enclosed in a post paid wrapper in an official depository under the exclusive care and custody of the U.S. Postal Service within the State of New York, United States of America.

Angelo J. Chick, Jr.

A handwritten signature in dark ink, appearing to read "Angelo J. Chick, Jr.", written over a horizontal line.

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181278



**TRANSPORTATION • COMMUNICATIONS  
INTERNATIONAL UNION**

AFL-CIO, CLC

LEGAL DEPARTMENT

181278

**ROBERT A. SCARDELLETTI**  
International President

**MITCHELL M. KRAUS**  
General Counsel

**LARRY R. PRUDEN**  
Assistant General Counsel

August 19, 1997

VIA HAND DELIVERY

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

I



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

Dear Mr. Williams:

Enclosed please find an original and twenty-five copies of TCU-4, the Motion to Waive Highly Confidential Requirement Regarding Transportation Communications International Union's Inside Counsel.

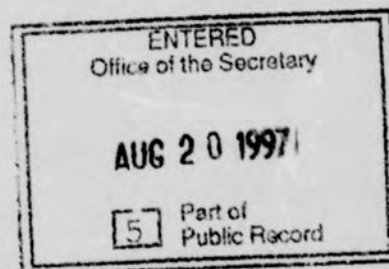
Thank you for your attention to this matter.

Very truly yours,

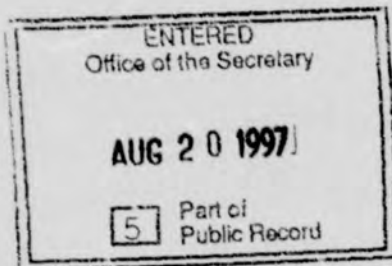
*Mitchell Kraus*

Mitchell M. Kraus  
General Counsel

MMK:fm  
Enclosures  
CC: Service List

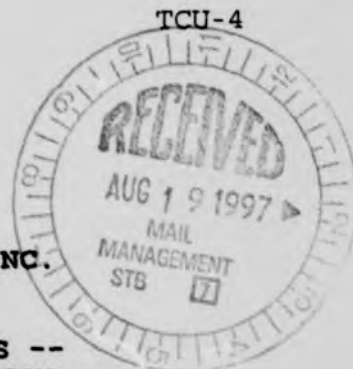


181278



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.

MOTION TO WAIVE HIGHLY CONFIDENTIAL REQUIREMENT  
REGARDING TRANSPORTATION COMMUNICATIONS INTERNATIONAL  
UNION'S INSIDE COUNSEL

In Decision No. 15 in the above-captioned matter (service date August 1, 1997), the Board modified the protective order entered in Decision No. 1 to allow in-house counsel for the United Transportation Union (UTU) to review material designated as highly confidential.

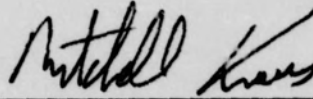
The Transportation Communications International Union ("TCU") seeks to have the Board modify the protective order so that its in-house counsel may also review material designated as highly confidential. By letter dated August 14, 1997, TCU's General Counsel signed the required confidentiality undertaking for such access (Exhibit 1). Applicants have advised that they will not provide access to documents designated highly confidential because Board Decision No. 15 does not cover others similarly situated.

It is submitted that there is no material difference between union in-house counsel and that TCU's in-house counsel should be afforded the same access to documents as UTU's.



It is respectfully requested that the Board expedite its ruling in this matter. Messrs. Spenski and Pfeifer, Applicants' officers who sponsored the labor impact statements, are scheduled for deposition on September 2 and 3. TCU's in-house counsel needs access to highly confidential documents in the near future to be able to adequately prepare for these depositions.

Respectfully submitted,



---

Mitchell M. Kraus  
General Counsel  
Transportation Communications  
International Union  
3 Research Place  
Rockville, MD 20850  
(301) 948-4910  
FAX: (301) 330-7662

Dated: August 19, 1997



**TRANSPORTATION • COMMUNICATIONS  
INTERNATIONAL UNION**

AFL-CIO, CLC

LEGAL DEPARTMENT

**RC BERT A. SCARDELLETTI**  
International President

**MITCHELL M. KRAUS**  
General Counsel

**LARRY R. PRUDEN**  
Assistant General Counsel

August 14, 1997

VIA FACSIMILE

Patricia E. Bruce, Esquire  
Zuckert, Scoutt & Rasenberger, LLP  
888 - 17th Street, NW, Suite 600  
Washington, DC 20006-3939

Re: Finance Docket No. 33388

Dear Ms. Bruce:

Consistent with the Administrative Law Judge's ruling on the motion by the United Transportation Union, I am hereby requesting that my name be included on the list of counsel for highly confidential documents. I am enclosing an executed appropriate undertaking for that purpose.

Should there be any problems in this regard, please advise.

Very truly yours,

Mitchell M. Kraus  
General Counsel

MMK:fm  
Enclosure

**Exhibit 1**

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Motion to Waive Highly Confidential Requirement Regarding Transportation Communications International Union's Inside Counsel was mailed this 19th day of August, 1997, via first-class mail, postage prepaid, to the following:

John V. Edwards  
Patricia E. Bruce  
Zuckert, Scoutt & Rasenberger, LLP  
888 - 17th Street, NW  
Washington, DC 20006-3939

Drew A. Harker  
Chris Datz  
Susan Cassidy  
Arnold & Porter  
555 - 12th Street, NW  
Washington, DC 20004-1202

David A. Coburn  
Steptoe & Johnson  
1330 Connecticut Avenue, NW  
Washington, DC 20036

Gerald P. Norton  
Harkins Cunningham  
1300 - 19th Street, NW, Ste. 600  
Washington, DC 20036

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

John M. Nannes  
Scot Hutchins  
Skadden, Arps, Slate, Meagher & Flom, LLP  
1440 New York Avenue, NW, 9th Floor  
Washington, DC 20005-2107

Larry I. Willis, Esquire  
Transportation Trades Department  
400 North Capitol Street, NW  
Suite 861  
Washington, DC 20001

Eric M. Hocky  
Gollatz, Griffin & Ewing, P.C.  
213 West Miner Street  
P. O. Box 796  
West Chester, PA 19381-0796

Michael P. Harmonis  
U.S. Department of Justice  
Antitrust Division  
325 - 7th Street, NW, Suite 500  
Washington, DC 20530

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John L. Oberdorfer  
Patton Boggs, L.L.P.  
2550 M Street, NW  
Washington, DC 20037

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GRA, Inc.  
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115 West Avenue  
Jenkintown, PA 19046

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Keller & Heckman, L.O.P.  
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Highsaw, Mahoney & Clarke, P.C.  
1050 - 17th Street, NW, Suite 210  
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W.W. Whitehurst & Associates, Inc.  
12421 Happy Hollow Road  
Cockeysville, MD 21030

L. John Osborn  
Sonnenschein, Nath & Rosenthal  
1301 K Street, NW  
Washington, DC 20005

William L. Sloyer  
C. Michael Loftus  
Christopher A. Mills  
Frank J. Pergolizzi  
Jean M. Cunningham  
Donald G. Avery  
Kelvin J. Dowd  
Slover & Loftus  
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G.W. Fauth & Associates, Inc.  
116 South Royal Street  
Alexandria, VA 22314

Kevin M. Sheys  
Oppenheimer, Wolff & Donnelly  
1020 19th Street, NW, Suite 400  
Washington, DC 20036

William C. Sippel  
Oppenheimer, Wolff & Donnelly  
180 North Stetson Avenue  
45th Floor  
Chicago, IL 60601

Erika Z. Jones  
Adrian L. Steel, Jr.  
Roy T. Englert, Jr.  
Mayer, Brown & Platt  
2000 Pennsylvania Avenue, NW  
Suite 6500  
Washington, DC 20006

Michael F. McBride  
Linda K. Breggin  
Brenda Durham  
Bruce W. Neely  
Joseph H. Fagan  
Brian D. O'Neill  
LeBoeuf, Lamb, Greene & MacRae, LLP  
1875 Connecticut Ave., NW, Suite 1200  
Washington, DC 20009-5728

Thomas D. Crowley  
L.E. Peabody & Associates, Inc.  
1501 Duke Street, Suite 200  
Alexandria, VA 22314

Paul M. Donovan  
LaRoe, Winn, Moerman & Donovan  
3506 Idaho Avenue, NW  
Washington, DC 20016

Arvid E. Roach II  
Covington & Burling  
1201 Pennsylvania Avenue, NW  
P.O. Box 7566  
Washington, DC 20044-7566

Thomas A. Schmitz  
Fieldston Company, Inc.  
1800 Massachusetts Avenue, NW  
Suite 500  
Washington, DC 20036-1883

Frederic L. Wood  
John K. Maser, III  
Nicholas J. DiMichael  
Karyn A. Booth  
Donelan, Cleary, Wood & Maser, P.C.  
1100 New York Avenue, NW, Suite 750  
Washington, DC 20005-3934

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Charles H. White  
Galland, Kharasch & Garfinkle  
1054 - 31st Street, NW  
Washington, DC 20007

Randolph L. Seger  
Robert B. Scott  
Michael P. Maxwell  
McHale, Cook & Welch  
1100 Chamber of Commerce Building  
Indianapolis, IN 46204

Doreen C. Johnson  
30 E. Broad Street  
16th Floor  
Columbus, OH 43215

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Eric Von Salzen  
Hogan & Hartson, L.L.P.  
555 - 13th Street, NW  
Washington, DC 20004



Patrick R. Plummer  
Debra L. Willen  
Guerrieri, Edmond & Clayman, P.C.  
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William A. Mullins  
Margaret T. Andrews  
Troutman, Sanders, LLP  
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Woodharbor Associates  
7801 Woodharbor Drive  
Fort Worth, TX 76179

John L. Sarratt  
Kilpatrick, Stockton  
4101 Lake Boone Trail  
Raleigh, NC 27607

Sandra L. Nunn  
Frost & Jacobs LLP  
2500 PNC Center  
201 E. 5th Street  
Cincinnati, OH 45202

Joseph Pomponio (RCC-21)  
U.S. Department of Transportation  
Federal Railroad Administration  
400 - 7th Street, SW  
Washington, DC 20590

Francis Mardula  
U.S. Department of Transportation  
Maritime Administration MAR-224  
400 - 7th Street, SW  
Washington, DC 20590

Paul Smith (C-30)  
U.S. Department of Transportation  
400 - 7th Street, SW  
Washington, DC 20590

Henry M. Wick, Jr.  
Charles J. Streiff  
Vincent P. Szelign  
Wick, Straiff, Meyer, McGrail & O'Boyle, P.C.  
1450 Two Chatham Center  
Pittsburgh, PA 15219

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Irene Ringwood  
Karl Morell  
Ball, Janik LLP  
1455 F Street, NW, Suite 225  
Washington, DC 20005

Inajo David Chappell  
Ulmer & Berne, LLP  
1300 East Ninth Street, Suite 900  
Cleveland, OH 44114-1583

Charles A. Spitulnik  
Jamie Palter Rennert  
Alicia M. Serfaty  
Hopkins & Sutter  
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Washington, DC 20006

Robert A. Wimbash  
John D. Heffner  
Keith G. O'Brien  
Rea, Cross & Auchincloss  
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Washington, DC 20036

Janice G. Barber  
The Burlington Northern  
and Santa Fe Railway Co.  
3017 Lou Menk Drive  
Fort Worth, TX 76131-2830

Richard E. Weicher  
The Burlington Northern  
and Santa Fe Railway Co.  
1700 East Golf Road  
Schaumburg, IL 60173

Daniel R. Elliott  
United Transportation Union  
14600 Detroit Avenue  
Cleveland, OH 44107-4250

Hugh G. Welsh  
Port Authority of New York  
and New Jersey  
Suite 67 East  
One World Trade Center  
New York, NY 10048

Heidi Edens  
General Counsel  
Providence and Worcester  
Railroad Company  
75 Hammond Street  
Worcester, MA 01610

Marcella M. Szel  
Canadian Pacific Railway  
401 Ninth Avenue, SW, Suite 500  
Calgary, Alberta T2P 4Z4  
CANADA

Terrence J. Foley  
The Port of Philadelphia & Camden, Inc.  
3460 N. Delaware S. 200  
Philadelphia, PA 19134

Scott M. Saylor  
North Carolina Railroad Company  
3200 Atlantic Avenue, Ste. 220  
Raleigh, NC 27604

Bruce A. Deerson  
Martin Marietta Materials, Inc.  
P. O. Box 30013  
Raleigh, NC 27622

Anne Fingarette Hasse  
APL Limited  
1111 Broadway  
Oakland, CA 94607

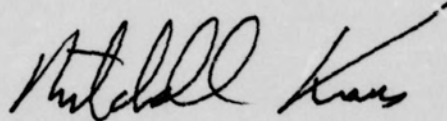
Edward J. Rodriguez  
Counsel for Housatonic Railroad Co., Inc.  
P. O. Box 298  
Centerbrook, CT 06409

Thomas M. O'Leary  
Executive Director  
Ohio Rail Development Commission  
50 West Broad Street, 15th Floor  
Columbus, OH 43215

James F. Peterson  
Kenneth E. Siegel  
American Trucking Association, Inc.  
2200 Mill Road  
Alexandria, VA 22314

Gary A. Laakso  
301 Yamato Road  
Boca Raton, FL 33431

Alfred P. Agler  
Director, Transportation  
Public Utilities Commission of Ohio  
180 E. Broad Street, 5th Floor  
Columbus, OH 43215

A handwritten signature in dark ink, appearing to read "Mitchell M. Kraus". The signature is fluid and cursive, with a long horizontal stroke extending from the end.

---

Mitchell M. Kraus

STB

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8-11-97

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ENTERED  
Office of the Secretary  
  
AUG 12 1997  
  
5 Part of  
Public Record

UNITED STATES OF AMERICA  
BEFORE THE  
DEPARTMENT OF TRANSPORTATION  
SURFACE TRANSPORTATION BOARD

CSX Corporation and  
Norfolk Southern Corporation

I

STB Finance  
Docket No. 33398

MOTION TO INTERVENE OF  
CENTRAL HUDSON GAS & ELECTRIC CORPORATION

RECEIVED  
AUG 5 1997  
MAIL  
MANAGEMENT  
STB [7]  
  
RECEIVED  
AUG 11 1997  
MAIL  
MANAGEMENT  
STB [7]

Central Hudson Gas & Electric ("Central Hudson") hereby  
moves to intervene in the proceeding before the Surface  
Transportation Board filed by CSX Corporation and Norfolk Southern  
Corporation on June 23, 1997. In further support, Central Hudson  
shows as follows:

I.

The name, title and mailing address of the person who  
should be served with communications concerning this filing are:

Diane Seitz  
Manager - Fuels Resources  
Central Hudson Gas & Electric Corporation  
284 South Avenue  
Poughkeepsie, NY 12601-4879

II.

Central Hudson is an investor-owned utility, providing  
natural gas and electric service to 263,000 electric and 60,000  
natural gas customers in the Mid-Hudson region of New York State.  
Central Hudson owns and operates two coal-fired electric generating  
units (Danskammer Generating Station Units 3 & 4) located on the  
west bank of the Hudson River about sixty-five miles north of New



York City. The units consume about 850,000 tons of low-sulfur coal per year of which approximately 50% is currently transported by Conrail from West Virginia to the Plant (single-line haul).

### III.

On June 23, 1997, CSX Corporation ("CSX") and Norfolk Southern Corporation ("NS") filed a joint application with the Surface Transportation Board seeking federal approval for the proposed acquisition and division of Conrail. The operating plan as filed calls for the CSX to obtain the Conrail lines from Columbus, Ohio to Buffalo, New York and then from Buffalo east to Selkirk and then south from Selkirk to New York City (River Line). The NS will obtain Conrail's New York Southern Tier through New York to New Jersey. Therefore, current CSX origins would be a single-line haul and current NS origins would be a two-line haul. The operating plan does not give Norfolk Southern access to the Danskammer Station.

Central Hudson's current tier coal supply is a Conrail origin mine. The joint filing proposes C to become the delivering carrier to Danskammer and Norfolk Southern assume the status of the origin line for our current domestic contract supplier. This move is currently a single-line haul on Conrail.

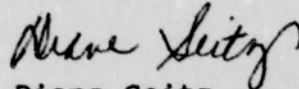
### IV.

As a transportation customer currently served by Conrail, Central Hudson will be adversely affected by the proposed

acquisition and division of Conrail. Central Hudson believes it is anti-competitive for CSX to deny Norfolk Southern trackage rights for deliveries of coal to Central Hudson. The merger as filed should not be approved unless it is so conditioned.

Central Hudson moves to intervene as a full party to this proceeding.

Respectfully submitted,



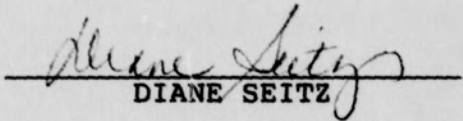
Diane Seitz  
Manager - Fuels Resources  
Central Hudson Gas &  
Electric Corporation  
284 South Avenue  
Poughkeepsie, NY 12601



**CERTIFICATE OF SERVICE**

I hereby certify that I have this day served the foregoing document upon Administrative Law Judge Jacob Leventhal and to each of the applicant's representatives (1) Dennis G. Lyons, Esquire, (2) Richard A. Allen, Esquire and (3) Paul A. Cunningham.

Dated at Poughkeepsie, New York, this 8th day of August, 1997.

  
DIANE SEITZ

STB

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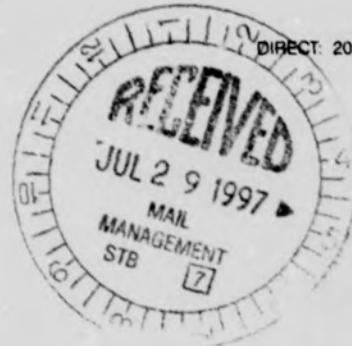
**TROUTMAN SANDERS LLP**  
ATTORNEYS AT LAW  
A LIMITED LIABILITY PARTNERSHIP

1300 I STREET, N.W.  
SUITE 500 EAST  
WASHINGTON, D.C. 20005-3314  
TELEPHONE: 202-274-2950  
FACSIMILE: 202-274-2994

WILLIAM A. MULLINS

July 29, 1997

The Honorable Vernon A. Williams  
Secretary  
Surface Transportation Board  
1925 K Street, NW  
Room 711  
Washington, D.C. 20423



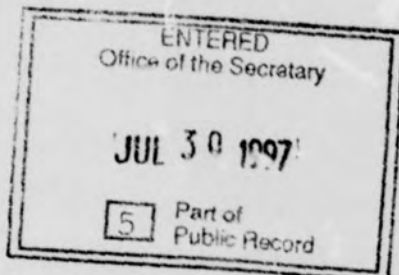
DIRECT: 202-274-2953

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

Dear Secretary Williams:

Enclosed for filing in the above captioned docket are the original and twenty-five copies of the Notice of Substitution of Counsel (NYSE&G-2) for New York State Electric & Gas. Also enclosed is 3.5-inch diskette containing the text of this pleading.

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



Sincerely yours,

William A. Mullins  
Attorney for New York State Electric & Gas

Enclosures

cc: The Honorable Jacob Leventhal  
Paul A. Cunningham, Esq.  
Richard A. Allen, Esq.  
Dennis G. Lyons, Esq.

186832

ORIGINAL

BEFORE THE  
SURFACE TRANSPORTATION BOARD



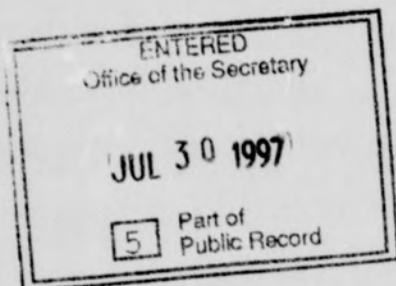
Finance Docket No. 33388

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

NOTICE OF SUBSTITUTION OF COUNSEL FOR  
NEW YORK STATE ELECTRIC & GAS

William A. Mullins  
John R. Molm  
Sandra L. Brown  
TROUTMAN SANDERS LLP  
1300 I Street, N.W.  
Suite 500 East  
Washington, D.C. 20005  
Tel: (202) 274-2950  
Fax: (202) 274-2994

Attorneys for New York State Electric & Gas



July 29, 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

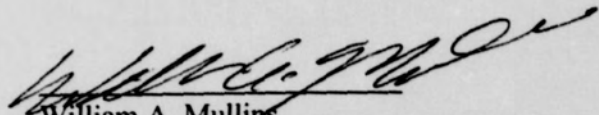
---

NOTICE OF SUBSTITUTION OF COUNSEL FOR  
NEW YORK STATE ELECTRIC & GAS

Please enter the appearances in this proceeding of the below-named persons on behalf of New York State Electric & Gas ("NYSE&G") and remove Michael F. McBride of LeBoeuf, Lamb, Greene & MacRae, LLP as counsel of record (as NYSE&G originally requested in its Notice of Appearance filed June 30, 1997, NYSE&G-1). New York State Electric & Gas intends to participate in this proceeding as a Party Of Record. Accordingly, please place the named persons, at the addresses provided, on the service list to receive all pleadings and decisions in this proceeding. By copy of this pleading, I am requesting applicants to serve us with copies of all pleadings filed to date and any future filings.

This 29<sup>th</sup> day of July, 1997.

Jim Mulligan  
Sean D. Brady  
New York State Electric & Gas Corporation  
Corporate Drive  
Kirkwood Industrial Park  
P.O. Box 5224  
Binghamton, N.Y. 13902-5224

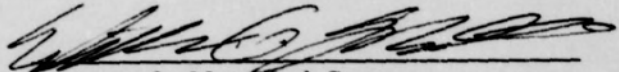


William A. Mullins  
John R. Molm  
Sandra L. Brown  
TROUTMAN SANDERS LLP  
1300 I Street, N.W.  
Suite 500 East  
Washington, D.C. 20005  
Tel: (202) 274-2950  
Fax: (202) 274-2994

Attorneys for New York State  
Electric & Gas

CERTIFICATE OF SERVICE

I hereby certify that a true copy of the foregoing "Notice of Substitution of Counsel for New York State Electric & Gas" (NYSEG-2) was served this 29<sup>th</sup> day of July, 1997, by delivering or depositing a copy in the United States mail in a properly addressed envelope with adequate postage thereon addressed to Applicants' representatives and Judge Leventhal.



Attorney for New York State  
Electric & Gas

180832

**TROUTMAN SANDERS LLP**  
ATTORNEYS AT LAW  
A LIMITED LIABILITY PARTNERSHIP

1300 I STREET, N.W.  
SUITE 500 EAST  
WASHINGTON, D.C. 20005-3314  
TELEPHONE: 202-274-2950  
FACSIMILE: 202-274-2994

WILLIAM A. MULLINS

DIRECT: 202-274-2953

July 29, 1997

The Honorable Vernon A. Williams  
Secretary  
Surface Transportation Board  
1925 K Street, NW  
Room 711  
Washington, D.C. 20423

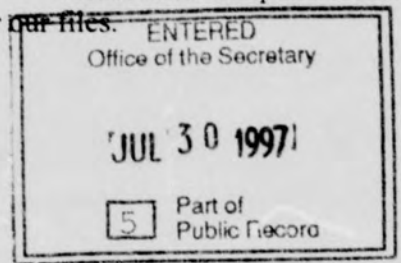


RE: Finance Docket No. 33388, *CSX Corporation and CSX Transportation, Inc., Norfolk Southern Corporation and Norfolk Southern Railway Company -- Control and Operating Leases/Agreements -- Conrail Inc. and Consolidated Rail Corporation*

Dear Secretary Williams:

Enclosed for filing in the above captioned docket are the original and twenty-five copies of the Notice of Substitution of Counsel (NYSE&G-2) for New York State Electric & Gas. Also enclosed is 3.5-inch diskette containing the text of this pleading.

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



Sincerely yours,

William A. Mullins  
Attorney for New York State Electric & Gas

Enclosures

cc: The Honorable Jacob Leventhal  
Paul A. Cunningham, Esq.  
Richard A. Allen, Esq.  
Dennis G. Lyons, Esq.

STB

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7-24-97

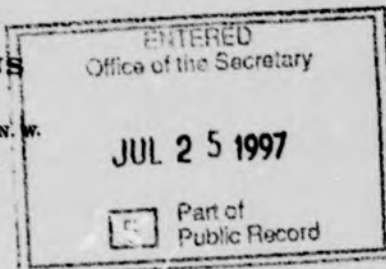
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180780

120780

WILLIAM L. SLOVER  
C. MICHAEL LOFTUS  
DONALD G. AVERY  
JOHN H. LE SEUR  
KELVIN J. DOWD  
ROBERT D. ROSENBERG  
CHRISTOPHER A. MILLS  
FRANK J. PERGOLIZZI  
ANDREW B. KOLESAR III

**SLOVER & LOFTUS**  
ATTORNEYS AT LAW  
1224 SEVENTEENTH STREET, N.W.  
WASHINGTON, D. C. 20036



July 24, 1997

202 347-7170



I

BY HAND DELIVERY

The Honorable Vernon A. Williams  
Secretary  
Surface Transportation Board  
1925 K Street, N.W., Room 711  
Washington, D.C. 20423-0001

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

Dear Mr. Secretary:

Enclosed for filing in the above-referenced proceeding  
please find an original and twenty-five (25) copies of Potomac  
Electric Power Company's ("PEPCO") "Petition to Modify Protective  
Order in Finance Docket No. 33388" (PEPC-3). We have also  
enclosed a copy of this document on computer diskette.

Enclosed for FILING UNDER SEAL in the above-referenced  
proceeding please find a separately packaged original and twenty-  
five (25) copies of the Highly Confidential "Appendix to Petition  
to Modify Protective Order in Finance Docket No. 33388."

By separate correspondence, PEPCO is filing this  
document simultaneously in Docket No. 41989. We have enclosed an  
additional copy of this filing to be date-stamped and returned to  
the bearer of this letter. Thank you for your assistance in this  
matter.

Sincerely,

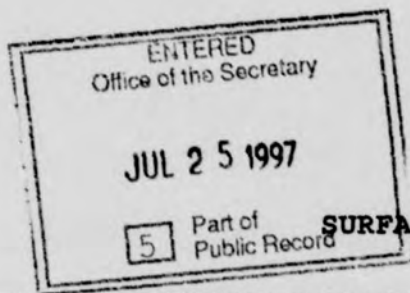
*C. Michael Loftus*  
C. Michael Loftus

Enclosures

cc: G. Paul Moates, Esq. (via telecopier - cover letter only)  
Restricted Service List in  
Finance Docket No. 33388 (via telecopier)



180780



PEPC-3

BEFORE THE  
SURFACE TRANSPORTATION BOARD



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

Finance Docket No. 33388

POTOMAC ELECTRIC POWER COMPANY,  
  
Complainant,  
  
v.  
  
CSX TRANSPORTATION, INC.,  
  
Defendant.

Docket No. 41989

POTOMAC ELECTRIC POWER COMPANY'S PETITION  
TO MODIFY PROTECTIVE ORDER IN FINANCE DOCKET NO. 33388

EXPEDITED CONSIDERATION REQUESTED

Pursuant to 49 C.F.R. § 1117.1, Potomac Electric Power Company ("PEPCO"), which is a participant in Finance Docket No. 33388 (the "Control Proceeding") and the Complainant in Docket No. 41989 (the "Rate Case"), hereby petitions the Board<sup>1</sup> to

<sup>1</sup> PEPCO has directed this Petition to the Board rather than to Administrative Law Judge Leventhal because the relief sought is not of the nature of a discovery dispute, and because of the need for expedited handling of issues that extend beyond the scope of either proceeding. (Footnote continued on page 2.)

modify the Protective Order entered in the Control Proceeding in Decision No. 1, served April 16, 1997, to permit PEPCO to utilize certain confidential and highly confidential information subject to that order in the Rate Case. Specifically, PEPCO seeks an exception from Paragraph 10 of the Protective order for this purpose; Paragraph 10 provides that confidential and highly confidential; material "may not be used for any purposes other than these proceedings . . . ."

The information involved is now in the possession of PEPCO's outside counsel and consultants and/or currently is available to them through the Applicants' document depository. The modification requested would preserve the Protective Order entered in the Rate Case in the Board's decision served February 5, 1997. PEPCO requests expedited consideration because it seeks to utilize the information involved in its Rebuttal Evidence in the Rate Case which is due on August 11, 1997. The information is highly relevant to significant issues in the Rate Case.

In its Reply Statement and Evidence filed in the Rate Case on July 11, 1997 ("Reply Evidence"), CSX Transportation, Inc. ("CSXT") has challenged certain of PEPCO's stand-alone

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(Footnote 1 continued) . . .

PEPCO notes that there is precedent for initial consideration of such issues by the full Board in the Rate Case itself. Specifically, when CSXT objected to production of certain management cost information requested by PEPCO during discovery, it sought (and obtained) initial Board consideration of the matter in lieu of the customary initial determination by an administrative law judge. See Decision in Docket No. 41989 served March 12, 1997, at 2.

traffic and revenue assumptions as lacking sufficient detail -- detail that CSXT itself possesses but has chosen not to disclose in its Reply. Information directly relevant to CSXT's criticism of PEPCO's stand-alone traffic group and revenues has been produced by the Applicants (including CSXT) in the Control Proceeding since the filing of the Control Application on June 23, 1997. Consequently, in order to supply the data that is needed to inform the Board's decision in the Rate Case, PEPCO requests relief that will allow it to treat and use confidential and highly confidential information that has been produced by the Applicants in the Control Proceeding as confidential and highly confidential information that was produced in the Rate Case. As such, this information would be subject to treatment as confidential and highly confidential material under the protective order that was served in the Rate Case on February 5, 1997.

Significantly, granting this Petition would not harm the Applicants in the Control Proceeding in any manner whatsoever. The relief requested by PEPCO would neither impose any burden upon the Applicants nor result in the disclosure of confidential or highly confidential information to parties or individuals that presently lack access to that information. To the contrary, this Petition merely asks the Board to permit PEPCO's representatives who have signed the protective orders in both proceedings to utilize evidence already in their possession (or currently available to them through the Applicants' depository) to rebut evidence submitted by CSXT in the Rate Case.

Nor would the relief requested by PEPCO prejudice CSXT in the Rate Case. In particular, CSXT is the party with access to this relevant information. CSXT has elected to defend its common carrier rates without specific recourse to this body of evidence, notwithstanding CSXT's recognition of the importance of traffic and revenue information to the issues in the Rate Case. In fact, in at least certain respects, the evidence submitted in the Rate Case is inconsistent with the information available in the Control Proceeding.

#### **ARGUMENT**

On January 3, 1997, PEPCO filed a Complaint against CSXT seeking the establishment of reasonable common carrier rates and service terms for the movement of coal from certain CSXT origins in northern West Virginia to PEPCO's Dickerson Generating Station ("Dickerson"). In accordance with the procedural schedule in effect in that proceeding, PEPCO filed its Opening Statement of Fact and Argument ("Opening Evidence") on May 5, 1997.

Arguing that CSXT's common carrier rates exceed a reasonable maximum under the Board's stand-alone cost constraint, PEPCO designed and presented a stand-alone railroad (the "Dickerson Railroad") which replicates a significant portion of CSXT's lines in northern West Virginia and western Maryland. Traffic moving over PEPCO's stand-alone model includes both: (i) coal and other freight that currently moves in single- or interline service over certain lines of the Defendant CSXT; and (ii) coal



that currently moves in single-line Consolidated Rail Corporation ("Conrail") service from mine origins along the former Monongahela Railroad ("MGA") in southwestern Pennsylvania to the Port of Baltimore (the "MGA traffic"). In particular, PEPCO's model assumes that a substantial volume of the MGA traffic will be diverted from Conrail single-line service to interline service involving the Dickerson Railroad as a bridge carrier and CSXT as the terminating carrier. PEPCO bases the volume and revenue associated with this MGA traffic upon specific information derived from the STB's 1995 Costed Waybill Sample, to which PEPCO's outside counsel and economic consultants obtained access on February 3, 1997.

In its Reply Evidence filed July 11, 1997 in the Rate Case, however, CSXT challenges PEPCO's inclusion of the MGA traffic, arguing inter alia that this inclusion is commercially infeasible and that the model's associated revenue divisions are both theoretically invalid and inconsistent with actual experience. CSXT also challenges the traffic and revenue projections utilized by PEPCO for the stand-alone railroad as being unfounded. CSXT further objects to PEPCO's assumed divisions of revenue between its stand-alone railroad and other carriers, but fails to provide any specific evidence of its existing divisions agreements with Conrail. Similarly, CSXT also presents the testimony of Conrail's Assistant Vice President - Power Generation Markets, Mr. Ronald A. Listwak, who claims that the diversion of MGA traffic projected by PEPCO is unlikely to occur, and that PEPCO's

revenue evidence (derived from the Costed Waybill Sample) is completely unreliable. As in the case of his counterparts at CSXT, however, Witness Listwak explicitly refuses to provide any actual revenue figures to support his generalized claims, notwithstanding the two-tiered protective order in the Rate Case.<sup>2</sup>

CSXT essentially has argued that it and Conrail possess information confirming that PEPCO's volume and revenue assumptions are invalid, but that neither it nor Conrail will consent to share that information with PEPCO or the Board. Fortunately, the Board need not accept CSXT's claims at face value. A source of data exists which will permit PEPCO to test a number of CSXT's broad assertions against specific, detailed information that is available without the imposition of any burden. That data exists in the form of a variety of different materials that are available in the Control Proceeding.

First, certain publicly available documents provide information that is relevant to the MGA traffic issue. Specifically, the Control Application itself indicates that CSXT's new direct access to MGA coal origins will give it a competitive single-line route for MGA coal traffic moving to Baltimore and other East Coast ports -- a route through Cumberland, Maryland, that involves a portion of the route of PEPCO's stand-alone rail-

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<sup>2</sup> Despite its failure to provide any detail to support its generalized objections to PEPCO's stand-alone model, CSXT flatly refused PEPCO's request that it provide workpapers supporting its various claims regarding the invalidity of PEPCO's evidence.



road).<sup>3</sup> Similarly, during discovery in the Control Proceeding, the Applicants have indicated publicly that MGA-origin coal traffic would move over the exact route hypothesized by PEPCO for its stand-alone railroad. See Responses to PEPCO's First Set of Interrogatories to Applicants, at 4.<sup>4</sup>

In addition to this public material, however, the Applicants also have produced, and outside counsel and consultants for PEPCO have obtained, confidential and highly confidential documents relevant to the issue of the MGA traffic. This additional material, of course, provides much more detail than is available in the Applicants' public pronouncements. For example, in addition to their public answers to PEPCO's First Set of Interrogatories, the Applicants also have answered these Interrogatories by producing highly confidential documents supporting their traffic projections. Significantly, these projections in the Control Proceeding are different from, and materially higher than, the projections CSXT urges upon the Board in the Rate Case. To cite two examples, CSXT's projection in the Rate Case of MGA-

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<sup>3</sup> See Application in Finance Docket No. 33388, Volume 2A (Verified Statement of Raymond L. Sharp) at 364; Volume 3A (Verified Statement of John W. Orrison) at 55; Volume 3A (CSXT Operating Plan) at 170-171; cf. Docket No. 41989, Reply Verified Statement of Mr. Marshall W. Bowen at 17 n.9 (indicating that the Control Application projects diversions of approximately half of the MGA/Baltimore traffic to CSXT's lines).

<sup>4</sup> "CSX is considering two options for movement of MGA coal to PEPCO stations: (1) through Newell Yard via McKeesport, PA through Cumberland, MD and Brunswick, MD . . . or (2) from Grafton, WV to Cumberland, MD taking the same route east as (1) above." Id.

origin coal traffic moving to Baltimore that it expects to capture if the Control Application is granted is significantly less than the projection contained in the highly confidential documents placed in Applicants' document depository in the Control Proceeding. Similarly, CSXT's projection in the Rate Case of increases in export coal traffic and revenues is significantly lower than the projected increases in export coal traffic and revenues contained in the documents in the Control Proceeding document depository. (For specifics, the Board is referred to the Highly Confidential Appendix to this Petition which is being filed under seal in both the Control Proceeding and the Rate Case.)<sup>5</sup>

The specific relevant, highly confidential documents available from the Applicants' document depository that PEPCO seeks to use for purposes of its rebuttal filing in the Rate Case include the following:

- Documents containing actual (1995 Conrail and CSXT) and projected (2000 CSXT and NS) coal traffic levels from the MGA origins moving to Baltimore, including terminated traffic, coastwise traffic and export traffic.
- Documents containing actual (1995 Conrail and CSXT) and projected (2000 CSXT and NS) revenues for CSXT coal traffic moving or projected to move from the MGA origins to Baltimore, including terminated traffic, coastwise traffic and export traffic.
- Documents containing actual (1995) and projected (2000) east coast coal export traffic levels, separately for Conrail (1995 only), CSXT and NS (1995 and 2000).

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<sup>5</sup> PEPCO is filing and serving separately redacted versions of this Appendix to comply with the protective orders in these two proceedings.

Given the confidential nature of each of these categories of documents, however, PEPCO currently is precluded from using them in the Rate Case.

It should be noted that the information PEPCO seeks to utilize from the Control Proceeding has only become available since the filing of the Control Application on June 23, 1997. It was not available for discovery by PEPCO during the discovery period in this case, nor was it available prior to the submission of PEPCO's Opening Evidence on May 5, 1997.

It should further be noted that, as an Applicant in the Control Case, most of the information involved was available to CSXT prior to the filing of its Reply Evidence on July 11, 1997. CSXT could have used this information in its Reply Evidence, yet chose not to do so.

In prior rate reasonableness litigation before the Interstate Commerce Commission, the opportunity has been provided to utilize confidential material that is already in a party's possession as the result of an unrelated proceeding. For example, in Docket No. 37063, Increased Rates on Coal, L&N R.R., Decision served August 15, 1990 ("L&N"), Chief Administrative Law Judge Cross permitted Dayton Power & Light Company's ("DP&L") outside counsel and consultants to utilize computerized traffic data from a non-party to the proceeding (Norfolk Southern Corporation and its railroad subsidiaries Norfolk and Western Railway Company and Southern Railway Company). This data previously had been produced by Norfolk Southern to DP&L's economic consultants

in a different Commission proceeding, Docket No. 38301S, Coal Trading Corp. v. The Baltimore and Ohio R.R. Finding in DP&L's favor, Chief Judge Cross ruled as follows:

The protective order(s) entered by the Commission in Docket No. 38301S, Coal Trading Corp., et al. v. The Baltimore and Ohio Railroad Co., et al., governing access to and use of the Data by LEPA are hereby modified to the limited extent necessary to permit DP&L and LEPA to utilize the Data for purposes of the instant proceeding . . .

Id. at 2. In the case of this Petition, the connection between the two proceedings is at least as great as in the L&N case. Here, CSXT is both the Defendant in the Rate Case, and an Applicant in the Control proceeding. Furthermore, Conrail is an Applicant in the Control proceeding, and is a party offering testimony on CSXT's behalf in the Rate Case. The Board therefore should afford PEPCO the same opportunity that it afforded to DP&L.

#### CONCLUSION

For the foregoing reasons, the Board should grant PEPCO's Petition to utilize confidential and highly confidential information from the Control Proceeding in support of its August 11, 1997 Rebuttal Evidence. Due to PEPCO's need to include this material in its rebuttal filing in the Rate Case, which is due on August 11, 1997, expedited consideration of this Petition is respectfully requested.

Respectfully submitted,

POTOMAC ELECTRIC POWER COMPANY

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OF COUNSEL:

Slover & Loftus  
1224 Seventeenth Street, N.W.  
Washington, D.C. 20036

Dated: July 24, 1997

Attorneys for Potomac Electric  
Power Company



# CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing document (with appropriately redacted versions of the Appendix) were served this 24th day of July, 1997, by facsimile upon the following counsel for CSXT in Docket No. 41989 and for the Applicants in Finance Docket No. 33388:

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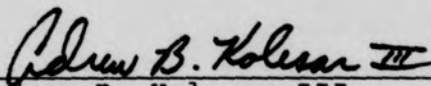
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(202) 429-3902 (fax)

and by facsimile upon all other parties on the Restricted Service List in Finance Docket No. 33388, as reported by the Applicants on Tuesday, July 22, 1997.

  
\_\_\_\_\_  
Andrew B. Kolesar III



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# CLF

Conservation Law Foundation



July 20, 1999

Mr. Vernon Williams  
Office of the Secretary  
Surface Transportation Board  
1925 K Street, N.W. Room 700  
Washington, D.C. 20423

Re: STB Finance Docket No: 33388 (Conrail Merger)

Dear Mr. Williams:

The Conservation Law Foundation is hereby withdrawing from this matter.  
Please remove CLF from the service list.

Kindly date-stamp and return the enclosed copy of this letter to us in the enclosed,  
postage prepaid envelope.

If you have any questions, please call me at 617-350-0990 ext. 744.

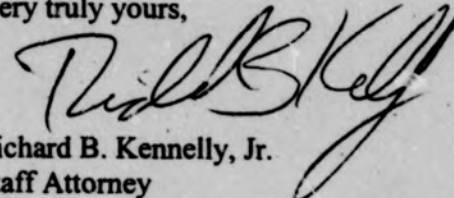
Thank you.

ENTERED  
Office of the Secretary

JUL 27 1999

Part of  
Public Record

Very truly yours,

  
Richard B. Kennelly, Jr.  
Staff Attorney

STB

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CHARLES L. LITTLE  
International President

BYRON A. BOYD, JR.  
Assistant President

ROGER D. GRIFFETH  
General Secretary and Treasurer

# **united transportation union**

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• KEVIN C. BRODAR  
Associate General Counsel

• ROBERT L. McCARTY  
Associate General Counsel

• DANIEL R. ELLIOTT, III  
Assistant General Counsel

July 16, 1997

### **UPS Next Day Air**

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



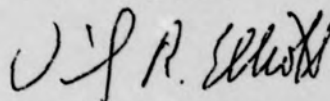
Re: Motion to Waive Highly Confidential Requirement Regarding United Transportation Union's Inside Counsel

Dear Judge Leventhal:

Enclosed please find United Transportation Union's Motion to Waive Highly Confidential Requirement Regarding United Transportation Union's Inside Counsel.

Thank you.

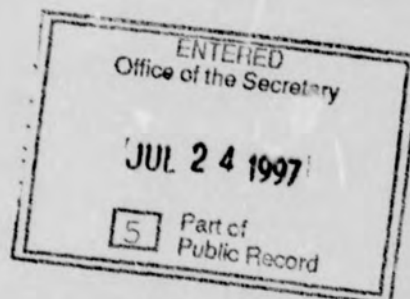
Very truly yours,



Daniel R. Elliott, III  
Assistant General Counsel

### **Enclosure**

cc: Vernon A. Williams, Secretary  
Surface Transportation Board



**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**

**MOTION TO WAIVE HIGHLY CONFIDENTIAL REQUIREMENT  
REGARDING UNITED TRANSPORTATION UNION'S INSIDE COUNSEL**

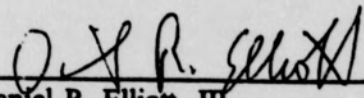
The United Transportation Union ("UTU") respectfully asks the Board to waive the provision in the protective order, just with respect to UTU, governing the production of highly confidential competitive information in discovery and restricting that information to use by outside counsel or outside consultants for the parties. UTU has signed Exhibit B of the April 16, 1997 order ("Decision 1") regarding highly confidential materials and provided the undertaking to the applicants. However, the applicants would not place UTU on the highly confidential list due to the protective order's restriction about inside counsel.

For the purposes of UTU, this restriction with regard to disclosure to only outside counsel or consultants is inappropriate. This clause is in place to protect the applicants from the possible disclosure of proprietary or commercially sensitive information and data which could cause serious competitive injury. The restriction forbids inside counsel from access to this information apparently based on the reasoning that these persons are more likely to disclose these sensitive items to persons within their companies to gain an unfair advantage against the applicants. However, with respect to UTU, this danger is non-existent since UTU's inside counsel would not

have the same, or any, motivation to disclose this information to anyone inside or outside of the organization. Moreover, this type of information is essentially of no value from a commercial standpoint to a union. Finally, UTU is handling this matter inside and has no intention of using outside counsel at this time.

WHEREFORE, UTU urges the Board to waive the confidentiality restriction by allowing UTU's inside counsel to be placed on the highly confidential list in this proceeding.

Respectfully submitted,

  
\_\_\_\_\_  
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FAX (216) 228-0937



### CERTIFICATE OF SERVICE

This is to certify that a copy of the foregoing United Transportation Union's Motion to Waive Highly Confidential Requirement Regarding United Transportation Union's Inside Counsel this 16th day of July, 1997 via first-class, postage pre-paid mail upon the following:

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Administrative Law Judge  
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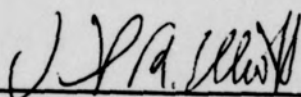
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\_\_\_\_\_  
Daniel R. Elliott, III



STB

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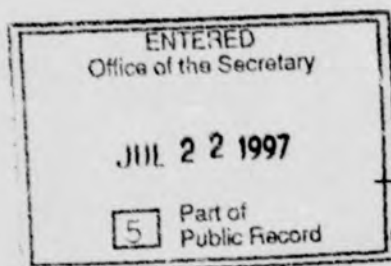
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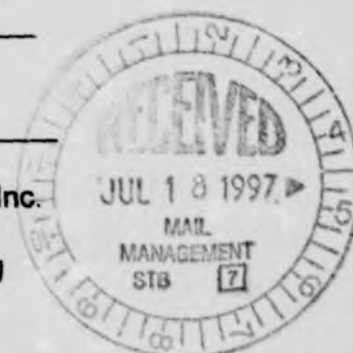
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ARU-6

BEFORE THE  
SURFACE TRANSPORTATION BOARD

Finance Docket No. 33388

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



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

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

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

Conrail's assets between them.<sup>2/</sup>

NS's and CSX's acquisition of control of Conrail will have adverse consequences for employees of Conrail and for employees of NS and CSX through reductions in work opportunities and consolidation of work; and it is likely to have similar adverse consequences for employees of competitors of Conrail, NS, and CSX. Additionally, actions taken by Applicants prior to final STB action on the Application will have adverse effects on railroad employees. In this regard, 49 U.S.C. § 11326 (a) expressly provides that in any transaction which must be approved under Section 11323, the Surface Transportation Board ("STB") must condition its approval by requiring arrangements for the protection of employees of the carriers involved who may be adversely affected by the transaction. If CSX and NS are permitted to acquire control over Conrail without prior STB approval under Section 11323, then members of the Allied Rail Unions will be subject to effects of that transaction without having the protections guaranteed by law. And if the Application is not approved or if it is approved but subject to conditions unacceptable to the applicants then there will be no protections available to employees who, in the interim, will have been affected by the current control of Conrail by CSX and NS. [U.S. SPSF]

As set forth below, the evidence shows that through the purchase of 100% of Conrail stock and the execution of formal agreements relating to the acquisition, CSX and NS have, notwithstanding the existence of a voting trust, already acquired control of

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

Conrail without prior STB approval. Accordingly, the Allied Rail Unions respectfully request the STB to order divestiture. Alternatively, if the STB determines that it is in the public interest for the STB to consider the control application that CSX and NS have filed, the STB must at the very least declare that the Merger Agreement, as amended, and the accompanying acquisition of 100% of CRR stock, the creation of CRR Holdings LLC ("CRR Holdings"), and the merger of Green Merger Corporation with and into CRR, has resulted in control of Conrail by NS and CSX, notwithstanding the creation of the voting trust, and therefore, this de facto control must be subject to employee protections.

### **FACTUAL BACKGROUND**

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

The battle over Conrail culminated on April 8, 1997, when CRR, CSX, and Green Acquisition Corporation entered into a Fourth Amendment to the Merger Agreement "in order to, among other things, facilitate entering into the CSX/NSC Letter Agreement and consummating the transactions contemplated thereby." Third Supplement at page 2. That same day CSXC and NSC entered into a Letter Agreement providing for the joint

acquisition of Conrail, consistent with CSX's October 14, 1996 Merger Agreement, as amended through the Fourth Amendment (collectively referred to as the "Merger Agreement, as amended"). Vol. 8a at 350-399. Through the Merger Agreement, as amended, CSX and NS placed numerous and significant binding limitations upon CRR's actions until the date of control. See, e.g., Vol. 8a at 216-219, 222-223, 224-225, 226-227, 237, 243.

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

Under the CRR Holdings Agreement, the interests are divided into three classes, Classes A, B, and C. Vol. 1 at 31. CSX owns all of the Class A interest and NS owns all of the Class B interest. *Id.* Classes A and B interests have identical rights and collectively have all management and voting rights in CRR Holdings. *Id.* Class C has no voting rights and is owned in proportionate amounts according to each carrier's



equitable interests. *Id.* Therefore, CSXC owns 42% and NSC owns 58% of the Class C interests. The Class C interests receive any allocation of profits or losses and distributions. *Id.*

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

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

On April 8, 1997, CSXC, NSC, CRR Holdings,<sup>3/</sup> Tender Sub (Green Acquisition Corporation), and Deposit Guaranty National Bank entered into an Amended and Restated Voting Trust Agreement ("Voting Trust Agreement") for the purpose of turning over all stock to a Trustee during the pendency of the Application before the STB. Vol. 8a at 323-349. Under the Voting Trust Agreement, the Trustee must exercise all voting

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<sup>3</sup> According to the Application, CRR Holdings was not formed until May 21, 1997. Vol. 8a at 405.

rights in favor of any proposal or action that is necessary or desirable or consistent with the effectuation of NS's and CSX's acquisition of control. Vol. 8a at 328. Moreover, the Trustee must vote against any "proposed merger, business combination or similar transaction" that involves CRR but not NS or CSX. *Id.* at 328-329. Finally, the Trustee must exercise voting rights in favor of disposing of the Trust Stock in accordance with Paragraph 8 of the Voting Trust Agreement. *Id.* at 329. With the exception of these three specific instructions, the Trustee must exercise all voting rights in accordance with the majority of directors of CRR. *Id.* Only if there are no persons qualified to give instructions may the Trustee exercise its own discretion and then it must exercise its voting rights with "due regard for the interests" of CSX and NS. *Id.*

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

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

The surviving corporation, CRR, is a wholly owned subsidiary of CRR Holdings, which is equally owned by CSX and NS. Vol. 1 at 31, 61. CRR also is a wholly-owned subsidiary of GAC. Vol. 1 at 61.<sup>4/</sup>

### **SUMMARY OF ARGUMENT**

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

Given that it is the directors and not the shareholders that make the decisions that affect the day-to-day operations of a carrier, a voting trust that, at best, neutralizes CSX's and NS's ability to vote their stock, is inherently inadequate in insulating CSX and NS from control of CRR. That the directors hold the real decision-making power is of particular significance in this case because the directors of the parent company, CRR Holdings, which undisputedly can control the actions of its subsidiary CRR, are individuals who are also directors and officers of CSX and NS. In other words, the directors and officers of the acquiring carriers are also directors of the parent corporation of the carrier to be acquired. The Voting Trust lacks any ability to insulate that control.

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<sup>4</sup> Although the April 8, 1997 Letter Agreement states that GAC and GMC will be subsidiaries of CRR Holdings (Vol. 8a at 352), there are no other documents showing how GAC was converted from a subsidiary of CSX to a subsidiary of CRR Holdings. Thus, it is unclear from the Application whether GAC (and its subsidiary CRR) remains a subsidiary of CSX.

Indeed, the Voting Trust feeds into that control by directing the Trustee to vote the shares according to the instructions of the directors of CRR, who by virtue of their status as directors of a subsidiary must follow the commands of the directors of the parent corporation. In short, by acquiring 100% of CRR stock and creating a holding company that is managed equally by CSX and NS, CSX and NS have complete control over CRR's day-to-day operations and the Voting Trust does absolutely nothing to divest them of that control.

Not only does the Voting Trust fail to prevent CSX and NS from controlling the *directors* of CRR Holdings and CRR, the Voting Trust also fails to insulate the *stockholders* from control the trustee has a fiduciary obligation to vote the stock in the best interests of the shareholders. And, where as here, the shareholders are CSX and NS, this means that the Trustee owes a strict duty to act in the best interests of CSX and NS. Similarly, the directors of a corporation owe a fiduciary duty to the shareholders, thus ensuring that the directors of CRR will vote in the best interest of the shareholder owners, CSX and NS. Finally, by acquiring 100% of CRR's stock, the practicalities of business relationships and human nature ensure that CSX and NS have acquired control of CRR.

In addition to the inherent inadequacy of the Voting Trust as a means of insulating CSX and NS from control, an examination of the many agreements contained in Volume 8 of the Application, including the Voting Trust Agreement, reveals that by virtue of those agreements CSX and NS already wield significant control over CRR. Thus, although the stock of CRR Holdings was put into a Voting Trust, the Voting Trust Agreement essentially directs the Trustee in the manner in which it can vote the stock. Besides



directing that the Trustee must vote the stock in a manner that effectuates and is consistent with the merger, the Voting Trust Agreement directs the Trustee to vote all other matters in accordance with the instructions of the majority of the directors of CRR. CRR's directors are not only subject to the commands of CRR Holdings' directors but also are bound by the bylaws and articles of incorporation that were created for Green Merger Corporation, a subsidiary created by CSX solely for the purpose of merging with CRR. In short, the Trustee must vote the Trust Shares either in accordance with three specific directions set forth in the Trust Agreement or pursuant to the directors of CRR, whose authority is circumscribed by any command from CRR Holdings. Under these circumstances, the Voting Trust Agreement clearly does not insulate CRR from the control of NS and CSX.

## **ARGUMENT**

### **I. CORPORATIONS THAT CONTROL CARRIERS MAY NOT ACQUIRE CONTROL OVER CARRIERS WITHOUT PRIOR STB APPROVAL**

Section 11323 and 11324 of the Interstate Commerce Act, as amended by the ICC Termination Act ("ICA, as amended")<sup>5/</sup> expressly provides that corporations that control carriers may not acquire control of additional carriers without prior approval from the STB. This requirement has been broadly construed by the Supreme Court because of the clear language of the statute and because of the repeated, explicit expressions of

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<sup>5</sup> Although the section numbers of the provisions of the statute that are cited in this petition were changed by the amendments to the ICA, the substance of those provisions was not changed.



Congress that transactions involving the control of multiple carriers must be approved by the STB, regardless of the manner in which such control is effected.

Furthermore, the language of the statute is quite clear, direct and expansive with respect to what actions constitute acquisitions of control of carriers under Section 11323 and 11324. Section 10102(3) of the ICA, as amended, 49 U.S.C. §10102(3), defines "control" as including "actual control, legal control and the power to exercise control, through or by (A) **common directors, officers, stockholders, a voting trust, or a holding or investment company**, or (B) **by any other means**" (emphasis added). In *Gilbertville Trucking Co. v. U.S.*, 371 U.S. at 125, the Supreme Court stated that the predecessor to current Section 10102(7) "encompass[es] every type of control in fact." In reaching that conclusion, the Court also referred to the Senate Report on the Emergency Transportation Act of 1933 amendments to former Section 5 the ICA as follows:

The Committee reports on these sections prior to their passages in the Emergency Railroad Transportation Act of 1933 stated their purposes as follows:

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

371 U.S. at 124 n.6 (emphasis added, ellipses and brackets in original).<sup>6/</sup> Accordingly, if a corporation that controls railroads acquires sufficient stock of another railroad to control that railroad, the purchaser has acquired control of a carrier under the ICA.

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

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

In *Alleghany Corp. v. Breswick & Co.*, 353 U.S. 151, 164-69 (1957), the Court relied upon *Marshall Transport's* broad reading of Section 5 in holding that a non-carrier which previously had indirect control of a carrier, but which increased its control of that carrier through the merger of that carrier and a subsidiary, was required to seek ICC authorization for its increased control of the previously indirectly controlled carrier. The

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<sup>6</sup> Former Section 5(2) of the ICA was the predecessor to current Section 11323; recodification of the statute in 1978 was done without change to the substance of the statute.

Court rejected a narrow construction of the term control and held that "[n]ot labels but the nature of the changed relation is crucial in determining whether a rearrangement within a railroad system constitutes an 'acquisition of control' under Section 5(2)." *Id.* at 166. The Court concluded by stating, "In other words, a non-carrier may not gain 'control' over carriers free of Commission regulation merely by operating through subsidiaries." *Id.* at 169. Thus, *Alleghany v. Breswick* made it quite clear that the Commission must review any type of transaction in any form which involves control of multiple carriers.

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

It is therefore clear from controlling precedent that the statutory requirement for prior STB approval of control transactions, and the statutory definition of control, must be construed broadly and applied aggressively; and that the acquisition of control of a carrier by a corporation which controls carriers is violative of the ICA, as amended, unless the STB grants prior authorization for such control. Yet, as is shown below, CSX and NS have confronted the STB with a *fait accompli*, which is precisely what Congress and the Supreme Court sought to avoid by prohibiting advance control.

## **II. A VOTING TRUST IS INHERENTLY INADEQUATE AS PROTECTION AGAINST THE UNAUTHORIZED EXERCISE OF CONTROL OF A CARRIER**

The Voting Trust, which under the best of circumstances, merely neutralizes the voting power of particular shareholders, fails in any way to neutralize the real source of operational control--the directors--and, therefore is inherently inadequate as a device for insulating the owners of a corporation from controlling it. Furthermore, the fiduciary obligations of the trustee and the directors ensure that, notwithstanding the existence of a voting trust, that the interests of the shareholders are paramount.

The underlying premise of the Voting Trust seems to be that by neutralizing the voting power of the shareholders, the shareholders cannot control the corporation of which they are 100% owners. This notion ignores a more fundamental principle that the *directors* of a corporation, not the shareholders, actually make the decisions that affect the day-to-day operations of the carrier. *U.S. V. Wallach*, 935 F.2d 445, 462 (2d Cir. 1991). The role of the shareholders, or the Trustee acting in the place of the shareholders, "in governing the conduct of the corporation is minimal and limited to



fundamental decisions such as the election of directors or the approval of extraordinary matters like mergers, a sale of substantially all corporate assets, dissolutions and amendments of the articles of incorporation or the corporate bylaws." *Id.* In this case, one of the terms of the merger agreement is that CRR will not change the date of the annual meeting, which is currently scheduled for December 19, 1997. Vol. 8a at 243. Thus, unless some special meeting is called, the Trustee will not even get to vote on matters until December 19, 1997, approximately one-half year after the merger was consummated and the control application was filed. In short, the notion that taking away shareholders' voting power insulates the shareholders from control of a corporation ignores the principle that directors, not shareholders, control the operations of a corporation.

The principle that directors control the operations of a corporation has particular impact here because the directors of CRR Holdings are also the officers and directors of CSX and NS and as directors of the parent corporation, they have the ability to direct the operations of the subsidiary CRR. It is these interlocking directors, not the shareholders, who operate the corporation and it is they who need to be insulated from control, and they clearly have not been.

Moreover, the notion that a Voting Trustee can insulate the shareholders from control ignores the well settled principle that the trustee of the voting trust owes "a strict duty to the depositing shareholders." *Vincel v. White Motor Corporation*, 521 F.2d 1113, 1121 (2d Cir. 1975). And, where, as here, the depositing shareholders are effectively CSX and NS, the duty owed to the shareholders by the Trustee is "indistinguishable" from the duty owed to the corporation. *Id.* "The trustee's duty [is] an obligation to deal

responsibly with all those persons owning any interest in the company and cannot, therefore, be separated from his duty to the corporation itself." *Id.* Accordingly, although the voting trust prohibits NS and CSX from giving instructions to the Trustee, the Trustee is nevertheless required, pursuant to his fiduciary duty, to vote the shares in the best interests of NS and CSX, and, therefore, the idea that the Trustee can vote without regard to NS's and CSX's interests is a fiction.

Second, the legal nature of other fiduciary relationships assures that NS and CSX are effectively in control of Conrail. The applicants have stated that "the business and affairs of CRR and CRC are under the control of their independent boards of directors." Vol. 1 at 33. This fact only underscores CSX's and NS's control because the directors of a Pennsylvania corporation owe their fiduciary duty to shareholders. *Walker v. Action Industries, Inc.*, 802 F.2d 703, 711 (4<sup>th</sup> Cir. 1986). See also *Foltz v U.S. News & World Report, Inc.*, 663 F. Supp. 1494, 1520 (D.D.C. 1987) (It is always the case that the directors and officers of a corporation manage the company for the benefit of its shareholders and that they owe those shareholders fiduciary duties to manage the company in an acceptable manner.); See also *Matter of Reading Co.*, 711 F.2d 509, 517 (3d Cir. 1983). As a result of the transactions all but 100 shares of pre-merger CRR stock is held by CRR Holdings and owned entirely by CSX and NS. According to the Application, the remaining 100 shares of premerger-CRR stock were owned by GAC and were contributed by GMC to the surviving corporation, CRR. Vol. 1 at 31; Vol. 8a at 442. In light of their fiduciary duty to the shareholders, there can be no doubt that the directors of CRR, who will be managing the day-to-day operations of CRR, must act in



the best interests of NS and CSX, the owners of 100% of CRR stock.

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

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

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

In short, the notion that the voting trust insulates NS and CSX from control ignores the realities of corporate operations as well as the fiduciary obligations of both the directors and the Trustee to act in the best interests of the shareholders, CSX and NS. Thus, the purchase of 100% of the shares of the corporation and the creation and structure of CRR Holdings assures that, regardless of the fictional devices that are created to give the appearance of divesting control, control really lies with the shareholders, CSX and NS.

**III. CSX'S AND NS'S PURCHASE OF 100% OF CONRAIL STOCK, THE CREATION OF CRR HOLDINGS, AND THE CONSUMMATION OF THE MERGER CONSTITUTES AN ACQUISITION OF CONTROL, NOTWITHSTANDING THE VOTING TRUST AGREEMENT, AND REQUIRES THE IMPOSITION OF EMPLOYEE PROTECTIVE CONDITIONS**

STB's predecessor, the former ICC, has in the past allowed carriers and corporations which controlled carriers to obtain control over additional carriers through stock purchases where the acquired stock was put into voting trusts pending former Commission approval of the control relationships. The former Commission allowed such acquisitions of control on the assumption that the voting trusts would prevent the exercise of such control during the pendency of ICC proceedings. It was believed that

the voting trust permitted the former Commission to accommodate the needs and realities of the market place without sacrificing the public transportation interests which it must protect.

The Allied Rail Unions respectfully submit that experience has shown that assumption to be erroneous. In *Santa Fe Southern Pacific Corp.--Control--Southern Pacific Transp. Co.*, F.D. No. 30400, the ICC actually affirmatively approved a voting trust as a method of preventing the unauthorized exercise of control over ATSF while the merger application was pending. The voting trust in that case contained specific protections against SFSP's actual exercise of control over Southern Pacific Transportation Company. However, the former Commission subsequently determined that the trust arrangement, which appeared by its terms to be adequate to protect against the unlawful exercise of control, had been seriously and repeatedly breached by SFSP. *Santa Fe Southern Pacific Corp.--Control--Southern Pacific Transp. Co.*, F.D. No. 30400 (Served February 27, 1987) (unpublished). The Allied Rail Unions respectfully submit that the former Commission's experience with the SFSP merger demonstrates that the STB is overly optimistic to assume that a voting trust will effectively prevent a controlling entity from exercising control during the pendency of STB proceedings, and that the facts here demonstrate that the voting trust created in this case has not prevented CSX and NS from exercising control. Moreover, Congress has prohibited such control without prior STB approval.

An examination of the actions taken by NS and CSX and the provisions contained in the Merger Agreement, as amended, and the Voting Trust Agreement shows that CSX and NS have already acquired control of CRR's operations without the prior

authorization of the STB. Second, the fiduciary obligations of the Voting Trustee and the directors to the shareholders, CSX and NS, coupled with the practical realities of human nature in the context of running a business, prevent the voting trust from providing adequate protection from the unlawful exercise of control.

As a result of this unauthorized control, CRR's actions will clearly be guided by what is in the best interest of CSX and NS. For example, since it has already been determined that CSX and NS will not need all of CRR's locomotives, it can be presumed that CRR will delay any planned maintenance on the locomotives that will not be used by CSX or NS. It can be presumed that the same logic will apply to the tracks that CSX and NS intend to abandon--maintenance that would have otherwise been performed will not be performed. Additionally, trackage that will be downgraded in terms of traffic after consummation will presumably also see less maintenance while the application is pending. Indeed, because CSX and NS believe that they can reduce the maintenance expenses associated with the equipment currently used by CRR (see, e.g. Vol. 1 at 7-8), CRR may defer significant system gang maintenance work during the pendency of the Application. CSX also expects to save \$1.0 million in non-track program maintenance activities and \$21 million annually from improved productivity of programmed rail, tie, and surfacing gangs. *Id.* Similarly, CSX expects to reduce expenses for car inspections and non-revenue car fleet maintenance by \$1.2 million. *Id.* at 7. With these kinds of savings potentially available in the very near future, NS and CSX could clearly direct CRR to defer to the extent possible these maintenance costs. This shift in CRR's operations will necessarily have an effect on employees because fewer of them will be needed. This will not necessarily mean lay-offs but rather may mean, for example, that fewer maintenance of way employees will be called for the system and regional gang



work. If, in fact, these actions occur, they will necessarily be occurring as a result of the control that NS and CSX are already able to exert over CRR's actions. While employees affected by these actions presumably will receive *New York Dock* protections if the Application is approved, they will not receive protections if the Application is not approved or if conditions are placed on the transaction such that NS and CSX determine that effectuation of formal control is no longer to their benefit. Moreover, the employees will not receive the protections' monetary benefits at the time they most need them--when they are affected. For these reasons, it is absolutely essential that the STB seriously examine whether CSX and NS are currently in control of CRR's operations for if they are, as the Allied Rail Unions contend, the STB must order divestiture or impose the *New York Dock* protections. Without this regulatory action, employees will not be protected from adverse effects of CSX's and NS's unauthorized control if the STB does not grant formal approval of the acquisition of control.

#### **A. The Voting Trust Agreement**

Although the Voting Trust Agreement delegates the voting powers to the Trustee, the Voting Trust Agreement unequivocally controls the manner in which the Trustee may vote the Trust Stock. Thus, the Trust Agreement directs the Trustee to vote the Trust Stock "to approve and effect the Merger, and in favor of any proposal or action necessary or desirable to effect, or consistent with the effectuation of [NS's and CSX's] acquisition of the Company." And in the event of two slates of nominees for directors, the Trustee must vote for the slate that supporting the effectuation not only of the Merger but of "the transactions contemplated by the CSX/NS Agreement." Vol. 8a at

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

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

To the extent that these three specific instructions do not guide the Trustee in a matter to be voted upon, the Trustee must vote the stock in accordance with the majority of the directors of CRR. However, the Trustee may not follow the instructions of the directors if to do so would require the Trustee to vote the Trust Stock "in favor of taking or doing any act which violates the Merger Agreement or would violate the CSX/NS Agreement or impede its performance or which if taken or done prior to the consummation of the Merger would have been a violation of the Merger Agreement." Vol. 8a at 329. Only if there are no directors to give instructions may the Trustee vote the Trust Stock in his sole discretion, but in the exercise of his discretion he must have "due regard for the interests of the [NS and CSX]." *Id.*



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

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

A second reason for the ineffectiveness of authorizing CRR's directors to instruct the Trustee concerns the merger of Green Merger Corporation ("GMC"), a direct subsidiary of GAC and an indirect subsidiary of CSX, with and into CRR on June 2, 1997. Vol. 8a at 441-445. As a result of the merger, GMC ceased to exist as a separate

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

entity and CRR is the surviving company with the name Conrail, Inc. Vol. 8a at 442, Art. I.<sup>8/</sup> All of CRR stock existing prior to the merger was either converted into the right to receive \$115 in cash or was canceled. Vol. 8a at 442-443, Art. III. The only remaining stock in the surviving company is the 100 shares of stock held by GMC prior to the merger which as a result of the merger have become shares of CRR. Vol. 8a at 442, Art. III. Under the Plan of Merger, the articles of incorporation and the by-laws of GMC became the articles of incorporation and by-laws of the surviving corporation, CRR. Vol. 8a at 442, Art. II. The directors and officers of CRR continue as the directors and officers in the surviving corporation. Vol. 8a at 442, Art. I.

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

Finally, if the Trustee is ever able to vote in its sole discretion, its discretion must be guided by the best interests of CSX and NS. Given that the Trustee's voting power is unambiguously guided by the goal of effectuating the merger and the acquisition of

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

CRR by CSX and NS, there can be very little doubt that the Voting Trust is virtually useless in terms of insulating NS and CSX from control over Conrail.

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

#### **B. The Merger Agreement, As Amended**

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

**CSX and NSC, as provided above, each having a 50% voting interest in [CRR Holdings] (which following the Merger, will own 100% of the Surviving Corporation [CRR]) following the stock contributions, will cause the Surviving Corporation to honor all commitments of the Surviving Corporation under the Merger Agreement.**

The second aspect of control created by the Merger Agreement, as amended, is that in making the Merger Agreement, as amended, an essential part of this transaction

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

Finally, the fact that CRR is now a subsidiary of CRR Holdings, Inc, a company owned equally by CSXC and NSC, underscores the control that CSX and NS have over CRR. As noted above, there can be little dispute that a parent corporation has the final authority regarding the subsidiary's direction. Inasmuch as CSX and NS officers and directors, including the CEO of each, are directors and co-chief executive officer of CRR Holdings, CRR Holdings can clearly control CRR's actions. Indeed, the ICA, as amended, recognizes that one means of exercising control is through common directors and officers. See, e.g., 49 U.S.C. § 10102[3].

An initial step in CSX's and NS's control of CRR was to seize control of the Application process before the STB. Thus, under Section 5.5(b) of the Merger Agreement, as amended, CRR and its subsidiaries must among other things cooperate in the preparation of all filing and other presentations before the STB or any other

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



federal, state, or local body and join with CSX <sup>10/</sup> in opposing any objections, appeals, or other petitions to reconsider or reopen. Vol. 8a at 224-225.

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

Significantly, the Merger Agreement, as amended, also provides that CSX and CRR shall establish a transition team upon consummation of the merger, which according to the Application, occurred on May 2, 1997. Vol. 8a at 237. The leadership of such team may include the current Chief Executive Officer or other senior executives

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<sup>10</sup> Although the Merger Agreement and its amendments only refer to CSX, the Letter Agreement states that "CSX and NSC will have equal decision-making authority with respect to the Amended Second Offer and the Merger Agreement including any amendment thereof." Vol. 8a at 353. Based on this language, it appears that NS would have the same authority that CSX has under the Merger Agreement.

of Conrail and CSX<sup>11/</sup> and would plan for "actions and operations to be undertaken form and after the Control Date." *Id.* Although the Merger Agreement, as amended, states that the transition team shall not control CRR's or its subsidiaries' day-to-day railroad operations prior to the Control Date, it is unrealistic to assume that current operations will not be affected by the decisions made regarding the path that future operations will take. This is particularly true since the membership of the transition team includes the chief executive officer of CRR, the person charged with ultimate decision-making authority about the day-to-day operations of CRR.

The Merger Agreement permits CSX and NS to exert control not only through affirmative actions but also through prohibitions on CRR's actions. Indeed, the actions that the Merger Agreement, as amended, prohibit CRR or its subsidiaries from taking, without CSX's and NS's consent<sup>12/</sup>, underscores the level of control the applicants already have over CRR. For example, CRR shall not: (1) sell, lease, or otherwise encumber any of its assets or properties except in transactions in the ordinary course of business consistent with past practice and not involving rail lines, yards and other fixed railroad operating property (Vol. 8a at 218); (2) make or agree to make acquisition or

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<sup>11</sup> Presumably NS also is a member of this transition team.

<sup>12</sup> Although the Third and Fourth Amendments refer only to CSX's consent, the April 8, 1997 letter states that "immediately upon execution of this Agreement, NSC effectively will possess joint participation and decision-making on an equal footing with CSX in providing any consents under Section 4.1 of the Merger Agreement. Vol. 8a at 354. Moreover, NS and CSX agreed that they would not without the prior agreement of the other, among other things, agree to any modifications of the terms and conditions of the Merger Agreement as amended including under "Section 4.1 of the Merger Agreement." Vol. 8a at 354.



capital expenditure, except for agreements and commitments made through March 1, 1997 in conformity with this agreement (*id.*); (3) enter into contracts or modify, amend, or terminate existing contracts except in the ordinary course of business and any contract entered into in the ordinary course of business shall not bind CRR or any successor after the control date (*id.* at 218-219); and (4) enter into any agreement limiting the ability to compete which would bind CRR or its successor or grant any concessions or rights to any railroad or other person with respect to the use of CRR's rail lines, yards or other fixed railroad p<sup>13/</sup>roperty (*id.* at 219). By requiring CRR to operate the railroad in the normal course of business, not make any changes, and not enter into contracts that would bind its successor, CSX and NS have virtually tied CRR's corporate hands as far operating the railroad and prevented CRR from taking actions that might be in the best interest of CRR as an entity operating competitively in the marketplace without any consideration of NS and CSX's interests.<sup>13/</sup> NS and CSX have similarly assured that the Trustee must vote the Trust Stock consistent with these restrictions.

The Voting Trust, which under the best of circumstances, merely neutralizes the voting power of the shareholders, fails in any way to neutralize the real source of operational control--the directors--and is therefore, inherently inadequate as a device for insulating the owners of a corporation from controlling it. In addition to limiting CRR's ability to enter into contracts, lease or sell assets, the purchase documents also provide

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<sup>13</sup> An example of this control can be found in Exhibit 1, hereto, which is a newspaper article describing a court suit alleging that CRR, under the control of CSX and NS, reneged on a contract that it had entered into in November 1996 with Matlack Bulk Intermodal Services, Inc.

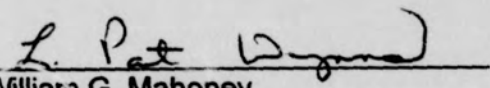
that CRR shall not (except with the consent of CSX): (1) declare, set aside, or pay dividends (Vol. 8a at 217); (2) issue or sell stocks or rights to acquire stock (*id.*); (3) make any different tax elections (Vol. 8a at 218); (4) limits payments, discharge, or settlement of material claims, liabilities or obligations except in the ordinary course of business (*id.*); (5) change its accounting methods, principles or practices (Vol. 8a at 219); (6) enter into or terminate any benefit plan (*id.*); (7) increase the compensation of any director, executive officer or other key employee or pay benefit not required as of date of this Agreement (*id.*); (8) take no action in connection with the application before the STB without CSX's consent (including meetings with public officials and making public statements) (Vol. 8a at 224-225); (9) declare or pay any dividend on CRR's capital stock with a record date on or prior to May 30, 1997 (Vol. 8a at 243); (10) change the date set for its 1997 Annual Meeting from December 19, 1997 without the prior consent of CSX in its sole discretion (Vol. 8a at 243); and (11) amend the Conrail Rights without the prior consent of CSX in its sole discretion (Vol. 8a at 244). In addition, CRR must give NS and CSX the opportunity to participate in the defense or prosecution of any litigation relating to the Merger Agreement. Vol. 8a at 226-227.

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

## CONCLUSION

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

Respectfully submitted,

  
\_\_\_\_\_  
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Date: July 18, 1997

**CERTIFICATE OF SERVICE**

I hereby certify that I have caused to be served one copy of Petition Of Allied  
Rail Unions For Declaratory Order Regarding Existing Acquisition Of Control Of Conrail  
By NS and CSX, by hand delivery to the offices of the following:

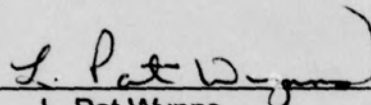
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and by first-class mail, postage prepaid, to the offices of the parties on the attached list.

Dated at Washington, D.C. this 18<sup>th</sup> day of July, 1997.

  
\_\_\_\_\_  
L. Pat Wynns

# EXHIBIT 1



7/15/97

# Company sues Conrail, NS

BY RIP WATSON

JOURNAL OF COMMERCE STAFF

A dispute tied to the carve-up of Conrail between Norfolk Southern and CSX has spilled over into a Delaware courtroom. An intermodal bulk terminal operator accuses NS of meddling in Conrail's affairs before any assets are acquired.

The case involves a suit by Matlack Bulk Intermodal Services Inc. of Wilmington, Del., against Conrail and NS. It is being heard in Delaware Chancery Court. Matlack provides bulk intermodal transfer and trucking services.

While NS and CSX have acquired Conrail stock, they cannot control Conrail's assets and business unless the Surface Transportation Board approves their plan next year.

Matlack asked the court to enjoin NS

from exerting effective control over three Conrail terminals that Matlack was in line to buy.

## Beat out other bidders

The facilities, called Flexi-Flo terminals, are used to transfer carloads of chemicals from rail cars to trucks that make direct delivery to non-rail customers. With a \$382,000 offer, Matlack beat out other bidders for the terminals.

Matlack, which already operates 30 bulk transfer terminals, claimed it executed a letter of intent to acquire Flexi-Flo terminals in Baltimore, Pittsburgh, and Jersey City, N.J., in November 1996.

The suit claims the reason Conrail did not close the deal was "due to pressure" from NS.

In a brief filed in response to Matlack's suit, attorneys for NS said "Ma-

tlack's claims that Norfolk Southern has interfered with its contractual relations and expectancies are meritless."

Attorneys representing NS argued that portions of the letter of intent specifically said Conrail was not legally required by that letter to close the deal or even continue talks. A Conrail spokesman said the sale is "on hold," adding, "There are some issues to be resolved."

The suit says Conrail and Matlack aimed to close the deal on April 1.

## Conrail renegotiated agreement

Some MBIS employees began working at the Pittsburgh facility in early April after Conrail laid off employees there, the suit says. However, the MBIS workers later subsequently were blocked from the facility.

Later in April, Matlack claimed, Conrail sought to renegotiate the agreement

after a deal was signed for NS and CSX to acquire Conrail. That deal called for NS to operate the three terminals.

## Matlack agreed to changes

The suit says Matlack agreed to the changes and sent a \$217,000 payment as a first installment, only to have it returned with a letter.

The suit quotes Conrail's May 5 letter as saying "since the subject transaction involves a long-term commercial agreement that will continue well past the acquisition of those properties, we have been discussing the commercial agreement in detail as part of the context of the overall transaction with Norfolk Southern and expect to continue those discussions for the next several days."

"Accordingly, we are not in a position to close the sale at this point nor set a closing date."

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July 17, 1997

**BY 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 Joint Petition for Supplementation of Application filed on behalf of New Jersey Transit Corporation, Virginia Railway Express and Massachusetts Bay Transportation Authority. Also enclosed is a 3.5 inch diskette containing the filing in WordPerfect 5.1.

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

Respectfully submitted,



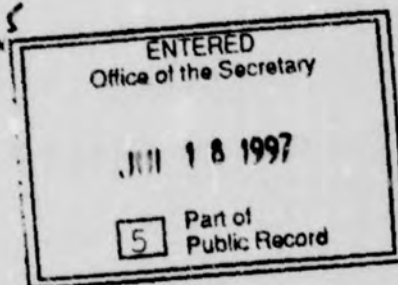
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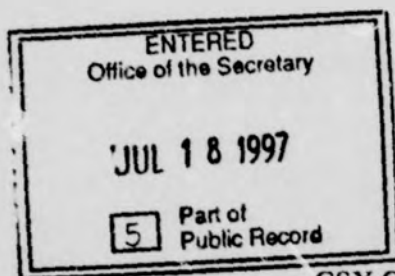
cc: The Honorable Linda J. Morgan  
The Honorable Gus A. Owen  
David M. Konschnik, Office of Proceedings  
All Parties on Certificate of Service



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**NJT-1  
VRE-2  
MBTA-1**



**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**

**JOINT PETITION FOR SUPPLEMENTATION OF APPLICATION**

**EXPEDITED CONSIDERATION REQUESTED**

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BEFORE THE  
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 LEASES/AGREEMENTS --  
CONRAIL, INC. AND CONSOLIDATED RAIL CORPORATION

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JOINT PETITION FOR SUPPLEMENTATION OF APPLICATION

**EXPEDITED CONSIDERATION REQUESTED**

**I. INTRODUCTION**

On June 23, 1997, Applicants<sup>1</sup> filed a joint railroad control application (the "Application") pursuant to 49 U.S.C. §§ 11321-25 and the Surface Transportation Board's Railroad Consolidation Procedures, 49 C.F.R. Part 1180, for authorization of the acquisition of control by CSX and NS of Conrail, and for the division of the use and operation of Conrail's assets between CSX and NS. On July 23, 1997, the Board is scheduled to publish a notice of acceptance of the Application in the *Federal Register*.<sup>2</sup>

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<sup>1</sup> CSX Corporation, CSX Transportation, Inc. ("CSXT"), Norfolk Southern Corporation, Norfolk Southern Railway Company ("NSR"), Conrail, Inc. and Consolidated Rail Corporation ("CRC"). CSX Corporation and CSXT are referred to collectively as "CSX," Norfolk Southern Corporation and NSR are referred to collectively as "NS," and Conrail Inc. and CRC are referred to collectively as "Conrail."

<sup>2</sup> Board Decision No. 6, served May 30, 1997.

Pursuant to 49 C.F.R. § 1117.1, New Jersey Transit Corporation ("NJT"), Massachusetts Bay Transportation Authority ("MBTA") and Virginia Railway Express ("VRE")<sup>3</sup> hereby petition the Surface Transportation Board ("Board") for an order directing the Applicants to file a supplement to the Application, on or before August 6, 1997, identifying the impact of the merger on the commuter rail operations of the Petitioners or providing supporting information for Applicants' blanket assertions that the subject transaction will have no adverse impact on the commuter rail operations of the Petitioners.

As is explained below, the Application does not meet the requirements of the Railroad Consolidation Procedures at 49 C.F.R. § 1180.8(a)(2), which requires, *inter alia*, that the Application "detail any impacts anticipated on [commuter passenger] services." Indeed, the Application contains virtually no information on the impact of the merger on commuter rail operations. This deficiency in the Application is material. Without supplementation of the Application, the Board does not have enough evidence in the record to apply the statutory criteria to the proposed transaction. Moreover, absent supplementation of the Application, Petitioners do not have the requisite information with which to engage in effective and focused discovery within the very limited pre-comment discovery period. Of course, without the basis to formulate effective and focused discovery, Petitioners would be unable to evaluate the impact of the subject transaction on their respective commuter rail operations.

The relief requested by the Petitioners is intended to remedy the deficiency in the Application, but would not preclude the Board's acceptance of the Application or delay the

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<sup>3</sup> Virginia Railway Express is co-owned by Northern Virginia Transportation Commission and Potomac and Rappahannock Transportation Commission.

Board's Procedural Schedule in this proceeding.<sup>4</sup> On July 16, 1997, counsel for Petitioners contacted counsel for NS and CSXT to see whether either Applicant would voluntarily supplement the Application with information to meet the requirements of 49 C.F.R. § 1180.8(a)(2). The parties discussed Petitioners' concerns, but Applicants declined to supplement the Application and the parties were unable to reach agreement on an alternative arrangement satisfactory to both Petitioners and Applicants.

## **II. STATEMENT OF FACTS**

### **A. Identity of Petitioners**

#### **1. New Jersey Transit Corporation**

New Jersey Transit Corporation operates approximately 591 commuter rail trains each weekday, over 972 route miles of rail line. NJT has an average weekday ridership of 170,000 trips and annual ridership of approximately 47 million. NJT was formed in 1982 to take over commuter rail services then provided by Consolidated Rail Corporation and commenced operations in 1983.

#### **2. Virginia Railway Express**

Virginia Railway Express, which is co-owned by Northern Virginia Transportation Commission and Potomac and Rappahannock Transportation Commission, operates 26 passenger trains per weekday over approximately 90 route miles of rail line. VRE has weekday ridership of approximately 7,000 trips and annual ridership of approximately 1.9 million. VRE commenced operations in 1992.

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<sup>4</sup> 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, 9 I.C.C.2d 939, 941 (1993) ("UP/CNW") (where several months after accepting the application the Interstate Commerce Commission ordered applicants to supplement it to conform to changes in the proposed transaction).



3. Massachusetts Bay Transportation Authority.

Massachusetts Bay Transportation Authority operates 405 commuter rail passenger trains per weekday over approximately 400 route miles of rail line. MBTA has average weekday ridership of approximately 100,000 trips and annual ridership of over 27 million. MBTA commenced operations in 1964.

B. Information in Application On Commuter Rail Impacts

Of its approximately 15,000 pages, the Application contains approximately 5 pages of information regarding NJT, about 2 pages on MBTA and about a page of information on VRE.<sup>5</sup> In contrast, the NS and CSXT Operating Plans alone offer 462 pages of text on the other four topics required by section 1180.8(a).<sup>6</sup>

The NS Operating Plan contains a one-page general description of the NJT and CRC lines which presently are used for commuter and freight operations and five additional short paragraphs generally describing two of the shared lines. Application, Vol. 3B at 302-304. The CSXT Operating Plan contains two paragraphs, one repeating information furnished in the NS Operating Plan and one summarily concluding that all other lines will not be adversely affected. Application, Vol. 3A at 277.<sup>7</sup>

The CSXT Operating Plan contains two short paragraphs on MBTA. Application, Vol. 3A at 276-277.<sup>8</sup>

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<sup>5</sup> The Application also includes a general commuter rail map and schematic diagrams depicting the lines operated by Petitioners. Application, Vols. 3B at 300, and 6A at 173-175 and 180.

<sup>6</sup> Excluding the general introduction and information on Amtrak.

<sup>7</sup> Although not part of the Operating Plans, the Environmental Report contains two pages of repetitive NJT information and two schematic diagrams depicting the lines operated by NJT. Application, Vol. 6A at 138-141 and 174-175.

<sup>8</sup> The Environmental Report contains approximately one page of information on MBTA, mostly a restatement of the information contained in the CSXT Operation Plan and a schematic MBTA system diagram. Application, Vol. 6A at 137-138 and 173.

The NS and CSXT Operating Plans contain one short paragraph each on VRE. Application, Vols. 3A at 279-280 and 3B at 306.<sup>9</sup>

The Operating Plans do not even purport to address the cumulative impact of the combined operations of NS, CSXT and CRC in the North Jersey Shared Assets Area (where NJT has extensive operations) or in other areas where NS and CSXT will both operate with Petitioners. Although the Application states that the subject transaction will have no adverse effect on Petitioners' commuter rail operations, it contains no evidence in support of these assertions. For example, although the Application contains the representation that NS, CSXT and CRC will schedule trains to avoid interference with commuter rail operations, there is not any information showing combined freight and commuter schedules on any NS, CSXT or CRC lines and not any information on NS, CSXT and CRC local freight trains operated on any lines owned or operated by Petitioners. Applicants have submitted 42 verified statements, but have not submitted a single verified statement on the impact of the transaction on commuter rail service. The verified statements accompanying the Operating Plans do not address commuter rail impacts in any material respect, nor do any of the other verified statements.<sup>10</sup>

### III. ARGUMENT

Section 1180.8(a)(2) of the Railroad Consolidation Procedures requires that the Operating Plan accompanying this Application "detail any impacts anticipated on [commuter passenger]

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<sup>9</sup> The Environmental Report contains one page restating essentially the same information on VRE and a schematic VRE system diagram. Application, Vol. 6A at 144-145 and 180.

<sup>10</sup> The Orrison Verified Statement accompanying the CSXT Plan contains a paragraph referencing commuter railroads, which contains no responsive factual information. Orrison V.S. at 37-38. The Mohan Verified Statement accompanying the NS Plan does not make any reference to commuter railroads. The Tobias Verified Statement mentions commuter operations, but provides no material factual information. Tobias V.S. at 476.

The NS and CSXT Operating Plans contain one short paragraph each on VRE. Application, Vols. 3A at 279-280 and 3B at 306.<sup>9</sup>

The Operating Plans do not even purport to address the cumulative impact of the combined operations of NS, CSXT and CRC in the North Jersey Shared Assets Area (where NJT has extensive operations) or in other areas where NS and CSXT will both operate with Petitioners. Although the Application states that the subject transaction will have no adverse effect on Petitioners' commuter rail operations, it contains no evidence in support of these assertions. For example, although the Application contains the representation that NS, CSXT and CRC will schedule trains to avoid interference with commuter rail operations, there is not any information showing combined freight and commuter schedules on any NS, CSXT or CRC lines and not any information on NS, CSXT and CRC local freight trains operated on any lines owned or operated by Petitioners. Applicants have submitted 42 verified statements, but have not submitted a single verified statement on the impact of the transaction on commuter rail service. The verified statements accompanying the Operating Plans do not address commuter rail impacts in any material respect, nor do any of the other verified statements.<sup>10</sup>

### III. ARGUMENT

Section 1180.8(a)(2) of the Railroad Consolidation Procedures requires that the Operating Plan accompanying this Application "detail any impacts anticipated on [commuter passenger]

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services, including delays which may be occasioned because a line is scheduled to handle increased traffic due to route consolidations." 49 C.F.R. § 1180.8(a)(2).

The purpose of section 1180.8(a)(2), like all of the other evidentiary requirements enumerated in the Railroad Consolidation Procedures, is to make sure that the application includes sufficient information to permit the Board to apply the statutory criteria and decide whether to (i) approve a proposed transaction and (ii) impose conditions to ameliorate the harms of an approved transaction. In other words, an application must present a *prima facie* case. UP/CNW, 9 I.C.C.2d at 950 (1993); Finance Docket No. 31505, Rio Grande Industries, Inc., et al. -- Purchase and Related Trackage Rights -- Soo Line Railroad Company Line Between Kansas City, MO and Chicago, IL (not printed), served April 6, 1990.

Under the Railroad Consolidation Procedures, "[a]pplicants can fail to meet their burden of proof and thus not present a *prima facie* case [by] disclosing facts that, even if construed in their most favorable light, are insufficient to support a finding that a proposal is consistent with the public interest." UP/CNW, 9 I.C.C.2d at 950; see also 49 C.F.R. § 1180.4(c)(8).

Here, the Application does not contain evidence detailing commuter rail impacts or supporting a finding that there will be no impacts. There is a paucity of information on commuter rail service and impacts in the Application and no substantive witness testimony on the subject. Even if construed in the light most favorable to Applicants, there is insufficient information in the Application for the Board to evaluate possible commuter rail train delays occasioned because of freight train increases on particular lines. 49 C.F.R. § 1180.8(a)(2). For this reason, the Application does not present a *prima facie* case. 49 C.F.R. § 1180.4(c)(8).



The extent of the deficiency cannot be cured by Petitioners (through discovery or otherwise) or simply ignored, especially because of the tight procedural schedule established in this case and the truncated period for discovery. Descriptions of anticipated responsive applications are due August 22, 1997. Board Decision No. 6, served May 30, 1997. Comments on the proposed transaction, requests for conditions and responsive applications are due on October 21, 1997. Id. All pre-comment/condition discovery must be served by October 5, 1997. Board Decision No. 10 (ALJ Jacob Leventhal), served June 27, 1997. Absent supplementation of the Application, Petitioners would remain in the unfair and untenable position of constructing Applicants' case, identifying NS and CSXT personnel with relevant knowledge regarding commuter rail impacts (remembering that Applicants do not offer a single witness on commuter rail issues), serving very general (by necessity) written discovery requests and thereafter fashioning proposed conditions to ameliorate any adverse impacts. If, for example, a Petitioner were to seek trackage rights or another condition requiring a responsive application, it would have just 30 days from the date the Board accepts the Application for consideration to do all of the above and file its descriptions of anticipated responsive application. Clearly, Petitioners cannot be required to bear Applicants' burden of proof in this proceeding.

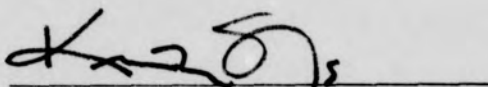
#### **IV. REQUEST FOR RELIEF AND FOR EXPEDITED CONSIDERATION**

For the foregoing reasons, Petitioners respectfully request that the Board order the Applicants to file a supplement to the Application, on or before August 6, 1997, identifying the impact of the merger on the commuter rail operations of the Petitioners or providing supporting information for Applicants' assertions that the subject transaction will have no adverse impact on the commuter rail operations of the Petitioners.



Petitioners have filed this Petition at the earliest practicable date after completing their initial review of the voluminous Application and conferring with Applicants. Given the procedural schedule and discovery schedule in the case, summarized above, a prompt Board decision on the Petition is essential in order for Petitioners to evaluate the impact of the merger on their operations. Petitioners therefore request expedited consideration of this Petition.

Respectfully submitted,



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**CERTIFICATE OF SERVICE**

I hereby certify that on this 17th day of July, 1997, a copy of the foregoing Joint Petition for Supplementation of Application was served upon the following people by hand delivery:

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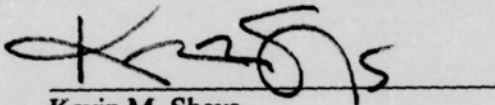
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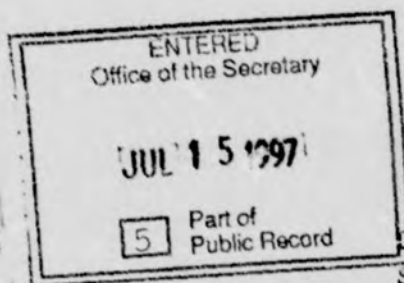
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ACE, et al.-5

UNITED STATES OF AMERICA  
DEPARTMENT OF TRANSPORTATION  
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

MOTION OF ATLANTIC CITY ELECTRIC COMPANY,  
DELMARVA POWER & LIGHT COMPANY, AND  
THE OHIO VALLEY COAL COMPANY  
TO COMPEL RESPONSES TO DISCOVERY

To: The Honorable Jacob Leventhal  
Presiding Administrative Law Judge

Pursuant to the Rules of Practice of the Surface  
Transportation Board ("Board") and the Discovery Guidelines  
adopted by the Presiding Judge on June 27, 1997, Atlantic City  
Electric Company, Delmarva Power & Light Company, and The Ohio  
Valley Coal Company (jointly, "Movants" or "ACE, et al.") hereby  
respectfully request that the Presiding Judge issue an order  
compelling Norfolk Southern Corporation and Norfolk Southern  
Railway Company (jointly, "Norfolk Southern"), CSX Corporation

and CSX Transportation, Inc. (jointly, "CSX"), and Conrail Inc. and Consolidated Rail Corporation (jointly, "Conrail") to respond to the Movants' requests for the production of documents.

The documents the Movants have requested be produced are required to meet the standard set forth by the United States Court of Appeals for the District of Columbia Circuit on the central issue in this proceeding -- whether Norfolk Southern's and CSX's acquisition of Conrail will have an anticompetitive effect on shippers that are currently solely served by Conrail.

This is a major issue for Movants and many other shippers. According to the Application, 45 percent of Conrail's shippers are sole-served, and all four of Atlantic City Electric Company's and Delmarva Power & Light Company's plants are solely served by Conrail, as are the two Centerior Energy plants that purchase coal from The Ohio Valley Coal Company. The relief sought by this Motion is needed promptly because this is an expedited proceeding, and the argument the discovery is designed to support will require substantial time to develop once the documents are made available to Movants.

Moreover, unlike proceedings before the Federal Energy Regulatory Commission and the Federal courts, obtaining this information in discovery is the only means of obtaining it in this proceeding because there will not be an oral hearing or

cross-examination of witnesses. The entire evidentiary record is presented in prepared filings. Accordingly, the documents requested by Movants must be produced.

In support hereof, Movants state:

**I. The Discovery At Issue**

This proceeding concerns the application of Norfolk Southern, CSX and Conrail (jointly, "the Applicants") for authorization for Norfolk Southern and CSX to acquire and control Conrail. The application was submitted on June 23, 1997, and consists of nearly 15,000 pages of text, testimony, and exhibits in 23 separately bound volumes. The Movants served their First Set of Interrogatories and First Set of Requests for Production of Documents separately on each of the Applicants on July 3, 1997.

Although served separately on each of the Applicants, Movants' interrogatories and requests for production of documents to each Applicant are essentially the same and consist of three requests for production and six interrogatories. The six interrogatories ask the Applicants to explain their rate-setting theories and practices for movements of coal to solely-served destinations and, if different, the rate-setting theories and practices for other commodities. The requests for production seek documents to test whether the Applicants' actual practices



conform to their explanations. The first two requests seek the Applicants' bids for certain movements of coal by unit trains or trainloads since 1978 and documents relating thereto. The third request for production seeks the Applicants' 100% traffic tapes since 1978, which provide detailed information about each shipment of goods by the railroads. Copies of the Movants' requests for production and interrogatories are attached hereto as Exhibit A.

The Applicants have not objected to any of the interrogatories. But, at or after the close of business on Friday, July 11, the fifth business day following the submission of the discovery requests and without contacting Movants' counsel to discuss the matter, each of the Applicants objected to Movants' first two requests for production and Norfolk Southern objected additionally to the third request. Since Paragraph 16 of the Discovery Guidelines require a responding party to object within five business days if it will provide no information or documents in response to a discovery request, it is clear that the Applicants are unwilling to provide even a single document relating to their bids to transport coal (the Applicants' single largest commodity, both in terms of tonnage and revenue) and that Norfolk Southern is unwilling to provide any documents concerning its traffic. The Applicants claim in summary fashion that the

discovery requested is not relevant to the proceeding, even though by not objecting to Movants' interrogatories they have effectively conceded that their rate-setting theories and practices for coal are relevant. They also contend that the discovery is unduly burdensome and overly broad. Conrail and Norfolk Southern also claim that the first two requests are ambiguous. Copies of the Applicants' objections are attached hereto as Exhibit B.

Before submitting these objections, Applicants did not contact counsel for Movants to clarify the alleged ambiguities or to resolve or even narrow disagreements concerning the alleged burden of the requests. Nevertheless, counsel for the Movants did contact counsel for the Applicants in an effort to resolve this dispute voluntarily. This effort was unavailing. Accordingly, Movants are submitting this Motion to Compel.

In the following Sections of this Motion, Movants will show that the documents are clearly within the scope of discovery and are not overly broad; that the alleged burden can be readily lightened; and that the alleged ambiguities are easily clarified. In addition, in Exhibit C, Movants are also submitting the Joint Affidavit of Dr. Alfred E. Kahn, Robert Julius Thorne Professor Emeritus at Cornell University, and Dr. Frederick C. Dunbar, both of whom are with the National Economic Research Associates, Inc.

and the Affidavit of Mr. Thomas E. Crowley, President of L. E. Peabody and Associates, Inc., to demonstrate that they advised Movants' counsel to submit such discovery requests and that the requested discovery is absolutely necessary for Drs. Kahn and Dunbar and Mr. Crowley to address the central issue in this proceeding -- the threat to captive customers of rate increases.

## **II. The Documents Requested Are Well Within the Scope of Discovery**

### **A. The Scope of Discovery Is Broad**

The scope of discovery in proceedings such as this is quite broad. The Board's Rules of Practice, 49 C.F.R. § 1114.21 (1996), provide in pertinent part:

#### **(a) When Discovery is available**

- (1) Parties may obtain discovery . . . regarding any matter, not privileged, which is relevant to the subject matter involved in a proceeding. . . .
- (2) It is not grounds for objection that the information sought will be inadmissible as evidence if the information sought appears reasonably calculated to lead to the discovery of admissible evidence.

The scope of discovery in proceedings before the Board is virtually identical to the scope of discovery specified in 18 C.F.R. § 385.402(a) (1996) for the proceedings set for hearing by the Federal Energy Regulatory Commission ("FERC"):

(a) General

[P]articipants may obtain discovery of any matter, not privileged, that is relevant to the subject matter of the pending proceeding. . . . It is not grounds for objection that the information sought will be inadmissible in the Commission proceeding if the information sought appears reasonably calculated to lead to the discovery of admissible evidence.

The scope of discovery authorized by both Rules is modeled on the scope of discovery under the Federal Rules of Civil Procedure.<sup>1</sup> The Federal Rules of Civil Procedure "allow broad scope to discovery and this has been recognized by the courts." Wright, Miller & Marcus, Federal Practice and Procedure: Civil 2d § 2007 (1994) (cases omitted).

The discovery requested by Movants falls well within the broad parameters of these Rules. But there is one difference between this proceeding and proceedings before the FERC and the Federal courts that requires discovery to have even greater scope here. Unlike the practice before the FERC and the courts, here

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<sup>1</sup> Rule 26 (b) (1) provides, in language virtually identical to the rules of the Board and the FERC that:

Parties may obtain discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action, whether it relates to the claim or defense of the party seeking discovery or to the claim or defense of any other party. . . . The information sought need not be admissible at the trial if the information sought appears reasonably calculated to lead to the discovery of admissible evidence.

there will be no oral hearing with cross-examination of witnesses. Thus, the discovery process is the sole means by which the Movants will ever be able to obtain any data to determine whether the proposed acquisition of Conrail will have an anticompetitive effect on shippers.

**B. The Matter About Which Movants Seek Discovery Is Relevant to This Proceeding**

1. Under the governing statute, the Board is to approve the acquisition of control over a railroad if the Board finds the transaction "consistent with the public interest." 49 U.S.C. § 11324(c) (1996). Among the factors the Board "shall consider" in making this determination is "whether the proposed transaction would have an adverse effect on competition among rail carriers in the affected region or in the national rail system." 49 U.S.C. § 11324(b)(5). The Board may also "impose conditions on the merger when needed to advance the public interest." Lamoille Valley Railroad Co. v. ICC, 711 F.2d 295, 300 (D.C. Cir. 1983) (discussing 49 U.S.C. § 11324(c) when it was codified as 49 U.S.C. § 11344(c)). Among the conditions the Board may impose are conditions "to protect the public from anticompetitive consequences" of the acquisition. Union Pacific, et al., 366 I.C.C. 462, 562 (1982) (citing Rail Consolidating Procedures, 363 I.C.C. 784, 789 (1981)) (emphasis in original).



The discovery sought by Movants is designed to obtain information to determine whether Norfolk Southern's and CSX's acquisition of Conrail will adversely affect competition among rail carriers and whether conditions are warranted "to protect the public from anticompetitive consequences" of the acquisition.

2. One adverse competitive effect of the transaction on the public may be to deprive shippers at the destination of the rail movement -- the consumers of the commodity being transported -- of the benefits of competition among shippers at the origin of the movement. For example, Delmarva Power & Light Company ("Delmarva") has two coal-fired generating plants in Delaware. Coal moved by rail is effectively the only source of fuel for these plants, and Conrail is the sole rail connection to them. Thus, Conrail, the destination carrier, is a monopolist. But there is competition for Delmarva's coal shipments by carriers operating between the coal fields and Conrail's interchange at Hagerstown, Maryland. The competing carriers are CSX and Norfolk Southern.<sup>2</sup> For reasons perhaps unique to Delmarva which counsel is prepared to disclose to the Presiding Judge in camera but which is not a matter of public record (although it is known to Conrail), Delmarva has been able to use

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<sup>2</sup> On a few occasions, Conrail has also transported coal from the coal fields to Hagerstown for Delmarva.

competition between CSX and Norfolk Southern to lower the price for transporting its coal from the coal fields to Hagerstown and Delmarva has reaped the benefit of this competition among origin carriers.

The proposed acquisition will eliminate Conrail as the destination carrier and will substitute Norfolk Southern as the monopolist transporting Delmarva's coal from Hagerstown.

Delmarva is concerned that the elimination of a neutral destination carrier monopolist with a destination carrier monopolist that also competes for traffic from the origin of the movement may diminish CSX's effectiveness as a competitor to Norfolk Southern and will enable Norfolk Southern, the new destination carrier monopolist, rather than Delmarva, to capture any benefit of competition among origin carriers that remains.

3. In prior merger cases, the Board and its predecessor, the Interstate Commerce Commission ("ICC") have adopted a theory that concludes that there is no competitive harm if the destination carrier monopolist is also an origin carrier and monopolizes that stage as well. The theory is the so-called "one lump" theory. Burlington Northern Inc., et al., Finance Docket No. 32549, Decision No. 38 (Aug. 16, 1995) ("Burlington Northern"), aff'd sub nom. Western Resources, Inc. v. Surface Transp. Bd., 109 F.3d 782 (D.C. Cir. 1997) ("Western Resources");

Chicago, Milwaukee, St. Paul and Pacific Railroad Co., et al., 2

I.C.C. 2d 161, 234, supplemental decision, 2 I.C.C. 2d 427

(1985); Union Pacific, et al., 366 I.C.C. at 538. The "one lump"

theory holds that:

there is only one monopoly profit to be gained from the sale of an end-product or service (here the transportation of coal for use at an electric generating plant). Because a monopolist at the end stage of production is in a position to capture the entire profit, integration backwards upstream, even when accompanied by monopolization of the earlier states (which hasn't happened here) normally does not enable it to raise the profit-maximizing price and thus inflicts no harm on the ultimate consumer.

Western Resources, 109 F.3d at 787 (citing 3 Areeda & Turner, Antitrust Law ¶ 725b, at 199 (1978)).

4. Many shippers, including the Movants, believe that in the real world they will suffer competitive harm as the result of the acquisition of a monopolistic destination carrier by an origin carrier, such as is proposed in this case, because they do not believe the "one lump" theory correctly describes the way railroads set their rates. But whichever view is correct, no claim can be made that the "one lump" theory forecloses inquiry into the rate-setting practices of the railroads involved in this transaction to determine whether shippers will be harmed by the acquisition of Conrail. The "one lump" theory is just that -- a theory. Thus, as the Court noted in Western Resources, whether

the acquisition of a monopolistic destination carrier by an origin carrier will cause competitive harm depends on the theory being "both correct and applicable. . . ." Id. Even the ICC did not hold that the "one lump" theory means there can never be competitive harm from such an acquisition. It claimed only that the "one lump" theory creates a presumption that can be rebutted by showing that:

First . . . prior to the merger, the benefits of origin competition flowed through to the utility and were not captured by the destination monopoly carrier. Second, if it is established that the benefits of origin competition are in fact passed on to the utility, there must be an additional showing that such competitive flow-through will be significantly curtailed by the merger.

Burlington Northern, slip op. at 71 (quoting Union Pacific, et al., 4 I.C.C. 2d 409, 476 (1988)); Chicago, Milwaukee, St. Paul and Pacific Railroad Co., et al., 2 I.C.C. 2d at 455; see also Western Resources, 109 F.3d at 787-88.

5. Although the Board's predecessor and the Court have recognized that the "one lump" theory is only a theory that can be rebutted, they have created a formidable obstacle to any effort to rebut the theory, as Drs. Kahn and Dunbar and Mr. Crowley explain in their Affidavits. In Western Resources, the Court rejected a variety of arguments that would undermine the basis for the theory. More importantly, the Court found that the

specific examples the utilities offered from their own files to show that the "one lump" theory did not apply to the way railroads set their rates were insufficient to rebut the theory. According to the Court, the theory is to be rejected "if its predictions are contradicted (frequently or more often than predictions from an alternative hypothesis)." Western Resources, 109 F.3d at 791 (quoting Friedman, Essays in Positive Economics 9 (1953)) (internal quotations omitted). Thus, specific examples that a utility can produce from its own files as to how the railroads set the rates for shipments to the utility are not enough to rebut the "one lump" theory. The Court's decision requires evidence which will show that the "one lump" theory is contradicted "frequently" or "more often than an alternative hypothesis."

**C. The Discovery Movants Seek Is Needed to Test Whether the "One Lump" Theory Is Frequently Contradicted by the Applicants' Actual Practice**

As Drs. Kahn and Dunbar and Mr. Crowley explain in their Affidavits in support of this Motion, the discovery requested by Movants is necessary to produce the data the Court of Appeals believes is necessary to contradict the "one lump" theory frequently. The interrogatories ask each of the railroads to explain their rate-setting theory and practices for establishing rates for coal movements to utilities or other large coal users



and whether the carrier serving the sole-served destinations obtain most or all of the profit associated with the movement of the coal. The interrogatories also ask whether there is a minimum level of profitability for each movement and, if so, how that level is calculated. These interrogatories are directly relevant to whether the monopolistic destination carrier and the competitive origin carriers set their rates as predicted by the "one lump" theory.<sup>3</sup>

The Applicants have effectively conceded the relevance of their rate-setting theories and practices since they have not objected to responding to the Movants' interrogatories. But the Movants are not willing to rely solely on the Applicants' statements. And they cannot be expected to rely solely on these statements. As the Court and the ICC have recognized, "self-serving statements by a merging railroad's officers are entitled to little credence." Lamoille Valley Railroad Co., 711 F.2d at

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<sup>3</sup> The interrogatories also request the railroads to state whether the practices and theories they follow differ from rate setting theories and practices for commodities other than coal. If so, the interrogatories request the railroads to provide information concerning these rate-setting practices and theories similar to the information requested for the rate-setting practices and theories applicable to coal. Responses to these interrogatories will shed light on whether the railroads follow the "one lump" theory generally or only with respect to coal, and the data contained on the traffic tapes requested of Applicants will test the correctness of their responses to Movants' interrogatories.

318 (citing Norfolk & Western et al., 360 I.C.C. 498, 512 (1979)).

Accordingly, the Movants have sought the production of documents to test whether the Applicants' actual rate-setting practices conform to the "one lump" theory and the railroads' statements concerning how they set rates. For example, the first two requests seek documents concerning the railroads' bids for carriage of coal by unit train or train load (the usual way coal is delivered to large buyers) to destinations which consumed 100,000 tons or more of coal per year since 1978. These documents will shed light on whether origin carriers are competing, whether the Applicants in fact analyze the market the way the "one lump" theory predicts, and, if there is origin competition, whether the origin carriers are willing to accept the rate the "one lump" theory predicts they will. The documents will also show, in conjunction with the data from the traffic tapes, whether the monopolistic destination carrier obtains the same profit no matter who the origin carrier is, as the "one lump" predicts.

The third request, to which only Norfolk Southern objects, seeks traffic tapes which show the actual revenues for each movement of freight and how the revenues have been divided among the carriers since 1978. This information is clearly relevant,

as the failure of CSX and Conrail to object shows. In any event, the traffic tapes will demonstrate whether the profit for each movement of freight was divided between the origin carrier and the monopolistic destination carrier as the "one lump" theory predicts or in some other fashion.

Significantly, none of the Applicants provides even the slightest basis for their assertions that the documents requested by Movants are not relevant to the subject matter of this proceeding. They clearly are. The documents are precisely the information the Court in Western Resources required to show that the acquisition of a monopolistic destination carrier by an origin carrier may cause competitive harm: Is the "one lump" theory "both correct and applicable" and is the theory contradicted "frequently or more often than predictions from an alternative hypothesis." Western Resources, 109 F.3d at 787 and 791.

### **III. The Requests Are Not Unduly Burdensome or Overly Broad**

Each of the Applicants claims that the requests for production to which they object are overly broad. No reason for the assertions is given. But from the Applicants' assertions about the burden the requests impose, it appears that the Applicants believe the requests are overly broad because they request bids and related documents for movements of coal to

certain destinations that occurred between 1978 and 1997, as well as the traffic tapes for the same period. Movants wish they could ask for documents for a shorter time period. But the prior decisions of the ICC and the Western Resources decision require the extended period. As noted above, the Western Resources decision requires evidence showing that the "one lump" theory is contradicted "frequently or more often than predictions from an alternative hypothesis." Western Resources, 109 F.3d at 791. It is simply not possible to show that a theory is contradicted "frequently" with only a few years of data. The data needs to be comprehensive.

Moreover, the issue the governing statute and precedent requires to be considered is whether the acquisition of Conrail by Norfolk Southern and CSX and the substitution of one of these companies for a neutral monopolistic destination carrier will have an anticompetitive effect on shippers. The ICC has found in approving prior mergers that similar substitutions will not harm shippers, based in part on the ICC's "experience." Burlington Northern, slip op. at 74. To be able to challenge that "experience," evidence showing that prior mergers involving the Applicants have had such an effect is clearly relevant. Unfortunately, the last major merger involving any of the Applicants closed in 1982 when Norfolk Southern was formed from

the merger of Norfolk and Western and the Southern systems. For CSX, its last merger was in 1980 when the C&O, B&O, Western Maryland and other railroads merged. Therefore, the time period of the requests must be extended even before those years so that there will be adequate documentation of the rate-setting practices of the Applicant railroads before the last major mergers occurred.

As to burden, both CSX and Conrail claim that they will have to produce thousands of documents to Movants in response to the first two requests. These assertions are easily answered. Movants will go to the Applicants' offices to examine the files. Norfolk Southern, but not CSX or Conrail, asserts that responding to the third request, which concerns the traffic tapes, is also burdensome. No reasons are given, and there is no burden here. The tapes apparently exist, and Norfolk Southern should be able readily to produce the tapes in the computer readable format requested.

#### **IV. The Requests for Production Can Be Easily Clarified**

Norfolk Southern and Conrail claim that the first two requests for production are ambiguous, but only Conrail identifies what it considers to be ambiguous. These alleged ambiguities could easily have been clarified with a phone call to



Movants' counsel. In any event, Movants will clarify the requests for Conrail.

First, Conrail claims that it is unclear whether the requests concern coal movements to destinations where 100,000 tons or more of coal were consumed on a monthly basis, on an annual basis, or in total between 1978 and 1997. Movants intended the request to apply to bids for movements of coal to destinations where 100,000 tons or more of coal were consumed on an annual basis, and will so clarify now.<sup>4</sup> Second, Conrail claims that it cannot readily identify how much coal a destination consumed as opposed to the destination where Conrail delivered coal (because the coal may be subsequently transported for export) or determine how much coal was consumed in the relevant time period. Conrail's concerns are misplaced; Movants will accept the bids and related documents for coal movements to destinations where the Applicant railroads delivered 100,000 tons or more in a year and draw their own conclusions about the amounts consumed. Conrail also claims it is uncertain whether the request applies to bids made during 1978-1997 or to bids made before 1978 for movements of coal to occur in 1978 or thereafter.

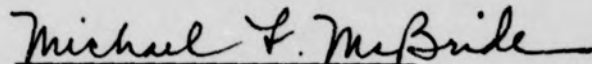
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<sup>4</sup> CSX appears to assume that the request seeks bids for movements to destinations which consumed 100,000 tons or more between 1978 and 1997. As noted, this assumption is mistaken; Movants intended that the 100,000 ton limitation apply to amounts consumed each year.

Movants intended the latter and believe the request reflects this intention. In any event, Movants will clarify that the request is directed to bids for coal movements between 1978 and 1997.

WHEREFORE, in consideration of the foregoing, the Movants' respectfully request the Presiding Judge to issue an order compelling CSX and Conrail to respond to the first and second request of Movants' First Set of Requests for Production and compelling Norfolk Southern to respond to each request of Movants' First Set of Requests for Production, as those requests have been clarified herein.

Respectfully submitted,



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Bruce W. Neely

Linda K. Breggin

Brenda Durham

LeBoeuf, Lamb, Greene

& MacRae, L.L.P.

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(202) 986-8102 (Facsimile)

Attorneys for Atlantic City

Electric Company, Delmarva

Power & Light Company, and

The Ohio Valley Coal Company

Dated: July 14, 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 --

---

CERTIFICATE OF SERVICE

I hereby certify that I have served this 14<sup>th</sup> day of  
July, 1997, a copy of the foregoing "Motion to Compel" by  
facsimile or hand delivery (as designated) upon each of the  
following parties of record:

Office of the Secretary  
Case Control Unit  
**ATTN: STB Finance Dkt. 33388**  
Surface Transportation Board  
Mercury Building  
1925 K Street, N.W.  
Washington, DC 20423-0001  
**VIA HAND DELIVERY**

Mr. Vernon Williams, Secretary  
Surface Transportation Board  
Mercury Building  
1925 K Street, N.W.  
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**VIA HAND DELIVERY**

David M. Konschnik, Director  
Office of Proceedings  
Surface Transportation Board  
Mercury Building  
1925 K Street, N.W.  
Washington, DC 20423  
**VIA HAND DELIVERY**

Honorable Jacob Leventhal  
Administrative Law Judge  
Federal Energy Regulatory  
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Office of Hearings, Suite 11F  
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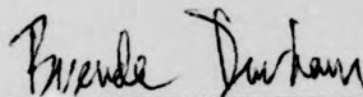
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3017 Lou Menk Drive  
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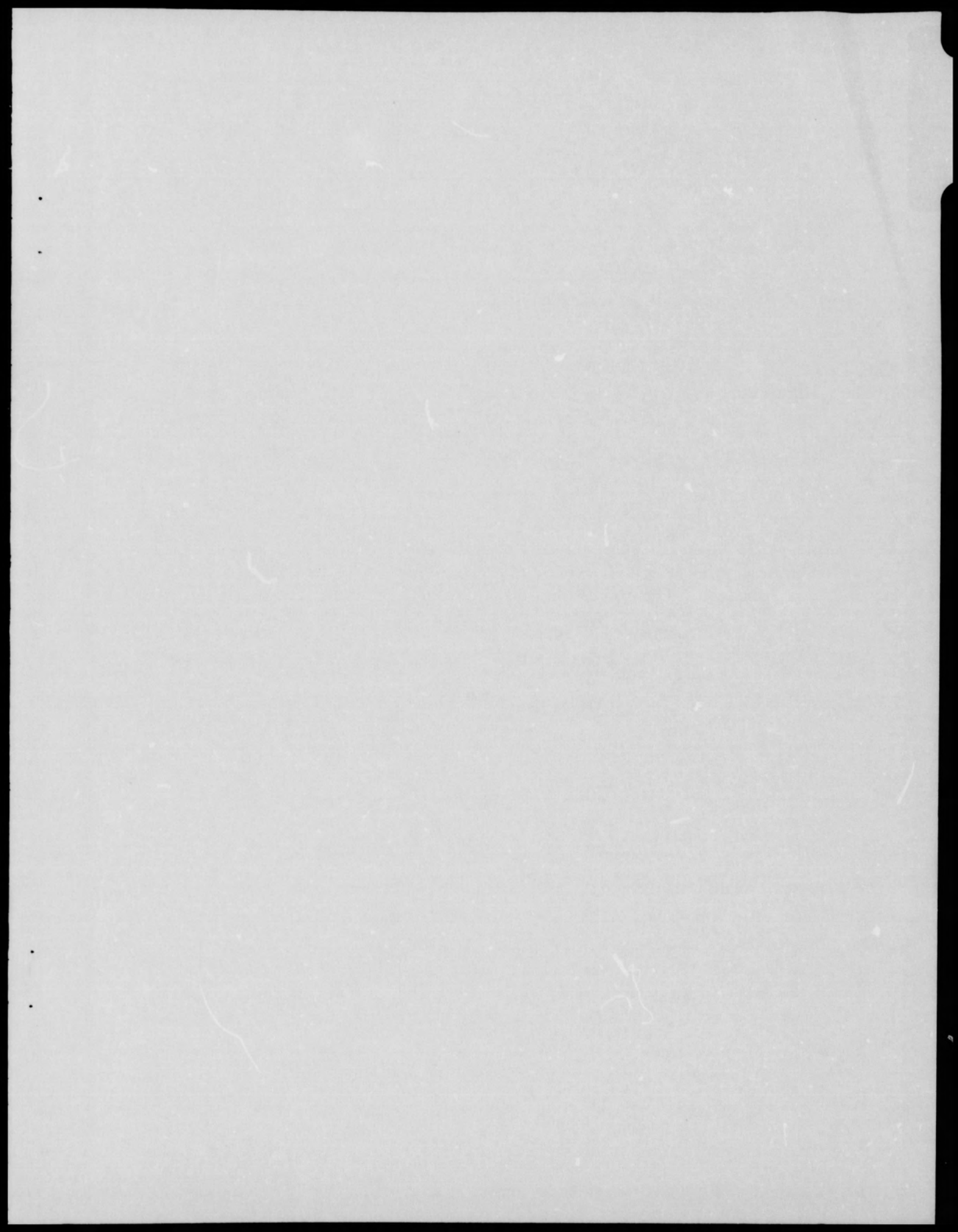
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Cleveland, OH 44107-9400



Brenda Durham





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

---

ATLANTIC CITY ELECTRIC COMPANY, ET AL.'S  
FIRST SET OF INTERROGATORIES AND  
FIRST SET OF REQUESTS FOR PRODUCTION OF DOCUMENTS TO CONRAIL

To: Conrail  
c/o Gerald P. Norton, Esq.  
Harkins Cunningham  
1300 Nineteenth Street, N.W.  
Suite 600  
Washington, DC 20036

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,  
Delmarva Power & Light Company, and The Ohio Valley Coal Company  
("ACE, et al.") hereby submits this First Set of Interrogatories  
and Requests for Production of Documents ("Discovery Requests")  
to Conrail.

## 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. "Conrail" means Conrail and all of its predecessor railroads.
4. "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 Conrail.

5. "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.

6. "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 an Interrogatory or 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 each discovery request, 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 these Document Requests 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.

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7. If you want clarification concerning an Interrogatory or Document Request, you are instructed to contact

counsel for ACE, et al. reasonably in advance of the response date.

8. These Discovery Requests 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.

#### DOCUMENT REQUESTS

1. Identify and produce all documents, in the department(s) of Conrail responsible for marketing coal, concerning bids for the carriage of coal by unit train or trainload movement, to every destination served by Conrail at which 100,000 tons or more of coal was consumed, for the years 1978-97.

2. Identify and produce all files, of the department(s) responsible for establishing or negotiating rates for the carriage of coal, that relate to the bid documents responsive to Document Request No. 1, including subsequent or prior correspondence or analyses.

3. Produce your 100% traffic tapes from 1978 through second quarter 1997. We request that Conrail furnish these traffic tapes in computer readable form, where available, including all necessary record layouts, field descriptions and

documentation. For each carload handled by Conrail provide the following information:

- a. Waybill number and date;
- b. Consignee/shipper;
- c. Commodity (by 7 digit STCC);
- d. Car initial and number;
- e. Car type;
- f. Origin city and state (including Freight Station Accounting Code and Standard Point Location Code);
- g. Destination city and state (including Freight Station Accounting Code and Standard Point Location Code);
- h. Location of any interchange(s) (including Freight Station Accounting Code and Standard Point Location Code);
- i. Railroads involved in the routing (identified by on and off junction);
- j. Miles by railroad;
- k. Number of cars on waybill;
- l. Number of tons;
- m. Revenues by railroad (including any refunds, rebates, "take-or-pay" penalty or other adjustments);
- n. Car owner;
- o. Any mileage payments for shipper owned equipment;

- p. For TOFC/COFC shipments, the TOFC/COFC plan;  
and,
- q. Variable costs.

#### INTERROGATORIES

1. Describe the rate-setting theory and practices of Conrail for proposing or establishing rates on shipments of coal by unit train or trainload to electric utilities and other major coal consumers served by only a single railroad at destination.
2. State whether the carrier serving the sole-served destinations referred to in Interrogatory No. 1 obtains most or all of the profit associated with any such movement in which two or more carriers are involved.
3. State whether, for the movements of coal referred to in Interrogatory No. 1, Conrail has a minimum required level of profitability for each such movement and, if so, how that level is calculated or defined.
4. State whether the rate-setting theory and practices of Conrail for coal furnished in response to Interrogatory No. 1 is the same as, or different from, the rate-setting theory and practices used for all other commodities.
5. If the answer to Interrogatory No. 4 is that the rate-setting theory and practices for coal differ from those for



one or more other commodities, state the commodity and describe the applicable rate-setting theory and practices applicable to those commodities.

6. State whether, for each commodity referred to in Interrogatories Nos. 4 and 5, Conrail has a minimum required level of profitability for such movement and, if so, how that level is calculated or defined.

Respectfully submitted,

Michael F. McBride

Michael F. McBride

Bruce W. Neely

Linda K. Breggin

Brenda Durham

Joseph H. Fagan

LeBoeuf, Lamb, Greene

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Attorneys for Atlantic City

Electric Company, Delmarva Power

& Light Company, and The Ohio

Valley Coal Company

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

---

ATLANTIC CITY ELECTRIC COMPANY, ET AL.'S  
FIRST SET OF INTERROGATORIES AND  
FIRST SET OF REQUESTS FOR PRODUCTION OF DOCUMENTS TO CSX

To: CSX  
c/o Drew A. Harker, Esq.                      David H. Coburn, Esq.  
Arnold & Porter                                Steptoe & Johnson, L.L.P.  
555 Twelfth Street, N.W.                      1330 Connecticut Avenue, N.W.  
Washington, D.C. 20004-1202                  Washington, D.C. 20036-1795

Pursuant to 49 C.F.R. §§ 1114.21-1114.31 and the  
Discovery Guidelines entered pursuant to the order dated June 27,  
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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.

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For each carload handled by Conrail provide the following information:

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- c. Commodity (by 7 digit STCC);
- d. Car initial and number;
- e. Car type;
- f. Origin city and state (including Freight Station Accounting Code and Standard Point Location Code);
- g. Destination city and state (including Freight Station Accounting Code and Standard Point Location Code);
- h. Location of any interchange(s) (including Freight Station Accounting Code and Standard Point Location Code);
- i. Railroads involved in the routing (identified by on and off junction);
- j. Miles by railroad;
- k. Number of cars on waybill;
- l. Number of tons;
- m. Revenues by railroad (including any refunds, rebates, "take-or-pay" penalty or other adjustments);
- n. Car owner;
- o. Any mileage payments for shipper owned equipment;

- p. For TOFC/COFC shipments, the TOFC/COFC plan;  
and,
- q. Variable costs.

#### INTERROGATORIES

1. Describe the rate-setting theory and practices of CSX for proposing or establishing rates on shipments of coal by unit train or trainload to electric utilities and other major coal consumers served by only a single railroad at destination.

2. State whether the carrier serving the sole-served destinations referred to in Interrogatory No. 1 obtains most or all of the profit associated with any such movement in which two or more carriers are involved.

3. State whether, for the movements of coal referred to in Interrogatory No. 1, CSX has a minimum required level of profitability for each such movement and, if so, how that level is calculated or defined.

4. State whether the rate-setting theory and practices of CSX for coal furnished in response to Interrogatory No. 4 is the same as, or different from, the rate-setting theory and practices used for all other commodities.

5. If the answer to Interrogatory No. 2 is that the rate-setting theory and practices for coal differ from those for one or more other commodities, state the commodity and describe



the applicable rate-setting theory and practices applicable to those commodities.

6. State whether, for each commodity referred to in Interrogatories Nos. 4 and 5, CSX has a minimum required level of profitability for each such movement and, if so, how that level is calculated or defined.

Respectfully submitted,

Michael F. McBride

Michael F. McBride

Bruce W. Neely

Linda K. Breggin

Brenda Durham

Joseph H. Fagan

LeBoeuf, Lamb, Greene

& MacRae, L.L.P.

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(202) 986-8000

Attorneys for Atlantic City

Electric Company, Delmarva

Power & Light Company and

The Ohio Valley Coal Company

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

---

ATLANTIC CITY ELECTRIC COMPANY, ET AL.'S  
FIRST SET OF INTERROGATORIES AND FIRST SET OF  
REQUESTS FOR PRODUCTION OF DOCUMENTS TO NORFOLK SOUTHERN

To: Norfolk Southern  
c/o John V. Edwards, Esq.  
Patricia Bruce, Esq.  
Zuckert, Scoutt & Rasenberger, L.L.P.  
888 Seventeenth Street, N.W.  
Washington, D.C. 20006-3939

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,  
Delmarva Power & Light Company, and The Ohio Valley Coal Company  
("ACE, et al.") hereby submits this First Set of Interrogatories  
and Requests for Production of Documents ("Discovery Requests")  
to Norfolk Southern.

## 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. "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 Norfolk Southern.

5. "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.

6. "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 an Interrogatory or 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 each discovery request, 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 these Document Requests 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, et al. reasonably in advance of the response date.

8. These Discovery Requests 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.

#### DOCUMENT REQUESTS

1. Identify and produce all documents, in the department(s) of Norfolk Southern responsible for marketing coal, concerning bid's for the carriage of coal by unit train or trainload movement, to every destination served by Norfolk Southern at which 100,000 tons or more of coal was consumed, for the years 1978-97.

2. Identify and produce all files, of the department(s) responsible for establishing or negotiating rates for the carriage of coal, that relate to the bid documents responsive to Document Request No. 1, including subsequent or prior correspondence or analyses.

3. Produce your 100% traffic tapes from 1978 through second quarter 1997. We request that Norfolk Southern furnish these traffic tapes in computer readable form, where available, including all necessary record layouts, field descriptions and

documentation. For each carload handled by Norfolk Southern provide the following information:

- a. Waybill number and date;
- b. Consignee/shipper;
- c. Commodity (by 7 digit STCC);
- d. Car initial and number;
- e. Car type;
- f. Origin city and state (including Freight Station Accounting Code and Standard Point Location Code);
- g. Destination city and state (including Freight Station Accounting Code and Standard Point Location Code);
- h. Location of any interchange(s) (including Freight Station Accounting Code and Standard Point Location Code);
- i. Railroads involved in the routing (identified by on and off junction);
- j. Miles by railroad;
- k. Number of cars on waybill;
- l. Number of tons;
- m. Revenues by railroad (including any refunds, rebates, "take-or-pay" penalty or other adjustments);
- n. Car owner;
- o. Any mileage payments for shipper owned equipment;

- p. For TOFC/COFC shipments, the TOFC/COFC plan;  
and,
- q. Variable costs.

#### INTERROGATORIES

1. Describe the rate-setting theory and practices of Norfolk Southern for proposing or establishing rates on shipments of coal by unit train or trainload to electric utilities and other major coal consumers served by only a single railroad at destination.

2. State whether the carrier serving the sole-served destinations referred to in Interrogatory No. 1 obtains most or all of the profit associated with any such movement in which two or more carriers are involved.

3. State whether, for the movements of coal referred to in Interrogatory No. 1, Norfolk Southern has a minimum required level of profitability for each such movement and, if so, how that level is calculated or defined.

4. State whether the rate-setting theory and practices of Norfolk Southern for coal furnished in response to Interrogatory No. 1 is the same as, or different from, the rate-setting theory and practices used for all other commodities.



5. If the answer to Interrogatory No. 4 is that the rate-setting theory and practices for coal differ from those for one or more other commodities, state the commodity and describe the applicable rate-setting theory and practices applicable to those commodities.

6. State whether, for each commodity referred to in Interrogatories Nos. 4 and 5, Norfolk Southern has a minimum required level of profitability for each such movement and, if so, how that level is calculated or defined.

Respectfully submitted,

*Michael F. McBride*

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Attorneys for Atlantic City

Electric Company, Delmarva

Power & Light Company, and

The Ohio Valley Coal Company

UNITED STATES OF AMERICA  
DEPARTMENT OF TRANSPORTATION  
SURFACE TRANSPORTATION BOARD

---

Finance Docket No. 33388

---

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

---

**CERTIFICATE OF SERVICE**

I hereby certify that I have served this 3rd day of July, 1997, a copy of the foregoing "Atlantic City Electric Company, et al.'s First Set of Interrogatories and First Set of Requests for Production of Documents" (ACE, et al., -2, -3, and -4) by first-class mail, postage prepaid, or by more expeditious means, as indicated below, upon each of the following:

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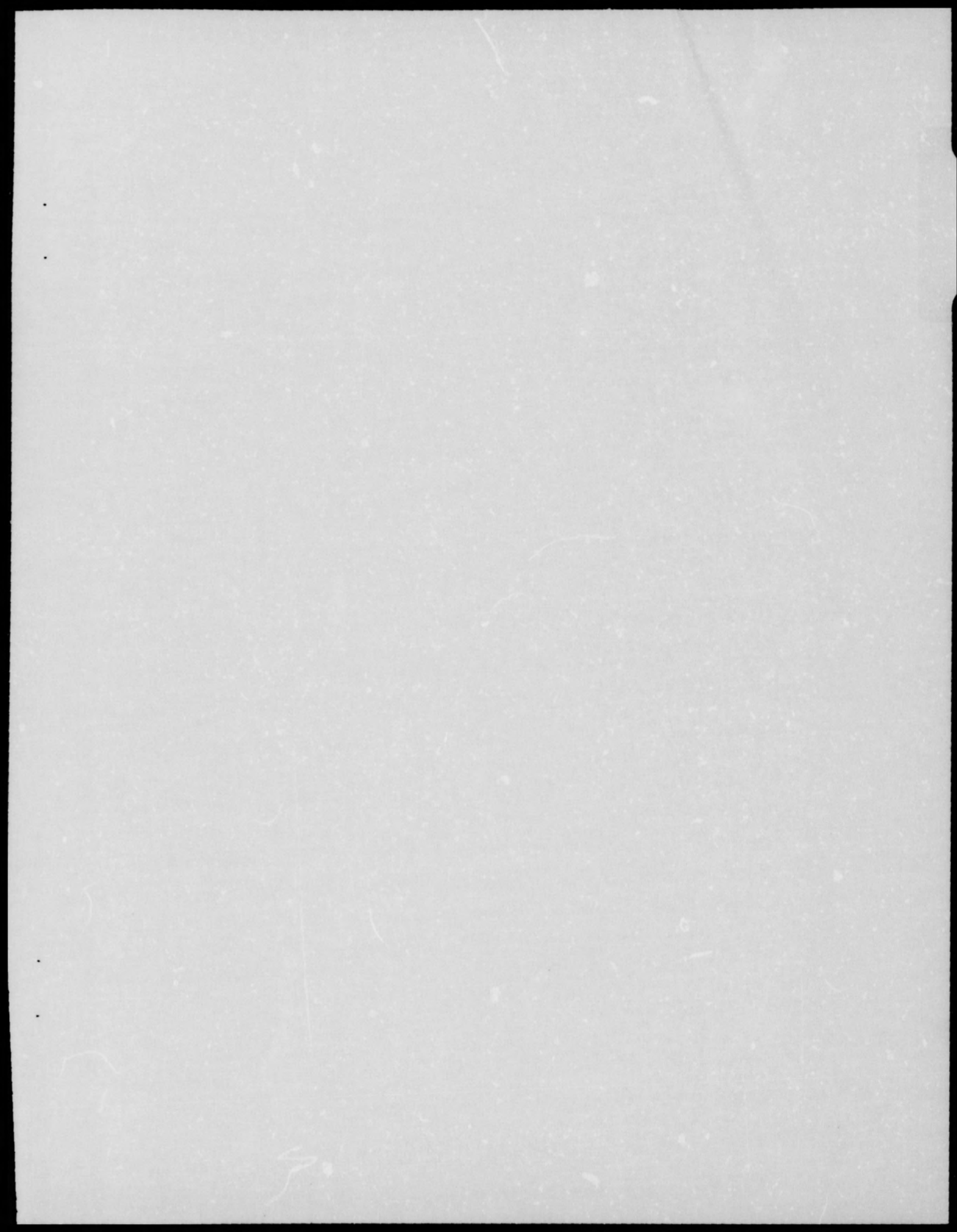
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July 11, 1997

By Hand Delivery

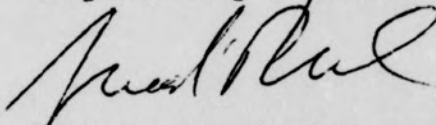
Hon. Jacob Leventhal  
Administrative Law Judge  
Federal Energy Regulatory Commission  
888 First Street, N.W.  
Washington, D.C. 20426

Re: Preliminary Discovery Objections

Dear Judge Leventhal:

Enclosed are Consolidated Rail Corporation's 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.

Respectfully submitted,



Paul A. Cunningham  
Gerald P. Norton

Counsel for Consolidated Rail  
Corporation

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

---

CONRAIL'S 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

TIMOTHY T. O'TOOLE  
CONSTANCE L. ABRAMS  
Consolidated Rail Corporation  
Two Commerce Square  
2001 Market Street  
Philadelphia, PA 19103  
(215) 209-2000

PAUL A. CUNNINGHAM  
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Harkins Cunningham  
Suite 600  
1300 19th Street, N.W.  
Washington, DC 20036  
(202) 973-7600

Counsel for Conrail Inc. and  
Consolidated Rail Corporation

July 11, 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

---

CONRAIL'S 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

Pursuant to the Discovery Guidelines (§ 16), Conrail Inc., and Consolidated Rail Corporation (collectively "Conrail") hereby respond preliminarily to the first set of discovery requests to Conrail served by Atlantic City Electric Company, et al. ("ACE") (ACE, et al. -2). Without waiving any other objections that may apply to these and other requests in this set, Conrail sets forth here the objections that have led it to conclude at this time that it will be providing no affirmative response (i.e., no information or documents) to these particular discovery requests.



## PRELIMINARY OBJECTIONS

### DOCUMENT REQUESTS

#### Request No. 1:

Identify and produce all documents, in the department(s) of Conrail responsible for marketing coal, concerning bids for the carriage of coal by unit train or trainload movement, to every destination served by Conrail at which 100,000 tons or more of coal was consumed, for the years 1978-97.

#### Objections to No. 1:

This request for "all" documents "concerning" bids for unit train or trainload shipments of coal for a 20-year period is thoroughly objectionable. It is massively overbroad and seeks documents that are irrelevant (both in time and subject matter) to this proceeding and are not reasonably calculated to lead to the discovery of relevant or admissible documents, evidence or information. The request is also unduly burdensome in that it could require Conrail to search massive numbers of files, including many that could prove to contain no responsive documents.

In addition, the phrase "at which 100,000 tons or more of coal was consumed" is vague and ambiguous because it does not specify a time period (e.g., monthly, annually, for the full 20-year period, etc.) to be used in determining whether a destination consumed more than 100,000 tons of coal. Conrail also cannot readily determine how much coal a "destination" consumed, as opposed to how much coal Conrail delivered to the destination, which may or may not be consumed at that destination

at all (e.g., export coal) or within the relevant time period. It is also unclear whether the request calls for bids made in "the years 1978-97," or also earlier bids related to movements during that period.

This request for voluminous data and documentation concerning every coal bid over 20 years cannot be justified as needed to analyze or respond to the application, especially in the context of the Board's schedule. It is thus inconsistent with the first requirement of the Discovery Guidelines that "all discovery requests must be tailored to be consistent with the procedural schedule adopted in this proceeding." (§ 1).

Request No. 2:

Identify and produce all files, of the department(s) responsible for establishing or negotiating rates for the carriage of coal, that relate to the bid documents responsive to Document Request No. 1, including subsequent or prior correspondence or analyses.

Objections to No. 2:

See Objections to Request No. 1. This request is further objectionable because, to the extent it is not duplicative of Request No. 1, it is equally, if not more, burdensome and irrelevant, in that files of the departments specified "that relate to the bid documents" could include a large number of documents that do not themselves necessarily

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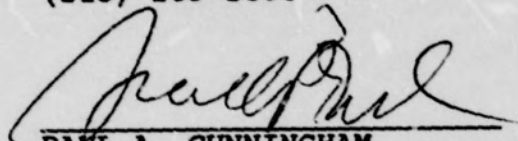
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2/2

relate to such bids. In addition, the period covered is even longer, in that the request includes correspondence or analyses "prior" to bids.

Respectfully submitted,

TIMOTHY T. O'TOOLE  
CONSTANCE L. ABRAMS  
Consolidated Rail Corporation  
Two Commerce Square  
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(215) 209-2000



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(202) 973-7600

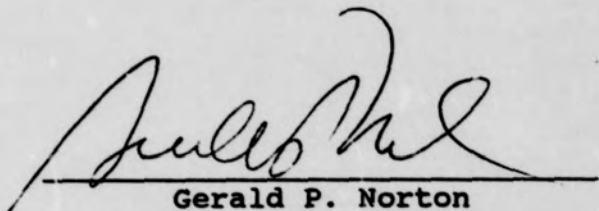
Counsel for Conrail Inc. and  
Consolidated Rail Corporation

July 11, 1997

CERTIFICATE OF SERVICE

I, Gerald P. Norton, certify that, on this 11th day of July, 1997, I caused a copy of the foregoing document to be served by hand 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, or by a more expeditious manner of delivery on all parties appearing on the restricted service list established pursuant to paragraph 3 of the Discovery Guidelines in Finance Docket No. 33388, and on

Hon. Jacob Leventhal  
Administrative Law Judge  
Federal Energy Regulatory Commission  
888 First Street, N.W.  
Washington, D.C. 20426



Gerald P. Norton



CSX-9

BEFORE THE  
SURFACE TRANSPORTATION BOARD

---

FINANCE DOCKET NO. 33388

---

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

---

CSX'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 REQUEST FOR PRODUCTION OF DOCUMENTS  
TO CSX (AEP, ET AL.-3)

---

Pursuant to Paragraph 16 of the Discovery Guidelines adopted in Decision No. 10 on June 26, 1997, CSX<sup>1</sup> submits its objections to Document Requests 1 and 2 of the First Set of Interrogatories and First Set of Requests for Production of Documents to CSX (AEP, et al. -3) served by Atlantic City Electric Company, Delmarva Power & Light Company and The Ohio Valley Coal Company (collectively, "Utilities/OVC"). Document Requests 1 and 2 seek the production of each and every document and file of CSX regarding bids and rates for almost the entirety of CSX's coal business for a twenty-year period.

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<sup>1</sup>"CSX" refers collectively to CSX Corporation and CSX Transportation, Inc.

- 2 -

With respect to the remaining discovery requests of Utilities/OVC, CSX will answer or object as appropriate within the 15-day period set forth in Paragraph 16 of the Discovery Guidelines. By service of these specific objections, CSX does not waive its other objections to the Definitions, Instructions, Document Requests, and Interrogatories contained in Utilities/OVC's discovery requests.

### DOCUMENT REQUESTS

1. Identify and produce all documents, in the department(s) of CSX responsible for marketing coal, concerning bids for the carriage of coal by unit train or trainload movement, to every destination served by CSX at which 100,000 tons or more of coal was consumed, for the years 1978-97.

CSX objects to Document Request 1 as unduly burdensome, overbroad, and irrelevant to this proceeding.

Document Request 1 calls for the production of every document relating to every bid for every movement of coal considered or submitted by CSX over a twenty-year time period. Most of CSX's coal consignees (341 in 1997, alone) consume more than 100,000 tons of coal per year (let alone over the twenty-year period specified in the request). In Jacksonville alone, CSX's Coal Department maintains hundreds of thousands of potentially responsive pages. The Coal Department has three other headquarter locations at which documents are maintained on a similar scale. This is a massively burdensome request.

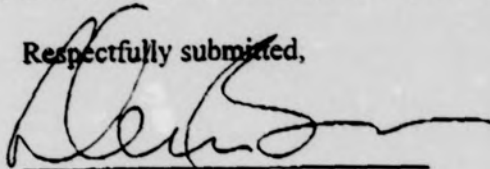
The information sought is not related to the Application filed by CSX, NS and Conrail and has no relevance to the issues in this proceeding. Discovery of such information must not be permitted.

- 3 -

2. Identify and produce all files, of the department(s) responsible for establishing or negotiating rates for the carriage of coal, that relate to the bid documents responsive to Document Request No. 1, including subsequent or prior correspondence or analyses.

CSX objects to Document Request 2 as unduly burdensome, overbroad, and irrelevant for the reasons set forth in the response to Document Request 1.

Respectfully submitted,



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Peter J. Shudtz  
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Richmond, VA 23219-4030  
(804) 775-1130

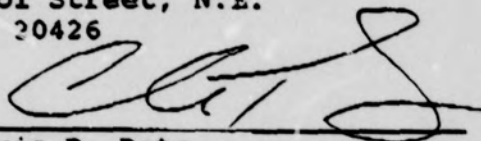
Counsel for CSX Corporation and CSX  
Transportation, Inc.

July 11, 1997

**CERTIFICATE OF SERVICE**

I, Chris P. Datz, certify that on July 11, 1997, I have caused to be served a true and correct copy of the foregoing CSX-9, CSX'S Objections to Document Requests 1 and 2 of Atlantic City Electric Company et. al.'s First Set of Interrogatories and First Set of Requests for Production of Documents (ACE, et. al.-4), on all parties that have submitted to Applicants a Request to be Placed on the Restricted Service List in STB Finance Docket No. 33388 and by hand delivery on the following:

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



Chris P. Datz

LAW OFFICES

**ZUCKERT, SCOUTT & RASENBERGER, L.L.P.**

888 SEVENTEENTH STREET, N.W.  
WASHINGTON, D.C. 20006-3930  
TELEPHONE: (202) 298-8660  
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(202) 342-1316

July 11, 1997

**By Hand Delivery**

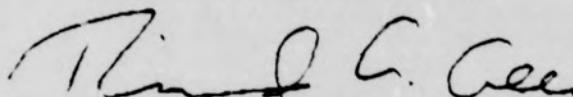
Hon. Jacob Leventhal  
Administrative Law Judge  
Federal Energy Regulatory Commission  
888 First Street, N.W.  
Washington, D.C. 20426

Re: Initial Discovery Objections

Dear Judge Leventhal:

Enclosed are 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.

Respectfully submitted,



Richard A. Allen  
Patricia E. Bruce

COUNSEL FOR NORFOLK SOUTHERN  
CORPORATION AND NORFOLK  
SOUTHERN RAILWAY COMPANY

Enclosure



NS-7

BEFORE THE  
SURFACE TRANSPORTATION BOARD

---

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

---

STB FINANCE DOCKET NO. 33388

---

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)

---

NS<sup>1/</sup> hereby submits its initial objections to Atlantic City Electric Company, et. al.'s First Set of Interrogatories and First Set of Requests for the Production of Documents to Norfolk Southern (ACE, et al.-4) served by Atlantic City Electric Company, Delmarva Power & Light Company and The Ohio Valley Coal Company ("ACE, et al.") on July 3, 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. . . ." NS reserves its right to

---

<sup>1/</sup> "NS" refers collectively to Norfolk Southern Corporation and Norfolk Southern Railway Company.

answer or object to all other discovery requests, definitions and instructions set forth in ACE, et al. - 4 within the time frame set forth in that same Discovery Guidelines Paragraph 16.

#### **Document Requests**

1. Identify and produce all documents, in the department(s) of Norfolk Southern responsible for marketing coal, concerning bids for the carriage of coal by unit train or trainload movement, to every destination served by Norfolk Southern at which 100,000 tons or more of coal was consumed, for the years 1978-97.

1. NS objects to Document Request No. 1 as requesting only information that is neither relevant nor reasonably calculated to lead to the discovery of admissible evidence. NS further objects to Document Request No. 1 as unduly vague, ambiguous, unduly burdensome and overly broad in scope and time.

2. Identify and produce all files of the department(s) responsible for establishing or negotiating rates for the carriage of coal, that relate to the bid documents responsive to Document Request No. 1, including subsequent or prior correspondence or analyses.

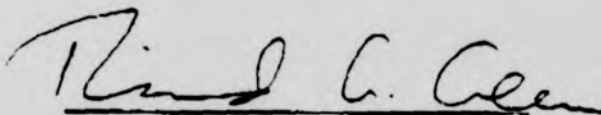
2. See objection to Document Request No. 1. NS further objects to this Document Request No. 2 as requesting only information that is neither relevant nor reasonably calculated to lead to the discovery of admissible evidence. NS further objects to Document Request No. 2 as unduly vague, ambiguous, unduly burdensome and overly broad.

3. Produce your 100% traffic tapes from 1978 through second quarter 1997. We request that Norfolk Southern furnish these traffic tapes in computer readable form, where available, including all necessary record layouts, field descriptions and documentation. For each carload handled by Norfolk Southern provide the following information: a. Waybill number and date;

b. Consignee/shipper; c. Commodity (by 7 digit STCC); d. Car initial and number; e. Car type; f. Origin city and state (including Freight Station Accounting Code and Standard Point Location Code); g. Destination city and state (including Freight Station Accounting Code and Standard Point Location Code); h. Location of any interchange(s) (including Freight Station Accounting Code and Standard Point Location Code); i. Railroads involved in the routing (identified by on and off junction); j. Miles by railroad; k. Number of cars on waybill; l. Number of tons; m. Revenues by railroad (including any refunds, rebates, "take or pay" penalty or other adjustments); n. Car owner; o. Any mileage payments for shipper owned equipment; p. For TOFC/COFC shipments, the TOFC/COFC plan; and q. Variable costs.

3. NS objects to this Document Request No. 3 as requesting information that is neither relevant nor reasonably calculated to lead to the discovery of admissible evidence. NS further objects to Document Request No. 3 as unduly burdensome and overly broad.

Respectfully submitted,



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J. Gary Lane  
James L. Howe III  
Robert J. Cooney  
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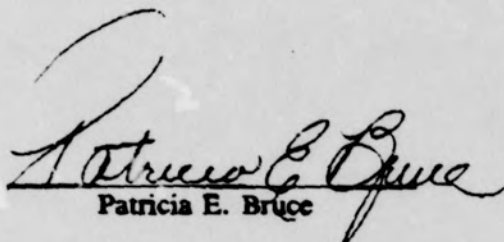
Counsel for Norfolk Southern  
Corporation and Norfolk Southern  
Railway Company

July 11, 1997

**CERTIFICATE OF SERVICE**

I, Patricia E. Bruce, certify that on July 11, 1997 I caused to be served by facsimile service, a true and correct copy of the foregoing NS-7, Norfolk Southern's Initial Objections to Atlantic City Electric Company, et al.'s First Set of Interrogatories and First Set of Requests for Production of Documents to Norfolk Southern (ACE, et al., -4), 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 and by hand delivery on the following:

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



Patricia E. Bruce

Dated: July 11, 1997

**RESTRICTED SERVICE LIST**  
**HIGHLY CONFIDENTIAL**  
July 11, 1997

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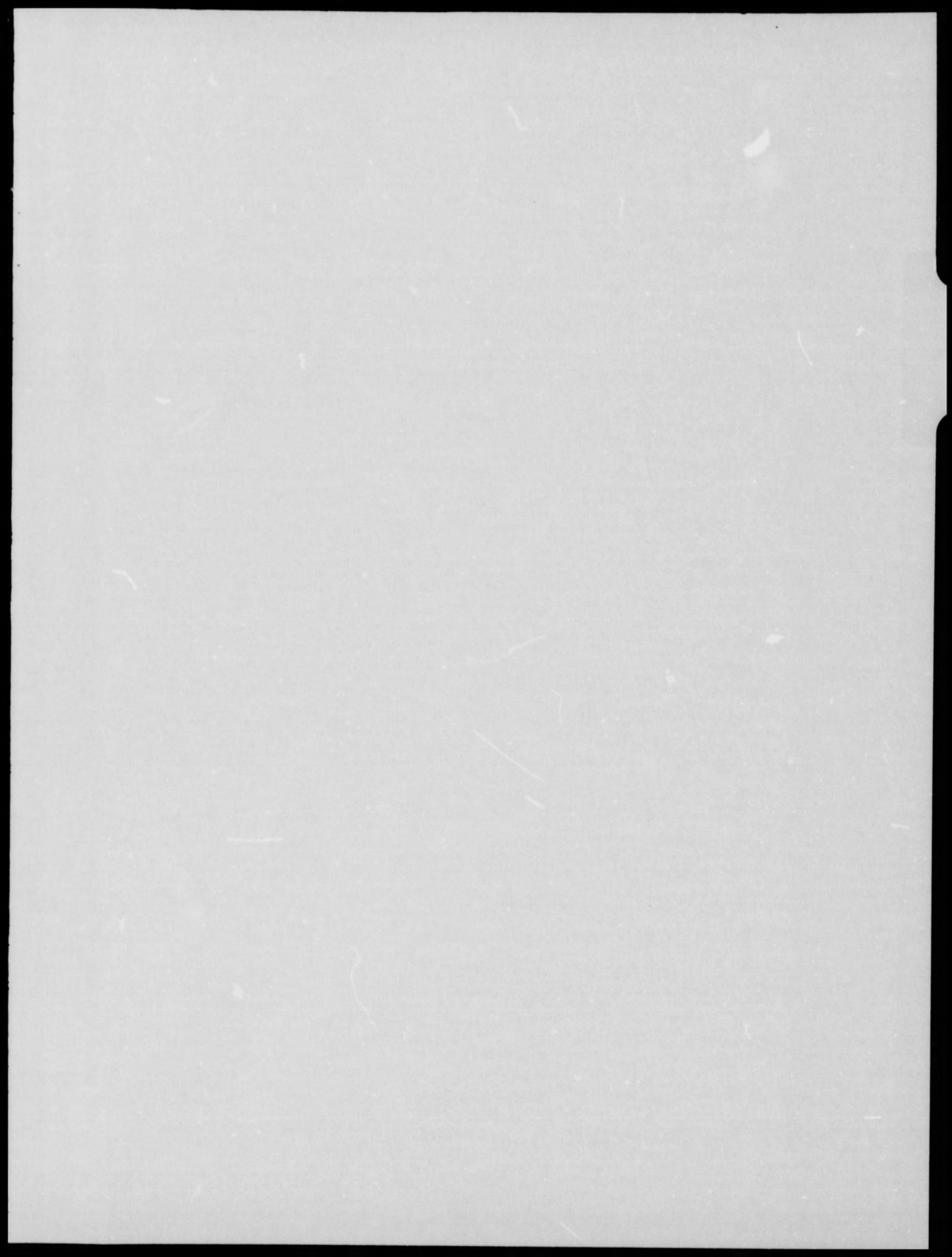
**RESTRICTED SERVICE LIST**  
**CONFIDENTIAL**  
**July 11, 1997**

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**New York, New York 10048**  
**Phone: 212-435-6915**  
**Fax: 212-435-6913**





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**

---

State of Virginia            )  
                                  ) ss.  
City of Alexandria         )

**AFFIDAVIT OF THOMAS D. CROWLEY**

Thomas D. Crowley, being duly sworn, deposes and says:

1. My name is Thomas D. Crowley. I am President of L. E. Peabody & Associates, Inc., a transportation and economic consulting firm located in Alexandria, Virginia. My firm and I consult for a wide range of shippers and others in the transportation industry, with a particular speciality in advising and consulting for shippers who move commodities by rail. I have been involved in most of the major rail-related matters before the Surface Transportation Board and its predecessor, the Interstate Commerce Commission, for over 26 years. Most notably with respect to the pending discovery dispute, I was a witness for numerous shippers in the Burlington Northern/Santa Fe merger and in the Union Pacific/Southern Pacific merger, and I was a witness in the recent "bottleneck" proceedings. A more complete description of my qualifications is set forth in Exhibit No. 1 to this Affidavit.

2. I have been retained by LeBoeuf, Lamb, Greene & MacRae, L.L.P. to support Mr. Michael F. McBride in his representation of several shippers in this proceeding. Among the assignments I have been given in support of Mr. McBride's representation of those clients, is

to assist him in developing evidence necessary to support the expected testimony of Professor Alfred E. Kahn, Robert Julius Thorne Professor Emeritus at Cornell University and a principal in NERA, and his colleague at NERA, Dr. Frederick C. Dunbar.

3. Among the subjects that Drs. Kahn and Dunbar are expected to address is the issue of the acquisition price paid for Conrail by CSX and Norfolk Southern and whether protective conditions for coal and other shippers are appropriate.

4. One issue to be explored is whether conditions should be imposed to protect shippers served by a "bottleneck" carrier from competitive harm caused by the acquisition of, and control of, Conrail. After consultation with Mr. McBride, I assisted him in developing discovery requests that would elicit information necessary to explore this issue. Specifically, the discovery requests seek information to determine the rate-setting practices of the Applicant railroads and whether the Applicants in fact set rates in accordance with the so-called "one lump" theory. Briefly, the "one lump" theory assumes that shippers whose rail service is dependent on a "bottleneck" carrier at origin or (more typically) at the destination are subject to monopoly pricing by the "bottleneck" carrier. The shipper is assumed to be charged a through rate that maximizes the net revenue for the traffic, subject to regulatory limits, with the destination carrier (in the typical case) forcing the origin carrier to take the lowest division of the through rate for its segment of the movement.

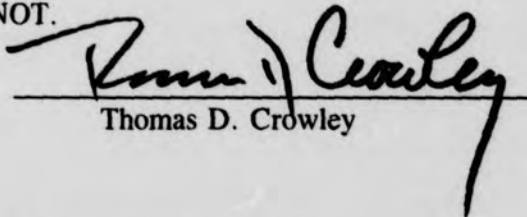
5. Based on the "one lump" theory, the ICC and STB have assumed in prior railroad merger and control proceedings that the merger or control transaction at issue will not harm the shippers in the circumstances described in paragraph 4 because they already are being charged the maximum rate, subject to regulatory limits, that they could be charged.

6. I and many shippers do not believe that railroads set rates in accordance with the "one lump" theory, and specifically the clients represented by Mr. McBride are apprehensive

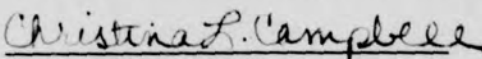
about the possibility of rate increases as a result of the acquisition of Conrail. At the same time, the ICC and the STB have erected a formidable hurdle to overcoming the assumption that the "one lump" theory is being followed, and the U. S. Court of Appeals for the District of Columbia Circuit has upheld the ICC's use of that theory in permitting the merger of the Burlington Northern/Santa Fe. In that case, the ICC did not accept limited, shipper-specific evidence that the "one lump" theory was not the basis for rate setting, finding it insufficiently comprehensive to rebut the theory, and the Court of Appeals seemed to require evidence that frequently departs from the theory.

7. Accordingly, I and Drs. Kahn and Dunbar have concluded that, in order to test whether the "one lump" theory accurately describes the rate-setting practices of the Applicants, and to demonstrate the need for protective conditions for shippers if it does not, railroad-wide, comprehensive evidence of the Applicants' rate-setting practices is needed to meet the standards previously set by the ICC and STB to overcome that theory. In my judgement, the discovery requests sent to Applicants by Mr. McBride on July 3, 1997 on behalf of Atlantic City Electric Company, et al. are absolutely essential for Drs. Kahn and Dunbar and me to test whether the Applicants' rate-setting practices conform in reality to the "one lump" theory.

FURTHER AFFIANT SAITH NOT.

  
Thomas D. Crowley

Sworn to and subscribed before me this 10 day of July, 1997.

  
Notary Public

My Commission expires My Commission Expires March 31, 2000

**FINANCE DOCKET NO. 33388**

State of New York )  
 ) ss. (for Dr. Dunbar)  
County of Westchester )

1. Our names are Alfred E. Kahn and Frederick C. Dunbar. We are Special Consultant and Senior Vice President of National Economic Research Associates, Inc. (NERA), respectively, a nationally known economic consulting firm. Each of us has been a witness in numerous proceedings before the Interstate Commerce Commission ("ICC") and Surface Transportation Board ("STB") over the years. These proceedings are listed in our attached resumes as part of our qualifications. Most notably for current purposes, Dr. Kahn recently testified for several shippers in the so-called "bottleneck" proceedings (Central Power & Light Co. v. Southern Pacific Transportation Co., et al., Docket No. 41242, et al., served December 31, 1996). Dr. Kahn also submitted a recent statement, in conjunction with a study prepared by another of his colleagues at NERA, Professor Jerome E. Hass, criticizing the STB's railroad "revenue adequacy" standards. Dr. Kahn is the author of the treatise The Economics of Regulation, which is relied on by most regulatory agencies.

2. We have been asked by several of the clients represented by Mr. Michael F. McBride to analyze whether the acquisition of Conrail assets by CSX and Norfolk Southern will leave captive shippers less protected from monopoly pricing by the railroads. Among the concerns we have is whether acquisition accounting will allow the railroads to evade rate protection afforded shippers by the Staggers Act. More generally, it is commonplace in almost every merger to question whether the acquisition premium over market price (such as the one paid for Conrail's shares by CSX and Norfolk Southern) reflect, in part, the expectation of an increased ability of the railroads to extract monopoly profits from traffic over which they have market power.

3. We have been asked specifically to consider whether the possibility that shippers may be subject to higher rates or poorer service after the merge is precluded by the "one lump" theory--and whether the theory accurately describes railroad pricing behavior. The theory applies to a situation where a shipper uses a rail route at least one link of which is a bottleneck. (Typically, the bottleneck carrier serves the receiver at the destination, but it may reside anywhere else--at an origin or a bridge link--according to the theory.) Under these circumstances, the one lump theory posits that the bottleneck carrier captures all the monopoly rents that are available, subject to regulatory restraints, if any. It follows from this theory that a railroad merger among carriers participating in a shipment where there is a bottleneck carrier will not result in increased rates, because the shippers would already be charged the maximum price that a rational, profit maximizing monopolist would charge.

4. In assisting Mr. McBride and his colleagues with the discovery request in this manner we were mindful of the following:

- a. There is considerable dispute among industry participants over the validity of this theory--with captive shippers believing it is not valid while railroads assert otherwise. Nonetheless, the ICC does not accept shipper-specific evidence

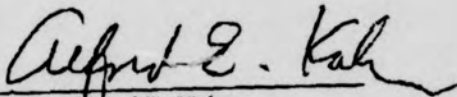


rebutting the theory in a merger proceeding as sufficient to reject it,<sup>1</sup> and the Court of Appeals has affirmed this decision.<sup>2</sup>

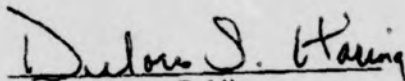
- b. At the present time there is no empirical support, of which we are aware, for the theory. Specifically, it has never been validated with railroad data in a peer-reviewed study.
- c. Nonetheless, the theory does lead to hypotheses that can be tested, but only with data now in possession of the railroads. Moreover, such an approach to testing the theory appears to be the only way which intervenors can satisfy their procedural burden in this matter.

5. To provide relevant and reliable economic evidence regarding the railroads' and STB's theory of rate setting, and to demonstrate the need (if any) for protective conditions for shippers if the theory is rejected, requires the comprehensive data requested of applicants by Mr. McBride on July 3, 1997 on behalf of Atlantic City Electric Company, et al. Anything less would not meet the requirements set by the STB and the courts.

**FURTHER AFFIANTS SAITH NOT.**

  
Alfred E. Kahn

Subscribed and sworn to before me this 14<sup>th</sup> day of July, 1997.

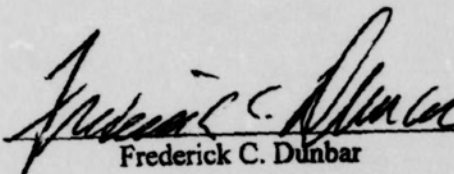
  
Notary Public

DELORES S. HARING  
Notary Public, State of New York  
No. 4786345  
Qualified in Tompkins County 98  
Commission Expires June 30, 1998

My Commission expires 6/30/98.

<sup>1</sup> *Burlington Northern Inc. and Burlington Northern Railroad Company--Control and Merger--Santa Fe Pacific Corporation and the Atchison, Topeka and Santa Fe Railway Company*, ICC Finance Docket No. 32549, August 23, 1995

<sup>2</sup> *Western Resources, Inc., Petitioner v. Surface Transportation Board and United States of America, Respondents; Santa Fe Pacific Corporation, et al., Intervenor*, U.S. Court of Appeals for the District of Columbia Circuit, 109 F.3d 782, 1997.

  
Frederick C. Dunbar

Subscribed and sworn to before me this 14th day of July, 1997.

  
Notary Public

My Commission expires October 31, 1997

DORIS L. GULOTTA  
Notary Public, State of New York  
No. 4640365 Qual. in Nassau County  
Cert. Filed in New York County  
Commission Expires 10/31/97

180616

LEBOEUF, LAMB, GREENE & MACRAE  
L.L.P.

A LIMITED LIABILITY PARTNERSHIP INCLUDING PROFESSIONAL CORPORATIONS

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BRUSSELS  
MOSCOW  
ALMATY  
LONDON  
(A LONDON-BASED  
MULTINATIONAL PARTNERSHIP)

July 14, 1997

**VIA HAND DELIVERY**

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

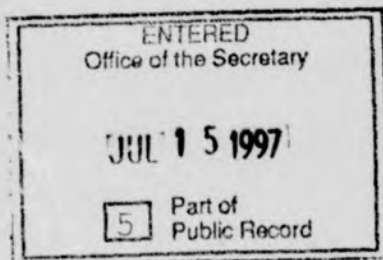


Re: CSX Corp./Norfolk Southern Corp. -- Control and Operating  
Leases/Agreements -- Conrail: Finance Docket No. 33388

Dear Secretary Williams:

Enclosed are the original and 25 copies of a "Motion to Compel" on behalf of Atlantic City Electric Company, Delmarva Power & Light Company, and The Ohio Valley Coal Company for filing in the above-referenced proceeding. Also enclosed is a 3.5" diskette containing the document in WordPerfect format.

Please date stamp and return the enclosed three additional copies via our messenger.



Enclosure

Very truly yours,  
*Michael F. McBride*  
Michael F. McBride  
Bruce W. Neely  
Linda K. Breggin  
Brenda Durham  
Joseph H. Fagan

Attorneys for Atlantic City Electric Company,  
Delmarva Power & Light Company, and  
The Ohio Valley Coal Company

cc (w/Enclosure- Motion, Affidavits): Restricted Service List

STB

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180037

LAW OFFICES

**ZUCKERT, SCOUTT & RASENBERGER, L.L.P.**

888 SEVENTEENTH STREET, N.W.  
WASHINGTON, D.C. 20006-3939  
TELEPHONE : (202) 298-8660  
FACSIMILES: (202) 342-0683  
(202) 342-1316



RICHARD A. ALLEN

June 4, 1997

Via Hand Delivery

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

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

Dear Secretary Williams:

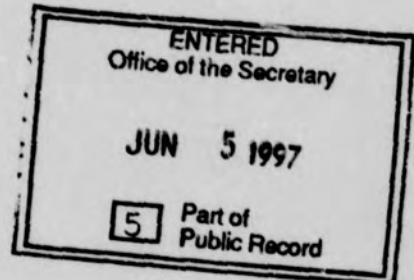
Enclosed for filing is an original and twenty five copies of  
CSX/NS-15, Applicants' Motion for Discovery Conference and  
Adoption of Discovery Guidelines. Also enclosed is a 3 1/2"  
computer disk containing the filing in Wordperfect 5.1 format,  
which is capable of being read by Wordperfect for Windows 7.0.

Should you have any questions regarding this, please call.

Sincerely,

*Richard A. Allen*  
Richard A. Allen

Enclosure







BEFORE THE  
SURFACE TRANSPORTATION BOARD

FINANCE DOCKET NO. 33388



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

APPLICANTS' MOTION FOR DISCOVERY CONFERENCE  
AND  
ADOPTION OF DISCOVERY GUIDELINES

Applicants, CSX Corporation ("CSXC"), CSX Transportation ("CSXT"),<sup>1/</sup> Norfolk Southern Corporation ("NSC"), Norfolk Southern Railway Company ("NSRC"),<sup>2/</sup> Conrail Inc. ("CRI") and Consolidated Rail Corporation ("CRC")<sup>3/</sup> hereby request that Administrative Law Judge ("ALJ") Jacob Leventhal convene a discovery conference to consider and adopt the guidelines, set forth in Appendix A hereto, to govern discovery in this matter.<sup>4/</sup> The guidelines are modeled closely upon the guidelines developed by the parties

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

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

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

<sup>4/</sup> The Board has stated that one of the tasks within the province of the ALJ in such matters is to adopt discovery guidelines. 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 ("CSX/NS"), Finance Docket 33388, Decision No. 6, served May 29, 1997 at 15.

and imposed by ALJ Leventhal in BN/SF<sup>5/</sup> and ALJ Nelson in UP/SP.<sup>6/</sup> Those guidelines, as well as their early adoption, were central to the expeditious and efficient progress of those cases.<sup>7/</sup> The guidelines provided all parties with a fair opportunity to conduct discovery and effectively curtailed abusive practices that caused delays in prior control proceedings. The establishment of discovery guidelines at the outset will provide guidance to all parties and promote an efficient and orderly proceeding.

Most of the provisions of the guidelines in BN/SF and UP/SP were essentially the same and are adopted in the proposed guidelines. On the few points of difference, the present proposed guidelines draw from both.

Paragraphs 1 through 9 set forth general guidelines for the discovery process.

Paragraph 1 addresses the issue of duplicative discovery requests.

Paragraph 2, concerning the application of the Board's discovery rules, is based on similar provisions in UP/SP and BN/SF.

Paragraph 3, based on a provision added in UP/SP, establishes a restricted service list upon whom discovery requests are to be served, thus avoiding the burden and cost of serving

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<sup>5/</sup> Burlington Northern, Inc. and Burlington Northern Railroad Company -- Control and Merger - Santa Fe Pacific Corporation and The Atchison, Topeka and Santa Fe Railway Company, Finance Docket No. 32549, order served March 27, 1995.

<sup>6/</sup> 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, order served December 7, 1995.

<sup>7/</sup> The Board's predecessor, the Interstate Commerce Commission ("ICC"), noted that the BN/SF discovery guidelines "worked exceedingly well." UP/SP, Decision No. 1, served Sept. 1, 1995.

all parties of record with all papers relating to discovery. The use of a restricted service list does not seem to have caused any objection or problem in UP/SP.

Paragraph 4, based on a provision added in UP/SP, requires that all discovery material be labeled and numbered in a manner consistent with labeling and numbering requirements for filings.

Paragraph 5 expands the document identification system used in UP/SP so that each document produced, as well as its confidentiality level, may be easily identified.

Paragraphs 6 and 7 include language similar to that added in the UP/SP discovery guidelines and provide for the placement in a document depository of materials related to evidentiary filings. Applicants propose to maintain a joint depository for their materials.

Paragraph 8 is essentially the same as in BN/SF and UP/SP.

Paragraph 9, concerning confidentiality, is based on similar provisions in UP/SP and BN/SF.

Paragraph 10, based on BN/SF, includes a limit on the number of written discovery requests that can be served without leave of the ALJ. A similar limitation was used in BN/SF and was not reported to have caused any problems in BN/SF.

Paragraphs 11 through 13 pertain to depositions. They are based on comparable provisions in UP/SP and BN/SF.

The Board recently revised its general discovery rules to provide for depositions upon notice. The proposed guidelines differ somewhat from the Board's new general discovery rules. They provide that any person submitting a verified statement will be made available for deposition. A party seeking to depose other persons, however, must demonstrate that it

requires deposition testimony on a specific subject matter relevant to the issues raised in the proceeding which has not been addressed by a witness who has submitted written testimony. Such requests will be subject to strict standards of relevance and reasonableness.

Comparable provisions concerning depositions in BN/SF had provided, in keeping with the then-current agency rules and practice, that the deposition of a person who had not submitted written testimony could not be taken without the consent of the AIJ.<sup>8/</sup>

The Board's revised deposition rule was adopted in light of the general experience that "depositions are seldom used in preparation for litigation before the Board." STB Ex Parte No. 527, Expedited Procedures for Processing Rail Rate Reasonableness, Exemption and Revocation Proceedings, 1996 STB LEXIS 238, served October 1, 1996, at \*24. That general experience does not apply to the review of major transactions such as this proceeding under Part 1180 of the Board's regulations, as evidenced by the fact that discovery guidelines differing from the discovery regulations are regularly imposed in such proceedings. The proposed guidelines are therefore reasonable and appropriate here.

Paragraphs 14 and 15, concerning service, are based on similar provisions in UP/SP and BN/SF.

Paragraphs 16 and 17 address discovery responses and objections. Based on experience in BN/SF and UP/SP, Applicants suggest elimination of the bifurcated response to discovery requests as set forth in the BN/SF and UP/SP guidelines. Under those guidelines, objections had to be noted within five days and responses were due within 15 days, including a restatement of objections. The experience in UP/SP, where more than 1200 discovery

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<sup>8/</sup>In UP/SP no specific standards were imposed.



requests were served on the applicants alone, suggests that the early service of objections imposed considerable unproductive burdens on the recipient of the discovery requests and did not significantly expedite resolution of discovery disputes. This was so in part because objections were usually not categorical refusals to produce, but qualified objections based on a combination of limited relevancy, undue burden, and confidentiality. Accordingly, the party propounding the discovery frequently could not determine whether the objection was worth taking issue with until the actual discovery responses were made. Applicants' proposed guidelines therefore eliminate the two-stage process that had been provided for in the UP/SP and BN/SF guidelines.

Paragraphs 18 through 20 modify and streamline procedures adopted in BN/SF for presenting discovery disputes to the ALJ. Paragraph 20 reflects the procedure normally followed by the presiding ALJ for handling discovery motions. See, e.g., CSX/NS, Finance Docket 33388, Decision No. 3, served April 22, 1997. Applicants' proposed guidelines will aid in the expeditious resolution of any discovery disputes that may arise during this proceeding.

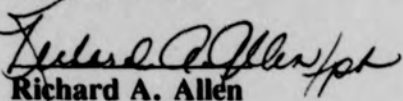
Paragraph 21, based on UP/SP, specifies a 30-day hiatus on the service of discovery requests by all parties during the last part of the period for responses to the application (from F+90 to F+120). This change from BN/SF seems to have been favored by all parties in UP/SP.

For the foregoing reasons, Applicants respectfully request that the ALJ hold a discovery conference to consider and adopt the guidelines, set forth in Appendix A hereto, to govern discovery in this matter.



Respectfully submitted,

**James C. Bishop, Jr.**  
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**J. Gary Lane**  
**James L. Howe III**  
**Robert J. Cooney**  
**George A. Aspatore**  
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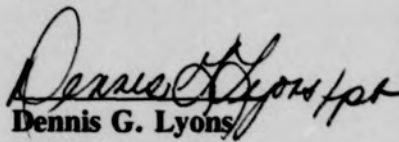
  
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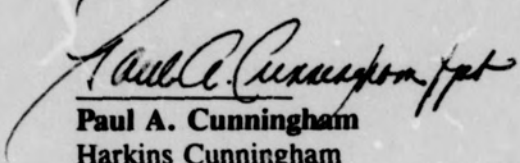
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**Harkins Cunningham**  
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**Washington, D.C. 20036**  
**(202) 973-7600**

**Counsel for Conrail Inc. and Consolidated**  
**Rail Corporation**

June 4, 1997

**APPENDIX A**  
**DISCOVERY GUIDELINES**

**A. General**

1. In consideration of the expedited procedural schedule governing this proceeding, all discovery requests must be tailored to be consistent with the procedural schedule adopted in the proceeding. The parties shall avoid any duplicative discovery requests.
2. The Board's discovery rules set forth at 49 C.F.R. pt. 1114 will apply to this proceeding except as modified by Board decision or by these discovery guidelines. Any of the discovery guidelines contained herein may be varied by agreement between any two or more parties (except if such a variance would adversely affect any third party). The Administrative Law Judge (the "ALJ") may vary any discovery guideline contained herein for good cause.
3. Persons wishing to engage in discovery in this proceeding must complete and fax to Zuckert, Scoutt & Rasenberger, L.L.P., Attention: Patricia Bruce at 202-342-1608 the attached Request to be Placed on the Restricted Service List ("Request") no later than 45 days following the date of filing of the primary application. On [date] and each Tuesday thereafter through [date F+45], Zuckert Scoutt & Rasenberger, L.L.P. shall provide the Restricted Service List to persons thereon reflecting the Requests received through the prior Friday.

4. Discovery requests, objections, motions to compel and responses shall be labeled and numbered in a manner consistent with the labeling/numbering requirement for filings (e.g., CSX/NS-1).

5. All workpapers and documents produced in response to a discovery request will be numbered such that each page can be uniquely identified and will include the acronym the producing party has chosen pursuant to 49 C.F.R. § 1180.4(a)(2) (e.g., CSX/NS or CSX or NS or CR) and alpha digits which correspond to the level of confidentiality assigned to the document ("P" meaning not confidential and public, "CO" meaning confidential, and "HC" meaning highly confidential).

6. Immediately upon each evidentiary filing, the filing party will place all documents relevant to the filing (i.e., workpapers supporting the filing and documents relied upon by the witnesses), other than documents that are privileged or otherwise protected from discovery, in a depository open to all parties. Norfolk Southern, CSX, and Conrail shall maintain a joint depository located at the offices of Arnold & Porter, 555 12th Street, N.W., Washington, D.C., with reference to all evidentiary filings.

7. Parties maintaining depositories shall provide suitable indices which identify the general classes of documents in their depositories and which identify documents relating to each witness statement contained in their evidentiary filings. Such indices shall be made available to any party utilizing the depository. When a party responds to a discovery request by referring to documents in a document depository, the responding party must provide a description of the document's location within the depository that is reasonable under the circumstances.

8. All depositories shall be maintained in the Washington, D.C. area, unless a party requests and receives written permission from the ALJ, after notice to all other parties and for good cause shown, to maintain its depository outside of the Washington, D.C. area. All depositories shall be open to any other party during normal business hours on weekdays and, on notice of a request to visit, Saturdays, and the party operating the depository shall provide staffing assistance reasonable under the circumstances. The party maintaining the depository shall establish reasonable procedures for the operation of the document depository, which may include requirements that notice be provided in advance of a planned visit and must provide that persons reviewing documents marked "CONFIDENTIAL" or "HIGHLY CONFIDENTIAL" first execute an appropriate undertaking pursuant to the protective order entered in Finance Docket No. 33388. Parties' depositories shall provide services for the making of copies of all documents contained therein, may charge a reasonable amount for reimbursement of duplication expenses, and shall use their best efforts to provide copies of depository documents within two (2) business days of receiving a request from a party for such documents.

9. Any discovery response containing confidential information or data as defined in the protective order issued in Finance Docket No. 33388 shall be designated and stamped "CONFIDENTIAL" or "HIGHLY CONFIDENTIAL" and shall be handled pursuant to the procedures contained in the applicable protective order. Discovery responses (other than with respect to documents which are placed in the document depository) which contain information designated as "CONFIDENTIAL" or "HIGHLY CONFIDENTIAL" shall be



served only in redacted form on parties who have not represented on the Request to be Placed on the Restricted Service List that they have executed the relevant protective order.

**B. Discovery Requests**

10. Parties may propound no more than two (2) rounds of discovery, each consisting of no more than fifty (50) written discovery requests (interrogatories, requests for admissions and/or document requests -- each counts as a single "discovery request"), on any particular party during the proceeding. A "round of discovery" is all written discovery requests served heretofore or hereafter by one party on any other single party in any single day. Each subpart of a discovery request is counted as a discovery request for purposes of the limitation set forth in this paragraph.

**C. Depositions**

11. A person who has submitted written testimony in this proceeding shall be made available for deposition. A person who has not submitted written testimony in this proceeding shall be deposed only if the party seeking the deposition demonstrates, in writing, that it requires such testimony on a specific subject matter relevant to the issues raised in this proceeding which has not been addressed by a witness who has submitted written testimony. Like other discovery requests, such request will be subject to strict standards of relevance and reasonableness. Any party seeking a ruling as to depositions shall follow the procedures set forth in Paragraphs 18 through 20 below.

12. Absent agreement among all parties or prior approval from the ALJ, all depositions of persons submitting verified statements shall be conducted in the Washington, D.C. area. Absent agreement among all parties or prior approval from the ALJ for good

cause shown, (1) no witness shall be deposed more than one time as to any written initial statements or more than one time as to any written rebuttal statements submitted by that witness in this proceeding, and (2) no other person shall be deposed more than one time. Parties shall use their best efforts to complete depositions as promptly as practicable, and if possible within two days.

13. Any party wishing to depose a witness sponsored by the Applicants shall, at least three weeks prior to the scheduled deposition, advise the counsel to the party on behalf of whom that witness appears that the party will participate in the deposition. To the extent reasonably practicable at least twenty-four hours or one business day, whichever is greater, prior to the scheduled deposition, the party deposing a witness sponsored by the Applicants shall advise the counsel to the party on behalf of whom the witness appears as to the documents to which the questioning will concern.

**D. Service**

14. All discovery requests, objections and motions to compel shall be served only on the Restricted Service List in the most expeditious manner possible, by hand delivery in the Washington, D.C. area and by overnight mail outside the Washington, D.C. area, or by facsimile.

15. Discovery responses shall be served only on the party that propounded the discovery and any party requesting copies of such responses in writing, except that the documents produced by a party in response to a discovery request shall be placed in the depository in lieu of being served. All discovery responses shall be immediately placed in the depository of the responding party (and in the case of any of the Applicants, in the joint

depository), and that party shall simultaneously provide written notice to all parties on the Restricted Service List that it has responded to a particular discovery request of another party (which shall be identified in the notice) and that it has placed its responses in its depository. The party propounding the discovery or any other party may request copies, which shall be supplied at a reasonable cost.

**E. Responses**

16. Responding parties shall answer or object to all discovery requests within fifteen days after receipt of service of the requests.

17. The responding party shall endeavor, to the greatest extent possible, to produce documents by placing those documents in its document depository within the fifteen-day response period. If the responding party is not able to produce such documents within the fifteen-day period, it shall contact the propounding party at the earliest possible time within the fifteen-day period and indicate its best judgement as to the date the documents will be provided. Upon request by the propounding party, the responding party shall produce, whenever reasonable, documents on an "as-available" basis rather than in a lump-sum production.

**F. Objections**

18. All objections to discovery requests shall be made promptly, but no later than fifteen business days from the date of receipt of service of the discovery request, by means of a written objection containing a general statement of the basis for the objection. If there is an objection to a discovery request, the parties involved shall promptly attempt to resolve it voluntarily.

19. The propounding party may present to the ALJ any discovery dispute not resolved informally between the parties by a motion to compel specifically identifying the discovery request in dispute, a statement of why the discovery is sought, and summarizing the objection thereto.

20. If a motion to compel is filed, the party filing such motion may seek to schedule a hearing before the ALJ which shall not be scheduled on less than seven business days notice, unless good cause is shown. The propounding party may state in its motion to compel that it does not request a hearing on the motion, but a hearing nevertheless will be held unless the party against whom discovery is sought states in its response that it also does not request a hearing on the motion, in which case the ALJ shall make a determination on the motion to compel upon the motion and response. The objecting party may file a written response one business day before the hearing or may respond orally at the hearing. If the objecting party or any other party submits a written response to the motion to compel, that written response must be served by facsimile or hand delivery on the ALJ, the Applicants and the movant no later than 5 p.m. on the business day immediately preceding the hearing on the motion to compel. Service of the written response on other parties on the Restricted Service List may be made by delivery to an overnight mail service for next business day delivery or by facsimile, and if by facsimile service may be made later than 5 p.m. on the same day the written response is served on the ALJ, the Applicants and the movant. If a discovery response is ordered, the response shall be made as soon as practicable.

#### **G. DISCOVERY MORATORIUM**

21. No discovery may be served on any party between F+90 and F+120.



**REQUEST TO BE PLACED ON  
THE RESTRICTED SERVICE LIST**

**NOTE: ALL INFORMATION MUST BE PROVIDED -- Please print**

The following persons should be placed on the Restricted Service List in Finance  
Docket No. 33388:

Name/Address:	Affiliation:	Protective Order Signed?
_____	_____	_____
_____	_____	Confidential
_____	Telephone Number:	_____
_____	_____	Highly
_____	Facsimile Number:	Confidential
	_____	_____

Name/Address:	Affiliation:	Protective Order Signed?
_____	_____	_____
_____	_____	Confidential
_____	Telephone Number:	_____
_____	_____	Highly
_____	Facsimile Number:	Confidential
	_____	_____

Name/Address:	Affiliation:	Protective Order Signed?
_____	_____	_____
_____	_____	Confidential
_____	Telephone Number:	_____
_____	_____	Highly
_____	Facsimile Number:	Confidential
	_____	_____

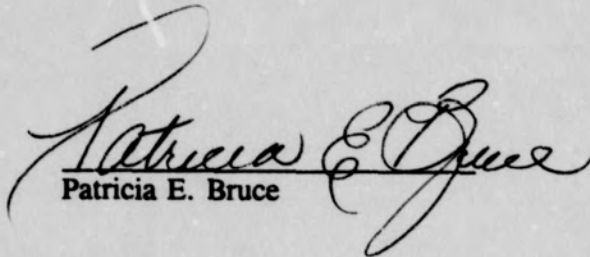
Date: \_\_\_\_\_



CERTIFICATE OF SERVICE

I, Patricia E. Bruce, certify that on June 4, 1997 I have caused to be served by first class mail, postage prepaid, or by more expeditious means a true and correct copy of the foregoing CSX/NS-15, Applicants' Motion for Discovery Conference and Adoption of Discovery Guidelines, on all parties that have appeared in STB Finance Docket No. 33388 and by hand delivery on the following:

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

  
Patricia E. Bruce

Dated: June 4, 1997

STB

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6-1-99

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194662

**HARKINS CUNNINGHAM**

ATTORNEYS AT LAW

SUITE 600

501 PENNSYLVANIA AVENUE, N.W.

WASHINGTON, D.C. 20004-2615

202 973-7600

FACSIMILE 202 973-7610

WRITER'S DIRECT DIAL

(202) 973-7601



2800 ONE COMMERCE SQUARE

2005 MARKET STREET

PHILADELPHIA, PA 19103-7042

215 551-6700

FACSIMILE 215 551-6710

June 1, 1999

ENTERED  
Office of the Secretary

JUN - 2 1999

Part of  
Public Record

**BY HAND**

Mr. Vernon A. Williams, Secretary  
Surface Transportation Board  
Case Control Branch  
ATTN: Finance Docket No. 33388  
1925 K Street, N.W.  
Washington, D.C. 20423

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

Dear Secretary Williams:

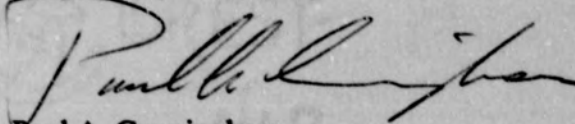
This is to notify you and all parties to this proceeding of the withdrawal of the undersigned as counsel for Conrail Inc. and Consolidated Rail Corporation (together, "Conrail"). Conrail will henceforth be represented in these proceedings by the following in-house counsel, who should be substituted for the undersigned on the service list in this proceeding:

**HARKINS CUNNINGHAM**

Mr. Vernon A. Williams, Secretary  
June 1, 1999  
Page 2

Cheryl A. Cook  
Jonathan M. Broder  
Consolidated Rail Corporation  
Two Commerce Square  
2001 Market Street  
Philadelphia, PA 19103  
(215) 209-5020

Respectfully submitted,

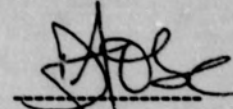
A handwritten signature in dark ink, appearing to read "Paul A. Cunningham", written over a faint rectangular box.

Paul A. Cunningham

cc: All Counsel of Record  
The Honorable Jacob Leventhal

CERTIFICATE OF SERVICE

I certify that I have on this 1<sup>st</sup> day of June, 1999, served copies of the foregoing Stipulation upon all known parties on record in this proceeding by first class mail.

  
D.S. Jobe