

**Congress of the United States**  
**House of Representatives**  
**Washington, DC 20515**

June 19, 1998

FILE IN DOCKET

CHAIRMAN MORGAN

JUL 1 10 53 AM '98

RECEIVED  
SURFACE TRANSPORTATION  
BOARD

The Honorable Vernon A. Williams  
Office of the Secretary  
Surface Transportation Board  
Attn: STB Finance Docket NO. 33388 (Sub. No. 80)  
1925 K Street, NW  
Washington, DC 20423-0001

Dear Secretary Williams:

We are writing to thank the Board for listening to our concerns regarding the many shippers that depend on service by the W&LE and our concerns over the fate of the W&LE itself.

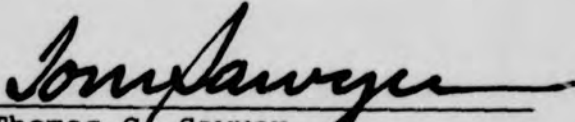
We believe that the conditions granted by the Surface Transportation Board will enable the W&LE to survive and service its debt in the new eastern post-merger consolidation. We anticipate that the W&LE will do everything it can to continue to serve its customers and to make the most of the opportunities to compete pursuant to the Board's conditions.

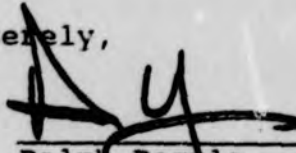
However, we are hearing from Ohio shippers and Ohio agencies that both the conditions and the opportunities appear to be ambiguous or unclear. These uncertainties--with their serious ramifications for local economies--are creating deep concern over whether there is sufficient revenue opportunity to ensure the survival of this line and its ability to continue to serve its shippers post merger.

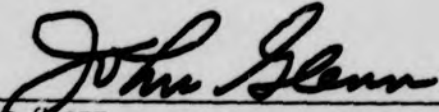
We understand that details of conditions are not typically spelled out in the staff recommendations in a merger voting conference. We are hopeful that the questions raised by the recommendations can be clarified in the Board's written decision.

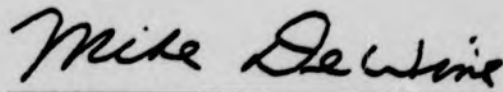
We thank you again for addressing the issues which the Ohio delegation has brought before the Board.

Sincerely,

  
Thomas C. Sawyer  
Member of Congress

  
Ralph Regula  
Member of Congress

  
John Glenn  
U.S. Senate

  
Michael DeWine  
U.S. Senate

SIDLEY AUSTIN BROWN & WOOD LLP

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WRITER'S DIRECT NUMBER  
(202) 736-8071

WRITER'S E-MAIL ADDRESS  
csadler@sidley.com

208942

September 22, 2003

**By Hand Delivery – Original and 25 Copies**

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

ENTERED  
Office of Proceedings  
SEP 22 2003  
Part of  
Public Record



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: Decision No. 89, Appendix Q

**Amendment to Petition for Extension of Time for Completion of Compliance with Environmental Condition 11**

Dear Secretary Williams:

On September 17, 2003 Norfolk Southern Corporation and Norfolk Southern Railway Company ("Norfolk Southern") submitted a Petition for Extension of Time for Completion of Compliance with Environmental Condition 11 ("Petition") in the above-referenced proceeding with respect to rail line segments N-100 (Riverton Junction, VA to Roanoke, VA) and N-111 (Fola Mine, WV to Deepwater, WV).

In the interim, Norfolk Southern has completed its obligations under Environmental Condition 11 for rail line segment N-111. Accordingly, Norfolk Southern no longer needs an extension of the current September 22, 2003 date for completion of compliance with Environmental Condition 11 with respect to rail line segment N-111. The request for



SIDLEY AUSTIN BROWN & WOOD LLP

WASHINGTON, D.C.

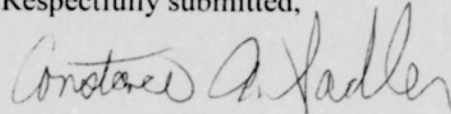
The Honorable Vernon A. Williams

September 22, 2003

Page 2

extension of time contained in Norfolk Southern's Petition remains applicable with respect to rail line segment N-100 for the reasons stated in the Petition.

Respectfully submitted,

A handwritten signature in cursive script, appearing to read "Constance A. Sadler".

Constance A. Sadler

cc: Victoria J. Rutson, SEA  
Bruno Maestri, Norfolk Southern Corporation

STB

FD

33388

3-26-99

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193914

CHARLES L. LITTLE  
International President

BYRON A. BOYD, JR.  
Assistant President

ROGER D. GRIFFETH  
General Secretary and Treasurer

# **united transportation union**



14600 DETROIT AVENUE  
CLEVELAND, OHIO 44107-4250  
PHONE: 216-228-9400  
FAX: 216-228-0937

## **LEGAL DEPARTMENT**

CLINTON J. MILLER, III  
General Counsel

• KEVIN C. BODAR  
Associate General Counsel

• ROBERT L. McCARTY  
Associate General Counsel

• DANIEL R. ELLIOTT, III  
Assistant General Counsel

March 25, 1999

### **UPS NEXT DAY AIR**

Vernon A. Williams, Secretary  
Surface Transportation Board  
1925 K Street, N.W.  
Washington, D.C. 20423-0001  
(202) 565-1650

ENTERED  
Office of the Secretary

MAR 26 1999

Part of  
Public Record



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:

Please find enclosed the original and 25 copies of United Transportation Union's Petition for Intensified Oversight as to Safety Integration Plan(s) for filing. We have also enclosed a diskette in Wordperfect format.

Very truly yours,

Daniel R. Elliott, III  
Assistant General Counsel

Enclosures

193914

ENTERED  
Office of the Secretary

MAR 26 1999

Part of  
Public Record

**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**

**PETITION OF UNITED TRANSPORTATION UNION FOR  
INTENSIFIED OVERSIGHT AS TO SAFETY INTEGRATION  
PLAN(S)**

United Transportation Union ("UTU"), the duly designated representative under the Railway Labor Act ("RLA") for conductors, brakemen, yardmen and yardmasters of the applicants, respectfully petitions the Board, pursuant to 49 C.F.R. § 1117.1 and the oversight jurisdiction of the Board contained in Decision No. 89 in this docket issued July 23, 1998 at page 160 *et seq.*, for intensified oversight of implementation of the Safety Integration Plans ("SIP") in this docket, in conjunction with the Federal Railroad Administration ("FRA"), because of recent events on the property of the Consolidated Rail Corporation ("Conrail").

In so petitioning, UTU is mindful of the FRA's Notice of Proposed Rulemaking ("NPRM") as to SIP's in STB Ex Parte No. 574, FRA Docket No. SIP-1, Notice No. 1, and adopts and incorporates herein by reference the Comments of the Transportation Trades Department, AFL-CIO, of which UTU is constituent member, submitted therein on March 1, 1999.



The grounds for this petition are contained in the attached Verified Statement of UTU International President Charles L. Little. On February 28, 1999, UTU Local Chairperson Jack E. McMillan sent a letter to Conrail General Manager, Dearborn Division, D. L. Wilson, decrying the shortage of conductors and engineers and Conrail's policy of noticing operating employees for disciplinary investigations if they mark off sick, which is the only way they may get time off, while at the same time saying, "If it's not safe, don't do it." Mr. Wilson's remarkable response in his March 8, 1999 letter stated, in pertinent part:

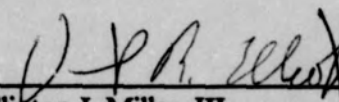
Obviously, we cannot allow the workforce to manage their schedule because they are not capable of understanding the many intricacies of the day-to-day operations of the railroad. There will be times when people will come to work in a tired condition; this does not make them 'unfit for duty', or unable to perform their task safely. They may need to take a little more caution in the performance of their duties or a little more care in the management of their activities. (emphasis added).

UTU knows of no way to construe Conrail's response as anything other than a requirement for operating employees to report for duty in a fatigued condition, which strikes at the heart of safe operations. While it is too early to say whether fatigue contributed to the recent accident where a Conrail train on March 23, 1999 struck a Union Pacific train at an interlocking at Momence, Illinois near Kankakee, the fact the accident occurred on Conrail's Dearborn Division is legitimate cause for concern in light of Mr. Wilson's March 8, 1999 letter.

UTU understands it is the primary jurisdiction of the National Transportation Safety Board ("NTSB"), with the FRA, to investigate and report upon the cause of that accident. But UTU cannot sit idly by in the face of an announced policy that demonstrates a callous disregard for fatigue concerns in operations, particularly where, as here, the employees and applicants are on the brink of implementation of the numerous and massive transactions involved in this docket.

Therefore, UTU respectfully petitions this Board, in conjunction with the FRA, to commence immediate and intensive oversight of Conrail operations as they relate to fatigue of its operating employees to ensure safe implementation of the transactions involved herein and to be certain that the SIP's herein are paid more than mere lip service in that implementation.

Respectfully submitted,

  
\_\_\_\_\_  
Clinton J. Miller, III  
General Counsel  
Daniel R. Elliott, III  
Assistant General Counsel  
United Transportation Union  
14600 Detroit Avenue  
Cleveland, Ohio 44107  
(216) 228-9400  
FAX (216) 228-0937

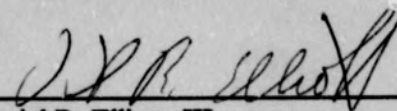
Date: March 26, 1999

**CERTIFICATE OF SERVICE**

This is to certify that a copy of the foregoing United Transportation Union's Petition for Intensified Oversight as to Safety Integration Plan(s) has been served this 25th day of March, 1999 via first-class mail, postage pre-paid, upon the following:

All Parties of Record

Respectfully submitted,

  
\_\_\_\_\_  
Daniel R. Elliott, III

**VERIFIED STATEMENT OF CHARLES L. LITTLE**

Charles L. Little, having been first duly cautioned and sworn, deposes and says:

1. I am the International President of the United Transportation Union ("UTU"), and have held that position since September 6, 1995.
2. UTU represents under the Railway Labor Act ("RLA") virtually all of the conductors, brakemen and yardmen on the nation's Class I railroads, as well as a majority of their yardmasters and some engineers.
3. UTU has 79,000 members in the United States and Canada in the rail, bus, transit, and airline industries, and is the largest rail union in the United States.
4. UTU has a great interest and concern that in transactions approved by the Surface Transportation Board ("STB"), Safety Integration Plans ("SIP") adequately protect the safety interests of the employees it represents, as evidenced most recently by the Comments of the Transportation Trades Department, AFL-CIO, of which UTU is a constituent member, submitted March 1, 1999 in STB Ex Parte No. 574, FRA Docket No. SIP-1, Notice No. 1, which are adopted and incorporated herein by reference.
5. One of UTU's greatest concerns regarding safety of rail operations is the problem of fatigue of the operating employees it represents, and, in addition to working with the STB and FRA with respect to that problem, UTU very recently, with the Brotherhood of Locomotive Engineers, signed Work/Rest Principles/Guidelines with members of the National Carriers' Conference Committee ("NCCC"), a true and correct copy of which is attached hereto as Exhibit 1.



6. UTU has become increasingly concerned about the safety of Conrail operations. After an accident between Bryan and Toledo, Ohio on or about January 17, 1999, which resulted in two crew member fatalities, I wrote a letter dated January 25, 1999, to the Administrator of the Federal Railroad Administration ("FRA") asking for a safety audit of Conrail, in light of that accident and two others in New York and New Jersey in the same period that resulted in two additional crew member deaths, a true and correct copy of which is attached hereto as Exhibit 2. There has been no response to date.

7. Earlier this month I received a copy of a February 28, 1999 letter from UTU Local Chairperson Jack E. McMillan to Conrail General Manager-Dearborn Division D. L. Wilson, a true and correct copy of which is attached hereto as Exhibit 3.

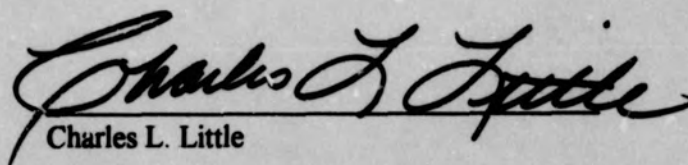
8. Local Chairperson McMillan shortly thereafter furnished me with a copy of Mr. Wilson's March 8, 1999 letter response (a true and correct copy of which is attached hereto as Exhibit 4), the third paragraph of which I find remarkably callous as to the fatigue problems of rail operating employees represented by UTU, since it says:

Obviously, we cannot allow the workforce to manage their schedule because they are not capable of understanding the many intricacies of the day-to-day operations of the railroad. There will be times when people will come to work in a tired condition; this does not make them 'unfit for duty', or unable to perform their task safely. They may need to take a little more caution in the performance of their duties or a little more care in the management of their activities

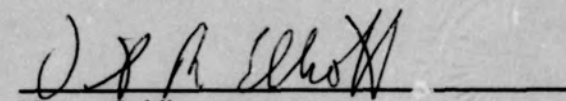
9. On March 23, 1999, a Conrail train "T-boned" a Union Pacific train at an interlocking at Momence, Illinois near Kankakee, and while the NTSB and FRA are now conducting a field investigation of that accident pursuant to 49 C.F.R. Part 831, and it is too early to say whether employee fatigue may have been involved for certain, the fact both the Toledo accident and this most

recent accident occurred on Conrail's Dearborn Division, coupled with the Dearborn Division General Manager's response regarding fatigue, to me indicate the propriety of intensified STB and FRA oversight to ensure that in the impending numerous and massive transactions in this docket, the safety of the employees UTU represents does not get lost in the shuffle, and because lack of attention to the problem of operating employee fatigue could jeopardize implementation of the transactions herein.

Further affiant sayeth naught.

  
Charles L. Little

Subscribed and sworn to before me this 25<sup>th</sup> day of March, 1999.

  
Notary Public  
**DANIEL R. ELLIOTT, ATTORNEY AT LAW**  
Notary Public-State of Ohio  
My Commission Has No Expiration Date  
Section 147.03 R.C.

## WORK/REST GUIDELINES/PRINCIPLES

### I. Coverage

The carriers represented before the National Panel established in accordance with the provisions of Article XIII of the May 8, 1996 Arbitration Award and Article XI of the May 31, 1996 Agreement and their employees represented by the United Transportation Union and the Brotherhood of Locomotive Engineers are covered by these Work/Rest Guidelines/Principles ("Guidelines").

### II. Purposes and Principles

To meet the needs of rail service, many operating craft employees work highly variable duty schedules. The impact of those schedules on the employees' health, quality of life, and safety on the job, and implementation of appropriate corrective measures, are prominent issues facing the railroad industry today.

Recent sleep research counsels that irregular work schedules may disrupt natural human sleep-wake cycles in certain circumstances, which could result in the potential for disrupted, shortened and poor quality sleep and, in some cases, reduced alertness and fatigue on the job.

The parties believe that management and labor should join in a mutual effort to review the relevant scientific research in this area and to facilitate implementation of validated countermeasures that will minimize the likelihood of fatigue while at the same time addressing related quality of life issues.

The purpose of these Guidelines is twofold. First, to encourage the dissemination of information concerning the science of fatigue and effective countermeasures. Second, to establish within a specified time frame programs designed to deal with the cause of fatigue in the

EXHIBIT

rail industry and work/rest issues. The parties intend this to be a continuing undertaking and therefore view this as an ongoing effort that will be amended from time to time.

These Guidelines create processes to accomplish various changes that are designed to enhance rest opportunities for employees. The parties believe that these enhanced rest opportunities will address fatigue-related concerns more effectively and should reduce the need for employees to seek rest opportunities by marking off. The parties mutually recognize that railroad employees have always taken seriously their obligation to take advantage of rest opportunities and are confident this will continue to be the case. The parties also agree that the economic factors involved in providing service should not increase, taking into account operational benefits expected to be obtained as a result of changes implemented under these Guidelines.

Finally, the parties agree that the following principles should guide the design and implementation of all undertakings pursuant to these Guidelines:

- o work rule accommodations--where and to the extent necessary, existing work rules may be changed to accommodate and facilitate changes implemented under these Guidelines; and
- o the overarching objective of these Guidelines is to achieve meaningful progress in addressing fatigue issues by mutual and cooperative actions; if and to the extent that particular initiatives do not prove effective, it is our mutual intention that the parties



work together to devise mutually agreeable corrective actions,  
rather than rely upon the traditional claim and grievance process.

III. Work/Rest Committee

A. A Work Rest Committee (the "Committee") shall be established on each carrier within 45 days from the date of these Guidelines. The carrier and the organizations shall each appoint its respective representatives on each Committee. The compensation and expenses of each Committee member shall be borne by the party appointing them. Membership on each Committee will include, to the extent possible, representatives with knowledge and experience in all of the various disciplines involved in the study of fatigue and its effects. The carrier and labor members of each Committee, in their respective collective groups, shall have an equal vote on any Committee action pursuant to these Guidelines.

IV Initial - Education and Training Program

1. Each Committee shall be responsible for developing an education and training program covering all employees represented by the organizations and appropriate carrier/management personnel. The program will include, as appropriate, the use of videotapes, books, informational brochures, group presentations, and other materials useful for understanding and explaining the effects of fatigue and possible corrective measures.

In developing such proposals, each Committee shall:

- (a) build upon and incorporate any existing or related programs in place on that carrier;
- (b) review and consider the scope and content of such programs as may exist on other carriers;
- (c) review and consider scientific literature regarding fatigue and appropriate operational responses; and
- (d) review and consider information, findings and results made available from the rail management/labor Work/Rest Review Task Force.

V. Other Immediate Tasks

Each Committee shall within six (6) months from the date of these Guidelines develop a program, and within nine (9) months of the date of these Guidelines shall implement the initiatives as set forth below in conjunction with and subject to the approval of the designated labor and management representatives on that carrier.

Each Committee may designate local work/rest groups to develop, prepare and facilitate local work/rest initiatives and/or programs under the direction of such Committee. It is recognized that variations in operating and other conditions may well lead to the development of different programs from one region or territory of a carrier to another. When local work/rest groups are established, they shall assume the same obligations, responsibilities, and time constraints applicable to the Committee established on that carrier.

A. Assigned Work Days/Rest Days

Work schedules consisting of assigned work days and predictable rest days will be made available to extra and pool employees working in unassigned freight service to the extent practicable. The number of assigned work days and rest days should be based on operational feasibility and other appropriate criteria, including, but not limited to, the lengths of the crew district and the mix of assignments which an extra board protects. Employees who are provided regularly assigned rest days pursuant to this Paragraph shall not be required to work on such rest days, but may voluntarily elect to do so, subject to fatigue and rest guidelines to be developed by each Committee.

B. Minimum Undisturbed Rest

An employee working in unassigned pool freight service will be provided 8 hours of undisturbed rest at his home terminal subsequent to completing service and being released from duty. Undisturbed rest will be measured from the time the employee goes off duty. Calls involving instructions for reporting to duty will not be authorized during periods of undisturbed rest, except in recognized emergencies. Any Committee may agree to extend application of this provision to other service. Any resolutions hereunder will comport with the applicable collective bargaining agreement and the Hours of Service Act.

C. A.M. Mark-Ups

When employees working in unassigned freight service return to service after being on compensated leave for 72 hours or more, they shall not be considered available for duty earlier than 7:00 a.m. local time on the first day back.

D. Assigned Service

Each Committee shall review the operations of the carrier for the purpose of determining whether greater segments of the operation can be run on an assigned basis, as opposed to unassigned or pool service. Experiments designed to increase the percentage of operations in assigned service shall be encouraged. Each Committee shall make a detailed account of its findings and recommendations for increasing assigned service operations after completing such task.

E. Transportation

Timely Pick-up/Safe Vehicles - The carrier will make diligent efforts to anticipate crew tie ups en route for the purpose of arranging timely transportation service to the crews outlawed by the Hours of Service Act.

In addition, all new or renewed contracts with transportation service providers shall address the matters of periodic safety inspections of vehicles, limitations on the number of hours that vehicle drivers may operate such vehicles, and federal, state and local licensing and regulatory requirements. Finally, a toll-free hot line will be provided train and engine service employees in order to report transportation problems.



F. Lodging Facilities

Minimum standards as to quality and safety of location shall be maintained, consistent with the current applicable collective bargaining agreement(s).

G. Line-Ups

Recognizing that work/rest issues are affected by the accuracy of information on train line-ups, each Committee will explore and recommend appropriate steps to improve such information.

H. Yardmasters' Hours Worked

A maximum number of continuous hours that will be worked by yardmasters when not restricted by the Hours of Service Act will be established.

VI. Review

At the end of six months of operation, each Committee shall review and assess the impacts of the program(s). It may recommend revisions, amendments or extensions of the program(s) (or elements thereof) based upon its findings. It shall also develop a plan to extend the program(s) (in whole or part), where and as appropriate, to additional portions of the system. Finally, each Committee shall be required to submit to the National Panel a detailed accounting of its findings within thirty (30) days after the end of each six (6) months of operations.

VII. Conflicts

If during the operation of any programs hereunder, a dispute arises involving the rules described above or an alleged conflict between existing rules and practices and the processes

described above, the dispute shall promptly be referred to each Committee for resolution. Each Committee shall have exclusive jurisdiction over any such dispute, subject to the provisions of Article VIII, C.

In resolving the dispute, each Committee shall attempt to interpret conflicting provisions in a manner that preserves the essential purpose of each rule or practice. In addition, each Committee shall consider on the one hand the adverse impact on the affected employees' ability to obtain proper rest, the employees' quality of life, and the employees' earnings as they relate to existing rules, practices and programs under these Guidelines, and on the other hand the service demands confronting the carrier, the need to create scheduling arrangements which maintain the ability of the carrier to meet day-to-day demands of service, and the carrier's need for the flexibility to utilize operating employees outside the normal schedule when necessary.

#### VIII. Responsibilities of the National Panel

The National Panel shall:

- A. Continue its study of fatigue and work/rest issues and the responses thereto for the purposes of determining whether existing or newly-developed scientifically validated data justify additional provisions or modifications to the working conditions identified in this document;
- B. Act as a clearinghouse of information with respect to fatigue and provide such data to the Committees. As part of this obligation, it shall dialogue with scientists or groups of scientists expert in this subject that its members mutually agree upon;

- C. Act as a facilitator with respect to any issue submitted to it by a Committee; and
- D. Act as a reviewing body of the reports and findings submitted to it pursuant to Article VI above.

IX General

The foregoing Guidelines reflect the parties' decision that the way to pursue resolution of fatigue-related problems is through good faith arms-length collective bargaining.

SIGNED THIS 18<sup>th</sup> DAY OF MARCH, 1999.

FOR THE EMPLOYEES REPRESENTED BY  
THE UNITED TRANSPORTATION UNION:

FOR THE EMPLOYEES REPRESENTED BY  
THE BROTHERHOOD OF LOCOMOTIVE  
ENGINEERS:

Charles D. Tipton  
Byron A. Boylston  
David E. Johnson, III  
Donald R. Carson  
R. J. Marceaux  
James R. Cackley  
B. R. Davis  
C. M. Vahldick

A. V. Monni  
Edward J. Jurecki  
Dory M. Hahn  
James J. Hahn  
Robert W. Gachwin MWT  
B. J. Henson  
Michael J. Henson

J. T. Reed

Dennis C. Summer

\_\_\_\_\_  
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\_\_\_\_\_  
\_\_\_\_\_

FOR THE CARRIERS, LISTED IN APPENDIX A,  
REPRESENTED BEFORE THE UTU AND BLE  
NATIONAL PANELS.

R. J. Miller

James J. [unclear]

David P. Lee

Emerson [unclear]

John [unclear]

[unclear]

K. R. Peifer



March 18, 1999  
Side Letter #1

Mr. Charles L. Little  
President  
United Transportation Union  
14600 Detroit Avenue  
Cleveland, Ohio 44107

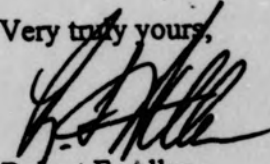
Mr. Clarence V. Monin  
President  
Brotherhood of Locomotive Engineers  
1370 Ontario Street  
Cleveland, Ohio 44113

Dear Messrs. Little and Monin:

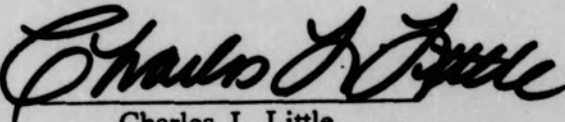
This refers to the Work/Rest Guidelines/Principles ("Guidelines") of this date. A question has arisen as to whether a new Work/Rest Committee must be established where a committee has already been established on a carrier that is charged with carrying out substantially similar responsibilities. In that situation, the parties may agree that the existing committee will serve as the Work/Rest Committee referred to in the Guidelines. Furthermore, where certain responsibilities of the Work/Rest Committee identified in the Guidelines have already been carried out, such responsibilities will be considered as having been fulfilled.

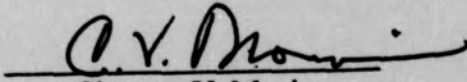
If this meets with your understanding, please sign in the space provided below.

Very truly yours,

  
Robert F. Allen

I agree:

  
Charles L. Little

  
Clarence V. Monin

March 18, 1999  
Side Letter #2

Mr. Charles L. Little  
President  
United Transportation Union  
14600 Detroit Avenue  
Cleveland, Ohio 44107

Mr. Clarence V. Monin  
President  
Brotherhood of Locomotive Engineers  
1370 Ontario Street  
Cleveland, Ohio 44113

Dear Messrs. Little and Monin:

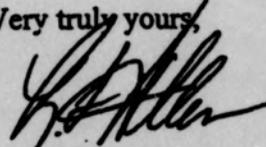
This refers to Article I of the Work/Rest Guidelines/Principles ("Guidelines") of this date.

The Guidelines by their terms cover all carriers party to the May 8, 1996 Arbitration Award and the May 31, 1996 Agreement. However, the parties confirm that the discussions that led to these Guidelines occurred in the context of fatigue and its effects as encountered on Class I railroads. While fatigue and the effects thereof are legitimate concerns throughout the industry and hence are not limited to Class I railroads, the parties realize that the occurrences of fatigue and the manner of responding to it may differ significantly on a Class II or III carrier.

Therefore, upon the request of any Class II or III carrier or organization party to these Guidelines, the National Panel is prepared to review the terms of the Guidelines for the purposes of determining whether such Guidelines should be revised, and, if so, in what manner, because the Guidelines do not respond to fatigue and its manifestations as it occurs on such Class II or III carrier.

If this meets with your understanding, please sign in the space provided below.

Very truly yours,

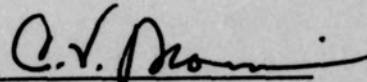


Robert F. Allen

I agree



Charles L. Little



Clarence V. Monin

March 18, 1999  
Side Letter # 3

Mr. Charles L. Little  
President  
United Transportation Union  
14600 Detroit Avenue  
Cleveland, Ohio 44107

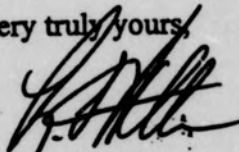
Mr. Clarence V. Monin  
President  
Brotherhood of Locomotive Engineers  
1370 Ontario Street  
Cleveland, Ohio 44113

Dear Messrs. Little and Monin:

This refers to Article I of the Work/Rest Guidelines/Principles ("Guidelines") of this date. The parties mutually recognize that the science of fatigue continues to evolve and have committed to taking appropriate measures where warranted by validated scientific findings.

If this meets with your understanding, please sign in the space provided below.

Very truly yours,

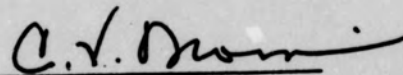


Robert F. Allen

I agree:



Charles L. Little



Clarence V. Monin



March 18, 1999  
Side Letter # 4

Mr. Charles L. Little  
President  
United Transportation Union  
14600 Detroit Avenue  
Cleveland, Ohio 44107

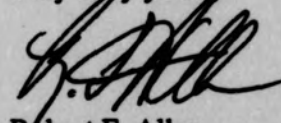
Mr. Clarence V. Monin  
President  
Brotherhood of Locomotive Engineers  
1370 Ontario Street  
Cleveland, Ohio 44113

Dear Messrs. Little and Monin:

This refers to Article VII of the Work/Rest Guidelines/Principles ("Guidelines") of this date. That provision provides exclusive jurisdiction to each Committee over certain disputes described therein. The parties are in agreement that any other dispute relating to the interpretation or application of these Guidelines, including the authority of any Committee established pursuant to the Guidelines to pursue an issue, or whether the process established therein was followed, shall be resolved in accordance with and pursuant to the peaceful procedures of the Railway Labor Act.

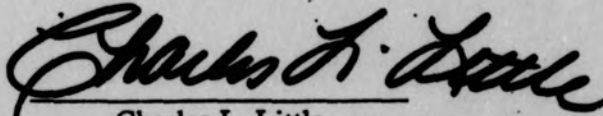
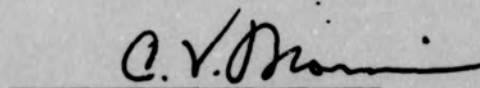
If this meets with your understanding, please sign in the space provided below.

Very truly yours



Robert F. Allen

I agree:

  
Charles L. Little  
Clarence V. Monin

CHARLES L. LITTLE  
International President

BYRON A. BOYD, JR.  
Assistant President

ROGER D. GRIFFETH  
General Secretary and Treasurer

**united  
transportation  
union**



14600 DETROIT AVENUE  
CLEVELAND, OHIO 44107-4250  
PHONE: 216-228-9400  
FAX: 216-228-5755

January 25, 1999

**FAX and UPS Next Day Air**

Hon. Jolene M. Molitoris, Administrator  
Federal Railroad Administration  
U.S. Department of Transportation  
400 7th Street, S.W., Room 8206  
Washington, DC 20590  
(202) 493-6014  
FAX (202) 495-6009

Dear Administrator Molitoris:

The series of recent accidents on the property of the Consolidated Rail Corporation ("Conrail"), resulting in the deaths of four crew members within a nine-day period, impel me to ask you to conduct an immediate Safety Audit on that property. Four deaths in nine days demands that fast action be taken to intensely investigate safety and training procedures on Conrail. Your investigation on the Union Pacific in 1997 after a series of accidents led to improved safety and training procedures. These accidents on Conrail are every bit as serious as the UP problem, and require the same degree of scrutiny.

Two Conrail crew members died in Ohio, one in New Jersey, and one in New York between January 14 and 22, 1999. The most publicized accident occurred on January 17 near Toledo, Ohio, when three Conrail trains collided, killing Raymond Corell, 52, of Angola, Indiana, a conductor who was a legislative representative and secretary/treasurer of UTU Local 227 in Huntington, Indiana, and R. H. Bell, 57, of Oregon, Ohio, a locomotive engineer represented by BLE Division 457 in Toledo. Corell and Bell were thrown from the engine of a mail train and died of head injuries according to Williams County, Ohio Coroner John Moats.

The most recent fatality occurred on Friday, January 22, 1999 near Attica, New York, when a car derailed, killing Larry K. Stroman, 45, a conductor who belonged to UTU Local 318 and had just completed engineer training.

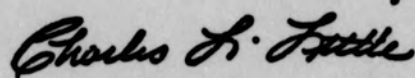
On January 14, 1999, Anthony Scarpello, 54, working for Conrail in Port Newark, New Jersey, was killed at 2:00 a.m. while switching an industry. Brother Scarpello, a conductor, belonged to UTU Local 1390, and had been working on the railroad for five years.

EXHIBIT

1 2

The number of accidents within such a short time span that cost the lives of our dedicated members is of such a character that it must be immediately learned whether there is a systemic operating deficiency on Conrail that degrades safety, our number one priority. Our members and the public are entitled to know now the status of operations on Conrail as it affects the safety of all.

Sincerely,



Charles L. Little  
International President

cc: C. V. Monin, Pres.-BLE (FAX)  
B. A. Boyd, Jr., Assistant Pres.-UTU  
J. M. Brunkenhoefer, NLD-UTU (FAX)  
All UTU International Officers (FAX)  
All UTU Conrail, Norfolk Southern and CSX General Chairpersons (FAX)  
All UTU State Legislative Directors (FAX)

UNITED TRANSPORTATION UNION  
LOCAL COMMITTEE OF ADJUSTMENT - LOCAL NO. 2  
P. O. BOX 148034  
TOLEDO, OHIO 43614-8034  
PHONE: (419) 698-3506  
FAX/MODEM: (419) 698-3550  
INTERNET E-MAIL: mcmillan.je@worldnet.att.net

February 28, 1999

Mr. D. L. Wilson, General Manager  
Dearborn Division  
Consolidated Rail Corporation  
17301 Michigan Avenue  
Dearborn, MI 48126-2700

Dear Sir:

There seems to be a serious lack of communication between the Transportation Department and the Workforce Management System on Conrail. We are given books of rules and other instructions that we are required to follow (and we have hell to pay if we don't). Yet when we try to abide by those directives, employees in the Workforce Management System - West District are refusing to allow us to comply.

Everyone is aware that there is a shortage of conductors and engineers, but we did not create the problem. Most of our members are "busting their buns" to move the trains because they realize that moving trains pays their wages.

You recently published, or had published, an insert for our Rules Book. On that insert there are "10 Points of Safety". Point number "7" says: "**DO NOT** report for duty unless fit to do so." Point number "10" says: "**IF IT'S NOT SAFE - DON'T DO IT.**" Following the "10 Points of Safety" the insert assures us: "Nothing you will do today is more important than your personal safety. Never attempt any task or work that could jeopardize your safety. If a conflict occurs between production and safety, the only acceptable choice is your safety. You have my **PERSONAL ASSURANCE** that the Dearborn Division is totally committed to your safety." The insert bears your signature below the information quoted above, and I am confident that you are sincere about the message published in the insert.

However, Workforce Management System employees are forcing some of our members to violate the directives by refusing to allow them to mark off when they are tired and not "fit" to "report for duty." Employees who report to work when sick or tired and unable to remain alert and attentive at all times while performing their duties are being placed in great jeopardy, along with co-workers and the general public. Some employees, in order to comply with NORAC Operating Rule S, Safety Rule 1000 and the insert quoted above, are forced to miss calls or mark off sick. In fact, certain Crew Dispatchers, Lead Clerks and Managers are telling employees that the only way they can let them off is if they mark off sick.

Am I missing something here? The same Department that is telling our members to mark off sick, is the same Department that causes G-250 Notices of Investigation to be issued because the employee marked off sick, allegedly in violation of Rule T, which has no provisions against marking off sick! Our members are damned if they do and damned if they don't!

An employee forced to resort to missing a call or mark off sick in order to comply with your directives, is subjected to the issuance of a G-250 Notice as the result of an alleged violation of the System Attendance Policy. I have within the past several months, represented three such employees.

Mr. D. L. Wilson, General Manager  
February 28, 1999  
Page 1 of 2





If they should report to work when they are exhausted, stressed or sick, after attempting to mark off *per your rules*, and they make a mistake resulting in one of the myriad of mishaps that could occur (including dismemberment or death), then disciplinary action is taken against the employee *who did nothing more than attempt to comply with the rules*.

When this happens, it sends a message to the newer employees that they should report for duty no matter what their physical or mental condition is. Some people are wondering why we are having such a rash of mishaps recently. There is no doubt in *MY* mind as to the cause of much of it. I have outlined it in this letter. In my opinion, until this problem is corrected, the situation is not going to improve.

If, as you assert —“Nothing [we] will do today is more important than [our] personal safety; that if a conflict occurs between production and safety, the only acceptable choice is [our] safety; **DO NOT** report for duty unless fit to do so”; and that “[We] have [YOUR] PERSONAL ASSURANCE that the Dearborn Division is totally committed to [our] safety”— perhaps you can put a stop to this madness and take steps to ensure that employees who have worked many days and long hours are allowed to have some quality time off to spend with their families or to just get away from the “rat race” for a while.

Please advise as to your intentions to rectify this problem and when we can expect some relief.

Respectfully yours,

J. E. McMillan  
Chairperson

Co: C. I. Little, UTU International President  
B. A. Boyd, UTU Assistant President  
W. J. Thompson, Director UTU OSLB  
C. D. Winebrenner, Chairperson UTU GCA  
T. K. Male, General Superintendent— Workforce Management System  
G. L. Griffin, Lead Manager - Workforce Management System  
P. E. Bunker, Chairperson LCA UTU Local 0002  
D. L. Gleaser, Chairperson LCA UTU Local 0102  
C. Kopf, Local Chairperson BLE  
K. Campbell, Local Chairperson BLE  
T. D. Garvin, Vice Chairperson LCA UTU Local 0002  
R. D. Measley, Vice Chairperson LCA  
R. L. Taylor, Secretary LCA UTU Local 0002  
J. M. Reese, Secretary LCA UTU Local 0002

On file as: DLW Safety and Rules

**CONRAIL**



March 8, 1989

File:

Mr. Jack E. McMillan  
Local Chairperson  
United Transportation Union  
P.O. Box 148034  
Toledo, Ohio 43614 8034

Dear Mr. McMillan:

After having carefully read your February 28, 1989, letter, I think it is prudent for you to understand that the issue of being fit to duty, properly protecting your obligations under the union contract, and being allowed reasonable days off are inter-connected, but require a considerable amount of knowledge and insight in order to be dealt with properly.

I have had conversations with Workforce Management concerning the issue of allowing people reasonable time off and have concluded that where possible, we will establish guaranteed extra boards with assigned days off. This should circumvent some of the stressful situations that arise when employees, either for good or bad reasons, attempt to take days off.

Obviously, we cannot allow the workforce to manage their schedule because they are not capable of understanding the many intricacies of the day-to-day operations of the railroad. There will be times when people will come to work in a tired condition; this does not make them 'unfit for duty', or unable to perform their task safely. They may need to take a little more caution in the performance of their duties or a little more care in the management of their activities.

When I say that nothing is more important than your personal safety and never attempt any task or work that could jeopardize your safety, I sincerely mean it. I will personally commit to you that if an employee does mark off using sickness as an excuse, and it is found that employee has not abused his right or obligations to protect his work assignment, I will see that employee is not harmed by the disciplinary process.

Sincerely,

D. L. Wilson  
General Manager

/ar



STB

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3-3-99

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BEFORE THE  
SURFACE TRANSPORTATION BOARD  
UNITED STATES DEPARTMENT OF TRANSPORTATION

---

Finance Docket No. 33388

ENTERED  
Office of the Secretary

MAR 04 1999

Part of  
Public Record

**CSX Corporation, et al. —**  
**Control and Operating Leases/Agreements —**  
**Consolidated Rail Corporation, et al.**

---



**EXPEDITED ACTION REQUESTED**

PETITION FOR LEAVE TO FILE REPLY TO RESPONSE TO PETITION FOR  
OVERSIGHT AND MODIFICATION OF REMEDIAL CONDITION

Submitted on Behalf of

OCCIDENTAL CHEMICAL CORPORATION

---

I

OCCIDENTAL CHEMICAL CORPORATION  
P.O. BOX 809050  
DALLAS, TEXAS 75380

Frederic L. Wood  
Nicholas J. DiMichael  
Karyn A. Booth  
DONELAN, CLEARY, WOOD  
AND MASER, P.C.  
1100 New York Ave., N.W.  
Washington, D.C. 20005

*Attorneys for Occidental Chemical Corporation*

MARCH 3, 1999



BEFORE THE  
SURFACE TRANSPORTATION BOARD  
UNITED STATES DEPARTMENT OF TRANSPORTATION

---

Finance Docket No. 33388

*CSX Corporation, et al. —  
Control and Operating Leases/Agreements —  
Consolidated Rail Corporation, et al.*

---

**EXPEDITED ACTION REQUESTED**

PETITION FOR LEAVE TO FILE REPLY TO RESPONSE TO PETITION FOR  
OVERSIGHT AND MODIFICATION OF REMEDIAL CONDITION

Submitted on Behalf of

OCCIDENTAL CHEMICAL CORPORATION

---

Occidental Chemical Corporation ("OxyChem") respectfully petitions the Surface Transportation Board for leave to file the attached pleading. The attached pleading is in the nature of a reply to the response filed by CSX on February 22, 1999, replying to the petition file by OxyChem on February 1, 1999. Under the Board's Rules of Practice, a reply to a reply is ordinarily not permitted. 49 C.F.R. 1104.13(c).

However, the Board may waive the provisions of section 1104.13(c) for good cause shown. The basis for good cause in this case involves the need to ensure that a "complete record" is before the Board for decision. *See, e.g., Southern Pacific Trans. Co. — Trackage Rights Exemption — The Houston Belt Terminal Ry. Co., et al*, Fin. Dkt. 33461, slip op. served Dec. 21, 1998) at 2-3, n.

7. As indicated in the attached pleading, certain factual assertions made by CSX in its response are erroneous and are not supported by the factual sources relied on by CSX.

In order to ensure that the Board has a complete and accurate record before it, OxyChem respectfully requests that the provisions of 49 C.F.R. §1104.13(c) be waived, and that the attached reply be accepted into the record.

Respectfully submitted,

OCCIDENTAL CHEMICAL CORPORATION  
P.O. BOX 809050  
DALLAS, TEXAS 75380

Frederic L. Wood  
Nicholas J. DiMichael  
Karyn A. Booth  
DONELAN, CLEARY, WOOD  
AND MASER, P.C.  
1100 New York Ave., N.W.  
Washington, D.C. 20005

*Attorneys for Occidental Chemical Corporation*

MARCH 3, 1999

### CERTIFICATE OF SERVICE

I hereby certify that I have this 3rd day of March, 1999, served a copy of the foregoing petition upon all parties of record in this proceeding, by first-class mail, postage prepaid, in accordance with the Rules of Practice.

  
FREDERIC L. WOOD

BEFORE THE  
SURFACE TRANSPORTATION BOARD  
UNITED STATES DEPARTMENT OF TRANSPORTATION

---

Finance Docket No. 33388

*CSX Corporation, et al. —  
Control and Operating Leases/Agreements —  
Consolidated Rail Corporation, et al.*

---

**EXPEDITED ACTION REQUESTED**

REPLY TO RESPONSE TO PETITION FOR  
OVERSIGHT AND MODIFICATION OF REMEDIAL CONDITION

Submitted on Behalf of

OCCIDENTAL CHEMICAL CORPORATION

---

OCCIDENTAL CHEMICAL CORPORATION  
P.O. BOX 809050  
DALLAS, TEXAS 75380

Frederic L. Wood  
Nicholas J. DiMichael  
Karyn A. Booth  
DONELAN, CLEARY, WOOD  
AND MASER, P.C.  
1100 New York Ave., N.W.  
Washington, D.C. 20005

*Attorneys for Occidental Chemical Corporation*

MARCH 3, 1999

BEFORE THE  
SURFACE TRANSPORTATION BOARD  
UNITED STATES DEPARTMENT OF TRANSPORTATION

---

Finance Docket No. 33388

*CSX Corporation, et al. —  
Control and Operating Leases/Agreements —  
Consolidated Rail Corporation, et al.*

---

**EXPEDITED ACTION REQUESTED**

REPLY TO RESPONSE TO PETITION FOR  
OVERSIGHT AND MODIFICATION OF REMEDIAL CONDITION

Submitted on Behalf of

OCCIDENTAL CHEMICAL CORPORATION

---

Occidental Chemical Corporation ("OxyChem") respectfully submits this reply to the response filed by CSX on February 22, 1999. CSX was responding to the petition filed by OxyChem on February 1, 1999, requesting that the Board exercise its oversight authority and modify a condition imposed on the transaction previously approved in this proceeding.

OxyChem based its request for the Board's action on certain facts that, in OxyChem's view, established that its facilities at Niagara Falls, NY, are entitled to be treated as "2-to-1" points. Certain factual assertions made by CSX in its response to OxyChem's request are not supported by the factual sources relied on by CSX. Each of those situations will be discussed below.



### **MR. DUNN'S LETTERS WERE NEVER RECEIVED BY OXYCHEM**

Attached to the CSX response was a verified statement by Mr. Ronald A. Dunn, a CSX national account manager. Mr. Dunn attached four letters to his verified statement as exhibits. Two of those letters, dated May 14, 1997 (Exhibit B) and June 30, 1997 (Exhibit D) were supposedly sent by Mr. Dunn on behalf of CSX to Mr. Robert L. Evans, then the Corporate Manager Rail Transportation for OxyChem.

In a verified statement attached to this reply, Mr. Evans states that he does "not have any recollection of having received either of those letters." Evans V.S. at 1. In addition, as stated in a reply verified statement from Mr. Daniel A. Ballard of OxyChem, even after a comprehensive search of OxyChem's files, neither the original nor any copy of either letter has been located.

Moreover, certain internal evidence from CSX's response supports a conclusion that the two letters were not, in fact, sent to OxyChem. The copies attached to Mr. Dunn's verified statement do not appear on CSX's letterhead. They do not contain a manuscript signature by Mr. Dunn. The inescapable conclusion, as stated in the testimony of Messrs. Evans and Ballard, is that the letters were never sent to or received by OxyChem.

CSX asserts in its response that these two letters should have made it clear to OxyChem that CSX's May 30, 1997 letter was not a representation of the 2-to-1 treatment CSX was going to provide at Niagara Falls, but only an "offer" to provide such treatment.<sup>1</sup> As Mr. Evans recalls, the May 30 letter containing the

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<sup>1</sup> CSX also seems to suggest later in its response that before a shipper facility can be considered a "2-to-1" point, there must be direct physical access by both carriers. Response at 17 and 23. However, the Board plainly recognizes that a 2-to-1 point exists whenever one of the two merging carriers reaches the affected shipper, not by direct physical access, but by reciprocal switching provided by the other merging carrier. *Union Pacific Corp. et al — Control and Merger — Southern Pacific Rail Corp.*, 1 S.T.B. \_\_\_\_ (1996), slip op. at 121. In this case, the Board has characterized the service provided by Conrail to CSX at Niagara Falls as equivalent to reciprocal switching. Decision 89 at 87.

clear statement that "Niagara Falls will be treated as a 2 to 1 point" was personally delivered by Mr. Dunn on that date. Evans V.S. at 2. If CSX ever intended, by means of the supposed May 14 or June 30 letters, to limit the statement in the May 30 letter to an "offer," such a limitation is ineffective, because OxyChem never received them. As Justice Holmes once observed: "An offer is nothing until it is communicated to the party to whom it is made." *United States v. Thayer*, 209 U.S. 39, 43 (1908).

**MR. MCGEE'S STATEMENT RELATED TO  
TRAFFIC "TO AND FROM CANADA"**

CSX also made certain assertions about the 1996 cancellations by Conrail of reciprocal switching at Niagara Falls. CSX asserted in its response that "There was evidence in the record of the case ... that the cancellations affected both movements through the Ontario Peninsula and to the South over Buffalo." Those assertions were supported by a single citation - to the entirety of a rebuttal verified statement by a former Conrail employee, Mr. A.J. McGee. However, CSX did not provide the Board with a ready copy of Mr. McGee's statement to demonstrate that its characterization of Mr. McGee's statement was supported by the statement itself.

Attached to this reply is a copy of Mr. McGee's statement, including particularly the pages (352-353) where he discusses the cancellations by Conrail at Niagara Falls. A careful reading of Mr. McGee's statement shows that he was referring *only* to movements "to and from Canada" and then stated that "in 1995 or 1996, CSX decided to route *the Canada traffic* via CN." McGee Rebuttal V. S. at 3, CSX/NS-177, Vol. 2A at 352 (emphasis added). As OxyChem demonstrated in its February 1 petition, the cancellations by Conrail affected other traffic movements by CSX at Niagara Falls (such as OxyChem's movements) that were not moving "to and from Canada." But a fair reading of Mr. McGee's statement

shows that he was referring only to traffic moving "to and from Canada." There was no evidence placed in the previous record by the applicants that the cancellations affected any other traffic, as was actually the case.

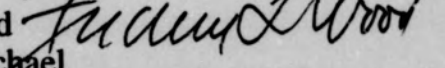
**OXYCHEM'S OCTOBER 17 LETTER  
REQUESTED NO AFFIRMATIVE RELIEF**

Because CSX failed to communicate any "offer" to OxyChem, OxyChem was free to rely on the representation in the May 30, 1997 letter that Niagara Falls would receive 2-to-1 treatment. While CSX expressed in that letter a hope that OxyChem would support its acquisition of Conrail, such support was not required. CSX's response adverts to the letter of October 17, 1997 from OxyChem included with the Comments of the Erie-Niagara Rail Steering Committee. That letter cannot be inconsistent with a non-existent "offer" that OxyChem never received from CSX. Beyond that, the letter obviously does nothing more than reiterate the hope and expectation that OxyChem will receive the 2-to-1 treatment that CSX had already represented that it would provide. It does not contain an affirmative request for relief. CSX's characterization of the letter is plainly incorrect.

For all of the foregoing reasons, OxyChem respectfully urges the Board to grant the relief requested in its February 1, 1999 petition.

Respectfully submitted,

OCCIDENTAL CHEMICAL CORPORATION  
P.O. BOX 809050  
DALLAS, TEXAS 75380

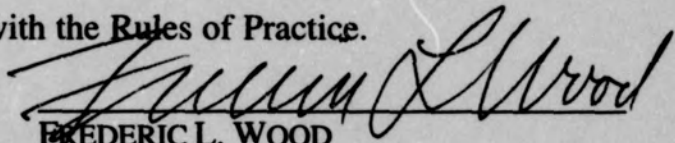
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Karyn A. Booth  
DONELAN, CLEARY, WOOD & MASER, P.C.  
1100 New York Ave., N.W.  
Washington, D.C. 20005

*Attorneys for Occidental Chemical Corporation*

MARCH 3, 1999

**CERTIFICATE OF SERVICE**

I hereby certify that I have this 3rd day of March, 1999, served a copy of the foregoing reply upon all parties of record in this proceeding, by first-class mail, postage prepaid, in accordance with the Rules of Practice.

  
FREDERIC L. WOOD



BEFORE THE  
SURFACE TRANSPORTATION BOARD  
UNITED STATES DEPARTMENT OF TRANSPORTATION

---

Finance Docket No. 33388

***CSX Corporation, et al. —  
Control and Operating Leases/Agreements —  
Consolidated Rail Corporation, et al***

---

**Verified Statement of Robert L. Evans**

My name is Robert L. Evans. I recently retired as Corporate Manager Rail Transportation for Occidental Chemical Corporation ("OxyChem"). My current address is 3040 Painters Walk, Flagler Beach, FL 32136. My responsibilities included the rail transportation needs of OxyChem. I am the same Robert L. Evans identified in certain documents that were submitted to the Board with CSX's response dated February 22, 1999.

Two of those documents (attached as Exhibits B and D to the verified statement of Mr. Ronald A. Dunn on behalf of CSX) purport to be two letters from Mr. Dunn to me dated May 14, 1997 and June 30, 1997. However, I do not have any recollection of having received either of those letters.

Mr. Dunn also says that he met with me sometime after sending me the letter dated May 30, 1997 that was attached to OxyChem's petition. In actuality, Mr. Dunn personally visited me in my office in Dallas to deliver the May 30 letter.

DECLARATION

I, Robert L. Evans, declare under penalty of perjury that the foregoing is true and correct. Further, I certify that I am qualified and authorized to file this verified statement.

Executed on FEB 25, 1999.

Robert L. Evans  
Robert L. Evans

BEFORE THE  
SURFACE TRANSPORTATION BOARD  
UNITED STATES DEPARTMENT OF TRANSPORTATION

---

Finance Docket No. 33388

*CSX Corporation, et al. —  
Control and Operating Leases/Agreements —  
Consolidated Rail Corporation, et al*

---

**Reply Verified Statement of Daniel A. Ballard**

My name is Daniel A. Ballard, Corporate Manager Transportation Pricing for Occidental Chemical Corporation ("OxyChem"). My business address is P.O. Box 809050, Dallas, Texas 75380. I am the same Daniel A. Ballard who previously submitted a verified statement that was attached to the petition filed by OxyChem with the Board on February 1, 1999.

On March 2, 1999, I completed a comprehensive search of all files maintained by R. L. Evans in OxyChem's Transportation Department filing cabinets. I did not find the original, any copies, or any reference to, Mr. Dunn's letters of May 14 and June 30, 1997.



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**ARNOLD & PORTER**

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

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

March 1, 1999

DENNIS G. LYONS  
(202) 942-5858

NEW YORK  
DENVER  
LOS ANGELES  
LONDON

0101507004



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

**FILED**

MAR 01 1999

ENTERED  
Office of the Secretary

MAR 01 1999

Part of  
Public Record

**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**

SURFACE  
TRANSPORTATION BOARD

Dear Secretary Williams:

Enclosed are an original and twenty-five (25) copies of CSX-180, "Petition for Reconsideration in Part or Clarification of Decision No. 115," for filing in the above-referenced docket.

This filing is accompanied by a check in the amount of \$150 in payment of the filing fee.

Please note that a 3.5-inch diskette containing a WordPerfect 5.1 formatted copy of the filing is also enclosed.

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

Thank you for your assistance in this matter. Please contact me if you have any questions.

**FEE RECEIVED**

MAR 01 1999

SURFACE  
TRANSPORTATION BOARD

Respectfully yours,

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

Enclosures  
via hand delivery

cc: Parties Listed on the  
Certificate of Service

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

PETITION FOR RECONSIDERATION IN PART  
OR CLARIFICATION OF DECISION No. 115

**Samuel M. Sipe, Jr.**  
**David H. Coburn**  
STEPTOE & JOHNSON LLP  
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March 1, 1999

**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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**PETITION FOR RECONSIDERATION IN PART  
OR CLARIFICATION OF DECISION NO. 115**

**INTRODUCTION AND SUMMARY**

Applicants CSX Corporation and CSX Transportation, Inc. (collectively, "CSX") petition the Board, pursuant to 49 C.F.R. § 1115.3,<sup>1</sup> to reconsider, or clarify, the following sentence of the Board's Decision No. 115, served February 8, 1999:

If NS comes to share ISRR's concerns over any potential inefficiencies associated with an ISRR-NS movement into Stout, or if, after having been given an opportunity to work, the ISRR-NS movement into Stout proves to be problematic, ISRR and NS may choose to negotiate a mutually beneficial agreement through which ISRR operates as NS' agent for movements into that plant.  
(Decision No. 115 at 4)

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<sup>1</sup> CSX indicated in its "Statement on Behalf of CSX Corporation and CSX Transportation, Inc. As Required by Decision No. 115 of the Board," CSX-178 at 2, that such a petition would be filed.



If the sentence quoted above is intended as an authorization to ISRR and NS<sup>2</sup> permitting ISRR to operate on the trackage rights granted to NS to access into the IP&L Stout Plant,<sup>3</sup> as "NS' agent," and so to operate without further order of the Board, then CSX respectfully submits that it is inconsistent with the Board's earlier decisions in this case and the Board's precedents, is unsupported by the record and, if implemented, is likely to produce consequences unintended by the Board. If that was the Board's intention, CSX respectfully requests that the Board reconsider and vacate that authorization. If the sentence was not intended as a present authorization of ISRR's operations as NS' agent with respect to the Condition No. 23 trackage rights, then CSX respectfully requests that the Board so state and thus clarify the matter.

### **BACKGROUND**

This matter relates to the provision of rail service to IP&L's Stout Plant in Indianapolis, IN.<sup>4</sup> The Stout Plant is currently served physically by rail only by INRD. INRD is an indirect 89%-owned subsidiary of CSX.

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<sup>2</sup> Respectively, Indiana Southern Railroad, Inc. and Norfolk Southern Railway Company. These and other abbreviations are as used in Decision No. 89, served July 23, 1998.

<sup>3</sup> Granted by the Board in Decision No. 89 at 177, Ordering Paragraph No. 23 ("Condition No. 23").

<sup>4</sup> IP&L has two Indianapolis plants capable of generating electricity using coal as the primary fuel, the Stout Plant and the Perry K plant. Both plants were the subject of disputes concerning the proper level of rail service alternatives to them subsequent to the Transaction. The sentence in question and the present Petition concern only Stout, not Perry K.

The Application did not propose any change in the number of carriers serving Stout. It contemplated that the Stout Plant would continue to be served physically by INRD. Conrail has a line that comes within three miles of the Stout Plant and has a connection with the INRD line serving Stout. That Conrail line, like the remainder of the Conrail lines in Indianapolis, is allocated to NYC for operation by CSX under the Transaction.

The two IP&L plants in Indianapolis burn coal mined in Southern Indiana as their fuel of choice. The mines in question are within 110 miles or less of Indianapolis and are served by short lines, including ISRR and INRD. Conrail does not directly serve the mines that supply the IP&L plants. INRD and IP&L have a rail transportation contract that dedicates the delivery of a specified percentage of Stout's coal requirements to INRD.<sup>5</sup> ISRR and Conrail have arrangements under which Conrail can receive in interchange coal trains from ISRR on the Conrail line near the Stout Plant. Under certain arrangements, INRD would then switch those trains for delivery to the Stout Plant.<sup>6</sup>

The Applicants recognized that a number of shippers in Indianapolis faced a 2-to-1 situation and their Application sought to cure those situations by giving NS

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<sup>5</sup> The terms of the contract are Highly Confidential. It is found at CSX/NS-178, Vol. 3D at 396.

<sup>6</sup> There also was a dispute in the case as to whether it was physically and/or economically feasible for IP&L to effect a buildout of a line of railroad either to the Conrail line (connecting with the ISRR line) just referred to or directly to the ISRR line itself. CSX/NS-176 at 56-57; CSX/NS-177, Vol. 2A at 306-11 (Kuhn R.V.S.); IP&L-3 Ex. 2 (Porter V.S.).

"trackage and other rights permitting it to serve all of the 2-to-1 shippers." Decision No. 89 at 93. A CSX settlement agreement with the City of Indianapolis enhanced NS' rights in Indianapolis and permitted connections between the Indianapolis short lines. It also permitted NS to build its own track in Hawthorne Yard, a major Conrail yard allocated for operation by CSX. Hawthorne Yard was to serve as the focus of NS' trackage rights operations in Indianapolis, with the related switching to be performed by CSX to effect pickup and delivery to all new, as well as existing, industries on the former Indianapolis Union Belt Railroad (the "Belt Line"). *Id.* at 93. The Application, however, took the view that the Stout Plant was not a 2-to-1 location; that it was sole-served physically by INRD before the Transaction and would be sole-served by INRD after it.

IP&L, ISRR and the Department of Justice ("DOJ") all took the view that additional rail access arrangements for Stout should be required. A principal filing in this regard was that of ISRR, which filed a Responsive Application (ISRR-4) seeking, as far as the Stout Plant was concerned, the following:

Overhead trackage rights between MP 6.0 on ISRR's Petersburg Subdivision and Indianapolis Power & Light's Stout facility located on the Indiana Rail Road Company ("INRD") rail line over a segment of the rail line currently owned by CRC and to be acquired by CSXT and a segment of INRD's rail line. (ISRR-4 at 2-3)

These trackage rights would have given ISRR the right and ability to run coal trains from the Southern Indiana mines served by ISRR directly into the Stout Plant, a

right which no rail carrier other than INRD had before the Transaction. Thus, it would have put IP&L into a position considerably better off after the Transaction than it was before.

The DOJ took a different view. It took the position (brief of the DOJ, DOJ-2 at 26-27) that “the Board should grant NS rights to connect with ISRR at MP 6 southwest of Stout, to run over CSX tracks<sup>7</sup> to INRD, and to run over INRD tracks to Stout, without interchange with INRD at Hawthorne yard.”

The DOJ stated that by doing this, the “Board could maintain the competitive status quo after the proposed transaction simply by granting NS the same access to ISRR and INRD that Conrail now enjoys.” *Id.* at 26. The DOJ also, addressing the buildout issue, said that “[t]hese rights would address Stout’s 2-1 situation, and they are narrowly tailored to remedy that anticompetitive effect.” *Id.* at 27.

Thus, the DOJ position followed the approach of substituting a Class I carrier — the carrier that the Applicants were proposing to solve 2-to-1 situations generally in the Indianapolis area — to step into the shoes of the disappearing Conrail in terms of providing enhanced access to Stout. In the DOJ’s view, that would put IP&L, as far as Stout was concerned, in the same place after the Transaction as it was before: served by single-line mine-to-plant coal runs from an 89%-owned CSX subsidiary, but with

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<sup>7</sup> The Conrail tracks being allocated for operation by CSX.



jointline service also available<sup>8</sup> via ISRR from its mines with a connecting Class I carrier having physical access to the plant. Importantly, DOJ's proposal in fact upgraded the competitive service available to Stout — by providing Stout with direct access both by NS and by CSX through its subsidiary, and by eliminating the separate INRD switching movement at the end of the haul for NS movements. As such, it was an enhancement of the existing alternative rail service available to IP&L.

For obvious reasons, ISRR and IP&L took a different view from that of the DOJ. ISRR obviously wanted to run single-line mine-to-plant coal movements to Stout, and IP&L wanted the option of receiving them. So, on brief, both of them supported direct access by ISRR from its Southern Indiana mines straight through to the Stout Plant.

For the IP&L brief (IP&L-11), direct access by ISRR was but one dish in a great smorgasbord of requests. The first of these was that "Indianapolis Should Be a Shared-Assets Area." *Id.* at 15-16. Alternatively, IP&L sought direct access by NS to the Stout Plant (and to Perry K as well). *Id.* at 16-23. But IP&L also supported the ISRR Responsive Application. *Id.* at 26-29. While IP&L left it to the reader to tally up the number of variants of access to Stout (and Perry K) that were sought — there were 14 separate conditions proposed in all (*id.* at 46-48) — they appear to amount to three

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<sup>8</sup> Note that that availability was only under a rail transportation contract with a clause defining its duration. The contract is in the Highly Confidential part of Applicants' Rebuttal, CSX/NS-178, Vol. 3D at 396.

carriers having direct access to Stout: (i) INRD/CSX; (ii) ISRR; and (iii) NS. See Requested Conditions Nos. 2, 4, 5 and 8, IP&L-11 at 46-47. The IP&L brief made some arguments as to why it would not do simply to give NS access to Stout<sup>9</sup>: IP&L claimed that the movements originating on ISRR-served mines "could be subject to higher switching charges and poorer dispatching" than INRD/CSX traffic. Id. at 26. The complaint was that, if NS handled the traffic, it would go through Hawthorne Yard for switching, which was claimed to be unnecessary and time-consuming.<sup>10</sup> There was no complaint by IP&L that NS would be an incompetent operator or otherwise incapable of performing its role in a joint-line movement of unit train coal between the ISRR and NS for delivery to Stout.

ISRR took a more focused approach — focused on itself. It had no interest, of course, in having NS serve the Stout Plant at all, as IP&L did. The fewer rail carriers to serve the Stout Plant the better off ISRR would be, so long as it was one of them. So it had little good to say about NS. ISRR said:

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<sup>9</sup> IP&L apparently wanted NS for the long run, if Western coal was ever to be used at Stout. Id. at 24-25.

<sup>10</sup> That, of course, was not the DOJ proposal; it is not clear what IP&L was attacking, since the Applicants did not propose to give NS any access to Stout; they simply proposed to keep the private contractual arrangements permitting ISRR access to Stout via interchange and INRD switch in force for as long as those private arrangements provided. IP&L itself supported NS' access to Stout, but directly, not via Hawthorne Yard. The DOJ proposal had not yet been made; it likewise involved direct access over the Conrail/INRD connection, not through yarding at Hawthorne Yard. DOJ-2 at 26-27.

For reasons previously discussed, NSR will not be a competitive factor for coal movements to Indianapolis. NSR's direct route from the nearby Indiana coal fields is over a highly-circuitous route, the eastern mines are located at too great a distance to be competitive, NSR will not gain access to ISRR, and NSR's overhead trackage rights on the Belt Line will specifically preclude NSR from serving Stout via a build-in. Moreover, NSR will be operationally constrained by the requirement that it only interchange traffic in Indianapolis with CSXT at the Hawthorne Yard. Brief of ISRR, ISRR-10 at 17.

There was no suggestion by ISRR that NS, which prides itself as the "Thoroughbred" of railroads, was incapable of efficiently handling an interchange movement with ISRR.<sup>11</sup>

With the positions of the parties and the record in this posture, following oral argument, the Board denied the Responsive Application filed by ISRR in Sub-No. 76. See Ordering Paragraph No. 65, Decision No. 89 at 181. Instead, the Board imposed Condition No. 23. Rather than restricting NS to accessing Stout via CSX switching at Hawthorne Yard, the Board significantly improved IP&L's position by permitting NS to serve Stout directly via trackage rights or through INRD switching, as selected by IP&L. Id. at 117, 177.<sup>12</sup> Responsive to the request made by the DOJ, the Board determined that

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<sup>11</sup> The DOJ proposal was not considered in ISRR's brief. It should be recalled that there was a simultaneous exchange of briefs and DOJ's brief was the first document in which it described the "relief" it sought.

<sup>12</sup> The buildout option asserted by IP&L, to the Belt Line, was also preserved, with a physical buildout required. See Decision No. 89 at 117 n.180, 177.

if the direct service option was chosen by IP&L, interchange was to be effected at MP 6.

Id. at 117, 177.

While ISRR did not file a Petition for Reconsideration in the case, IP&L did. IP&L-15. It contended, *first*, that it would be physically impossible for there to be an interchange from ISRR to NS at MP 6. IP&L-15 at 2. *Second*, it also asked the Board to clarify that CSX would not be permitted to impose a switching charge at Stout if it was served directly by NS. Id. at 2-3.

The Petition did not take issue with the Board's choice of NS to furnish direct service to Stout, to the exclusion of ISRR (unless a buildout was constructed). A footnote (id. n.1 at 1-2) raised some question concerning NS' ability to bring Western coal effectively to Stout should IP&L ever plan to burn Western coal there, but did not criticize NS's competence to handle an interchange with ISRR, although IP&L requested that the interchange be handled at Crawford Yard, where ISRR and Conrail currently interchange, rather than at MP 6.

The Board looked with favor on these IP&L requests with respect to Stout. It noted that the DOJ had said that interchange should be effected at MP 6 and required that the parties attempt to negotiate a satisfactory solution as to the interchange point. Sixty days was allowed for this. Decision No. 96 at 14. The Board granted IP&L's request that neither CSX nor INRD levy a switching charge at Stout if it was to be served directly



by NS. *Id.* at 14 n. 35.<sup>13</sup> IP&L did not seek review of the Board's Indianapolis decisions in a Court of Appeals.

As directed by the Board, conferences among the involved parties occurred, with extensions of time being granted by the Board. CSX agreed that the interchange between ISRR and NS could take place at Crawford Yard. In a filing reporting on the status of the discussions among the parties, IP&L reported to the Board that agreement on that interchange point had been reached, but made a suggestion to the Board that NS would be incapable of adequately effecting interchange with ISRR for NS' movement to the Stout Plant. Undesignated letter of Jan. 19, 1999 at 2. NS, which filed a report at the same time, did not confess as to any such incapacity. Indeed, NS stated that: "NS believes that, from an operating standpoint, the procedure proposed by CSX for interchange traffic at Crawford Yard, unlike a MP 6.0 interchange, is feasible." NS-74 at 2.

The IP&L filing (letter of Jan. 19, 1999 from its counsel) claimed (page 2, ¶ 3) that NS has "informed IP&L that it cannot efficiently or effectively compete with [INRD] . . . for ISRR-origin coal delivery to the Stout Plant." It was claimed that the interchange "cannot be workable." *Id.* The only evidentiary support furnished for this (there is no writing signed by an officer of NS) is an IP&L officer's affidavit, appended to the letter filing, that an NS manager of corporate development told him that it was "operationally

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<sup>13</sup> CSX had conceded that point. *See* CSX-163 at 3.

possible” for NS to perform the movement, and possibly to quote a rate for it, but that the rate would not be equal to or close to the existing Conrail rate for its interchange with ISRR. Weaver Aff. at 2-3.<sup>14</sup> From this, the affiant Weaver apparently drew the conclusion that “NS admitted that it would not be able to effectively compete with INRD for transportation of ISRR-origin coal to the Stout Plant.” *Id.* at 3.

This discussion between an NS manager for corporate development and IP&L about rates, if correctly reported, is apparently the background for the Board’s expression in the sentence quoted at the beginning of this Petition.

## DISCUSSION

**A. Clarification Is Necessary.** — With great respect, CSX questions whether the Board, in Decision No. 115, through the language quoted on page 1 above, meant definitively to authorize ISRR to operate over NS’ trackage rights “as NS’ agent” for the trackage rights movements to Stout, subject only to the negotiation and execution of “a mutually beneficial agreement” to that effect. Trackage rights grants historically have

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<sup>14</sup> No context for the rate discussion was provided, that is, whether the rate was for isolated “spot” movements or for performance under a replacement contract for the INRD contract upon its expiration, with a high-volume commitment. From CSX’s perspective, as of the Split Date, it intends to adopt Conrail’s published tariff rate as it pertains to the switching necessary for ISRR to access the Stout Plant (and the related divisional arrangements) and to maintain the same for the foreseeable future, subject to RCAF(U) adjustments.

required operations by the tenant "with its own crews" and with its own equipment.<sup>15</sup>

Trackage rights agreements, such as those approved in this case for CSX and NS to use each other's lines to cure competitive problems and for other purposes, do not permit the tenant road to authorize other carriers to use the tenant road's rights. That would permit a tenant to afford access to the facilities of an owner carrier without the owner's consent.

In effect, in a step for which we know of no precedent, the Board, if it has in fact made such an authorization, has granted trackage rights which can be exercised either by NS or by ISRR. The action taken, if it means that, was taken in response to an uncollaborated assertion made in the midst of a number of reports on a series of negotiating sessions, involving such issues as the appropriateness of ISRR interchange at MP 6 or at Crawford Yard, the difficulties caused by the reluctance of INRD to execute a trackage rights agreement which its parent corporation has subsequently been ordered to procure and grant, and related matters. If meant as such an authorization, the sentence radically modifies the Board's Condition No. 23, crafted by the Board after reviewing a very full record of the divergent views of the Applicants, IP&L, ISRR and the DOJ.<sup>16</sup> All four of those groups or parties had views differing from each of the others as to Stout. The DOJ's view prevailed. Now, if the Board's action should be construed as a present

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<sup>15</sup> See the discussion below at 16-17.

<sup>16</sup> By permitting direct access to ISRR and NS, the Board would also be departing from its competitive precedents by providing three carriers direct access to a facility served by only one carrier prior to the Transaction under consideration.

authorization, then, in effect, the Board has granted both NS and ISRR direct access to the Stout Plant by means of trackage rights. Thus, the "agency" theory is fictional — the new movements authorized are ISRR movements and the effect of the proposed "agency" for NS (which NS did not propose) in practice allows both ISRR and NS direct access to Stout. Direct access to Stout is what ISRR asked for in its Responsive Application, but its Responsive Application was denied. In furtherance of such denial, Condition No. 23 as imposed by the Board shows no intent to provide Stout with direct access by three different carriers: ISRR, NS and INRD.

We trust that that is not what the Board intended, and that it was simply raising a possibility of alternatives to be considered in the future under the Board's oversight powers through a formal proceeding with an opportunity to make a case and a defense. That should only happen after the Split Date, and after the NS participation in the movement has "been given an opportunity to work." Decision No. 115 at 4. In addition to that new opportunity, IP&L and ISRR will continue to enjoy the preexisting access arrangements for ISRR-origin coal that were established by Conrail and INRD under switching and tariff arrangements (and related divisional arrangements) that CSX intends to adopt and maintain for the foreseeable future, subject to RCAF(U) adjustments. We presume that NS will be a vigorous competitor in Indianapolis as it is and we believe will be everywhere that its paths cross those of CSX, and that it will employ its trackage rights. If it does not, the Board's oversight powers exist, and presumably one of the



alternatives would be the forfeiture of the NS trackage rights and their award to another party, after an opportunity to be heard.

There is evidence that the Board was not granting a present authorization in Decision No. 115 but looking only to the future and making a comment about a hypothetical possibility. Ordering Paragraph No. 3 of Decision No. 115 says that: "All requests for relief contained in the papers filed January 19, 1999, January 20, 1999, and February 3, 1999, and not specifically granted in these ordering paragraphs are denied." The argument that IP&L made to the effect that NS ought to be permitted to deputize ISRR as its agent to operate its trackage rights was made in the IP&L January 19, 1999 filing. It was not "specifically granted in these ordering paragraphs"; the Ordering Paragraphs in Decision No. 115 pertain only to the episode concerning the reluctance of INRD to grant the ordered trackage rights (Paragraphs Nos. 1 & 2) and the extent to which past and future pleadings were to be served on the parties (Paragraph No. 4). Thus, considering both the substance and the form of Decision No. 115, it appears that the sentence quoted at the start of this Petition was not intended to be a present authorization of anything by the Board, and CSX respectfully requests the Board to make that clarification.

**B. If the Sentence Was an Authorization, It Should Be Vacated. —**

Alternatively, if the Board decides not to make that clarification, CSX suggests that the

Board reconsider its authorization and vacate it. The reasons have already been touched on, and we will underline them briefly.

1. *The Board's Action in Decision No. 115 Reverses Its Own Considered Action in Decision No. 89 Imposing Condition No. 23 to Grant Direct Access to Stout Only to NS.* — In its Decision No. 89, the Board had before it a number of alternatives based on a substantial record, clear evidence and full arguments concerning access to Stout. It was clear that the existing access to Stout consisted of INRD direct and Conrail via INRD switch, and that Conrail had no direct access via ISRR or INRD to the Southern Indiana coal which Stout burned, although it (as did CSX and NS) had access to other coal sources in the East and, via the major transcontinental gateways, to Western coal. The DOJ supported access solely to NS; ISRR sought direct access only for itself; IP&L's position was "the more the merrier"; and the Applicants stood on their Application. The Board chose the DOJ's proposal, which provided substantial improvement in IP&L's situation, since it substituted direct access by NS, rather than a switch by its chief rival's subsidiary, for the Conrail interchange with INRD switch.

To overthrow that Decision on the basis of the scant evidence put forward by IP&L — a skimpy report of a conversation between an IP&L official and an NS representative, which dealt with rates, transformed in a cover letter into language which suggested operational difficulty — and to actually grant a present authorization on the basis of it, would be unusual, contrary to agency precedent and an unfair use of the

Board's discretion. The Board itself, in Decision No. 115, noted NS' view that the interchange would be feasible. See Decision No. 115 at 4, quoting NS-74 at 2. CSX believes that the Board should not and (as developed above) did not make a decision to grant authority in the future on the basis of a hypothetical.

2. The Board's Action Would Be Contrary to the Record and Unsupported By Evidence. — If the language amounts to a present authorization, it appears to have been taken without the necessary findings or record support. The Board never resolved the conflict in testimony analyzed in the second paragraph on page 4 of its Decision No. 115, between the views expressed by IP&L as to NS' abilities to provide an efficient interchange and the statements of NS itself. A decision cannot be made without resolving what the facts are. Those facts should, as the Board itself suggested, only be resolved after the Split Date and after the NS interchange has been given a chance to work. In effect, IP&L was "crying before it was hurt." The concept of "agency" operation of trackage rights should best be put off for further seasoning until and unless a real life problem is identified in terms of NS' performance and the constraints that will exist in the market on transportation pricing of fuel supply to the Stout Plant.

3. The Apparently Unforeseen Consequences of the Board's Action. — The Board's action, if a present authorization, may well have consequences which the Board did not discuss or, it appears, anticipate. The typical trackage rights agreement, through the years, has authorized and required the tenant to exercise the trackage rights with its

own equipment and "with its own crews." One need look no further than the form of trackage rights agreement proposed in the Responsive Application by ISRR to exercise trackage rights over the Conrail/CSX line and INRD lines: See ISRR-4, Ex. 2, Trackage Rights Agreement, Section 1, giving ISRR "the right to operate its trains, locomotives, cars, and equipment with its own crews . . . over the following segments . . . ." As a further example, similar provisions were identically contained in each of the trackage rights agreements put forward confrontationally by CSX and Canadian Pacific in their filings of November 30, 1998, in Sub-No. 69 in this matter: "the right to operate its trains, locomotives, cars and equipment with its own crews . . . over the following segment[s]. . . ." CSX-167, Potter V.S., Ex. 2 at 3; CP-24, Attachment A, Form A at 1. The master trackage rights agreements adopted by the NS and CSX to solve 2-to-1 situations in the Application, and approved by the Board, contained similar language: "grant to NSR the right to operate its trains, locomotives, cars and equipment with its own crews . . . over the lines of railroad owned by NYC and operated by CSXT" (CSX/NS-25, Vol. 8B at 222); "grant to CSXT the right to operate its trains, locomotives, cars and equipment with its own crews . . . over the lines of railroad owned by PRR and operated by NSR . . ." (*id.* at 609).



The granting of trackage rights requires approval and authorization by the Board (49 U.S.C. § 11323(a)(6)), or an appropriate exemption under 49 U.S.C. § 10502.<sup>17</sup> But such an approval of the grant of trackage rights is subject to 49 U.S.C. § 11326, which requires the provision of a labor-protective arrangement meeting the terms of the statute or as otherwise bargained by the rail carrier and the representative of its employees. Even where an exemption applies, the labor-protective requirements remain applicable. See 49 U.S.C. § 10502(g); 49 C.F.R. § 1180.2(d). The agency arrangements whereby the NS trackage rights would, in effect, be exercised by ISRR would be the involuntary grant of additional trackage rights by CSX and INRD, and in such a case, even the class exemption provided for in 49 C.F.R. § 1180.2(d)(7) would not be applicable, though whether it was or not, labor protection would be involved.

CSX and NS are each Class I rail carriers, and as such have, as do all Class I rail carriers, obligations under the Railway Labor Act to the various classes and crafts of their employees, including, without limitation, those operating locomotives and trains. The "agency" arrangements suggested by the Board may raise a labor issue as to who has the right to operate the trains of NS, the principal, under the agency/principal dichotomy suggested in Decision No. 115. Of course, if the "agency" was tantamount to the grant of trackage rights authority to ISRR and the Board's action was an authorization of it, an

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<sup>17</sup> It is thus unlike haulage arrangements, which can be said to involve some sort of agency, but an agency in which the owner of a line of rail is the agent of the carrier for whom haulage is being supplied, not vice versa.

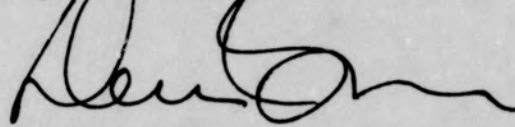
"override" of labor obstacles could be effected, subject to appropriate labor protection. It does not appear that the Board gave those issues the consideration they deserve in Decision No. 115.

For all the above reasons, if the Board in fact intended the sentence in question to be the present authorization of an agency relationship as urged by IP&L (an entity, we should note, which is not itself subject to the Railway Labor Act or to most of the provisions of subtitle IV of title 49, U.S. Code), CSX respectfully suggests that the Board vacate that authorization. By doing so, it would leave itself free to consider the issues that would be raised by such an "agency" fully and deliberately on a complete factual record when, as and if the difficulties foreseen by IP&L ever come to pass. As noted above, there might well be issues both as to the existence of the problem and the viability of the solution. Until then, the carefully crafted plan of the Board's Decision No. 89, including Condition No. 23, should be given a full and fair chance to work after the Split Date.

## CONCLUSION

The sentence quoted on page 1 should be clarified or, if intended as an authorization, vacated, as set forth above.

Respectfully submitted.



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March 1, 1999

## CERTIFICATE OF SERVICE

I, Dennis G. Lyons, certify that on March 1, 1999, I have caused to be served a true and correct copy of the foregoing "Petition for Reconsideration in Part or Clarification of Decision No. 115," to the following parties, by first-class mail, postage prepaid, or by more expeditious means:

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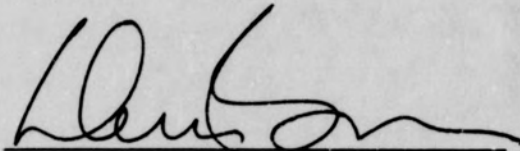
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A handwritten signature in dark ink, appearing to read "Dennis G. Lyons", written over a horizontal line.

DENNIS G. LYONS

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Office of the Secretary

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Public Record

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

**NORFOLK SOUTHERN'S MOTION TO STRIKE,  
OR IN THE ALTERNATIVE, TO FILE A REPLY**

Norfolk Southern Corporation and Norfolk Southern Railway Company (together, "NS") hereby move to strike from the record of this proceeding the February 3, 1999 letter attached hereto (the "INRD Letter"), from John H. Broadley, counsel for the Indiana Rail Road Company ("INRD"), to Secretary Williams, raising numerous objections to NS's request, in NS-74, that the Board either order the Indiana Rail Road Company ("INRD") to grant NS trackage rights necessary to permit NS to serve directly Indianapolis Power & Light Company's Stout plant, as contemplated in Decisions No. 89, or order CSX—INRD's parent—to direct INRD to do so. If the Board decides, however, to accept the INRD Letter, NS asks in the alternative that it be permitted to respond, as set out below, to various points raised by INRD.

1. The Board should strike the INRD Letter because it is an unauthorized pleading by a non-party. The Board's regulations contemplate that replies and motions addressed to pleadings may be filed only by parties to that proceeding. See 49 C.F.R. § 1104.13(a) ("A party may file a reply or motion addressed to any pleading within 20 days after the pleading is filed with the

Board, unless otherwise provided.” (emphasis added)). As INRD itself has taken pains to point out, it is not a party to this proceeding. See INRD Letter at 1-2.

As the Board well knows, INRD belatedly sought to intervene as a party *after* the Board issued its final decision in this proceeding, and the Board, quite properly, declined to permit it. See Decision No. 93 (served September 3, 1998). The Board’s refusal to permit INRD to intervene is the subject of a pending petition for review before the U.S. Court of Appeals for the Second Circuit.

Notwithstanding its conceded non-party status, INRD insists on asserting the privilege of acting like one, by filing a pleading raising numerous legal issues in opposition to a request for Board relief sought by NS.<sup>1</sup> And, even more incredibly, in arguing the merits of its position, INRD seeks to rely on the very non-party status that should prevent it from participating in the first place. See INRD Letter at 1-2. NS submits that INRD should not be allowed to have it both ways—it cannot on the one hand presume to act like a party while at the same time asserting its status as a non-party in arguing the merits of its position. Nor would it be in the Board’s interest, moreover, to accept INRD’s pleading and thereby provide INRD evidence of *de facto* party status when the Board affirmatively rejected INRD’s belated effort to join the proceeding, and that action is now the subject of pending litigation.

The Board therefore should strike the INRD Letter from the record.

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<sup>1</sup> In a followup letter to the Board, dated February 5, 1999, from INRD’s counsel, John H. Broadley, to Secretary Williams, opposing IP&L’s motion to strike the INRD Letter (which followup letter, incidentally, is also an unauthorized pleading that should be stricken), INRD argues that the INRD Letter is not a pleading, because INRD is not a party—a neat bit of defining the issue away—and because it does not “request any relief or oppose any party’s request for relief,” an assertion that is utterly astounding. The entire thrust of the INRD Letter, from beginning to end, is to oppose NS’s request that the Board take steps to ensure that INRD grants trackage rights to the Stout plant to NS.



2. If the Board decides to accept the INRD Letter, it should permit NS to file, and should consider, the NS response set out below. If the Board decides to accept the INRD Letter for filing, then NS submits that, to the extent any response by NS otherwise would be considered an unauthorized reply to a reply, *see* 49 C.F.R. § 1104.13(c), the Board nevertheless should permit NS to respond to the substance of INRD's comments. The INRD Letter affirmatively advances several legal arguments in opposition to relief sought by NS in NS-74, which NS otherwise would have no opportunity to address.<sup>2</sup> The Board thus would be denied a balanced presentation of the issues raised by INRD, hindering its ability to reach a fully-informed judgment as to those matters.

NS therefore asks that if the Board accepts the INRD Letter, it accept and consider the following reply:

#### **RESPONSE TO THE INRD LETTER**

INRD objects to the statement in NS-74 that the Board should either order INRD to grant NS trackage rights necessary to permit NS to serve directly the Stout plant of the Indianapolis Power & Light Company ("IP&L"), as contemplated in Decisions 89 and 96, or order CSX—the 89% owner of INRD—to direct INRD to do so. In sum, INRD argues that because INRD is not a party to this proceeding, the Board cannot order it to grant trackage rights to NS; that the Board also cannot order CSX to direct INRD to do so because that would require CSX to breach its fiduciary duty to INRD under Indiana law; and that it is ambiguous whether the Board in fact granted trackage rights to NS over INRD.

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<sup>2</sup> INRD, in characterizing its letter as seeking merely to "clarify on a number of points," demonstrates a knack for understatement.

NS submits that, irrespective of whether the Board could order INRD directly to grant trackage rights to NS, the Board plainly has the authority to direct CSX to see to it that INRD—its majority-owned subsidiary—does so. Further, in granting IP&L the option to choose “direct” NS service to the Stout plant, the Board plainly intended that NS obtain trackage rights over INRD, the only carrier whose tracks reach the plant.

**A. The Board clearly has the authority to order CSX to direct its subsidiary INRD to grant trackage rights to NS.**

Regardless of whether the Board could order INRD directly to grant trackage rights to NS, the Board unquestionably can direct CSX, a primary applicant in the proceeding before it, to ensure that INRD, CSX’s majority-owned subsidiary, does so.<sup>3</sup>

First, INRD does not question, nor could it, of course, that CSX, a primary applicant, is subject to the Board’s conditioning power. Moreover, INRD concedes that, were the Board to order CSX to direct INRD to grant trackage rights to NS, CSX would have the power to do so. *See* INRD Letter at 2 (“It is undisputed that CSX . . . has the *power* to enter into the transaction.” (emphasis in original)).

Having conceded that CSX has the power to do what NS asks the Board to order it to do, INRD is left to argue only that the Board cannot order CSX to direct its subsidiary INRD to grant trackage rights to NS because it would cause CSX thereby to breach its fiduciary duty to INRD’s minority shareholders under Indiana law. *See* INRD Letter at 3-4.

INRD is wrong for several reasons. First, it raises a red herring by asserting that CSX “cannot *voluntarily* engage in *self-dealing*” by causing INRD to grant trackage rights to NS.

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<sup>3</sup> Because the Board’s authority vis-a-vis CSX is clear, it is not necessary to address whether the Board can order INRD directly, and NS’s silence on that issue should not be construed as expressing a view one way or another.

INRD Letter at 3 (emphasis added). That, of course, is not at all what CSX would be doing; rather, it would be complying with a mandatory condition to the Conrail transaction, ordered by the Board as necessary to ensure that the transaction meets the public interest test it must meet under federal law. Further, it could hardly be "self-dealing" for CSX to comply with a Board order to provide trackage rights to NS, its primary *competitor*.

But even assuming, for the sake of argument, that complying with a Board order to direct INRD to grant trackage rights to NS would violate some provision of Indiana law, it is well-established that the effect of those laws would be preempted under 49 U.S.C. § 11321, which exempts rail carriers participating in a Board-approved transaction from the antitrust laws and all other law, including State and municipal law, as necessary to let the carriers carry out the transaction.<sup>4</sup>

INRD argues, without citing any authority, that the preemption provisions of § 11321 would not apply here. *See* INRD Letter at 3-4 and n.3. But well-established authority makes clear that INRD is wrong, and that § 11321 would prevent application of the Indiana law INRD discusses. In *Schwabacher v. United States*, 334 U.S. 182 (1948), a case arising out of the merger of the C&O and Pere Marquette, minority shareholders of the Pere Marquette claimed that under Michigan state law, they were entitled to a higher price per share than the valuation approved by the ICC as "just and reasonable." The Supreme Court held that the federal law granting the ICC authority to approve rail mergers (which included the predecessor to § 11321)

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<sup>4</sup> "A rail carrier . . . participating in [a Board-approved] transaction is exempt from the antitrust laws and all other law, including State and municipal law, as necessary to let that rail carrier . . . carry out the transaction, hold, maintain, and operate property and exercise control or franchises acquired through the transaction." 49 U.S.C. § 11321(a).

"is plenary and exclusive," *id.* at 198, and that the dissenting shareholders could not rely on rights founded on Michigan law to challenge what the Commission had approved. *Id.*

INRD tries to avoid the plain import of *Schwabacher* in two ways, neither of which has merit. INRD argues that unlike in *Schwabacher*, the "transaction" to which the Indiana law applies "is not before the Board and has not been approved by the Board." INRD Letter at 4 and n.4. That argument is meritless because it relies on a mischaracterization of "transaction" under § 11321. INRD says the "transaction" that it claims is not before the Board is "the grant of trackage rights by INRD to NS," thus suggesting that every condition imposed by the Board is a separate "transaction" under § 11321. By its terms, however, preemption under § 11321 applies to "transactions approved . . . by the Board under this subchapter." The subchapter referred to is Subchapter II of Chapter 113 of Title 49, which provides for Board approval of rail consolidations, mergers, and acquisitions of control. *See* 49 U.S.C. § 11323. Thus, in the context of this proceeding, the "transaction" that enjoys § 11321 immunity is the entire Conrail control transaction as approved by the Board—meaning, of course, as *conditioned* by the Board, including the condition that IP&L be permitted to receive "direct" NS service to the Stout plant over INRD. The direct access that NS asks the Board to order CSX to make happen is indeed before the Board, as a Board-approved condition to the Conrail transaction. If the Board finds it necessary, as NS believes it is, to order CSX to take actions to realize the direct NS access to the Stout plant contemplated in Decision No. 89, those actions clearly therefore would enjoy § 11321 immunity.

Additionally, INRD argues that *Schwabacher* should be disregarded because in that case, the minority stockholders seeking the protection of state law were parties to the agency



proceeding, while here, they are not. INRD thus implies that the preemptive effect of § 11321 applies only to persons who are parties to the agency proceeding. INRD Letter at 4 n.4.

That argument also is baseless. Nothing in *Schwabacher* suggests that § 11321 is so limited. Indeed, INRD's argument is refuted by the plain language of § 11321 and by common sense. Section 11321 plainly provides that under the circumstances described, rail carriers are exempt "from all other law, including State and municipal law," as necessary to carry out the transaction. Nowhere does § 11321 suggest that it is limited to protecting carriers against claims under state and other laws asserted only by parties to the agency proceeding. INRD is attempting to read into § 11321 a limitation that is not there.

Moreover, INRD's interpretation of § 11321 effectively would gut the statute by permitting *anyone* not a party to the agency proceeding to thwart a Board-approved transaction by raising challenges under innumerable other federal, state and municipal laws—the very result § 11321 is intended to prevent. That result, in turn, likely would encourage opponents of a proposed transaction before the Board to intentionally refrain from entering the agency proceeding, so as to have standing, under INRD's view, to raise state law and other legal challenges later. Thus encouraging interested persons to stay away from Board proceedings in the hope of raising legal roadblocks later, would prevent the Board from making its decisions in the first instance on the basis of the best and fullest record possible.

In sum, the Board has the authority to order CSX to direct INRD to grant trackage rights to NS; CSX, by INRD's own admission, has the power to do so; and under well-established authority, the preemptive effect of § 11321 would insulate CSX from any claim by INRD's minority stockholders under Indiana law.

**B. "Direct" service by NS to the Stout plant clearly contemplates trackage rights over INRD.**

INRD also suggests that perhaps the Board did not contemplate permitting NS to operate directly to Stout via trackage rights over INRD, but rather intended "direct" access to mean only preserving an *option* for direct access to Stout via a build-out. INRD Letter at 5.

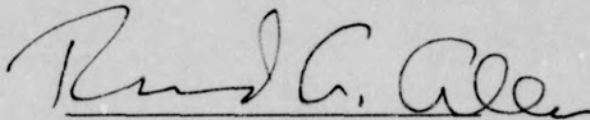
While the Board, of course, is in the best position to know what it meant when it gave IP&L the option of receiving "direct" service by NS, NS submits that Decision Nos. 89 and 93 clearly demonstrate that the Board meant "direct" service to mean trackage rights over INRD—the only rail line that accesses the Stout plant.

First, in Decision No. 89, the Board clearly distinguished "direct" access to Stout from the preservation of a build-out option. It noted that it was allowing Stout to be served "directly by NS" or "INRD switching at Stout, as selected by IP&L," but then referred separately to the build-out option. *See* Decision No. 89 at 117 and n. 180. Further, in Decision No. 93, the Board plainly referred to what it had granted in Decision No. 89 as trackage rights over INRD. *See* Decision No. 93 at 1 (noting that INRD sought to intervene for the purpose of arguing that the Board overreached its authority when it required INRD "in ordering paragraph number 23 to grant *trackage rights* to NS that would enable NS to serve the Stout plant . . . directly, rather than via a switching arrangement with INRD." (emphasis added)). It appears unambiguous, therefore, that the Board in fact intended that "direct" access meant trackage rights over INRD.

## CONCLUSION

For the foregoing reasons, the Board should strike the INRD Letter and should also, in any event, order, as NS has requested, CSX to direct INRD to grant trackage rights to NS for the purpose of carrying out the "direct" access to the Stout plant that the Board ordered in Decision No. 89 and IP&L has chosen.

Respectfully submitted,



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Dated: February 5, 1999

## CERTIFICATE OF SERVICE

I hereby certify that on this 5th day of February, 1999, a copy of the foregoing "Norfolk Southern's Motion To Strike, Or In The Alternative, To File A Reply" was served by first class mail, postage prepaid, or by more expeditious means, on the parties listed below:

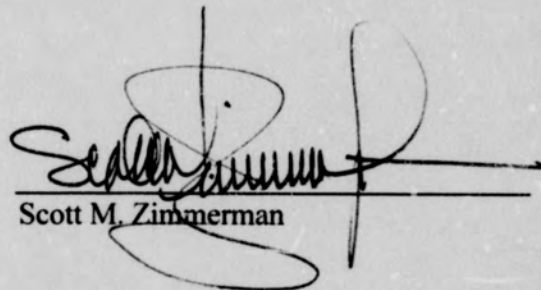
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JOHN H. BROADLEY

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February 3, 1999

Honorable Vernon A. Williams  
Secretary, Surface Transportation Board  
1925 K Street NW  
Suite 700  
Washington, D.C. 20423

Re: Finance Docket No. 33388, CSX Corporation et al. --  
Control and Operating Leases/Agreements -- Conrail, Inc.  
and Consolidated Rail Corporation.

Dear Mr. Williams:

I have received copies of letters sent to you pursuant to ordering paragraph no. 8 of Decision No. 96 entered in the captioned proceeding relating to the negotiation of interchange arrangements between Indiana Southern Railroad (ISRR) and Norfolk Southern (NS). I note that in its most recent filing, NS has strayed far beyond the confines of providing a report under ordering paragraph no. 8 and has asked the Board to *order* The Indiana Rail Road Company ("INRD") to grant certain trackage rights to NS. INRD would like to clarify on a number of points to ensure that its silence is not interpreted either by the parties to the captioned proceeding or the Board as acquiescence in positions taken by the parties in those letters.

1. Party status of INRD in the captioned proceeding

At the time Decision Nos. 89 and 96 were entered, INRD was not, and is not now, a party to the captioned proceeding. In Decision No. 93 the Board summarily rejected INRD's attempt to intervene in and become a party to

the proceeding. Because it is not a party to the proceeding and because the Board has refused it party status, INRD believes that any order of the Board issued in the captioned proceeding that purports to be directed to INRD and that either (i) requires INRD to take some action, or (ii) prohibits INRD from taking some action is *ultra vires* and would deny INRD due process under the Fifth Amendment to the Constitution.<sup>1</sup> Indeed, in The Indiana Rail Road Company v. Surface Transportation Board, Case No. 98-4387, recently docketed in the Second Circuit, INRD is taking the position that the portion of ordering paragraph no. 8 in Decision No. 96 that prohibits INRD from imposing switching charges on NS for traffic moving to IP&L's Stout Plant is *ultra vires* and denies INRD due process under controlling Supreme Court authority.<sup>2</sup>

2. INRD's obligation to negotiate interchange issues

In ordering paragraph no. 8 of Decision No. 96 the Board plainly directed CSX, NS, ISRR, and IP&L to negotiate regarding the details of an interchange at MP 6. Even if INRD were a party to this proceeding and subject to the Board's jurisdiction in this matter (neither of which is the case), the issue of interchange arrangements between ISRR and NS at milepost 6 is unrelated to INRD. No interchange arrangements at MP 6 that are within the realm of reason could affect INRD or require INRD's participation in negotiations.

3. The Board's authority to order INRD to grant trackage rights.

In its most recent filing in response to ordering paragraph no. 8, NS has asked the Board to *order* INRD to grant trackage rights to NS over INRD's line between the Belt and Stout Plant. The law is clear that the Board has

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<sup>1</sup> Excepting, of course, the Board's power under 49 U.S.C. 721(c) and 721(d) to compel INRD's testimony in the proceeding or the testimony of INRD employees.

<sup>2</sup> We note that the Board has supported the motion of Indianapolis Power & Light Company to dismiss that petition for review on the grounds that INRD was not a party to the proceeding below, conceding INRD's non-party status.

jurisdiction to order one rail carrier to grant trackage rights to another (freight) carrier over its lines under only two sections of the Interstate Commerce Act -- 49 U.S.C. 11102(a) relating to terminal trackage rights, and 49 U.S.C. 11123 relating to service failure. There is no evidence that NS is seeking Board action under section 11123, and there is absolutely no factual basis on which the Board could find an emergency exists with respect to rail service to Stout Plant. Nor is there any evidence that NS is seeking to invoke Board action under Section 11102(a). NS has not made any claims that, if true, would meet the statutory standards of that section nor has it made the type of allegations that would be necessary to meet the requirements of the Board's competitive access regulations. Whatever the power of the Board under 49 U.S.C. 11321 et seq. to impose conditions on the applicants (a matter we will address below), it is well settled that the Board's authority under the merger provisions of the Interstate Commerce Act *does not extend* to the compulsory inclusion of non-consenting railroads in mergers. *See e.g. St. Joe Paper Co. v. Atlantic Coast Line R. Co.*, 347 U.S. 298, 305 (1954) ("Congress has consistently and insistently denied the Interstate Commerce Commission the power to take the initiative in getting one railroad to turn over its properties to another railroad in return for assorted securities of the latter.")

4. The Board cannot order CSX to compel INRD to enter into a trackage rights agreement

As an alternative to its request that the Board order INRD to grant trackage rights to NS, NS asks the Board to order CSX to compel INRD to grant trackage rights to NS. Presumably, NS seeks such an order from the Board under Section 11321 et seq. It is undisputed that CSX owns 89% of Midland United which in turn owns 100% of INRD and has the *power* to compel INRD to enter into the transaction. It is equally undisputed, however, that INRD is a separate corporate entity from CSX. Because INRD has minority stock holders, CSX is not free under Indiana law to use INRD for its own purposes. Indiana law makes clear that stock holders in close corporations owe a fiduciary duty to each other. *See e.g. Barth v. Barth*, 659 N.E.2d 559, 561 (Ind. 1995). Moreover, under Indiana law CSX's directors owe a duty of loyalty *to INRD* and to *all of INRD's stock holders*. *Id.* at 561 n.6. CSX cannot voluntarily engage in self-dealing by causing INRD to enter into transactions (such as the proposed grant of trackage

Honorable Vernon A. Williams  
February 3, 1999  
Page No. 4

rights to NS) that would be for the benefit of CSX but that would be detrimental to INRD, and a Board order to do so entered in this proceeding would not provide CSX immunity to do so.<sup>3</sup>

The Board's approval of a transaction authorizes the applicant to ignore otherwise applicable state law where the state law imposes "obstacles in the path of otherwise lawful plans of reorganization." *Callaway v. Benton*, 336 U.S. 132, 140-41 (1949). The merger before the Board, however, does not include the grant of trackage rights by INRD to NS, nor, indeed, does it include any transaction to which INRD would be a necessary party, and as we have pointed out above, the Board does not have the power to compel INRD involuntarily to participate in the merger. In order to immunize implementation of a transaction from restrictions of state law -- *that transaction* -- the grant of trackage rights by INRD to NS -- must be before the Board and approved by the Board. That is plainly not the case now.<sup>4</sup>

While the Board's failure to require the inclusion of INRD in the merger and to require INRD to become an applicant limits, to some degree, the Board's ability to address competition issues presented by the merger, the Board is not without remedies that can be effected by the applicants without breaching their fiduciary or other duties under Indiana law. For example, the Board can

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<sup>3</sup> Regardless of the preemption provisions of 49 U.S.C. 11321, a Board order directing a party before it to breach a fiduciary duty owed to another person and take action that would amount to constructive (if not actual) fraud under state law, would seem to stretch the Board's undoubtedly broad conditioning authority under the merger provisions of the act well beyond the breaking point.

<sup>4</sup> Thus, the situation here is distinguished from *Schwabacher v. United States*, 334 U.S. 182 (1948), where preferred stock holders in a company that was a party to the merger before the Commission sought to take advantage of state appraisal rights to obtain more from their stock than was provided for by the merger agreement approved by the Commission. Here, the transaction to which the state law would apply -- the grant of trackage rights to NS -- is not before the Board and has not been approved by the Board.



Honorable Vernon A. Williams  
February 3, 1999  
Page No. 5

place NS in precisely the position Conrail is today vis a vis service to Stout Plant by granting NS precisely the rights that the Department of Justice's witness, Dr. Woodward, proposed -- trackage rights of the Belt to an interchange with ISRR at MP 6 plus trackage rights on the Belt to serve Stout Plant directly through any build-out that IP&L might construct. See DOJ-1, Woodward V.S. at 24. Alternatively, the Board has other remedies available that would be within the applicants' power to satisfy without breaching fiduciary obligations to INRD or anyone else.

5. NS's interpretation of the Board's decisions maybe in error

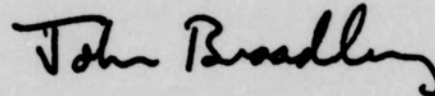
Finally, NS and INRD have assumed that the Board granted NS direct access to the Stout Plant in the form of trackage rights over INRD's tracks instead of IP&L's requested relief of direct access to Stout Plant via a build-out to the Belt. While the Board's language in Decision Nos. 89 and 96 is subject to that interpretation, the language is ambiguous. The Board did not use the phrase "trackage rights" when referencing INRD in those decisions and did not address compensation for any trackage rights, suggesting it may not have contemplated such an arrangement. However, the Board did say, in reference to the interchange at milepost 6, that it "... was necessary to permit NS to compete as Conrail does now at Stout." (Decision 96, at 14). Conrail does not now compete by having trackage rights over INRD but does compete in the manner the Board specifically ordered for NS: by preserving the option for direct access through the build-out or through an INRD switch into the plant.

The only express reference in Board decisions to NS trackage rights over INRD's line is in Decision No. 93 denying INRD leave to intervene. There, the Board asserted that IP&L and DOJ had asked for NS trackage rights over INRD. IP&L of course, made no such express request, and neither did DOJ in its comments and request for conditions. DOJ's sole reference to NS trackage rights *over INRD* was in its final brief when it used the term -- again in the larger (erroneous) context of putting NS in the same competitive position at Stout Conrail is today.

Honorable Vernon A. Williams  
February 3, 1999  
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INRD does not intend to make by this letter, and this letter should not be construed as, a general appearance in the captioned proceeding.

Yours very truly,

A handwritten signature in cursive script that reads "John Broadley".

John Broadley

cc: Chairman Linda Morgan  
Vice-Chairman Clyburn  
Louis Mackall, Esq. (STB)  
Frederick Burkholz, Esq. (CSX)  
Richard A. Allen, Esq. (NS)  
Karl Morell, Esq. (ISRR)  
Michael McBride, Esq. (IP&L)

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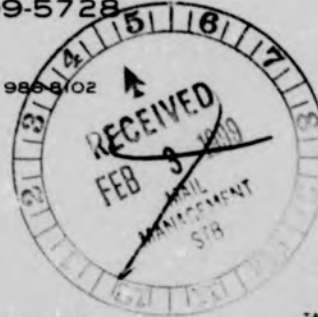
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February 3, 1999



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**VIA HAND DELIVERY**

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**FEB - 4 1999**

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The Honorable Vernon A. Williams  
Secretary, Surface Transportation Board  
1925 K Street, N.W., 7th Floor  
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. Finance Docket No. 33388

Dear Secretary Williams:

Enclosed for filing in the above-referenced proceeding are the original and 10 copies of IPL-20, the "Motion to Strike Unauthorized Pleading of The Indiana Rail Road Company, and request That the Board Do So Without Awaiting Replies to This Motion" on behalf of Indianapolis Power & Light Company.

We inadvertently failed to designate IPL's letter to the Board, dated January 19, 1999, as IPL-19, but hereby request that it be designated as such.

Also enclosed is a 3.5" diskette containing the Motion in WordPerfect format, and three additional copies for time-stamping and return via our messenger.

Respectfully submitted,

*Michael F. McBride*

Michael F. McBride  
Brenda Durham

Attorney for Indianapolis Power & Light  
Company



The Honorable Vernon A. Williams  
February 3, 1999  
Page 2

cc (w/encl.): Richard A. Allen, Esq.  
Karl Morell, Esq.  
Fred E. Birkholz, Esq.  
George A. Aspatore, Esq.  
Dennis G. Lyons, Esq.  
Frederic L. Wood, Esq.  
John Broadley, Esq.

IPL-20

ENTERED  
Office of the SecretaryBEFORE THE  
SURFACE TRANSPORTATION BOARD

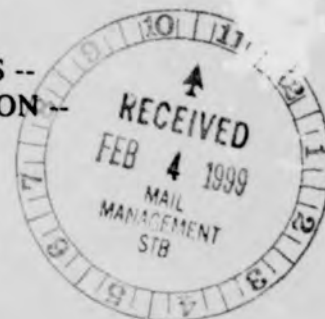
FEB - 4 1999

Part of  
Public Record

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 STRIKE UNAUTHORIZED PLEADING  
 OF THE INDIANA RAIL ROAD COMPANY, AND  
 REQUEST THAT THE BOARD DO SO WITHOUT  
 AWAITING REPLIES TO THIS MOTION

Pursuant to 49 C.F.R. §§ 1104.8, 1104.13, and 1117.1, Indianapolis Power & Light Company ("IPL") hereby moves to strike the February 3, 1999 letter ("letter") filed herein by The Indiana Rail Road Company ("INRD"), on the ground that INRD is not a party to this proceeding and therefore has no right to make any submission to the Board on the matters pending before it. See also 49 C.F.R. § 1104.4 (3)-(4)(there must be "good ground for the document" and that the party has not "interposed the document for delay").<sup>1</sup>

<sup>1</sup> IPL finds it impossible to conclude (a) that INRD thought it had "good ground" for its letter, when it had already been denied intervention in this proceeding and has not sought reconsideration of that ruling, or (b) that the February 3, 1999 letter was not "interposed ... for delay," given the already protracted nature of this dispute. INRD is represented by eminent counsel, a former General Counsel of the ICC, who could not be confused about either INRD's lack of right to make submissions in a proceeding in which it is not a party, or that such an argumentative pleading (even in the form of a letter) would not be likely to delay the disposition of the issues surrounding IPL's Stout Plant. Although IPL believes that there is no basis to hear any further from INRD in this proceeding, at the very least appropriate

(continued...)

The Board has been down this track before. INRD sought leave to intervene **after** the Board issued Decision No. 89, but the Board denied that request in Decision No. 93. The Board therefore made it clear that INRD had no right to file further pleadings in this proceeding, but INRD's letter blatantly ignores the Board's order. What good is it to rule on such a request, and deny it, if the requesting entity simply proceeds as if its request were granted? The Board's very authority to conduct this proceeding as it chooses is at stake here.

Moreover, INRD has previously conducted itself as a party, notwithstanding Decision No. 93. It filed a Petition for Review of Decision No. 96, notwithstanding Decision No. 93. That Petition was filed in the D.C. Circuit, but was transferred to the Second Circuit, and was there assigned No. 98-4387. IPL promptly moved to dismiss INRD's Petition in No. 98-4387, and that motion was **granted** on February 2, 1999.<sup>2</sup> (Counsel for IPL were informed of the order by the Clerk's office of the Second Circuit, but do not as yet have a copy of the order.)

It therefore is critical to protect the record in these proceedings for the Board to strike INRD's letter, or INRD will again pretend to have been a party to these proceedings, file another Petition for Review, and rely on the arguments it made in its letter. The Board and the parties to this proceeding should not be subject to such blatant evasion of the Board's orders.

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<sup>1</sup>(...continued)  
practice should have required INRD to seek leave to file its letter.

<sup>2</sup> INRD also filed a Petition for Review of Decision No. 93, which denied its request for leave to intervene herein. That Petition was also filed in the D.C. Circuit, but was transferred to Second Circuit and assigned Case No. 98-4385. IPL has not moved to dismiss that Petition; INRD will therefore have a right to seek to convince the Second Circuit that it should have been allowed to intervene, even though it was more than one year late in seeking to do so.

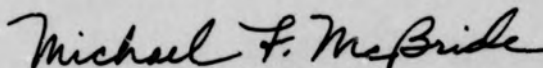
IPL has not responded to the substance of INRD's letter for the reasons stated herein, but wishes its silence not to be construed as acquiescence to any portion of INRD's arguments. IPL anticipated some of them, and refuted them, in its January 19, 1999 letter herein. Other parts of INRD's letter seem directed at creating a dispute with its parent CSX. But such intra-corporate disputes are not the Board's or IPL's concern, and the Board need not involve itself in them for that reason as well.

Lastly, INRD should not be allowed to cause any delay in this proceeding merely by filing an unauthorized pleading, particularly in light of the already protracted nature of this dispute. See letters submitted January 19-20, 1999 herein. Accordingly, IPL requests that the Board rule on this Motion without awaiting a reply from INRD or any other party, because it has already denied INRD party status. See Decision No. 93 (denying INRD's request for intervention before IPL replied to it).

Conclusion

INRD's February 3, 1999 letter should be stricken without awaiting a reply to this Motion from INRD or any other party.

Respectfully submitted,



Michael F. McBride  
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Attorneys for Indianapolis Power & Light  
Company



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**

---

**CERTIFICATE OF SERVICE**

I hereby certify that I have served, this 3rd day of February 1999, a copy of the foregoing "Motion to Strike Unauthorized Pleading of The Indiana Rail Road Company, and Request That the Board Do So Without Awaiting Replies to This Motion" (IPL-20), by first-class mail, postage prepaid, or by more expeditious means, upon the following:

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

Richard A. Allen, Esq.  
Zuckert, Scoutt & Rasenberger, L.L.P.  
888 Seventeenth Street, N.W.  
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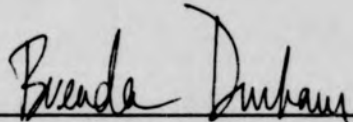
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Brenda Durham

STB FD

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193204



DONELAN CLEARY  
WOOD & MASER, P.C.

Hon. Vernon A. Williams  
Secretary  
Surface Transportation Board  
1925 K Street, NW  
Washington, DC 20423

February 1, 1999

ENTERED  
Office of the Secretary

FEB 02 1999

Part of  
Public Record



Re: Finance Docket No. 33388, *CSX Corporation, et al.*  
— *Control and Operating Leases/Agreements* —  
*Consolidated Rail Corporation, et al.*

Dear Mr. Williams:

Enclosed for filing with the Board in the above proceeding are twenty-five copies of the public version of the Petition for Oversight and Modification of Remedial Condition, that was filed on behalf of Occidental Chemical Corporation yesterday. Also enclosed is a diskette containing the public version of the petition in electronic format, as required by the procedures applicable to this proceeding.

If there are any questions concerning this matter, please contact me by telephone at the number shown below, or by electronic mail at the address shown below.

Sincerely yours,

FREDERIC L. WOOD

E-mail: r.wood@dcwm.com

ATTORNEYS AND COUNSELORS AT LAW

1100 New York Avenue, Suite 750, N.W., Washington, D.C. 20005-3934, Tel: 202-371-9500, Fax: 202-371-0900

**PUBLIC VERSION**

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

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Finance Docket No. 33388

***CSX Corporation, et al. —  
Control and Operating Leases/Agreements --  
Consolidated Rail Corporation, et al.***

---

**EXPEDITED ACTION REQUESTED**

**PETITION FOR OVERSIGHT AND MODIFICATION OF REMEDIAL CONDITION**

**Submitted on Behalf of**

**OCCIDENTAL CHEMICAL CORPORATION**

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OCCIDENTAL CHEMICAL CORPORATION  
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DALLAS, TEXAS 75380

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*Attorneys for Occidental Chemical Corporation*

**FEBRUARY 1, 1999**



**PUBLIC VERSION**

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

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Finance Docket No. 33388

***CSX Corporation, et al. —  
Control and Operating Leases/Agreements —  
Consolidated Rail Corporation, et al.***

---

**EXPEDITED ACTION REQUESTED**

**PETITION FOR OVERSIGHT AND MODIFICATION OF REMEDIAL CONDITION**

**Submitted on Behalf of**

**OCCIDENTAL CHEMICAL CORPORATION**

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Occidental Chemical Corporation ("OxyChem") respectfully petitions the Surface Transportation Board to begin proceedings under the oversight condition imposed in Decision No. 89 for the purpose of establishing that more than one rail carrier should have a right of access to and from OxyChem's chemical production facilities located at or near Niagara Falls, New York in order to provide rail transportation service. It is essential that the Board promptly commence these proceedings before the "Closing Date" of the acquisition of control of Consolidated Rail Corporation ("Conrail") by CSX Corporation

("CSX") and Norfolk Southern Corporation ("NS") to prevent harm to the competitive position of OxyChem at Niagara Falls.<sup>1</sup>

## FACTUAL BACKGROUND

OxyChem is a diversified manufacturer of commodity chemicals, plastics and specialty products. OxyChem operates a large production facility located in Niagara Falls, NY, that produces chlorine and caustic soda, as well as other products. This plant ships about 10,000 carloads annually. Ballard V.S. at 1.<sup>2</sup> The OxyChem facilities at Niagara Falls presently are served directly only by the Conrail.<sup>3</sup> In early 1996, CSX Transportation, Inc. ("CSXT") did not serve Niagara Falls directly, but had access to the nearby points of Suspension Bridge or Buffalo, NY.<sup>4</sup> Prior to April 1, 1996, and for many years before, Conrail had maintained in effect tariffs that provided for unrestricted reciprocal switching at Niagara Falls to and from a number of shippers (including OxyChem) for the account of CSXT. At the time of publication, on October 24, 1994, of Original Page 164 in Conrail Tariff CR ICC 8001-D, the charge for this service was \$390 per car. These tariff provisions remained essentially unchanged until April 1, 1996. In 6<sup>th</sup> Revised Page 164 to Tariff 8001-D, effective on that

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<sup>1</sup> The "Closing Date" is the date on which CSX and NS will effectuate the division of Conrail's assets and begin separate operations. Decision No. 89 at 174, n. 263. It was recently announced the Closing Date will be June 1, 1999. See Attachment A.

<sup>2</sup> Included with this petition are two verified statements; one by Mr. Daniel A. Ballard of OxyChem and another by Mr. John Friedmann of Norfolk Southern Corporation. Also included is a Highly Confidential Appendix ("H.C. App."), which is not included in the public versions of this petition. Certain matters in this petition are also highly confidential and have been redacted from the public version. The Highly Confidential version of this Petition is submitted under seal in accordance with 49 C.F.R. §1104.14 and the protective order adopted by the Board in this proceeding. Decision No. 1 (served April 16, 1997).

<sup>3</sup> The facilities are located on a rail line that was formerly operated by the Niagara Junction Ry., a switching carrier owned by three of Conrail's predecessor lines. Cf. *Niagara Jct. Ry. Co. Control*, 267 I.C.C. 349 (1947).

<sup>4</sup> Until early 1996, CSXT's access to Suspension Bridge was obtained by means of trackage rights over a Canadian rail carrier from Detroit. CSXT's access to Buffalo was via a connection to the Buffalo & Pittsburgh Railroad, Inc. See note 6, *infra*.

date, Conrail canceled the availability of reciprocal switching for CSXT for all shippers at Niagara Falls.

At the time of the cancellation of reciprocal switching by Conrail, OxyChem and CSXT had in effect several rail transportation contracts applicable to the movement of chemicals from OxyChem's Niagara Falls facilities to several Eastern or Midwestern destinations. Those contracts did not include Conrail as a contracting party, even though CSXT did not have direct access to the OxyChem facilities at Niagara Falls. [[Redacted]]

For example, in Contract CSXT-C-61649 (effective March 1, 1993) (H.C. App. Tab 1), applicable to the movement of caustic soda from Suspension Bridge, NY<sup>5</sup> to Baltimore, MD, the following provision appeared in Paragraph 12:

[[Redacted.]]

(emphasis in original). [[Redacted]]<sup>6</sup> Conrail was clearly not a participant in the line-haul movement, but, although not explicitly named, it was the only rail carrier that could provide the reciprocal switching service at Niagara Falls that would allow CSXT to perform under this contract [[Redacted]]. It should also be noted that Conrail was and still is able to provide a competing single-line service between Niagara Falls and the Eastern destination covered by the contract.

In 1996, Contract CSXT-C-61649 was amended.<sup>7</sup> The contract amendment was sent to OxyChem by CSXT's national account manager in Dallas, TX, with a letter dated April 30, 1996. The amendment was executed by OxyChem on May

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<sup>5</sup> [[Redacted]].

<sup>6</sup> "BPRR" refers to the Buffalo & Pittsburgh Railroad, Inc., which acquired CSXT's former line from Buffalo to New Castle, PA, in 1987. ICC Fin. Dkt. No. 31116 *Buffalo & Pittsburgh R. Inc. — Exemption*, 52 Fed. Reg. 40000 (Oct. 26, 1987).

<sup>7</sup> There were a few other amendments in the meantime that have no direct bearing on the issues here,[[Redacted]].



14, 1996. However, the amendment carries an effective date of March 1, 1996.<sup>8</sup>  
 [[Redacted]]<sup>9</sup>

### **MERGER PROCEEDINGS**

Early in 1997, CSX and NS reached agreement on a joint acquisition of control of Conrail, and, after approval by the STB under the provisions of 49 U.S.C. §§11321-11325, for the division of Conrail's assets between them. CSX and NS first filed their notice of intent with the STB on April 10, 1997, and then filed an application on June 23, 1997, for approval of the transaction.

Of significance to the issues involved here, the transaction assigns to CSXT all of Conrail's lines between Buffalo and Suspension Bridge (including all of the lines of the former Niagara Junction) that Conrail now uses to serve OxyChem's facilities. However, NS will be given overhead trackage rights between Buffalo and Suspension Bridge, without the right to serve any shippers along the line. *See CSX/NS-18 at 36; CSX/NS-25 at 95 and 111.*

After the proposed acquisition of Conrail was announced, but *before* the application was filed, CSXT sent a letter to OxyChem. *See Attachment B.* This letter, dated May 30, 1997, from a CSXT national account manager, stated, in part:

In acceptance of your request, Niagara Falls, NY will be treated as a 2 to 1 point under the terms of the acquisition. Access will be granted via Buffalo, NY for a \$390/car charge. CSXT is glad we are able to afford OxyChem the competitive access at Niagara Falls you had in the past.

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<sup>8</sup> Pursuant to the provisions of new 49 U.S.C. § 10709, enacted by the ICC Termination Act of 1995, and effective on January 1, 1996, the summary of the amendment is no longer filed with the STB, and the contract amendment became effective upon execution in accordance with its terms.

<sup>9</sup> Two other contracts with similar provisions were revised in similar fashion: Contract CSXT-C-61730, applicable to the movement of chlorine to points in Florida; and Contract CSXT-C-64857, applicable to the movement of chlorine to Cincinnati. H.C. App. Tabs 2 and 3, respectively.. Conrail can also provide competitive service for the movements covered by these contracts.



The letter goes on to express CSXT's hope that OxyChem would support the acquisition of Conrail by providing a verified statement. OxyChem did not provide a supporting letter for inclusion in the application as filed on June 23, 1997. However, OxyChem did file a verified statement by Mr. Antonio Orbegoso with the STB on October 20, 1997, generally supporting the application subject to certain specified implementation conditions.

During the course of the proceedings for approval of the Conrail acquisition, a group of shippers and other interests from the Niagara Frontier area of Western New York contended that Conrail's 1996 cancellation of reciprocal switching for CSXT at Niagara Falls was related to the control transaction. They urged the STB to provide a remedy, in accordance with its current policies set out in 49 C.F.R. § 1180.1(c)(2)(i), for the loss of competitive alternatives caused by the cancellation, because shippers in Niagara Falls that previously had direct or indirect access to two carriers would otherwise be limited to a single carrier. See Comments of Erie-Niagara Rail Steering Committee, ENRS-6 at 28-30.

In response to this contention, the Applicants' Rebuttal contained the following statements:

Presently, Conrail is the only carrier with direct access to Niagara Falls shippers. Several years ago, CSX served Niagara shippers via trackage rights over CN lines through Canada. Conrail provided switching for CSX at Suspension Bridge to and from shippers in Niagara. In December of 1995, however, CSX negotiated a contract with CN pursuant to which CN carries CSX traffic over CN lines as CSX's agent. Since 1995, CSX has not used its trackage rights over CN. *Until December 9, 1997, CN carried this CSX traffic across the International Bridge at Fort Erie, through Buffalo and into Conrail's Frontier Yard.* Conrail then transported this CSX traffic to and from the Frontier Yard as part of the line haul.

STB Finance Docket No. 33388, CSX/NS-176 at 66 (emphasis added).

The STB has consistently, in all recent rail merger proceedings, recognized the need to protect all so-called "2-to-1" points from the effects of the proposed transaction. *See, e.g.,* Fin. Dkt. No. 32760 *Union Pacific Corp., et al. — Control and Merger — Southern Pacific Rail Corp., et al.*, Decision No. 44. at 98-103 (served Aug. 12, 1996). In this proceeding, the Board noted the willingness of the Applicants to agree to protect all shippers at 2-to-1 locations from harm. Decision No. 89 at 34; 51. Indeed, the Board said that "we will ensure, that wherever that would happen, applicants will provide one another sufficient trackage rights at reasonable rates, together with any other conditions that might be called for, to remedy the situation." *Id.* at 51.

In accordance with this well-established policy, the STB responded to the shippers' concerns about the situation at Niagara Falls in its principal decision, Decision No. 89 (served on July 23, 1998). The STB, plainly relying on the assertion from Applicants' rebuttal quoted above, assumed that the *only* means by which CSXT had obtained access to customers at Niagara Falls was via its trackage or haulage rights that crossed through Canada from Detroit and then over one of the two Niagara River bridges, either at Fort Erie, New York (International Bridge), or Niagara Falls (Suspension Bridge). In any event, the Board concluded that relief from the cancellation was appropriate:

We find that these arrangements whereby Conrail receives compensation for the short pick-up and delivery component of International Bridge or Suspension Bridge movements into and out of the Niagara Falls area via a division of a line haul rate to be no different in substance from its prior compensation arrangement, when its compensation was termed a switching charge.

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In their settlement with [The National Industrial Transportation League], CSX and NS have agreed to mitigate the market power they will inherit from Conrail at exclusively served points where Conrail performs switching services. We find that the terms of that

agreement, as they apply to reciprocal switching, should be applied to those points in the Niagara Falls area where Conrail recently replaced its switching charges with equivalent "line-haul" charges, and to those movements to which the switches and line-haul rates applied (i.e. movements using International Bridge or Suspension Bridge).<sup>10</sup>

STB Decision 89 at 87. In accordance with this finding, the STB approved the transaction subject to the following condition, among numerous others:

The \$250 maximum reciprocal switching charge provided for in the NITL agreement must be applied to certain points in the Niagara Falls area for traffic using International Bridge and Suspension Bridge, for which Conrail recently replaced its switching charges with so-called "line-haul" charges.

STB Decision 89 at 178, Ordering Paragraph No. 37. In summary, the STB is requiring CSXT and NS to treat the points in Niagara Falls where Conrail canceled reciprocal switching in 1996 as 2-to-1 points, but only for traffic using the two international bridges.

The STB also imposed two additional conditions that are relevant here. First, "Applicants must adhere to all of the representations they made during the course of this proceeding, whether or not such representations are specifically referenced in this decision." STB Decision 89 at 176 Ordering Paragraph No. 19. Second, the Board imposed a general condition establishing a 5-year oversight period, explicitly "retaining jurisdiction to impose additional conditions if, and to the extent, we determine that additional conditions are necessary to address unforeseen harms caused by the transaction." *Id.* at 160, Ordering Paragraph No. 1.

On August 22, 1998, the applicants consummated the transaction by taking control of Conrail. *See* Letter from Applicants' Counsel dated August 24, 1998.

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<sup>10</sup> The NITL Agreement referred to provided, among other things, for the reduction by NS and CSX of Conrail's reciprocal switching charge to a maximum of \$250 per car for five years (subject to inflation adjustment). Decision 89 at 57.



No Applicant has sought reconsideration of the Niagara Falls condition. Therefore, having consummated the transaction, CSX is fully bound by all the conditions imposed by the Board. The issue brought before the Board by this petition is whether the Niagara Falls condition, as it presently is stated, is adequate to protect shippers like Occidental Chemical located at Niagara Falls from the loss of competitive alternatives that would be caused by the transaction when it is finally implemented on the Closing Date.

#### **CURRENT SITUATION**

CSXT has now stated to OxyChem that it will not treat Niagara Falls as a 2-to-1 point after the Closing Date<sup>11</sup> when it acquires operational control of the Conrail lines in the Niagara Falls area. It has specifically stated that the May 30, 1997 letter is "off the table." Ballard V.S. at 4. In addition, CSXT has not definitively indicated to OxyChem which of its traffic, if any, at Niagara Falls will be subject to the condition imposed by the STB limiting the maximum switching charge to \$250 per car. In essence, there has been no indication from CSXT as to the manner in which it will implement this condition. For the condition to have any meaning, CSXT, after it acquires and begins to operate the Conrail lines in the Niagara Falls area, will have to provide access by another rail carrier to all of the shippers at Niagara Falls that had reciprocal switching for CSXT that was canceled in 1996 by Conrail. Presumably, such access will have to be accomplished in the same manner that Conrail provides access to CSXT, either by reciprocal switching at a charge of \$250 or by providing a "line-haul" service between Niagara Falls and Buffalo at a maximum division of \$250 per

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<sup>11</sup> As indicated above, on Wednesday, January 20, 1999, NS announced, presumably with the concurrence of CSX, that the separate operation of the assets acquired from Conrail will begin on June 1, 1999.



car. The expectation would be that CSXT will provide access to NS, which will interchange traffic with CSX at Buffalo's Frontier Yard. *Friedmann V.S.* at 2.<sup>12</sup>

In OxyChem's case, there are two categories of traffic that are at issue. The situation with regard to the category of OxyChem's CSX traffic that was handled or could be handled in connection with BPRR at Buffalo clearly requires relief from the Board. On the one hand, the *current* Niagara Falls condition imposed by the Board *only* applies to traffic that *moves via the two Niagara River bridges*. On the other hand, it appears that the limited scope of this condition occurred because CSX, the applicant with full knowledge of the situation at Niagara Falls, *failed to inform the Board fully and completely regarding the situation at Niagara Falls. OxyChem had traffic under contract with CSXT that was being handled under reciprocal switching via Buffalo and an interchange with BPRR at the time of the 1996 cancellation by Conrail of reciprocal switching for CSXT at Niagara Falls.* CSX continued to receive this traffic after the cancellation, with Conrail moving the traffic to Buffalo under a new arrangement with CSXT exactly as it did before, without using the international bridges. Nonetheless, those new arrangements in 1996 for the movement via Buffalo were and are identical to the kind of arrangements between CSX and Conrail that were found by the Board to warrant relief for traffic moving via the international bridges.

However, CSXT never informed the STB of the existence of these arrangements. If their existence had been disclosed to the STB, it is probable that

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<sup>12</sup> There are other carriers, specifically the two Canadian rail carriers, that also reach the Buffalo area and that could be given access by CSXT. However, their route structures do not replicate the route structures provided by CSX. Conrail still provides reciprocal switching at Niagara Falls to Canadian Pacific (formerly the Delaware & Hudson) at an undisclosed charge, but only on traffic that moves via Buffalo in connection with CP on routes that "do not pass through Niagara Falls, NY." See Item 18040, Note 1, 7<sup>th</sup> Revised Page 164, Conrail Tariff 8001-D.

the STB would have imposed a broader condition, i.e., a condition that was not limited to traffic using International Bridge or Suspension Bridge.

Moreover, CSXT, in its letter of May 30, 1997, to OxyChem, had made a representation that such traffic would be treated as 2-to-1 traffic and that "CSXT is glad we are able to afford OxyChem the competitive access at Niagara Falls you had in the past." Attachment B. In reliance on this representation, OxyChem had not requested relief from the Board for the situation at Niagara Falls. Ballard V.S. at 3-4. Only after the Board's Decision No. 89 was issued did CSX inform OxyChem that it would not adhere to this representation.

The other category of traffic involves OxyChem's traffic that did move to or from the Niagara Falls facility via the international bridges. Any traffic that was handled in a route involving the use of either the International Bridge or Suspension Bridge is clearly subject to the STB condition limiting the maximum switching charge or division to \$250 per car. CSX has yet to indicate to OxyChem how that traffic will be handled in order to comply with the Board's condition.

**OXYCHEM IS ENTITLED TO RELIEF FROM THE BOARD TO PREVENT HARM CAUSED BY THE ACQUISITION OF CONRAIL**

OxyChem has been unable, despite efforts over the last several months, to reach a satisfactory voluntary resolution with CSXT of its concerns about the implementation of the transaction for acquiring Conrail as it may affect the situation at Niagara Falls. OxyChem clearly has the right to seek relief under the STB's general oversight condition. Such relief can be sought at any time, and can be invoked by submitting an appropriate petition for additional or modified conditions under the oversight authority of the Board. *See, e.g.,* Fin. Dkt. No. 32760 (Sub-No. 26) *Union Pacific Corp., et al. — Control and Merger —*

*Southern Pacific Rail Corp., et al., [Houston/Gulf Coast Oversight]* Decision No. 1 at 5 (corrected decision served May 19, 1998).

It is now clear that shippers such as Occidental Chemical had access to two-carrier service at Niagara Falls for the transportation of traffic that did *not* involve moving via the international bridges. CSX's refusal to provide access to a second carrier for the shippers at Niagara Falls after it implements its acquisition of control of the Conrail lines involved pursuant to the approved transaction would directly harm OxyChem. In Decision No. 89, the Board has clearly indicated that it will provide a remedy wherever there is a 2-to-1 situation. Decision No. 89 at 51. It has also said that:

We are retaining jurisdiction to impose additional conditions if, and to the extent, we determine that additional conditions are necessary *to address unforeseen harms caused by the transaction.*

*Id.* at 160 (emphasis added).

As NS has stated in the attached verified statement from John Friedmann, a Director of Strategic Planning, it was and is "very much aware of the STB's well established principle that shippers who would otherwise go from service by two railroads to one as a result of a consolidation should retain two railroad service." Friedmann V.S. at 1. The Applicants represented to the Board that they had agreed to provide each other access in all situations where the transaction would result in such a reduction. CSX/NS-18 at 18. As Mr. Friedmann states, even where the applicants have become aware of the existence of a 2-to-1 situation while the transaction was awaiting approval, they have "agreed to provide appropriate relief." *Id.* at 1-2.<sup>13</sup> It is thus clear that both the Board and the applicants recognize the need to protect all shippers in 2-to-1 shippers from

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<sup>13</sup> CSX's unwillingness to provide relief voluntarily at Niagara Falls stands in stark contrast to NS' willingness to agree to provide CSX access to the Niagara Frontier Food Terminal when it was discovered that this was a "2-to-1" point. See Decision 89 at 86, 137 and CSX/NS-176 at 68.



harm. The Board's Niagara Falls condition only partially addresses the harm caused by the transaction as stands approved, and it must be modified accordingly.

It is OxyChem's position that the appropriate means to remedy this situation is a modification of the Niagara Falls condition to remove the limitation of its application to traffic using International Bridge and Suspension Bridge. Under all of the circumstances, especially CSX's failure fully to inform the STB regarding the situation existing at Niagara Falls, as well as its representation to OxyChem in the May 30, 1997, letter that Niagara Falls "will be treated as a 2 to 1 point," such relief is clearly required.

**EXPEDITED ACTION ON THIS PETITION IS REQUESTED**

OxyChem would like to request bids for the transportation of its Niagara Falls traffic in the near future. Ballard V.S. at 4. It is essential that the situation at Niagara Falls be determined well in advance of the scheduled Closing Date of June 1, 1999. This will enable OxyChem to conduct the bidding process with full understanding as to whether or not more than one carrier will be able to bid to provide this service. In addition, this will enable OxyChem to complete the bidding process, establish the rates and service terms, and position its rail equipment to support the service.

For these reasons, OxyChem respectfully requests that this request for relief be handled expeditiously.

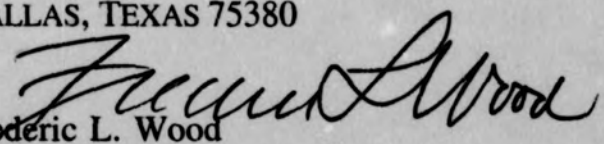


**CONCLUSION**

For all of the foregoing reasons, Occidental Chemical Corporation respectfully requests the Board expeditiously to exercise its authority under Ordering Paragraph No. 1 in Decision No. 89 for the purpose of conducting oversight of the implementation of the transaction approved in this proceeding. The Board is also respectfully requested, in the course of such oversight, to modify Ordering Paragraph No. 37 in Decision No. 89 by removing the limitation of its application to traffic "using International Bridge and Suspension Bridge."

Respectfully submitted,

OCCIDENTAL CHEMICAL CORPORATION  
P.O. BOX 809050  
DALLAS, TEXAS 75380



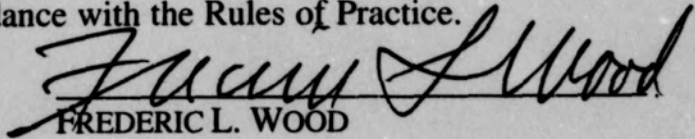
Frederic L. Wood  
Nicholas J. DiMichael  
Karyn A. Booth  
DONELAN, CLEARY, WOOD  
AND MASER, P.C.  
1100 New York Ave., N.W.  
Washington, D.C. 20005

*Attorneys for Occidental Chemical Corporation*

FEBRUARY 1, 1999

**CERTIFICATE OF SERVICE**

I hereby certify that I have this 1st day of February, 1999, served a copy of the foregoing petition upon all parties of record in this proceeding, by first-class mail, postage prepaid, in accordance with the Rules of Practice.

  
FREDERIC L. WOOD

BEFORE THE  
SURFACE TRANSPORTATION BOARD  
UNITED STATES DEPARTMENT OF TRANSPORTATION

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Finance Docket No. 33382

***CSX Corporation, et al. —  
Control and Operating Leases/Agreements —  
Consolidated Rail Corporation, et al***

---

**Verified Statement of Daniel A. Ballard**

My name is Daniel A. Ballard, Corporate Manager Transportation Pricing for Occidental Chemical Corporation ("OxyChem"). My business address is P.O. Box 809050, Dallas, Texas 75380. My responsibilities include the rail transportation needs of OxyChem. OxyChem is a diversified manufacturer of commodity chemicals, plastics and specialty products. OxyChem is the second largest producer of chlorine and caustic soda in the United States, and the largest merchant marketer of these products. OxyChem is the third largest U.S. producer of polyvinyl chloride (PVC) resins. According to OxyChem's National Account Managers for both the Norfolk Southern and the CSXT, OxyChem is the largest chemical shipper on the Conrail.

OxyChem has a very significant presence in Western New York with its chlor-alkali production facility at Niagara Falls. The primary requirements for a

competitive world class chlor-alkali facility are cheap power, access to brine, and an extensive transportation network. OxyChem's facility at Niagara Falls has been successful over the years because of the presence of each of these three key ingredients.

OxyChem originates large volumes of caustic soda and chlorine by rail at Niagara Falls, totaling about 10,000 carloads annually. In recent years, a significant proportion of that traffic has been handled under transportation contracts to which CSX Transportation has been a party. Several of those contracts involved movements via interchanges in Buffalo to carriers other than Conrail to eastern and southeastern destinations served by CSXT.<sup>1</sup> Until 1996, CSXT was able to obtain access to OxyChem's Niagara Falls facility by means of reciprocal switching services provided by Conrail. Conrail was never a party to these contracts before 1996. In early 1996, after Conrail canceled reciprocal switching for CSXT at Niagara Falls, Conrail became a party to these contracts, either by amendment or by new contracts. However, in all other respects the contracts were substantially unchanged. Both before and after the contracts were revised, Conrail's only involvement was to move the traffic to and from the Buffalo connections.

On May 30, 1997, OxyChem received a letter from the National Account Manager for the CSXT stating "In acceptance of your request, Niagara Falls, NY will be treated as a 2 to 1 point under the terms of the acquisition. Access will be



granted via Buffalo, NY for a \$390\car [sic] charge. CSXT is glad we are able to afford OxyChem the competitive access at Niagara Falls you had in the past."

The letter goes on to state, "With this new development, CSXT is hopeful to receive your support of the acquisition in the form of a verified statement." On October 20, 1997, Antonio Orbegoso, Vice President - Purchasing, Transportation and Energy of OxyChem, submitted a verified statement to the Surface Transportation Board (STB). The verified statement was in support of the applicants to Finance Docket No. 33388. OxyChem's support was linked to an understanding that the STB would take steps to address specific, but rather broad, Conrail implementation concerns.

Based on the letter from CSXT, OxyChem believed, at the time of filing its verified statement to the STB, that, effective with the Split Date, CSXT would allow another carrier to have access to our Niagara Falls facility by reciprocal switch or some other equivalent means. Consequently, a request to the Surface Transportation Board to protect the availability of a reciprocal switch between Niagara Falls and Buffalo, NY was not included in the verified statement. Indeed, the letter from the CSXT was the reason OxyChem took no formal action to address the inadequacy of single carrier service at Niagara Falls.

In September 1998, representatives of the CSXT, while in the course of pursuing OxyChem's Conrail business, stated that the statement made nearly 16 months prior by the CSXT National Account Manager was no longer "on the table."

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<sup>1</sup> For the information of the Board, copies of several examples of these contracts are contained in a highly

CSXT was not going to honor the written commitment to provide OxyChem competitive access at Niagara Falls.

OxyChem would like to request bids for rail transportation from its Niagara Falls facility in the near future. OxyChem needs a prompt resolution of the issue raised by CSXT's actions so that it can move forward with the bid process, and then to be able to position rail equipment and take other necessary steps in a timely manner.

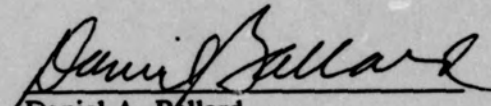
## VERIFICATION

County of Dallas }

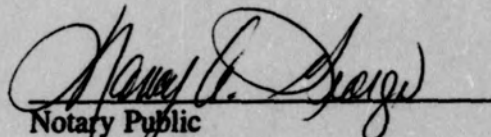
} ss:

State of Texas }

I, Daniel A. Ballard, being duly sworn, do hereby state that I have read the foregoing document, have knowledge of the contents thereof, and that all facts herein are true to the best of my knowledge and belief.

  
Daniel A. Ballard

Sworn to and subscribed to before me, a Notary Public, in and for the state of Texas,  
this 28<sup>th</sup> day of January 1999.

  
Notary Public

My Commission Expires:

9/02/02

**VERIFIED STATEMENT**

**OF**

**JOHN H. FRIEDMANN**

My name is John Friedmann and I am Director - Strategic Planning for Norfolk Southern Corporation. I have been extensively involved in the Conrail transaction, including allocating the operation and use of Conrail properties between NS and CSX and planning how the combined NS-CR system will operate.

During the allocation process, we were very much aware of the STB's well established principle that shippers who would otherwise go from service by two railroads to one as the result of a consolidation, should retain two railroad service. As we "drew the map," it was our intent to provide appropriate relief for "2-to-1" shippers. Hence, we stated on page 18 of our initial application that "In essentially all of the circumstances where the transaction would otherwise result in such a reduction to one carrier, CSX and NS have agreed to provide one another with trackage and/or haulage rights that will permit the continuation of two-carrier service."

While we addressed all of the known "2-to-1" situations, it turned out that we missed several. Given the scope of the transaction, that is not surprising. When we discovered that there was a "2-to-1" we had not accounted for, we agreed to provide appropriate relief. For example, there was a shortline in



Michigan, the Michigan Southern, that we thought only connected to Conrail.


While literally true, the shortline also reached Norfolk Southern through a friendly connection via the Adrian and Blissfield. NS modified the arrangement to allow the shortline to continue to connect with two carriers, NS and CSX, by providing a haulage connection for Michigan Southern to CSX.

Cars from Niagara Falls should flow via CSX to the NS/CSX interchange at Conrail's Frontier Yard in Buffalo, site of the current NS/CR interchange in Buffalo and the nearest NS/CSX interchange point to Niagara Falls. NS and CSX plan to continue to make Frontier Yard the primary NS/CSX interchange in the Buffalo/Niagara region.

## VERIFICATION

COMMONWEALTH OF VIRGINIA )  
 ) SS:  
CITY OF NORFOLK )

J. H. Friedmann, being duly sworn, deposes and says that he is Director, Strategic Planning for Norfolk Southern Corporation, that he has read the foregoing verified statement, knows the facts asserted therein and that the same are true as stated.

  
J. H. FRIEDMANN

Subscribed and sworn to before me,  
a Notary Public in and for the  
State and City aforesaid, this  
27<sup>th</sup> day of January, 1999.

*Sandra J. Gorky*  
NOTARY PUBLIC

**My commission expires:**

MARCH 31, 2002

[SEAL]

**From:** nsinfo@nscorp.com  
**Date:** Wed, Jan 20, 1999 2:51 PM  
**Subject:** NS and CSX Announce Readiness for June 1 Closing Date  
**To:** Rick Wood

January 20, 1999

Contacts: Robert Fort  
Norfolk Southern Corporation  
(757) 629-2710

Elisabeth Gabrynowicz  
CSX Corporation  
(804) 782-1449

Norfolk Southern and CSX Announce Readiness for June 1 Conrail  
Transaction Closing Date

NORFOLK and RICHMOND, VA -- Norfolk Southern Corporation (NYSE: NSC) and CSX Corporation (NYSE: CSX) jointly announced today that they will close the Conrail transaction on June 1, 1999, and begin operating their respective portions of Conrail's routes and assets.

With the necessary customer service planning, capital improvement projects, employee training and labor implementing agreements now largely complete, and with computer systems integration testing under way, the June 1 date provides ample time for ensuring that post-Closing operations are seamless for rail customers and safe for employees and the communities that the railroads serve.

"Our heightened readiness will give customers, stockholders, employees and communities a high degree of confidence that our expanded system will meet their expectations for safe, reliable rail service," said David R. Goode, Norfolk Southern chairman, president and chief executive officer. "We will avoid problems of the kind that could cause inconvenience to the public and thereby compromise expected operating and financial synergies. We want to get things right - from the start."

John W. Snow, CSX chairman and chief executive officer, said, "We have been consistent in our definition of a successful integration, and we have gone to extraordinary lengths over the past 15 months to assure success. Any other approach would have been shortsighted. We are now within a few months of beginning the new era of railroading in the East, and we look forward to the high prospects it brings our customers, shareholders, employees and the public."

After Closing, Norfolk Southern will operate about 7,200 miles of Conrail routes, creating a 21,600-mile rail system serving 22 states in the East, as well as in the District of Columbia and the Province of Ontario, Canada. CSX will operate approximately 4,000 miles of Conrail routes, resulting in a 22,300-mile rail system serving 23 states east of the Mississippi, the District of Columbia and Montreal and Ontario, Canada.

Norfolk Southern Corporation, a Virginia-based holding company

with headquarters in Norfolk, owns a major freight railroad, Norfolk Southern Railway, which will operate its portion of the Conrail properties.

CSX Corporation, based in Richmond, Va., is an international transportation company providing rail, intermodal, container-shipping and contract logistics services worldwide.

# # #

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Norfolk Southern Corporation  
<http://www.nscorp.com>

CSX Corporation  
<http://www.csx.com>

----- RFC822 Header Follows -----  
Received: by mail.dcw.com with ADMIN;20 Jan 1999 14:51:33 U  
Received: by gateway.nscorp.com id <130920>; Wed, 20 Jan 1999 14:20:29 -0500  
Date: Wed, 20 Jan 1999 14:24:29 -0500  
Message-Id: <99Jan20.142029est.130920@gateway.nscorp.com>  
from: nsinfo@nscorp.com  
To: <r.wood@dcw.com>  
subject: NS and CSX Announce Readiness for June 1 Closing Date  
Content-Type: text  
Apparently-To: nsinfo@webserver2  
Sender: owner-nsinfo@nscorp.com  
Precedence: bulk





Friday, May 30, 1997

Mr. Robert L. Evans  
Occidental Chemical Corporation  
5005 LBJ Freeway  
Dallas, TX 75244

Dear Bob:

This letter serves as a revised response to your letter dated February 28, 1997 regarding the CSX\NS\CR acquisition. In acceptance of your request, Niagara Falls, NY will be treated as a 2 to 1 point under the terms of the acquisition. Access will be granted via Buffalo, NY for a \$390\car charge. CSXT is glad we are able to afford OxyChem the competitive access at Niagara Falls you had in the past.

With this new development, CSXT is hopeful to receive your support of the acquisition in the form of a verified statement. As I mentioned before, it is our desire to receive all support statements and letters by June 2, 1997. Thank you again and CSXT looks forward growing our relationship with OxyChem well into the future.

Sincerely,

A handwritten signature in dark ink, appearing to read "Ronald A. Dunn", written over a horizontal line.

Ronald A. Dunn  
National Account Manager

c.c.  
Tony Orbegoso

STB

FD

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PUBLIC VERSION

BEFORE THE  
SURFACE TRANSPORTATION BOARD  
UNITED STATES DEPARTMENT OF TRANSPORTATION

Finance Docket No. 33388

ENTERED  
Office of the Secretary

FEB 02 1999

Part of  
Public Record

**CSX Corporation, et al. —**  
**Control and Operating Leases/Agreements**  
**Consolidated Rail Corporation, et al.**



**EXPEDITED ACTION REQUESTED**

PETITION FOR OVERSIGHT AND MODIFICATION OF REMEDIAL CONDITION

Submitted on Behalf of

**OCCIDENTAL CHEMICAL CORPORATION**

OCCIDENTAL CHEMICAL CORPORATION  
P.O. BOX 809050  
DALLAS, TEXAS 75380

Frederic L. Wood  
Nicholas J. DiMichael  
Karyn A. Booth  
DONELAN, CLEARY, WOOD  
AND MASER, P.C.  
1100 New York Ave., N.W.  
Washington, D.C. 20005

*Attorneys for Occidental Chemical Corporation*

FEBRUARY 1, 1999

**PUBLIC VERSION**

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

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Finance Docket No. 33388

***CSX Corporation, et al. —  
Control and Operating Leases/Agreements —  
Consolidated Rail Corporation, et al.***

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**EXPEDITED ACTION REQUESTED**

**PETITION FOR OVERSIGHT AND MODIFICATION OF REMEDIAL CONDITION**

**Submitted on Behalf of**

**OCCIDENTAL CHEMICAL CORPORATION**

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Occidental Chemical Corporation ("OxyChem") respectfully petitions the Surface Transportation Board to begin proceedings under the oversight condition imposed in Decision No. 89 for the purpose of establishing that more than one rail carrier should have a right of access to and from OxyChem's chemical production facilities located at or near Niagara Falls, New York in order to provide rail transportation service. It is essential that the Board promptly commence these proceedings before the "Closing Date" of the acquisition of control of Consolidated Rail Corporation ("Conrail") by CSX Corporation



("CSX") and Norfolk Southern Corporation ("NS") to prevent harm to the competitive position of OxyChem at Niagara Falls.<sup>1</sup>

## FACTUAL BACKGROUND

OxyChem is a diversified manufacturer of commodity chemicals, plastics and specialty products. OxyChem operates a large production facility located in Niagara Falls, NY, that produces chlorine and caustic soda, as well as other products. This plant ships about 10,000 carloads annually. Ballard V.S. at 1.<sup>2</sup> The OxyChem facilities at Niagara Falls presently are served directly only by the Conrail.<sup>3</sup> In early 1996, CSX Transportation, Inc. ("CSXT") did not serve Niagara Falls directly, but had access to the nearby points of Suspension Bridge or Buffalo, NY.<sup>4</sup> Prior to April 1, 1996, and for many years before, Conrail had maintained in effect tariffs that provided for unrestricted reciprocal switching at Niagara Falls to and from a number of shippers (including OxyChem) for the account of CSXT. At the time of publication, on October 24, 1994, of Original Page 164 in Conrail Tariff CR ICC 8001-D, the charge for this service was \$390 per car. These tariff provisions remained essentially unchanged until April 1, 1996. In 6<sup>th</sup> Revised Page 164 to Tariff 8001-D, effective on that

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<sup>1</sup> The "Closing Date" is the date on which CSX and NS will effectuate the division of Conrail's assets and begin separate operations. Decision No. 89 at 174, n. 263. It was recently announced the Closing Date will be June 1, 1999. See Attachment A.

<sup>2</sup> Included with this petition are two verified statements; one by Mr. Daniel A. Ballard of OxyChem and another by Mr. John Friedmann of Norfolk Southern Corporation. Also included is a Highly Confidential Appendix ("H.C. App."), which is not included in the public versions of this petition. Certain matters in this petition are also highly confidential and have been redacted from the public version. The Highly Confidential version of this Petition is submitted under seal in accordance with 49 C.F.R. §1104.14 and the protective order adopted by the Board in this proceeding. Decision No. 1 (served April 16, 1997).

<sup>3</sup> The facilities are located on a rail line that was formerly operated by the Niagara Junction Ry., a switching carrier owned by three of Conrail's predecessor lines. Cf. *Niagara Jct. Ry. Co. Control*, 267 I.C.C. 349 (1947).

<sup>4</sup> Until early 1996, CSXT's access to Suspension Bridge was obtained by means of trackage rights over a Canadian rail carrier from Detroit. CSXT's access to Buffalo was via a connection to the Buffalo & Pittsburgh Railroad, Inc. See note 6, *infra*.

date, Conrail canceled the availability of reciprocal switching for CSXT for all shippers at Niagara Falls.

At the time of the cancellation of reciprocal switching by Conrail, OxyChem and CSXT had in effect several rail transportation contracts applicable to the movement of chemicals from OxyChem's Niagara Falls facilities to several Eastern or Midwestern destinations. Those contracts did not include Conrail as a contracting party, even though CSXT did not have direct access to the OxyChem facilities at Niagara Falls. [[Redacted]]

For example, in Contract CSXT-C-61649 (effective March 1, 1993) (H.C. App. Tab 1), applicable to the movement of caustic soda from Suspension Bridge, NY<sup>5</sup> to Baltimore, MD, the following provision appeared in Paragraph 12:

[[Redacted.]]

(emphasis in original). [[Redacted]]<sup>6</sup> Conrail was clearly not a participant in the line-haul movement, but, although not explicitly named, it was the only rail carrier that could provide the reciprocal switching service at Niagara Falls that would allow CSXT to perform under this contract [[Redacted]]. It should also be noted that Conrail was and still is able to provide a competing single-line service between Niagara Falls and the Eastern destination covered by the contract.

In 1996, Contract CSXT-C-61649 was amended.<sup>7</sup> The contract amendment was sent to OxyChem by CSXT's national account manager in Dallas, TX, with a letter dated April 30, 1996. The amendment was executed by OxyChem on May

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<sup>5</sup> [[Redacted]].

<sup>6</sup> "BPRR" refers to the Buffalo & Pittsburgh Railroad, Inc., which acquired CSXT's former line from Buffalo to New Castle, PA, in 1987. ICC Fin. Dkt. No. 31116 *Buffalo & Pittsburgh R. Inc. — Exemption*, 52 Fed. Reg. 40000 (Oct. 26, 1987).

<sup>7</sup> There were a few other amendments in the meantime that have no direct bearing on the issues here,[[Redacted]].

14, 1996. However, the amendment carries an effective date of March 1, 1996.<sup>8</sup>  
 [[Redacted]]<sup>9</sup>

### MERGER PROCEEDINGS

Early in 1997, CSX and NS reached agreement on a joint acquisition of control of Conrail, and, after approval by the STB under the provisions of 49 U.S.C. §§11321-11325, for the division of Conrail's assets between them. CSX and NS first filed their notice of intent with the STB on April 10, 1997, and then filed an application on June 23, 1997, for approval of the transaction.

Of significance to the issues involved here, the transaction assigns to CSXT all of Conrail's lines between Buffalo and Suspension Bridge (including all of the lines of the former Niagara Junction) that Conrail now uses to serve OxyChem's facilities. However, NS will be given overhead trackage rights between Buffalo and Suspension Bridge, without the right to serve any shippers along the line. *See CSX/NS-18 at 36; CSX/NS-25 at 95 and 111.*

After the proposed acquisition of Conrail was announced, but *before* the application was filed, CSXT sent a letter to OxyChem. *See Attachment B.* This letter, dated May 30, 1997, from a CSXT national account manager, stated, in part:

In acceptance of your request, Niagara Falls, NY will be treated as a 2 to 1 point under the terms of the acquisition. Access will be granted via Buffalo, NY for a \$390\car charge. CSXT is glad we are able to afford OxyChem the competitive access at Niagara Falls you had in the past.

---

<sup>8</sup> Pursuant to the provisions of new 49 U.S.C. § 10709, enacted by the ICC Termination Act of 1995, and effective on January 1, 1996, the summary of the amendment is no longer filed with the STB, and the contract amendment became effective upon execution in accordance with its terms.

<sup>9</sup> Two other contracts with similar provisions were revised in similar fashion: Contract CSXT-C-61730, applicable to the movement of chlorine to points in Florida; and Contract CSXT-C-64857, applicable to the movement of chlorine to Cincinnati. H.C. App. Tabs 2 and 3, respectively.. Conrail can also provide competitive service for the movements covered by these contracts.

The letter goes on to express CSXT's hope that OxyChem would support the acquisition of Conrail by providing a verified statement. OxyChem did not provide a supporting letter for inclusion in the application as filed on June 23, 1997. However, OxyChem did file a verified statement by Mr. Antonio Orbegoso with the STB on October 20, 1997, generally supporting the application subject to certain specified implementation conditions.

During the course of the proceedings for approval of the Conrail acquisition, a group of shippers and other interests from the Niagara Frontier area of Western New York contended that Conrail's 1996 cancellation of reciprocal switching for CSXT at Niagara Falls was related to the control transaction. They urged the STB to provide a remedy, in accordance with its current policies set out in 49 C.F.R. § 1180.1(c)(2)(i), for the loss of competitive alternatives caused by the cancellation, because shippers in Niagara Falls that previously had direct or indirect access to two carriers would otherwise be limited to a single carrier. See Comments of Erie-Niagara Rail Steering Committee, ENRS-6 at 28-30.

In response to this contention, the Applicants' Rebuttal contained the following statements:

Presently, Conrail is the only carrier with direct access to Niagara Falls shippers. Several years ago, CSX served Niagara shippers via trackage rights over CN lines through Canada. Conrail provided switching for CSX at Suspension Bridge to and from shippers in Niagara. In December of 1995, however, CSX negotiated a contract with CN pursuant to which CN carries CSX traffic over CN lines as CSX's agent. Since 1995, CSX has not used its trackage rights over CN. *Until December 9, 1997, CN carried this CSX traffic across the International Bridge at Fort Erie, through Buffalo and into Conrail's Frontier Yard.* Conrail then transported this CSX traffic to and from the Frontier Yard as part of the line haul.

STB Finance Docket No. 33388, CSX/NS-176 at 66 (emphasis added).



The STB has consistently, in all recent rail merger proceedings, recognized the need to protect all so-called "2-to-1" points from the effects of the proposed transaction. *See, e.g.,* Fin. Dkt. No. 32760 *Union Pacific Corp., et al. — Control and Merger — Southern Pacific Rail Corp., et al.*, Decision No. 44. at 98-103 (served Aug. 12, 1996). In this proceeding, the Board noted the willingness of the Applicants to agree to protect all shippers at 2-to-1 locations from harm. Decision No. 89 at 34; 51. Indeed, the Board said that "we will ensure, that wherever that would happen, applicants will provide one another sufficient trackage rights at reasonable rates, together with any other conditions that might be called for, to remedy the situation." *Id.* at 51.

In accordance with this well-established policy, the STB responded to the shippers' concerns about the situation at Niagara Falls in its principal decision, Decision No. 89 (served on July 23, 1998). The STB, plainly relying on the assertion from Applicants' rebuttal quoted above, assumed that the *only* means by which CSXT had obtained access to customers at Niagara Falls was via its trackage or haulage rights that crossed through Canada from Detroit and then over one of the two Niagara River bridges, either at Fort Erie, New York (International Bridge), or Niagara Falls (Suspension Bridge). In any event, the Board concluded that relief from the cancellation was appropriate:

We find that these arrangements whereby Conrail receives compensation for the short pick-up and delivery component of International Bridge or Suspension Bridge movements into and out of the Niagara Falls area via a division of a line haul rate to be no different in substance from its prior compensation arrangement, when its compensation was termed a switching charge.

\*\*\*

In their settlement with [The National Industrial Transportation League], CSX and NS have agreed to mitigate the market power they will inherit from Conrail at exclusively served points where Conrail performs switching services. We find that the terms of that

agreement, as they apply to reciprocal switching, should be applied to those points in the Niagara Falls area where Conrail recently replaced its switching charges with equivalent "line-haul" charges, and to those movements to which the switches and line-haul rates applied (i.e. movements using International Bridge or Suspension Bridge).<sup>10</sup>

STB Decision 89 at 87. In accordance with this finding, the STB approved the transaction subject to the following condition, among numerous others:

The \$250 maximum reciprocal switching charge provided for in the NITL agreement must be applied to certain points in the Niagara Falls area for traffic using International Bridge and Suspension Bridge, for which Conrail recently replaced its switching charges with so-called "line-haul" charges.

STB Decision 89 at 178, Ordering Paragraph No. 37. In summary, the STB is requiring CSXT and NS to treat the points in Niagara Falls where Conrail canceled reciprocal switching in 1996 as 2-to-1 points, but only for traffic using the two international bridges.

The STB also imposed two additional conditions that are relevant here. First, "Applicants must adhere to all of the representations they made during the course of this proceeding, whether or not such representations are specifically referenced in this decision." STB Decision 89 at 176 Ordering Paragraph No. 19. Second, the Board imposed a general condition establishing a 5-year oversight period, explicitly "retaining jurisdiction to impose additional conditions if, and to the extent, we determine that additional conditions are necessary to address unforeseen harms caused by the transaction." *Id.* at 160, Ordering Paragraph No. 1.

On August 22, 1998, the applicants consummated the transaction by taking control of Conrail. *See* Letter from Applicants' Counsel dated August 24, 1998.

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<sup>10</sup> The NITL Agreement referred to provided, among other things, for the reduction by NS and CSX of Conrail's reciprocal switching charge to a maximum of \$250 per car for five years (subject to inflation adjustment). Decision 89 at 57.

No Applicant has sought reconsideration of the Niagara Falls condition. Therefore, having consummated the transaction, CSX is fully bound by all the conditions imposed by the Board. The issue brought before the Board by this petition is whether the Niagara Falls condition, as it presently is stated, is adequate to protect shippers like Occidental Chemical located at Niagara Falls from the loss of competitive alternatives that would be caused by the transaction when it is finally implemented on the Closing Date.

### **CURRENT SITUATION**

CSXT has now stated to OxyChem that it will not treat Niagara Falls as a 2-to-1 point after the Closing Date<sup>11</sup> when it acquires operational control of the Conrail lines in the Niagara Falls area. It has specifically stated that the May 30, 1997 letter is "off the table." Ballard V.S. at 4. In addition, CSXT has not definitively indicated to OxyChem which of its traffic, if any, at Niagara Falls will be subject to the condition imposed by the STB limiting the maximum switching charge to \$250 per car. In essence, there has been no indication from CSXT as to the manner in which it will implement this condition. For the condition to have any meaning, CSXT, after it acquires and begins to operate the Conrail lines in the Niagara Falls area, will have to provide access by another rail carrier to all of the shippers at Niagara Falls that had reciprocal switching for CSXT that was canceled in 1996 by Conrail. Presumably, such access will have to be accomplished in the same manner that Conrail provides access to CSXT, either by reciprocal switching at a charge of \$250 or by providing a "line-haul" service between Niagara Falls and Buffalo at a maximum division of \$250 per

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<sup>11</sup> As indicated above, on Wednesday, January 20, 1999, NS announced, presumably with the concurrence of CSX, that the separate operation of the assets acquired from Conrail will begin on June 1, 1999.

car. The expectation would be that CSXT will provide access to NS, which will interchange traffic with CSX at Buffalo's Frontier Yard. *Friedmann V.S.* at 2.<sup>12</sup>

In OxyChem's case, there are two categories of traffic that are at issue. The situation with regard to the category of OxyChem's CSX traffic that was handled or could be handled in connection with BPRR at Buffalo clearly requires relief from the Board. On the one hand, the *current* Niagara Falls condition imposed by the Board *only* applies to traffic that *moves via the two Niagara River bridges*. On the other hand, it appears that the limited scope of this condition occurred because CSX, the applicant with full knowledge of the situation at Niagara Falls, *failed to inform the Board fully and completely regarding the situation at Niagara Falls. OxyChem had traffic under contract with CSXT that was being handled under reciprocal switching via Buffalo and an interchange with BPRR at the time of the 1996 cancellation by Conrail of reciprocal switching for CSXT at Niagara Falls.* CSX continued to receive this traffic after the cancellation, with Conrail moving the traffic to Buffalo under a new arrangement with CSXT exactly as it did before, without using the international bridges. Nonetheless, those new arrangements in 1996 for the movement via Buffalo were and are identical to the kind of arrangements between CSX and Conrail that were found by the Board to warrant relief for traffic moving via the international bridges.

However, CSXT never informed the STB of the existence of these arrangements. If their existence had been disclosed to the STB, it is probable that

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<sup>12</sup> There are other carriers, specifically the two Canadian rail carriers, that also reach the Buffalo area and that could be given access by CSXT. However, their route structures do not replicate the route structures provided by CSX. Conrail still provides reciprocal switching at Niagara Falls to Canadian Pacific (formerly the Delaware & Hudson) at an undisclosed charge, but only on traffic that moves via Buffalo in connection with CP on routes that "do not pass through Niagara Falls, NY." See Item 18040, Note 1, 7<sup>th</sup> Revised Page 164, Conrail Tariff 8001-D.



the STB would have imposed a broader condition, i.e., a condition that was not limited to traffic using International Bridge or Suspension Bridge.

Moreover, CSXT, in its letter of May 30, 1997, to OxyChem, had made a representation that such traffic would be treated as 2-to-1 traffic and that "CSXT is glad we are able to afford OxyChem the competitive access at Niagara Falls you had in the past." Attachment B. In reliance on this representation, OxyChem had not requested relief from the Board for the situation at Niagara Falls. Ballard V.S. at 3-4. Only after the Board's Decision No. 89 was issued did CSX inform OxyChem that it would not adhere to this representation.

The other category of traffic involves OxyChem's traffic that did move to or from the Niagara Falls facility via the international bridges. Any traffic that was handled in a route involving the use of either the International Bridge or Suspension Bridge is clearly subject to the STB condition limiting the maximum switching charge or division to \$250 per car. CSX has yet to indicate to OxyChem how that traffic will be handled in order to comply with the Board's condition.

#### **OXYCHEM IS ENTITLED TO RELIEF FROM THE BOARD TO PREVENT HARM CAUSED BY THE ACQUISITION OF CONRAIL**

OxyChem has been unable, despite efforts over the last several months, to reach a satisfactory voluntary resolution with CSXT of its concerns about the implementation of the transaction for acquiring Conrail as it may affect the situation at Niagara Falls. OxyChem clearly has the right to seek relief under the STB's general oversight condition. Such relief can be sought at any time, and can be invoked by submitting an appropriate petition for additional or modified conditions under the oversight authority of the Board. *See, e.g., Fin. Dkt. No. 32760 (Sub-No. 26) Union Pacific Corp., et al. — Control and Merger —*

*Southern Pacific Rail Corp., et al., [Houston/Gulf Coast Oversight] Decision No. 1 at 5 (corrected decision served May 19, 1998).*

It is now clear that shippers such as Occidental Chemical had access to two-carrier service at Niagara Falls for the transportation of traffic that did *not* involve moving via the international bridges. CSX's refusal to provide access to a second carrier for the shippers at Niagara Falls after it implements its acquisition of control of the Conrail lines involved pursuant to the approved transaction would directly harm OxyChem. In Decision No. 89, the Board has clearly indicated that it will provide a remedy wherever there is a 2-to-1 situation. Decision No. 89 at 51. It has also said that:

We are retaining jurisdiction to impose additional conditions if, and to the extent, we determine that additional conditions are necessary *to address unforeseen harms caused by the transaction.*

*Id.* at 160 (emphasis added).

As NS has stated in the attached verified statement from John Friedmann, a Director of Strategic Planning, it was and is "very much aware of the STB's well established principle that shippers who would otherwise go from service by two railroads to one as a result of a consolidation should retain two railroad service." Friedmann V.S. at 1. The Applicants represented to the Board that they had agreed to provide each other access in all situations where the transaction would result in such a reduction. CSX/NS-18 at 18. As Mr. Friedmann states, even where the applicants have become aware of the existence of a 2-to-1 situation while the transaction was awaiting approval, they have "agreed to provide appropriate relief." *Id.* at 1-2.<sup>13</sup> It is thus clear that both the Board and the applicants recognize the need to protect all shippers in 2-to-1 shippers from

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<sup>13</sup> CSX's unwillingness to provide relief voluntarily at Niagara Falls stands in stark contrast to NS' willingness to agree to provide CSX access to the Niagara Frontier Food Terminal when it was discovered that this was a "2-to-1" point. See Decision 89 at 86, 137 and CSX/NS-176 at 68.

harm. The Board's Niagara Falls condition only partially addresses the harm caused by the transaction as stands approved, and it must be modified accordingly.

It is OxyChem's position that the appropriate means to remedy this situation is a modification of the Niagara Falls condition to remove the limitation of its application to traffic using International Bridge and Suspension Bridge. Under all of the circumstances, especially CSX's failure fully to inform the STB regarding the situation existing at Niagara Falls, as well as its representation to OxyChem in the May 30, 1997, letter that Niagara Falls "will be treated as a 2 to 1 point," such relief is clearly required.

**EXPEDITED ACTION ON THIS PETITION IS REQUESTED**

OxyChem would like to request bids for the transportation of its Niagara Falls traffic in the near future. Ballard V.S. at 4. It is essential that the situation at Niagara Falls be determined well in advance of the scheduled Closing Date of June 1, 1999. This will enable OxyChem to conduct the bidding process with full understanding as to whether or not more than one carrier will be able to bid to provide this service. In addition, this will enable OxyChem to complete the bidding process, establish the rates and service terms, and position its rail equipment to support the service.

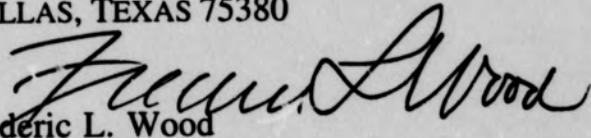
For these reasons, OxyChem respectfully requests that this request for relief be handled expeditiously.

**CONCLUSION**

For all of the foregoing reasons, Occidental Chemical Corporation respectfully requests the Board expeditiously to exercise its authority under Ordering Paragraph No. 1 in Decision No. 89 for the purpose of conducting oversight of the implementation of the transaction approved in this proceeding. The Board is also respectfully requested, in the course of such oversight, to modify Ordering Paragraph No. 37 in Decision No. 89 by removing the limitation of its application to traffic "using International Bridge and Suspension Bridge."

Respectfully submitted,

OCCIDENTAL CHEMICAL CORPORATION  
P.O. BOX 809050  
DALLAS, TEXAS 75380



Frederic L. Wood  
Nicholas J. DiMichael  
Karyn A. Booth  
DONELAN, CLEARY, WOOD  
AND MASER, P.C.  
1100 New York Ave., N.W.  
Washington, D.C. 20005

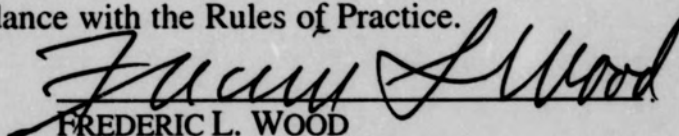
*Attorneys for Occidental Chemical Corporation*

FEBRUARY 1, 1999



**CERTIFICATE OF SERVICE**

I hereby certify that I have this 1st day of February, 1999, served a copy of the foregoing petition upon all parties of record in this proceeding, by first-class mail, postage prepaid, in accordance with the Rules of Practice.

  
FREDERIC L. WOOD

BEFORE THE  
SURFACE TRANSPORTATION BOARD  
UNITED STATES DEPARTMENT OF TRANSPORTATION

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Finance Docket No. 33388

*CSX Corporation, et al. —  
Control and Operating Leases/Agreements —  
Consolidated Rail Corporation, et al*

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**Verified Statement of Daniel A. Ballard**

My name is Daniel A. Ballard, Corporate Manager Transportation Pricing for Occidental Chemical Corporation ("OxyChem"). My business address is P.O. Box 809050, Dallas, Texas 75380. My responsibilities include the rail transportation needs of OxyChem. OxyChem is a diversified manufacturer of commodity chemicals, plastics and specialty products. OxyChem is the second largest producer of chlorine and caustic soda in the United States, and the largest merchant marketer of these products. OxyChem is the third largest U.S. producer of polyvinyl chloride (PVC) resins. According to OxyChem's National Account Managers for both the Norfolk Southern and the CSXT, OxyChem is the largest chemical shipper on the Conrail.

OxyChem has a very significant presence in Western New York with its chlor-alkali production facility at Niagara Falls. The primary requirements for a

competitive world class chlor-alkali facility are cheap power, access to brine, and an extensive transportation network. OxyChem's facility at Niagara Falls has been successful over the years because of the presence of each of these three key ingredients.

OxyChem originates large volumes of caustic soda and chlorine by rail at Niagara Falls, totaling about 10,000 carloads annually. In recent years, a significant proportion of that traffic has been handled under transportation contracts to which CSX Transportation has been a party. Several of those contracts involved movements via interchanges in Buffalo to carriers other than Conrail to eastern and southeastern destinations served by CSXT.<sup>1</sup> Until 1996, CSXT was able to obtain access to OxyChem's Niagara Falls facility by means of reciprocal switching services provided by Conrail. Conrail was never a party to these contracts before 1996. In early 1996, after Conrail canceled reciprocal switching for CSXT at Niagara Falls, Conrail became a party to these contracts, either by amendment or by new contracts. However, in all other respects the contracts were substantially unchanged. Both before and after the contracts were revised, Conrail's only involvement was to move the traffic to and from the Buffalo connections.

On May 30, 1997, OxyChem received a letter from the National Account Manager for the CSXT stating "In acceptance of your request, Niagara Falls, NY will be treated as a 2 to 1 point under the terms of the acquisition. Access will be

granted via Buffalo, NY for a \$390\car [sic] charge. CSXT is glad we are able to afford OxyChem the competitive access at Niagara Falls you had in the past."

The letter goes on to state, "With this new development, CSXT is hopeful to receive your support of the acquisition in the form of a verified statement." On October 20, 1997, Antonio Orbegoso, Vice President - Purchasing, Transportation and Energy of OxyChem, submitted a verified statement to the Surface Transportation Board (STB). The verified statement was in support of the applicants to Finance Docket No. 33388. OxyChem's support was linked to an understanding that the STB would take steps to address specific, but rather broad, Conrail implementation concerns.

Based on the letter from CSXT, OxyChem believed, at the time of filing its verified statement to the STB, that, effective with the Split Date, CSXT would allow another carrier to have access to our Niagara Falls facility by reciprocal switch or some other equivalent means. Consequently, a request to the Surface Transportation Board to protect the availability of a reciprocal switch between Niagara Falls and Buffalo, NY was not included in the verified statement. Indeed, the letter from the CSXT was the reason OxyChem took no formal action to address the inadequacy of single carrier service at Niagara Falls.

In September 1998, representatives of the CSXT, while in the course of pursuing OxyChem's Conrail business, stated that the statement made nearly 16 months prior by the CSXT National Account Manager was no longer "on the table."

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<sup>1</sup> For the information of the Board, copies of several examples of these contracts are contained in a highly



CSXT was not going to honor the written commitment to provide OxyChem competitive access at Niagara Falls.

OxyChem would like to request bids for rail transportation from its Niagara Falls facility in the near future. OxyChem needs a prompt resolution of the issue raised by CSXT's actions so that it can move forward with the bid process, and then to be able to position rail equipment and take other necessary steps in a timely manner.

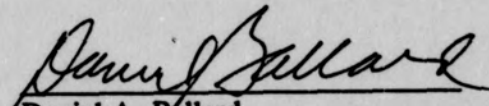
## VERIFICATION

County of Dallas }

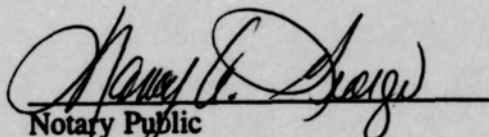
} ss:

State of Texas }

I, Daniel A. Ballard, being duly sworn, do hereby state that I have read the foregoing document, have knowledge of the contents thereof, and that all facts herein are true to the best of my knowledge and belief.

  
Daniel A. Ballard

Sworn to and subscribed to before me, a Notary Public, in and for the state of Texas,  
this 28<sup>th</sup> day of January 1999.

  
Notary Public

My Commission Expires:

9/02/02

VERIFIED STATEMENT

OF

JOHN H. FRIEDMANN

My name is John Friedmann and I am Director - Strategic Planning for Norfolk Southern Corporation. I have been extensively involved in the Conrail transaction, including allocating the operation and use of Conrail properties between NS and CSX and planning how the combined NS-CR system will operate.

During the allocation process, we were very much aware of the STB's well established principle that shippers who would otherwise go from service by two railroads to one as the result of a consolidation, should retain two railroad service. As we "drew the map," it was our intent to provide appropriate relief for "2-to-1" shippers. Hence, we stated on page 18 of our initial application that "In essentially all of the circumstances where the transaction would otherwise result in such a reduction to one carrier, CSX and NS have agreed to provide one another with trackage and/or haulage rights that will permit the continuation of two-carrier service."

While we addressed all of the known "2-to-1" situations, it turned out that we missed several. Given the scope of the transaction, that is not surprising. When we discovered that there was a "2-to-1" we had not accounted for, we agreed to provide appropriate relief. For example, there was a shortline in

Michigan, the Michigan Southern, that we thought only connected to Conrail.

While literally true, the shortline also reached Norfolk Southern through a friendly connection via the Adrian and Blissfield. NS modified the arrangement to allow the shortline to continue to connect with two carriers, NS and CSX, by providing a haulage connection for Michigan Southern to CSX.


Cars from Niagara Falls should flow via CSX to the NS/CSX interchange at Conrail's Frontier Yard in Buffalo, site of the current NS/CR interchange in Buffalo and the nearest NS/CSX interchange point to Niagara Falls. NS and CSX plan to continue to make Frontier Yard the primary NS/CSX interchange in the Buffalo/Niagara region.



## VERIFICATION

COMMONWEALTH OF VIRGINIA )  
 ) SS:  
CITY OF NORFOLK )

**J. H. Friedmann, being duly sworn, deposes and says that he is Director, Strategic Planning for Norfolk Southern Corporation, that he has read the foregoing verified statement, knows the facts asserted therein and that the same are true as stated.**

  
J. H. FRIEDMANN

Subscribed and sworn to before me,  
a Notary Public in and for the  
State and City aforesaid, this  
27<sup>th</sup> day of January, 1999.

*Sandra J. Gorky*  
NOTARY PUBLIC

**My commission expires:**

**MARCH 31, 2002**

[SEAL]

**From:** nsinfo@nscorp.com  
**Date:** Wed, Jan 20, 1999 2:51 PM  
**Subject:** NS and CSX Announce Readiness for June 1 Closing Date  
**To:** Rick Wood

January 20, 1999

Contacts: Robert Fort  
Norfolk Southern Corporation  
(757) 629-2710

Elisabeth Gabrynowicz  
CSX Corporation  
(804) 782-1449

Norfolk Southern and CSX Announce Readiness for June 1 Conrail  
Transaction Closing Date

NORFOLK and RICHMOND, VA -- Norfolk Southern Corporation (NYSE: NSC) and CSX Corporation (NYSE: CSX) jointly announced today that they will close the Conrail transaction on June 1, 1999, and begin operating their respective portions of Conrail's routes and assets.

With the necessary customer service planning, capital improvement projects, employee training and labor implementing agreements now largely complete, and with computer systems integration testing under way, the June 1 date provides ample time for ensuring that post-Closing operations are seamless for rail customers and safe for employees and the communities that the railroads serve.

"Our heightened readiness will give customers, stockholders, employees and communities a high degree of confidence that our expanded system will meet their expectations for safe, reliable rail service," said David R. Goode, Norfolk Southern chairman, president and chief executive officer. "We will avoid problems of the kind that could cause inconvenience to the public and thereby compromise expected operating and financial synergies. We want to get things right - from the start."

John W. Snow, CSX chairman and chief executive officer, said, "We have been consistent in our definition of a successful integration, and we have gone to extraordinary lengths over the past 15 months to assure success. Any other approach would have been shortsighted. We are now within a few months of beginning the new era of railroading in the East, and we look forward to the high prospects it brings our customers, shareholders, employees and the public."

After Closing, Norfolk Southern will operate about 7,200 miles of Conrail routes, creating a 21,600-mile rail system serving 22 states in the East, as well as in the District of Columbia and the Province of Ontario, Canada. CSX will operate approximately 4,000 miles of Conrail routes, resulting in a 22,300-mile rail system serving 23 states east of the Mississippi, the District of Columbia and Montreal and Ontario, Canada.

Norfolk Southern Corporation, a Virginia-based holding company

with headquarters in Norfolk, owns a major freight railroad, Norfolk Southern Railway, which will operate its portion of the Conrail properties.

CSX Corporation, based in Richmond, Va., is an international transportation company providing rail, intermodal, container-shipping and contract logistics services worldwide.

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Norfolk Southern Corporation  
<http://www.nscorp.com>

CSX Corporation  
<http://www.csx.com>

----- RFC822 Header Follows -----  
Received: by mail.dcm.com with ADMIN;20 Jan 1999 14:51:33 U  
Received: by gateway.nscorp.com id <130920>; Wed, 20 Jan 1999 14:20:29 -0500  
Date: Wed, 20 Jan 1999 14:24:29 -0500  
Message-Id: <99Jan20.142029est.130920@gateway.nscorp.com>  
from: nsinfo@nscorp.com  
To: <r.wood@dcm.com>  
subject: NS and CSX Announce Readiness for June 1 Closing Date  
Content-Type: text  
Apparently-To: nsinfo@webserver2  
Sender: owner-nsinfo@nscorp.com  
Precedence: bulk



Friday, May 30, 1997

Mr. Robert L. Evans  
Occidental Chemical Corporation  
5005 LBJ Freeway  
Dallas, TX 75244

Dear Bob:

This letter serves as a revised response to your letter dated February 28, 1997 regarding the CSX\NS\CR acquisition. In acceptance of your request, Niagara Falls, NY will be treated as a 2 to 1 point under the terms of the acquisition. Access will be granted via Buffalo, NY for a \$390\car charge. CSXT is glad we are able to afford OxyChem the competitive access at Niagara Falls you had in the past.

With this new development, CSXT is hopeful to receive your support of the acquisition in the form of a verified statement. As I mentioned before, it is our desire to receive all support statements and letters by June 2, 1997. Thank you again and CSXT looks forward growing our relationship with OxyChem well into the future.

Sincerely,

A handwritten signature in dark ink, appearing to read "Ronald A. Dunn", written in a cursive style.

Ronald A. Dunn  
National Account Manager

c.c.  
Tony Orbegoso



STB

FD-33424

8-26-98

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ID-190748

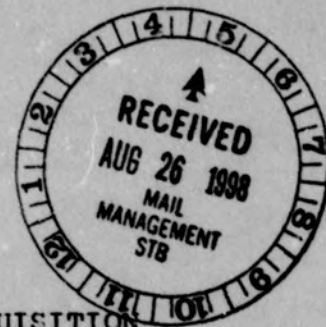
ORIGINAL

Before the  
SURFACE TRANSPORTATION BOARD

Finance Docket No. 33424

PORTLAND & WESTERN RAILROAD, INC.--ACQUISITION  
AND OPERATION EXEMPTION--THE BURLINGTON NORTHERN  
AND SANTA FE RAILWAY COMPANY

MOTION TO STRIKE



ENTERED  
Office of the Secretary

AUG 27 1998

Part of  
Public Record

GORDON P. MacDOUGALL  
1025 Connecticut Ave., N.W.  
Washington DC 20036

Attorney for John D. Fitzgerald

Dated: August 26, 1998

Before the  
SURFACE TRANSPORTATION BOARD

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Finance Docket No. 33424

PORTLAND & WESTERN RAILROAD, INC.--ACQUISITION  
AND OPERATION EXEMPTION--THE BURLINGTON NORTHERN  
AND SANTA FE RAILWAY COMPANY

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MOTION TO STRIKE

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Protestant, John D. Fitzgerald,<sup>1/</sup> for and on behalf of United Transportation Union-General Committee of Adjustment (UTU-GCA) for lines of The Burlington Northern and Santa Fe Railway Company (BNSF), submits this motion to strike portions of the Reply to Petition For Reconsideration, filed August 17, 1998. by Portland & Western Railroad, Inc. (PNWR).

The portion to be stricken is Exhibit A to the PNWR pleading filed August 17, and the accompanying footnote 2, at p. 3:

"The bill of sale, easement and certain pages of the agreement relating to offers to BNSF employees were provided to counsel for Mr. Fitzgerald on July 9, 1997, prior to the filing of Mr. Fitzgerald's original petition. See letter (without enclosures) attached as Exhibit A."

Contrary to PNWR's statement, and its Exhibit A, counsel was not provided with a copy of Exhibit A.

ARGUMENT

UTU-GCA on July 10, 1997, filed its petition to revoke.<sup>2/</sup> The petition complained that PNWR had not responded to informal discovery,

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<sup>1/</sup> General Chairman for United Transportation Union, with offices at 400 E. Evergreen Blvd., Vancouver WA 98660.

<sup>2/</sup> The petition also embraced request for rejection and for stay.

and UTU-GCA stated at p. 3 of its July 10, 1997 pleading:

"Protestant has made an informal discovery request for the agreements between BNSF and PWR governing the transaction at issue, and which are mentioned in the notice. (Notice, 2). Counsel for PWR has taken the request under advisement. To date, protestant does not have a copy of the agreements, whether redacted or unredacted. (nf.3). Protestant seeks the assistance of the Board, and suggests the Board in its order require production of the documents."

Contrary to PNWR in its August 17, 1998 filing, UTU-GCA's counsel was not provided with a copy of Exhibit A prior to filing the UTU-GCA petition to revoke. Exhibit A states "THE ORIGINAL WILL NOT BE MAILED TO YOU." The FAX transmittal was to (202) 452-0531. This is not the FAX number for UTU-GCA counsel.<sup>3/</sup> Upon inquiry, this was the FAX number for a Washington, DC printing company, Balmar.<sup>4/</sup> Counsel's office records do not indicate any work was performed by Balmar during the year 1997.

It is clear that UTU-GCA counsel was not provided with a copy of Exhibit A on July 9, 1997, or at any time prior to filing the petition to revoke on July 10, 1997, either by mail or by FAX.<sup>5/</sup>

WHEREFORE, the Board should strike Exhibit A to PNWR's reply filed August 17, 1998, and the accompanying footnote 2 at p. 3 thereof.

Respectfully submitted,

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<sup>3/</sup> Since about September 1995, UTU-GCA's counsel has utilized (202) 331-8343 for FAX transmissions and receipts.

<sup>4/</sup> In earlier years, prior to September 1995, UTU-GCA counsel sometimes utilized the Balmar FAX in emergency situations for FAX transmission and receipts, but with a further client code identification, as Balmar is a large company, with branch offices, and with many customers.

<sup>5/</sup> The July 10, 1997 pleading was sent by FAX in addition to overnight express and telephone advice (see: certificate of service), with UTU-GCA identification. Certainly, thereafter, PNWR was on notice concerning the proper FAX number for UTU-GCA counsel. Moreover, we believe it poor practice not to accompany a FAX transmittal with a paper copy. We understand the Board has issued instructions in this regard.



*Gordon P. MacDougall*  
GORDON P. MacDOUGALL  
1025 Connecticut Ave., N.W.  
Washington DC 20036

August 26, 1998

Attorney for John D. Fitzgerald

CERTIFICATE OF SERVICE

I hereby certify I have served a copy of the foregoing upon  
all parties of record by first class mail postage-prepaid.

Washington DC

*Gordon P. MacDougall*  
Gordon P. MacDougall

STB

FD-33388

8-24-98

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ID-190669

190669

ENTERED  
Office of the Secretary

AUG 25 1998

Part of  
Public Record



- 1998 - PRESIDENT APPOINTS BRONX LAWYER FOR CHIEF OF STAFF.  
1998 - NATIONAL Champions of Chess - Bronx "Middle School" Kids triumph.  
1998 - CITYWIDE Basketball Championship, won by Bronx "Mustangs", boys 14-16 Division.  
1998 - New York City 100 Celebration - "America begins in New York"  
Home of Port Morris Patriots and Democracy in the United States  
1997 - "All - America City" awarded to The Bronx.  
1997 - "Fordham University" placed in the "Nation's Best Values"  
1997 - Bronx "Little League" win Baseball Crown for NEW YORK STATE.  
1996 - The Bronx... "New York Yankees"... World Champions.  
World Famous - Bronx Zoo and Wild Life Habitat.  
World Famous - Bronx Botanical Gardens.  
"Six Most Remarkable Contiguous Bridges in the World"...  
Span the Federal Harlem River, to join the Island of Manhattan to the Bronx mainland.  
World Famous, New York City Marathon, cross these bridges,  
at the Major Highways of "NYC Tourist Corridor" and "Antique Center"  
1994 - Federal Empowerment Zone awarded Port Morris.  
1888 - Railroad Builds gracious "Landmark" Office Building, atop Scenic Riverscape; Historic 1776 Revolutionary Site,  
and Home of Patriots, "Lewis (\*) and Gouverneur (\*\*) Morris".  
1815 (\*\*) An Early Voice on Conservation to Protect Habitat of Birds, Fish, Wildlife.  
1790 (\*) Debate in Congress to have the "Capitol of the United States" rise on hill, atop historic and scenic river.  
1788 (\*) - Ratified the "Constitution for United States" for New York State.  
1787 (\*\*) - PENNED, PHRASED AND DRAFTED THE FINAL 'CONSTITUTION OF THE UNITED STATES'.  
1776 (\*) - SIGNED THE "DECLARATION OF INDEPENDENCE".  
1670 - Jonas Brounck's Brounckslan becomes "Morrisania Village" of the Patriots, (then in Westchester).  
1642 - "Indian Peace Treaty" is signed in Jonas Brounck's Farm House.  
1639 - "Brounckslan settled by Jonas Brounck, (then in Westchester).  
1492 - 1639 Home of Reckgawawanc Tribe's Chieftains Ramachqua and Taekamuck in "Nuacin Village".  
(1996 - New York City Bronx Park Department, named "Ramachqua").

Landmark Studios, Inc.  
2 Willis Avenue, Port Morris  
The Bronx, New York 10454-4417

zee frank@aol.com

Zee Frank  
V. 718-292-9697  
F. 718-292-9698

Mr. Vernon Williams, Office of Secretary  
Surface Transportation Board  
1925 K Street NW  
Washington, D. C. 20423

Re: Finance Docket No. 33388

Dear Mr. Williams:

In accordance with my submission on the Appeal To The Surface Transportation Board, under Finance Docket No. 33388, I respectfully make the Motion that you grant:

1. My Appeal to join with the Appeal of Congressman Jerrold Nadler, New York City
2. The waiver, that I shall not be required to serve all parties.

My input is specific to New York City and the \$500,000,000 project which included the Oak Point Rail Link and Harlem River Intermodal Rail Terminal; which project is crucial to avoid serious consequences to New York City; (as occurred in past recession, when it "hit New York City harder and deeper than anywhere else in the country"). Rail Infrastructure is crucial to diversification.

My submissions to the Surface Transportation Board are ongoing for over a year. Volume 6A, Appendix A, contains 18 pages printed by the Surface Transportation Board, on Pages A310 through A315, under Finance Docket No. 33388.

Other writings were included on the Public Docket in this proceeding as advised February 10, 1998 by the Office of the Chairman.

The writer is an observer and historian of the plans, contracts etc. of the Rail project. The building of the Oak Point Rail Link and Harlem River Intermodal Rail Terminal was planned in the 70's and started in early 80's. Harlem River Yard has had a Rail Right of Way since the mid-19th Century.

The Rail Project is in the Federal Empowerment Zone. I have recently been specially honored by President Clinton and Vice-President Gore at the White House for the Empowerment Conference. (See note attached).

My writings reflect my interest in economic vitality in the global economy, pursued in a healthy environment, to keep all Americans fit for hi-tech industry; in this World that has become smaller, more competitive, more interesting.

Enclosures:

3 Pages of Cover Letter and White House Note

12 Pages of Appeal AND RELEVANT ATTACHMENTS, BELOW:

5 Pages to the Justice Department re: **ENVIRONMENTAL URGENCIES!..**

18 Pages to the Justice Department re: **ECONOMIC URGENCIES!**

**AND "DOCUMENTED.... MONOPOLY OF RAIL".....**

**AT THE HARLEM RIVER INTERMODAL TERMINAL,**

**ESSENTIAL FOR THE OAK POINT RAIL LINK,**

**(FEDERAL, STATE, CITY PROJECT)**

38 PAGES TOTAL

Respectfully Submitted,

Zee Frank  
Landmark Studios, Inc.

ORIGINAL AND 25 COPIES

*Zee Frank*  
*Landmark Studios Inc*



THE WHITE HOUSE  
WASHINGTON

August 11, 1998

Ms. Zee Frank  
2 Willis Avenue  
Pt. Morris  
Bronx, New York 10454-4417

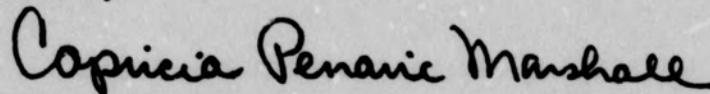
Dear Ms. Frank:

The President was pleased you could join him at the White House on July 15 for the *Empowerment Zone Reception*.

He thought you might like to have the enclosed photograph as a memento of the day.

I send along my thanks and best wishes to you.

Sincerely,

A handwritten signature in cursive script that reads "Capricia Penavic Marshall".

Capricia Penavic Marshall  
Social Secretary

- 1998 - PRESIDENT APPOINTS BRONX LAWYER FOR CHIEF OF STAFF.  
 1998 - NATIONAL Champions of Chess - Bronx "Middle School" Kids triumphant!  
 1998 - CITYWIDE Basketball Championship, won by Bronx "Mustangs", boys 14-16 Division.  
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 Home of Port Morris Patriots and Democracy in the United States.  
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 "Six Most Remarkable Contiguous Bridges in the World"...  
 Span the Federal Harlem River, to join the Island of Manhattan to the Bronx mainland.  
 World Famous, New York City Marathon, cross these bridges,  
 at the Major Highways of "NYC Tourist Corridor" and "Antique Center"  
 1994 - Federal Empowerment Zone awarded Port Morris.  
 1888 - Railroad Builds gracious "Landmark" Office Building, atop Scenic Riverscape; Historic 1776 Revolutionary Site,  
 and Home of Patriots, "Lewis (\*) and Gouverneur (\*\*) Morris".  
 1815 (\*\*) An Early Voice on Conservation to Protect Habitat of Birds, Fish, Wildlife.  
 1790 (\*) Debate in Congress to have the "Capitol of the United States" rise on hill, atop historic and scenic river.  
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 1776 (\*) - SIGNED THE "DECLARATION OF INDEPENDENCE".  
 1670 - Jonas Brounck's Brouncksland becomes "Morrisania Village" of the Patriots, (then in Westchester).  
 1642 - "Indian Peace Treaty" is signed in Jonas Brounck's Farm House.  
 1639 - "Brouncksland settled by Jonas Brounck, (then in Westchester).  
 1492 - 1639 Home of Reckgawawanc Tribe's Chieftains Ramachqua and Taekamuck in "Nuacin Village".  
 (1996 - New York City Bronx Park Department, named "Ramachqua").

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 F. 718-292-9698

## APPEAL TO SURFACE TRANSPORTATION BOARD

FINANCE DOCKET NO. 33388

### "PROPOSED CONRAIL ACQUISITION"

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

SUBMITTED BY:

Zee Frank

Landmark Studios, Inc.  
 2 Willis Avenue, Port Morris  
 The Bronx, New York 10454-4417

August 9, 1998

Voice 718-292-9697  
 Fax 718-292-9698

INTEGRAL TO THE INDUSTRY OF NEW YORK CITY, THE RIGHT OF WAY FOR CONRAIL THROUGH THE HARLEM RIVER YARD, BRONX, NEW YORK WAS USURPED FOR PRIVATE USE BY AN ENTITY, CALLED HARLEM RIVER YARD VENTURES (GALES, ETAL). THIS WAS NOT ADDRESSED FOR THE ACQUISITION BY CSX AND NORFOLK SOUTHERN. THIS RIGHT OF WAY EXISTS SINCE THE MID-NINETEENTH CENTURY.

FURTHER, THE PROJECT OF OAK POINT RAIL LINK AND HARLEM RIVER INTERMODAL TERMINAL IS PUBLIC INFRASTRUCTURE, AND PAID BY FEDERAL, STATE AND CITY. THIS RIGHT OF WAY, FOR DIRECT ACCESS FOR RAIL FREIGHT IN NEW YORK CITY ALSO WAS OMITTED FOR THE ACQUISITION OF CSX AND NORFOLK SOUTHERN.

THIS WAS AN OMISSION OF A PROJECT COST, (\$500,000,000), WHICH INCLUDED STRUCTURAL CHANGES TO BRIDGES, TO ALLOW INTERMODAL RAIL FREIGHT TO DIRECTLY ENTER NEW YORK CITY, TO SERVE EIGHT MILLION AND ENLARGED TO SERVE SOME TWENTY MILLION, ON THE EXISTING RIGHT OF WAY, OF THE OAK POINT RAIL LINK AND ITS PATHWAY THROUGH THE HARLEM RIVER INTERMODAL TERMINAL. PAID FOR WITH FEDERAL, STATE, CITY PUBLIC FUNDS.

OMINOUSLY, THE PRIVATE ENTITY, GALES, ETAL. IS CURRENTLY, IMPEDING THIS RIGHT OF WAY. LEGAL DOCUMENTS ADDRESS THE HAZARDS THUS CREATED STRUCTURALLY, TO THE OAK POINT RAIL LINK, PAID BY FEDERAL, STATE AND CITY. (EXCERPTS FROM THE LEGAL DOCUMENTS ARE ATTACHED.) RAIL FREIGHT SERVICE FOR SOME TWENTY MILLION UNITED STATES CITIZENS, PER THE DOCUMENTS WILL MATERIALLY REDUCE SERVICE, AND CREATE HAZARDS

THIS ALSO GENERATES ENORMOUS ENVIRONMENTAL AND ECONOMIC CONSEQUENCES.

A. BY IMPEDING THE OAK POINT RAIL LINK RIGHT OF WAY, THIS REDUCES MATERIALLY, THE REDUCTION OF POLLUTING EMISSIONS, THAT CONVE"SION OF TRUCKS TO RAIL WOULD HAVE GENERATED, TO MITIGATE THE PRESENT NON-ATTAINMENT OF AIR QUALITY FOR THIS REGION.

B. SIGNIFICANTLY, THE SAME GALESI ETAL, WOULD REPLACE 70% OF THE 96 ACRES OF NEW RAIL LAND WITH HORRIFIC POLLUTING USES, FOR PRIVATE PROFIT AND AT THE SAME TIME HAVE THE MONOPOLY ON THE PUNY 28 ACRES OF RAIL FOR THEIR OWN PRIVATE PROFIT USES, AS THEY SERIOUSLY AUGMENT THE POLLUTION AND HAZARDS. (Please see Volume 6A, Appendix A: Comments Received on the Draft EIS, Pages A-310 thru A-315). NOW ADD A MASSIVE USA WASTE WHICH THE COMMUNITY AND CONGRESSMEN ETC. HAVE ALSO BLASTED FOR THIS #1 ASTHMA COMMUNITY IN THE UNITED STATES, WHICH WILL HAVE A MONOPOLY ON THIS RAIL THAT WAS PAID FOR BY FEDERAL, STATE AND CITY. THIS MONOPOLY SERVES GALESI, ETAL FOR PRIVATE PROFIT, AND INFRINGES ON THE RIGHTS OF ALL INDUSTRY IN NEW YORK CITY.

C. NEW YORK STATE DEPARTMENT OF TRANSPORTATION WILL RECEIVE SBILLIONS A YEAR OF (ISTEA) INTERMODAL SURFACE TRANSPORTATION EFFICIENCY ACT PUBLIC FUNDS. THESE FUNDS PROVIDES FOR ALL INDUSTRY TO COMPETE IN THE GLOBAL ECONOMY. TO CRIPPLE THE ECONOMY OF NEW YORK CITY IS IRRATIONAL. NEW YORK STATE ENJOYS THE SELKIRK RAIL YARDS. 28 ACRES TO SERVE 20 MILLIONS IS LUDICROUS.



1. YOU REPLACE THIS VALUABLE LAND, WHICH WAS ALREADY ENGINEERED WITH SAFE PATHWAYS AND "NEW, YES ALL NEW RAIL", AND YES IN THE CENTER OF NEW YORK CITY, THE TOURIST CORRIDOR, WHERE ALL THE HIGHWAYS MESH WITH THE CRITICAL CITY BRIDGES, AND TURN IT OVER NOT ONLY FOR NOXIOUS, USES, BUT ALSO POTENTIALLY EXPLOSIVE....CHEMICALS.....POWER PLANT..... 150 FOOT STACKS ALLOWED TO EMIT VOC'S OVER THE ENTIRE CITY AND ODOROUS IN THE CENTER OF THE CITY'S BOROUGHES, AT THE FDR (EAST RIVER) DRIVE, AND THEY GENERATE DEADLY EMISSIONS, PARTICULATES..

2. YOU SIMULTANEOUSLY DESTROY THE ECONOMICS FOR NEW YORK CITY. YOU DO NOT HAVE TO BE AN ALAN GREENSPAN TO REALIZE THAT DUMPING IN NEW JERSEY AND BRINGING INTERMODAL FREIGHT ACROSS IN TRUCKS OR BARGE, RAISES THE COSTS, TIME, ACCIDENT LIABILITY TO DISCOURAGE RAIL USE. THIS IS A THIRD WORLD APPROACH TO THE GLOBAL ECONOMY. IF YOU DO NOT HAVE RAIL LAND, (AS UNION PACIFIC FOUND OUT), YOU CANNOT BE A PLAYER IN THE WORLD ECONOMY.

3. THIS BURDENS NEW YORK CITY:

a. THE CITIZENS OF NEW YORK CITY AND BORDERING AREAS OF 20 MILLION WILL BE UNFAIRLY TAXED. THIS SHOULD BE A FEDERAL BI-PARTISAN CONCERN.

b. THE ENVIRONMENTAL DEADLY ATTACK ON THE COMMUNITY IS UNFAIR; AS YOU BOTH DESTROY RAIL AND THEN ADD NOXIOUS, ODOROUS USES.

c. AND, CYNICALLY, YOU IMPAIR THE HEALTH OF THE COMMUNITY. FIRST THE GOVERNMENT POLLUTES, THEN THEY PAY THE HEALTH COSTS.

**BUT NOTHING IS PAID FOR THE ANGUISH, THE INABILITY TO GO TO SCHOOL, THE INABILITY TO PREPARE FOR A JOB, AND THE LACK OF RAIL FOR INDUSTRY TO PROVIDE JOBS.**

**d. IT IS STAGGERING TO PROJECT THE DEPTH OF THE HARM. THE IRONY IS THAT THE NOXIOUS, ODOROUS, HAZARDOUS USES CAN BE ON ANY LAND. TO REPLACE RAIL INFRASTRUCTURE OF \$500,000,000 IS OBSCENE. ITS LIKE BUILDING A HUGE SHACK ON PARK AVENUE. (BUT THERE ARE HUGE TAX BENEFITS FOR THE POLLUTING PRIVATE USES, AND THE 'MONOPOLY' OF RAIL TO EXCLUDE COMPETITION.)**

**IT IS ESSENTIAL FOR THE SURFACE TRANSPORTATION BOARD TO REEVALUATE NEW YORK CITY AND TO ADDRESS THAT WHICH WAS SERIOUSLY OMITTED.**

**A. HARLEM RIVER INTERMODAL TERMINAL ALWAYS HAD A RAIL RIGHT OF WAY, (CONRAIL, ETC.). OAK POINT RAIL LINK AND HARLEM RIVER INTERMODAL TERMINAL WAS PLANNED THE END OF THE 1970's AND DOCUMENTED IN 1982. THE OAK POINT RAIL LINK WAS FINALLY COMPLETED 1997, BUT STOPPED DEAD AS THE GALES ETAL FAILED TO PROVIDE ACCESS. THIS 'BOONDOGGLE' WAS HEADLINE NEWS IN THE MEDIA WHICH REPORTED UPON THE NEW YORK STATE COMPTROLLER'S AUDIT ON GALES ETAL (HARLEM RIVER YARD VENTURES). (THIS FOLLOWED SCATHING CRITICISMS BY THE PANEL OF THE U.S. DEPARTMENT OF TRANSPORTATION, MAY 1996 UNDER THE ISTEA ACT. PRIOR TO THAT THE NEW YORK CITY COMPTROLLER WROTE DETAILED REPORT ABOUT THE ENORMOUS SUBSIDIES THAT ARE GIVEN TO GALES ETAL AND THE DIRE IMPACTS TO NEW YORK CITY INDUSTRY.**

THE DISPARITY OF UPSTATE NEW YORK VS. DOWNSTATE (NYC) IS CLEARLY DESCRIBED AS THE PORT OF ALBANY MERELY TORE UP A LEASE WITH THE GALESI, ETAL WHO HAD PLANNED SIMILAR NOXIOUS, HAZARDOUS USES FOR ALBANY. THE MEDIA REPORTED THAT GALESI WANTED TO CONTROL ALL THE NEW YORK RAIL FROM CHICAGO, MIDWEST AND SOUTH, ALSO OCEAN FREIGHT TO RUSSIA.

B THE SURFACE TRANSPORTATION BOARD, (ALTHOUGH IN MY SUBMISSIONS). APPEAR TO HAVE BEEN DIVERTED FROM THE FACT THAT THE OAK POINT RAIL LINK, TO BRING FREIGHT DIRECTLY TO NEW YORK CITY, IS COMPLETED, BUT STANDS DEAD, AT THE PLEASURE OF GALESI, ETAL.

C. THIS DIVERSION APPEARS TO BE ORCHESTRATED IN ORDER TO DO JUST THAT. A COVER-UP THAT THE OAK POINT RAIL LINK IS COMPLETE "TO BRING RAIL FREIGHT DIRECTLY TO NEW YORK CITY TO PROVIDE ENVIRONMENTAL AND ECONOMIC BENEFITS WHICH UPSTATE NEW YORK ENJOYS WITH THEIR SELKIRK RAIL YARDS. INSTEAD THERE IS A "SPIN" ABOUT A TUNNEL, TO BRING RAIL FREIGHT DIRECTLY TO NEW YORK CITY. THAT IS SWELL! BUT, THE EXPERTS QUESTION WHETHER IT IS DOABLE.....AND IT WILL TAKE MORE THAN A DECADE TO FIND OUT AND MUCH MORE THEN A SINGLE SBILLION TO TRY!

WHY CLOUD THE FACT THAT NEW YORK CITY, NOW HAS A MEANS TO BRING RAIL FREIGHT TO NEW YORK CITY, AND CONRAIL HAS RIGHT OF WAY? STB MUST INCLUDE THE RIGHT OF WAY, NOW EXISTING AND THE FACT THAT, THE HARLEM RIVER YARD HAD A RIGHT OF WAY SINCE THE MID-19TH CENTURY.

D. THIS APPEAL IS TO PUT THE SPOTLIGHT ON THE RIGHT OF WAY EXISTING FOR THE OAK POINT RAIL LINK AND WHICH NYMTC CONFIRMED.. THIS PROJECT WAS ENGINEERED WITH THE HARLEM RIVER INTERMODAL TERMINAL AND APPEARED IN THE ISTEA ACT. IT WAS STATED AS CRITICAL BY THE UNITED STATES DEPARTMENT OF TRANSPORTATION PER THE ISTEA PANEL REVIEW OF MAY 1996 AND SUBSEQUENT MEMO AND LETTER AND IN YOUR FILES; FOR ECONOMIC AND ENVIRONMENTAL HEALTH AND TO SERVE THE GLOBAL ECONOMY. IT MUST BE ADDRESSED, AS. FAILURE TO PROVIDE RAIL FREIGHT DIRECTLY TO NEW YORK CITY FOR THIS GENERATION, TO PROSPER IMMEDIATELY , ENVIRONMENTALLY AND ECONOMICALLY, IS SIMPLY UNACCEPTABLE.

E. CAN ANY CITIZEN, POLITICIAN STAND UP BEFORE THE PEOPLE AND DENY NEW YORK CITY ITS RIGHTFUL HEALTH AND JOB PROTECTION. THE OMISSION OF THE OAK POINT RAIL LINK FROM THE DEBATE IS MORE THAN PERJURY, OBSTRUCTION OF JUSTICE, ETC. ETC. ETC. ETC. ETC. THIS IS A DIRECT HIT ON EVERY CITIZEN IN NEW YORK CITY, AND NO ONE MAN WHO PLANNED CONTROL OF RAIL MIDWEST TO DOWN SOUTH SHOULD HAVE SUCH POWER. ALBANY SAID "NO" FOR THE HEALTH OF ITS CITIZENS UPSTATE....NOW ALBANY HAS TO SAY "NO" FOR THE HEALTH AND ECONOMICS FOR ITS CITIZENS OF NEW YORK CITY.

F. THIS APPEAL COULD BE FLOODED WITH EXTRAORDINARY EVENTS, SINCE MY SUBMISSION, AS TO THE ENVIRONMENTAL PROBLEMS, HERE IN NEW YORK CITY....AS GRIDLOCK....BILLS SUBMITTED TO HELP THE ASTHMA VICTIMS....THE MAYOR'S ACKNOWLEDGMENT OF THE CRISES, ETC.



ALSO A TITLE VI ACTION, ETC. TO LIMIT THIS PAPER WORK, TO FOCUS ON THE RIGHT OF WAY FOR THE OAK POINT RAIL LINK, AND TO PROTECT ITS VIABILITY, I AM NOT INCLUDING THESE ENVIRONMENTAL CRISIS ISSUES WITH THESE PAPERS.

HOWEVER, THEY ARE AVAILALE WITH THE JUSTICE DEPARTMENT IN THEIR 60 DAY COMMENT PERIOD FILES RE THE MERGER OF USA WASTE AND WASTE MANAGEMENT, SUBMITTED TO ROBERT KRAMER, ESQ. OF THE ANTI-TRUST UNIT. IT IS UNBELIEVABLE THAT A BRONX BILL HAD TO BE PASSED TO ALLOW THE ASTHMA VICTIMS TO USE THEIR VENTILATER IN SCHOOL WHEN THEY CANNOT BREATH. IMAGINE THEY WERE NOT PERMITTED TO SAVE THEIR LIVES.

SHOULD YOU WISH THE FILE. I SHALL BE HAPPY TO RESPOND AT ONCE. AS YOUR BOARD CAN SEE, NEW YORK CITY NEEDS A BREAK!

G. SIGNIFICANTLY, BY ALLOWING THE PROJECT OF OAK POINT RAIL LINK AND HARLEM RIVER INTERMODAL TERMINAL TO BE SEVERED, IT CREATES AN ENORMOUS RAIL MONOPOLY FOR MOSTLY ONE MAN (GALESI GROUP) AND USA WASTE. THAT IS WHY THE STAKES ARE HIGH. BUT THAT IS WHY NEW YORK CITY REQUIRES PROTECTION OF THIS FEDERAL, STATE AND CITY \$500,000,000 INFRASTRUCTURE.

I sincerely trust that the board of the Surface Transportation Board, revisits the abandonment of New York City. My contact with the STB has been with great respect for the entire staff led by Ms. Linda Morgan. I trust this additional insight into the dilemma that faces New York City, will be helpful to put the spotlight upon the 20 millions of citizens that depend upon full use of the Oak Point Rail

Link to protect their right to quality air, and economic opportunities in this global economy.

We believe the purpose of the Federal Government is to monitor equitable treatment.

Lets not destroy this irreplaceable infrastructure for the private benefit of largely one man.

Respectfully submitted, Zee Frank

Submitting 12 pages + 5 (18)

They include 9 pages of comments, the cover page where you can find some of my prior submissions in Volume 6A, and cover page of Title VI Lawsuit filed by others, wherein the engineered Oak Point Rail Link is being converted to jig saw puzzle that supposed to accept mile long and two mile long trains. The Exhibits and Affidavit of Jose Perez are mentioned at the bottom of Page 16 attached, from which we quote: "That reduction is still in process and is likely to destroy most rail capacity, not only at Harlem River yard but also the ability to move trains efficiently between the nation's rail system and the rail system East of HRY, See Affidavit of Jose Perez."

Please know that we will immediately send all the references therein, upon your request.

It is tantamount to reliving the Union Pacific crisis, but worse as "Galesi" is not a Rail Expert and has its staff constantly state you cannot make money on Intermodal that is why he is replacing same with noxious, hazardous uses. Well CSX and Norfolk Southern say, you can, with their \$10.2 Billions Bid.

I am faxing this Sunday 8/9/98, but will send it certified tomorrow in the mail.

Somehow I feel it is urgent as the Galesi Etal gang have become fearful with a continuous set of very hostile actions.

*Submitting 6 pages to Justice Dept  
with media statistics on Asthma!*

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF NEW YORK

-----X

THE SOUTH BRONX COALITION FOR CLEAN AIR, INC.  
d/b/a SOUTH BRONX CLEAN AIR COALITION,  
THE BUSINESS LABOR AND COMMUNITY COALITION,  
INC., THE URBAN ENVIRONMENTAL ALLIANCE,  
INC., THE CHERRY TREE ASSOCIATION, INC. AND  
THE NEW YORK CITY ENVIRONMENTAL  
JUSTICE ALLIANCE,

Plaintiffs,

98 Civ. 4404 (AWS)

Certification

- against -

E. VIRGIL CONROY as Chairman and President  
of the METROPOLITAN TRANSPORTATION  
AUTHORITY and of the NEW YORK CITY TRANSIT  
AUTHORITY and MANHATTAN & BRONX SURFACE  
TRANSIT OPERATING AUTHORITY, and  
of the LONG ISLAND RAILROAD, Hon. GEORGE PATAKI,  
as Governor of the STATE OF NEW YORK, JOSEPH H. BOARDMAN  
as Commissioner of the NEW YORK STATE DEPARTMENT OF  
TRANSPORTATION, the NEW YORK STATE URBAN DEVELOPMENT  
CORP. d/b/a the EMPIRE STATE DEVELOPMENT CORP.,  
JOHN CAHILL as Commissioner, New York State DEPARTMENT  
OF ENVIRONMENTAL CONSERVATION, HON. CAROL M.  
BROWNER as administrator of the UNITED STATES ENVIRONMENTAL  
PROTECTION AGENCY, HON. RODNEY SLATER as UNITED STATES  
SECRETARY OF TRANSPORTATION, HARLEM RIVER  
YARD VENTURES, INC., THE NEW YORK POST COMPANY, INC. and  
USA WASTE, INC.

Defendants.

-----X

application notice dated July 16, 1997 and objections, Exhibit J). That change increased the legal capacity of the facility by 49%<sup>2</sup> and markedly reduced capacity of the small remaining rail intermodal terminal. That rail terminal was designed to remove trucks from the highway along the West side of the Bronx and across northern Manhattan by placing them on rail cars, at the north end of the Triborough Bridge. The reduction of, or, indeed, the destruction of, the rail terminal's capacity substantially reduces the environmental mitigation used to justify the entire 1993 Harlem River Yard plan. That reduction is still in process, and is likely to destroy most rail capacity<sup>3</sup>, not only at Harlem River yard but also the ability to move trains efficiently between the nation's rail system and the rail system East of HRY, See Affidavit of Jose Perez.

<sup>2</sup> While the licensed capacity of the facility remained 3,000 tons, a permit holder in New York is entitled to an as of right increase in through put of 49% provided it can show that it has the capacity within its facility to handle the added volume.

<sup>3</sup> Your deponent is familiar with track curvature as it effects rail operations. One of the purposes of the Harlem River Yard project commenced in 1982 was to eliminate the need for freight trains to negotiate sharp curves on the Port Morris Branch of Conrail, the only present access across the Bronx. The long sweeping curves shown on the aerial photographs I took of Harlem River Yard in 1994 (Exhibit Q, 1&2) and shown on the causeway in Mr. Jose Perez's photos taken from the Third Avenue Bridge on July 7, 1998, (Exhibit R-1) were to solve this problem by providing a high speed alternative to the Port Morris route. But the changes shown in Mr. Perez's photo taken from the Willis Avenue Bridge show the realignment of the tracks on the Harlem River yard to accommodate the expanded U.S.A. Waste garbage facility (Exhibit R-2). Please note that intermodal freight is handled in trailers mounted on 89' long cars, designated as TTX cars. These cars cannot negotiate curves of more than 12.5 degrees. Any greater curve will cause these cars to derail. Further six axle locomotives similarly cannot negotiate a greater curvature. That means that the track curves 12.5 degrees in 100 feet. The photographs taken by Mr. Perez and affixed to his affidavit show a curve on the new through track, depicted in the center of the photograph, which appears to exceeds this limit. The Court can check this by understanding that the rails are 4'8" apart and the change in direction shown in the photograph is about 45 degrees. That entire change in direction appears, when compared with the width of the track, to be accomplished in a little more than 100 feet. Therefore neither TTX cars nor modern large road locomotives could safely operate on this track, except perhaps in very short trains moving at extremely slow speed. No economical intercity movement could be accomplished over this track.



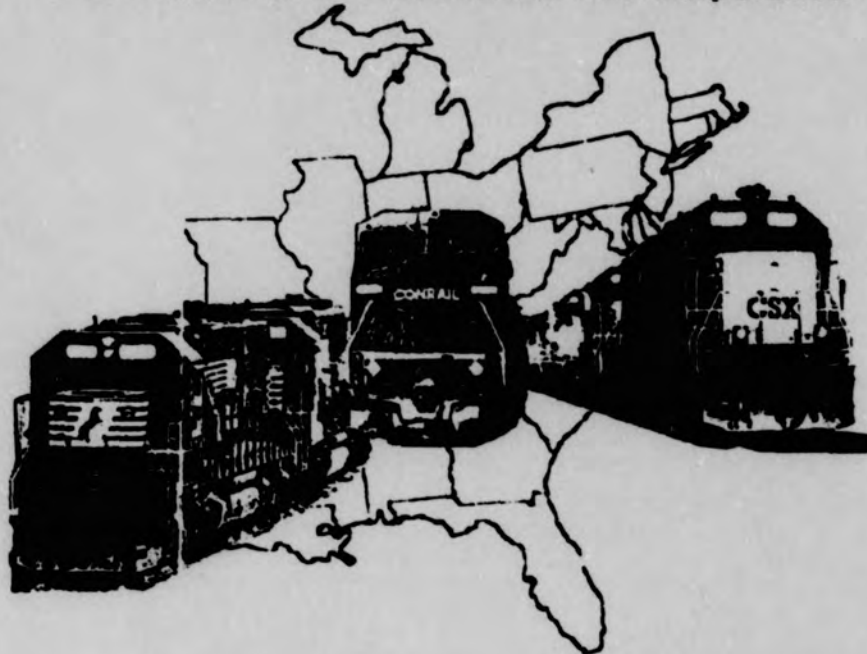
# FINAL ENVIRONMENTAL IMPACT STATEMENT

Finance Docket No. 33388

## "PROPOSED CONRAIL ACQUISITION"

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



## VOLUME 6A

### Appendix A: Comments Received on the Draft EIS

*prepared by:*

Surface Transportation Board  
Section of Environmental Analysis

1125 K Street, NW • Washington, DC 20423-0001

*Information Contacts:*

Elaine K. Kaiser  
Environmental Project Director  
888-869-1997

Michael J. Dalton  
Environmental Project Manager  
888-869-1997

*Please see pages A 310, A 311,  
A 312, A 313, A 314 & A 315.*

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zee frank@aol.com

Zee Frank  
 V. 718-292-9697  
 F. 718-292-9698

Fax to: 202-307-6283 August 11, 1998 RE MERGER USA WASTE AND WASTE MGMT.

ROBERT KRAMER, ESQ. CHIEF OF LITIGATION  
 ANTI-TRUST DIVISION, U.S. JUSTICE DEPARTMENT  
 1401 H Street, N.W. Suite 3000  
 Washington, D. C. 20530

Dear Mr. Kramer and Staff:

We have submitted comprehensive letters and documents since March, 1998. (The recent letters in error recited USA WASTE TAKE OVER OF WASTE MANAGEMENT, TO ASSUME \$4 BILLION IN DEBT. ACTUALLY IT IS 7\$ BILLION. IT BRINGS TO MIND THAT THE OBVIOUS HAS NOT BEEN ADDRESSED. WASTE MANAGEMENT CURRENT REVENUE IS FAR IN EXCESS OF USA WASTE. IS IT REALLY PRUDENT TO ALLOW SUCH HUGE DEBT TO BE TAKEN OVER BY USA WASTE... WITHOUT AUDITING HOW THEY INTEND TO PAY OFF THAT DEBT; AND BY WHAT MIRACLE OTHER THAN TAXING THE PEOPLE).

EACH OF MY SUBMISSIONS AS THIS ONE #9, PRESENTED GRAPHIC EXHIBITS FOR YOUR CONSIDERATION. OF MAJOR IMPORTANCE WAS THAT THIS SPECIFIC AREA IS TARGETED FOR UNFAIR PARTICULATES, DIESEL TRUCKS WHICH ARE DEADLY TO SOUTH BRONX. THIS IS ADDED TO THE FACT THAT THE SOUTH BRONX IS THE LAND MASS FOR NEW YORK CITY AND HENCE THE HIGHWAYS ENTER AT THE BRIDGES HERE TO OTHER BOROUGHES.

THE PRECISE AREA HERE OF BRUCKNER BOULEVARD IS THE 2ND LARGEST IN VEHICLE MOVEMENT TO THE MAJOR DEEGAN, ALSO HERE WHICH IS NO. 1. OTHER MAJOR HIGHWAYS CONVERGE AS NEW ENGLAND/BRUCKNER XWY/HUTCHINSON, ETC.

PAGE 2.

AND UPSTATE OVER THE GEORGE WASHINGTON BRIDGE, ETC. ETC. ETC.

UP IN WASHINGTON, D. C. YOU REALLY CANNOT JUDGE THE SIGNIFICANCE OF ADDING A MAJOR, MAJOR, MONSTROUS USA WASTE THAT THEY ARE RUSHING TO BUILD.

AND, IT IS QUITE UNDERSTANDING THAT YOU VIEW NINE SUBMISSIONS AS A NUISANCE, BECAUSE YOU GET STRAIGHT FROM THE POLITICIANS ETC. A DIFFERENT MESSAGE. REMEMBER THEIR CAMPAIGN FUNDS ARE URGENT FOR THEIR EXISTENCE. GRANTED. BUT THERE MUST BE SOME LINE DRAWN. IN THE END POLITICIANS, LAWYERS, CORPORATE CEO'S, ETC. END UP TO TRUST THEIR PHYSICIAN AS THEY SEEK TO LIVE LONGER.

THEREFORE IT IS MANDATORY THAT YOU CONSIDER MEDICAL STATISTICS VALID. AND AS LAWYERS, YOU PLACE THAT JUDGMENT ABOVE CEO'S, POLITICIANS, ETC. BY THE WAY, RECENT STUDY REVEALED THAT DOCTORS ARE MOST RESPECTED.

WELL THERE ARE THREE MEDIA ARTICLES, 8/10, 8/11/98 THAT YOU MUST CONSIDER AS ATTORNEYS. IF THIS COUNTRY HAS BEEN GLUED TO THE TELEVISION BECAUSE A GUY LIED ABOUT SEX WITH A CONSENTING ADULT; (AS MILLIONS OF HUSBANDS AND ALSO WIVES HAVE DONE THROUGHOUT TIME)..... THEN AGAIN, AS ATTORNEYS YOU MUST RECONSIDER THE SOUTH BRONX, WHERE IN AFFECT GENOCIDE IS OCCURRING.

FROM THE GENERATION THAT AMERICANS FOUGHT THEIR WAY INTO EUROPE, UNDER THE BARRAGE OF GUN FIRE TO ACHIEVE POWER FOR THE UNITED STATES.... THEN I FEEL QUALIFIED TO ASK THE JUSTICE DEPARTMENT FOR THE SAME COURAGE.

ENCLOSED ARE:

8/10/98, PAGE 2, DAILY NEWS "CENTER TO TARGET ASTHMA"

"NEW YORK IS THE ONLY CITY TO GET TWO CENTERS...ON ASTHMA

"CHILDREN RE INHERENTLY MORE VULNERABLE TO TOXIC AND ENVIRONMENTAL EXPOSURES"

**"THE SERIES SHOWED THE SOUTH BRONX HAS THE HIGHEST RATES IN THE COUNTRY FOR ASTHMA-RELATED HOSPITALIZATIONS AND DEATHS."**

(Do you remember the article sent to you, where Bronx officials had to get a Bill signed by the Governor to allow the kids to have their ventilators in school, to save their lives. ETC. ETC.

8/11/98, PAGE 42, DAILY NEWS "BREATHE EASIER"

READ THE STATISTICS AND NOTE: "WITH AN AVERAGE OF ONE CHILD HOSPITALIZED WITH DISORDER EVERY 35 MINUTES--TWICE THE NATIONAL AVERAGE ---ASTHMA IS THE LEADING CAUSE OF HOSPITALIZATION AND SCHOOL ABSENTEEISM AMONG CITY CHILDREN."

(WHAT ELSE WILL MOVE YOU INTO ACTION. THESE ARE NOT POLITICIANS WRITING).

8/11/98, PAGE 16, DAILY NEWS "NYPD TAKES HIT ON COMPLAINTS"

THE DISTRICT 40 PRECINCT IS EXACTLY WHERE THE GALES, ETAL AND USA WASTE ARE TAKING OVER. TONIGHT DATELINE WILL RUN THE REPORT ON TELEVISION.

(This also must answer you question how come the Police in this district do not take action against those who are destroying property and serious intimidation.)

A LOT OF PEOPLE ARE CONCERNED, AND DOCTORS WANT TO SERVE PATIENTS THEY CAN HELP. THEY CAN'T STOP THE POLLUTION, BUT YOU CAN. YOU CAN HELP BY TELLING USA WASTE TO RESTRICT THEIR OPERATION TO SPM. TO DIVEST SPM AND THEN ADD ENORMOUS VOLUME, SURELY GENERATES GENOCIDE. THE FACTS ARE NOW CLEAR. PLEASE CONSIDER. ZEE

*5 Pages*



# Centers to target asthma

## Enviro diseases up

By KATHY KIRBY

Daily News Washington Bureau

WASHINGTON — Two New York medical schools are getting the lion's share of federal funds that Vice President Gore will award today to establish the nation's first research centers on asthma and other environmental threats to children.

Mount Sinai School of Medicine and Columbia University's School of Public Health will receive \$2.8 million to study the effects of urban pollution on New York's youngest citizens.

They are among eight medical institutions selected in an extremely competitive process to pick the sites of the new children's environmental health research centers.

New York is the only city to get two centers.

Frederica Perera, a professor of public health, will help set up Columbia's center.

In areas of northern Manhattan, Perera said, environmentally induced childhood ailments "are serious and increasing."

As many as 17% of the children suffer from asthma and as many as 15% of babies are born underweight in Harlem and Washington Heights, Perera said.

Nationally, child cancer rates have been going up by 1% each year.

Researchers believe these disturbing figures reflect the fact that "children are inherently more vulnerable to toxic

and environmental exposures," Perera said.

Her group at Columbia plans to use a combination of high-tech molecular biology and old-fashioned, door-to-door surveys to track the causes of children's health problems and figure out ways to prevent them.

The new childhood environmental health centers — which also will be established in Ann Arbor, Mich.; Berkeley, Calif.; Los Angeles; Iowa City, Iowa; Baltimore and Seattle — are jointly funded by the U.S. Environmental Protection Agency and the Department of Health and Human Services.

Gore will announce the grants at a White House ceremony today.

"Our children are our most precious resource, and we must do all we can to provide them with a safe, healthy environment," Gore said in a statement.

"These new research centers will insure that our efforts to prevent asthma and protect children against pesticides and other environmental hazards are guided by the best possible science."

The funds' awarding comes in the wake of an award-winning, four-part Daily News series on the raging asthma epidemic affecting city children.

The series showed the South Bronx has the highest rates in the country for asthma-related hospitalizations and deaths.

To day's paper 8/10/98 TELLS IT ALL!  
DO NOT DESTROY RAIL FOR POLLUTION!

STOP DESTRUCTION  
OF RAIL FOR DEADLY  
USES!

SOUTH  
BRONX

DEADLY





It has taken near  
50 pages in Daily News  
to wake up NYC to  
the genocide in So Bronx!  
(See Page 2 of 8/10/98 News)

42

**DAILY NEWS**  
400 W. 39th St., New York, N.Y. 10018

MORTIMER B. ZUCKERMAN, Chairman & Co-Publisher  
FRED DRASNER, Chief Executive Officer & Co-Publisher  
HAROLD EVANS, Vice Chairman & Editorial Director  
DEBBY KRENEK, Editor in Chief  
ARTHUR BROWNE, Managing Editor  
MICHAEL GOODWIN, Editorial Page Editor

The state report said: "Any serious review of his medical records should have resulted in the conclusion that he was not medically qualified to drive a bus."

"Any serious review" obviously didn't happen. Why?

## Breathe easier

In granting two New York City medical schools \$2.8 million to study the effects of urban pollution on asthma and other environmental threats to children, the federal government is putting resources where they are needed most — at the center of the worst asthma epidemic in the nation.

The grant to fund research centers at Mount Sinai School of Medicine and Columbia University's School of Public Health comes after a Daily News series exposed huge gaps in city efforts to treat asthma and target worst-hit areas.

The statistics are shocking:

Some 500,000 New York City residents, 130,000 of them children, suffer from asthma. That's the highest rate in the United States. Each year, 35,000 New Yorkers are hospitalized for the disease, and some 300 die — up 50% since 1980. With an average of one child hospitalized with the disorder every 35 minutes — twice the national average — asthma is the leading cause of hospitalization and school absenteeism among city children.

Other childhood diseases are up as well, with cancer growing at a rate of about 1% a year. Said public health professor Frederica Perera, who will help set up Columbia's study center: "Children are inherently more vulnerable to toxic and environmental exposures." She said the center will use a combination of molecular biology and old-style door-to-door polling to track the causes of childhood illnesses and find ways to prevent them.

The new centers will put the best possible science at the greatest point of need. Thankfully, that means the prognosis for the future of our city's children is, at long last, hopeful.

## When in Brooklyn . . .

From the wires: ROME (Reuters) — Thirty-six per cent of the female tourists from Europe and the United States said hopes of finding passion had brought them to Italy.

What, you think they come to New York for the bagels?

Tuesday, August 11, 1998 • DAILY NEWS

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40th Precinct in same district as  
the genocide area in South Bronx  
It's why the law is on "Environmental Justice"

Supporters vowed an appeal, continue to be available at two-year colleges.

"Well, obviously I disagree with the judge that we held a

received more public scrutiny than any CUNY vote in the last 30 years. For the judge to find a

him whether the legal in view of suit. With Sal

## NYPD takes hit on complaints

By **HENRI E. CAUVIN**  
Daily News Staff Writer

Members of a police watchdog group who went undercover to seek information on how to file complaints against cops were rebuffed or misled at nearly half the 32 city precincts they visited, according to a TV news magazine report. "Get out of my station. Get out," a sergeant at the 40th Precinct in the South Bronx told one man seeking a complaint form, according to the report to air tonight on NBC's "Dateline."

During the confrontation — caught on hidden camera — the cop became angry when the man declined to discuss his complaint or give his name. "Leave until you want

to come in and tell me about this complaint," the cop said. "If you don't want to cooperate with me, I can't take your complaint. Understand me? So you're wasting my time."

The man stood his ground, however, pressing the officer for a form he could fill out elsewhere. Ultimately, the officer relented. "Get out. There's the form," the cop said.

Getting the form should not have been that difficult, said Police Commissioner Howard Safir, who called the sergeant's conduct "totally inappropriate."

"That's somebody who needs retraining, discipline, and depending on his record, maybe he doesn't deserve to be dealing with the public,"

Safir told "Dateline."

At 17 of the stationhouses surveyed, cops followed NYPD procedures, giving out complaint forms and a toll-free complaint-hotline number, according to "Dateline."

At the other 15, however, the undercover watchdogs from the Florida-based Police Complaint Center were rebuffed or given the runaround, the show's producers said.

Police Department spokeswoman Marilyn Mode would not say whether officers highlighted in the report had been or would be disciplined.

The NYPD, she said, acts based on its own investigations. "We don't know what went on before the tape was rolling," she said.

## Bank robbery puts thief in th

By **JOHN MARZULLI**  
Daily News Staff Writer

Cops are looking for a bank robber who was left seeing red after his latest heist.

The bandit, believed responsible for eight stickups since May 4, was splattered after a red-dye packet exploded in his bag of loot Friday afternoon outside the Greenpoint Savings Bank at 158-10 Jewel Ave., Flushing, Queens.

The red-faced robber gathered up \$498 scattered on the sidewalk and left behind \$692 before fleeing in a waiting livery cab, said Sgt. Paul Helbock of the NYPD major case squad.

Helbock said the robber hit one of the main banks that uses the explosive packets, which behind a stubborn st takes several days of bing to remove.

The robber is described as a light-skinned man, 25 to 35 years old, 5-foot-8 to 5-foot-9, stocky build. He has photographed wearing Yankees baseball cap and Puerto Rican flag band and wrap-around sunglasses.

Anyone with information is asked to call (800) TIPS or the major case squad at (212) 374-3955.

**Regal Empress** "BEST VALUE IN CRUISING"  
REFURBISHED IN 1997  
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Use your  
Macy's

DAILY NEWS PAGE 16  
8/11/98

SOUTH BRONX  
ON DATELINE TV  
8/11/98

1998 - PRESIDENT APPOINTS BRONX LAWYER FOR CHIEF OF STAFF.  
 1998 - NATIONAL Champions of Chess - Bronx "Middle School" Kids triumphant!  
 1998 - CITYWIDE Basketball Championship, won by Bronx "Mustangs", boys 14-16 Division.  
 1998 - New York City 100 Celebration - "America begins in New York".  
 Home of Port Morris Patriots and Democracy in the United States.  
 1997 - "All - America City" awarded to The Bronx.  
 1997 - "Fordham University" placed in the "Nation's Best Values".  
 1997 - Bronx "Little League" win Baseball Crown for NEW YORK STATE.  
 1996 - The Bronx... "New York Yankees"... World Champions.  
 World Famous - Bronx Zoo and Wild Life Habitat.  
 World Famous - Bronx Botanical Gardens.  
 "Six Most Remarkable Contiguous Bridges in the World" ...  
 Span the Federal Harlem River, to join the Island of Manhattan to the Bronx mainland.  
 World Famous, New York City Marathon, cross these bridges,  
 at the Major Highways of "NYC Tourist Corridor" and "Antique Center"  
 1994 - Federal Empowerment Zone awarded Port Morris.  
 1888 - Railroad Builds gracious "Landmark" Office Building, atop Scenic Riverscape; Historic 1776 Revolutionary Site,  
 and Home of Patriots, "Lewis (\*) and Gouverneur (\*\*) Morris".  
 1815 (\*\*) An Early Voice on Conservation to Protect Habitat of Birds, Fish, Wildlife.  
 1790 (\*) Debate in Congress to have the "Capitol of the United States" rise on hill, atop historic and scenic river.  
 1788 (\*) - Ratified the "Constitution for United States" for New York State.  
 1787 (\*\*) - PENNED, PHRASED AND DRAFTED THE FINAL "CONSTITUTION OF THE UNITED STATES".  
 1776 (\*) - SIGNED THE "DECLARATION OF INDEPENDENCE".  
 1670 - Jonas Brounck's Brouncksland becomes "Morrisania Village" of the Patriots, (then in Westchester).  
 1642 - "Indian Peace Treaty" is signed in Jonas Brounck's Farm House.  
 1639 - "Brouncksland settled by Jonas Brounck, (then in Westchester).  
 1492 - 1639 Home of Reckgawawanc Tribe's Chieftains Ramachqua and Taekamuck in "Nuacin Village".  
 (1996 - New York City Bronx Park Department, named "Ramachqua").

Landmark Studios, Inc.  
 2 Willis Avenue, Port Morris  
 The Bronx, New York 10454-4417

zee frank@aol.com

Zee Frank  
 V. 718-292-9697  
 F. 718-292-9698

August 18, 1998 Fax to: 202-307-6283

RE: MERGER USA WASTE AND WASTE MGMT  
**MONOPOLY OF SOLID WASTE AND RAIL IN THE BRONX**

Robert Kramer, Esq., Chief of Litigation  
 U.S. Justice Department - Anti-Trust Division  
 Washington, D. C. 20530

Dear Mr. Kramer and Staff:

Your mandate requires that USA WASTE divest itself of the former SPM Waste, of Waste Management, in the Bronx. We are attaching two written documents, (and a tape is also available) of just how USA Waste/Galesi operated before the Merger was manipulated of USA Waste and Waste Management.

We have brought to your attention, (and copied to you, present Federal litigation by others) that the USA WASTE is frantically in the process to build an enormous Waste facility, which will replace the rail land required for all industry in New York City. This rail land is part of a \$500,000,000 project of the Oak Point Rail Link and the Harlem River Intermodal Terminal, paid with Federal, State, City funds. This Terminal is urgent for the 20 million that would depend upon the Rail Freight, (8 million NYC residents plus adjacent areas). THE TOTAL ACREAGE OF THE HARLEM RIVER INTERMODAL TERMINAL IS CRUCIAL TO SERVE THIS POPULATION.

TO ALLOW USA WASTE TO DIVEST THE SPM/WASTE FACILITY AND THEN DESTROY THE RAIL TO BUILD ANOTHER FACILITY; RESULTS IN THE DOUBLE WHAMMY OF CREATING A MONOPOLY OF SOLID WASTE.....BY ALSO CONTROLLING THE RAIL MONOPOLY FOR THE ENTIRE CITY AND ADJACENT AREAS. (This structure is NOT ONLY PLANNED TO REPLACE THE CRUCIAL RAIL LAND, BUT TO BE BUILT IN 100 YEAR DECLARED FLOODPLAINS, WITH POTENTIAL SERIOUS IMPACTS.)

**THIS IS OF SIGNIFICANT CONCERN FOR THE JUSTICE DEPARTMENT, ANTI-TRUST DIVISION**



THE ATTACHED STATEMENTS BY THE THEN LARGEST SOLID WASTE ORGANIZATION, WASTE MANAGEMENT, SETS FORTH COMPELLING REASONS THAT USA WASTE SHOULD MAINTAIN THE SPM AND DIVEST ITSELF OF THE PLANNED SOLID WASTE STRUCTURE THAT WOULD DEVASTATE THE ENTIRE CITY, BY REPLACING THE RAIL REQUIRED FOR ALL INDUSTRY IN THE CITY.

September 13, 1995

WMX, Waste Management, Inc. Headquarters by Thomas J. Jennings; Vice President and General Counsel wrote to John B. Daly, Commissioner, State of New York, Department of Transportation, Albany. The State of New York had leased the Harlem River Intermodal Terminal to the entity called Harlem River Yard Ventures of the Galesi Group.

The 2 page letter is attached. It reports that the Harlem River Yard Ventures of the Galesi Group (who has a contract with USA Waste), severed the Rail Line then had by Waste Management. (Waste Management acquired the entire New York City's Waste Disposal contract).

The letter is self-explanatory, but the result was they just cut Waste off.

That is how these folks operate.

November 2, 1995

New York State Urban Development Corporation Hearing at Hostos Community College, re the activities for the Harlem River Intermodal Terminal.

Herewith is the cover page and pages 72 through 77 by a representative of Waste Management pleading for the use of Rail (Certified copy of record by Roy Allen & Associates), Mr. Jay McLaughlin.

Attached is also the letter from Empire State Development Corporation submitting the hearing transcript to me. The other speakers argued against the destruction of Rail for the noxious uses etc. and against Environmental Justice. The entire transcript is available if requested.

This is a case history of how powerful...power is; and the reason for the Justice Department, Anti-Trust Division. Clearly, this shows that even a powerful company like Waste Mgmt. was subjected to extraordinary monopoly, even though they are the main New York City source, under contract. The SPM, now Waste Mgmt, now USA Waste should continue its contract and USA Waste should divest itself of the new location which would destroy the Rail required for all industry; and hence a/iron clad Monopoly, of unlimited power.

Now if this isn't enough, there was a hearing at the Bronx Borough President's offices. The Tape on that hearing was stormy. It includes dialogue between Waste Management, (by Will Flowers)/the New York State Department of Transportation and the representative (T. Riccio) of the Harlem River Yard Ventures/ the Galesi Group. (Please request the tape, if desired).

**TO ACCENTUATE THE NEED FOR KEEPING USA WASTE FROM DESTROYING THE RAIL YARD.....THE NEW YORK STATE COMPTROLLER REPORT, DATED FRIDAY, AUGUST 14, 1998, STATED THAT IT IS URGENT TO DIVERSIFY NEW YORK CITY, TO AVOID ANOTHER RECESSION, WHEREBY NEW YORK CITY WAS HIT "HARDER AND DEEPER THAN ANYWHERE ELSE IN THE COUNTRY". THE RAIL INFRASTRUCTURE IS MANDATORY FOR SUCH DIVERSIFICATION. WITHOUT THE RAIL NEW YORK CITY CANNOT BE COMPETITIVE AS THE RAIL FREIGHT WILL LARGELY BE DUMPED IN NEW JERSEY WITH ADDED TRUCK EMISSIONS TO BRING THE FREIGHT ACROSS THE HUDSON RIVER.**



Page 3.

The Office of the State Comptroller in February, 1997 wrote a scathing report on the plans to destroy the Rail, and the "Boondoggle" caused whereby the Oak Point Rail Link was complete, but stopped dead by the failure of the Harlem River Yard Ventures/Galesi Group.

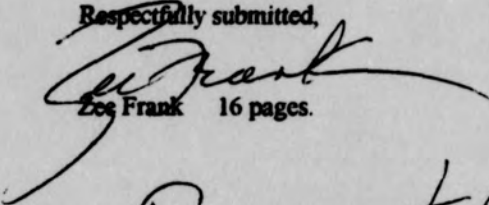
In July 30, 1997, they further showed their concern on the enormous destruction of Rail that will occur with the replacement of the Rail by these private profit uses which should be outside the Rail Yard. There are maps showing the amount of Rail being removed. Also, the Permit for the Oak Point Rail Link was reissued in consideration that more, not less, Rail Track will be laid.

And, in closing gentlemen, today, I received from the White House, photos of the pictures taken with President Clinton, when I represented the Empowerment Zone at the White House Conference. I thought I would enclose a copy of the note with the photos, to support my interest in the Bronx community.

Your careful review will be appreciated. As you can see from the dates of the articles submitted to you, in the past, things are moving fast here, which explains the number of letters submitted, to keep you updated.

Your comments will be appreciated.

Respectfully submitted,

  
Zee Frank 16 pages.

*Regards to your staff!*

**WMX****Waste Management, Inc.**

4 WMX Technologies Company  
Three Greenwood Square  
3329 Street Road  
 Bensalem, PA 19020-8532

Phone 215 244 9514  
Fax 215 244 1309

September 13, 1995

John B. Daly  
Commissioner  
State of New York  
Department of Transportation  
Albany, NY 12232

Dear Commissioner Daly:

This in response to your letter dated September 1, 1995 to Mr. Vincent L. Promuto concerning rail access to the facility of Waste Management of New York City (formerly held by SPM Environmental, Inc.) located adjacent to the Harlem River Yard.

We appreciate your encouragement of rail traffic through the Harlem River Yard and intend to finalize a contract with Conrail within the next several months to provide such service to the Waste Management facility. Your assertion that there is no rail access running through the Harlem River Yard to the Waste Management facility is, however, incorrect. According to officials at Conrail and based on our own investigation, this rail line which provided service to shippers at the Harlem River Yard for many years up to and until 1993, has never been abandoned. Rail lines such as this one, cannot be abandoned through non-use or the sale of the underlying fee title. Abandonment can only be accomplished with the approval of the Interstate Commerce Commission (ICC) after the necessary procedural requirements of the Interstate Commerce Act have been satisfied. This has not occurred with respect to this rail line.

Although we are willing to discuss an amicable resolution of the situation with Harlem River Yard Ventures, our right to rail access through the Yard is not dependent upon reaching an agreement, but flows from the Interstate Commerce Act.

John B. Daly  
September 13, 1995  
Page 2

We welcome your assistance in dealing with your tenant, who has made it clear to us, through words and actions, that it has an entirely different view of the matter. Again, we would prefer a good relationship with Harlem River Yard Ventures, but we do not intend to allow any unlawful interference with our operation. If you have any questions or need further information, please do not hesitate to contact me.

Very truly yours,



Thomas J. Jennings  
Vice President and General Counsel

TJJ/rw

cc: Vincent L. Promuto  
Anthony Riccio

ORIGINAL

1

NEW YORK STATE  
URBAN DEVELOPMENT CORPORATION

-----X

Public Hearing :

Re: :

New York (Bronx County) - Harlem :

River Yard Intermodal Transportation :

and Distribution Center Civic Project :

-----X

Hostas Community College  
500 Grand Concourse  
Bronx, New York

November 2, 1995  
6:15 o'clock p.m.

B e f o r e:

THOMAS F. TORRES, Esq.

The Hearing Officer

ROY ALLEN & ASSOCIATES, INC.  
521 Fifth Avenue, 17th Floor, New York New York 10175  
(212) 840-1167



2 99-year lease, what's going to stop him from building an  
3 incinerator in ten or 20 years, huh?

4 What?

5 (Applause.)

6 MR. TRUDELL: Yolanda Rivera? Banana  
7 Kelly? No, they're not going to stop him.

8 The only thing that's going to stop him  
9 is us in this community right now. Stopping the land grab,  
10 99-year lease, land give-away scam. Poor excuse for a  
11 public process.

12 THE HEARING OFFICER: Thank you,  
13 Mr. Trudell.

14 MR. TRUDELL: Thank you.

15 THE HEARING OFFICER: Thank you, sir.

16 (Applause.)

17 THE HEARING OFFICER: Okay, our next  
18 speaker is Mr. Jay McLaughlin, Waste Management of New York  
19 City.

20 MR. MCLAUGHLIN: Thank you.

21 Just for purposes of reference, we're  
22 right here (indicating). We're on the water. We're a  
23 14-acre site and our rail access used to run through the  
24 Harlem River Yards. Right now it's being blocked by the  
25 Galesi Group and the State DOT.

1  
2 We're a Fortune 100 company. We came to  
3 the South Bronx in February. Nobody made any big  
4 announcements. We didn't have any big incentives. We  
5 bought a transfer station and recycling facility in the  
6 South Bronx. We invested over \$30 million in this facility  
7 without one single incentive. Our incentive really was the  
8 opportunity in the South Bronx.

9 Also, we run a union shop. We have 50  
10 jobs at the site. We pay our taxes and over 90 percent of  
11 our employees are Bronxites. And by that, I mean, the  
12 payroll register shows the checks, residents going to Morris  
13 Avenue, people in Morrisania, people in Mott Haven, people  
14 on Viele Avenue, people on Hunts Point Avenue. We are an  
15 employer in the Bronx. Nobody begged us to come. We wanted  
16 to come here.

17 In fact, we have a subsidiary that's  
18 called Rust Engineering. We did some studies for the  
19 community project for the paper plant. We've invested over  
20 \$150,000 in time, as you well know, to help this process go  
21 along. We're a company that is committed to the  
22 environment, a safe environment. And it's the biggest  
23 company in the block. We're the biggest target of the EPA  
24 and the regulators.

25 I really have something to say specific

2 to our interests as an employer in the South Bronx, as a big  
3 corporation in the South Bronx. I am sure you never heard  
4 of us, but we're the maroon trucks. We're a worldwide  
5 company with \$12 billion in revenue a year. And I have  
6 something to say to Mr. Daniels and to the DOT that they've ✓  
7 heard before. I come to make two simple points.

8 The developer, Mr. Riccio, and his ✓  
9 people are blocking our rail access. And this rail access  
10 which we built, with Mr. Bruce Blackey's approval, of your  
11 department, in 1991. Over that we have railed from 1991 to  
12 1993 hundreds of thousands of tons of sludge and recyclable  
13 materials out of our site.

14 Do you know what that does? For every )  
15 rail car, which is 90 tons, that means four trucks are off  
16 your street. Four fewer trucks to run over your kids. Four  
17 fewer trucks to pollute our air, because I breathe it  
18 because I work there. And everybody knows that. Mr. Riccio  
19 know that; Mr. Daniels has been kind enough to visit our  
20 site knows that; and the State DOT knows that.

21 We see no reason why the State would  
22 support the cutting off of our rail. Our rail is now  
23 blocked. Commissioner Daly knows it. We have recyclables  
24 that can be railed out of there and we're trucking them out  
25 of there and we're polluting the air for everybody. The

2 State DOT knows about it. Bruce Blackey knew about it. Mr.  
3 Riccio knows about it. And nobody is doing a thing about  
4 it.

5 Mr. Riccio talks about abandoned rail  
6 yards. Well, guess what? Ours weren't abandoned. They cut  
7 them off.

8 Okay. In five years we paid over half  
9 million dollars of real estate tax in the South Bronx. We  
10 paid all our payroll taxes. We even pay the union dues of  
11 the guys. We pay their health insurance. And we didn't ask  
12 for a handout. We got none. We think we can make money  
13 with the people of the South Bronx.

14 My second point is the developer's  
15 application for \$7 million from the State and the City.

16 Article 8 in your lease, Article 8 --  
17 you want to read this article, because it's a real  
18 interesting article of the lease that you negotiated, the  
19 lease that you call the sweetheart lease. The lease at  
20 least said that the tenant is going to pay for all  
21 construction approvals.

22 Just like when you have an apartment,  
23 like I have an apartment, and you want to put a new kitchen  
24 in. The landlord going to give you 75 percent of the  
25 money? Uh-uh.



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They're giving it to him. UDC is giving it to him and Mr. Giuliani is giving it to him.

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And I want to ask a question. How come Ambassador Gargano is a softer touch than Mario Cuomo? How come Rudy Giuliani is rolling over quicker than David Dinkins?

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\$7 million for these guys. And the specific lease provision -- Article 8 of that lease says all leasehold improvements must be paid by the tenant. And, in fact, you can't even apply to the State for it. It specifically says that.

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I would like to ask you that as a legal officer. Because I think this is a bogus \$7 million that you're handing over. And frankly, because -- give it to Banana Kelly. I mean, seriously, let's have them do the paper project. Don't give it to an overly rich developer.

18

19

I come here just to say something --  
(Applause.)

20

21

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MR. MCLAUGHLIN: I really came here to say that. This is a request, this is request for the 7 million for a man who is actively going to choke off our jobs. If we can't rail out we may have to do some other things with our site. We have the only active intermodal site in the South Bronx that is choked. When the public

1

2 calls -- the reason for funding this group -- for intermodal  
3 rail, he choked us off.

4

5 We offered to pay him for it. All these  
6 fancy plans. We're the invisible piece right here  
7 (indicating). We're paying taxes. We're paying people to  
8 work in the South Bronx. We're paying union wages, not  
9 minimum wages. And guess what? We ain't polluting. Out of  
10 every hundred tons that come into our transfer station, 35  
tons get recycled, doesn't go to the landfill.

11

12 So, all I want to say is, I appreciate  
13 the time and I appreciate Mr. Daniels and the DOT people for  
14 coming here and listening to all of us. And I've heard Ms.  
15 Frank before, she's an eloquent woman; and I've heard a lot  
16 of you because we've been at this process every step of the  
way.

17

18 I'd just ask you to consider two  
19 points. Let us use the rail. And please, consider the  
20 equity of someone who's asking for 7 million when his lease  
says he ain't entitled to it.

21

Thank you very much.

22

(Applause.)

23

THE HEARING OFFICER: Thank you,

24

Mr. McLaughlin.

25

By the way, Ms. Frank made a statement

**Empire State** Development Corporation

November 21, 1995

Ms. Zee Frank  
2 Willis Avenue  
Bronx, New York 10454

Re: Harlem River Yard Intermodal Transportation and Distribution Center  
Civic Project/Bronx Community Paper Company

Dear Ms. Frank:

As you requested, I have attached a copy of the transcript from the public hearing held on November 2, 1995 in connection with the Harlem River Yard Intermodal Transportation and Distribution Center Civic Project and the Bronx Community Paper Company facility. A list of speakers at the hearing appears at the front of the transcript. ESDC does not have the list of people who attended but did not speak at the public hearing. You may request that information from the Banana Kelly Community Improvement Association.

Sincerely,

*Robin Fleischmann*

Robin Fleischmann  
Project Manager

Attachment - Transcript

EDURBANFLEISCHMHARLRIVZFRANK.LET



TO: SURFACE TRANSPORTATION BOARD, MERGER NS/CSX, FINANCE #33388  
AND JUSTICE DEPARTMENT, MERGER USA WASTE/WASTE MGMT  
NEW YORK CITY DEPENDS UPON RAIL INFRASTRUCTURE TO SERVE  
ALL INDUSTRY; AS IT CANNOT BE SUSTAINED BY THE FINANCIAL SECTOR.  
THE HARLEM RIVER INTERMODAL RAIL TERMINAL OF 96 ACRES MUST BE  
THE CATALYST FOR ALL INDUSTRY. THEY CANNOT SERVE A SINGLE MAN  
WHO WILL REPLACE 70% OF PUBLIC RAIL YARD. AS A MONOPOLY. FOR  
PRIVATE PROFIT USES (WHICH CAN BE OUTSIDE THE PUBLIC RAIL YARD). TO  
CRIPPLE OTHER INDUSTRIES, BY SEVERING 70% OF THE RAIL LAND, WILL  
IMPACT EIGHT MILLION CITIZENS, TO CAUSE DIRE CONSEQUENCES, AS  
HERETOFORE, MORE SERIOUS THEN ANYWHERE ELSE IN THE COUNTRY.  
THAT IS WHY FEDERAL, STATE AND CITY SPENT \$500,000,000 FOR THE  
PROJECT OF OAK POINT RAIL LINK AND THE HARLEM RIVER RAIL  
INTERMODAL. IT HAS TO SERVE AS PLANNED, NOT 70% DESTROYED.  
PLEASE ATTACH THIS STATISTIC TO FILE SUBMITTED, AND STOP DESTRUCTION OF RAIL INFRASTRUCTURE..  
Zee Frank, Landmark Studios, Inc , 2 Willis Avenue, Port Morris, Bronx, New York 10454-4417

**DAILY NEWS, FRIDAY, AUGUST 14, 1998**

# Up against Wall

## City econ not Street-wise: Study

By **ESTHER GROSS**

Daily News Staff Writer

With the jittery stock market stumbling repeatedly the past two weeks, a new state report warns that the city's economic health is over-dependent on Wall Street and more closely linked to prosperity in the financial district than ever before.

"While good times on Wall Street pour unprecedented personal and business tax revenue into the city and state, the flow of income from this single area poses some risks," said state Controller Carl McCall.

The city's financial sector comprises just 5% of New York's total work force, but accounts for more than half of the city's growth in average salaries, jobs and tax revenues.

That's because top Wall Street employees earn an average of \$182,000, 4.5 times the average salary of \$39,200 earned by New Yorkers out-



**CONTROLLER** Carl McCall warns of risks.

side the financial sector.

A sharp downturn on Wall Street could have an even more painful effect on the city's economy than in the late 1980s, when a recession "hit New York City harder and deeper than anywhere else in

the country," said James Parrott, chief economist for the controller's office.

To help lessen the risk, the report urges that "private and public investment should go toward diversifying and strengthening some of the other sectors that have potential, such as culture and media, biotechnology and manufacturing," Parrott said.

Wall Street professionals agreed that, like any American city with a dominant local industry, New York faces risks from a market downslide.

"We will continue to be in a correcting type of environment," said Salomon Smith Barney strategist Marshall Acuff. "If that period extends, we may see a more general recession."

Merrill Lynch strategist Bob Farrell added, "The financial business is a key part of the economic basis in New York — if it cools off, the city will have some reduction in revenues."



H. CARL McCALL  
STATE COMPTROLLER



A.E. SMITH STATE OFFICE BUILDING  
ALBANY, NEW YORK 12236

STATE OF NEW YORK  
OFFICE OF THE STATE COMPTROLLER

July 30, 1997

Ms. Zee Frank  
Landmark Studios, Inc.  
2 Willis Avenue, Port Morris  
Bronx, NY 10454-4417

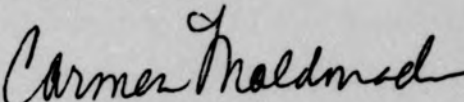
Dear Ms. Frank:

Comptroller McCall has asked me to reply to your letter of July 9, 1997 expressing your concerns about the development of the Harlem Rail Yard and the Oak Point Link. I appreciate the time and effort you have put into tracking development of these State rail freight facilities. The nature of the disclosures including the reference to the destruction of tracks at the Harlem Rail Yard is disturbing and, therefore, I have asked my staff to look further into these matters.

Because the concerns and issues raised in your correspondence involve the actions of a number of different individuals and organizations, I think you can understand that there is a need to clarify the situation before any decision is made as to how to respond to your concerns. In this regard, you can expect Mr. Gerald Tysiak from my staff to contact you. He will make arrangements to obtain additional information on the disclosures referred to in your correspondence. I would very much appreciate your continued cooperation so that we can establish the facts and circumstances surrounding this rail project.

Thank you again for bringing these matters to our attention. I will share our decision with you after my staff completes its preliminary review of the disclosures provided in your correspondence.

Very truly yours,

  
Carmen Maldonado  
Audit Director



# NEWS

From the Office of the New York State Comptroller  
**H. Carl McCall**

**CONTACT:** Steven Greenberg  
(518) 474-4015

**FOR RELEASE:** Immediate  
February 18, 1997

Joan Lebow  
(212) 681-4825

## **McCALL: DOWNSTATE RAIL PROJECTS NOT PRODUCING RESULTS \$200 MILLION SPENT ON OAK POINT LINK, HARLEM RIVER YARD AND OTHER PROJECTS**

State Comptroller H. Carl McCall today released a study of the State Department of Transportation's Oak Point Link and Harlem River Yard Projects. The projects are targeted at improving the rail freight network in the downstate region of New York by increasing intermodal rail service. Intermodal service involves the transportation of truck trailers and containers on rail cars. The study reviewed DOT's administration of the projects from April, 1988 through September, 1996.

"For the past 25 years, the State has been spending money - more than \$200 million - to develop a better rail freight system for the downstate region," McCall said. "But New York still does not have a comprehensive rail freight plan. There's been no coordination. Bridge clearances that were raised to 19 feet six inches are not high enough to accommodate today's double stacked rail cars. The Port Authority, which is a partner in this project, has also been involved in a competing project in New Jersey. Both the Oak Point Link and the Harlem River Yard projects have been bureaucratically bungled."

The Oak Point Link project is a planned 1.9 mile dedicated freight rail link that will remove freight trains from the existing "zig-zag" passenger rail route that traverses the Bronx. Construction on the Link was begun in 1983 and was supposed to take approximately four years to complete. However, in 1987, with only one-third of the link completed, DOT found design flaws and terminated the original construction contract. The link was redesigned and a new contract was awarded in 1992, with a targeted completion date of February 1995. DOT officials expect the link to be operational soon.

"Fourteen years after it was begun, ten years after the first completion date, two years after the second completion date, \$185 million spent, and the Oak Point Link is still not operational," McCall said. "The link was supposed to create 5,000 permanent new jobs. So far, there have been 11 -- four waste transfer employees and seven security officers. And now, because of construction delays, changes in technology and the overhead clearance limitations, it's questionable how much use the link will actually get

# ✓ 'Boondoggle'

## McCall: Rail projects wasted millions

By Margaret Ramirez

STAFF WRITER

An ambitious state effort to establish a world-class rail network for commercial freight has become a \$200-million boondoggle, state Comptroller H. Carl McCall said yesterday.

In a stinging report, McCall criticized the state's record since the 1970s on two flagship rail projects that were supposed to form the hub of a regional freight system based in the South Bronx. The study said the projects sit idle and unfinished after at least \$213 million in public investment since 1988.

Standing near an uncompleted section of freight rail track in the Bronx, McCall released his report on the state Department of Transportation's two closely related projects at Oak Point Link and the Harlem River Yard. In the study, which traced the state's stop-and-start efforts from April, 1988, through September, 1996, McCall said the failures have prevented the state from reducing its dependence on smog-belching, highway-clogging trucks. The vast majority of the region's goods are currently shipped by truck, at increased cost to industry and consumers.

The absence of a full freight access system also means that thousands of jobs that were supposed to be created have not been produced, McCall said.

"For the past twenty-five years, the state has been spending money — more than \$200 million — to develop a better rail freight system for the downstate region. But New York still does not have a comprehensive rail freight plan," McCall said. "Both the Oak Point Link and the Harlem River Yard projects have been bureaucratically bungled."

The Oak Point Link project, on which construction began in 1983, is a 1.9-mile direct rail link that would remove freight trains from a current zigzag route that crosses busy Bronx train lines. Although Oak Point was to be completed in 1987, design flaws and escalating costs resulted in termination of the original contract, when only one-third of the link had been constructed.

McCall also warned that the state's original vision of a freight rail access program, first proposed

in the 1970s, is now outdated due to changes in technology. Bridge clearances that had been planned are no longer high enough to accommodate today's double-stacked railcars. The estimated price tag for completing the Oak Link has thus increased from \$70 million to \$185 million.

The Harlem River Yard project, meanwhile, was expected to remedy the lack of intermodal services in the city and Long Island. Intermodal transport is the movement of truck trailers and shipping containers on railroad flatcars, now considered the most economically efficient method of freight transport. Northern New Jersey boasts 10 intermodal facilities, while no such facilities exist east of the Hudson River.

In 1991, a 99-year lease was signed by private business interests, the Galesi Group, with the state Transportation Department to develop a state-of-the-art transportation and industrial park on the 96-acre Harlem River Yard. However, as of September, 1996, the only activity at the yard was the operation of a small waste transfer station.

Together, the link and the yard were expected to slash shipping costs by more than \$100 million per year, reduce air pollution from truck traffic, save \$500 million on road improvements, and create 5,000 new jobs.

McCall found that only 11 jobs had been created at the partially completed Oak Point Link — four waste transfer employees and seven security positions. Development at the Harlem Yard has not begun.

"What was supposed to be a boon for the state has turned into a boondoggle," McCall said. "Six years and \$28 million in taxpayer dollars later and the Harlem River Yard has not produced any significant benefit for the people of New York."

John Guinan, assistant DOT commissioner for passenger and freight transportation, acknowledged that the projects have been "plagued by excessive delays and escalating costs." But he said the Transportation Department was committed to improving rail access.

McCall urged Gov. George Pataki to address the situation.

Pataki's decision came as Mayor Rudolph Giuliani earlier yesterday ordered city agencies to review the plan.

Whitman hailed the news as a victory for New Jersey in its showdown with New York City over a plan to dump 640 million gallons of untreated sewage over four days.

The dumping can only occur in cold-weather months, according to New York Department of Environmental Resources spokesman Gary Sheffer and New Jersey Department of Environmental Protection Commissioner Robert Shinn.

As a result of Pataki's call for delay, the dumping cannot occur until next winter — if it is permitted at all.

"Given the concerns raised by New Jersey and the concerns raised by [federal authorities], the governor felt it necessary to order further study," Sheffer said. Officials hope those tests can be done by fall.

Giuliani had expressed concern that he had not been told of the plan to release the untreated waste.

"I was concerned that I wasn't notified about it. That always worries me as to whether or not every single thing has been done that should be done," the mayor said, insisting that while the dumping was routine "it is also very frightening."

The announcement by the Pataki administration resulted in cancellation of a scheduled meeting in Manhattan today between representatives of city, state and federal agencies to discuss the matter, said Whitman chief of staff Harriet Derman.

Whitman had attacked the dumping plan at an afternoon news conference yesterday in the town of Highlands near Sandy Hook, offering an array of TV cameras a view of the New York skyline. Gesturing toward the city, Whitman said New Jersey would never accept New York's proposal to dump sewage and she promised legal action to stop it if needed. "It is utterly medieval when you talk about putting this kind of raw sewage into the waterways," Whitman said.

City officials have said sewage tanks at a Manhattan pumping station must be emptied into the East River while repair work is done on the pump system. The DEP issued an emergency order Friday to close clamming beds on the New Jersey coast because of the threat.

Liz Willen contributed to this story.



Rudolph Giuliani



Christie Whitman



THE WHITE HOUSE  
WASHINGTON

August 11, 1998

Ms. Zee Frank  
2 Willis Avenue  
Pt. Morris  
Bronx, New York 10454-4417

Dear Ms. Frank:

The President was pleased you could join him at the White House on July 15 for the *Empowerment Zone Reception*.

He thought you might like to have the enclosed photograph as a memento of the day.

I send along my thanks and best wishes to you.

Sincerely,

Capricia Penavic Marshall

Capricia Penavic Marshall  
Social Secretary



STB

FD-33388

8-17-98

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ID-190549

190549

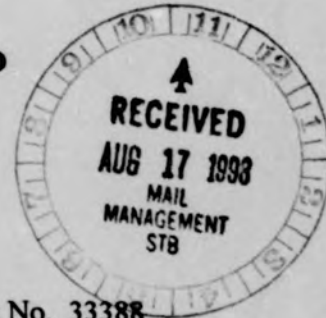
INRD-3

ENTERED  
Office of the Secretary

AUG 17 1998

Part of  
Public Record

**BEFORE THE  
SURFACE TRANSPORTATION BOARD  
Washington, D.C.**



Finance Docket No. 33388

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

**MOTION OF THE INDIANA RAIL ROAD COMPANY TO TREAT  
PETITION FOR RECONSIDERATION AS TIMELY FILED**

On Wednesday August 12, 1998 The Indiana Rail Road Company ("INRD") filed a petition for leave to intervene in this proceeding and attached thereto a petition for reconsideration of the Board's Decision No. 89, following the intervention procedures applicable in Board proceedings (49 CFR 1112.4) and in the federal courts. (F.R.Civ.P. 24(c)). The Office of the Secretary accepted INRD's filing on Wednesday August 12, 1998.

On Thursday August 13, 1998 the Office of the Secretary notified counsel for INRD that a filing fee of \$150 was due with respect to the *petition for reconsideration*. INRD paid the requested fee the same day. Staff in the Office of the Secretary stated that the "filing date" for the petition for reconsideration would be the date on which the filing fee was paid, not the date on which the intervention petition was filed and the date on which the petition for reconsideration was lodged with the Board.

The Board's regulations provide that "any filing . . . that is not accompanied by the appropriate filing fee is deficient." 49 CFR 1002.2(b). It is not clear how this regulation affects a pleading lodged with the Board as part of an intervention petition, nor is it clear whether this regulation is intended to change the rule applied in the federal courts that appellate time limits are satisfied by tender of the appeal papers even if filing fees inadvertently are not tendered at the time of filing. Parissi v. Telechron, 349 U.S. 46 (1955) (Per Curiam). INRD is concerned that if the Board grants its intervention petition, a Board order allowing the filing of INRD's petition for reconsideration may relate back to August 13, 1998, the date on which the filing fee was paid, not to August 12, 1998, the date on which the motion for leave to intervene was filed and the petition for reconsideration lodged with the Board.

Neither the Board nor any party would be prejudiced by treating INRD's petition for reconsideration as properly lodged with the Board on August 12, 1998. The intervention petition (to which the petition for reconsideration was attached) was filed and accepted by the Secretary's Office, and copies of both documents were served on all parties to the proceeding, on August 12, 1998, within the time for filing a petition for reconsideration. (49 CFR 1115.3(e)). INRD paid the requested filing fee for the petition for reconsideration as soon as the Office of the Secretary notified counsel that a filing fee should have been tendered at the time the intervention petition was filed.

INRD's petition for reconsideration raises matters of serious concern to INRD that will not otherwise be presented to the Board and, for the reasons set forth in the intervention petition, INRD will be seriously prejudiced if the Board does not consider its petition for reconsideration.

Accordingly, INRD requests that if the Board grants its intervention petition, the Board deem its petition for reconsideration to have been timely filed.

Respectfully submitted,

THE INDIANA RAIL ROAD COMPANY

By: John Broadley  
One of its attorneys

John Broadley  
JENNER & BLOCK  
601 13<sup>th</sup> Street NW  
Washington, D.C. 20005  
Tel. 202/639-6010

Dated: August 17, 1998



### **CERTIFICATE OF SERVICE**

I certify that on this 17<sup>th</sup> day of August 1998 I caused copies of the foregoing MOTION OF THE INDIANA RAIL ROAD COMPANY TO TREAT PETITION FOR RECONSIDERATION AS TIMELY FILED on all persons on the Board's service list in this proceeding entitled to service by depositing copies thereof in the United States mails, postage pre-paid, addressed to such parties, or where represented by counsel, to counsel for such parties, and to Administrative Judge Leventhal.

John Bradley

Dated: August 17, 1998

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L.L.P.

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MULTINATIONAL PARTNERSHIP

FEE RECEIVED

AUG 12 1998

WRITER'S DIRECT DIAL:

(202) 986-8050

SURFACE  
TRANSPORTATION BOARD

August 12, 1998



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/Agreement -- Conrail; Finance  
Docket No. 33388

Dear Secretary Williams:

Enclosed are the original and 25 copies of the  
"Petition of Indianapolis Power & Light Company for Clarification  
or Reconsideration of Decision No. 89" (IP&L-15) and "The  
Fertilizer Institute's Petition for Clarification or  
Reconsideration of Decision No. 89" (TFI-8) in the above-  
referenced proceeding. Also enclosed is a 3.5" diskette  
containing the Petitions in WordPerfect format, and three  
additional copies of the Petitions for time-stamping and return  
via our messenger.

ENTERED  
Office of the Secretary

AUG 14 1998

Part of  
Public Record

Respectfully submitted,

*Michael F. McBride*

Michael F. McBride

Attorney for The Fertilizer  
Institute and Indianapolis Power &  
Light Company

cc(w/encl.): All Parties of Record

FILED

AUG 14 1998

SURFACE  
TRANSPORTATION BOARD

190535

BEFORE THE  
SURFACE TRANSPORTATION BOARD

IP&L-15

**FEE RECEIVED**

Finance Docket No. 33388

AUG 12 1998



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

**PETITION OF INDIANAPOLIS POWER & LIGHT COMPANY  
FOR CLARIFICATION OR RECONSIDERATION OF DECISION NO. 89**

**FILED**

AUG 14 1998

ENTERED  
Office of the Secretary

AUG 14 1998

Part of  
Public Record

SURFACE  
TRANSPORTATION BOARD

Michael F. McBride  
Brenda Durham  
LeBoeuf, Lamb, Greene & MacRae, L.L.P.  
1875 Connecticut Avenue, N.W.  
Suite 1200  
Washington, DC 20009-5728  
(202) 986-8000 (Telephone)  
(202) 986-8102 (Facsimile)

Attorneys for Indianapolis Power & Light Company

Dated: August 12, 1998  
Due Date: August 12, 1998



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 LEASES/AGREEMENTS --  
CONRAIL INC. AND CONSOLIDATED RAIL CORPORATION

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PETITION OF INDIANAPOLIS POWER & LIGHT COMPANY  
FOR CLARIFICATION OR RECONSIDERATION OF DECISION NO. 89

Pursuant to 49 C.F.R. Part 1115, Indianapolis Power & Light Company ("IPL") hereby seeks clarification or reconsideration of certain conditions imposed by the Board in Decision No. 89 ("Decision") in the above-referenced proceeding. IPL sincerely appreciates the Board's efforts at preserving IPL's existing rail-to-rail competition at its Stout and Perry K Plants. IPL's purpose in seeking clarification or reconsideration is to retain its **pre-Transaction** competitive options at both Plants.<sup>1</sup>

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<sup>1</sup>IPL does not intend to address the acquisition premium issue in this Petition (see Decision at 62-70) because the Board has left no doubt about its views on the matter even though IPL respectfully disagrees with the Board's analysis. However, IPL wishes to correct the record concerning the Board's statement that "perhaps because of the thorough manner in which applicants discredited [Drs. Kahn's and Dunbar's and Mr. Crowley's] studies, IP&L chose not to even mention them in its brief" (Decision at 68 n.105). In fact, IPL endorsed those studies in both of its Briefs, IP&L-11 at 41 and 43 and NITL-12/TFI-6/IPL-12 at 11.

IPL also disagrees with the Board's assumption that efficient NS routing of Western coal  
(continued...)

1. Clarification Concerning IPL's Stout Plant:

A. ISRR and NS Cannot Interchange at MP 6.0. The Board purported to require the Applicants to "allow for the creation of an NS/ISRR interchange at MP 6.0 on ISRR's Petersburg Subdivision." Decision at 177. Although legal title in the rail line referred to as the Petersburg Subdivision passes from ISRR to Conrail at MP 6.0, ISRR trains interchange with Conrail **at the Crawford Yard** on the West side of Indianapolis, rather than at MP 6.0 on the Petersburg Branch. **There is no interchange point at MP 6.0**, nor could interchange occur there. This is why Conrail and ISRR interchange at Crawford Yard rather than at MP 6.0. As the Board may be aware, it is common practice for the physical interchange of a train to take place in a location other than where legal title changes. IPL believes that, because the Board states that it intends "to approximate more closely pre-transaction market conditions" (Decision at 117), the Board intended that NS/ISRR be able to interchange in the same manner that CR/ISRR interchange today. Thus, IPL requests that the Board clarify that the "creation of an NS/ISRR interchange" be required at the same interchange used by CR/ISRR today -- the Crawford Yard (sometimes also referred to as the "GM Yard").

B. IPL Is Entitled to a Clear Ruling That CSX Is Not Permitted to Impose a Switching Charge at Stout If NS or ISRR Serve It Directly. In footnote 151, the Board stated that

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<sup>1</sup>(...continued)

to IPL's Stout Plant will be possible, and that NS access to that Plant will necessarily preserve IPL's existing competitive options if Western coal were used at Stout. See Decision at 117 n.181. However, IPL assumes that the Board would reexamine the issue of NS' ability to efficiently carry Western low-sulfur coal to Stout in the future should the Board's assumption prove to be incorrect. Therefore, IPL will not seek reconsideration of the Western coal issue at this time.

the condition it is "imposing on traffic to IP&L's Stout plant will result in availability of direct NS service presumably free of CSX<sup>2</sup> switching charges" (emphasis supplied). Decision at 94. To avoid any confusion and promote expeditious implementation of the Board's order, IPL requests that the Board delete the word "presumably" from footnote 151. Moreover, there is no logical reason for imposition of a CSX switch charge if NS (or ISRR) serves the Stout Plant directly because CSX would not perform a switch service under such circumstances.

II. Clarification and Reconsideration Concerning IPL's Perry K Plant:

A. IPL Should Be Allowed to have Trains Destined for Its Perry K Plant Routed in an Efficient Manner. It is clear that the Board intended that IPL unit trains destined for its Stout Plant be routed directly to the Stout Plant rather than inefficiently through the Hawthorne Yard as the Applicants proposed. Decision at 117. However, because the Board did not specifically rule in the same manner concerning IPL's Perry K Plant, the Decision may be read to imply that trains destined for Perry K would have to be routed through the Hawthorne Yard, which is not how Perry K trains are routed today. Thus, the Board would, in effect, have imposed an inefficiency on the transportation of coal to Perry K that does not occur today. In addition, IPL "presumably" would be required to pay for this operational inefficiency by reimbursing CSX, directly or indirectly, for its switching services. Compare Decision at 94 n.151. According to the terms of the primary Application, IPL would pay a trackage rights fee for a movement to the Hawthorne Yard, and then pay a switch charge for the movement from the Hawthorne Yard to Perry K. Since the Board intended to "approximate more closely pre-

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<sup>2</sup>For purposes of this document, the term CSX also refers to its 89% owned subsidiary, INRD.

transaction market conditions" (Decision at 117), it must not have intended for movements of coal to Perry K to become less efficient, and also require IPL to pay more for the inferior service. Under the Applicants' proposed approach, ISRR trains routed from Indiana coal fields would pass by the current efficient interchange point (at Crawford Yard), and proceed past the Perry K Plant in an easterly direction, only to return in a westerly direction from the Hawthorne Yard to Perry K. IPL believes the Board should clarify its ruling so that there can be no question that trains to Perry K will be routed as they are today, through the Crawford Yard directly into Perry K, and not through the Hawthorne Yard.

If the Board did intend for Perry K trains to be routed through the Hawthorne Yard, IPL hereby seeks reconsideration, on the grounds stated.

B. Movements of Coal to Perry K Should Not Be Required to Pay a Switching Charge. The Board should further clarify that movements to Perry K will be charged only a trackage rights fee but not a switching fee. At the heart of this matter is the pending loss of Conrail as a neutral destination carrier to IPL's Perry K Plant. During this proceeding, IPL (and ISRR generally) presented unrebutted evidence concerning the neutrality of Conrail at Perry K. See IP&L-3, Weaver V.S. at 12; ISRR-9, Neumann V.S. at 3, Weaver V.S. at 2 and 18, Crowley V.S. at 1, 7-10. Conrail is not affiliated with either ISRR or INRD<sup>3</sup> and therefore is not motivated to favor one carrier over the other for movements of coal to Perry K, whereas CSX

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<sup>3</sup>Mr. Thomas G. Hoback, CSX Witness and President of INRD, admitted that Perry K has two rail-carrier access, ISRR/CR and INRD via switch over Conrail. See CSX/NS-177, Rebuttal, Vol. 2A, p. P-198 (noting Conrail charge for moving INRD-origin coal to Perry K). In fact, INRD recently originated coal that was routed via switch on Conrail to Perry K. As the Board is fully aware, CSX owns 89% of INRD and cannot possibly be neutral, as the destination carrier at Perry K, between INRD and ISRR.



would obviously favor its subsidiary INRD.<sup>4</sup> Moreover, Conrail is prevented from acting as a "bottleneck" carrier at Perry K (as the Board **presumes** it may do, see Decision at 95) because IPL can, and has, bypassed Conrail altogether by having INRD haul coal by rail to the Stout Plant, then trucking it from Stout into Perry K. See CSX/NS-177, Hoback V.S. at P-195-96; ISRR-9, Crowley V.S. at 3 and 9, Neumann V.S. at 3; IP&L-3, Weaver V.S. at 5, Crowley V.S. at 5, 8-9, 18. Thus, Conrail is not the classic bottleneck carrier at Perry K.<sup>5</sup>

Instead, Conrail is disciplined by truck movements from IPL's Stout Plant to Perry K, as well as rail-to-rail competition. The ISRR/CR and INRD/CR rail-to-rail movements to Perry K both compete with the INRD/Stout/truck movement to Perry K. Therefore IPL does not have to depend on Conrail to deliver its coal to Perry K. The substantial limitations described by IPL in its Supplemental Brief to this proceeding regarding truck movements to Stout do not apply to Perry K. See "Supplemental Brief of Indianapolis Power & Light Company in Support of Request for Conditions in IP&L-3 and in Support of the Responsive Application of Indiana Southern, Inc. (ISRR-4)" (IP&L-11) at 29-36, and footnote 4 supra. With CSX stepping

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<sup>4</sup>ISRR is at a further disadvantage in this routing scenario. Not only is INRD likely to be favored under any CSX switching scenario in which it competes with another railroad but also in light of CSX's ownership of the Belt and INRD, it is likely that INRD trains will continue to be efficiently switched, at the "top of the hill" as Mr. Hoback described it (as they are today) while ISRR trains will be routed further east to Hawthorne Yard for switching (which is less efficient by definition and also would allow CSX to discriminate in dispatching from the Hawthorne Yard, in favor of INRD).

<sup>5</sup>Unlike the situation at the Stout Plant, a combination movement of rail-to-truck is a competitive option for coal deliveries to Perry K because IPL ships much less coal to it (no more than 200 thousand tons per year) as compared to the amount used at Stout (approximately 1.5 million tons per year), and the traffic disruptions and congestion IPL has discussed if so much coal were delivered by truck to Stout would not occur to nearly the same extent at Perry K. Also, truck traffic to Stout would need to travel through the busy Harding Street/I-465 interchange, whereas trucks from Stout to Perry K would not travel through this congested area.

into the shoes of Conrail, CSX would control all of these movements, i.e., ISRR/CSX and INRD/CSX (rail-to-rail movements) and CSX/INRD to Stout, and then via truck to Perry K. Therefore, CSX could easily eliminate competition due to its sole access to Perry K and control of INRD, unless reconsideration is granted.

In light of the discussion at pages 62-70 of the Decision, it is difficult to imagine a scenario where the Board's "presumption" is rebuttable for true "bottleneck" facilities. But if ever the presumption does not apply, it is at Perry K, which is not a "bottleneck" facility for the reasons stated, which evidence the Board did not discuss even though there is no evidence to the contrary. See Decision at 93-95. There certainly is no dispute, for example, that IPL can, and has, trucked coal from Stout to Perry K, bypassing Conrail. See CSX/NS-177, Hoback V.S. at P-195-96; ISRR-9, Crowley V.S. at 3 and 9, Neumann V.S. at 3; IP&L-3, Weaver V.S. at 5, Crowley V.S. at 5, 8-9, 18. Therefore, the Board's determination to apply its "bottleneck" presumption to Perry K was in error. See Western Resources, Inc. v. Surface Transp. Bd., 109 F.3d 782 (D.C. Cir. 1997).

Moreover, the current movement options to Perry K by either ISRR/CR or INRD via Conrail switch do not **require** IPL to pay a trackage rights fee and a switching charge, as the Board asserts. IPL pays a switch charge only for INRD movements to Perry K via Conrail, and not a trackage rights fee. However, Conrail/ISRR charge only a single through rate for ISRR-origin coal to Perry K, because Conrail once owned the ISRR line and entered into a contract with IPL prior to the sale of the line to ISRR. Therefore, IPL does not now pay a trackage rights

fee for either movement, and does not pay a switching charge for ISRR-origin coal, and therefore should not be obligated to do so post-Transaction.<sup>6</sup>

The most practical way to ensure that IPL maintains its current competition for coal movements to Perry K and to avoid it having to pay inappropriate switching charges and trackage rights fees is for the Board to clarify that NS (or ISRR) may serve Perry K directly from the Crawford Yard. Moreover, allowing NS or ISRR to serve Perry K directly would be more efficient and consistent with IPL current competitive options, and the Board's creation of an interchange between ISRR and NS, so as to not further penalize IPL.<sup>7</sup>

#### Conclusion

IPL's goal throughout the above-referenced proceeding has been to preserve its existing competitive options to its Stout and Perry K Plants. IPL requests that the relief described herein be provided to achieve that objective, which the Board shares. See Decision at

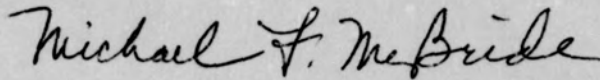
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<sup>6</sup>IPL recognizes that a line-haul charge to a carrier may in essence include payment for use of that carrier's tracks, and therefore it does not oppose paying an appropriate trackage rights fee when one carrier uses another's track. But see Decision at 140-42 (IPL's contention, to which it adheres, that the trackage rights fee should not be 29 cents/car-mile). IPL supports the separate Petition of The Fertilizer Institute to use the RCAF(A) as the adjustment mechanism for the trackage rights fee. See IP&L-11 at 43-44 and 49 U.S.C. § 10708(a) (mandating use of a productivity-adjusted RCAF). Accordingly, IPL hereby requests that the Board clarify that the RCAF(A) be the adjustment mechanism for the CSX trackage rights fee.

<sup>7</sup>If the Board does not preserve IPL's existing competition at Perry K via the remedies that IPL seeks, the Board will create an opportunity for CSX to act as a "bottleneck" carrier at Perry K, which the Board "presumes" CSX will exploit. See Decision at 94. The Board should not, and may not, create "bottleneck" situations under its prevailing merger policy.

117 ("to approximate more closely pre-transaction market conditions"). IPL also seeks reconsideration of the RCAF(A) issue addressed herein.

Respectfully submitted,

A handwritten signature in cursive script that reads "Michael F. McBride".

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Attorneys for Indianapolis Power & Light Company



BEFORE THE  
SURFACE TRANSPORTATION BOARD

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FINANCE DOCKET NO. 33388

---

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

---

**CERTIFICATE OF SERVICE**

I hereby certify that I have served, this 12th day of August, 1998, a copy of the foregoing "Petition of Indianapolis Power & Light Company for Clarification or Reconsideration of Decision No. 89" (IP&L-15), by first-class mail, postage prepaid, or by more expeditious means, upon all parties of record. The following persons were served by hand delivery or facsimile:

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  
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David M. Konschnik, Director  
Office of Proceedings  
Surface Transportation Board  
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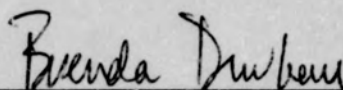
Honorable Jacob Leventhal  
Administrative Law Judge  
Federal Energy Regulatory  
Commission  
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VIA FACSIMILE

A handwritten signature in cursive script, reading "Brenda Durham", is written over a horizontal line.

Brenda Durham

STB

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8-12-98

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BEFORE THE  
SURFACE TRANSPORTATION BOARD

TFI-8

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

I

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THE FERTILIZER INSTITUTE'S PETITION FOR  
CLARIFICATION OR RECONSIDERATION  
OF DECISION NO. 89  
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ENTERED  
Office of the Secretary

AUG 14 1998

Part of  
Public Record

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Attorneys for The Fertilizer Institute

Dated: August 12, 1998  
Due Date: August 12, 1998



BEFORE THE  
SURFACE TRANSPORTATION BOARD

TFI-8

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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 --

---

**THE FERTILIZER INSTITUTE'S PETITION FOR  
CLARIFICATION OR RECONSIDERATION  
OF DECISION NO. 89**

Pursuant to 49 C.F.R. Part 1115, The Fertilizer Institute ("TFI") hereby seeks clarification of Decision No. 89 because it does not appear that the Board ruled on TFI's contention (which the Board summarized in Decision No. 89 at 248 n.401) that the Board must use the Rail Cost Adjustment Factor (Adjusted), rather than the RCAF (Unadjusted), in any adjustment mechanism adopted in this proceeding, with one exception.<sup>1</sup>

Although the Board acknowledged TFI's separate position from that of NITLeague on the RCAF issue (Decision at 66-67), it did not directly address TFI's issue at pages 66-67 because it rejected the specific proposal (a 5-year rate cap) discussed there. But

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<sup>1</sup>The exception is for switching charges, which the Board acknowledged (Decision at 248 n.401) TFI agreed to because of "special circumstances," i.e., that Applicants had agreed to reduce the Conrail switching charges substantially from pre-Transaction levels, and because such charges are not typically adjusted every quarter or even every year. The Settlement Agreement between TFI and Applicants, attached hereto, otherwise preserved TFI's right (page 2, ¶2) "to argue in favor of RCAF-A in all other respects in this proceeding or in other proceedings."

TFI's position applied to all applications of an inflation-adjusted mechanism (with the one exception previously noted), not just the specific issue discussed at pages 66-67. Decision at 248 n.401 ("the Board is simply not permitted to use any measure other than the RCAF-A as an adjustment mechanism for railroad rates or other charges").

Thus, for example, although the Board acknowledged the need for an adjustment mechanism at page 142 footnote 216 with respect to the 29-cent CSX trackage rights fee, it did not say what it should be. TFI contends that 49 U.S.C. § 10708 requires that the mechanism be the RCAF (Adjusted).

Moreover, with respect to the 3-year rate cap on interline rates agreed to by Applicants and NITLeague, the Board referred to the RCAF (Unadjusted) (Decision at 111) without addressing TFI's contention that it should have used the RCAF (Adjusted) instead.<sup>2</sup>

Of course, having properly raised the issue, TFI is entitled to have it addressed, and to get a ruling on it. If there were to be judicial review of this aspect of the Board's Decision (which TFI hopes to avoid by filing this Petition), the Court of Appeals insists that the Board provide some explanation of its determination. Burlington Truck Lines, Inc. v. United States, 371 U.S. 156, 167-68 (1962); United States v. Chicago, M., St. P. & P.R. Co., 294 U.S. 499, 511 (1935) ("We must know what a decision means before the duty becomes ours to say whether it's right or wrong."); Greater Boston Television Corp. v. FCC, 444 F.2d 841, 851-52 (D.C. Cir. 1970) ("if an agency glosses over or swerves from prior precedents without discussion, it may cross the line from the tolerably terse to the intolerably mute.")

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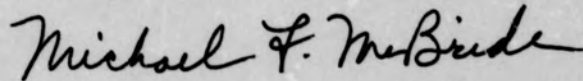
<sup>2</sup>Under the Board's "catch-all" finding (Decision at 184 Finding No. 81) TFI's contention is deemed rejected even though not discussed specifically.

If the Board did intend to reject TFI's contention, TFI hereby seeks reconsideration, on the ground that the statute -- 49 U.S.C. § 10708 -- requires the use of the RCAF (Adjusted) rather than the RCAF (Unadjusted). See Decision at 85 n.56; see also Edison Electric Institute v. ICC, 969 F.2d 1221 (D.C. Cir. 1992) (affirming ICC's adoption of the productivity adjustment to the RCAF).

Conclusion

The Board should use the RCAF (Adjusted) as its adjustment mechanism in all respects except where TFI and the Applicants have otherwise agreed (i.e., with respect to switching charges).

Respectfully submitted,



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(202) 986-8102 (Facsimile)

Attorneys for The Fertilizer Institute

Dated: August 12, 1998  
Due Date: August 12, 1998

**AGREEMENT BETWEEN THE FERTILIZER INSTITUTE,  
NORFOLK SOUTHERN AND CSX**

THIS SETTLEMENT AGREEMENT, made this 2<sup>nd</sup> day of June, 1998, between and among, on the one hand, Norfolk Southern Corporation (NS) and CSX Corporation (CSX) on behalf of their rail carrier subsidiaries, and, on the other hand, The Fertilizer Institute, an organization of affected rail users, (Organization).

WITNESSETH that

WHEREAS, NS and CSX have filed an application (Application) before the Surface Transportation Board (STB) in Finance Docket No. 33388, for authority to control and operate specified portions of Conrail, and

WHEREAS, the parties desire to record the terms on which the Organization and NS and CSX have agreed on certain matters, and the remaining conditions that the Organization may seek from the STB

NOW THEREFORE, for and in consideration of the mutual covenants contained herein, NS, CSX and Organization agree as follows:

1. Upon execution of this agreement, Organization shall file a statement supporting the transaction in all respects other than with respect to matters directly related to the conditions requested by Organization pertaining to rates summarized at page 6, Section III ("Post-Implementation Rate Conditions") of the October 21, 1997 Comments and Request for Conditions submitted to the STB by National Industrial Transportation League ("NITL"), et. al (NITL-7) or in Organization's October 21, 1997 letter comments (TFI-2) submitted to the STB, both in Finance Docket 33388. Organization shall not take a position inconsistent with this agreement, except that Organization reserves the right to pursue the conditions requested by NITL, et. al., including TFI, pertaining to Post-Implementation Rate Conditions and NS and CSX reserve the right to oppose those proposed conditions. This agreement by Organization is not to be construed as expressing opposition to any condition or responsive or inconsistent application requested by any other party to this proceeding.



2. NS and CSX understand that Organization believes that RCAF-A rather than RCAF-U is generally the more appropriate measurement by which rail rates should be adjusted. NS and CSX recognize that Organization's acceptance of RCAF-U as the adjustment mechanism only for switching rates in this Agreement is based upon three factors: (i) the Agreement requires NS and CSX to make a significant reduction in current Conrail switching rates; (ii) assurances by NS and CSX that they will use RCAF-U as a cap, not a method of automatically increasing switching rates; and (iii) NS and CSX recognize and agree that Organization's acceptance of RCAF-U in this Agreement in no way prejudices its right to argue in favor of RCAF-A in all other respects in this proceeding or in other proceedings.

3. The terms of this agreement are set forth in Appendix A. Except as specified otherwise in this Agreement, defined terms have the same meaning they have in the Application.

IN WITNESS WHEREOF, the parties hereto have caused this agreement to be executed by their duly authorized representatives.

CSX

NS

TFI

By: <u>[Signature]</u>	By: <u>[Signature]</u>	By: <u>[Signature]</u>
Title: <u>VP - Merch. Mktg.</u>	Title: <u>VP - Merch. Mktg.</u>	Title: <u>President</u>
Date: <u>6/1/98</u>	Date: <u>6/1/98</u>	Date: <u>6/12/98</u>

## APPENDIX A

### I. Implementation and Oversight - Pre Closing Date

- A. Council. NS and CSX will create on or before February 1, 1998, a Conrail Transaction Council (Council). The Council shall consist of representatives from NS and CSX, each Organization that has agreed to the terms of this Agreement and representatives of other organizations of affected rail users. The Council is intended to function as a forum for constructive dialogue. NS and CSX shall discuss the implementation process with the Council. The Council may present to NS and CSX mechanisms to identify and address any perceived obstacles to the effective and efficient implementation of the proposed transaction, and may convey to NS and CSX any particular concerns or recommendations with respect to implementation planning or the implementation process. NS and CSX shall endeavor to address such presentations, concerns or recommendations, and shall report to the Council on the actions taken with respect thereto or the reasons for taking different actions. The Council is not intended to supplant STB oversight of the transaction as set forth in Section II of this Appendix A.
- B. Shared Asset Area (SAA) Summary Description of Operations. In order to facilitate a better understanding of the SAA's among the shipping public, NS and CSX shall provide to the Council no later than February 1, 1998 a summary description of how operations will be conducted in each SAA, i.e. Northern New Jersey, Philadelphia/Southern New Jersey and Detroit. The summary shall focus on the function and interrelationship of the various crews of each railroad, the dispatching controls and the effect of the SAA's on individual shippers with respect to concerns such as car ordering, car supply and car location.
- C. Labor Implementing Agreements. NS and CSX will obtain the necessary labor implementing agreements prior to the Closing Date and will advise the STB when that has been accomplished. NS and CSX will, consistent with safe and efficient rail operations, implement the transaction as soon after Control

Date as possible. If NS or CSX request the STB to initiate the labor implementing agreement process prior to the Control Date, Organization will support the request.

- D. Management Information Systems. Prior to the Closing Date, NS and CSX will advise the STB that management information systems designed to manage operations on the former Conrail system within the SAA's and interchanges between the NS/Conrail and CSX/Conrail systems, including necessary car tracking capabilities, are in place.

## II. Implementation and Oversight - Post Closing Date

- A. Oversight. The Board should require specific oversight of the implementation and effect of the transaction for a three-year period. This condition is not intended to limit the authority of the Board to continue oversight beyond the three-year period, or limit the right of any party, including the Organization, to request continued oversight if conditions at the end of the three year period warrant such a request.
- B. Reports. As part of this continuing oversight, the Board should require quarterly reports from NS and CSX and should provide an opportunity for comment by shippers. NS, CSX and the Council shall jointly recommend to the Board objective, measurable standards to be used in such reports. The base for the standards, to the extent the information is readily available, shall be the standards on Conrail prior to the Control Date. In addition to the measurable standards, information in the quarterly reports may include:
- a. status of implementation plans for operations in the SAA's;
  - b. status of labor implementing agreements;
  - c. status of integration of management information systems;
  - d. status of allocation of responsibility for performing Conrail transportation contracts; and
  - e. any other matters about which the Board or Council

reasonably requests information.

- C. Specification of Transportation Contract Movement Responsibilities. NS and CSX will cause Conrail transportation contracts to be allocated between their rail carrier subsidiaries and discharged in accordance with their terms subject to allocation and other terms of Section 2.2(c) of the Transaction Agreement between NS and CSX. If a shipper whose contract has been allocated pursuant to the "Percentage Division" of 50-50 provided for in such Section 2.2(c), is dissatisfied with the service it receives from the carrier performing the contract from specified origins to specified destinations, it may at any time after six months from the Closing Date (after written notice to the carrier as to claimed operating or other deficiencies below the level at which Conrail provided performance of the contract, and an opportunity of thirty days to improve its performance and to cure those deficiencies going forward), submit the issues to expedited binding arbitration under an arbitration protocol for the selection of arbitrator(s) and the conduct of the arbitration to be developed by NS, CSX and Organization not later than July 1, 1998, with arbitration to be concluded within thirty days from the date the arbiter is selected. In that arbitration, the issue shall be whether there is just cause because of such deficiency in performance to have the responsibility for the performance of the contract (for the specified origin/destination pairs) transferred. In such arbitration the only remedy shall be, if such just cause appears, to order the transfer of such responsibility for performance to the other carrier. Such transfer shall be affected unless the transferee certifies that it is not operationally feasible for it to perform the service; provided, however, that unless otherwise agreed by NS, CSX and the shipper, such transfer shall not become effective for 30 days in order to allow NS and CSX to make the appropriate operating changes. Except for such transfer, such arbitration shall not address or affect in any way the rights, obligations or remedies of any party under the terms of such contract; and the award in such arbitration shall not be deemed to establish any facts with respect to the



performance of such contract for any purpose other than the arbitration. No such transfer of responsibility shall affect the "50-50" Percentage Division of revenues and expenses with respect to the contract in question and the other contracts which are allocated pursuant to the "Percentage Division" in Section 2.2(c) of the Transaction Agreement. Notwithstanding the maintenance of the Percentage Division of 50-50, no reallocation of any other contract shall be made to equalize the responsibilities for performance of the contracts subject to the Percentage Division.

### **III. Other Conditions and Provisions**

- A. Transload and New Facilities within the SAA During the term of the Shared Assets Operating Agreements, any new or existing facility within the three Shared Assets Areas (other than an "Operator Facility") shall be open to both NS and CSX, to the extent and as provided in those Agreements, including, without limitation, Section 6 thereof. By way of example of the foregoing, the Agreements generally provide that: 1) both NS and CSX will have access to existing or new shipper owned facilities, 2) both NS and CSX will have the opportunity to invest in joint facilities in the Shared Assets Areas in order to gain access to such facilities, and 3) either NS or CSX may solely develop facilities that it will own or control (such as transloading facilities or automotive ramps) that will be accessed exclusively by the railroad that develops such facility.
- B. Reciprocal Switching. NS or CSX, as the case may be, will cause any point at which Conrail now provides reciprocal switching to be kept open to reciprocal switching for ten years after the Closing Date.
- C. Reciprocal Switching Rates. For a period of five years after the Closing Date, reciprocal switch charges between NS and CSX at the points referred to in the preceding paragraph will not exceed \$250 per car, subject to annual RCAF-U adjustment, and at other points and/or with all other carriers will not exceed: (a)

where no separate settlement is made between carriers, the existing rates subject to RCAF-U adjustment, or (b) where there are such settlements, the amount therein prescribed (not in excess of that provided for in (a)). The foregoing does not apply where NS and CSX have entered into agreements intended to address so-called 2-to-1 situations as set forth in the Application.

- D. Gateways. NS and CSX anticipate that all major interchanges with other carriers will remain open as long as they are economically efficient.
- E. Interline Service. This paragraph does not apply to a shipper who has an existing Conrail transportation contract if a more favorable treatment is provided under Section 2.2(c) of the Transaction Agreement. NS and CSX agree to take the following actions with respect to transportation services to Conrail shippers on routes (i.e. origin-destination pairs) over which at least fifty (50) cars were shipped in the calendar year prior to the Control Date in single line Conrail service (i.e. origin and destination served by Conrail) where that service will become joint line NS-CSX after the Closing Date. Upon request by the affected shipper, NS and CSX will, for a period of three years, (a) maintain the Conrail rate (subject to RCAF-U increases); and (b) work with that shipper to provide fair and reasonable joint line service. If a shipper objects to the routing employed by NS and CSX, or to the point selected by them for interchange of its traffic, the disagreement over routing or interchange, or both, shall be submitted to binding arbitration under the procedures adopted by the STB in Ex Parte 560. The arbiter in such an arbitration shall determine whether the route employed by NS or CSX or the point of interchange selected by them, or both, satisfies the requirements of 49 U.S.C. §10705; and if it not, the arbiter may establish as the sole award in such arbitration, a different route or point of interchange for such traffic.

- F. **STB Approval.** Except as provided in this paragraph, this agreement is not subject to STB approval and will be binding on the parties in the absence of STB approval except with respect to any provision disapproved by the STB or inconsistent with the STB's action on the Application. Notwithstanding the foregoing provision, the parties will ask the STB to approve the creation of the Council, the exchange of information, the process for addressing shipper implementation and service concerns hereunder and the allocation of transportation contracts under II(C). In the absence of such approval by the STB, NS and CSX shall not be obliged to take any action which in their sole judgment might create liability under the antitrust laws.

**BEFORE THE  
SURFACE TRANSPORTATION BOARD**

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**FINANCE DOCKET NO. 33388**

---

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

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**CERTIFICATE OF SERVICE**

I hereby certify that I have served, this 12th day of August, 1998, a copy of the foregoing "The Fertilizer Institute's Petition for Clarification or Reconsideration of Decision No. 89" (TFI-8), by first-class mail, postage prepaid, or by more expeditious means, upon all parties of record. The following persons were served by hand delivery or facsimile:

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Honorable Jacob Leventhal  
Administrative Law Judge  
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A handwritten signature in cursive script, reading "Brenda Durham", is written over a horizontal line.

Brenda Durham