

STB

FD

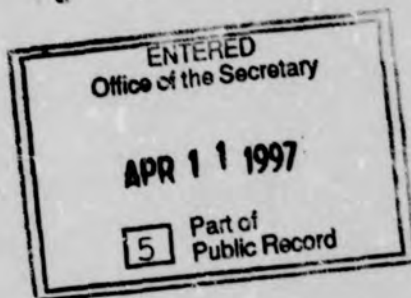
33388

4-10-97

1

179262

179262



BEFORE THE  
SURFACE TRANSPORTATION BOARD

FINANCE DOCKET NO. 33388

CSX/NS-4

OFFICE OF SECRETARY

APR 10 4 59 PM '97

RECEIVED  
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--  
TRANSFER OF RAILROAD LINE BY NORFOLK SOUTHERN  
RAILWAY COMPANY TO CSX TRANSPORTATION, INC.

**PETITION TO ESTABLISH PROCEDURAL SCHEDULE**

CSX Corporation ("CSXC"), CSX Transportation, Inc. ("CSXT"),<sup>1</sup>  
Norfolk Southern Corporation ("NSC"), Norfolk Southern Railway Company  
("NSRC")<sup>2</sup> and Conrail, Inc. ("CRI") and Consolidated Rail Corporation  
("CRC")<sup>3</sup> are today notifying the Board of their intention to file a joint  
application seeking Surface Transportation Board ("Board") authorization under  
49 U.S.C. §§ 11323-25 for the acquisition of control of Conrail by CSX and NS,  
and for the long-term operating agreements, operating leases, or other operating  
arrangements, and other matters, contemplated by the application. See Notice of  
Intent to File Railroad Control Application (CSX/NS-1), filed this date.  
Applicants hereby request that the Board establish the following schedule to  
govern the proceeding on their application. The term "F" designates the date of  
filing of the application and "F + n" means "n" days following that date:

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

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

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



### **PROPOSED PROCEDURAL SCHEDULE**

- F - 30 Preliminary Environmental Report provided to Section of Environmental Analysis.
- F Primary application (including the Environmental Report) and related applications filed.
- F + 30 Board notice of acceptance of primary application and related applications published in the Federal Register, including notice of any transaction-related abandonment proposals.
- F + 45 Notification of intent to participate in proceeding due, including notice of intent to participate in abandonment proceedings.
- F + 60 Description of anticipated inconsistent and responsive applications due; petitions for waiver or clarification due with respect to such applications.
- F + 120 Inconsistent and responsive applications due. All comments, protests, requests for conditions, and any other opposition evidence and arguments due. Comments by U.S. Department of Justice ("DOJ") and U.S. Department of Transportation ("DOT") due. Opposition submissions, requests for public use conditions, and Trails Act requests due for all transaction-related abandonment proposals.
- F + 135 Notice of acceptance (if required) of inconsistent and responsive applications published in the Federal Register.
- F + 150 Response to inconsistent and responsive applications due. Response to comments, protests, requested conditions, and other opposition due. Rebuttal in support of primary application and related applications due. Rebuttal, responses to requests for public use and Trails Act conditions for transaction-related abandonments due.
- F + 165 Rebuttal in support of inconsistent and responsive applications due.
- F + 185 Briefs due, all parties (not to exceed 50 pages), except that CSX and NS may file separate briefs, each not to exceed 50 pages.
- F + 200 Oral argument (at Board's discretion).
- F + 205 Voting conference.
- F + 255 Date of service of final decision.

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

### **OVERVIEW OF PROPOSED SCHEDULE**

The establishment of a schedule at the outset of a proceeding provides guidance to all parties and promotes efficient and orderly consideration of the issues presented. Applicants' proposed schedule is similar to the schedules originally proposed by CSX and NS (which were identical to each other) in the earlier-filed CSX/Conrail and NS/Conrail control dockets,<sup>4</sup> but adopts certain modifications that reflect the Board's own proposed and final schedules in the prior dockets.

Applicants' proposed schedule, like the schedules previously proposed in the NS/Conrail and CSX/Conrail dockets, was modelled closely upon that followed by the Board in its recent expeditious handling of the control application in Finance Docket No. 32760, *Union Pac. Corp. -- Control and Merger -- Southern Pac. Rail Corp. ("UP/SP")*. See *id.*; *UP/SP*, Decision No. 9, served Dec. 27, 1995, at 15; see also *UP/SP*, Decision No. 10, served Jan. 10, 1996, at 4 (denying request to enlarge *UP/SP* schedule); *UP/SP*, Decision No. 11,

---

<sup>4</sup> See *CSX Corporation and CSX Transp. Inc. -- Control and Merger-- Conrail Inc. and Consolidated Rail Corporation*, F.D. 33220, CSX/R-4 (Petition to Establish Procedural Schedule) (filed Oct. 18, 1996); *Norfolk Southern Corporation and Norfolk Southern Railway Co. --Control-- Conrail Inc. and Consolidated Rail Corp.*, F.D. 33286, NSC-2 (Petition to Establish Procedural Schedule) (filed Nov. 8, 1996).

served Feb. 2, 1996, at 3 (same); Finance Docket No. 32549, Burlington N. Inc. -- Control & Merger -- Santa Fe Pac. Corp., Decision served March 7, 1995.<sup>5</sup> Applicants believe that the schedule in the UP/SP case would provide more than enough time to address such competitive and other issues as may be anticipated in this case. In that case, the schedule permitted the Board to deal thoroughly with the serious competitive issues presented by the Department of Justice and other parties. The transaction contemplated here will not present such issues. On the contrary, it is clear that this transaction will significantly enhance rail competition in the Eastern United States.

The presence of major inconsistent applications initially threatened in the Conrail restructuring are no longer anticipated, so Applicants have reorganized their previously proposed 255-day schedules to account for other concerns the Board expressed as to the procedural schedules in those prior dockets. Following CSX's and NS's initial proposals of 255-day schedules in the prior dockets, the Board responded with its own proposal for a 300-day procedural schedule that anticipated competing applications from CSX and NS. See F.D. 33220, Decision No. 3 (served Nov. 15, 1996); F.D. 33286, Decision No. 1 (served Nov. 27, 1996). The Board extended its proposed 300-day schedule to 365 days only after receiving comments from parties who urged the addition of time in light of a circumstance with few if any precedents -- substantial and complicated inconsistent applications in two overlapping

---

<sup>5</sup> Applicants' proposal is also consistent with the procedure to govern major and significant rail combinations previously proposed by the Interstate Commerce Commission for public comment in Ex Parte No. 282 (Sub-No. 19), New Procedures in Rail Acquisitions, Mergers & Consolidations, Decision served Jan. 26, 1995. The proposed schedule cuts the time for oral argument preparation while expanding the time for the Board's decision following any oral argument.

proceedings involving two Class I railroads.<sup>6</sup> The proposed schedule provides for 120 days to submit responsive and inconsistent applications and makes adequate provision for parties to address them, but the situation of the two other major rail carriers in the Eastern United States filing inconsistent and hostile application to acquire all or substantially all of Conrail in the same docket is no longer presented, and adjustments tailored to that situation are not required.

Petitioners urge the Board to adopt the expedited schedule proposed herein. In order to remove the potentially debilitating effects of a long-drawn battle to acquire the stock ownership in, and potential control over, Conrail -- and, incident to that, to afford the Conrail stockholders their consideration promptly -- NS and CSX have agreed on an acquisition structure which calls for the two of them to pay the stockholder consideration "up front" while holding the acquired Conrail stock in a voting trust or voting trusts under the Board's regulations. This procedure will result in a total cash outlay of over \$10 billion on the part of NS and CSX in early June, 1997. Thereafter, Conrail will be held in a voting trust pending the Board's final decision on the proposed transactions. The substantial benefits that will certainly result from the acquisition and division of Conrail, including the very significant increase in rail competition in the Northeast, will not be realized until after Board approval and until NS and CSX are in a position to implement the division and the separate operations which NS and CSX contemplate. In addition, expedition would assure that Conrail's operations would not deteriorate over time pending Board approval as a result of employment uncertainty among Conrail management due to the intended division between NS and CSX of most of Conrail routes under long-term operating

---

<sup>6</sup> See F.D. 33220, Decision No. 8 at 7, F.D. 33286, Decision No. 4 at 7 (adding time in response to the urging of numerous commentators who requested additional time to digest and respond to the anticipated inconsistent applications).

agreements, operating leases with Conrail or other operating arrangements. Such uncertainty could cause attrition of Conrail's management in the pre-control phase while the Board's processes are going forward and certainly will result in some diversion of the attention of certain officers and employees from management of Conrail's affairs. In the light of the substantial investments made by NS and CSX, the delay in the realization of the benefits of increased competition and the need to avert any deterioration of Conrail service pending STB approval and the subsequent implementation of the division of Conrail and their separate operations, the Petitioners respectfully urge that the Board's decisional process be as expedited as possible consistent with the requirements of fair hearing and due process. Petitioners therefore propose a schedule which addresses these concerns. Additional modifications in the schedule may be warranted by circumstances as they develop.

#### **PROPOSED DEADLINES**

Applicants' proposed deadlines at F + 30, F + 45, and F + 120<sup>7</sup> are consistent with the final schedule adopted by the Board in the prior CSX/Conrail and NS/Conrail dockets. See F.D. 33220, Decision No. 8 (served Jan. 30, 1997) at 10-11; F.D. 33286, Decision No. 4 (served Jan. 30, 1997) at 10. These deadlines reflect the well-considered, unanimous preferences of Applicants, the Board, and interested parties who commented in the prior proceedings; these

---

<sup>7</sup> Although the Board originally had proposed trifurcated deadlines for various parties' submissions of comments, protests, and requests for conditions, see F.D. 33220, Decision No. 3 at 6-7; F.D. 33286, Decision No. 1 at 4-5, the Board's decision establishing a final procedural schedule recognized that a single deadline at F + 120 would best meet the needs of all interested parties. See F.D. 33220, Decision No. 8 at 6-7; F.D. 33286, Decision No. 4 at 7-6.

deadlines remain relevant and appropriate for the context of the current CSX/NS/Conrail docket.

Applicants' proposed deadlines at F + 135, F + 150, and F + 165 are consistent with the Board's own proposed procedural schedules for the CSX/Conrail and NS/Conrail dockets,<sup>8</sup> but are somewhat shorter than the final schedule the Board adopted in those dockets.<sup>9</sup> Although the final schedule in the prior dockets included some additional time for these deadlines, the Board explained that it was adding time due to "the complexity and magnitude of issues that potentially may arise in an inconsistent or responsive application in this proceeding," as well as to "allow adequate time for the processing of inconsistent and responsive applications."<sup>10</sup> Because an inconsistent or responsive application for all or substantially all of Conrail is no longer anticipated, additional time to account for that circumstance is unnecessary. Applicants' proposed deadlines at F + 135, F + 150, and F + 165,<sup>11</sup> are appropriate for the less complicated proceeding associated with the currently proposed acquisition of Conrail, and will allow sufficient time for meaningful participation by all interested parties.

---

<sup>8</sup> See F.D. 33220, Decision No. 3; F.D. 33286, Decision No. 1.

<sup>9</sup> See F.D. 33220, Decision No. 8; F.D. 33286, Decision No. 4.

<sup>10</sup> F.D. 33220, Decision No. 8 at 7; F.D. 33286 Decision No. 4 at 7.

<sup>11</sup> In the prior proceedings, the Board originally had proposed separate deadlines for responses to comments, protests and conditions, rebuttal in support of the primary application, and responses to inconsistent and responsive applications. F.D. 33220, Decision No. 3 at 8-9; F.D. 33286, Decision No. 1 at 5-6. The Board ultimately granted Applicants' request for a Consolidated Filing of these responses and rebuttals at F + 150, however, because it recognized that "a Consolidated Filing by applicants would result in a more orderly record and would allow them to address the issues coherently in one submission, without needless fragmentation or repetition." F.D. 33220, Decision No. 8 at 7; F.D. 33286, Decision No. 4 at 7.

Applicants' proposed F + 185 deadline for the filing of briefs is five days shorter than the F + 190 deadline originally proposed by the Board in the prior dockets, allowing a 20-day window between the filing of rebuttal in support of inconsistent or responsive applications and the filing of briefs instead of the Board's originally proposed 25-day window. The Board's final schedule extended this time period by an additional 15 days, creating a 40-day window. Again, the Board's extension of this time period in the final schedule was related to the unique situation of substantial inconsistent applications and parallel proceedings, which no longer is at issue. This case, while involving a single, overall primary application and an agreed upon division of Conrail, involves the extension of two separate and competing railroads into the territory now served by Conrail. It also involves separate, competing operating and marketing plans for those two railroads. The process thus has many of the aspects of separate applications by the two carriers. It accordingly would be more orderly to permit each of them to file a separate, 50-page brief, since there may well be a considerable number of arguments made individually by the two of CSX and NS and many points of opposition to be responded to that are peculiar to one or the other of CSX or NS. Our proposed schedule so provides.

In comparison to the schedules that the applicants in those matters proposed in the prior CSX/Conrail and NS/Conrail dockets, the proposed schedule extends the time allowed for the Board's deliberation from oral argument to the final decision. Applicants propose these changes to accommodate the Board's desire for additional time for deliberation, as was indicated by the Board's proposed and final schedules in the prior dockets.

## **ENVIRONMENTAL REPORTING**

In accordance with the Board's environmental regulations, NS and CSX have already commenced to consult with the Section of Environmental Analysis ("SEA") about the environmental review process. NS and CSX have entered into Memoranda of Understanding ("MOU") with SEA and the independent third-party consultants selected by SEA regarding their respective roles and responsibilities in the environmental review process. As part of the ongoing consultation process, NS and CSX will continue to provide to SEA and the independent third-party consultants, at the earliest practicable time, relevant information about the proposed activities, operations and methodologies for environmental analysis.

In addition, the Applicants will provide a Preliminary Environmental Report ("PER") to SEA by F - 30 to further assist SEA's environmental review process during the pre-filing period. The PER will summarize for SEA both (1) descriptions of those aspects of the transaction which will be analyzed in the Environmental Report, and (2) the methodologies for the analysis of both localized and system-wide environmental effects to be presented in the Environmental Report. Through this ongoing consultation process, SEA may profitably proceed with its environmental analysis throughout the pre-filing period.

Applicants will then file their complete Environmental Report with their Application.

## **TRANSACTION-RELATED ABANDONMENTS**

Applicants are proposing that any applications for authority for, or for exemption of, transaction-related abandonments, including supporting verified

statements, be filed with the primary application<sup>12</sup> and be treated as related applications, with any opposition evidence, comments, rebuttal and briefing on those applications to be submitted in accordance with the same schedule as the primary application. This would involve modest departures from the procedures and timetables prescribed in 49 C.F.R. § 1152.25(d)(6) and (7), and Applicants request that the Board grant a waiver under 49 C.F.R. § 1152.24(e)(5) to permit these modifications.<sup>13</sup>

### **DISCOVERY**

Applicants request that, in keeping with recent merger and control proceedings, the Board initially turn all discovery matters (excluding the procedural schedule) over to an Administrative Law Judge ("ALJ") to be designated, and direct that parties wishing to engage in discovery consult with the ALJ. *E.g.*, UP/SP, Decision No. 1, served Sept. 1, 1995, at 5 & n.6; UP/SP, Decision No. 6, at 13; UP/SP, Decision No. 9, at 12.<sup>14</sup>

---

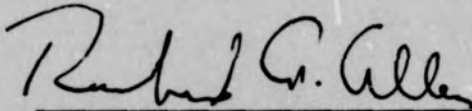
<sup>12</sup> In their Petition for Waiver or Clarification of Railroad Consolidation Procedures, and Related Relief, to be filed shortly, Applicants will request certain relief that will ensure that this is possible.

<sup>13</sup> The Commission approved such departures, in a merger-related context, from the usual timetable for processing abandonment applications in UP/SP, Decision No. 6, served Sept. 5, 1995, at 7-10; *see also* Finance Docket No. 30800, Union Pac. Corp. -- Control -- Missouri-K.-T. R.R., Decision served March 19, 1987.

<sup>14</sup> We request that, as in recent merger and control cases, the Board require appeals of ALJ decisions to be filed within three working days, with responses to appeals or to any procedural motion filed with the Board to be filed within three working days. *E.g.*, UP/SP, Decision No. 6, at 14 & n.3; UP/SP Decision No. 9, at 14; Finance Docket No. 33220, Decision No. 8 at 8; Finance Docket No. 33286, Decision No. 4 at 8.

Accordingly, Applicants request that the Board adopt their proposed schedule.

**JAMES C. BISHOP, JR.**  
**WILLIAM C. WOOLDRIDGE**  
**JAMES L. HOWE, III**  
**ROBERT J. COONEY**  
**GEORGE A. ASPATORE**  
Norfolk Southern Corporation  
Three Commercial Place  
Norfolk, VA 23510-9241  
(757) 629-2838



**RICHARD A. ALLEN**  
**JAMES A. CALDERWOOD**  
**ANDREW R. PLUMP**  
**JOHN V. EDWARDS**  
Zuckert, Scoutt & Rasenberger, L.L.P.  
888 Seventeenth Street, N.W.  
Suite 600  
Washington, DC 20006-3939  
(202) 298-8660

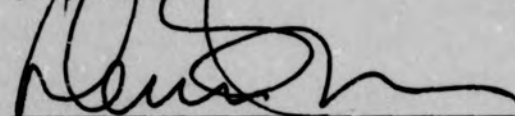
**JOHN M. NANNES**  
**SCOT B. HUTCHINS**  
Skadden, Arps, Slate,  
Meagher & Flom LLP  
1440 New York Avenue, N.W.  
Washington, DC 20005-2111  
(202) 371-7400

Counsel for Norfolk Southern  
Corporation and Norfolk Southern  
Railway Company

Respectfully submitted,

**MARK G. ARON**  
**PETER J. SHUDTZ**  
CSX Corporation  
One James Center  
902 East Cary Street  
Richmond, VA 23129  
(804) 782-1400

**P. MICHAEL GIFTOS**  
**PAUL R. HITCHCOCK**  
CSX Transportation, Inc.  
500 Water Street  
Speed Code J-120  
Jacksonville, FL 32202  
(904) 359-3100



**DENNIS G. LYONS**  
**RICHARD L. ROSEN**  
**PAUL T. DENIS**  
Arnold & Porter  
555 12th Street, N.W.  
Washington, DC. 20004-1202  
(202) 942-5000

**SAMUEL M. SIPE, JR.**  
**TIMOTHY M. WALSH**  
Steptoe & Johnson LLP  
1330 Connecticut Avenue  
Washington, DC 20036-1795  
(202) 429-3000

Counsel for CSX Corporation and CSX  
Transportation, Inc.

*Paul A. Cunningham*  
*per def*

---

**TIMOTHY T. O'TOOLE**  
**CONSTANCE L. ABRAMS**  
Consolidated Rail Corporation  
Two Commerce Square  
2001 Market Street  
Philadelphia, PA 19103  
(215) 209-4000

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

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

April 10, 1997

STB

FD

33388

4-10-97

I

179261



**EXPEDITED CONSIDERATION REQUESTED**

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.

**PETITION FOR PROTECTIVE ORDER**

**JAMES C. BISHOP, JR.**  
**WILLIAM C. WOOLDRIDGE**  
**JAMES L. HOWE, III**  
**ROBERT J. COONEY**  
**GEORGE A. ASPATORE**  
Norfolk Southern Corporation  
Three Commercial Place  
Norfolk, VA 23510-9241  
(757) 629-2838

**RICHARD A. ALLEN**  
**JAMES A. CALDERWOOD**  
**ANDREW R. PLUMP**  
**JOHN V. EDWARDS**  
Zuckert, Scoutt & Rasenberger, L.L.P.  
888 Seventeenth Street, N.W.  
Suite 600  
Washington, DC 20006-3939  
(202) 298-8660

**JOHN M. NANNES**  
**SCOT B. HUTCHINS**  
Skadden, Arps, Slate,  
Meagher & Flom LLP  
1440 New York Avenue, N.W.  
Washington, DC 20005-2111  
(202) 371-7400

Counsel for Norfolk Southern  
Corporation and Norfolk Southern  
Railway Company

**MARK G. ARON**  
**PETER J. SHUDTZ**  
CSX Corporation  
One James Center  
902 East Cary Street  
Richmond, VA 23129  
(804) 782-1400

**P. MICHAEL GIFTOS**  
**PAUL R. HITCHCOCK**  
CSX Transportation, Inc.  
500 Water Street  
Speed Code J-120  
Jacksonville, FL 32202  
(904) 359-3100

**DENNIS G. LYONS**  
**RICHARD L. ROSEN**  
**PAUL T. DENIS**  
Arnold & Porter  
555 12th Street, N.W.  
Washington, DC 20004-1202  
(202) 942-5000

**SAMUEL M. SIPE, JR.**  
**TIMOTHY M. WALSH**  
Steptoe & Johnson LLP  
1330 Connecticut Avenue  
Washington, DC 20036-1795  
(202) 429-3000

Counsel for CSX Corporation and CSX  
Transportation, Inc.

CSX/NS-3

OFFICE OF THE SECRETARY

APR 10 4 49 PM '97

RECEIVED  
SURFACE TRANSPORTATION  
BOARD

ENTERED Office of the Secretary	APR 11 1997	Part of Public Record 5
------------------------------------	-------------	-------------------------------

**TIMOTHY T. O'TOOLE**  
**CONSTANCE L. ABRAMS**  
Consolidated Rail Corporation  
Two Commerce Square  
2001 Market Street  
Philadelphia, PA 19103  
(215) 209-4000

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

April 10, 1997

Counsel for Conrail Inc. and  
Consolidated Rail Corporation

**EXPEDITED CONSIDERATION REQUESTED**

**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.**

**PETITION FOR PROTECTIVE ORDER**

CSX Corporation ("CSXC"), CSX Transportation, Inc. ("CSXT"),<sup>1</sup>  
Norfolk Southern Corporation ("NSC"), Norfolk Southern Railway Company  
("NSRC")<sup>2</sup> and Conrail, Inc. ("CRI") and Consolidated Rail Corporation  
("CRC")<sup>3</sup> are today notifying the Board of their intention to file a joint  
application seeking Board authorization under 49 U.S.C. §§ 11323-25 for the  
acquisition of control of Conrail by CSX and NS, and for the long-term operating  
agreements, operating leases or other operating arrangements, and other matters,  
contemplated by the application. *See* Notice of Intent to File Railroad Control  
Application (CSX/NS-1), filed this date. Petitioners hereby request that the  
Board enter a protective order for this matter, in the form provided in  
Appendix A to this petition. The proposed order is necessary for two reasons.

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

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

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

First, to prepare the Application, personnel of the Petitioners, Conrail, and their affiliates must exchange information, including shipper-specific material such as traffic data and tapes. The proposed protective order is necessary to protect confidential information and to facilitate compliance with 49 U.S.C. §§ 11323 and 11904 and other relevant provisions of the ICC Termination Act of 1995. The proposed order will allow Petitioners, Conrail and their affiliates to prepare and present all relevant materials that may be required for the Board's analysis of the Application.

Second, the proposed order will facilitate any necessary discovery at subsequent stages in this docket by protecting the confidentiality of materials reflecting the terms of contracts, shipper-specific traffic data, and other confidential and/or proprietary information in the event that such materials are sought or produced.

The proposed protective order is modelled substantially on those entered by the Board or its predecessor, the Interstate Commerce Commission ("Commission"), in recent control proceedings.<sup>4</sup>

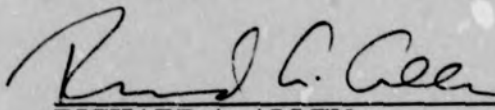
---

<sup>4</sup> See, e.g., Finance Docket No. 32760, Union Pac. Corp. -- Control & Merger -- Southern Pac. Rail Corp. ("UP/SP"), Decision No. 2, served Sept. 1, 1995; Finance Docket No. 32549, Burlington N. Inc. -- Control & Merger -- Santa Fe Pac. Corp. ("BN/Santa Fe"), Decision served July 15, 1994; Finance Docket No. 32167, Kansas City S. Indus., Inc. -- Control -- MidSouth Corp., Decision served Nov. 3, 1992; Finance Docket No. 32133, Union Pac. Corp. -- Control -- Chicago & N.W. Holdings Corp., Decision served Aug. 24, 1992.

The proposed order contains a provision (see App. A hereto, para. 6), similar to provisions in orders entered by the Commission in UP/SP and BN/Santa Fe, allowing the parties to restrict the disclosure of certain highly confidential competitive or proprietary information to outside counsel and outside consultants for other parties. See UP/SP, at 5; BN/Santa Fe, App. at 4-5. In UP/SP, the Commission heard and rejected objections by several parties to the corresponding provision in the protective order adopted in that case. Finance Docket No. 32760, Union Pac. Corp. -- Control and Merger -- Southern Pac. Rail Corp., decision served Oct. 25, 1995, at 1-6. (The Commission also rejected objections to the provisions in the UP/SP protective order corresponding to paragraph 2 in the order proposed by Petitioners here. *Id.* at 6-8.)

Accordingly, Petitioners request that a protective order be entered in the form provided in Appendix A hereto, including the forms of confidentiality undertakings that accompany it.

**JAMES C. BISHOP, JR.**  
**WILLIAM C. WOOLDRIDGE**  
**JAMES L. HOWE, III**  
**ROBERT J. COONEY**  
**GEORGE A. ASPATORE**  
Norfolk Southern Corporation  
Three Commercial Place  
Norfolk, VA 23510-9241  
(757) 629-2838

  
**RICHARD A. ALLEN**  
**JAMES A. CALDERWOOD**  
**ANDREW R. PLUMP**  
**JOHN V. EDWARDS**  
Zuckert, Scoutt & Rasenberger, L.L.P.  
888 Seventeenth Street, N.W.  
Suite 600  
Washington, DC 20006-3939  
(202) 298-8660

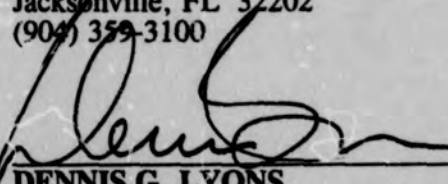
**JOHN M. NANNES**  
**SCOT B. HUTCHINS**  
Skadden, Arps, Slate,  
Meagher & Flom LLP  
1440 New York Avenue, N.W.  
Washington, DC 20005-2111  
(202) 371-7400

Counsel for Norfolk Southern  
Corporation and Norfolk Southern  
Railway Company

Respectfully submitted,

**MARK G. ARON**  
**PETER J. SHUDTZ**  
CSX Corporation  
One James Center  
902 East Cary Street  
Richmond, VA 23129  
(804) 782-1400

**P. MICHAEL GIFTOS**  
**PAUL R. HITCHCOCK**  
CSX Transportation, Inc.  
500 Water Street  
Speed Code J-120  
Jacksonville, FL 32202  
(904) 359-3100

  
**DENNIS G. LYONS**  
**RICHARD L. ROSEN**  
**PAUL T. DENIS**  
Arnold & Porter  
555 12th Street, N.W.  
Washington, DC 20004-1202  
(202) 942-5000

**SAMUEL M. SIPE, JR.**  
**TIMOTHY M. WALSH**  
Steptoe & Johnson LLP  
1330 Connecticut Avenue  
Washington, DC 20036-1795  
(202) 429-3000

Counsel for CSX Corporation and CSX  
Transportation, Inc.

*Paul A. Cunningham*

**TIMOTHY T. O'TOOLE**  
**CONSTANCE L. ABRAMS**  
Consolidated Rail Corporation  
Two Commerce Square  
2001 Market Street  
Philadelphia, PA 19103  
(215) 209-4000

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

April 10, 1997

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

## **APPENDIX A**

### **PROTECTIVE ORDER**

1. For purposes of this Protective Order:

(a) "Application" means the primary Application (and all related applications of CSX and/or NS and Conrail) to be filed in the Proceedings.

(b) "Confidential Documents" means documents and other tangible materials containing or reflecting Confidential Information.

(c) "Confidential Information" means traffic data (including but not limited to waybills, abstracts, study movement sheets, and any documents or computer tapes containing data derived from waybills, abstracts, study movement sheets, or other data bases, and cost workpapers), the identification of shippers and receivers in conjunction with shipper-specific or other traffic data, the confidential terms of contracts with shippers, confidential financial and cost data, and other confidential or proprietary business information.

(d) "Designated Material" means any documents designated or stamped as "CONFIDENTIAL" or "HIGHLY CONFIDENTIAL" in accordance with paragraph 5 or 6 of this Protective Order, and any Confidential Information contained in such materials.

(e) These "Proceedings" consist of Finance Docket No. 33383, any related proceedings before the Surface Transportation Board, and any judicial review proceedings arising from Finance Docket No. 33388 or from any related proceedings before the Board.

2. Personnel of CSX Corporation ("CSXC"), CSX Transportation, Inc. ("CSXT"), and their affiliates (collectively, "CSX"), and of Norfolk Southern Corporation ("NSC"), Norfolk Southern Railway Company ("NSRC")

and their affiliates (collectively, "NS"), including outside consultants and attorneys for CSX and NS ("representatives"), may exchange Confidential Information obtained from CSX, NS or Conrail, Inc. ("CRI"), Consolidated Rail Corporation ("CRC") and their affiliates (collectively, "Conrail") (and, in the case of Conrail information, whether received directly by CSX or NS or by one of them from the other) with any other personnel or representatives of CSX or NS, and personnel of Conrail may furnish information to personnel or representatives of CSX or NS, in each case for the purpose of preparing for or participating in the Proceedings, but not for any other business, commercial, or other competitive purpose, provided that, if the Application in these Proceedings is approved, and control of Conrail by CSX and NS is authorized and effected, then CSX and NS may respectively use Confidential Information obtained from Conrail pertinent to their respective operations under operating agreements with Conrail or operating agreements with Conrail in connection with such operations. Information previously exchanged or furnished under the protective orders entered in either of Docket Nos. 33220 and 33286 shall be deemed to have been exchanged or furnished under this order.

3. To the extent that any meetings, conferences, exchanges of data, or other cooperative efforts between representatives of CSX, NS and Conrail are held and carried out for purposes of these Proceedings, such meetings, conferences, exchanges of data and other cooperative efforts are deemed essential for the conduct and disposition of such proceedings and will not be deemed a violation of 49 U.S.C. §§ 11323 or 11904, or any other relevant provision of the ICC Termination Act of 1995.

4. If the Application is disapproved by the Board, or if the Application is approved but control is not effected, or if no Application is filed, then all

Confidential Documents, other than file copies of pleadings and other documents filed with the Board and retained by outside counsel for a party to these Proceedings, must be destroyed or returned to the party originating the Confidential Information contained or reflected in such Confidential Documents.

5. If any party to these Proceedings determines that any part of a discovery request or response, of a transcript of a deposition or hearing, or of a pleading or other paper filed or served in these Proceedings contains Confidential Information or consists of Confidential Documents, then that party may designate and stamp such Confidential Information and Confidential Documents as "CONFIDENTIAL." Any information or documents designated or stamped as "CONFIDENTIAL" shall be handled as provided for hereinafter, except that no prohibition in any subsequent paragraph is applicable to an exchange of information pursuant to paragraph 2 of this Protective Order.

6. Any party producing material in discovery to another party to these Proceedings, or submitting material in pleadings or other documents filed or served, may in good faith designate and stamp particular Confidential Information, such as material containing shipper-specific rate or cost data or other competitively sensitive or proprietary information, as "HIGHLY CONFIDENTIAL." Any information or documents so designated or stamped shall be handled as provided hereinafter, except that no prohibition in any subsequent paragraph is applicable to an exchange of information pursuant to paragraph 2 of this Protective order.

7. Information and documents designated or stamped as "CONFIDENTIAL" may not be disclosed in any way, directly or indirectly, or to any person or entity except to an employee, counsel, consultant, or agent of a party to these Proceedings, or an employee of such counsel, consultant, or agent,

who, before receiving access to such information or documents, has been given and has read a copy of this Protective Order and has agreed to be bound by its terms by signing a confidentiality undertaking substantially in the form set forth at Exhibit A to this Order.

8. Information and documents designated or stamped as "HIGHLY CONFIDENTIAL" may not be disclosed in any way, directly or indirectly, to any employee of a party to these Proceedings, or to any other person or entity except to an outside counsel or outside consultant to a party to these Proceedings, or to an employee of such outside counsel or outside consultant, who, before receiving access to such information or documents, has been given and has read a copy of this Protective Order and has agreed to be bound by its terms by signing a confidentiality undertaking substantially in the form set forth at Exhibit B to this Order.

9. Any party to these Proceedings may challenge the designation by any other party of information or documents as "CONFIDENTIAL" or as "HIGHLY CONFIDENTIAL" by filing a motion with the Board or with an administrative law judge or other officer to whom authority has been lawfully delegated by the Board to adjudicate such challenge(s).

10. Designated Material may not be used for any purposes other than these Proceedings, including without limitation any business, commercial, strategic, or competitive purpose.

11. Any party who receives Designated Material in discovery shall destroy such materials and any notes or documents reflecting such materials (other than file copies of pleadings or other documents filed with the Board and retained by outside counsel for a party to these Proceedings) at the earlier of:

(1) such time as the party receiving the materials withdraws from these

Proceedings, or (2) the completion of these Proceedings, including any petitions for reconsideration, appeals, or remands.

12. No party may include Designated Material in any pleading, brief, discovery request or response, or other document submitted to the Board, unless the pleading or other document is submitted under seal, in a package clearly marked on the outside as "Confidential Materials Subject to Protective Order." See 49 C.F.R. § 114.14. All pleadings and other documents so submitted shall be kept confidential by the Board and shall not be placed in the public docket in these Proceedings except by order of the Board or of an administrative law judge or other officer in the exercise of authority lawfully delegated by the Board.

13. No party may include Designated Material in any pleading, brief, discovery request or response, or other document submitted to any forum other than this Board in these Proceedings unless (1) the pleading or other document is submitted under seal in accordance with a protective order that requires the pleading or other document to be kept confidential by that tribunal and not be placed in the public docket in the proceeding, or (2) the pleading or other document is submitted in a sealed package clearly marked, "Confidential Materials Subject to Request for Protective Order," and is accompanied by a motion to that tribunal requesting issuance of a protective order that would require the pleading or other document be kept confidential and not be placed in the public docket in the proceeding, and requesting that if the motion for protective order is not issued by that tribunal, the pleading or other document be returned to the filing party.

14. No party may present or otherwise use any Designated Material at a Board hearing in these Proceedings, unless that party has previously submitted, under seal, all proposed exhibits and other documents containing or reflecting

such Designated Material to the Board, to an administrative law judge or to another officer to whom relevant authority has been lawfully delegated by the Board, and has accompanied such submission with a written request that the Board, administrative law judge or other officer (a) restrict attendance at the hearing during any discussion of such Designated Material, and (b) restrict access to any portion of the record or briefs reflecting discussion of such Designated Material in accordance with this Protective Order.

15. If any party intends to use any Designated Material in the course of any deposition in these Proceedings, that party shall so advise counsel for the party producing the Designated Material, counsel for the deponent, and all other counsel attending the deposition. Attendance at any portion of the deposition at which any Designated Material is used or discussed shall be restricted to persons who may review that material under the terms of this Protective Order. All portions of deposition transcripts or exhibits that consist of, refer to, or otherwise disclose Designated Material shall be filed under seal and be otherwise handled as provided in paragraph 12 of this Protective Order.

16. To the extent that materials reflecting Confidential information are produced by a party in these Proceedings, and are held and/or used by the receiving person in compliance with paragraphs 1, 2, 5, or 6 above, such production, disclosure, holding, and use of the materials and of the data that the materials contain are deemed essential for the disposition of this and any related proceedings and will not be deemed a violation of 49 U.S.C. §§ 11323 or 11904 or of any other relevant provision of the ICC Termination Act of 1995.

17. All parties must comply with all of the provisions of this Protective Order unless the Board or an administrative law judge or other officer

exercising authority lawfully delegated by the Board determines that good cause has been shown warranting suspension of any of the provisions herein.

18. Nothing in this Protective Order restricts the right of any party to disclose voluntarily any Confidential Information originated by that party, or to disclose voluntarily any Confidential Documents originated by that party, if such Confidential Information or Confidential Documents do not contain or reflect any Confidential Information originated by any other party.

**Exhibit A**

**UNDERTAKING -- CONFIDENTIAL MATERIAL**

I, \_\_\_\_\_, have read the Protective Order served on \_\_\_\_\_, 1997, governing the production and use of Confidential Information and Confidential Documents in STB Finance Docket No. \_\_\_, understand the same, and agree to be bound by its terms. I agree not to use or permit the use of any Confidential Information or Confidential Documents obtained pursuant to that Protective Order, or to use or to permit the use of any methodologies or techniques disclosed or information learned as a result of receiving such data or information, for any purpose other than the preparation and presentation of evidence and argument in Finance Docket No. 33388, any related proceedings before the Surface Transportation Board, and/or any judicial review proceedings in connection with Finance Docket No. 33388 and/or with any related proceedings. I further agree not to disclose any Confidential Information, Confidential Documents, methodologies, techniques, or data obtained pursuant to the Protective Order except to persons who are also bound by the terms of the Order and who have executed Undertakings in the form hereof, and that at the conclusion of this proceeding (including any proceeding or administrative review, judicial review, or remand), I will promptly destroy any documents containing or reflecting materials designated or stamped as "CONFIDENTIAL," other than file copies, kept by outside counsel, of pleadings and other documents filed with the Board.

I understand and agree that money damages would not be a sufficient remedy for breach of this Undertaking and that Applicants or other parties producing confidential information or confidential documents shall be entitled to specific performance and injunctive and/or other equitable relief as a remedy for any such breach, and I further agree to waive any requirement for the securing or posting of any bond in connection with such remedy. Such remedy shall not be deemed to be the exclusive remedy for breach of this Undertaking but shall be in addition to all remedies available at law or equity.

---

Dated: \_\_\_\_\_

## **Exhibit B**

### **UNDERTAKING -- HIGHLY CONFIDENTIAL MATERIAL**

I am outside [counsel] (consultant) for \_\_\_\_\_, for whom I am acting in this proceeding. I have read the Protective Order served on \_\_\_\_\_, 1997, governing the production and use of Confidential Information and Confidential Documents in STB Finance Docket No. 33388, understand the same, and agree to be bound by its terms. I agree not to use or to permit the use of any Confidential Information or Confidential Documents obtained pursuant to that Protective Order, or to use or to permit the use of any methodologies or techniques disclosed or information learned as a result of receiving such data or information, for any purpose other than the preparation and presentation of evidence and argument in Finance Docket No. 33388, any related proceedings before the Surface Transportation Board, or any judicial review proceedings in connection with Finance Docket No. 33388 and/or with any related proceedings. I further agree not to disclose any Confidential Information, Confidential Documents, methodologies, techniques, or data obtained pursuant to the Protective Order except to persons who also are bound by the terms of the Order and who have executed Undertakings in the form hereof.

I also understand and agree, as a condition precedent to my receiving, reviewing, or using copies of any information or documents designated or stamped as "HIGHLY CONFIDENTIAL," that I will take all necessary steps to assure that said information or documents be kept on a confidential basis by any outside counsel or outside consultants working with me, that under no

circumstances will I permit access to said materials or information by employees of my client or its subsidiaries, affiliates, or owners, and that at the conclusion of this proceeding (including any proceeding on administrative review, judicial review, or remand), I will promptly destroy any documents containing or reflecting information or documents designated or stamped as "HIGHLY CONFIDENTIAL," other than file copies, kept by outside counsel, of pleadings and other documents filed with the Board.

I understand and agree that money damages would not be a sufficient remedy for breach of this Undertaking and that Applicants or other parties producing confidential information or confidential documents shall be entitled to specific performance and injunctive and/or other equitable relief as a remedy for any such breach, and I further agree to waive any requirement for the securing or posting of any bond in connection with such remedy. Such remedy shall not be deemed to be the exclusive remedy for breach of this Undertaking but shall be in addition to all remedies available at law or equity.

OUTSIDE [COUNSEL] [CONSULTANT]

Dated: \_\_\_\_\_

STB

FD

33388

4-10-97

1

179260

CSX/NS-2

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.

OFFICE OF SECRETARY

APR 10 4 59 PM '97

RECEIVED  
SURFACE TRANSPORTATION  
BOARD

PETITION FOR WAIVER  
OF 49 C.F.R. § 1108.4(b)(1)

CSX Corporation ("CSXC"), CSX Transportation, Inc. ("CSXT"),<sup>1</sup> Norfolk Southern Corporation ("NSC"), and Norfolk Southern Railway Company ("NSRC")<sup>2</sup> and Conrail Inc. ("CRI") and Consolidated Rail Corporation ("CRC")<sup>3</sup> are today notifying the Board of their intention to file a joint application seeking Board authorization under 49 U.S.C. §§ 11323-25 for the acquisition of control of Conrail by CSX and NS, and for long-term operating agreements, operating leases, or other operating arrangements, and other matters, contemplated by the application. See Notice of Intent to File Railroad Control Application (CSX/NS-1), filed this date. Pursuant to 49 C.F.R. § 1152.24(e)(5) and § 1180.4(f), Petitioners request that the Board waive the requirements of 49 C.F.R. § 1180.4(b)(1) so that they need not wait three months before filing

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

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

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



the proposed application. If this Petition is granted, Petitioners propose to submit an Application approximately two months from the date of filing of their Notice of Intent.

Although 49 C.F.R. § 1180.4(b)(1) generally requires a three-month waiting period between pre-filing notification and the filing of a proposed application, Petitioners request that the Board grant a waiver of this requirement. Given the unique context of this proceeding, waiver of the three-month waiting period represents the most efficient and appropriate course of action.

The purpose of a Notice of Intent is to alert all interested parties to the proposed transaction and the forthcoming application. Here, such notice has already been provided in many forms. The Notice of Intent that CSX filed on October 18, 1996, regarding a proposed merger with Conrail, the Notice of Intent that NS filed on November 6, 1996, regarding a competing proposed merger with Conrail and the substantial and continuous media coverage of the proposed acquisition of Conrail and the negotiations leading to the current agreement assure that the Board and all interested parties and members of the public have had notice that an application will be filed, as well as the nature of the proposed transaction. As the public already has been afforded sufficient notice of the proposed application for the control of Conrail by Petitioners, the purpose of the three-month waiting period ordinarily required under 49 C.F.R. § 1180.4(b)(1) already has been fulfilled. Imposing a three month waiting period in this control proceeding would cause unnecessary delay and no identifiable benefit. A relaxation of the rule would do no harm.

Expedition is appropriate given the circumstances. In order to remove the potentially debilitating effects of a long-drawn battle to acquire the stock ownership in, and potential control over, Conrail -- and, incident to that, to

afford the Conrail stockholders their consideration promptly -- the Petitioners have agreed on an acquisition structure which calls for the two of them to pay the stockholder consideration "up front" while holding the acquired Conrail stock in a voting trust or voting trusts under the Board's regulations. This procedure will result in a total cash outlay of over \$10 billion on the part of the Petitioners. In the meantime, Conrail will be held in a voting trust. In these circumstances, Petitioners wish to proceed as expeditiously as possible.

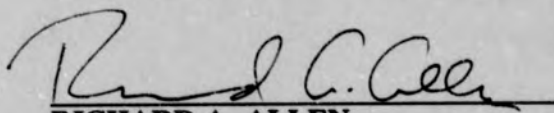
To further ensure the continuity of the notice previously afforded to all interested parties, Petitioners are serving their Notice of Intent to File Railroad Control Application, a Petition for Protective Order, a Petition to Establish Procedural Schedule which will be filed in the next few days, and this Petition for Waiver on all parties on the service list for the prior CSX/Conrail docket, Finance Docket No. 33220, and the prior NS/Conrail docket, Finance Docket No. 33286.

Respectfully submitted,

**JAMES C. BISHOP, JR.**  
**WILLIAM C. WOOLDRIDGE**  
**JAMES L. HOWE, III**  
**ROBERT J. COONEY**  
**GEORGE A. ASPATORE**  
Norfolk Southern Corporation  
Three Commercial Place  
Norfolk, VA 23510-9241  
(757) 629-2838

**MARK G. ARON**  
**PETER J. SHUDTZ**  
CSX Corporation  
One James Center  
902 East Cary Street  
Richmond, VA 23129  
(804) 782-1400

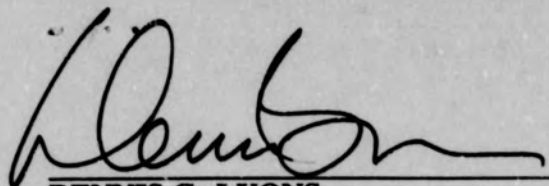
**P. MICHAEL GIFTOS**  
**PAUL R. HITCHCOCK**  
CSX Transportation, Inc.  
500 Water Street  
Speed Code J-120  
Jacksonville, FL 32202  
(904) 359-3100



**RICHARD A. ALLEN**  
**JAMES A. CALDERWOOD**  
**ANDREW R. PLUMP**  
**JOHN V. EDWARDS**  
Zuckert, Scoutt & Rasenberger, L.L.P.  
888 Seventeenth Street, N.W.  
Suite 600  
Washington, DC 20006-3939  
(202) 298-8660

**JOHN M. NANNES**  
**SCOT B. HUTCHINS**  
Skadden, Arps, Slate,  
Meagher & Flom LLP  
1440 New York Avenue, N.W.  
Washington, DC 20005-2111  
(202) 371-7400

Counsel for Norfolk Southern  
Corporation and Norfolk Southern  
Railway Company



**DENNIS G. LYONS**  
**RICHARD L. ROSEN**  
**PAUL T. DENIS**  
Arnold & Porter  
555 12th Street, N.W.  
Washington, DC 20004-1202  
(202) 942-5000

**SAMUEL M. SIPE, JR.**  
**TIMOTHY M. WALSH**  
Steptoe & Johnson LLP  
1330 Connecticut Avenue  
Washington, DC 20036-1795  
(202) 429-3000

Counsel for CSX Corporation and CSX  
Transportation, Inc.

*Paul A. Cunningham*  
*per dpt.*

**TIMOTHY T. O'TOOLE**  
**CONSTANCE L. ABRAMS**  
Consolidated Rail Corporation  
Two Commerce Square  
2001 Market Street  
Philadelphia, PA 19103  
(215) 209-4000

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

Counsel for Conrail Inc. and  
Consolidated Rail Corporation

April 10, 1997