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August 12, 1998

***BY HAND DELIVERY** (25 copies)*

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

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Office of the Secretary

AUG 13 1998

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AUG 12 1998

SURFACE
TRANSPORTATION BOARD

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

Dear Secretary Williams:

Enclosed are an original and twenty-five (25) copies of CSX/NS-209, "Petition for Reconsideration of Decision No. 89 of Applicants CSX Corporation, CSX Transportation, Inc., Norfolk Southern Corporation, and Norfolk Southern Railway Company" for filing in the above-referenced docket.

Please note that a copy of this filing is also enclosed on a 3.5-inch diskette in WordPerfect 5.1 format.

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

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

FILED

AUG 12 1998

TRANSPORTATION BOARD

Respectfully yours,

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

Enclosures
cc: All Parties of Record
Elaine K. Kaiser

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CSX/NS-209

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 OF DECISION NO. 89 OF APPLICANTS CSX CORPORATION, CSX TRANSPORTATION, INC. NORFOLK SOUTHERN CORPORATION, AND NORFOLK SOUTHERN RAILWAY COMPANY

Applicants CSX Corporation and CSX Transportation, Inc. (collectively, "CSX") and Norfolk Southern Corporation and Norfolk Southern Railway Company (collectively, "NS") hereby submit the following petition for reconsideration of two "environmental" conditions and one "transportation" condition included in Decision No. 89, pursuant to 49 C.F.R. § 1115.3.

PREFACE AND SUMMARY

1. The Board's expansive and detailed analysis of potential environmental impacts of the Conrail Transaction presented in the Draft Environmental Impact Statement ("DEIS"), Final Environmental Impact Statement ("FEIS") and Decision

No. 89 more than satisfies the requirements of the National Environmental Policy Act ("NEPA"), 42 U.S.C. §§ 4321 et seq., and of the Board's environmental regulations, 49 C.F.R. Part 1105. However, the Board should reconsider two environmental conditions imposed in Decision No. 89.[1]

First, Applicants request that the Board clarify that Environmental Condition 11 does not require them to reduce railroad noise levels below pre-existing levels. Environmental Condition 11 specifies a noise reduction "design goal" of 10 dBA, even though most of the receptors identified as warranting mitigation are only projected to experience an increase of noise in the range of 5-10 dBA. The 10 dBA design goal was recommended for the first time in the FEIS. The Board should clarify that the design goal for a line segment should either be 10 dBA or the projected increase in noise for the line segment as a result of the Transaction, whichever is less. Under Board precedent, conditions should be narrowly tailored only to remedy adverse effects of the Transaction. Applicants do not believe that the Board intended to require them to make substantial expenditures to reduce noise below pre-existing levels, and thus seeks this clarification of Environmental Condition 11.

Second, CSX requests that the Board amend Environmental Condition 26(C) with respect to the location of the Wheel Impact Load Detectors ("WILDs") required to be installed on the CSX line to the east and west of the Greater Cleveland Area. CSX submits with this Petition the Verified Statement of Robert A. Carter of Consolidated

[1] The discussion of the WILD locations on CSX referenced in Part II of the Petition (the second of the two environmental issues) does not concern NS and accordingly NS does not join in the request made therein.

Rail Corporation that demonstrates that the appropriate location for the WILD to the east of the Greater Cleveland Area is at West Springfield, PA and that the optimal location for the WILD west of the Greater Cleveland Area is likely farther west than Olmsted Falls, OH. Condition 26(C) does not take into account this important information about the engineering and operational criteria for siting WILDs because CSX did not have the opportunity to submit this information to the Board's Section of Environmental Analysis ("SEA") prior to issuance of the FEIS. The installation of WILDs was recommended for the first time in the FEIS. CSX requests that Condition 26(C) be modified: (1) to replace installation of a new WILD within 20 miles east of Cleveland with maintenance of the existing Conrail WILD at West Springfield, PA; and (2) to defer the determination of the location of a WILD installation to the west of the Greater Cleveland Area until CSX has had the opportunity to present to the Board a recommendation based on a detailed evaluation of the relevant engineering and critical operating criteria.

2. Finally, on the "transportation" side, Applicants urge the Board to make plain that the Condition it is imposing for the relief of two Ohio "one-to-two" aggregates shippers, Wyandot Dolomite ("Wyandot") and National Lime & Stone ("NL&S") involves transitional and temporary measures, like the settlement proposal from which the Board extrapolated them, and like the "one-to-two" provisions in the NITL Settlement. Applicants urge that the Board clarify or otherwise provide that the intention is that this Condition will remain in effect for five years from the Split Date.

ARGUMENT

I. AS TO ENVIRONMENTAL CONDITION 11, THE BOARD SHOULD CLARIFY OR AMEND THE CONDITION TO MAKE IT PLAIN THAT IT IS NARROWLY TAILORED SO THAT THE DESIGN GOAL FOR NOISE REDUCTION DOES NOT EXCEED THE PROJECTED INCREASE IN NOISE ON THE LINE SEGMENT

Environmental Condition 11 states in pertinent part as follows:

> **Condition 11.** Applicants shall mitigate train wayside noise (locomotive engine and wheel/rail noise) at noise-sensitive receptor locations on the rail line segments listed below within the noise contour boundary established for each segment. With the written concurrence of the responsible local government(s), Applicants shall mitigate wayside noise with measures such as noise barriers or building sound insulation treatments, including air-conditioning if appropriate. The design goal for noise mitigation shall be a 10-decibel (dBA) noise reduction. The minimum noise reduction achieved shall be 5 dBA.

Environmental Condition 11 requires that CSX and NS mitigate wayside noise on line segments where the noise level post-Transaction is projected, using the methodology set forth in the DEIS and FEIS, to equal or exceed 70 dBA L_{dn} and where the increase in noise level as a result of the Transaction is projected to be 5 dBA L_{dn} or more. Applicants are concerned that Environmental Condition 11 could be read to specify a 10 dBA design goal for noise mitigation on all line segments that meet the wayside noise mitigation criteria, even where the projected increase in noise level is less than 10 dBA. On many of the specified line segments, a 10 dBA reduction would more than mitigate the increased noise from Transaction-related traffic increases, sometimes substantially so. The cost of noise mitigation with a design goal of 10 dBA would be substantially higher than the cost of mitigation with a design goal equal to the

lesser of 10 dBA or the projected Transaction-related increase in noise. Applicants are thus concerned that Condition 11 might be interpreted by some to require them to make substantial expenditures to remedy pre-existing noise levels, directly contrary to this Board's precedent regarding the proper exercise of its conditioning authority. Applicants accordingly seek clarification that Environmental Condition 11 is narrowly tailored to require a design goal of the lesser of 10 dBA or the projected increase in noise level as stated in the FEIS. See FEIS, Vol. 6C, Appendix J, Attachment J-2 at pages J-15 to J-16.

It has been the consistent policy of the Surface Transportation Board, as it was the policy of the Board's predecessor the Interstate Commerce Commission, not to exercise its conditioning power to remedy pre-existing conditions or other conditions not related to any effect from the proposed action before the Board.[2] This policy was reaffirmed by the Board in Decision No. 89:

> A condition must address an effect of the Transaction, and will generally not be imposed "to ameliorate longstanding problems which were not created by the merger." Finally, a condition should also be tailored to remedy adverse effects of a transaction, and should not be designed simply to put its proponent in a better position than it occupied before the consolidation.

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[2] Union Pac. Corp., Union Pac. R.R. Co., and Missouri Pac. R.R. Co. – Control and Merger – Southern Pac. Rail Corp., Southern Pac. Transp. Co., St. Louis Southwestern Ry. Co., SPCSL Corp., and Denver and Rio Grande Western R.R. Co., Finance Docket 32760, Decision No. 44, at 145 (served Aug. 12, 1996); Burlington Northern, Inc. & Burlington Northern R.R. Co.—Control & Merger—Santa Fe Pacific Corp. & Atchison, Topeka and Santa Fe Ry. Co., Finance Docket 32549, Decision No. 38, at 56 (served Aug. 23, 1995) ("To be granted, a condition must first address an effect of the transaction.").

Decision No. 89 at 78 (quoting Burlington Northern, Inc.—Control & Merger—St. Louis-San Francisco Ry. Co., 360 I.C.C. 788, 952 (1980)).

Decision No. 89 identifies 506 receptors on CSX line segments,[3] 115 receptors on NS line segments, and 27 receptors on a Shared Asset Area line segment that the Board believes meet the wayside noise mitigation criteria, not counting the substantial number of receptors for which Applicants agreed to provide noise mitigation in their settlements with

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[3] CSX notes that 77 of the receptors identified as meeting the wayside noise criteria are on the Toledo-Deshler line segment. In its Comments on the DEIS at 97 (filed Feb. 2, 1998), CSX objected to the proposed condition that CSX mitigate noise on this line segment on the ground that CSX resumed mainline train traffic on this line in May 1997 independent of the Transaction and that there will be no further increase as a result of the Transaction. In the FEIS, SEA acknowledged the May 1997 increase in traffic, but simply concluded, without explanation, that the increase was related to the Conrail Transaction. FEIS, Vol. 3 at page 5-34. CSX respectfully submits that this conclusion is erroneous.

Prior to the late 1980s, CSX operated through train traffic over both of its lines south from Toledo, the Columbus Subdivision through Fostoria to Columbus and the Toledo Subdivision through Deshler to Cincinnati. In about 1989, faced with the need to make a significant expenditure for maintenance and renewal of the Toledo Subdivision, CSX concluded that traffic density and customer demand did not then justify the expenditure and concentrated its through train movements on the Columbus Subdivision. Traffic density grew through the 1990s, however, both on the Columbus Subdivision and on the B&O line between Fostoria and Deshler that the Toledo-Cincinnati trains operated over, and customer demands for quicker service also increased during this time. CSX concluded in late 1996 that the deferred maintenance and renewal expenditures on the Toledo Subdivision were then justified. CSX undertook that work and resumed mainline operations on the Toledo-Deshler line segment in May 1997. That decision was made independent of the Transaction.

No further significant change in traffic on this line segment is expected to result from the Transaction. Accordingly, Environmental Condition 11 requires CSX to undertake a substantial program of noise mitigation on the Toledo-Deshler line segment that is not related to any effect from the Transaction. CSX seeks clarification of the design goal for Environmental Condition 11 so that the cost of the required noise mitigation is not further increased by any misunderstanding as to the required level of mitigation on other line segments.

communities. Applicants are still in the process of evaluating these receptors and determining an appropriate noise reduction strategy. Although Applicants are not yet in a position to determine the average cost per receptor, Applicants remain concerned about the very substantial cost of wayside noise mitigation, as they have expressed to the Board in many prior filings. SEA estimated the cost at about $10,000 per receptor in the FEIS. FEIS, Vol. 2 at page 4-70. Applicants believe that this figure is overly conservative and, at best, is in range only if the Board clarifies the scope of the required reduction as Applicants have requested.[4]

The Board should not deviate from its longstanding precedent and expand the scope of a condition to include mitigation of a pre-existing condition. Applicants request that the Board clarify that it did not do so.

II. THE BOARD SHOULD MODIFY ENVIRONMENTAL CONDITION 26(C) REGARDING THE LOCATION OF WHEEL IMPACT LOAD DETECTORS ON THE CSX LINE IN THE GREATER CLEVELAND AREA IN LIGHT OF ENGINEERING AND OPERATING INFORMATION CSX DID NOT HAVE THE OPPORTUNITY TO PRESENT TO SEA[5]

Decision No. 89, Environmental Condition 26(C), requires installation of two wheel impact load detectors ("WILDs") on the CSX system in the Greater Cleveland Area, one within 20 miles to the east of the Greater Cleveland Area and one west of the Greater Cleveland Area at Olmsted Falls, OH. The installation of WILDs was

[4] Since this is the first time that the Board has required any specific wayside noise mitigation in the context of a railroad control transaction or otherwise, the Board did not have prior experience to rely on in assessing just how costly the required noise mitigation would be and whether that expense is justified in light of the substantial benefits of the Transaction.

[5] As set forth in footnote 1, this Part II is submitted only on CSX's behalf.

proposed for the first time in the FEIS.[6] SEA had not requested any information from CSX on engineering or operating considerations relating to the WILDs. In its Comments on the FEIS (CSX-153 at 11-12), CSX questioned the appropriateness of the recommended condition on the ground that WILD is a technology designed for the purpose of determining the need for preventive wheel maintenance on a system-wide basis, and is not intended to be used as a supplemental system for mainline derailment protection in the immediate vicinity of the WILD. In addition, CSX questioned the proposed locations of the WILDs. CSX reported that Conrail presently maintains a WILD on the east side of Cleveland at West Springfield, PA.

CSX then submitted its Report of Applicants CSX Corporation and CSX Transportation, Inc. on Recommended Conditions 24(A), 38(C) and 45(B) of the Final Environmental Impact Statement (CSX-154) on July 1, 1998 ("CSX Report"). The CSX Report reiterated that the West Springfield WILD is appropriately located with respect to traffic moving through the Greater Cleveland Area. CSX Report at 7-8. Although CSX continued to believe that the installation of yet another WILD on the Berea-Greenwich line segment on the west side of Cleveland would not be a provident expenditure (in that it would likely provide little additional benefit to that provided by the West Springfield WILD), CSX chose not to contest the requirement that a WILD be installed on the west side of Cleveland but simply requested that CSX be granted discretion to locate the WILD farther west. Id. at 9.

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[6] Condition 26(C) was numbered Condition 38(C) in the FEIS.

In Decision No. 89, the Board did not grant either of CSX's requests regarding the siting of WILDs in the Greater Cleveland Area, but directed CSX to file a petition for reconsideration should it wish to pursue the matter. Decision No. 89 at 159. CSX has decided to pursue this matter because it does not believe that Condition 26(C) as presently written effectuates the Board's intent to promote efficient rail operations in the Greater Cleveland Area. Installing the WILDs where specified in Condition 26(C) would have operational disadvantages without offsetting advantages. CSX submits the Verified Statement of Robert A. Carter of Consolidated Rail Corporation as Exhibit A to this Petition. Pursuant to 49 C.F.R. § 1115.3(b)(1) and (2), CSX respectfully submits that this petition should be granted based on new evidence CSX did not have the opportunity to submit prior to issuance of the FEIS and because the locations specified in Decision No. 89 involve material error.

A. WILD East of the Greater Cleveland Area

As explained in the Verified Statement of Robert A. Carter, WILDs are wheel maintenance inspection devices that Conrail strategically locates to facilitate wheel maintenance on a system-wide basis rather than to promote safety in any particular community. It is not a productive use of resources to locate two WILDs on the same traffic lane such that the second WILD reinspects virtually all the same cars inspected by the first. Instead, WILDs should be located on different traffic lanes throughout a system so that, system-wide, the greatest possible percentage of the cars are inspected. As explained by Mr. Carter, Conrail in 1995 installed a two-track WILD system at West Springfield, PA, about 60 miles to the east of the City of Cleveland. The WILD was installed to inspect the substantial tonnage and mix of traffic moving on the Conrail Water Level Line, including traffic moving through the Greater Cleveland

Area. Installing a second WILD on the line 40 or 50 miles to the west of West Springfield, as required by Environmental Condition 26(C), would be redundant – it would provide little, if any, additional benefit.[7]

Moreover, Mr. Carter explains that installing a second WILD closer to the Greater Cleveland Area would have operational disadvantages. Because alarms from WILDs require some trains to be stopped to inspect for wheel defects, a WILD could exacerbate congestion in a busy terminal area. It is highly desirable from an operations standpoint to stop trains, set out cars and change out wheelsets before the trains reach the busy terminal area. Furthermore, if a train were to pass over two WILDs within a short distance, duplicative reports would be generated for the dispatcher to evaluate, increasing the burden on the dispatcher.

Mr. Carter explains that Conrail evaluated the many engineering and operating criteria that must be satisfied for installation of a WILD on the Water Level Line between Buffalo and Cleveland. In particular, Mr. Carter evaluated the line segment from Cleveland east for installation of a WILD, and concluded that there was no location between Cleveland and Ashtabula that would be appropriate for installation of a WILD. Among other reasons, the potential locations on that line segment did not satisfy the operational criterion of consistent train speed of at least 40 mph. The West Springfield location satisfied that criterion and was determined to be optimal based on consideration of all the criteria. When the WILD at West Springfield indicates an

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[7] In its letter to Secretary Williams dated June 12, 1998, the City of Cleveland expressed its "initial reaction" that the existing WILD "may be sufficient 60 miles to the east of Cleveland for trains approaching from that direction." June 12, 1998 letter at page 3.

alarm requiring prompt inspection, the inspection can be performed with minimal disruption to other traffic. Defective wheels on eastbound cars can be changed at Erie, PA and defective wheels on westbound cars can be changed at Conneaut or Ashtabula.

Because installation of a second WILD 40 or 50 miles to the west of the West Springfield installation would provide almost no additional benefit, and, indeed, would cause operational problems, CSX requests that Condition 26(C) be modified to replace installation of a new WILD within 20 miles to the east of Cleveland with maintenance of the existing Conrail WILD at West Springfield, PA.

B. WILD West of the Greater Cleveland Area on the Berea-Greenwich Line Segment at Olmsted Falls

The WILD required by Condition 26(C) to be installed in the vicinity of Olmsted Falls, OH, would similarly inspect substantially the same traffic as that inspected at West Springfield. Moreover, Conrail plans to install an additional WILD on its system this fall to the west of the Greater Cleveland Area at Pendleton, IN to inspect the traffic flows from Indianapolis. Accordingly, it is not apparent that a WILD is optimally located on the Berea-Greenwich line segment. System-wide analysis of CSX post-Transaction traffic flows could well demonstrate that installation of a WILD on another line segment would provide broader coverage of traffic that will not already be inspected by the West Springfield and Pendleton WILDs, and thus would provide much greater benefit on a system-wide basis. CSX has not yet performed such a system-wide evaluation of its post-Transaction traffic flows.

If the Board maintains, however, that the proper objective of the required WILD is to maximize the inspection of wheels that specifically traverse the Greater Cleveland Area, CSX requests that it at least be granted the opportunity to determine the precise

location on the Berea-Greenwich line segment for installation of a WILD. Based on preliminary review, it does not appear that Olmsted Falls is the optimal location. If a WILD were installed at Olmsted Falls, eastbound trains would likely already be on the Short-Berea or Marcy-Short line segment before the dispatcher could transmit instructions to slow the train pending setout of a car with a defective wheel or to stop a train for inspection of a defective wheel. It appears that it would be preferable to locate a WILD closer to Greenwich to allow adequate time for the WILD to transmit the report to the dispatcher and for the dispatcher to evaluate the report and transmit any required instructions to the train.

Because CSX is not yet on the property (the Berea-Greenwich line segment is a Conrail line), and because CSX has had only limited experience with WILDs, CSX to date has not been able to undertake the detailed evaluation that is required before installation of a WILD. As explained above, this detailed evaluation is warranted, not only because of the substantial expense of a WILD, but because WILDs can have an adverse effect on rail operations if not sited properly. CSX therefore requests that it be afforded the opportunity to undertake this detailed analysis of the engineering and operational criteria discussed by Mr. Carter, and to report back to the Board with a recommendation as to where a WILD would function most effectively with least disruption to efficient traffic flows. CSX believes that this consultation process would allow the Board to best effectuate the objective of Condition 26(C).

III. THE BOARD SHOULD MODIFY THE CONDITION WITH RESPECT TO WYANDOT AND NL&S CONTAINED IN ORDERING PARAGRAPH NO. 43 OF ITS DECISION TO MAKE IT PLAIN THAT THE RELIEF PROVIDED FOR IN THAT CONDITION IS TEMPORARY, NOT PERPETUAL, AND IS INTENDED TO LAST FIVE YEARS FROM THE SPLIT DATE

Ordering Paragraph No. 43, Decision at 179, reads as follows:

> 43. As respects Wyandot and NL&S, CSX and NS: must adhere to their offer to provide single-line service for all existing movements of aggregates, provided they are tendered in unit-trains or blocks of 40 or more cars; and in other circumstances including new movements, for shipments moving at least 75 miles, must arrange run-through operations (for shipments of 60 cars or more) and pre-blocking arrangements (for shipments of 10 to 60 cars).

Applicants seek clarification or definition of the duration of this Condition. As the Condition's text makes plain, its origin was in the offer made to Wyandot, NL&S and Martin Marietta Materials, Inc., to provide single-line service with respect to aggregates on certain specified existing movements tendered in unit trains or blocks of 40 or more cars. The offer was limited to 5 years from the Split Date, with any renewal to be "at the mutual discretion of NS and CSX."[8] *See* the text of the proposed "Settlement Agreement" attached to Applicants' letter of June 6, 1998, to the Secretary of the Board sent in response to the request for information made by Chairman Morgan at the close of the oral argument on June 4, 1998.[9]

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[8] "This arrangement will remain in place for five (5) years. Renewal will be at the mutual discretion of NS and CSX."

[9] As to existing movements, the Board enlarged the scope of the written proffer from the specific movements specified in the proffer to all existing movements meeting the car quantity requirements. *See* Decision No. 89 at 111 and n.172. While the Board, in its discussion of the disposition of the Wyandot and NL&S's objections to the proffer, noted

[Footnote is continued on next page]

It is clear, accordingly, that the first part of the Condition (the part ending at the semicolon) is limited to five years from the Split Date, since it is in essence an order to "adhere to their [CSX's and NS's] offer," with certain enhancements (i.e., other existing movements than those specified were covered). The second part of the Condition, however, explicitly goes beyond the text of the offer and covers "other circumstances including new movements" of aggregates.[10] In these cases, shipments moving at least 75 miles containing 60 cars or more must be handled in "run-through operations" and "pre-blocking arrangements" are to be arranged for shipments of 10 to 60 cars moving that distance.

Applicants ask the Board to clarify, or otherwise make plain, that the entire Condition is limited to five years following the Split Date. That was the term of the "offer" made by CSX and NS, and it would be paradoxical to provide no time limit on "new movements," where the shippers would seem to have less of an expectancy, while imposing a five-year limit on the Condition in the case of existing movements. It is one thing to freeze existing movements for a limited period of time; to be sure, the entire Condition has some of the vices of the now discredited DT&I Conditions (*see* Decision No. 89 at 60-61, 76-77, 102) but, due to the fact that the Transaction, in the process of

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[Footnote is continued from previous page]

that it was adopting a broader scope of coverage of the existing movements than that proposed in the written proffer, it did not say that it was disapproving the five-year limitation there contained. Id.

[10] At the oral presentation of the CSX/NS proffer by Mr. Allen, NS's counsel, on June 4, 1998, it was made plain that only existing movements were covered. Transcript at 373 (unwilling to offer single-line service "wherever they may want to go" or "for the rest of time").

creating much new single-line services unfortunately turned some existing single-line service into joint-line service,[11] a freezing of existing movements for a period of time was deemed appropriate by the Applicants in their proffer and by the Board in its Decision. The three-year limitation in Paragraph III.E of the NITL Settlement and the five-year arrangements contained in the written proffer were designed to ameliorate the effects of the changes in the railroad configuration for a reasonable time to allow shippers to find new customers and markets served by enhanced single line service. But a perpetual "freeze" of movements – including those presently nonexistent -- perpetuating the dead hand of the old unitary Conrail system, without end on the separate system operations of CSX and NS -- would be unwise as a matter of transportation policy and inconsistent with the Board's present attitude toward DT&I conditions.[12] As the Board well put it, as to the two shippers the "harm of losing single-line service is very modest" (Decision No. 89 at 111 and n.172) and surely the harm of losing a service that these shippers never used would be even more modest.

Neither the loss of present single-line service nor the inability to make use of a potential but unused single-line service based on the old Conrail configuration demands

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[11] Only about one lost single-line movement for every six new ones created. *See* Decision No. 89 at 72. Other transactions have the same effect of creating joint line service where there used to be single line service. Every short-line sale or "spinoff" creates those situations, and it would be most unwise to create a precedent of perpetual "fixes" for those who go from single line service to joint line service as a result of them.

[12] In further recognition that remedies for the "one-to-two" shippers ought to be temporary and transitional, the general protections for two-to-one shippers negotiated in the NITL Settlement were limited to three years. *See* Para. IIIE, App. B at B-6-7, CSX/NS-176, Vol. 1 at 773-74. This three-year period was not revised by the Board in its Decision (*see* Decision No. 89 at 176, n. 264) although that was asked for by some interests. Id. at 110 and n.168.

an eternal remedy. If there is economic justification for the railroads to provide run-through operations or pre-blocking arrangements beyond the lifetime of the Condition, or in cases not provided for by the Condition, surely they will; but to impose a dead hand condition for more than five years, particularly for movements which never took place on the old Conrail system, would be unjustified. It would condemn the carriers to a life sentence of inefficient movements and perpetuate inefficient and uneconomical transportation. The Board acknowledged that the remedies applied in Ordering Paragraph No. 43 could be a "substantial overreach" and "unduly interfere with applicants' proposed operations" and should be reserved for "isolated instances." Decision No. 89 at 72 and n.113.[13] The Board should limit the entire Condition to five years from the Split Date.

[13] *See also* Decision No. 89 at 77: "Freezing . . . routes would prevent efficiency-enhancing changes. . . ."

CONCLUSION

For the reasons stated, the Board should modify, amend or clarify the Conditions identified herein as requested.

Respectfully submitted,

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August 12, 1998

Exhibit A

VERIFIED STATEMENT

OF

ROBERT A. CARTER

CONSOLIDATED RAIL CORPORATION

I am Robert A. Carter, System Engineer-Electronics, for Consolidated Rail Corporation. I have 22 years of railroad experience with Conrail, including 20 years in communications and signal engineering. I presently have responsibility for the design, siting and installation of wayside detector devices for Conrail, including wheel impact load detectors ("WILDs"). In particular, I participated in the decision by Conrail to install WILDs on its system and to site the WILDs, including at West Springfield, PA.

Conrail has been on the forefront of the application of WILD technology. To my knowledge, many rail carriers do not yet use them, at least not extensively. I am aware of no federal regulations or industry guidelines that require their use.

Wheel impact detectors detect certain defects in wheels, including flat spots, spalling, shelling and out-of-round wheels. These wheel defects can induce high impact loads on the rails, which, with continued usage over time, can result in broken wheels, broken rails and other forms of damage. These types of wheel defects were previously identified by visual inspection during initial train departure. Wheel impact detectors consist of track-mounted strain gages and state-of-the-art microprocessor technology. The cost of a two-track WILD installation (including automated equipment identification tag readers) has averaged about $700,000.

When an impact load is exceeded, the car number and wheel number are identified for inspection. Conrail has established three levels of alarms. Impact is

measured in kips (one thousand pounds of force). An alarm over 170 kips (a "Level A alarm") requires a train to stop for an inspection as soon as possible. If it is determined that the wheel in question has a defect that raises an immediate safety concern (such as a broken flange or rim), the car is set out at the nearest point. If it is determined that the wheel in question does not have a defect that raises an immediate safety concern, the train can then proceed at a maximum speed of 30 mph to the next yard/terminal where the car is set out. An alarm over 150 kips (a "Level B alarm") requires a train to slow down to 30 mph and proceed to the next yard/terminal or other designated location where the car causing the alarm is set out. When an alarm level is between 100 and 149 kips (a "Level C alarm"), the car may proceed to its destination. The mechanical department is notified and the car is shopped for repair after it is unloaded.

Conrail presently has three WILD locations on its system: a two-track system at Mill Creek, PA (MP 197.0), a two-track system at West Springfield, PA (MP 108.6) and a one-track system at Middlesex, NJ (MP 30.5). The Mill Creek WILD installation dates to 1986, the West Springfield WILD installation dates to 1995 and the Middlesex WILD installation dates to 1996. Conrail has planned two more WILD installations for later in 1998: at Pendleton, IN (MP 257.9) to inspect traffic on the Indianapolis Line and at Lydick, IN (MP 445.2) to inspect traffic on the Chicago Line. The WILDs were strategically located on the Conrail system to cover a substantial portion (64%) of Conrail's long-haul traffic on its high-tonnage routes. Conrail had plans for four additional WILD installations in future years that would have increased its coverage of its long-haul traffic on high-tonnage routes to about 90%.

Approximately 3,000 alarms per year are indicated by the WILD at West Springfield. The great majority of the alarms -- about 93% -- are Level C alarms. As explained above, the cars continue to their destinations and are shopped after being unloaded. Of the remaining 7% of the alarms (about 200 per year), about 5.5% (about 160 per year) are Level B alarms and about 1.5% (about 40 per year) are Level A alarms. As explained above, a Level B alarm, under Conrail policy, requires that the car be set out at the next yard/terminal and a Level A alarm requires that the train be stopped as soon as possible and inspected.

WILDs are maintenance inspection devices that are designed to identify wheel defects before they can cause damage from continued high impacts. Conrail strategically selects WILD locations to facilitate wheel maintenance on a system-wide basis, rather than to promote safety in any particular community. Although improved wheel maintenance does provide safety benefits on a system-wide basis over the long term, WILDs have not been utilized by Conrail, or any other railroad to my knowledge, to provide localized safety benefits. It is an unproductive use of resources to locate WILDs such that two WILDs test the same cars twice. The objective is to locate WILDs on different traffic lanes so that different traffic is tested.

Numerous considerations go into the selection of a site for installation of a WILD. Physical requirements for installation of the WILD include:

- straight track (a minimum of 2,000 feet of tangent double track);
- level track (0.20% or less in grade);
- absence of highway/rail grade crossings and rail/rail diamonds; and
- communication and power line availability.

Operational requirements include:

- consistent train operating speed above 40 mph;
- appropriate locations for stopping a train for a Level A alarm at appropriate distances in both directions from the WILD; and
- yards with mechanical workforces available for performing wheel changeouts for Level A and B alarms at appropriate distances in both directions from the WILD.

Moreover, as stated above, to maximize the benefit of a WILD, it should be located where there is a substantial gross tonnage crossing the site and where the traffic is not already being inspected by another WILD.

It must be understood that the WILD does not instantaneously transmit a report. It takes about four minutes for the WILD to process the information from a train before it is transmitted to the dispatcher. A report is transmitted to a printer on the dispatcher's desk each time a train passes over a WILD. The dispatcher then needs several minutes to evaluate the information, determine the appropriate response, and relay the information and instructions to the engineer. As a general matter, then, a WILD should be located where there are appropriate places to stop a train about ten miles in either direction from the WILD. It would not be prudent to locate a WILD in a congested area because it would exacerbate the congestion; when a train must be stopped on a mainline track for an inspection after a Level A alarm, both that track and the adjacent track will typically be blocked for about a one-hour period. Moreover, it would not be prudent to locate a WILD where a dispatcher would have to evaluate reports from more than one WILD,

particularly on a busy line. The increased volume of paper could be burdensome. This is not a situation where two is better than one.

In 1995, Conrail selected its Water Level Line between Cleveland and Buffalo for a WILD installation because of the substantial amount of traffic operating over the line that was not already being inspected by the WILD installation at Mill Creek, PA. I participated on the team that conducted the detailed evaluation of that line to determine the optimal site for the WILD installation. I analyzed the track from Cleveland east and determined that no location on that line segment between Cleveland and Ashtabula, Ohio satisfied the physical and operational criteria. I concluded that the West Springfield, PA site best met the physical and operational requirements. In particular, it is on a stretch of free-running track where trains seldom have to slow below 40 mph because of congestion or other problems. On a congested track, the WILD will not provide reliable information about wheel impacts from trains that are not maintaining a consistent speed of at least 40 mph as they pass over the WILD. In addition, there are appropriate stopping, car setout and wheel change-out locations on either side of West Springfield. Defective wheels on westbound trains are changed out at Ashtabula or Conneaut and defective wheels on eastbound trains are changed out at Erie. It is advantageous to accomplish these change-outs before trains enter the more congested terminal areas in Cleveland and Buffalo.

I understand that the Surface Transportation Board has ordered the installation of WILDs at a number of locations in or near the Greater Cleveland Area, including with respect to CSX, (1) within twenty miles east of Cleveland on the Conrail Water Level

Line, and (2) about five miles southwest of Berea on the Conrail Indianapolis Line at Olmsted Falls, OH.

Based on my detailed evaluation of the Water Level Line east of Cleveland, as explained above, I do not believe that any location within 20 miles east of Cleveland is appropriate for a WILD installation. Indeed, although a relatively small percentage of the alarms from a WILD installation require a train to be stopped to set out cars (about 200 per year), it would not, in my opinion, promote the objective of facilitating the efficient flow of traffic through the Cleveland terminal area to locate an additional WILD installation east of Cleveland where it would cause trains to be stopped close to or within the Cleveland terminal area. An additional WILD installation would also burden the dispatcher with largely duplicative reports.

I also question whether MP 19.0 on the Conrail Indianapolis Line just southwest of Berea, OH, is an appropriate location for a WILD installation. Conrail had developed no plans to install a WILD on the Berea-Greenwich line segment because that traffic is substantially covered by other existing and planned WILDs on the Conrail system that are more strategically located. In particular, the WILD at West Springfield inspects a substantial portion of this traffic and the planned WILD at Pendleton, IN was selected to inspect additional traffic on the Indianapolis Line. If I were to select the location for a new WILD installation on the post-Transaction CSX system, I would first consider the new traffic flows resulting from the Conrail Transaction to determine the traffic lane where a WILD installation would provide the greatest benefit in terms of inspecting the greatest portion of unique traffic. I would then study that line segment in detail to determine the specific location that best satisfies the engineering and operational criteria.

I am familiar with the line segment between Berea and Greenwich, but I have not evaluated that line segment in detail with respect to the criteria governing the installation of WILDs. A decision regarding location of a WILD should be based on a thorough evaluation of all the criteria. It appears, however, that it would be preferable to locate a WILD closer to Greenwich (somewhere west of MP 40) to allow sufficient time for the report to be transmitted by the detector and evaluated by the dispatcher and for the dispatcher to give a direction to the engineer to stop or slow the train before the train enters the Cleveland terminal area.

VERIFICATION

I, Robert A. Carter, verify 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 August 11, 1998.

Robert A. Carter

CERTIFICATE OF SERVICE

I, Mary Gabrielle Sprague, certify that on August 12, 1998, I have caused to be served a true and correct copy of the foregoing CSX/NS-209, "Petition for Reconsideration of Decision No. 89 of Applicants CSX Corporation, CSX Transportation, Inc., Norfolk Southern Corporation, and Norfolk Southern Railway Company" to all parties on the Service List in Finance Docket No. 33388, by first-class mail, postage prepaid, or by more expeditious means.

Mary Gabrielle Sprague

STB FD 33388 8-12-98 I 190507

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August 12, 1998

I

VIA HAND DELIVERY

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

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

Dear Secretary Williams:

Enclosed for filing with the Board in the above-captioned proceeding are an original and twenty-five copies of the **Petition of Wisconsin Central Ltd. for Partial Reconsideration of Monitoring and Reporting Conditions** (WC-19), dated August 12, 1998. A computer diskette containing the text of WC-19 in WordPerfect 5.1 format also is enclosed.

Please feel free to contact me should any questions arise regarding this filing. Thank you for your assistance on this matter.

Respectfully submitted,

Thomas J. Litwiler
Attorney for
Wisconsin Central Ltd.

TJL:tl

Enclosures

cc: Designated Parties of Record

*Known as Oppenheimer Wolff & Donnelly LLP in these cities.

ORIGINAL

190507

WC-19

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 WISCONSIN CENTRAL LTD. FOR PARTIAL RECONSIDERATION OF MONITORING AND REPORTING CONDITIONS

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ATTORNEYS FOR
WISCONSIN CENTRAL LTD.

Dated: August 12, 1998

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 WISCONSIN CENTRAL LTD. FOR PARTIAL RECONSIDERATION OF MONITORING AND REPORTING CONDITIONS

Pursuant to 49 C.F.R. § 1115.3, Wisconsin Central Ltd. ("WCL") hereby seeks partial reconsideration of the Board's Decision No. 89 herein, served July 23, 1998, approving the joint control of Consolidated Rail Corporation ("Conrail") by CSX Transportation, Inc. ("CSXT") and Norfolk Southern Railway Company ("NS") and the division of Conrail's assets between CSXT and NS. WCL does not seek here to challenge the merits of the Board's decision in any substantive respect. Rather, WCL seeks a modification of the monitoring and reporting condition imposed by the Board with respect to the Chicago Switching District and the operations of the Indiana Harbor Belt Railroad Company ("IHB"). Decision No. 89 provides that information reported by the Applicants pursuant to that condition will be kept secret, even while nearly all other operational monitoring information provided by the Applicants -- including information directly analogous to that to be provided for Chicago -- will be made public. Given the importance of post-merger operational issues

in the Chicago switching terminal and on the IHB, and the absence of any meaningful or identifiable reason for singling out Chicago-area information as "commercially sensitive," WCL believes the Board's decision to protect such information from public scrutiny is not warranted by the record and should be corrected.

WCL was only one of a number of parties in this proceeding which raised concerns about post-transaction rail operations in the Chicago Switching District generally and on IHB specifically. The wide range of other interests advancing similar positions included Northern Indiana Public Service Company, A.E. Staley Manufacturing Company, Prairie Group, I & M Rail Link, LLC, the Indiana Port Commission, the Illinois Department of Transportation, the Wisconsin Department of Transportation, The Detroit Edison Company, a group of on-line IHB shippers and members of Congress.[1] While the Board ultimately denied the particular relief sought or supported by these parties, it recognized and reiterated throughout its decision the importance both of fluid rail operations in the Chicago terminal and of the continued operational independence of the IHB. See Decision No. 89 at 92, 161, 174 n.262, 187.[2]

To adequately protect these interests the Board: 1) required that the Applicants adhere to their representation

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[1] See, e.g., Decision No. 89 at 90-91, 209 n.305, 335; DE-02, filed October 21, 1997.

[2] The Board had previously concluded that, despite Conrail's 51% ownership of IHB, IHB was managed and operated as an independent switching carrier. Decision No. 53 (STB served November 10, 1997) at 4.

that the IHB will continue to be managed and operated as a neutral switching carrier; 2) indicated that its general 5-year oversight condition would specifically assess "transaction-related impacts within the Chicago Switching District, including the effect of IHB's management change on its role as a neutral switching carrier;" and 3) imposed particular monitoring conditions with respect to Chicago-area rail operations. Decision No. 89 at 92, 161 and 164-165.[3] The latter conditions are encompassed within two "elements" of the Board's operational monitoring arrangement.

The first such element, numbered 10 and entitled "Chicago Gateway Operations," requires Applicants to report weekly on "the number and on time delivery of run through trains delivered to western carriers via the Chicago gateway . . . ." Decision No. 89 at 164. The second and likely more relevant element[4] requires Applicants to provide weekly reports on a variety of activities on their major yard facilities. Decision

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[3] WCL notes that the specific operational monitoring and reporting requirements imposed do not appear to be directly related to the issue of IHB's continued independence as a neutral switching carrier. Should it appear that the independence of the IHB has been compromised as a result of the transaction, WCL anticipates that further information from the Applicants -- either through additional reporting or discovery -- would be necessary.

[4] With respect to element number 10, WCL believes that a report on how well Applicants' <u>own</u> trains are transiting the Chicago Switching District would not be particularly probative of how Applicants may be using their control and assets in the Chicago terminal to the disadvantage of <u>other</u> carriers and on-line IHB shippers. Indeed, just the opposite is true: to the extent that other traffic is subordinated or forced out -- as WCL and numerous others fear -- Applicants' own operational performance could be expected to improve concomitantly, but at the expense of IHB's role as a neutral switching carrier.

No. 89 at 164 (element 11, "Yards and Terminals"). This element includes a specific and separate requirement that IHB provide such reports with respect to its Blue Island and Gibson Yards. Decision No. 89 at 165 and Appendix R.[5] The yard/terminal information to be provided in element 11 is derived verbatim from the similar information requirements of element 7, relating to yards within the Shared Asset Areas, with one exception: certain terminal on-time performance information that would otherwise be included in element 11 (and is included in element 7 for the Shared Asset Areas) is instead to be included in element 12, entitled "On Time Performance."

Operational monitoring element 15 then proceeds to explain what informational reporting will be available to the public. Inexplicably, it provides that all such information will be public <u>except</u> for those three elements -- 10, 11 and 12 -- that have any relationship to the Chicago-area issues. Decision No. 89 at 165.[6] Transmittal letters outlining the delays contained in informational reporting under elements 10 and 12 will also be made public. <u>Id</u>. It is <u>only</u> with respect to element 11 -- the information most relevant to the Chicago Switching District and IHB issues raised by WCL and others -- that the public will be denied such information <u>in its entirety</u>.

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[5] CSXT is also required to provide such information for Barr Yard in Chicago, which is identified in Appendix R as a "CSX Yard."

[6] "While we do not plan to make all of the reporting information publicly available . . . we will place reports filed pursuant to reporting elements 1, 2, 3, 4, 5, 6, 7, 8, 9, 13, and 14 in the docket as they are filed . . . ." Of course, there are only three other reporting elements -- 10, 11 and 12 -- left.

The Board explains that certain reports can be made public because they "do not contain commercially sensitive information," Decision No. 89 at 165, implying that information reported under element 11 must be kept secret because it is somehow "commercially sensitive."

Yet this is completely without foundation. The yard/terminal information to be reported under element 11 is identical to the information to be reported under element 7 with respect to yards in the Shared Asset Areas.[7] And reports under element 7 will be made public in their entirety. We do not understand how such identical information can be not commercially sensitive for yards in New Jersey or Detroit but somehow of a different character for yards in Chicago.

Numerous, diverse parties, ranging from members of Congress to state DOTs to private shippers, have expressed concerns about post-transaction rail operations in the Chicago Switching District. It is particularly important that they have access to the information that Applicants will be reporting under element 11. Applicants may prefer that each of those parties be forced to view and analyze the situation in isolation -- based solely on their own post-transaction experience -- but it is hard to see how such an approach is consistent with either the public interest or the Board's purpose in adopting its oversight and

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[7] Cf. Decision No. 89 at 164 [element 7] ("For each respective SAA, and each yard in each SAA where appropriate, reports are to include (1) fluid yard capacity; (2) cars on hand loaded and empty; (3) cars handled per day; (4) average daily dwell time for cars handled . . . ."") with Decision No. 89 at 164 [element 11] ("These reports [under element 11] must include those informational items requested for the SAAs . . . .").

operational monitoring conditions in this case. Shielding this information from public scrutiny also will force the Board to blindly judge its meaning and impact without input from those in the best position to know: the end-users of switching and terminal services in the Chicago area. There is no reason why the information to be reported to the Board under operational monitoring element 11 cannot and should not be made available to the public, just as it will as to the Shared Asset Areas.

WHEREFORE, WCL respectfully requests that the Board grant partial reconsideration of Decision No. 89 herein and provide that reports filed by the Applicants pursuant to reporting element 11 of the operational monitoring condition will be placed in the public docket as they are filed.

Respectfully submitted,

By: Thomas J. Litwiler EF

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ATTORNEYS FOR
WISCONSIN CENTRAL LTD.

Dated: August 12, 1998

CERTIFICATE OF SERVICE

I hereby certify that on this 12th day of August, 1998, a copy of the foregoing **Petition of Wisconsin Central Ltd. for Partial Reconsideration of Monitoring and Oversight ConditionS** (WC-19) was served by hand delivery upon the Primary Applicants herein, as follows:

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

Richard A. Allen, Esq.
Zuckert, Scoutt & Rasenberger, L.L.P.
888 Seventeenth Street, N.W.
Suite 600
Washington, DC 20006-3939

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

by first class mail, postage prepaid, upon all remaining designated parties of record appearing on the official service list in this proceeding, served August 19, 1997 and revised on October 7, 1997 and December 5, 1997.

Thomas J. Litwiler

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ENTERED
Office of the Secretary

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AUG 13 1998

Part of Public Record

RECEIVED
AUG 12 1998
MAIL MANAGEMENT
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ERIC M. HOCKY

FILED
AUG 12 1998
SURFACE TRANSPORTATION BOARD

August 11, 1998

FEDEX

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

FEE RECEIVED
AUG 12 1998
SURFACE TRANSPORTATION BOARD

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
PETITION OF READING BLUE MOUNTAIN & NORTHERN RAILROAD COMPANY TO REOPEN AND TO CLARIFY

Dear Sir or Madam:

Enclosed for filing in the above referenced proceeding are an original and 25 copies of Petition of Reading Blue Mountain & Northern Railroad Company to Reopen and to Clarify (RBMN-10), along with a diskette containing the document in a format (WordPerfect 6.1) that can be converted to WordPerfect 7.0.

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

Respectfully,

ERIC M. HOCKY

Enclosures

cc: All parties shown on the Certificate of Service

EMH/bah
H:\WPDATA\TRANS\RBMN\CR-MERGE\STB06.WPD

RBMN-10

BEFORE THE
SURFACE TRANSPORTATION BOARD

STB FINANCE DOCKET NO. 33388

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

PETITION OF READING BLUE MOUNTAIN & NORTHERN RAILROAD COMPANY TO REOPEN AND TO CLARIFY

William P. Quinn
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GOLLATZ, GRIFFIN & EWING, P.C.
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Dated: August 11, 1998

Attorneys for Reading Blue Mountain & Northern Railroad Company

BEFORE THE
SURFACE TRANSPORTATION BOARD

STB FINANCE DOCKET NO. 33388

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

**PETITION OF READING BLUE MOUNTAIN
& NORTHERN RAILROAD COMPANY
TO REOPEN AND TO CLARIFY**

Reading Blue Mountain & Northern Railroad Company ("RBMN") files this Petition requesting that the Board reopen and clarify Decision No. 89 served July 23, 1998 (the "Decision"). In the Decision, the Board approved with certain conditions the acquisition and control of Conrail by CSX and NS, and the division of assets of Conrail by and between CSX and NS.[1] RBMN believes that certain of the provisions of the Decision which affect RBMN need clarification in order

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[1] "Conrail" refers to Conrail, Inc. and Consolidated Rail Corporation and their wholly owned subsidiaries. "CSX" refers to CSX Corporation and CSX Transportation, Inc. and their wholly owned subsidiaries . "NS" refers to Norfolk Southern Corporation and Norfolk Southern Railway Company ("NSR") and their wholly owned subsidiaries.

to be properly implemented. By this Petition, RBMN requests that the Board clarify the following ordering paragraphs of the Decision:

> **20. Applicants must adhere to all of the terms of the NITL agreement, subject to the modifications made in this decision.**

The Board modified the NITL agreement among NITL, CSX and NS in several significant ways, including extending the single-line to joint-line protections to Class III carriers. Decision at 56. As RBMN understands the Decision, as a Class III railroad RBMN will be able to invoke the single-line to joint-line protections set forth in the NITL agreement, including requiring CSX and NS to maintain the existing Conrail rates and to provide fair and reasonable joint line service, and that RBMN will have the availability of arbitration for disputes concerning the routing or interchange points for connecting service that will be split between CSX and NS. However, although "shippers on Class III railroads in those circumstances would face the same degree of harm as do shippers that are losing single-line Conrail service to the transaction," the Board's discussion of the extension of the NITL agreement seems limited to Class III railroads, and not to their respective shippers. *See* Decision at 56 ("the Class III carrier, at its option, will be able to invoke..."). On the other hand, among the modifications made to the NITL agreement noted in the ordering paragraph is "the extension of the single-line to joint-line and reciprocal switching protections to reach shortlines that connect with Conrail *and shippers served by such shortlines*." Decision at 176 n.264 (emphasis added). Accordingly, RBMN requests that the Board clarify Ordering Paragraph 20 and/or the discussion at page 56 to provide that the single-line to joint-line protection may be exercisable by both Class III railroads and/or by shippers served by Class III railroads.

8. Except as otherwise provided in this decision, NYC and PRR shall have, upon consummation of the authorized control and the NYC/PRR assignments, all of such right, title, interest in and other use of such assets as CRC itself had, notwithstanding any provision in any law, agreement, order, document, or otherwise, purporting to limit or prohibit CRC's unilateral transfer or assignment of such assets to another person or persons, or purporting to affect those rights, titles, interests, and uses in the case of a change of control.

10. Except as otherwise provided in this decision, CSXT and NSR may use, operate, perform, and enjoy the Allocated Assets and the assets in Shared Assets Areas consisting of assets other than routes (including, without limitation, the Existing Transportation Contracts), as provided for in the application and pursuant to 49 U.S.C. 11321, to the same extent as CRC itself could, notwithstanding any provision in any law, agreement, order, document, or otherwise, purporting to limit or prohibit CRC's assignment of its rights to use, operate, perform, and enjoy such assets to another person or persons, or purporting to affect those rights in the case of a change in control. . . .

Under the Transaction Agreement, certain Allocated Assets were identified, and RBMN understands that Ordering Paragraphs 8 and 10 provide that the Board is using its powers under 49 USC 11321 to override any anti-assignment clause such that the specified Allocated Assets may be assigned by Conrail to NYC and PRR, and that such assets can thereafter be used by CSXT and NSR. "Allocated Assets" are comprised of three categories of assets -- (1) the items described in Schedule 1 of the Transaction Agreement (primarily routes and related assets including trackage and other operating rights agreements, and property interests); (2) Transportation Contracts allocated under Section 2.2(c); and (3) unallocated assets to be designated prior to Closing Date under Article II. *See* CSX/NS-25, Transaction Agreement, §1.1, "NYC Allocated Assets" and "PRR Allocated Assets." Although the first two categories include specific types of contracts that will be Allocated Assets, the third does not. Rather, this last category includes a number of assets of Conrail which

are not designated as Allocated Assets under the Transaction Agreement, but which may be allocated at some future point. For example, under the Transaction Agreement, §2.2(e), undesignated contracts may be allocated by the "Contract Committee" to PRR, NYC or left with Conrail.

One contract not specifically allocated is an RBMN agreement with Conrail dated August 19, 1996 (the "Lehigh Agreement") for the purchase of lines known as the Lehigh Cluster. The Lehigh Agreement, among other items, includes ongoing allowances and "blocking provisions." The Lehigh Agreement also includes an anti-assignment clause. However, since it is not an operating agreement and since it relates to a route Conrail does not presently own or operate, the Transaction Agreement does not allocate it. During discovery, when NS was asked whether the Lehigh Agreement would be assigned to it by Conrail, NS responded, in part, as follows:

> . . . NS further objects to this interrogatory to the extent it seeks information *concerning an agreement which NS does not possess. . . .*
>
> *NS has not yet reviewed the agreement* referred to in the interrogatory, but upon consummation of the Transaction, NS has agreed to assume certain agreements as set forth in the Transaction Agreement. See Volume 8B and 8C.

See NS-36, an excerpt of which is attached hereto as Exhibit A (emphasis added).

The Application merely requests generally that the Board override anti-assignment clauses, but makes no showing of the necessity of such an override with respect to specific contracts. Indeed, no such showing was possible since NS and CSX had not yet determined whether or to whom undesignated contracts such as the Lehigh Agreement should be allocated.[2] In each situation

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[2] RBMN has still not been notified if, or to whom the Lehigh Agreement will be allocated.

where the Board specifically reviewed the override requests of NS and CSX it limited or refused to grant the requests. *See* Decision at 72-73 (assignment of CRC's Existing Transportation Contracts limited to 180 days), 100 (refusing to assign trackage rights over Gateway), and 126-127 (leaving override of collective bargaining agreements to arbitration). Since overriding negotiated contractual terms is not favored, the Board should not override anti-assignment clauses in agreements that NS and CSX have not yet allocated or demonstrated are necessary to implementation of the transaction. Accordingly, RBMN requests that the Board clarify Ordering Paragraph 8 to provide that contracts such as the Lehigh Agreement that were not specified as Allocated Assets in the Transaction Agreement may not be assigned unilaterally to NYC or PRR where a valid anti-assignment clause is present, without the consent of the other party to the contract or a showing that the contract is essential to the transaction. Further, the Board should clarify Ordering Paragraph 10 to provided that NS and CSX may not use or operate such a contract without the consent of the other party to the contract or a showing that the contract is essential to the transaction.

39. As respects any shortline, such as RBMN, that operates over lines formerly operated by CSX, NS or Conrail (or any of their predecessors), and that, in connection with such operations, is subject to a "blocking" provision: CSX and NS, as appropriate must enter into an arrangement that has the effect of providing that the reach of such blocking provision is not expanded as a result of the CSX/NS/CR transaction.

RBMN agrees that it is appropriate for the Board to provide that blocking provisions not be expanded as a result of the CSX/NS/CR transaction. However, it is not clear to RBMN who the parties to such an arrangement should be. As discussed previously, the Transaction Agreement does not specify to whom its Lehigh Agreement (which includes a blocking provision) will be

assigned. It may remain with Conrail, or it may be assigned to PRR and used by NS pursuant to the Operating Agreement.[3] RBMN requests that the Board clarify its order to provide that whatever entity is ultimately determined to hold the Lehigh Agreement be subject to the requirements of Ordering Paragraph 39, whether it be Conrail or PRR (and NSR to the extent it will use and operate the Lehigh Agreement).[4]

Conclusion

For the reasons set forth above, RBMN requests that the Board reopen Decision No. 89 and clarify Ordering Paragraphs 8, 10, 20 and 39 as set forth above.

Respectfully submitted,

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Dated: August 11, 1998

Attorneys for Reading Blue Mountain & Northern Railroad Company

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[3] Since RBMN's lines only connect with Conrail lines to be allocated to PRR, RBMN assumes that the Lehigh Agreement, if allocated, would be allocated to PRR and not NYC.

[4] The Decision, at 30, indicates that NSR has the right with the consent of PRR to amend or modify any contract on behalf of PRR.

CERTIFICATE OF SERVICE

I hereby certify that on this date a copy of the foregoing document was served on the following persons by United States First Class Mail:

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Secretary of Transportation
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US Department of Transportation
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c/o Michael P. Harmonis
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325 7th Street, Suite 500
Washington, DC 20530

All Other Parties of Record

Dated: August 11, 1998

Eric M. Hocky

H:\WPDATA\TRANS\RBMN\CR-MERGE\RBMN-10.DOC

(a) If so, which Applicant will fulfill Conrail's obligations thereunder with respect to RBMN?

(b) Identify each document that relates to your response to this interrogatory.

1. NS objects to this interrogatory to the extent it seeks a business commitment to which Requester is not entitled in discovery. Without waiving this objection, and subject to the General Objections stated above, NS responds as follows:

1(a) NS will review the Conrail Express Program, and anticipates integrating many of its provisions into the NS Thoroughbred Program.

1(b) NS has no responsive documents.

Interrogatory No. 2

With respect to RBMN's purchase of the Lehigh Division:

(a) Will NS assume Conrail's rights and obligations under the Lehigh Agreement?

(b) Will NS continue the allowances set forth in Section 9.9 and Appendix N of the Lehigh Agreement?

(c) Will NS assume Conrail's rights and obligations under the Interchange Agreements dated August 19, 1996, covering interchange at Lehighton and Mehoopany?

(d) Will NS assume Conrail's rights and obligations under the trackage rights agreement dated August 19, 1996, covering the use of lines between Packerton Junction and M&H Junction, PA?

(e) Identify each document that relates to your response to this interrogatory.

2. NS objects to this interrogatory to the extent it seeks a business commitment to which Requester is not entitled in discovery. NS further objects to this interrogatory to the extent it seeks information concerning an agreement which NS does not possess. NS also

objects to the interrogatory to the extent it is vague and ambiguous as to the "assum[ption] of Conrail's rights and obligations" under the agreement described in subsection (c) of this interrogatory. Without waiving any of these objections, and subject to the General Objections stated above, NS responds as follows:

NS has not yet reviewed the agreement referred to in the interrogatory, but upon consummation of the Transaction, NS has agreed to assume certain agreements as set forth in the Transaction Agreement. See Volume 8B and 8C. The Application anticipates that existing contracts will continue in full force and effect and will be performed in accordance with Section 2.2(c) of the Transaction Agreement. NS plans to honor all commitments contained in Conrail contracts in force and assumed by NS after approval and consummation of the Transaction. After expiration of these contracts, terms and conditions of future contracts will be subject to negotiation by the interested parties.

Interrogatory No. 3

Will NS give connecting shortlines such as RBMN the option to participate in joint rates as an independent carrier (not subject to allowances) in all instances, including those in which the shortline has agreed to allowances with Conrail?

3. NS objects to this interrogatory to the extent it seeks a business commitment to which Requester is not entitled in discovery. NS further objects to this interrogatory as not relevant to the extent it seeks information regarding shortlines other than RBMN. Without waiving these objections, and subject to the General Objections stated above, NS responds as follows:

STB FD-33388 8-12-98 I ID-190492

190492

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JOHN H. BROADLEY
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August 12, 1998

Honorable Vernon Williams
Secretary
Surface Transportation Board
1925 K Street NW
Washington, D.C. 20423-0001

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

Dear Mr. Williams:

Enclosed please find for filing in the captioned proceeding an original and 25 copies of the PETITION OF THE INDIANA RAIL ROAD COMPANY FOR LEAVE TO INTERVENE and the PETITION OF THE INDIANA RAIL ROAD COMPANY FOR RECONSIDERATION OF DECISION NO. 89. I have also enclosed an additional copy of both documents which I would appreciate your date stamping and returning with our messenger.

In addition I have also enclosed a diskette containing electronic copies of each document in Word Perfect 6/7/8 format. The file containing the electronic copy of the intervention petition is entitled INRD-1.wpd, and the file containing the electronic copy of the reconsideration petition is entitled INRD-2.wpd.

Also filed herewith is a certificate of service indicating that copies of each of the petitions has been served on all persons on the Board's service list in this proceeding designated as a party of record and on Administrative Judge Leventhal.

Yours very truly,

John Broadley

John Broadley

Enclosures

190492

INRD-1

BEFORE THE
SURFACE TRANSPORTATION BOARD
Washington, D.C.

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

PETITION OF THE INDIANA RAIL ROAD COMPANY
FOR LEAVE TO INTERVENE

The Indiana Rail Road Company ("INRD"), by its undersigned attorneys, hereby petitions the Board for leave to intervene in this proceeding to ask the Board to reconsider one aspect of Decision No. 89 (served July 23, 1998) in this proceeding (the "Decision"). INRD's petition for reconsideration is filed herewith.

BACKGROUND

The INRD owns and operates a line of railroad between Newton, IL and Indianapolis, IN where it interchanges with Conrail at a point on the Indianapolis Belt Railway. The Indianapolis Power & Light Company's (IP&L's) Stout electric generating plant is located INRD's line in Indianapolis, approximately two miles south of INRD's junction with Conrail. INRD is the only rail carrier serving the Stout plant directly, though it has in place a switching

agreement under which it will switch cars to the Stout plant for other carriers from its interchange point with Conrail.

In November 1996 the Board approved CSXT's acquisition of control of INRD. CSXT currently owns 89% of the stock of INRD's parent, Midland United Corporation, a non-carrier holding company, which owns 100% of the stock in INRD. The remaining 11% of the stock in Midland United Corporation is owned by interests not affiliated with CSXT. Because of CSXT's control of INRD, INRD is an "applicant carrier" as defined in 49 CFR 1180.3(b), though it is not an "applicant" in this proceeding. See F.D. 33388, Decision No. 7, May 30, 1997, at 5-7. Until now, INRD has not been a party to this proceeding.

Under the terms of the applicants' proposed transactions, CSXT will acquire Conrail's rail assets in Indianapolis. Many shippers in Indianapolis now are served by Conrail directly and also have access to service by CSXT through a Conrail switch. Other shippers are served by CSXT directly and have access to service by Conrail through a CSXT switch. CSXT and NS have proposed that after CSXT acquires Conrail's lines in Indianapolis, NS will have trackage rights over CSXT into Hawthorne Yard in Indianapolis and will be permitted to serve shippers in Indianapolis that previously had both Conrail and CSXT service by means of a cost-based CSXT switch from Hawthorne Yard.

INDIANAPOLIS POWER & LIGHT COMPLAINTS ABOUT THE APPLICANTS' PROPOSALS AT STOUT PLANT

In its October 21, 1997 Supplemental Comments, Evidence, and Request for Conditions ("IP&L-3"), IP&L made certain complaints concerning the applicants' proposals with respect to Stout plant. Specifically, IP&L stated (IP&L-3 at 6):

> Accordingly, IPL strongly opposes the proposed transaction unless the Board revises the proposed arrangement to make Norfolk Southern an equal competitor with CSX/Indiana Rail Road in Indianapolis, *as Conrail is today*. In so requesting, IPL is not seeking any advantage over today's circumstances, because Indianapolis today has balanced competition between Conrail and CSX/Indiana Rail Road. (emphasis added)

IP&L clearly understood that Conrail's present access to the Stout plant is through an INRD switch, or through a potential build-out from Stout plant to Conrail at the Indianapolis Belt (IP&L-3 at 23):

> Quite clearly, Conrail not only has the right but also the duty to serve the Stout Plant today (either via switching or directly if a build-in or build-out were constructed), as does CSX's 89 percent-owned subsidiary of a subsidiary, Indiana Rail Road. (See Application, Vol. 1 at 271). *Stout thus has two-carrier access today*, and would only effectively have one carrier serving Stout if CSX were to displace Conrail, since CSX obviously does not compete with one of its almost wholly owned subsidiaries. (emphasis added)

IP&L objected to applicants' argument that Stout technically was not a "2 to 1" shipper because CSX does not presently serve it. IP&L's argument is illuminating (IP&L-3 at 25):

> IPL's response is that Applicants' claim is complete nonsense. Obviously, IPL is losing the ability to build out to one of its two carriers today, and the ability to build out to CSX at the Indianapolis Belt rather than Conrail does not create effective competition with Indiana Rail Road, since CSX controls Indiana Rail Road. . . . So IPL needs a carrier other than CSX to provide effective competition at Stout, *to replace Conrail*. (emphasis added)

It is plain throughout IP&L's objections that the harm it alleges the proposed transaction will cause to its competitive position at Stout plant occurs because substituting

CSXT for Conrail will deprive IP&L of a meaningful build-out option from Stout plant to a carrier not affiliated with INRD, the carrier serving Stout plant directly.

IP&L's proposed solution to the problem was precise and to the point -- preserve a meaningful build-out option (IP&L-3 at 26):

> Thus, the Board must permit IPL to be served by NS directly, if a build-in or build-out from the Indianapolis Belt is feasible, since IPL has the right today, or the Board could order Conrail to provide service to IPL. . . . . The accompanying testimony of Witnesses Crowley and Porter demonstrates that such a build-out, if financed by IPL, would cost between approximately _____ million, at most and is entirely feasible along the route shown in the map accompanying the testimony of Witness Porter . . . .
>
> It is therefore necessary for the Board to adopt a protective condition that Applicants may not proceed with the proposed transaction unless CSX permits, and NS accepts, local trackage rights, not just overhead rights, *over the Indianapolis Belt*, and that *NS is specifically obliged to serve IPL's Stout Plant upon request by IPL, and to quote reasonable rates and terms of service for such transportation if IPL so requests.*

THE BOARD'S DECISION

In its Decision, the Board denied IP&L's request that Indianapolis be designated a shared assets area and broadened NS's rights to serve shippers in Indianapolis. Specifically, with respect to service to Stout plant, the Decision granted IP&L's request that IP&L's build-out option from Stout be preserved by ensuring that NS obtained trackage rights over the Indianapolis Belt which it could use to serve Stout plan over an IP&L build-out. The Decision also preserved IP&L's existing form of two carrier service at Stout plant -- service provided directly by INRD and service provided by a carrier unaffiliated with INRD through an INRD switch. The Board did this by granting NS local trackage rights on the Indianapolis Belt which

it can use with an INRD switch to serve Stout plant. Together, these two conditions would have perfectly replicated the existing competitive situation at Stout and would have offset precisely the anticompetitive effects of the transaction alleged by IP&L. Moreover, in each case it did so by imposing conditions on the applicants which the applicants themselves could satisfy -- CSXT was obligated to give NS local trackage rights over the Indianapolis Belt that would permit NS to access an IP&L build-out, and that would permit NS to access an interchange with INRD so that NS could serve Stout plant directly through an INRD switch as Conrail can today.

The Decision, however, went beyond rectifying the alleged adverse effects of the proposed transaction on IP&L's competitive position at Stout plant. Instead of placing IP&L after the proposed transaction in the same competitive position it is in today, the Decision significantly improves that position by conditioning approval of the transaction on *INRD granting trackage rights to NS to permit NS to move its trains over INRD's line to Stout plant even in the absence of a build-out.*[1] The Board did not explain why, under its current approach to dealing with competitive problems caused by proposed transactions, the alleged loss of *potential rail competition* (the build-out option) at Stout plant required a remedy that both preserves the potential rail competition of the build-out option and significantly *increases* the existing level of rail competition at that plant without IP&L exercising the build-out option. The Board repeatedly has refused to impose conditions on proposed transactions to remedy

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[1] The July 23 Decision does not indicate what the terms of those trackage rights should be. If they are at the $0.29 per car-mile contained in the NS-CSXT general agreement, they would clearly represent a substantial revenue reduction to INRD compared to the charges INRD would collect for switching the traffic. This would also likely be the case if the charges were to be set under the Board's SSW approach.

competitive conditions not caused by the transaction in question, and repeatedly has refused to provide broader relief than needed to remedy adverse competitive effects that it has found. The Board did not explain its departure from that policy in the case of Stout plant.

As set forth in the accompanying petition for reconsideration, INRD requests that the Board modify the Decision to eliminate any condition on the transaction that would require INRD to grant trackage rights to NS over INRD's line from the Indianapolis Belt to IP&L's Stout plant.

REASONS FOR ALLOWING INRD TO INTERVENE

The Board's regulations provide (49 CFR 1112.4):

> (a) The Board may grant a petition to intervene in a proceeding set for modified procedure if intervention:
>
> (1) Will not unduly disrupt the schedule for filing verified statements, except for good cause shown; and
> (2) Would not unduly broaden the issues raised in the proceeding.

INRD meets both requirements. INRD does not seek to introduce additional evidence into this proceeding either through verified statements or otherwise. Nor does INRD seek to broaden the issues raised in the proceeding. INRD's sole purpose for intervention in this proceeding, and the basis of its request for relief, is that the Decision imposes a condition on the applicants that would require CSXT to cause INRD to grant to NS trackage rights over INRD's line between the Indianapolis Belt and the IP&L Stout plant, a condition that is not required to ameliorate any competitive harm that IP&L has alleged is caused by the transaction at Stout plant, or that the Board has found. Moreover, that condition is not consistent with prior Board policies and precedents.

The adverse competitive impacts of the transaction on IP&L at Stout are fully remedied by granting NS local trackage rights over the Belt to the junction with INRD and permitting NS to serve Stout either through an INRD switch as Conrail can do today, or through an IP&L build-out as Conrail could do today if IP&L were to build-out. Additional relief in the form of a grant of trackage rights to NS over INRD's line between the Indianapolis Belt and the Stout plant goes beyond what is needed to restore the competitive status quo at Stout plant and will significantly improving IP&L's rail competitive position there with a consequent adverse effect on INRD's competitive position.[2]

INRD is a separate corporate entity from CSX or CSXT and has different ownership, albeit CSXT's ownership interest in INRD is sufficient to give CSXT effective control of INRD and CSXT's exercise of that control has been approved by the Board. Because the interests and CSXT and INRD in connection with this matter may not be identical, the Board should permit INRD to intervene in this proceeding and allow its petition for reconsideration to be filed.

CSX, the indirect 89% owner of the stock of INRD, has not approved and did not request the filing of this petition. INRD understands that CSX does not support this petition or the positions taken therein. INRD is filing this petition through the action of its

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[2] The additional relief will have an adverse effect on INRD whether the trackage rights are at the $0.29 per car-mile rate contained in the CSXT - NS trackage rights agreement, or whether they are based on the Board's SSW formula. Only a market-based trackage rights charge which INRD could set to reflect IP&L's avoided build-out costs would preserve the competitive status quo at Stout plant. The Decision did not identify the basis for trackage rights compensation for NS's use of INRD's lines.

senior management, which is affiliated with the minority interest in INRD, in order to protect what it believes to be the interests of INRD and its stockholders.

CONCLUSION

Because INRD meets the criteria set by the Board's regulations for intervention, and because the concerns and interests raised in the attached petition for reconsideration will not be advanced by any party to this proceeding, INRD requests that it be permitted to intervene, be designated a party of record, and that the Board accept and consider its attached petition for reconsideration.

Respectfully submitted,

THE INDIANA RAIL ROAD COMPANY

By John Broadley
One of its attorneys

John Broadley
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Dated: August 12, 1998

190491

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August 12, 1998

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VIA MESSENGER

Vernon A. Williams, Secretary
Office of the Secretary of Transportation
Surface Transportation Board
1925 K Street, NW -- Room 711
Washington, DC 20423-0001

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

Dear Secretary Williams:

Enclosed please find an original and 25 copies of Providence and Worcester Railroad Company's Petition for a Stay Pending a Request for Judicial Review for filing in connection with the above-referenced docket. We have also enclosed a copy of the Petition to be date-stamped and returned to us.

Should you have any questions regarding this filing, please do not hesitate to contact us.

Very truly yours,

David K. Monroe

Enclosures

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BEFORE THE
SURFACE TRANSPORTATION BOARD

Finance Docket No. 33388

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

PETITION OF PROVIDENCE AND WORCESTER RAILROAD COMPANY FOR A STAY PENDING A REQUEST FOR JUDICIAL REVIEW

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Attorneys for
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DATE: August 12, 1998

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 PROVIDENCE AND WORCESTER RAILROAD COMPANY
FOR STAY PENDING A REQUEST FOR JUDICIAL REVIEW

Pursuant to 49 C.F.R. § 1115.5, Providence and Worcester Railroad Company ("P&W") seeks a limited stay of the implementation of the division of assets of Consolidated Rail Corporation ("Conrail") between CSX Transportation, Inc. ("CSX") and Norfolk Southern Railway Company ("NS") pending judicial review of Decision No. 89 in the above-referenced docket.

I. FACTUAL BACKGROUND

P&W is a regional freight railroad operating in Massachusetts, Rhode Island, Connecticut and New York. P&W is the only interstate freight carrier serving the State of Rhode Island, and possesses the exclusive and perpetual right to conduct freight operations over the Northeast Corridor between New Haven, Connecticut, and the Massachusetts/Rhode Island border.

In 1981, Congress passed the Northeast Rail Service Act of 1981 ("NERSA") which mandated, inter alia, that the Secretary of Transportation commence an expedited supplemental transaction to transfer Conrail's rail lines in Connecticut and Rhode Island

to one or more railroads in the region. Congress granted the United States Special Court, established under the Regional Rail Reorganization Act of 1973 ("Special Court"), original and exclusive jurisdiction to review, approve and implement supplemental transactions under NERSA. Pursuant to 45 U.S.C. §§ 719 and 745(f), Congress delegated to the Special Court the responsibility to implement Congressional policy and to determine whether supplemental transactions under NERSA were in the public interest.

On April 13, 1982, the Special Court issued an Order approving and directing the consummation of an expedited supplemental transaction to allocate assets of Conrail located in Connecticut and Rhode Island. Pursuant to that Order of the Special Court, P&W acquired certain of Conrail's rail assets in Connecticut and Rhode Island. In addition, pursuant to paragraph 21 of the Order of the Special Court, P&W was granted the exclusive right to succeed to Conrail's freight operations and freight service operations on the shoreline between Westbrook and New Haven, Connecticut, and Conrail's terminal properties known as the New Haven Station.

Paragraph 21 of the Order of the Special Court provides, in pertinent part:

> [I]f Conrail elects to withdraw from or abandon or discontinue freight service obligations on the "Shore Line" between Westbrook, Connecticut (MP 101.2) and New Haven, Connecticut (MP 70.2) or on the terminal properties known as "New Haven Station" (which properties are more precisely defined in Appendix D) and if the Administrator shall find, on application of P&W, that P&W is continuing to operate as a self-sustaining railroad capable of undertaking additional common carrier responsibilities without federal financial assistance, Conrail shall sell said rail properties at a reasonable price and on reasonable terms and conditions to be agreed upon by Conrail and P&W or, in the absence of agreement, in accordance with the procedures of the American Arbitration Association, and P&W shall succeed to Conrail's service obligations upon the following conditions ...

In paragraph 25 of the Order, the Special Court retained exclusive jurisdiction over the subject supplemental transactions.

In June 1997, CSX and NS agreed to the joint acquisition, control, and division of Consolidated Rail Corporation ("Conrail") and its assets. Pursuant to an agreement between and among CSX, NS, and Conrail, Conrail will transfer its rail assets to two wholly-owned subsidiaries -- New York Central Line LLC ("NYC") and Pennsylvania Lines LLC ("PRR"). CSX and NS will have exclusive authority to appoint the officers and directors of NYC and PRR, respectively. In addition, Conrail will follow the direction of CSX and NS with respect to the management and operation of NYC and PRR, respectively. Following the division of Conrail's assets, Conrail will no longer hold itself out to the public as performing transportation services directly for its own account. Indeed, in the words of applicants, "[t]here will be no more Conrail running along all lines." Statement of Mr. Dennis G. Lyons, counsel for CSX, before the Board, June 3, 1998, at 121. Under Section 8.9 of the Transaction Agreement, dated June 10, 1997, between and among CSX, NS and Conrail, NYC or its assets, including New Haven Station, will be transferred directly to CSX after the division of Conrail is complete.

The effect of the transactions implementing the control and division of Conrail's assets by CSX and NS, will be that Conrail will no longer provide freight services at New Haven Station. Conrail's withdrawal from New Haven Station and discontinuance of operations triggers the operation of paragraph 21 of the Order of the Special Court, entitling P&W to purchase New Haven Station, upon reasonable terms and conditions.

On November 12, 1997, P&W filed a complaint with the statutory successor to the Special Court, seeking a declaration of its rights under the Order of the Special Court. On December 1, 1997, Conrail moved to dismiss P&W's complaint on the grounds of ripeness, asserting that P&W's claims were not ripe because the Conrail/CSX/NS transaction had not yet been approved by the Board. Conrail also argued that P&W's rights under the Order would remain intact even if the board approved the transaction. On January 22, 1998, the District Court granted Conrail's motion to dismiss, but gave P&W leave to refile its claims after the transaction was approved.

On July 23, 1998, the board served Decision No. 89 approving the Conrail/CSX/NS transaction. While acknowledging that the District Court had primary jurisdiction in interpreting the Order, the Board preempted any rights that P&W might have as a result of the transaction under the Order, pursuant to 49 U.S.C. § 11321(a). As a result of the Board's application of 49 U.S.C. § 11321(a) to the Order of the Special Court in Decision No. 89, CSX will succeed to Conrail's freight service obligations and rights in New Haven Station, and P&W will be dispossessed of its rights under the Order of the Special Court to acquire New Haven Station upon Conrail's withdrawal from its freight service obligations at New Haven Station.

P&W seeks a limited stay of the implementation of the division of Conrail relating only to New Haven Station. The grant of a limited stay pending judicial review will not materially affect the consummation of the division of Conrail, and will preserve P&W's rights under the Order of the Special Court. A stay is appropriate because P&W believes the Board's decision to preempt the Order of the Special Court is erroneous for several

reasons. First, the Board's application of 49 C.F.R. § 11321(a) to the Order of the Special Court violates Congress' grant of original and exclusive jurisdiction to the Special Court over the supplemental transactions relating to Conrail's properties in Connecticut and Rhode Island. Second, the Board's determination that New Haven Station is an integral and necessary part of the underlying transaction does not appear to be supported by the record, and indeed appears to be contrary to the facts. Finally, the Board's application of 49 U.S.C. § 11321(a) to P&W's rights does more than merely override a contractual anti-assignment clause -- it results in the taking of a real property right held by P&W.

II. A LIMITED STAY OF DECISION NO. 89 IS JUSTIFIED

A party seeking a stay must establish (1) that it will likely prevail on the merits; (2) that it will suffer irreparable harm in the absence of a stay; (3) that a stay will not substantially harm other interested parties; and (4) that a stay is in the public interest. See Union Pacific RR Co.-Aban-Wallace Branch, Id., 9 I.C.C.2d 946, 501 (1993); Washington Metropolitan Area Transit Commission v. Holiday Tourists, Inc., 559 F.2d 841, 843 (D.C. Cir. 1977); Virginia Petroleum Jobbers Association v. FPC, 259 F.2d 921, 925 (D.C. Cir. 1958). P&W can satisfy each of these four factors, and is therefore entitled to a stay.

A. P&W Is Likely To Prevail On The Merits.

The Board's decision to preempt the Order of the Special Court pursuant to 49 U.S.C. § 11321, is in direct conflict with Congress' grant of original and exclusive jurisdiction over the supplemental transactions which are the subject of the Order of the Special Court. In enacting NERSA, Congress excluded the ICC from any involvement in transactions under NERSA, instead delegating to the Special Court the sole authority to deter-

mine whether the transactions were in the public interest and otherwise in furtherance of Congressional policy.

The language of NERSA, as well as the history of the transactions under NERSA, make clear that Congress intended to divest the ICC of its authority to determine whether the supplemental transactions under NERSA are in the public interest. In 49 U.S.C. § 745(c), Congress granted the ICC the authority to review and approve supplemental transactions under 45 U.S.C. § 745(a). In contrast, Congress gave the ICC no role for the expedited supplemental transactions under NERSA described in 45 U.S.C. § 745(f). Indeed, although the supplemental transactions under the Order of the Special Court clearly would otherwise have been within the scope of the ICC's authority under 49 U.S.C. §§ 11321-28, the ICC did not review or authorize these supplemental transactions or subsequent transfers under paragraph 21 of the Order.

Moreover, even if the Board has the authority to use § 11321 to undo a supplemental transaction under NERSA, the Board's determination that New Haven Station is an integral and necessary part of the underlying transaction is unsupported by the record and contrary to the facts. The Board's power under § 11321(a) to exempt a transaction from inconsistent laws arises only when necessary to carry out the fundamental purposes of the transaction. See Norfolk & Western v. Train Dispatchers, 111 Sup. Ct. 1156 (1991); City of Palestine v. United States, 559 Fed. 2d 408 (5th Cir., 1977). New Haven Station and P&W's rights under the Order were not even mentioned in the application and there appears to be no support in the record to support the Board's application of § 11321(a) to P&W's rights under the Order. In fact, New Haven Station is presently an isolated mar-

ginal appendage to the Conrail system, disconnected from Conrail's main operations. Conrail has shed many of its assets in Connecticut over the last several years, and even entered into an aborted sale of New Haven Station to P&W, leaving New Haven Station as an island operation.

B. P&W Will Suffer Irreparable Harm If The Stay Is Not Granted.

Unless a stay is granted, there will be insufficient time to seek judicial review for P&W's rights, negotiate or arbitrate the terms of sale, and prepare for the orderly transition of freight service obligations before CSX assumes control of New Haven Station. Once CSX assumes control of New Haven Station, there is a substantial risk that P&W's interests in the property will be compromised. CSX will be able to enter into transactions which encumber the property or affect railroad operations to P&W's detriment. For example, CSX will be able to enter into leases on the property, inter-carrier agreements, or shipping arrangements which would be contrary to P&W's interests and plans for the property. In addition, there is a substantial likelihood that the property and service to shippers would be allowed to deteriorate given its isolated location from the rest of the CSX system. CSX could even determine to remove track, phase out facilities and services, or attempt to transfer rights to yet another party.

C. A Stay Would Not Substantially Harm Other Interested Parties.

A limited stay of decision No. 89 to prevent a transfer of New Haven Station to CSX would not substantially harm CSX. New Haven Station is an isolated backwater with respect to CSX's system. Delaying the transfer of New Haven Station and its operations to CSX pending judicial review would have no appreciable impact on the successful implementation of the overall transaction.

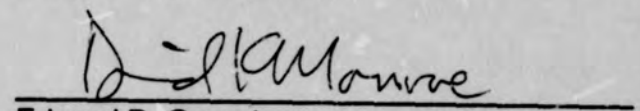
D. A Grant Of The Requested Stay Is In The Public Interest.

Congress determined, in enacting NERSA, that it was in the public interest that rail service in Connecticut and Rhode Island be provided, to the extent possible, by regional rail carriers like P&W. Similarly, the Special Court expressly found that the transactions covered by its Order were in the public interest. Given these determinations, and the significant issues raised by the Board's use of § 11321 to override these findings, the public interest would be best served by staying that portion of the Board's decision relating to New Haven Station until a court can resolve the conflict between the Board's authority under § 11321 and the Special Court's exclusive jurisdiction over the supplemental transactions under NERSA.

III. CONCLUSION

For all of the foregoing reasons, the Board should grant a limited stay of the implementation of the division of assets of Conrail between CSX and NS pending judicial review of that portion of Decision No. 89 relating to New Haven Station.

Respectfully submitted,



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Attorneys for
Providence and Worcester Railroad Company

DATE: August 12, 1998

CERTIFICATE OF SERVICE

I do hereby certify that a true and correct copy of Providence and Worcester Railroad Company's Petition for a Stay Pending a Request for Judicial Review was served on all parties of record by depositing same in the United States Mail, first class postage prepaid, this 12th day of August 1998.

David K. Monroe

STB FD-33388 8-12-98 I ID-190490

190490

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August 12, 1998

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

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

Dear Secretary Williams:

Enclosed are the original and 25 copies of the Petition of APL Limited for Clarification of Decision No. 89. A 3.5-inch diskette with the file name apl.27 in Word 6.0 format is also enclosed.

Please time and date stamp the extra copy of this letter and pleading. Thank you for your assistance. If you have any questions, please call me.

Sincerely yours,

Louis E. Gitomer
Attorney for APL Limited

Enclosures

190490
ORIGINAL

APL-27

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 APL LIMITED FOR CLARIFICATION OF DECISION NO. 89

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Dated: August 12, 1998

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 APL LIMITED FOR CLARIFICATION OF DECISION NO. 89

APL Limited ("APL") petitions the Surface Transportation Board (the "Board") to clarify the effect of Decision No. 89 on the existing rail transportation contract between Consolidated Rail Corporation ("Conrail") and APL (the "TSA"),[1] after "Day 180."[2] Throughout this proceeding, APL has sought to protect its rights to be served at Dual Points[3] by the railroad of its choosing, while continuing its TSA and maintaining its Lease of the South Kearny Terminal (the "APL Terminal") at the current rental rate of $1 per year.[4] The Lease represents a $25 million investment by APL in developing a state-

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[1] The TSA was entered on June 1, 1988. *See* CSX/NS-178, Volume 3D, at 205-259.
[2] "Day 180" is the 180th day after the division of the operation and use of Conrail's assets. Decision No. 89, at 17, fn. 27.
[3] Dual Points are defined in Section 2.2(c)(iii)(A) of the Transaction Agreement as "a station with line-haul service by both...." CSX/NS-25, Volume 8B, at 25.

of-the-art intermodal terminal from bare earth, as well as being a critical operational asset to APL. In return for APL's $25 million investment, Conrail agreed to rent the APL Terminal for $1 a year during the Lease term.

APL has sought throughout this proceeding to assure that it has the ability to select its carrier without requiring it to terminate its TSA. Now APL seeks to have the Board clarify that this will be the case on Day 181. This is a critical issue for APL because, if APL terminates the TSA, APL believes that CSXT,[5] which has been allocated the APL Terminal under the Transaction Agreement (*See* CSX/NS-25, Volume 8B, at 85), will most likely terminate the Lease.[6] Why should the newcomers to the TSA, CSXT and NSR, be allowed to allocate the traffic under the TSA instead of APL, one of the original parties to the TSA?

In Decision No. 89, based on the discussion at pages 73 and 113-114, the Board appears to agree with APL, that, as of Day 181, APL will be able to select the railroad that will serve it at Dual Points without being forced to terminate its TSA. The Board states at page 113: "After [Day180], APL will have the right to exercise all of its

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4 The Lease between Conrail and APL was entered on June 1, 1988 for a term running until May 31, 2004, subject to an option for an additional eight year term. *See* CSX/NS-178, Volume 3D, at 319-353.

5 "CSX" refers to CSX Corporation, "CSXT" refers to CSX Transportation, Inc., "NS" refers to Norfolk Southern Corporation, and "NSR" refers to Norfolk Southern Railway Company. CSX, CSXT, NS, and NSR are jointly referred to as "Applicants."

6 The Lease terminates 90 days after the termination of the TSA by the lessor or lessee. *See* CSX/NS-178, Volume 3D, at 333.

contractual rights and, if they permit, contract with both NS and CSX in this region."[7] However, Decision No. 89, because it discusses the subject of shippers' contract rights on Day 181 at several different locations in differing language (see discussion below), is subject to different interpretations. This was clearly demonstrated in CSX-158 which states at pages 2-3:

> In any event, CSX states that it sees no ambiguities in the Board's Condition. It views the governing text as Ordering Paragraph 10, on page 175 of the Decision, where a very precise statement is made. That statement is to the effect that a shipper having an antiassignment clause in its rail transportation contract, which APL clearly does, may, at the end of the 180-day period beginning on the Split Date, either elect to continue the contract until its expiration date under the terms of the existing contract and with the arrangements as to carrier (CSX/NS) as prevailed during the 180-day period, or to exercise termination rights under the contract, the exercise of such rights to be subject to giving a 30-day notice.[8]

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[7] It also appears, although not stated explicitly, that the Board had the Lease at the APL Terminal in mind when it referred to contracting "in this region".

[8] CSXT's position completely ignores the limitations placed upon Ordering Paragraph 10. That Ordering Paragraph is subject to other conditions imposed in the decision: (1) Ordering Paragraph 1 states:

> 1. In STB Finance Docket No. 33388, the application filed by CSXC, CSXT, NSC, NSR, CRR, and CRC is approved, ***subject to the imposition of the conditions discussed in this decision***. The Board expressly reserves jurisdiction over the STB Finance Docket No. 33388 proceeding and all embraced proceedings in order to implement the 5-year oversight condition imposed in this decision and, if necessary, to impose additional conditions and/or to take other action if, and to the extent, we determine it is necessary to impose additional conditions and/or to take

other action to address harms caused by the CSX/NS/CR transaction. (emphasis added)

(2) Ordering Paragraph 8, states:

> 8. ***Except as otherwise provided in this decision***, NYC and PRR shall have, upon consummation of the authorized control and the NYC/PRR assignments, all of such right, title, interest in and other use of such assets as CRC itself had, notwithstanding any provision in any law, agreement, order, document, or otherwise, purporting to limit or prohibit CRC's unilateral transfer or assignment of such assets to another person or persons, or purporting to affect those rights, titles, interests, and uses in the case of a change of control. (emphasis added)

and, (3) Ordering Paragraph 10, states:

> 10. ***Except as otherwise provided in this decision***, CSXT and NSR may use, operate, perform, and enjoy the Allocated Assets and the assets in Shared Assets Areas consisting of assets other than routes (including, without limitation, the Existing Transportation Contracts), as provided for in the application and pursuant to 49 U.S.C. 11321, to the same extent as CRC itself could, notwithstanding any provision in any law, agreement, order, document, or otherwise, purporting to limit or prohibit CRC's assignment of its rights to use, operate, perform, and enjoy such assets to another person or persons, or purporting to affect those rights in the case of a change in control. As respects any CRC Existing Transportation Contract (i.e., any CRC transportation contract in effect as of Day One) that contains an antiassignment or other similar clause: at the end of the 180-day period beginning on Day One, a shipper with such a contract may elect either (a) to continue the contract until the expiration thereof under the same terms with the same carrier that has provided service during the 180-day period, or (b) to exercise whatever termination rights exist under the contract, provided the shipper gives 30 days' written notice to the serving carrier. (emphasis added)

It is clear from reading Ordering Paragraphs 1, 8, and 10 in their entirety, that the "precise statement" referred to by CSX is "subject to ... the conditions discussed in the decision" and "as otherwise provided in this decision". It is imperative that the Board

This view was confirmed by CSX-159, at 8-9. NS has not stated what its position is regarding the impact of Decision No. 89 on APL. As can be seen from the disparity of the positions espoused by APL and CSX, Decision No. 89 must be clarified to eliminate the inconsistent statements in the decision and to assure that APL's rights are clearly understood by all three parties.

Inconsistent language in Decision No. 89

There are five places where the Board discusses shippers' options at the end of the initial 180 day period.[9] Footnote 27 on page 17 states:

> a shipper with a contract that contains an antiassignment or other similar clause may elect either: to continue the contract until the expiration thereof under the same terms with the same carrier that has provided service during the 180-day period; or, without making any showing with regard to service, can exercise whatever termination rights the contract may contain....

On page 56, the Board states:

> At the end of 180 days after Day One, the day on which Conrail assets are divided, shippers will be permitted freely to exercise whatever termination rights those contracts may contain...

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clarify Decision No. 89 with respect to conditions imposed on CSXT and NSR and the rights of APL to select its carrier on Day 181.

9 This discussion has not included the finding paragraph at page 168 since it is subject to "the extent limited in this decision," nor ordering paragraph 10, at page 175, because it is conditioned "[e]xcept as otherwise provided in this decision". Once the Board clarifies the five text portions of Decision No. 89, APL expects that the finding and ordering paragraphs will also be clarified.

These two statements seem to stringently limit a contract shipper's options at the end of the first 180 days to either keeping service with the railroad allocated under Section 2.2(c) or terminating the contract.

However, those two statements contrast markedly with statements elsewhere in the decision. At page 54, the Board states that it is: (1) "permitting only a temporary override of antiassignment provisions and other similar provisions that would unduly impede the carrying out of the transaction." Here the Board is focusing on impediments to the initial implementation - a "temporary condition"; it is not locking in limitations on contract rights for all time.

Later in Decision No. 89, at 73, the Board acknowledges that shippers with rail transportation contracts will again have all of their contract rights after day 180 when it states:

> Applicants, however, have not demonstrated that a permanent override would be necessary to carry out this transaction. Accordingly, we will limit our override of antiassignment and other similar clauses to a 6-month period following Day One. This will permit each of these carriers to compete for this traffic, where possible, after an initial adjustment period. After 180 days, if the contract has not expired already, the shipper may elect to continue the contract until its expiration under the same terms with the same carrier, or, without making any showing with regard to service, it may exercise any termination or renegotiation rights contained in the contract....

Equally important, in this statement the Board is encouraging CSXT and NSR to compete for the traffic after the initial implementation period. It is contradictory to foster

competition on the one hand and, on the other hand, to strictly limit a shipper's options by telling it that the only way it can benefit from this competition is by terminating its contract - negotiated in good faith with Conrail. If the Board requires shippers to terminate contracts to take advantage of competition, then the Board has done far more than override antiassignment clauses for 180 days; it has fractured the contract cornerstone of the Staggers Act by effectively voiding negotiated contracts. The Board could not have intended this result.

Finally, at page 113 of Decision No. 89 the Board said specifically as to APL: "[W]e have partially granted the relief that APL seeks by limiting the override of antiassignment and other similar clauses to 180 days from Day One. After that time, APL will have the right to exercise all of its contractual rights and, if they permit, contract with both NS and CSX in this region." Here the Board has clearly given back to APL on Day 181 all of its contractual rights. Hence, it is inconsistent for the Board elsewhere in Decision No. 89 to have limited shippers' rights to either terminating their contracts or accepting the new order established by CSXT and NSR under Section 2.2(c). The Board must clarify pages 17 and 56 along with the finding on page 168 and ordering paragraph 10 of Decision No. 89 to bring them into harmony with the discussions on pages 54, 73, and 113.

The Importance of Clarifying the "Contract Condition" in Decision No. 89.

It is vital for the Board to clarify the effect of Decision No. 89 at Day 181 so that APL, CSXT, and NSR will know which decision paths to follow. APL requests that the Board take the following action to clarify Decision No. 89: (1) affirm that for Dual Points Section 2.2(c), insofar as it addresses allocation of traffic by CSXT and NSR, is not effective after Day 180; and (2) affirm that APL can select the railroad which it desires to have serve it at Dual Points after Day 180 without terminating its TSA.[10]

The Board has decided that there is a compelling reason for CSXT and NSR to be able to plan for the implementation of the services that they will provide to contract shippers "at the outset, in the months immediately following Day One, the date when CSX and NS begin to integrate Conrail's assets into their systems."[11] Decision No. 89 at 73. Using that rationale, the Board chose, for a limited time period, to override any antiassignment or other similar clauses in rail transportation contracts.[12] Despite APL's

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[10] APL also believes that it would be helpful if the Board would clarify that the time period for the initial implementation is 180 days, not six months; since both terms are used in Decision No. 89, clarification would be of great assistance to the parties in planning their operations.

[11] APL believes that Day One will not be the date that CSXT and NS "begin to integrate Conrail's assets" but that it is the day when Conrail's assets must be fully integrated into CSXT's and NSR's operations. Throughout this proceeding, Applicants have indicated that the split of Conrail will not be piecemeal, but will require full integration with either CSXT or NSR on Day One. There are no plans that APL is aware of for the gradual partition of Conrail.

[12] At page 73, the Board has misstated APL's position. APL has not argued that the bargain of an antiassignment clause should not be undercut, "absent some very compelling reason." Decision No. 89 at 73. Instead, APL has argued that the Board does not have the authority to override any clause in a rail transportation contract (APL-18 at 10-18), and if the Board does have the authority, it is not necessary to exercise it in this instance (APL-18 at 18-32).

disagreement with the Board in its approach to the interplay of contracts and Day One implementation, APL believes that, the Board was correct in its concern for well planned and properly implemented Day One operations. APL joins the Board in desiring the transition and the initial operation of a divided Conrail by CSXT and NSR to be smooth and efficient from the outset, without major disruptions.

As long as APL receives the level of service required by the TSA, APL will accept government interference with its contract for the first 180 days. However, after that time, APL desires to take advantage of the Board's holding that the initial implementation period is limited to 180 days because: "This will permit each of these carriers to compete for this traffic, where possible, after an initial adjustment period. ... They will also have substantial time to negotiate new contracts or contract extensions with shippers." Decision No. 89, at 73.

Implementation does not stop on Day One. Under Decision No. 89 there will be a second implementation date, Day 181, for those shippers that have rail transportation contracts that will remain in effect after Day 180.[13] It is the effect of Decision No. 89 on those contracts which the Board must clarify so that the operations on Day 181 and thereafter can be planned for and will proceed smoothly ("Day 181 Implementation").[14]

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13 Decision No. 89 discusses both a 180-day and a six month interim period. As stated in note 10 above, APL requests clarification of which time period the Board means. APL will use the 180-day time period in its discussion in this Petition.

14 The Board must note that despite the voluminous record in this proceeding, the **only** contract in evidence that will extend beyond the first 180 days after Day One is the TSA, which, by its terms runs until May 31, 2004. This fact makes it even more critical for the

APL believes that there will be a very small universe of contracts that will be impacted by Day 181 Implementation.[15]

Between now and Day 180, shippers and CSXT and NSR have a number of decisions to make, at least several of which will depend on what the Board meant in Decision No. 89 regarding shippers' rights under their contracts to select their carriers on Day 181. Prior to Day One, CSXT and NSR will have decided which railroad will serve which of Conrail's contract shippers under Section 2.2(c) of the Transaction Agreement for the initial 180 days. CSX/NS-25, Volume 8B, at 25-29. Prior to Day One, CSXT and NSR will have to finalize their plans for service for Day One, which should include discussions with the shippers they will serve. Clarification of what will happen for Day 181 implementation is essential for this planning process.

APL believes that the Board intends to put contract shippers in the same position on Day 181 as those shippers would have been in on Day One **but for** the antiassignment override and the approval of Section 2.2(c). In that regard, it is important for the Board to understand the options that would have been available to APL on Day One without

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Board to consider the uniqueness and intricacies of the TSA in ruling on this Petition for Clarification.

[15] APL attempted to obtain this information in discovery, but was rebuffed by Applicants. *See* APL-18, at 28, and APL-22/EKC-6, at 4. On May 15, 1998, less than three weeks before oral argument, and over five months after Applicants filed their rebuttal, CSXT sought to file new evidence telling the Board how many Conrail rail transportation contracts had antiassignment clauses according to CSXT's count. The Board correctly rejected the proffered evidence as being filed too late in Decision No. 84.

Section 2.2(c) and the override provision.[16] On **that** Day One CSXT and NSR would have jointly assumed the obligation to serve APL under the TSA. On **that** Day One, APL would have selected which of the two carriers it wished to use at Dual Points under the TSA.

In negotiating the TSA, APL and Conrail never envisioned the break-up and sale of Conrail to two carriers, and therefore they did not include a contract provision specifically governing the partition of the TSA. Indeed, APL believed that its contract was beyond the reach of the Board until Applicants' entire transaction was made public. Only after CSX and NS had acquired all of the stock of Conrail and placed it in a voting trust did APL become aware that CSX and NS had proposed Section 2.2(c) and the override provision, which together would allow CSXT and NSR to divide up APL's Dual Point traffic without APL's consent. By that time it was impossible for APL to get Conrail to agree to a modification of the TSA which would allow APL to select which carrier it wished to have serve it at Dual Points. That led to APL's participation in this proceeding.

It is important to recognize that APL is the innocent party in this proceeding. APL was not a party to the division of Conrail. With that fact in mind, APL believes that the Board in Decision No. 89 intended to give those shippers with contracts **all** of the rights

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16 More specifically, the analysis of APL's Day One options is based on no Board interference with the TSA, meaning that division of the TSA is not governed by Section 2.2(c) and there is no railroad serving APL on the day before Day One other than Conrail.

they would have had on Day One if not for the "limited ... override." These rights include competition by CSXT and NSR for APL's traffic "where possible," commencing on Day 181. Under the TSA, service to and from Local[17] Points will be provided by CSXT and by NSR, depending upon the allocation of Conrail assets. Between Dual Points, service can be provided by either CSXT or NSR. In the case of the APL Terminal, the Transaction Agreement specifically provides that the APL Terminal is a jointly served facility, giving both CSXT and NSR access to the APL Terminal. *See* CSX/NS-18, at 47; CSX/NS-20, Volume 3A (CSX Operating Plan), at 227; CSX/NS-20, Volume 3B (NS Operating Plan), at 194; and CSX/NS-25, Volume 8B, at 85. Of course, if the Lease is terminated, APL will no longer have the APL Terminal, and NSR will be effectively barred from serving APL at the APL Terminal. In that case, the dual access to the APL Terminal which is provided for in the Transaction Agreement will become meaningless.

The TSA has created a network of rail service between 15 different points: Chicago, Boston, Springfield, MA, Worcester, MA, Cleveland, Columbus, OH, Toledo, OH, Baltimore, Allentown, PA, Pittsburgh, Morrisville, PA, Harrisburg, PA, St. Louis, Syracuse, and South Kearny, NJ. After Day One, CSXT and NSR will both serve the six Dual Points of Chicago, Cleveland, Columbus, Baltimore, St. Louis, and South Kearny. It is for service between these points that APL expects CSXT and NSR to compete to serve APL beginning on Day 181. To effectively avail itself of an option to choose, APL

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[17] Local is defined in CSX/NS-25, Volume 8B, at 25.

must be able to complete negotiations and make its selections by Day 149 so that APL can give 30 days notice if it elects to change railroads originally assigned to serve it at Dual Points under Section 2.2(c).[18]

In summary, on Day One, without the restrictions placed by the Board on shippers' contract rights, the TSA applies equally to CSXT and NSR in connection with any Dual Points, including South Kearny. Since the TSA applies to both CSXT and NSR, APL can therefore select which railroad will handle its Dual Point traffic without any impact whatever on its Lease.[19] This same right should exist on Day 181. Therefore, the Board should affirm that these rights revest in APL as of Day 181.

It is particularly important that APL have the right to select its own carrier because CSX owns two of APL's key competitors, Sea-Land and CSX Intermodal, Inc. ("CSXI"). CSXI is CSXT's intermodal "arm." Putting APL's intermodal rail transportation business into the lap of its chief competitor for the duration of its TSA without APL's consent and without any special contract protection jeopardizes APL's ability to continue to provide effective competition in the northeast. *See* CSX-159, at 12-13.

In order to preserve APL's rights on Day 181, the Board must clarify Decision No. 89. If it does not, CSXT's interpretation of the Board's Decision No. 89 as set forth in CSX-158 and CSX-159 may govern, which would leave APL with very limited rights. Specifically, under CSXT's interpretation, if APL's business has been given to CSXT

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[18] APL might elect to have CSXT serve it if APL received sufficient contract protection.
[19] It may well be that different railroads handle traffic at different Dual Points.

during the first 180 day period, the only way which APL could give its business in the New York/New Jersey area on Day 181 to NSR would be to terminate the TSA. Termination of the TSA would in all likelihood result in termination of the Lease and loss of APL's $25 million investment, as well as loss of a critical operational facility. NSR would be effectively barred from serving APL at the APL Terminal. So the only other choice which APL would have would be to remain with CSXT. This is an inequitable outcome which is completely at odds with the Board's direction encouraging competition, "where possible," between NSR and CSXT after the initial implementation period. Decision No. 89 at 73.[20] This business decision is not of APL's making, but is a direct result of the Conrail, CSX, and NS transaction.

To summarize, the clarification which APL seeks is as follows:

The right of NSR and CSXT to allocate traffic to Dual Points under Section 2.2(c) should terminate on Day 180. Section 2.2(c) is part of the interim process adopted by the Board to give CSXT and NSR the best chance to start operations of the divided Conrail without problems. But, Section 2.2(c) appears to prohibit competition between CSXT and NSR for Dual Point traffic **after** the 180 day period in contrast to the Board's direction that the carriers shall compete for traffic after the initial adjustment

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[20] APL reiterates that it is prepared to negotiate a market based Lease of the APL Terminal with CSX, so long as APL is reimbursed for its $25 million investment, and retains continued use of the APL Terminal, whether served by CSXT or NSR.

period. Decision No. 89 at 73. Therefore, the Board must clarify Decision No. 89 that the traffic allocation provisions of Section 2.2(c) do not apply after Day 180.[21]

APL can select the railroad that will serve it at Dual Points beginning on Day 181 without being forced to terminate the TSA. Without the clarification requested, the only way APL will be able to select the railroad that will serve APL at Dual Points is to terminate its TSA. But if it terminates the TSA, then APL in all likelihood will lose its Lease. This puts APL, an innocent by-stander to the transaction between Conrail, CSX, and NS, in a no-win situation. Therefore, the Board must clarify Decision No. 89 to make it clear that APL may select the carrier it wishes to serve it at Dual Points without requiring it to invoke its antiassignment provision, thereby terminating its TSA.[22]

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[21] Although one of the problems with Section 2.2(c) is the allocation of revenue between CSXT and NSR, APL is not addressing that issue. APL notes that requiring the allocation of revenue between competitors does not create the typical market incentives for the railroads to seek to be selected to provide APL service at Dual Points.

[22] The interim period should be 180 days not six months. In Decision No. 89, the Board has used both six months (page 73 and 187) and 180 days (pages 17, 56, 75, 76, 113, and 175) as the interim time period during which it has overridden antiassignment and similar clauses in rail transportation contracts. They are not the same. Although the difference may be as slight as one to two days, it is a critical difference when it comes to train operations.

Although APL is indifferent to whether the Board clarifies the period to be 180 days or six months, it will probably be easier for all concerned to calculate when the 181st day will occur instead of when the day after six months occurs, especially if Day One is sometime other than the first day of the month.

CONCLUSION

For the reasons set forth above, the Board should clarify Decision No. 89 as requested in this petition so that as of Day 181, APL will be able to select the railroad that will serve it at Dual Points without requiring APL to terminate its TSA.

Respectfully submitted,

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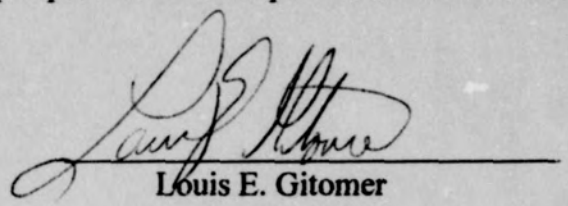
Attorneys for:
APL LIMITED

Dated: August 12, 1998

CERTIFICATE OF SERVICE

I hereby certify that I have caused the Petition of APL Limited for Clarification of Decision No. 89 in APL-27 to be served by hand on Applicants' representatives in this proceeding and by first class mail, postage pre-paid on all other parties on the service list in STB Finance Docket No. 33388.



Louis E. Gitomer
August 12, 1998

STB FD-33388 8-12-98 I ID-190489

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Public Record

DAVID H. COBURN
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August 12, 1998

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

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

Dear Secretary Williams:

Enclosed are an original and twenty-five (25) copies of the "Petition of Applicants CSX Corporation and CSX Transportation, Inc. for Clarification of Decision Nos. 87 and 89" (CSX-160) for filing in the above-referenced docket.

Please note that a copy of this filing is also enclosed on a 3.5-inch diskette in WordPerfect format.

Thank you for your assistance.

Sincerely,

David H. Coburn

DHC:dyj
Enclosure
cc: All Parties of Record

190489

CSX-160

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 APPLICANTS CSX CORPORATION AND CSX TRANSPORTATION, INC. FOR CLARIFICATION OF DECISION NOS. 87 and 89

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August 12, 1998

CSX-160

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 APPLICANTS CSX CORPORATION AND CSX TRANSPORTATION, INC. FOR CLARIFICATION OF DECISION NOS. 87 and 89

Pursuant to 49 C.F.R. 1117.1, Applicants CSX Corporation and CSX Transportation, Inc. (collectively, "CSX") hereby seek clarification that, on and after the August 22, 1998 Control Date, CSX can share confidential information in the APL/Conrail contract, and information contained in or touching or concerning that contract, with its affiliate, CSX Intermodal, Inc. ("CSX Intermodal").[1] In connection with this request for clarification, CSX as a prophylactic measure and to remove any concerns that APL might have, also offers certain conditions specified herein relative to access to that contract by CSX Intermodal.

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[1] CSX Intermodal is a wholly-owned subsidiary of CSX Corporation.

CSX Intermodal is the entity within the CSX corporate family that is responsible for marketing and administering the transportation of intermodal traffic transported on trains operated by CSX Transportation, Inc. ("CSXT"). It is the entity with which APL officials have on numerous occasions discussed the implementation of the Transaction relative to APL traffic. See attached verified statement of CSX Intermodal President and Chief Executive Officer Lester M. Passa. Any continued restriction on the ability of CSX Intermodal officials to review the Conrail contract would require that special, and less efficient, arrangements be made with respect to only one intermodal user, APL. Such arrangements would require that CSXT officials whose regular responsibilities do not embrace intermodal traffic would need to act in lieu of the persons most knowledgeable with respect to intermodal traffic, and best able to efficiently address APL's needs and administer its contract, i.e., CSX Intermodal officials. While such arrangements can be made, for the reasons set forth below, CSX does not believe that it is required under Decision Nos. 87 and 89 to undertake such arrangements and seeks clarification that its view of those decisions is consistent with the Board's intent.

I. Background

CSX submits that the only present restriction against the disclosure of information concerning the Conrail/APL contract to CSX Intermodal is paragraph 19(c) of the Protective Order issued in this proceeding, which paragraph was added to the Protective Order on June 11, 1998 by Decision No. 87. In that Decision, the Board granted Applicants' May 22, 1998 Motion For Amendment of the Protective Order (CSX/NS-206) in order to allow CSX and NS personnel access to the existing Conrail transportation contracts prior to the Control Date for specified purposes associated with the implementation of the Transaction. Specifically, the Board added

new paragraphs 19(a) and 19(b) to the Protective Order allowing CSX and NS personnel access, prior to the Control Date, to the Conrail transportation contracts solely for purposes of allocating performance of the contracts between CSX and NS pursuant to section 2.2(c) of the Transaction Agreement, placing information into the CSX and NS information systems, and planning rail operations.

The Board also added paragraph 19(c) to the Protective Order. That paragraph bars disclosure of the APL/Conrail contract, and related information, by CSX personnel to CSX Intermodal, Sea-Land Service, Inc. ("Sea-Land" – a CSX ocean carrier affiliate), or any of their subsidiaries, officers or employees during the term that the Protective Order remains in effect with respect to access by CSX to confidential Conrail data.[2]

Paragraph 19(c) apparently stems from comments made by APL at the oral argument concerning the fact that CSX Intermodal and Sea-Land, both of which APL competes with in certain segments of its business, would have access to sensitive APL commercial information were the Protective Order modified as requested by Applicants.[3] See Transcript of June 4, 1998

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[2] In the implementation of paragraph 19(c), and consistent with Decision No. 87, CSX and APL have entered an agreement prohibiting through the Control Date the disclosure of confidential APL/Conrail contract information to CSX Intermodal and to Sea-Land. A copy of that Agreement is attached. The Agreement contemplates that the restriction against sharing confidential data with CSX Intermodal will survive the termination of the Protective Order and the Board's approval of control of Conrail "to the extent such approval is so conditioned." As CSX discusses below, no such condition has been imposed.

[3] In a June 9, 1998 letter to the Board (APL-24), APL urged the Board to include specific disclosure protection with respect to CSX Intermodal and Sea-Land in any amendment of the Protective Order issued in response to CSX/NS-206 to guard against unspecified "irreparable injury." APL may at that time have anticipated that a condition barring such disclosure would have been incorporated in the Board's decision approving the Transaction, i.e., Decision No. 89. However, as discussed further below, no such condition relative to CSX Intermodal was incorporated in Decision No. 89. Indeed, it bears note that APL never requested any such disclosure condition in either its October 21, 1997 Response and Request for Conditions (APL-4)

(Continued ...)

at 333. In response to APL's concern, CSX proffered at the oral argument, and in a letter to the Board dated June 6, 1998 proffering a variety of conditions, that restrictions would be placed on access to the APL/Conrail contract by its "ocean carrier affiliates," i.e., Sea-Land and its ocean carrier subsidiaries.[4] See Transcript of June 4, 1998 at 416 and attachment to June 6, 1998 letter.[5] However, CSX never offered any such proffer with respect to CSX Intermodal, given that the latter, unlike Sea-Land, would in the normal course be directly engaged in servicing APL's traffic, as discussed further below.

At the June 8 Voting Conference, the Board staff recommended, and the Board agreed, that CSX be required to adhere to its representations concerning access to the APL contract, but described those proffered conditions in terms of a restriction against disclosure "to CSX's water carrier [Sea-Land] and intermodal affiliates."[6] See Transcript, June 8, 1998 at 41. As noted above, CSX in fact never made any proffer concerning a restriction against access to the contract

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or in its February 23, 1998 Brief (APL-18), and did not seek a disclosure condition until oral argument.

[4] CSX's only ocean carrier affiliates are Sea-Land and its ocean carrier subsidiaries. See Application, CSX/NS-18, Volume 1, at p. 265, note (2) (referencing the fact that Sea-Land owns several foreign corporations that include ocean carriers). CSX Intermodal does not engage in ocean carriage.

[5] CSX's June 6, 1998 written proffer was as follows:

A "Chinese Wall" in conventional form shall be imposed by CSX, CSXT and CSXI so that neither the contracts of Conrail with APL nor any confidential information contained in or touching or concerning such contracts shall be made available to Sea-Land or any of its officers or employees, such "Chinese Wall" arrangements to be for the protection and benefit of APL.

[6] The reference to "water" carrier affiliates at the Voting Conference would of course embrace not only Sea-Land and its subsidiaries, but also American Commercial Lines, a barge line that CSX controlled at the time of the Voting Conference, but recently sold. See Decision No. 89 at 114, fn. 175. APL never made an issue out of CSX's control of that barge line.

by its intermodal affiliate. Indeed, it would have made no sense for it to do so since, as APL well knows from the discussions it has had with CSX Intermodal officials, CSX Intermodal would be directly involved in handling APL's traffic and administering its Conrail contract, just as CSX Intermodal does with respect to other intermodal traffic that is transported on CSXT trains.

II. Reasons for Granting this Petition

A. Neither the Protective Order, as Amended by Decision No. 87, Nor Decision No. 89 Prohibit the Disclosure of the APL Contract to CSX Intermodal On or After the Control Date

The Protective Order does not, by its terms or purpose, apply to prevent the disclosure of confidential commercial information as between entities that are commonly controlled. The amendment to the Protective Order sought by CSX/NS-206, and granted in Decision No. 87, was intended only to accelerate, subject to restrictive terms and conditions, the access to Conrail's confidential information that CSX and NS would have if the Board approved their control of Conrail at the June 8 Voting Conference. It follows that as of the date that CSX assumes control of Conrail, the Protective Order, including paragraph 19, becomes inoperative with respect to the disclosure of confidential Conrail information to CSX, and to its various affiliates and subsidiaries. Accordingly, on and after August 22, CSX believes that nothing in the Protective Order (or in the CSX/APL agreement implementing it) operates to prevent the disclosure to CSX

Intermodal of confidential Conrail/APL contract information by officials of CSX Transportation, Inc. ("CSXT") who have access to that contract.[7]

CSX also submits that Decision No. 89 does not change this result. In that Decision, the Board did not impose any condition restricting access by CSX Intermodal to Conrail contract information. (As noted above, APL never requested in its October 1997 request for conditions or in its February 1998 brief that such a condition be imposed.) Rather, the Board explicitly rejected APL's arguments in favor of a special condition prohibiting CSX discrimination against it, finding on the basis of the record evidence that CSX Intermodal regularly handles the traffic of other intermodal service providers and ocean carriers such as APL. See Decision No. 89 at 114. The Board also found that the Interstate Commerce Commission ("ICC") had considered and rejected similar fears of discrimination that had been raised in connection with CSX's prior attainment of control of American Commercial Lines, Inc., a barge operator, and that APL's concerns here were "not materially different." Id.[8] Characterizing the prospect of unlawful discriminatory practices arising from the transaction as "relatively slight," the Board concluded that its general oversight of the transaction could address any issues that might arise. Id. at 114.

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[7] This is only logical since CSX Intermodal operates the intermodal terminals and markets the intermodal services that APL traffic would be utilizing after the allocation of the Conrail terminals and lines. In other words, to the extent that APL's traffic now handled by Conrail is transported on CSXT-operated trains, CSX Intermodal would in the ordinary course be actively involved in handling APL's traffic and administering its contract, just as it would be intimately involved in the transportation of intermodal freight transported on CSXT trains on behalf of other customers.

[8] The Board cited the ICC and court decisions in CSX Corp. – Control – American Commercial Lines, Inc., 2 I.C.C.2d 490 (1984); aff'd, Crounse Corp. v. ICC, 781 F.2d 1176, 1193 (6th Cir. 1986), cert. denied 479 U.S. 890 (1986) ("Crounse"); Water Transport Assoc. ICC, 715 F.2d 581 (D.C. Cir. 1983).

The Board also noted in Decision No. 89 that "the confidentiality provisions that we have imposed should prevent any access by CSX's water and intermodal affiliates to confidential contract information about APL." In support of this statement, the Board cited Decision No. 87, which amended the Protective Order and constituted the only disclosure-related provisions that the Board had imposed. CSX does not interpret this reference to the confidentiality of the APL contract information and to Decision No. 87 -- the only reference in Decision No. 89 to this confidentiality issue -- as imposing any new or different disclosure obligations beyond those imposed by the Protective Order, as amended by Decision No. 87.[9] Accordingly, since the Protective Order and Decision No. 87 will not operate to prevent disclosure of confidential Conrail contract information from CSX or its affiliates on or after the Control Date, CSX submits that there is no restriction on such disclosure to CSX Intermodal on or after that date, and seeks Board concurrence that it has properly interpreted Decision Nos. 87 and 89.[10]

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[9] CSX recognizes that Decision No. 89 also requires that CSX adhere to representations that it made during the course of the proceeding. See Ordering Paragraph 19 at page 176. As noted above, CSX made no representations that it would not share the APL contract with its intermodal affiliate, which would normally be involved in implementing the contract. As noted further below, CSX will adhere to its representations concerning access of Sea-Land and its ocean carrier subsidiaries to the APL contract.

[10] Whatever basis that may have existed at the time that Decision No. 87 was issued for restricting access by CSX Intermodal personnel to the APL/Conrail contract has evaporated with the issuance of Decision No. 89, finding that APL's discrimination concerns do not warrant the imposition of any conditions. APL has offered no convincing reason for restricting the access of CSX Intermodal personnel to its contract data, but apparently relies on these same discrimination concerns. Thus, maintaining any such access restriction on and after the Control Date would serve no legitimate purpose.

B. Prohibiting Disclosure of the APL/Conrail Contract to CSX Intermodal Would be Inconsistent with CSX's Normal Business Practices and Require That Less Efficient Arrangements be Fashioned for this One Intermodal Customer

Consistent with the proffer that it offered as an accommodation to APL, CSX is prepared to maintain the confidentiality of the APL/Conrail information as respects Sea-Land, and its subsidiaries, officers or employees.[11] Sea-Land does not require access to the APL/Conrail contract information, but the situation with respect to CSX Intermodal is quite different. As explained in the attached verified statement of Lester M. Passa, CSX Intermodal markets intermodal services for traffic transported on trains operated by CSXT and administers all intermodal contracts on behalf of the CSX family of corporations within North America. Thus, in the ordinary situation, CSX Intermodal officials would be actively involved in administering any contract with respect to intermodal transportation, including of course the APL/Conrail contract. As Mr. Passa explains, it is CSX Intermodal personnel, not CSXT personnel, who to date have had several focused discussions with APL personnel concerning the manner in which APL's traffic would be handled post-Transaction. CSX Intermodal officials, however, have been disadvantaged in their ability to pursue these discussions by their inability to review the commercial terms of the APL contract. (APL had voluntarily provided a redacted version of the Conrail contract to CSX Intermodal some months ago. However, virtually all key commercial terms had been removed from that copy of the contract.) Unable to see those terms to date, CSX

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[11] The terms, similar to those of paragraph 19(c) and CSX's previous proffer, would be as follows: No confidential information contained in or touching the APL/Conrail contracts shall at any time be made available to Sea-Land Service, Inc., or any of its subsidiaries, officers or employees.

Intermodal officials will be handicapped in their efforts reach final arrangements with APL for the carriage of its traffic and to administer its contract.

If the APL/Conrail contract were to remain unavailable to CSX Intermodal after the Control Date (and for the above reasons, CSX believes that CSX Intermodal can attain access to that contract on and after the Control Date), CSX Intermodal would nonetheless be able to service APL's freight in a manner that should be fully satisfactory to an important customer such as APL. However, were CSX Intermodal unable to access the contract, discussions with APL might be needlessly prolonged and complicated. Mr. Passa explains that an alternative organizational arrangement fashioned for no purpose other than to address APL's situation would need to be established under which CSXT personnel, none of whom regularly address intermodal matters but who can now review the APL/Conrail contract and do so without any restriction following the Control Date, would need to be brought in to reach final commercial arrangements with APL. Alone among the numerous other ex-Conrail intermodal users that will negotiate service, rate and other arrangements with CSX Intermodal (many of whom, like APL, are also competitors of CSX Intermodal) APL would thus need to be treated differently, and less efficiently, than all other intermodal customers in terms of the way in which APL interacts with its transportation provider – and for no valid reason.[12] The ultimate irony of this unusual situation is that APL professes to want the Transaction-spawned benefit of competition between CSX and NS on major routes that can be served by both railroads (e.g., Chicago-New York), but at the same time seems to mysteriously favor the disqualification, at least as to the Conrail/APL

[12] As noted above, the Board has determined that APL's concerns regarding discriminatory treatment by CSX Intermodal are not well founded and require no special protective conditions.

contract, of the CSX Intermodal personnel who are expert in providing competitive intermodal services and who will be charged with servicing APL's freight in the future.

Nonetheless, to prevent any color of concern as to CSX Intermodal, CSX is willing to offer the following prophylactic restriction to APL's benefit: From and after the Control Date, when the Protective Order terminates as to the access of NS and CSX to Conrail's confidential information, CSX Intermodal shall not use confidential information contained in or relating to the Conrail contracts with APL for any purposes other than placing information about such contracts in its information systems, testing such systems, planning and preparation of operations under the contracts, and the performance of the contracts, and not for any other business, commercial or competitive purposes.

CONCLUSION

For all of the above reasons, CSX hereby requests that the Board affirm that on and after August 22, 1998, CSX Intermodal officials will be able to review the Conrail/APL contract, and related contract data.

Respectfully submitted,

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Counsel for CSX Corporation and CSX Transportation,. Inc.

August 12, 1998

VERIFIED STATEMENT OF
LESTER M. PASSA

My name is Lester M. Passa. I am President and Chief Executive Officer of CSX Intermodal, Inc. ("CSX Intermodal"). CSX Intermodal is a wholly owned subsidiary of CSX Corporation. I have held my position with CSX Intermodal since November 1997. My qualifications, including the various job positions that I have held over the last ten years with Conrail, before joining CSX Transportation, Inc. ("CSXT") in June 1997 as its Vice President – Commercial Integration, were spelled out in the verified statement that I provided in support of the August 10, 1998 reply of CSX Corporation and CSXT to APL's Petition for Stay. I incorporate that verified statement into this statement by reference.

I offer this verified statement in support of the August 12, 1998 Petition for Clarification of Applicants CSX Corporation and CSXT, which entities I will jointly refer to as CSX. That Petition seeks clarification that on and after the August 22, 1998 Control Date in connection with the CSX/NS/Conrail Transaction, CSX can share with me and other CSX Intermodal officials copies of the Conrail/APL contract, subject to the conditions on the use of that contract that I will describe below.

As explained in my earlier verified statement, CSX Intermodal is the intermodal marketing arm for CSXT. CSX Intermodal sells the intermodal rail services that are provided on trains operated by CSXT, operates intermodal terminals, provides motor carrier drayage services associated with intermodal rail service and administers all intermodal contracts for the CSX family of corporations within North America. CSX Intermodal also sells intermodal services on trains operated by railroads other than CSXT. We regularly deal with a broad range of intermodal customers that utilize trains operated by CSXT, including entities with which CSX

Intermodal competes in offering intermodal transportation services, such as APL. We are currently dealing with numerous customers that have previously utilized Conrail intermodal services in contemplation of CSX's forthcoming control of Conrail and operation of Conrail assets to be allocated to CSX.

In my prior verified statement, I explained why APL's concerns about discriminatory treatment by CSX Intermodal are not well-founded, and why we believe that CSX Intermodal can offer excellent service to APL following the Transaction, on a par with that offered to our best customers. CSX Intermodal officials have had several meetings with their counterparts at APL, and we look forward to continuing these discussions.

Given the role of CSX Intermodal within the CSX corporate family, it is only normal that CSX Intermodal officials should represent CSX's interests in connection with handling APL's traffic since CSX Intermodal handles the negotiation of all of the intermodal arrangements for freight transported by CSXT. In fact, to the best of my knowledge, no CSXT officials have been involved in any of our discussions with APL concerning the manner in which its traffic would be serviced or in similar discussions that we have had with Conrail intermodal users other than APL.

As a result of Decision No. 87 issued by the Board, no CSX Intermodal official has seen an unredacted version of the APL/Conrail contract. (APL has supplied us with a redacted version of its contract, but since virtually all of the commercial terms have been redacted, it is of little value.) This restriction against our review of that contract has impeded our ability to negotiate with APL. The restriction would become more of an impediment were such a restriction to be continued beyond the Control Date and would impair our ability to administer APL's Conrail contract. While APL's traffic can be serviced by CSX whether or not we see the

contract, any continued inability to review the Conrail contract would force us to fashion a less efficient arrangement for dealing with APL, an arrangement unique to that one intermodal customer. Under such an arrangement, CSXT officials, who do not normally address intermodal matters but who could review the APL/Conrail contract, would be required to substitute for CSX Intermodal officials in dealing with APL on commercially sensitive matters arising under that contract.

This kind of substitute arrangement makes no commercial sense, either for APL or for CSX. Neither is it justified by any legitimate concern that CSX Intermodal might somehow misuse the information in the Conrail contract. In this connection, however, we are prepared to stipulate that on and after the Control Date, CSX Intermodal will not use any confidential information in the APL/Conrail contract for any purpose other than placing information about such contract in its information systems, testing such systems, planning and preparation of operations under the contract, and the performance of the contract, and not for any other business, commercial or competitive purposes.

The fact is that CSX Intermodal, by virtue of its role as the marketer and provider of intermodal services, would normally need to become familiar with the terms under which APL's traffic is handled by CSX under the Conrail contract, just as we would review contracts that Conrail has maintained with dozens of other intermodal users. Thus, over the long term, APL would be dealing with CSX Intermodal. In this context, any post Control Date restriction on CSX Intermodal access to the Conrail contract can serve no legitimate purpose, and only render less efficient APL's dealings with CSX.

VERIFICATION

I, Lester M. Passa, declare under penalty of perjury that the foregoing is true and correct. Further, I certify that I am qualified and authorized to file this statement. Executed this 11th day of August, 1998.

Lester M. Passa

AGREEMENT

This Agreement is made this __ day of July, 1998 between APL Limited ("APL") and CSX Corporation and CSX Transportation, Inc. (collectively, "CSX").

WHEREAS, on June 11, 1998 the Surface Transportation Board issued Decision No. 87 in STB Finance Docket No. 33388, CSX Corporation and CSX Transportation, Inc., Norfolk Southern Corporation and Norfolk Southern Railway Company – Control and Operating Leases/Agreements – Conrail, Inc. and Consolidated Rail Corporation (the "Proceeding"), amending the terms of the April 17, 1997 Protective Order entered in the Proceeding by adding a new paragraph 19 to allow CSX and Norfolk Southern (jointly, "Applicants") personnel access to Conrail transportation contracts and certain related information for certain permissible purposes related to the Transaction that is the subject of the Proceeding;

WHEREAS, Paragraph 19(c) of the Protective Order, as added by STB Decision No. 87, provides specifically that disclosure protection satisfactory to APL shall be provided by the Applicants so that neither Conrail contracts nor any confidential information relating to such contracts shall be made available to CSX Intermodal, Inc. ("CSXI") or Sea-Land Service, Inc. ("Sea-Land"), or any of their subsidiaries, officers or employees; and

WHEREAS, CSX and APL have agreed to implement Paragraph 19(c) of the Protective Order, as added by STB Decision No. 87, in the manner set forth herein,

NOW, THEREFORE, in consideration of the above, APL and CSX hereby agree as follows:

1. CSX personnel involved in addressing rate and operational issues related to the handling of APL traffic after the Transaction is effectuated may be given access, immediately upon execution of this Agreement by CSX and APL and appropriate undertakings by CSX personnel, to Conrail contracts addressing APL traffic and to other confidential information concerning such contracts and traffic consistent with the purposes spelled out in STB Decision No. 87 and with the terms of the Protective Order, as modified, entered in the Proceeding, provided that such CSX personnel in addition to any other agreement required by the Protective Order, agree that neither the contracts of Conrail with APL nor any confidential information contained in or touching or concerning such contracts shall be made available to CSXI or Sea-Land, or any of their subsidiaries, officers or employees.

2. In conformity with the terms of the STB Decision No. 87 and this Agreement, CSX personnel requiring access to the Conrail/APL transportation contracts and related confidential data for purposes consistent with the terms of Decision No. 87 shall execute a Protective Order undertaking in the form appended hereto prior to attaining access to the Conrail/APL contracts or related confidential information.

3. References herein to "CSX" shall not include its subsidiaries and expressly do not include CSXI and Sea-Land.

Executed this __ day of July, 1998.

For CSX:

P D J Ahern
[Name]

V.P. LAW & GENERAL COUNSEL
[Title]

For APL:

Ann Fazzalaro Hasse
[Name]

Assistant Secretary
[Title]

UNDERTAKING

I, _____, an employee of CSX Corporation or CSX Transportation, Inc. (collectively, "CSX") have read the Protective Order contained in Decision No. 1 issued in STB Finance Docket No. 33388 served on April 17, 1997, as amended by Decision No. 4 served on May 2, 1997, and by the Board's ruling on CSX/NS-206 in its Decision No. 87 served on June 11, 1998, governing the production and use of Confidential Information and Confidential Documents in STB Finance Docket No. 33388, and have read the Agreement of June _, 1998 between APL Limited ("APL") and CSX concerning non-disclosure of confidential APL contracts and information to CSX Intermodal, Inc. ("CSXI"), Sea-Land Service, Inc. ("Sea-Land"), or their subsidiaries, officers or employees, understand each of the above documents and agree to be bound by their terms. I agree not to use or to permit the use of any Confidential Information or Confidential Documents obtained pursuant to Paragraph 19 of the Protective Order (including without limitation copies of or other information regarding transportation contracts to which Conrail is a party, their historic performance and cost of performance by Conrail, and related operations by Conrail) or to use or to permit the use of any methodologies or techniques disclosed or information learned as a result of receiving such data or information, for any purpose, until the approval of the Surface Transportation Board of the Application in Finance Docket No. 33388 becomes fully effective, other than for the purposes of allocating performance of the transportation contracts to which Conrail is a party between CSX and NS pursuant to Section 2.2(c) of the Transaction Agreement dated as of June 10, 1997 among CSX, NS and Conrail, placing information about such contracts in the information systems of CSX and NS, testing such systems, and planning and preparation of rail operations, but not for any other

business, commercial, or competitive purpose. I further agree not to disclose any Confidential Information, Confidential Documents, methodologies, techniques, or data obtained pursuant to the Protective Order except to persons who are also bound by the terms of the Order and who have executed an appropriate Undertaking. Furthermore, unless expressly agreed otherwise in writing between CSX and APL, I agree pursuant to paragraph 19(c) of the Protective Order and pursuant to any condition imposed by the STB upon its approval of the Transaction in Finance Docket No. 33388 (to the extent of such condition) not to disclose the contracts between APL and Conrail nor any confidential information contained in or touching or concerning such contracts to CSXI or Sea-Land, or to any of their subsidiaries, officers or employees, whether such information is obtained by me pursuant to the Protective Order or pursuant to the exercise by CSX of control over Conrail authorized by the STB in Finance Docket No. 33388. The undertaking in the preceding sentence shall survive the termination of the Protective Order and the STB's approval of control of Conrail by CSX and NS to the extent such approval is so conditioned.

If directed by the Board, I will promptly destroy any copies of any documents containing or reflecting any Confidential Information obtained pursuant to Paragraph 19 of the Order.

I understand and agree that money damages would not be a sufficient remedy for breach of this Undertaking and that Applicants or other parties producing or furnishing Confidential Information or Confidential Documents or parties to such transportation contracts of Conrail shall be entitled to specific performance and injunctive and/or other equitable relief as a remedy for any such breach, and I further agree to waive any requirement for the securing or posting of any bond in connection with such remedy. Such remedy shall not be deemed to be the exclusive

remedy for breach of this Undertaking but shall be in addition to all remedies available at law or equity.

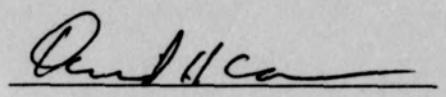
_____

Print Name: _____

Dated: _____

CERTIFICATE OF SERVICE

I, David H. Coburn, certify that on August 12, 1998, I have caused to be served a true and correct copy of the foregoing CSX-160, Petition of Applicants CSX Corporation and CSX Transportation, Inc. for Clarification of Decision Nos. 87 and 89, on all parties of record on the Service List in Finance Docket No. 33388, by first-class mail, postage prepaid, or by more expeditious means.



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August 12, 1998

BY HAND DELIVERY

The Honorable Vernon A. Williams
Secretary
Surface Transportation Board
ATTN: STB Finance Docket No. 33388
1925 K Street, N.W.
Washington, D.C. 20423-0001

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

Dear Secretary Williams:

Enclosed for filing in the above-referenced proceeding, please find an original and twenty-five (25) copies of the Petition for Reconsideration of the Cities of East Chicago, Indiana; Hammond, Indiana; Gary, Indiana; and Whiting, Indiana (collectively, The Four City Consortium) (FCC-18). Also enclosed, please find a computer diskette containing the text of this document (in WordPerfect 8.0 format).

We have included an extra copy of the filing that we request be time-stamped and returned with our messenger.

Sincerely,

Christopher A. Mills
An Attorney for
The Four City Consortium

Enclosure

190488

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Office of the Secretary

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BEFORE THE
SURFACE TRANSPORTATION BOARD

CSX CORPORATION AND CSX TRANSPORTATION, INC., AND NORFOLK SOUTHERN CORPORATION AND NORFOLK NORFOLK SOUTHERN RAILWAY COMPANY-- CONTROL AND OPERATING LEASES/ AGREEMENTS -- CONRAIL INC. AND CONSOLIDATED RAIL CORPORATION	Finance Docket No. 33388

PETITION FOR RECONSIDERATION
BY THE CITIES OF EAST CHICAGO, INDIANA;
HAMMOND, INDIANA; GARY, INDIANA; AND WHITING,
INDIANA (COLLECTIVELY, THE FOUR CITY CONSORTIUM)

FILED
AUG 12 1998
SURFACE
TRANSPORTATION BOARD

THE CITIES OF EAST CHICAGO, INDIANA; HAMMOND, INDIANA; GARY, INDIANA; AND WHITING, INDIANA (COLLECTIVELY, THE FOUR CITY CONSORTIUM)

By: C. Michael Loftus
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OF COUNSEL:

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Dated: August 12, 1998

FCC-18

BEFORE THE
SURFACE TRANSPORTATION BOARD

CSX CORPORATION AND CSX TRANSPORTATION, INC. AND NORFOLK SOUTHERN CORPORATION AND NORFOLK SOUTHERN RAILWAY COMPANY -- CONTROL AND OPERATING LEASES/AGREEMENTS -- CONRAIL INC. AND CONSOLIDATED RAIL CORPORATION	Finance Docket No. 33388

PETITION FOR RECONSIDERATION
BY THE CITIES OF EAST CHICAGO, INDIANA;
HAMMOND, INDIANA; GARY, INDIANA; AND WHITING,
INDIANA (COLLECTIVELY THE FOUR CITY CONSORTIUM)

Pursuant to 49 U.S.C. § 722(c) and 49 C.F.R. §§ 1115.3 and 1117.1, the Cities of East Chicago, Indiana; Hammond, Indiana; Gary, Indiana; and Whiting, Indiana (collectively the "Four City Consortium" or the "Four Cities") hereby petition the Board to reconsider and clarify its Decision No. 89 in this proceeding served July 23, 1998 ("Decision No. 89"), approving the acquisition of control of Conrail Inc. and Consolidated Rail Corporation ("Conrail"), by CSX Corporation and its rail affiliates ("CSX") and Norfolk Southern Corporation and its rail affiliates ("NS") (collectively "Applicants").

I.

SUMMARY OF POSITION

In this proceeding, the Four Cities have demonstrated, and the Board has recognized, certain significant environmental and safety-related post-acquisition railroad operational impacts on the Four Cities region.[1] To mitigate these impacts, the Board in Decision No. 89 adopted, in toto, the environmental mitigation conditions for the Four Cities recommended by the Section of Environmental Analysis ("SEA") in its Final Environmental Impact Statement ("EIS") reproduced as Appendix Q of Decision No. 89. See Decision No. 89, at 173 (ordering the Applicants to comply with the environmental mitigation conditions in Appendix Q).

Despite the Board's recognition of the unique status of the Four Cities and its imposition of a few conditions to mitigate some of the adverse impacts on the region that will result from the Conrail transaction, the remedial action taken by the Board is inadequate to address the transaction's impacts. In particular, the Board has committed several procedural and substantive material errors in this proceeding that must be corrected so that its approval of the application will comport

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[1] See Decision No. 89 at 152 (determining that on a local basis, the transaction will result in "potential significant adverse environmental impacts resulting from shifts in rail activity as the rail carriers take advantage of the reconfigured rail system" and that such activities "could cause potential significant adverse effects.") Among others, the Board referenced SEA's conclusions on the serious community and local impacts related to safety and delay at rail/highway at grade crossings, as well as emergency response vehicle delay. Id.

with the law and protect the public interest.

The purpose of this Petition is to request the Board to remedy these procedural and substantive material errors in this proceeding. Specifically, in order to remedy material errors and to help ensure that the environmental conditions imposed by the Board have their intended effect, the Board should take appropriate action to (i) hold CSX to its revised operational representations submitted very late in this proceeding for a critical Four Cities' rail line segment, and (ii) address material factual inaccuracies contained in the Final EIS, as adopted by the Board in Decision No. 89, involving environmental justice impacts on Four Cities' low income/minority populations.

Additionally, Decision 89 lacks specificity with regard to the Board's requirement that the Applicants must adhere to all of the representations that they have made in the course of this proceeding. In particular, the Board should clarify its decision with regard to the Applicants' representations concerning post-transaction operations in the Four Cities to ensure that the public interest is adequately protected. Finally, with regard to the requirement that the Applicants file periodic status and progress reports, the Board should reconsider and modify its decision in certain respects so that the Four Cities will be provided with important operational information that can enable them to help the Board engage in ongoing and effective

oversight.[2]

II.

ARGUMENT

A. The Board Should Remedy Errors Committed by SEA in Accepting and Adopting CSX Submitted Traffic Data

Very late in this proceeding, CSX submitted to SEA certain supplemental operational data pertaining to Four Cities' traffic movements.[3] The Four Cities protested the submission of this new evidence and on May 18, 1998 filed with a Board a Motion to Strike the offensive materials ("May 18 Motion"). In its May 18 Motion, the Consortium referenced in detail the severe damage caused by CSX's evidentiary submission, which among other things,

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[2] After the Four City Consortium filed its Brief on February 23, 1998, the Consortium filed with the Board two separate petitions addressing many of the problems that are addressed herein, including (1) its May 18, 1998 Motion to Strike from the record various materials submitted by CSX to the Board's Section of Energy and Environment ("SEA"), and (2) its July 7, 1998 Petition for Clarification and Modification, requesting the Board to clarify and modify the environmental mitigation contained in the Final EIS, as adopted by the Board at its June 8, 1998 Open Voting Conference. The Consortium hereby incorporates by reference its May 18 Motion to Strike and its July 7 Petition For Clarification and Modification. In particular, the Consortium requests the Board to reconsider and to take necessary corrective action for the reasons stated in these previously submitted petitions and for the additional supporting reasons set forth herein.

[3] The materials in question that were accepted by SEA and the Board and incorporated into the Final EIS, included, among others, an April 23, 1998 Supplemental Environmental Report containing certain material changes to CSX's operating plan, including its post-transaction operations for the Pine Junction-Barr Yard, IN line segment (C-023) and a May 6, 1998 Verified Statement of James E. Roots clarifying CSX's original operating plan which was modified based on the above operational changes, and other "errors."

altered critical operational data set forth in the Application -- the very data which the Four Cities had relied upon in assembling its case.[4] In Decision No. 83, served May 26, 1998, the Board denied the Four Cities Motion to Strike or, alternatively, to afford it an opportunity to respond to the newly submitted data.

In Decision No. 83, the Board concluded that the "environmental review process is a fluid and open one" and that CSX's submission of new evidence did not contravene the rules governing this proceeding or result in any prejudice to the Four Cities. The Board also concluded that it had no responsibility to provide the Four Cities with an opportunity to respond to the new evidence. Id. at 2. With respect to the Four Cities' specific protest of the late filing of the new evidence, the Board held: "[n]or is there merit to the Four Cities' claim that parties participating in the environmental review process are bound to comply with our procedural schedule for submission of material on the merits and may not submit new evidence or studies to SEA upon closure of the evidentiary phases of a proceeding." Id.

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[4] Additionally, as stated in the Four Cities' May 18 Motion, due to the late discovery of this new evidence a few days before the issuance of the Final EIS and the June 3-4 oral argument, and the fact that the Four Cities were unable to reconcile or replicate the data included in the tables accompanying the ICF study without additional information, they were unable to respond to the filing. The Four Cities therefore requested that the Board strike the materials from the record or hold in abeyance completion and publication of the Final EIS and the Board's oral argument/voting conference pending the opportunity to obtain additional information and to file a response.

In its October 1, 1997 Notice of Final Scope of Environmental Impact Statement, the Board made clear that any comments submitted outside its required 45-day comment period on the Draft EIS would not be incorporated in the Final EIS. The Board's Notice specified as follows:

> After considering comments on the Draft EIS, SEA will issue a Final EIS. The Final EIS will address comments on the Draft EIS and will include SEA's final recommendations, including appropriate environmental mitigation. *Environmental comments not received in accordance with the 45-day comment period for the Draft EIS will not be incorporated into the Final EIS.* The Final EIS and SEA's final environmental recommendations serve as the basis for the Board's disposition of environmental issues.

Id. at 8 (emphasis supplied).

Contrary to the Board's rules governing this proceeding, in the Final EIS SEA incorporated in full the above-referenced new evidence submitted by CSX some three months outside the 45-day comment period for the Draft EIS. Meanwhile, the SEA's recommended mitigation for the Four Cities was based, at least in part, on its conclusion that the CSX's newly submitted revised daily train traffic figures would help remedy the critical rail/highway grade crossing congestion situation on CSX's Baltimore and Chicago Terminal Railroad ("BOCT") line segment (C-023).[5] The Four Cities have been severely prejudiced

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[5] See e.g., Final EIS, at 4-153 ("[t]he recent revision of the CSX and NS Operating Plans reduces the number of trains on rail line segment C-023, which is one of the routes of greatest concern to the Four City Consortium."); Id. at 4-156 ("[s]ince the issuance of the Draft EIS, CSX has revised its Operating Plan

by SEA's acceptance and publication of this new evidence.

The Board concluded in Decision No. 83 that it would normally provide a party with an opportunity for additional/ responsive comment "[w]here such changes could potentially affect parties' rights." Despite the fact that the newly submitted CSX data was deemed by SEA to be a "substantial" alteration, and modified previous evidence submitted by the Applicants to the Board involving one of the most critical and congested rail lines in the Four Cities' region, the Board denied the Four Cities an opportunity to submit additional comments in time to effect the outcome of the Final EIS and thus the Board's final decision in the case.[6]

The Four Cities do not question the Board's conclusion in Decision No. 83 that the nature of the environmental review process is necessarily a more informal one, or that in order for the SEA to carry out its responsibilities and to encourage public participation in the process, parties should be afforded an

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to substantially reduce the projected train traffic on rail line segment C-023").

[6] In past Board decisions involving situations where a party has modified initial evidentiary filings, the Board, as a simple matter of fairness, has permitted the opposing party an opportunity to submit rebuttal evidence. See e.g. McCarty Farms, et al. v. Burlington Northern, Inc., Docket No. 37809 (served May 2, 1995) (affording party an opportunity to submit rebuttal evidence after certain evidentiary revisions were made by the complainant, declaring that "all parties must have sufficient time to respond to an opponent's evidence"); Georgia Central Railway, L.P. -- Abandonment Exemption -- in Chatham County, GA, Docket No. AB-367 (Sub-No. 2x) (served Aug. 6, 1997) (affording a party the opportunity to reply to responsive evidence where the railroad had submitted new evidence on the record).

opportunity to bring relevant matters to SEA's attention outside the formal comment period. However, at a minimum, because this information was included in the Final EIS, and incorporated in the Board's written decision and used to help justify the Board's environmental conditions imposed in the case,[7] the Board has a responsibility to ensure that CSX is held accountable to its representations.[8] Accordingly, the Board should clarify for the record that it will hold CSX to its representations for train traffic levels on the BOCT line.

B. The Board Committed Material Error by Failing to Correct Final EIS Environmental Justice Inaccuracies

In their July 7, 1998 Petition for Clarification and Modification ("July 7 Petition") (at 14-16) and at the oral

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[7] See Decision 89, at 153 n. 239 ("in the Four Cities area, CSX agreed to make operational improvements and offered to reroute trains away from a rail line segment between Pine Junction and Barr Yard, through East Chicago.")

[8] The Board in Decision No. 83 also failed to address the issue raised by the Four Cities in their May 18, 1998 Motion that CSX's actions violated the Board's discovery rules. In particular, 49 C.F.R. § 1114.29(b) imposes a duty on parties in proceedings before the Board to supplement discovery responses as appropriate. In their discovery requests, the Four Cities requested from CSX detailed post-transaction traffic data over the BOCT line (segment C-023) -- the same line over which CSX altered its operating plans. (See e.g. Interrogatory No. 1(e) of the Four Cities First Set of Interrogatories and Document Production Requests, and Interrogatories No. 2 and 3 of the Four Cities Second Set of Interrogatories and Document Production Requests). (The referenced questions are attached as Exhibit 1.) While CSX was able to notify the Board of the corrected traffic data, CSX failed to supplement its discovery responses, as required by the Board's rules. The Four Cities did not find out about the new data until after it was too late for an appropriate response.

argument,[9] the Four Cities advised the Board that the Final EIS contained material inaccuracies with respect to the environmental justice impacts of the transaction on the Four Cities. In particular, in Chapter 5, pages 5-154 and 5-155 of the Final EIS, SEA concluded that two critical line segments[10] were outside the scope of review in this proceeding because the segments in question had no significant environmental justice impacts. As stated in the Final EIS, "the Hobart-to-Clarke Junction rail line segment did not meet the initial environmental justice criteria for further analysis."

The SEA's conclusion on environmental justice impacts is directly contrary to its findings in the Draft EIS. In table K-15 of the Draft EIS, SEA determined that both lines C-024 and C-026 do, in fact, meet the Board's requirements for environmental justice analysis -- with the Tolleston-to-Clarke Junction line segment impacting a 98.7 percent minority population.

In the Draft EIS, SEA indicated that it would be conducting additional public outreach as well as additional studies to determine exactly how the environmental justice populations identified in the Draft EIS would be impacted. It also concluded that "SEA is currently developing additional

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[9] See June 4, 1998 Oral Argument Transcript, at 165.

[10] The line segments include portions of the Tolleston-to-Clarke Junction segment (C-024) and the Warsaw-to-Tolleston segment (C-026), which are both a part of the former Pennsylvania Railroad ("PRR") line between Hobart and Clarke Junction that runs through the heart of Gary, IN, and that has been inactive for ten years. As part of the Conrail transaction, CSX proposes to rehabilitate the track and restore this line to service.

mitigation strategies [beside public outreach] in coordination with the local communities in Indiana surrounding the sites and rail line segments and will report on these strategies in the Final EIS." Draft EIS Vol. 5, at IN-81. Apparently, no such environmental justice mitigation strategy was developed for the Hobart-to-Clarke Junction line segment in Gary as the above-referenced passage from the Final EIS passage indicates that SEA completely ignored, for mitigation purposes, the significant impacts of restoring rail service on this long-unused line. An analysis of the transaction's impacts on the minority and low-income populations in Gary that will be affected by such restoration is clearly warranted under the Board's own criteria.[11]

Under applicable guidance orders,[12] the Board is required to impose mitigation as necessary to alleviate environmental justice impacts. In this instance, SEA (and the Board) have totally ignored demonstrated significant environmental

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[11] SEA apparently also ignored the Four Cities' February 2, 1998 Comments on the Draft EIS (at 46-52), the accompanying Verified Statement of Michael L. Cervay, former Director of Planning and Community Development for the City of Gary (at 4-16), and the letter submitted by the Broadway Area Community Development Corporation -- all of which discussed in detail some of the environmental justice impacts of reinstating rail service on the Hobart-to-Clarke Junction line (including the construction of low- to moderate-income single family homes in the Midtown neighborhood of Gary).

[12] See e.g., Executive Order 12898, Federal Actions to Address Environmental Justice in Minority Populations and Low-Income Populations, (Feb. 11, 1994); Department of Transportation (DOT) Order to Address Environmental Justice in Minority Populations and Low-Income Populations, 62 Fed. Reg. 18377 (Apr. 15, 1997).

justice impacts on Four Cities' populations.[13] In the Final EIS, SEA states that its purpose in implementing environmental justice mitigation in this proceeding is as follows:

> the public interest warrants addressing whether the proposed Conrail Acquisition could have disproportionately high and adverse impacts on minority and low-income populations and, if so, whether reasonable and feasible mitigation measures could eliminate or mitigate disproportionate impacts. The public interest also warrants addressing whether it is appropriate to modify recommended mitigation measures to meet the needs of a minority and low-income population that would experience disproportionate effects.

Final EIS, Chap. 5, at 5-88. To mitigate the significant environmental justice impacts of post-acquisition operations over the former PRR line between Hobart and Clarke Junction, it is imperative that the Board require the Applicants to suspend any action to restore this line to service, at least until the Board has conducted an investigation of appropriate mitigation action necessary to remedy those impacts.[14]

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[13] It is important to note that the Hobart-to-Clarke Junction line (segments C-026 and C-024) is one of two lines that the Four Cities have specifically targeted in this proceeding as presenting significant safety, crossing delay, socioeconomic, and other environmental problems. Under the Four Cities' Alternative Routing Plan, this out-of-service rail line would remain closed post-transaction -- thus fully mitigating any adverse environmental impacts presented by renewed operations over the line.

[14] At a very minimum, safety and noise mitigation is warranted at the Roosevelt Manor low-to moderate-income housing project site where the former PRR line constitutes the northern border of the site. See Cervay Environmental V.S. at 4-8 (statement accompanying the Four Cities February 2, 1998 Comments on the Draft EIS).

C. The Board's Requirement that Applicants Must Adhere to All Representations Made in the Proceeding Requires Clarification

In Decision No. 89, at 176, the Board has ordered the Applicants to "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."[15] The Four Cities request specific clarification from the Board that its requirement that the Applicants must adhere to "all" representations made on the record during this proceeding includes the Applicants' representations concerning the post-transaction daily train frequencies on the BOCT line, and on other critical area lines.[16]

Throughout this case, the Four Cities have sought the Board's assistance to mitigate the impacts caused by the incremental increase in the number of trains that will operate through northwest Indiana post-transaction, particularly over the

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[15] The Board makes similar references to this requirement throughout Decision No. 89. See pages 17 n. 26 ("[w]e think it appropriate to note, and to emphasize, that CSX and NS will be required to adhere to all of the representations made on the record during the course of this proceeding, whether or not such representations are specifically referenced in this decision"); 21 n. 36 ("[o]ur oversight will include: applicants' adherence to the various representations that they made on the record during the course of this proceeding"); 161 (same); 174 n. 262 (same).

[16] As referenced in section A, above, the Four Cities have also requested that the Board hold CSX to its representations as to BOCT line operations in response to the Board's acceptance of CSX's modified post-transaction data submitted very late in this proceeding.

highly-congested BOCT line.[17] The Applicants have placed on the record, in their operating plans and elsewhere, pre- and post-transaction rail traffic levels for individual line segments. The Board has afforded interested persons the opportunity to question, analyze, and comment on the impact of the transaction based on the Applicants' operational representations. For communities adversely impacted by the transaction, such as the Four Cities, the Board has imposed environmental conditions that it believes will ameliorate the transaction's adverse impacts.

To help ensure accountability, and the success of Board-ordered environmental mitigation, it is imperative that the Board hold the Applicants to their representations with respect to rail traffic volumes and daily train frequencies on critical line segments. Accordingly, the Four Cities respectfully request the Board to clarify that it will hold the Applicants to their representations as to post-transaction traffic levels, at least

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[17] As explained above, at a very late stage in this proceeding, CSX revised its operating plan for the BOCT line. Under CSX's original operating plan, CSX represented that its base-year average daily train frequency on the BOCT line would increase from 27.6 to 33.3 post-transaction (an increase of 5.7 trains/day). CSX revised operating plan, submitted in May, 1998, noted that base year daily traffic levels for the BOCT line were actually 30.0 because of the re-routing of trains, and would only increase to 31.7 post-transaction (an increase of 1.7 trains/day). The Board-imposed environmental mitigation for the Four Cities, as reference above, was based, in part, on CSX's newly supplied operational data. The Four Cities stress that if the Board does not hold CSX to its revised daily train numbers, CSX would be free to conduct operations at levels higher than represented over this critical line segment -- thus making a mockery out of the environmental mitigation process, and at a very minimum, severely undermining the very necessary environmental mitigation imposed by the Board in this case for the Four Cities region.

on the most critical line segments in the Four Cities where the Board has determined that the transaction will cause significant environmental impacts -- and to the extent that the Applicants and the Four Cities cannot otherwise negotiate a mutual resolution as to individual line segment traffic levels. Such action is necessary to help protect the Four Cities from the harms associated with post-transaction rail traffic volumes above the levels represented by the Applicants both in their Operating Plans and in their later filings in this proceeding.

D. The Board Should Modify its Decision with Regard to the Applicants' Status Reports on Operations

In Decision No. 89, the Board imposed certain monitoring and reporting obligations on the Applicants as a condition to approval of the transaction. Id. at 160-65. Among other things, the Applicants will be required, beginning August 23, 1998, to report monthly on the status of construction and other capital projects, including those in the Chicago Terminal area. Beginning on "Day One," Applicants also will be required to provide weekly reports on the number and on time delivery of run-through trains delivered to western carriers via the Chicago gateway by major commodity group.[18] Additionally, the Applicants will be required to report weekly on the activity of their respective major yard facilities, including the Barr Yard. Id.

[18] Under the Board's decision, the weekly reports on Chicago Gateway Operations are required to include "whether the connections were on time within two hours, based on the current schedules," and the weekly reports must include a discussion of "significant areas of delay." Id. at 164.

at 163-65.

The Four Cities are pleased that these important reports will be filed with the Board, as such reports can provide critical data on the Applicants' progress in carrying out their merger plans. However, to assure that the Four Cities and the public interest are adequately protected, the Board should modify and augment the reporting requirements in the following modest respects.

First, while Decision No. 89 requires the Applicants to file publicly their monthly reports on construction and related capital projects, the decision does not require the Applicants to file publicly their weekly reports on Chicago Gateway and Yard and Terminal operations. This later information is only to be filed under seal with the Board's Office of Compliance and Enforcement. The Four Cities respectfully request that the Board modify its decision to require the Applicants to file all the above reporting data publicly. The public dissemination of this construction and operational information is vital to keeping communities, the media, public officials, etc. apprised of important service performance indicators.

As the Board has prudently recognized in its ongoing oversight in the UP/SP merger proceeding (Finance Docket No. 32760), the dissemination of performance data to the public is extremely important. In its recent decision governing continuing Board oversight of the UP/SP merger, the Board denied UP's

requests to file similar reports under seal.[19] The Board likewise should require performance data to be filed publicly in this proceeding.

UP's post-merger service problems demonstrate the importance of obtaining objective operational information for monitoring purposes. Such information in this proceeding can assist communities such as the Four Cities in monitoring the Applicants' progress toward achieving promised improvements in rail operations, and also assist them in making decisions concerning corrective actions that may be needed to remedy any problems that develop. The Board should not make the mistake of suppressing this critical performance data from public view.

Second, the Board should augment the reporting requirements of Decision No. 89 to require that more specific operational information relating to the Applicants' Chicago Gateway operations be reported. In particular, Decision No. 89 requires the Applicants to "report weekly on the number and on time delivery of run through trains delivered to western carriers via the Chicago gateway, including Streator, IL, by major commodity group." By requiring the Applicants to report only on run-through trains interchanged with western carriers, and not all through (non-local) trains, the Board will be missing the

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[19] STB Service Order No. 1518 (Sub-No. 1), Joint Petition for a Further Service Order, et al. (served July 31, 1998). If the Applicants in the instant proceeding have a legitimate commercial objection to the filing of any of the required performance data publicly, they can petition the Board to file such information under seal.

entire picture on system flow and the state of traffic congestion in the region. Accordingly, the Board should require Applicants to report on all through train operations, not just run-through trains interchanged with western carriers in the Chicago area.

Additionally, the Board should require the Applicants to report on all operations over the critical rail lines crossing northwest Indiana that have been shown by the Four Cities to be especially problematic. In this regard, the Board should revise its reporting requirements, and require the Applicants to report either directly to the Four Cities, or publicly, the following additional information:

The Applicants shall provide reports on a monthly basis commencing on the effective date of the Board's written decision containing the following information:

(1) On a daily average basis (calculated monthly), the number of trains per day (run through and local) operated in both (and separately in each) directions over the following rail line segments:

- **The Pine Junction-to-State Line Tower portion of the Pine Junction-to-Barr Yard line segment (C-023);**
- **The Tolleston-to-Clarke Junction rail line segment (C-024);**
- **The Tolleston-to-Hobart portion of the Warsaw-to-Tolleston line segment (C-026); and**
- **The Hobart-to-State Line Tower portion of the Hobart-to-Burnham Yard line segment (N-469).**

(2) On a daily average basis (calculated monthly), the average speed of trains (run through and local) operating over the Pine Junction-to-State Line Tower

portion of the Pine Junction-to-Barr Yard line segment (C-023). The speed should be calculated on an average miles-per-hour basis based on the recorded time of train departure from Pine Junction and the recorded time of train passing through the interlocker at State Line Tower for westbound trains, divided by the length of the line segment; and vice versa for eastbound trains.

(3) Status of CSX's project to restore to service and upgrade the Tolleston-to-Clarke Junction rail line segment (C-024) and the Tolleston-to-Hobart portion of the Warsaw-to-Tolleston line segment (C-026) in the event that the Board determines, based on further review, that these currently inactive line segments may be restored to service.

(4) A detailed description of the Applicants' compliance with the environmental conditions imposed by the Board at Appendix Q of Decision No. 89, including each of Conditions 21 (a) through (i), as well as Conditions 1, 6, and 8 as applicable.[20]

As the Four Cities have represented in their July 7, 1998 Petition for Clarification and Modification, these additional reporting requirements are necessary because the Final EIS recommendations adopted by the Board, as applicable to the

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[20] These requests for additional reporting are very similar to the reporting requirement requests made by the Four Cities in their July 7 Petition. The Four Cities also note that CSX, in its July 10, 1998 Reply to the Four Cities Petition, represented that "CSX does not oppose providing relevant information to the Four Cities, but does not agree that these proposed reporting requirements should be imposed as an additional condition." CSX Reply, at 2. While the Four Cities would not object to CSX providing this requested information only to them, it has yet to receive any assurances from CSX that this information will be forthcoming. Additionally, the Four Cities have not received any indication that NS is willing to provide them with any regional operational information. Therefore, in order for their interests to be protected, the Four Cities respectfully request the Board to order the Applicants to perform this additional reporting.

Four Cities, are to a large degree either non-binding on the Applicants or qualified by language such as "to the extent practicable" -- leaving it uncertain as to whether promised mitigation will actually be undertaken to the full extent necessary to achieve the intended results. Also, because the Board's refusal to impose all of the environmental mitigation measures requested by the Four Cities was largely based on the Applicants' assurances that certain planned operational and construction-related improvements will more than offset the transaction's harms on the Four Cities, the reporting requirements suggested above are absolutely necessary to ensure that such promises actually will be realized.[21]

Only with these augmented protections will the Four Cities be able to determine whether the Applicants are complying fully with the Board's decision, and fulfilling their pledge to mitigate the environmental impacts of the Conrail transaction on

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[21] For example, a typical response by SEA to one of the many concerns raised by the Four Cities about safety and public health impacts associated with the transaction was as follows:

> The Applicants have committed to improvements that would allow an increase in freight train speed to 40 miles per hour and would change the highway/rail at-grade warning devices to state-of-the-art constant warning time devices. These changes would decrease the amount of time that trains block highway/rail at-grade crossings by shortening train pass-through time and gate down time at crossings. . . . SEA maintains that the improvements undertaken by CSX and NS would mitigate the effects associated with the increased number of trains.

Final EIS, Chap. 5, at 5-143.

northwest Indiana. These additional reporting requirements will not be burdensome, as the Applicants will already be compiling similar data on their Chicago Gateway Operations to be filed in their weekly reports to the Board.

CONCLUSION

To adequately protect the population of northwest Indiana from the environmental harms associated with this transaction, the Four City Consortium respectfully requests that the Board clarify and modify its Decision No. 89 in the manner specified herein. Such action will ensure that the Board's approval of the application comports with the law and adequately protects the public interest.

Respectfully submitted,

THE CITIES OF EAST CHICAGO, INDIANA; HAMMOND, INDIANA; GARY, INDIANA; AND WHITING, INDIANA (COLLECTIVELY, THE FOUR CITY CONSORTIUM)

OF COUNSEL:

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1224 Seventeenth Street, N.W.
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(202) 347-7170

Attorneys for The Four City Consortium

Dated: August 12, 1998

Exhibit No. 1

FCC-03

BEFORE THE
SURFACE TRANSPORTATION BOARD

CSX CORPORATION AND CSX TRANSPORTATION, INC. AND NORFOLK SOUTHERN RAILWAY COMPANY COMPANY -- CONTROL AND OPERATING LEASES/AGREEMENTS -- CONRAIL AND CONSOLIDATED RAIL CORPORATION -- TRANSFER OF RAILROAD LINE BY NORFOLK SOUTHERN RAILWAY COMPANY TO CSX TRANSPORTATION, INC.	)	Finance Docket No. 33388

CITIES OF EAST CHICAGO, INDIANA; HAMMOND, INDIANA; GARY, INDIANA; AND WHITING, INDIANA FIRST SET OF INTERROGATORIES AND DOCUMENT PRODUCTION REQUESTS TO APPLICANTS

The Cities of East Chicago, Indiana; Hammond, Indiana; Gary, Indiana; and Whiting, Indiana (referred to collectively as "The Four Cities Consortium" or "Consortium"), hereby submits its First Set of Interrogatories and Document Requests to Applicants.

The Consortium requests that Applicants answer these discovery requests within fifteen (15) days after service thereof, as provided in the Discovery Guidelines adopted by Administrative Law Judge Leventhal in his decision served June 27, 1997. However, if Applicants raise a complete objection to any Interrogatory(ies) or Document Request(s), such that no substantive answer or documents will be provided absent an order compelling same, then Applicants are requested to serve objection(s) upon the undersigned counsel for the Consortium within five (5) days after service hereof.

means of identifying it), its title or heading, the author's (authors') full name(s), its recipient(s), general subject matter contents, number of pages and the document's present location and custodian and in the case of contracts filed with the Interstate Commerce Commission or Surface Transportation Board, the contract number. If such document was, but is no longer in Applicants' possession, custody or control, state what disposition was made of it.

9. "Identify," when used with reference to a communication other than a document, means to state the nature of the communication (e.g., meeting, telephone call, etc.), the time, date and place the communication occurred, and the participants' full names, business addresses and job titles.

10. "Identify," when used with reference to an individual, means to state the full name, business address(es) and job title(s) of such individual during the period covered by these interrogatories and document production requests.

11. "Relate to" or "Relating to" means making a statement about, discussing, describing, referring to, reflecting, explaining, analyzing, or in any other way pertaining, in whole or in part, to a subject.

12. "Transaction" means the acquisition and division of Conrail's rail lines as sought by Applicants through the joint Railroad Control Application submitted in Finance Docket No. 33388.

13. "CSX line segments" means each of the following

line segments owned or operated by CSX and/or its affiliates (including but not limited to the Baltimore & Ohio Chicago Terminal Railroad ("BOCT")) shown on the maps attached hereto and identified as Map IL-7, Map IL-8 and Map IL-9:

(a) Willow Creek to Pine Junction;

(b) Pine Junction to Colehour Junction;

(c) Pine Junction to east Chicago Yard;

(d) East Chicago Yard to Calumet Park;

(e) East Chicago Yard to Rock Island Junction;

(f) Calumet Park to Blue Island Yard;

(g) Blue Island Yard to Ashland Avenue.

14. "NS line segments" means each of the following line segments owned or operated by NS and/or its affiliates shown on the maps attached hereto and identified as Map IL-6, IL-7, Map IL-8 and Map IL-9:

(a) Springsboro to Hobart;

(b) Hobart to Van Loon;

(c) Van Loon to Osborn;

(d) Osborn to Calumet Yard;

(e) Calumet Yard to Landers;

(f) Clarke Junction to Gary.

15. "Conrail line segments" means each of the following line segments owned or operated by Conrail and/or its affiliates (including but not limited to the Indiana Harbor Belt ("IHB")) shown on the maps attached hereto and identified as Map IL-7, Map IL-8 and Map IL-9:

1. Provide the following information with respect to each Conrail line segment, CSX line segment, and NS line segment:

(a) The length of the segment to the nearest tenth of a mile;

(b) The average number of daily train movements (including light engine movements) in each direction by month during 1996;

(c) Railroad timetables;

(d) The current and post acquisition forecast traffic volumes in million gross ton miles;

(e) The expected post-acquisition average number of daily train movements in each direction;

(f) the current and post acquisition planned primary traffic type specified as follows: priority/ time sensitive freight, bulk freight, local freight, through freight, etc.;

(g) The current and post acquisition planned movement of hazardous materials, including, but not limited to, daily, monthly, and yearly train movements in each direction, train lengths, and traffic volumes in million gross ton miles;

(h) The (i) average and (ii) maximum lengths, expressed in number of cars, for trains (excluding light engine movements) operated over each such line segment during 1996;

(i) The number of at-grade public highway cross-

of the proposed transaction on the communities of East Chicago, Indiana; Hammond, Indiana; Gary, Indiana; and Whiting, Indiana, including in particular, impacts on pedestrian safety, vehicular safety and congestion, emergency services, schools, hospitals, land use, and air quality.

5. Please produce copies of all documents identified in response to Interrogatory No. 1 through Interrogatory No. 16 above.

Respectfully submitted,

THE CITY OF EAST CHICAGO, INDIANA
THE CITY OF HAMMOND, INDIANA
THE CITY OF GARY, INDIANA
THE CITY OF WHITING, INDIANA
COLLECTIVELY THE FOUR CITY CONSORTIUM

By: C. Michael Loftus

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OF COUNSEL:

Slover & Loftus
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Washington, DC 20036

Date: August 15, 1997

FCC-07

BEFORE THE
SURFACE TRANSPORTATION BOARD

CSX CORPORATION AND CSX TRANSPORTATION, INC. AND NORFOLK SOUTHERN RAILWAY COMPANY COMPANY -- CONTROL AND OPERATING LEASES/AGREEMENTS -- CONRAIL AND CONSOLIDATED RAIL CORPORATION -- TRANSFER OF RAILROAD LINE BY NORFOLK SOUTHERN RAILWAY COMPANY TO CSX TRANSPORTATION, INC.	)	Finance Docket No. 33388

CITIES OF EAST CHICAGO, INDIANA; HAMMOND, INDIANA; GARY, INDIANA; AND WHITING, INDIANA SECOND SET OF INTERROGATORIES AND DOCUMENT PRODUCTION REQUESTS TO APPLICANTS

The Cities of East Chicago, Indiana; Hammond, Indiana; Gary, Indiana; and Whiting, Indiana (referred to collectively as "The Four Cities Consortium" or "Consortium"), hereby submits its Second Set of Interrogatories and Document Requests to Applicants.

The Consortium requests that Applicants answer these discovery requests within fifteen (15) days after service thereof, as provided in the Discovery Guidelines adopted by Administrative Law Judge Leventhal in his decision served June 27, 1997. However, if Applicants raise a complete objection to any Interrogatory(ies) or Document Request(s), such that no substantive answer or documents will be provided absent an order compelling same, then Applicants are requested to serve objection(s) upon the undersigned counsel for the Consortium within five (5) days

(f) the current and post acquisition planned primary traffic type specified as follows: priority/ time sensitive freight, bulk freight, local freight, through freight, etc.;

(g) The current and post acquisition planned movement of hazardous materials, including, but not limited to, daily, monthly, and yearly train movements in each direction, train lengths, and traffic volumes in million gross ton miles;

(h) The (i) average and (ii) maximum lengths, expressed in number of cars, for trains (excluding light engine movements) operated over each such line segment during 1995;

(i) The number of at-grade public highway crossings, and the type of crossing protection provided at each;

(j) The number of rail-highway grade separations; and

(k) The number of (i) grade crossing accidents and (ii) grade crossing fatalities that occurred during 1995 and that were reported to any local, state or federal government agency.

2. Describe CSX's operating plan after the control transaction is consummated with respect to westbound traffic moving between Pine Junction and Bedford Park/Clearing Yard via Rock Island Junction. In particular, describe the volume of

westbound traffic (expressed in both daily numbers of trains and in millions of annual gross tons) that is expected to move (a) via Conrail/CSX's present lakefront line via CP 501, Indiana Harbor, Whiting and Colehour, and (b) via the CSX/BOCT line to or through East Chicago and/or State Line Tower.

3. Describe CSX's operating plan after the transaction is consummated with respect to eastbound traffic moving between Bedford Park/Clearing Yard and Willow Creek. In particular, describe the volume of eastbound traffic (expressed in both daily numbers of trains and in millions of annual gross tons) that is expected to move eastward through Calumet Park (a) via the CSX/BOCT line to Pine junction via State Line Tower and East Chicago Yard; (b) via the present IHB line via Gibson and Gary/Tolleston; and (c) via the present Conrail Porter branch via Gibson and Tolleston.

4. With respect to route (a) specified in Interrogatory No. 3, identify, with specific reference to mileposts, station names and/or control points, the trackage owned or two be owned by CSX or any of its affiliates and trackage over which CSX expects to operate via trackage rights over another carrier (including the identification of such other carrier(s)).

5. With respect to route (b) specified in Interrogatory No. 3, identify, with specific reference to the owning or controlling carrier, mileposts, station names and/or control points, the specific line segments CSX expects to use to operate between Pine Junction and Rock Island Junction.

B. ADDITIONAL DOCUMENT REQUESTS

1. Produce copies of all studies performed by Burns and McDonald (a) related to the portions of the Environmental Report contained in Volume 6 of the Application that pertain to Lake and Porter Counties, Indiana, and (b) referred to on pages 355-57 of the Transcript of the deposition of D. Michael Mohan on September 17, 1997.

2. Produce all documents, including but not limited to workpapers, related to any studies produced pursuant to Supplemental Document Request No. 1

3. Produce all documents related to the portion of the settlement agreement recently reached between CSX and CN, as described in CN-8, that relate to the matters described in Supplemental Interrogatory No. 12.

Respectfully submitted,

THE CITY OF EAST CHICAGO, INDIANA
THE CITY OF HAMMOND, INDIANA
THE CITY OF GARY, INDIANA
THE CITY OF WHITING, INDIANA
COLLECTIVELY THE FOUR CITY CONSORTIUM

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OF COUNSEL:

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Dated: September 22, 1997

CERTIFICATE OF SERVICE

I hereby certify that this 12th day of August, 1998, I have served copies of the foregoing Petition for Reconsideration by hand upon Applicants' counsel:

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and by first-class mail, postage pre-paid upon:

The Honorable Rodney Slater
Secretary
U.S. Department of Transp.
400 7th Street, S.W.
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Washington, D.C. 20590

The Honorable Janet Reno
Att'y Gen. of the United States
U.S. Dept. of Justice
10th & Constitution Ave., N.W.
Room 4400
Washington, D.C. 20530

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

and upon all other Parties of Record in Finance Docket No. 33388.

Peter a. Pfohl

Peter A. Pfohl

STB FD-33388 8-12-98 I ID-190487

190487

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SUBCOMMITTEES:
RANKING MEMBER
COMMERCIAL AND ADMINISTRATIVE LAW
CONSTITUTION

TRANSPORTATION AND INFRASTRUCTURE COMMITTEE
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SURFACE TRANSPORTATION

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August 11, 1998

Mr. Vernon A. Williams
Secretary
Surface Transportation Board
1925 K Street, Suite 700
Washington, D.C. 20423-0001

Dear Secretary Williams:

Enclosed for filing please find an original and 25 copies of our (Jerrold Nadler Et. Al.) Application for Reconsideration of Petition, concerning docket #33388. Additionally you will find a 3.5" disk containing the text of the brief.

I am requesting that one copy be stamped and returned in the enclosed self addressed envelope upon receipt.

If you have any question please feel free to contact me.

Thank you.

Sincerely,

Jerrold Nadler

Jerrold Nadler
Member of Congress

JUDICIARY COMMITTEE
SUBCOMMITTEES:
RANKING MEMBER
COMMERCIAL AND ADMINISTRAT. /E LAW
CONSTITUTION

TRANSPORTATION AND INFRASTRUCTURE COMMITTEE
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Certificate of Service

I, Brett Heimov, certify that on August 11, 1998, I have caused to be served by first-class mail a true and correct copy of the attached brief on all parties that have appeared in STB Finance Docket no. 33388.

Brett Heimov

Dated: August 11, 1998

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

APPLICATION OF REPRESENTATIVES JERROLD NADLER, CHRISTOPHER SHAYS, CHARLES RANGEL, BEN GILMAN, BARBARA KENNELLY, NANCY JOHNSON, CHARLES SCHUMER, ROSA DELAURO, MICHAEL FORBES, SAM GEJDENSON, NITA LOWEY, MAJOR OWENS, THOMAS MANTON, MAURICE HINCHEY, ED TOWNS, CAROLYN B. MALONEY, NYDIA M. VELAZQUEZ, GARY ACKERMAN, ELIOT L. ENGEL, LOUISE M. SLAUGHTER, JOHN LAFALCE, MICHAEL MCNULTY, JAMES MALONEY AND GREGORY MEEKS

1. FOR RECONSIDERATION OF THEIR PETITION FOR INCLUSION OF A CROSS-HARBOR FLOAT OPERATION, THE BAY RIDGE LINE OF THE LONG ISLAND RAILROAD, THE NEW YORK TERMINAL PRODUCE MARKET, 65TH STREET YARD AND FRESH POND JUNCTION IN THE JOINT FACILITIES RAILROAD PROPOSED BY

THE APPLICANTS AND FOR ACCESS FOR INTERMODAL SERVICES THROUGH THE HUDSON AND EAST RIVER TUNNELS AND ON THE NORTHEAST CORRIDOR EAST OF NEWARK, N.J. AS A CONDITION OF THE ACQUISITION REQUESTED and

2. TO STAY ALL FURTHER ACTION ON THIS APPLICATION FOR REARGUMENT, LIMITED TO THE EAST OF HUDSON ISSUES, THROUGH JULY 20, 1999.

The intervenor applicants are elected representatives of the people of the States of New York and Connecticut in the House of Representatives of the United States (hereinafter referred to as the Congressional Delegation). The Congressional Delegation first urges the Surface Transportation Board:

1. to reconsider its decision on the application of Norfolk Southern and CSX (hereinafter referred to as the Applicants) to acquire the assets of Conrail to the extent its order effects services East of the Hudson River as the Order creates an unworkable concentration of carriers sharing facilities which are absolutely inadequate to handle services required while ignoring facilities which are vital to the provision of adequate service which are largely unused but which if properly used could provide a workable system; and

2. to adjourn any consideration of this application for reconsideration for one year to allow the applicants, the Congressional Delegation, the States and the other effected carriers time to attempt to reach a settlement.

RECONSIDERATION

It is respectfully submitted that the decision of the Board is based upon errors of law and fact.

1. The decision finds that there is a lack of traffic in the region, a finding inconsistent with every study of the local market done in the last twenty five years. Indeed the market is huge, but is not served by the railway system due to institutional problems associated with fragmentation of management. Thus, the rail share of the local market is small, its share being dictated by the scope of services now available and not by the size or nature of the market.

2. The decision correctly finds that there is a lack of physical capacity on facilities within the region but then grants three major operators, CSX, Canadian Pacific and Providence and Worcester the right to terminate their main line operators, on top of the existing New York and Atlantic operations, at Fresh Pond Jt. in Queens. Fresh Pond is the smallest facility in the region and the one most hemmed in by a residential neighborhood. It is the least expandable of the region's remaining railway yards. The decision ignores other terminals identified by the Congressional Delegation, which are, or could be easily, available and are presently unused such as New Lotts Avenue and 65th Street yard. 65th Street yard, on the Brooklyn waterfront is, for example, a fully built intermodal terminal. It remains unused as no competent operator has been identified by the City of New York which is capable of providing intermodal service from that site. Canadian Pacific Railway specifically wishes to provide intermodal service between New York and Canada. Under the Order, CP must terminate at Fresh Pond, where there are no terminal facilities nor space to provide them. Fresh Pond is but 11 miles on the nearly unused Bay Ridge Line away from the available 65th Street yard. 65th Street yard is not in the middle of a residential neighborhood. It is on the Brooklyn waterfront, an industrial area of the City of New

York. CP alone is directed to make the needed investments to provide itself with terminal facilities but, without access to 65th Street, it has access only to Harlem River Yard. The entire capacity of Harlem River Yard is to be devoted to garbage transloading and servicing the Hunt Point produce market. Even if some space is reserved for general intermodal services, the remaining capacity of The Harlem River Yard, if any, is totally inadequate to support both CSX and CP intermodal services as the property devoted to intermodal services has been reduced to only 28 acres and is devoid of acceptable amounts of either rail car or trailer storage space.

3. Despite the acknowledged failure of the New York Cross Harbor Railroad to provide needed services over a substantial period of time, its facilities are left in the control of that company and no supplemental services are provided for. CSX is required to study the situation but is not required to take any specific action to solve the problem presented by a lack of access to the South. The Order should be modified to require the Joint Facilities Railroad to acquire the Cross Harbor at a price to be set by the Board pursuant to the provisions of 10907(c) as that is the only solution which has a high probability of affording needed relief. Short of that, both CSX and NS must be required to participate in any solution of the cross harbor access problem, not just CSX. Further, any action they are directed to take must have specific defined tasks and goals so that compliance with the Board's directives may be measured.

4. The Congressional Delegation's request for access through the Hudson and East River Tunnels was based upon the fact that the Railroader is the only rail vehicle which can now pass through Pennsylvania Station in New York and these tunnels. That vehicle is now operated by Norfolk Southern. Norfolk Southern does not have access to the tunnels or to the lines of the East River. The market East of the river, however, is a single stack of intermodal market (Trailer on Flatcar "TOFC") for which the Railroader is entirely suitable. The Railroader also does not

need the extensive terminal facilities required by conventional intermodal services. The Congressional Delegation argues that confining the Railroader services of Norfolk Southern to the West side of the Hudson is irrational where the New York-New Jersey metropolitan region's severe air quality problems are related directly to over dependence on cross harbor trucking. The institution of Railroader services through the Amtrak tunnels could provide immediate regional relief which would mitigate the increase in regional trucking anticipated by this transaction. The Congressional Delegation stated that such services should be provided by Norfolk Southern or by any other carrier willing to provide such services, i.e. in connection with or supplementing those of Norfolk Southern. The objections based entirely on track capacity are premature. The Congressional Delegation sought only to prevent any grant of exclusivity on the facilities in question which would bar an application by a willing carrier, including either of the applicants. Any such application in the future would be subject to the agreement of Amtrak which we assume would not grant access in such a way as to interfere with its operations or those of its tenants. The Congressional Delegation also pointed out that based upon past traffic patterns on the lines in question which included substantial freight services along with more passenger services than are presently provided, there is substantial capacity for the services needed.

Objections to the Congressional Delegation's demands were based solely on statements as to the number of trains now using the facilities and the general statement that service is to increase once present electrification extensions are complete. These arguments are irrelevant. No evidence was submitted establishing that the facilities lacked the required capacity to accommodate Railroader operations except for a statement about clearance restrictions which were demonstrably wrong.

The Congressional Delegation objects to the granting of exclusive rights on critical

trackage to any carrier which declares in advance its intention not to operate that trackage to the maximum level needed to serve the public interest.

5. The Board had determined that far fewer truck diversions to the highways of the Bronx and northern Manhattan will occur than estimated by the Congressional Delegation. However, it is agreed that the transaction will result in an increase. At present, the State of New York must reduce truck traffic in New York City to comply with the State Implementation Program (SIP) under the Clean Air Act. Where, as here, the transaction will add hundreds[1] of trucks across the Bronx and Manhattan everyday, it violates the SIP and the transaction cannot be approved without the modifications requested by the Congressional Delegation which will provide sufficient mitigation to bring the transaction in compliance with the SIP and thus, with the Clean Air Act. In a region which already toils in the extreme adverse health effects of excessive air pollution, no increase in truck traffic is acceptable, nor lawful under the Clean Air Act.

6. Finally, the transaction, by providing for competitive access only via the Hudson Division, and only by the addition of the Canadian Pacific system, the services of which are confined to non-New York & Atlantic facilities, when combined with the ban on garbage traffic imposed by the MTA on the New York & Atlantic Railway, baring all such traffic from all MTA railways on Long Island, makes the minority neighborhoods of the South Bronx the only place in the entire New York Metropolitan Area where garbage can be loaded on rail cars for export from the region. The ban imposed by the MTA is designed specifically to protect white residential areas from a nuisance created by garbage traffic. The Board's Order, by failing to provide access

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[1]The parties and the board disagree as to the number of hundreds involved. However, all agree that an increase im truck traffic across the Bronx and Manhattan will occur. These trucks, however, will travel from the northeastern border of the Bronx to the George Washington Bridge. That is a distance of about fifteen miles. Every one hundred trucks so diverted generates 1,500 vehicle miles traveled by day.

to New York & Atlantic facilities and for access to the South via the floats, the direction relevant to most garbage traffic for the foreseeable future, not only forces all such traffic onto a circuitous route, it creates a disparate impact on minority residential areas, a violation of regulations promulgated under Title VI of the Civil Rights Act of 1964 as amended.

By reason of the above, the Board should reconsider the application of the Congressional Delegation for the imposition of conditions to the approval of the acquisition in question.

APPLICATION FOR A STAY OF THIS RECONSIDERATION

Notwithstanding the above, the Congressional Delegation and the applicant railroads, CSX Corp. and Norfolk Southern Corp., have agreed to enter into a dialogue in an attempt to resolve the issues raised here and in the many comments submitted in this proceeding relating to service East of the Hudson. The applicants and the Congressional Delegation have agreed to meet and to include all rail carriers in the area in such discussions to attempt to develop an operating plan which will markedly improve services, allocating physical resources and available governmental and private financing for improvements appropriately. All believe that these discussions will be successful and the Congressional Delegation seeks to adjourn further consideration of this matter by the Board or by the Courts until sufficient time has elapsed to determine if this process will succeed.

Therefore, the Congressional Delegation respectfully requests that this matter be marked timely filed but that all action thereon be stayed until July 20, 1999 or until such earlier time as any party shall move to reopen the matter.

Dated, New York, N.Y.
August 11, 1998

Jerrold Nadler

Jerrold L. Nadler
Member of Congress
11 Beach Street, Suite #910
New York, NY 10013

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KRUGLIAK, WILKINS, GRIFFITHS & DOUGHERTY CO., L.P.A.

ATTORNEYS AT LAW

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August 10, 1998

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AUG 12 1998

SURFACE TRANSPORTATION BOARD

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Via Overnight Delivery

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

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

Dear Mr. Williams:

Enclosed please find one (1) original and twenty-five (25) copies of SDB-15, Petition for Reconsideration in the aforementioned matter.

Should you need anything further or have any questions regarding the enclosed, please feel free to contact me directly at (330) 497-0700. Thank you for your assistance.

Yours very truly,

KRUGLIAK, WILKINS, GRIFFITHS
& DOUGHERTY CO., L.P.A.

Randall C. Hunt

RCH/jau

cc: Parties of Record
Steve Paquette-Stark Development Board

FILED
AUG 12 1998
SURFACE TRANSPORTATION BOARD

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Office of the Secretary
AUG 13 1998
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BEFORE THE
SURFACE TRANSPORTATION BOARD

FINANCE DOCKET NO. 33388 ~~(SUB-NO. 79)~~

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
STARK DEVELOPMENT BOARD, INC.

Randall C. Hunt, Esq.
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& DOUGHERTY CO., L.P.A.
4775 Munson Street, N.W.
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Counsel for Stark Development Board, Inc.

August 11, 1998

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TABLE OF CONTENTS

SUMMARY OF PETITION AND LAW

Now comes the Stark Development Board, Inc. ("SDB") who hereby petitions the Surface Transportation Board ("STB" or "Petitioner") to reconsider its Decision No. 89, as decided July 23, 1998 ("Decision"). This petition seeks to have the STB reconsider the protective conditions requested by the SDB, as set forth in its Application in this proceeding, and as outlined hereinafter.

Although there was not a specific ruling by the STB on the protective conditions requested by the SDB, page 78 of the Decision ruled upon "individual conditions sought." *STB Finance Docket No. 33388, Decision No. 89 at 78.* This section of the Decision issued a blanket denial on conditions requested by various Applicants as follows:

> All requests for conditions not specifically discussed and approved in this decision should be considered denied. *STB Finance Docket No. 33388, Decision No. 89, at 78-79.*

The SDB is filing this petition on the basis that its protective conditions requested were denied on the basis of a pre-existing problem. This premise is based on the STB's Decision which ruled that "many of the conditions requested have been denied because they are addressed to a pre-existing problem." *STB Finance Docket No. 33388, Decision No. 89, at 78.*

Although the SDB acknowledges that the STB attempted to resolve certain Applicants' concerns and issues by imposing "other broad conditions", the Decision did not include conditions which would remedy the adverse effects of this acquisition on the SDB. *SDB Finance Docket No. 33388, Decision No. 89, at 79.* It should be emphasized, concisely and clearly, that the conditions granted in favor of the Wheeling and Lake Erie Railway Company ("W&LE") will not ameliorate or eliminate the harmful effects of this acquisition on the SDB

and its Neomodal terminal ("Neomodal" or "Terminal"). The W&LE conditions granted by the STB have no direct bearing on the viability of the Terminal.

This petition is also being filed as a result of the unwillingness of the Applicants to enter into constructive settlement discussions with the SDB, to discuss potential solutions to the adverse effects of this acquisition. Although the Decision recites various settlement arrangements with numerous parties, the STB should be aware, as it exercises its oversight jurisdiction, that no such arrangements or even discussions have occurred with the SDB.

The STB, under *49 U.S.C. § 11344(c)*, has broad authority to impose conditions in this proceeding. See *Lamoille Valley R.R. v. ICC*, 711 F.2d. 295, 302 (D.C. Cir. 1983). The Petitioner acknowledges that the STB and its predecessor, the Interstate Commerce Commission ("ICC"), have maintained a policy of refraining from burdening a merger with conditions, unless the conditions are necessary either to ameliorate the anti-competitive impact of a merger or to protect essential services. *Grainbelt Corporation and Farmrail Corporation v. STB*, 109 F.3d. 794, 796 (D.C. Cir. 1997).

In making a determination and ruling on the issuance of conditions, the STB will:

1.) Impose conditions only when a transaction threatens harm to the public interest;

2.) The conditions are operationally feasible;

3.) The conditions would ameliorate or eliminate the harm; and

4.) The conditions would result in a greater benefit to the public than a detriment to the transaction. *Union Pacific-Control-Missouri Pacific; Western Pacific*, 366 I.C.C. 462, 562-565 (1982) and *Grainbelt Corporation* at 796.

ARGUMENT

I. THE SDB AND ITS TERMINAL DID NOT HAVE A "PRE-EXISTING PROBLEM" PRIOR TO THE ACQUISITION OF CONRAIL, INC. AND CONSOLIDATED RAIL CORPORATION (COLLECTIVELY "CONRAIL"), BY CSX CORPORATION AND CSX TRANSPORTATION, INC. (COLLECTIVELY "CSX") AND NORFOLK SOUTHERN COMPANIES AND NORFOLK SOUTHERN RAILWAY COMPANY (COLLECTIVELY "NS").

It is an undisputed fact that Neomodal was strategically built in 1995 on the main line of the W&LE, a regional railroad, due to its connections with three (3) Class I carriers, Conrail, CSX, and NS. It is also an undisputed fact that prior to the Conrail break-up, CSX did not have access and NS had limited access to the NEO intermodal market. In fact, prior to the Conrail break-up, Neomodal was the only significant intermodal terminal in NEO that provided CSX and NS with a terminal to compete with Conrail for NEO and Western Pennsylvania intermodal business.

Despite claims by the Applicants that the "core problem" of Neomodal is that it is not on CSX or NS main lines (*CSX/NS Rebuttal, Vol. 1 of 3, pg. 474*), the real problem facing Neomodal is the post proceeding plans of the Applicants. With the break-up of Conrail, CSX is now planning to build an intermodal terminal at the newly acquired Conrail Collingwood, Ohio Yard, and NS is planning to build an intermodal terminal at its Bellview, Ohio Yard and at the recently acquired Conrail Pittsburgh, Pennsylvania Yard. These intermodal terminal projects did not exist prior to this break-up, and therefore were not pre-existing problems for the SDB and Neomodal, as claimed by the STB in its Decision.

The SDB did not and does not now seek to enjoin or restrict, in any way, the post proceeding intermodal plans of the Applicants. The protective conditions of SDB, as outlined

hereinafter, are merely an attempt to level the intermodal playing field after the Conrail break-up. It is imperative for the STB to understand that prior to the Conrail break-up, W&LE and Neomodal had access to all CSX and NS intermodal origin and destination markets through the Bellview, Ohio Yard of NS and through the Willard, Ohio Yard of CSX. Unfortunately, now, W&LE and Neomodal will no longer have access to the East and West service of NS, and will be effectively eliminated from the major CSX intermodal systems, when CSX relocates its intermodal train blocking from its Willard Yard to its Collingwood Conrail Yard, a yard to which Neomodal has no direct access through the W&LE.

The STB should not be misled by the Applicants claims that the problem with Neomodal is its location on the W&LE and not on the lines of CSX and NS. If Neomodal's location was, in fact, the problem, then CSX and NS would not have aggressively pursued the W&LE to secure haulage contracts prior to the Conrail break-up. (*SDB 4, Stadelman, Exhibit D)*. Furthermore, if the SDB knew that CSX and NS were secretly buying Conrail in the time period prior to the start of the construction of Neomodal, then $11.2 Million Dollars of Federal funds would not have been expended by various Federal and State agencies to build the Terminal.

No, what is fact, is that the operational and financial problems facing the SDB and its Terminal were created as a result of the Conrail break-up. There was no pre-existing problems, and therefore, the protective conditions sought by the SDB, as outlined hereinafter, warrant reconsideration by the STB and a specific ruling related thereto.

II. THE PROTECTIVE CONDITIONS SOUGHT BY THE SDB ARE OPERATIONALLY FEASIBLE FOR THE APPLICANTS, WOULD PARTIALLY AMELIORATE THE HARM TO NEOMODAL AND ITS NEO SHIPPERS, AND WOULD RESULT IN A GREATER BENEFIT TO NEO SHIPPERS THAN A DETRIMENT TO THE CONRAIL BREAK-UP.

Throughout this proceeding and throughout informal discussions with the Applicants, there has been no claim or contention, by either CSX or NS, that the protective conditions sought by the SDB were not operationally feasible. In fact, the SDB developed the protective conditions, in part, to merely reflect the service provided by the Applicants prior to the Conrail break-up; and, in part, as an accommodation to the post proceeding intermodal plans of CSX and NS. The conditions were not developed to unreasonably interfere with or frustrate the Applicant's intermodal plans, but were designed to enable NEO shippers to continue to receive adequate service through Neomodal and the W&LE. Again, the SDB is not seeking to enjoin the intermodal plans of the Applicants, but is merely seeking to continue the existing, competitive intermodal service through Neomodal.

By imposing the following SDB protective conditions, the STB would insure NEO shippers competitive intermodal options and would preserve the essential intermodal service now provided by the W&LE and Neomodal. Without the issuance of said conditions and the ongoing oversight by the STB, there would be a loss of valuable competitive intermodal service with a resulting harm to NEO shippers. Without STB action, there is no incentive for the Applicants to negotiate with the SDB, particularly in light of their future intermodal plans.

The conditions requested by the SDB would insure the continued viability of Neomodal and would save it from bankruptcy. This outcome is obviously a greater benefit to the public than any detriment to the Applicants in their break-up of Conrail. In fact, the

Applicants have never proffered any arguments or claims that these limited conditions would, in any way, impact their divestiture of Conrail and its associated benefits.

Chairman Morgan stated during the oral arguments in this proceeding that it is important that Neomodal survive. Consistent therewith, the STB has acknowledged in this proceeding that the W&LE "provides valuable competitive service to shippers, ...also provides a transportation network that could be important to shippers if the major carriers have difficulty providing service" *STB Finance Docket No. 33388, Decision No. 89, at 108.* Like the W&LE, Neomodal provides valuable competitive intermodal service to NEO shippers and represents a competitive alternative to the Applicants' intermodal service. Finally, like the W&LE, Neomodal and SDB are entitled to protective conditions to insure this "valuable competitive service to shippers" and the preservation of this essential service.

CONCLUSION

In conclusion, the record reflects that the operational and eventual financial problems facing the SDB and its Terminal did not exist prior to the Conrail break-up. Again, do not be misled by the shallow claims of the Applicants that the "core problem" of Neomodal is its location. In fact, the problem with Neomodal is the post proceeding intermodal plans of the Applicants.

But, SDB, through this petition, is not seeking to enjoin or in any way interfere with the Applicants' intermodal plans or with this break-up. No, SDB is merely requesting the reconsideration of the following protective conditions to insure the continued viability of Neomodal for the benefit of NEO shippers, to wit:

1.) Written assurance with remedies for ten (10) years, that at least one (1) CSX intermodal train operating East and one (1) intermodal train operating West will stop daily at its Willard, Ohio Yard and daily pick up and/or drop off cars to W&LE and Neomodal;

2.) Written assurance that CSX will connect the W&LE directly into its Collingwood, Ohio Yard and provide timely, reliable, daily access thereto;

3.) Written assurance, with remedies for ten (10) years, that at least one (1) NS intermodal train passing through its Bellview, Ohio Yard, in all directions, will daily stop and pick up or drop off cars to W&LE and Neomodal;

4.) Written assurance, with remedies, that CSX and NS will provide W&LE and Neomodal with competitive, timely schedules and reliable service within the CSX and NS systems;

5.) Written assurance, with remedies for ten (10) years, that NS and CSX will quote a levelized, total intermodal system haulage rate for NS Cleveland, NS Pittsburgh, CSX Collingwood and W&LE/Neomodal NS and CSX, such that W&LE and Neomodal are not placed in a disadvantage in the NEO marketplace from competing with other CSX and NS Ohio and Western Pennsylvania terminals;

6.) Written assurance, with remedies, that CSX and NS will provide a steady, timely supply of empty containers and trailers and intermodal rail cars to Neomodal, as required;

7.) CSX and/or NS shall enter into guaranteed ten (10)-year take or pay lift contract(s) with Neomodal at a 1998 level of 20,000 lifts per year, at Thirty Dollars ($30.00) per lift. The Thirty Dollar ($30.00) lift rate and the 20,000 lifts per year shall escalate at five percent (5%) per year, compounded, for the ten (10)-year period; and

8.) Written assurances that CSX and NS will aggressively market and sell Neomodal as if it were their own terminal.

Respectfully Submitted

Randall C. Hunt, Esq. (0016865), of
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ATTORNEYS FOR
STARK DEVELOPMENT BOARD, INC.

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing was sent by ordinary U.S. mail this 11th day of August, 1998, to the counsel and/or parties of record on the restricted service list.

Randall C. Hunt (0016865), of
KRUGLIAK, WILKINS, GRIFFITHS
& DOUGHERTY CO., L.P.A.
ATTORNEYS FOR
STARK DEVELOPMENT BOARD, INC.

STB FD-33434 8-4-98 I ID-190364

190364

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I

UPS Next Day Air

August 3, 1998

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

Re: Track Tech. Inc.
–Acquisition and Operation–
The Burlington Northern & Sante Fe
Railway Company
Finance Docket No. 33434

Dear Mr. Williams:

Please find enclosed the original and ten copies of United Transportation Union's Notice of Dismissal for filing in the above-captioned matter. In accordance with prior Board orders we have also enclosed a disk in WordPerfect format.

Thank you for your cooperation.

Sincerely,

Daniel R. Elliott, III
Assistant General Counsel

cc: C. J. Miller, III, General Counsel

BEFORE THE
SURFACE TRANSPORTATION BOARD

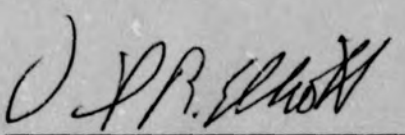
FINANCE DOCKET NO. 33434

TRACK TECH. INC.
– ACQUISITION AND OPERATION –
THE BURLINGTON NORTHERN AND SANTE FE RAILWAY COMPANY

NOTICE OF DISMISSAL

United Transportation Union ("UTU") respectfully notifies the Board of its dismissal of UTU's Petition to Revoke in this action. On August 22, 1997, Track Tech, Inc. filed its Verified Notice of Exemption to acquire and to operate certain lines of Burlington Northern Santa Fe Railroad ("BNSF"). On May 8, 1998, UTU filed a Petition to Revoke the exemption in this proceeding. On May 26, 1998, BNSF moved to hold the proceeding in abeyance based on its belief that an agreement could be reached with UTU to resolve the labor organization's concerns. Neither Track Tech nor BNSF responded to UTU's Petition to Revoke, and the Board has not ruled on the matter. Subsequently, UTU and BNSF did resolve their differences regarding the Notice of Exemption. Based on the foregoing discussion, UTU withdraws its Petition to Revoke.

Respectfully submitted,



Daniel R. Elliott, III
Assistant General Counsel
United Transportation Union
14600 Detroit Avenue
Cleveland, Ohio 44107

CERTIFICATE OF SERVICE

This is to certify that a copy of the foregoing United Transportation Union's Notice of Dismissal has been served this 3rd day of August, 1998 via first-class, postage pre-paid mail upon the following:

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STB FD-33388 7-31-98 I ID-190326

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July 31, 1998

ENTERED
Office of the Secretary

AUG - 3 1998

Part of
Public Record

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

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

Dear Secretary Williams:

Enclosed are the original and 25 copies of the Petition to Stay of APL Limited. A 3.5-inch diskette with the file name apl.26 in Word 6.0 format is also enclosed.

Please time and date stamp the extra copy of this letter and pleading. Thank you for your assistance. If you have any questions, please call me.

Sincerely yours,

Louis E. Gitomer
Attorney for APL Limited

190326

ORIGINAL

APL-26

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 TO STAY OF APL LIMITED

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Attorneys for:
APL LIMITED

Dated: July 31, 1998

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 TO STAY OF APL LIMITED

Pursuant to 49 CFR § 1115.3(f) APL Limited ("APL") seeks a stay of the implementation of the division of the assets of Consolidated Rail Corporation ("Conrail") between CSX Transportation, Inc. ("CSXT") and Norfolk Southern Railway Company ("NS") pending clarification and/or reconsideration of Decision No. 89 by the Surface Transportation Board (the "Board"), or the completion of judicial review.[1]

BACKGROUND

APL is involved in intermodal transportation, providing both international and domestic service. The intermodal transportation that APL provides and receives was deregulated by the Interstate Commerce Commission in *Improvement of TOFC/COFC Regulation*, 364 I.C.C. 731 (1981). After deregulation, APL entered into a Transportation Service Agreement (the "TSA") with Conrail on June 1, 1988 (*See* CSX/NS-178, Volume 3D, at 205-259).

---

[1] APL does not seek the stay of the effectiveness of Decision No. 89 insofar as it permits the joint control of Conrail.

Concurrently, APL entered a lease (the "Lease") of real estate with Conrail in order to construct a state-of-the-art intermodal facility in northern New Jersey, the South Kearny Terminal, in order to facilitate APL's intermodal operations to, from and through the New York City metropolitan area (*See* CSX/NS-178, Volume 3D, at 319-353). APL paid $25 million to construct the South Kearny Terminal, and in return Conrail agreed to lease the real estate to APL for $1 per year. The Lease terminates if APL terminates the TSA, but the Lease continues if APL simply negotiates a substitute TSA. *Id.* at 333. This arrangement has continued with Conrail for ten years, and the TSA and Lease are not scheduled to expire until May 31, 2004; the Lease has an eight year renewal option as long as a substitute or successor TSA is in effect. *Id.* at 323.

Conrail is the only railroad capable of serving all of the origins and destinations in the northeast United States where APL requires service. After CSXT and NS divide Conrail, neither will be able to provide the same geographic scope of service that has been provided by Conrail. Indeed, as a result of the division of Conrail by CSXT and NS, APL's single network service which is now provided by Conrail will be divided into two networks, served by either CSXT or NS. APL will no longer have available to it the unitary network service that it bargained for with Conrail. Not only will APL lose its unitary network service, but CSXT and NS will unilaterally decide which one of them will serve APL at so-called dual points pursuant to Section 2.2(c) of the Transaction Agreement (*See* CSX/NS-25, Volume 8B, at 25-29).

APL has been an innocent bystander throughout the process of the acquisition and partition of Conrail by CSXT and NS. APL did not cause this transaction to occur. APL did not seek to have its unitary network in the northeastern United States subdivided. In this

proceeding before the Board, APL sought to salvage what it could of its TSA by asking the Board not to approve section 2.2(c), not to override the anti-assignment clause in the TSA, and to allow APL to select which railroad would serve it at dual points. CSXT and NS sought to have the Board approve section 2.2(c), override the anti-assignment clause in the TSA, and deny APL the right to select the railroad to serve it at dual points.

Instead of adopting either of those proposals, the Board attempted to craft a condition to allow the railroads to implement the partition of Conrail during a 180-day period without creating "chaos", while preserving all of the rights of a shipper under its rail transportation contract. Unfortunately, in adopting this "Contract Condition", the Board discussed it at least six times in Decision No. 89, and it used different language with different meanings each time.[2] APL believes the Board should not allow the division of Conrail to occur when the rights of shippers under transportation contracts have been overridden and where those rights are unclear because the language of Decision No. 89 is susceptible to differing interpretations.

A STAY IS JUSTIFIED

APL will demonstrate that it is entitled to a stay of the division of the operations of Conrail because: (1) there is a strong likelihood that APL will prevail on the merits; (2) APL will suffer irreparable harm in the absence of a stay; (3) other interested parties will not be substantially harmed; and (4) the public interest supports the granting of the stay. *See Virginia Petroleum Jobbers Ass'n* v. *FPC*, 259 F.2d 921, 925 (D.C. Cir. 1958); *Washington Metropolitan Area Transit Comm'n* v. *Holiday Tours*, 559 F.2d 841, 843 (D. C. Cir. 1977) ("*Holiday Tours*"); and *Union Pacific RR. Co.-Aban.-Wallace Branch, ID*, 9 I.C.C. 2d 496, 501 (1993).

[2] See pages 17, 56, 73, 75, 113, and 175.

1. *There is a strong likelihood that APL will prevail on the merits.*

APL will prevail both in having Decision No. 89 clarified and in having Decision No. 89 overturned where the Board has overridden terms of the TSA.

a. It is clear from a simple reading of the various statements in Decision No. 89 about the Contract Condition that the Board's discussion of the Contract Condition is inconsistent and must be clarified. Not only must the Board clarify the Contract Condition, but in order to return shippers like APL to the same position they were in before the 180-day interim period, the Board must affirmatively give these shippers the right to select the carrier that will serve them at dual points without having to invoke their anti-assignment provisions and terminating their contracts since two railroads will be replacing the service of one railroad. There is no other way for the Board to "permit each of these carriers to compete for this traffic". Decision No. 89 at 73.

b. APL will also prevail on the merits in this proceeding. First, the Board has not even addressed its own requirement that, before it regulates traffic deregulated under its exemption power (now at 49 U.S.C. § 10502), it must revoke the exemption under that section of the statute. *See Rail Exemption Misc. Agricultural Commodities*, 8 I.C.C.2d 674 (1992). The Board has not revoked the exemption for intermodal transportation. Thus, it cannot regulate intermodal contracts.

In addition, the Board erred in deciding that it could use section 11321 to override the provisions of a rail transportation contract. Instead of reading the clear language of section 10709 which states that "A contract ... shall not be subject to this [P]art [A] ...", the Board engaged in linguistic gymnastics to conclude that APL had read the clear language of section 10709 "out of context". Decision No. 89 at 74. The Board erred in interpreting statutory

language that is clear on its face. Moreover, if the Board actually wanted to look to the context of section 10709, it would have looked to the legislative history which supports APL's position. *See* APL-18 at 10-18.

It is therefore likely that APL will succeed on the merits in having Decision No. 89 clarified and/or reconsidered.

2. *APL will suffer irreparable harm if the division of Conrail is not stayed.*

As previously explained in APL's verified statements filed on October 21, 1997, CSXT's affiliates, Sea-Land and CSX Intermodal, Inc. ("CSXI"), are APL's principal competitors in the market for international and domestic container transportation. Yet, CSXI, APL's chief competitor in the stacktrain market, is the intermodal "arm" of CSXT. If CSXT and its affiliates create a situation in which APL cannot compete effectively, and CSXT will certainly have that power under Decision No. 89, APL's business will not disappear; it will simply move to another intermodal provider. The most likely beneficiary is APL's main intermodal competitor, CSXI. If CSXI, in conjunction with CSXT, can divert APL's intermodal traffic, CSXT will have used the Board's merger process to significantly harm or even eliminate CSXI's largest competitor. The Board's decision gives CSXT the power to do this.

APL understands that CSXT is taking the position that the Board's decision provides that, 180 days after Day One, APL can select the railroad that will serve it at dual points only if APL exercises the anti-assignment clause in the TSA and terminates its current TSA. (APL, on the other hand, believes that the Board's decision in fact allows APL to choose its carrier on the 181st day without terminating its contract.) But -- if APL is forced to exercise the anti-assignment clause, thereby terminating the TSA, CSXT will be able to argue that, by

terminating the TSA, APL has terminated the lease of the APL South Kearny Terminal. Thus, the Board's decision will not put APL back on Day 181 to where it was on Day One. Instead it will present APL with the archetypal "Catch 22": APL will either be forced to use the rail service of CSXT, the rail affiliate of APL's principal intermodal competitor, in order to assure that the Lease continues, or it will be forced to give up its $25 million investment and the use of its key facility for its northeastern service if APL must terminate the TSA to select NS.[3] When APL signed its agreement with Conrail, it anticipated a cooperative partnership between itself and Conrail, a relationship for the long haul. What APL now faces is an adversarial relationship with CSXT and CSXI, a circumstance which the TSA did not anticipate and therefore did not address.

The northeast is a critical part of APL's network. Damaging APL's service in this region will impact the rest of its network and will result in a significant loss of revenue and competition. The main beneficiary would be CSX Corporation through its CSXI and Sea-Land subsidiaries.

Unless the Board stays the division of Conrail until it clarifies Decision No. 89, APL will suffer the harm described above. A stay would permit the resolution of this issue now. This is critical because the reason that CSXT and NS must efficiently and effectively implement the division of Conrail is to best serve the shippers.

3. *A stay will not harm CSXT or NS*

A stay of the division of Conrail's operations between CSXT and NS in order for the Board to make clear the effect of Decision No. 89 on rail transportation contracts will not harm CSXT or NS. Indeed, it will benefit them by avoiding the chaos that would result on Day 181

[3] APL has made no decision at this time as to which carrier it would select.

from the varied interpretations of Decision No. 89 that currently exist. Differing interpretations of the Contract Condition will not permit CSXT or NS to plan for operations on Day 181. The interim 180-day period would merely be a hiatus, postponing the inevitable operational problems. (The Board should bear in mind that problems on the Union Pacific did not arise until sometime after its merger was consummated.)

Moreover, as a practical matter, APL believes that since CSXT and NS have not announced when Day 1 will occur, that the Board will be able to resolve this problem well before then so as to avoid any potential harm to CSXT and NS. Since the public benefits of this transaction will not begin to accrue until after Conrail is divided, no member of the public will be harmed either.

4. *The public interest supports the stay.*

CSXT and NS agreed to section 2.2(c). They now claim that there would be chaos if they could not implement the transaction by dividing Conrail's existing transportation contracts in accord with section 2.2(c) and that no other means of dividing the contracts will work. Unfortunately, the Board has allowed CSXT and NS to use a situation of their own making as a basis for claiming that any other solution creates chaos. But, the Board's duty is to protect the public interest, not the private contract interests of parties that have prevented them from adequately planning for their transaction.

Rail transportation contracts were a cornerstone of the deregulation of the 1980's. They were clearly in the public interest because they allowed railroads and shippers to do business without government interference. *See* APL-18 at 13. Now the Board is interfering with those

contracts and adversely affecting the rights of shippers because CSXT and NS have chosen to implement their transaction through section 2.2(c). The public interest will be served by the Board's reconsideration of this intrusion into shippers' contract rights.

The overriding public interest is the sanctity of rail transportation contracts, which the Board must preserve. Granting this stay in order for the Board to clarify and/or reconsider its decision on rail transportation contracts prior to the division of Conrail so that all of the parties can plan for the second period of implementation on Day 181 is consistent with the public interest.

CONCLUSION

For the reasons set forth above, the Board should grant a stay of the implementation of the division of the assets of Conrail between CSXT and NS pending the clarification and/or reconsideration of Decision No. 89 by the Board, or the completion of judicial review.

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Dated: July 31, 1998

CERTIFICATE OF SERVICE

I hereby certify that I have caused the Petition to Stay of APL Limited in APL-26 to be served by hand on Applicants' representatives in this proceeding and by first class mail, postage pre-paid on all other parties on the service list in STB Finance Docket No. 33388.

Louis E. Gitomer
July 31, 1998

STB FD-33424 7-27-98 I ID-190258

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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

PETITION FOR RECONSIDERATION

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Attorney for John D. Fitzgerald

Due Date: July 27, 1998

Before the

SURFACE TRANSPORTATION BOARD

Finance Docket No. 33424

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

PETITION FOR RECONSIDERATION

Preliminary Statement

Protestant, John D. Fitzgerald,[1/] 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 petition for reconsideration of the decision dated June 26, 1998 (served July 6).

The Board's July 6 decision denied UTU-GCA's petition to revoke the exemption filed July 10, 1997, and denied UTU-GCA's petition to stay operation of the exemption and to reject the notice of exemption, also embraced in the same UTU-GCA filing of July 10, 1997.

This petition for reconsideration is filed in accordance with 49 CFR 1115.3, on the grounds of material error and new evidence.

1. Agreement-New Evidence. The Board's decision infers that UTU-GCA at the time it filed its petition on July 10, 1997, had the sale agreement and easement between Portland & Western Railroad, Inc. (PWR) and The Burlington Northern and Santa Fe Railway Company (BNSF). (Decision, 2 n.5). The Board's decision is misleading. The "bill of

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1/ General Chairman for United Transportation Union on lines of The Burlington Northern and Santa Fe Railway Company, with offices at 400 E. Evergreen Blvd., Vancouver, WA 98660.

sale" and "easement" are ministerial documents. They were attached to PWR's reply to petition for stay. (PWR Reply to Stay, 7/11/97, Ex. A, Ex. B). The informative agreement was not submitted until PWR's reply to petition to revoke, on July 30, 1997, and it was a redacted copy. (PWR Reply to Petition to Revoke, 7/30/97, Ex. A). A confidential copy was submitted only to the Board.[2/]

The new evidence submitted by PWR indicates that BNSF retains the effective power to control the line. The involved transaction is a "rail service easement," outside the section 10902 class exemption.

PWR cannot salvage the line without BNSF's consent. BNSF intends to to donate and convey its ownership in the rail line to Oregon Department of Transportation. (Sale Agreement, Section 7(a)). BNSF has the right to repurchase track materials if PWR should decide to sell the materials to another party. Section 7(b).

It is clear that when the sale agreement is examined it its entirely, together with the bill of sale and easement, that the transaction does not come under the section 10902 class exemption. Instead, PWR has undertaken an agency agreement with BNSF. BNSF sets the freight rates, and PWR must interchange traffic with BNSF, or be severely penalized. Instead of a lease, the full facts indicate that the transaction is simply an agency arrangement between PWR and BNSF. A franchise is not needed for such an arrangement, at least not from the STB.

2. Petition for Stay. The matter of a stay is mooted by the Board's issuance of a final decision. However, the ruling made by the Office of Proceedings is capable of recurring without effective review. The Board's decision states that it is neither appropriate nor necessary for the Board to rule that the Board has authority to con-

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2/ See: PWR Letter to STB Sec'y Williams, dated August 1, 1997.

sider stay requests filed between the time a notice becomes effective and the consummation date given in the notice. (Decision, 3-4). It is insufficient for the Board to merely state that the Office of Proceedings did not rule the matter jurisdictional. The issue is the Board's change in policy--from permitting stay requests prior to consummation--to now allowing manipulation of filing and consummation dates without adequate protection for the public or for rail employees.

UTU will not repeat its contentions on this score. They may be found in the UTU-GCA appeal filed August 1, 1997. The Board's policy has been altered without adequate explanation. It is arbitrary and capricious for the Board to rule--through its Office of Proceedings--that it will not consider a stay request. (Notice, 7/22/97).

CONCLUSION

The Board should grant reconsideration, and dismiss the proceeding as outside the class exemption; the Board should rule that it will entertain stay requests between the effectiveness of the exemption and the time of consummation.

Respectfully submitted,

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July 27, 1998

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.

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UNITED STATES OF AMERICA
DEPARTMENT OF TRANSPORTATION
SURFACE TRANSPORTATION BOARD

ENTERED
Office of the Secretary

JUL 22 1998

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 LEASE/AGREEMENTS--
CONRAIL INC. AND CONSOLIDATED RAIL CORPORATION

REQUEST OF CITIZENS GAS & COKE UTILITY TO WITHDRAW COMMENTS IN OPPOSITION TO THE APPLICATION OF CSX CORPORATION, et al., UNLESS COMPETITIVE CONDITIONS ARE IMPOSED

Citizens Gas & Coke Utility, by counsel, requests that the Surface Transportation Board (the "Board") allow Citizens Gas & Coke Utility to withdraw its Comments in Opposition to the Application of CSX Corporation, Unless Competitive Conditions are Imposed on condition that the Board order that approval of the Joint Application by the Board is subject to the terms of a Settlement Agreement entered into June 3, 1998, between Citizens Gas & Coke Utility and CSX. The terms of the Agreement between the Parties are confidential; accordingly, the Settlement Agreement is not provided to the Board. Subject to the Agreement of June 3, 1998, Citizens Gas & Coke Utility now withdraws its Comments and Request for Imposition of Conditions.

Respectfully submitted,

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SURFACE TRANSPORTATION BOARD

Finance Docket No. 33388

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

CERTIFICATE OF SERVICE

I hereby certify that I am serving a copy of the foregoing Request of Citizens Gas & Coke Utility to Withdraw Comments of Citizens Gas & Coke in Opposition to the Application of CSX Corporation, et al., Unless Competitive Conditions are Imposed to Applicants' attorneys and on all other persons of record in this proceeding.

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STB FD-33388 7-17-98 J ID-MOCH

FILE IN DOCKET

Congress of the United States

House of Representatives

Washington, DC 20515

June 19, 1998

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 WSLE and our concerns over the fate of the WSLE itself.

We believe that the conditions granted by the Surface Transportation Board will enable the WSLE to survive and service its debt in the new eastern post-merger consolidation. We anticipate that the WSLE 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

CHAIRMAN MORGAN

JUN 1 10 53 AM '98

RECEIVED
SURFACE TRANSPORTATION

I appreciate your interest in this matter. I will have your letter and my response made a part of the public docket in this proceeding. If I may be of further assistance, please do not hesitate to contact me.

Sincerely,

Linda J. Morgan

Linda J. Morgan

Enclosure

Surface Transportation Board
Washington, D.C. 20423-0001

Office of the Chairman

FILE IN DOCKET

July 17, 1998

The Honorable Marcy Kaptur
U.S. House of Representatives
Washington, D.C. 20515

Dear Congresswoman Kaptur:

Thank you for your letter regarding the proposal by CSX and Norfolk Southern (NS) to acquire control of Conrail and to divide certain assets of Conrail between the two acquiring railroads. The proceeding remains pending before the Surface Transportation Board (Board) as STB Finance Docket No. 33388.

The Board recently conducted an extensive oral argument on the proposed transaction, hearing from more than 70 witnesses over the course of the 2-day argument held on June 3 and 4, 1998. Following oral argument, the Board held an open voting conference on June 8, 1998, at which we voted to approve the proposed transaction, subject to a number of conditions. The Board currently is preparing a final written decision that implements the vote at the voting conference, which is scheduled for issuance on July 23, 1998.

In voting for approval, the Board found that the transaction, as augmented by numerous settlement agreements among the parties and as further conditioned, would inject competition into the eastern United States in an unprecedented manner. The conditions adopted by the Board, while significant, recognize the operational and competitive integrity of the overall proposal and the importance of promoting and preserving privately-negotiated agreements. In particular, the Board's conditions include 5 years of oversight, along with substantial operational monitoring and reporting to ensure that the transaction is successfully implemented; mitigation of potential adverse impacts on the environment and on safety; recognition of employee interests, including a reaffirmation of the negotiation and arbitration process as the proper way to resolve important issues relating to employee rights; and several conditions that address the vital role of smaller railroads and regional concerns about competition. I have enclosed a copy of the Board's press release describing the results of the voting conference.

With respect to the specific concerns raised in your letter, as you know, the Board has voted to impose several conditions to mitigate harm to the Wheeling and Lake Erie Railway (WLE) from the proposed transaction. You can be assured that the Board is taking the comments included in your June 19 letter into consideration in preparing its final written decision.

I appreciate your interest in this matter. I will have your letter and my response made a part of the public docket in this proceeding. If I may be of further assistance, please do not hesitate to contact me.

Sincerely,

Linda J. Morgan

Linda J. Morgan

Enclosure

Surface Transportation Board
Washington, D.C. 20423-0001

Office of the Chairman

July 17, 1998

The Honorable Steven C. LaTourette
U.S. House of Representatives
Washington, D.C. 20515

Dear Congressman LaTourette:

Thank you for your letter regarding the proposal by CSX and Norfolk Southern (NS) to acquire control of Conrail and to divide certain assets of Conrail between the two acquiring railroads. The proceeding remains pending before the Surface Transportation Board (Board) as STB Finance Docket No. 33388.

The Board recently conducted an extensive oral argument on the proposed transaction, hearing from more than 70 witnesses over the course of the 2-day argument held on June 3 and 4, 1998. Following oral argument, the Board held an open voting conference on June 8, 1998, at which we voted to approve the proposed transaction, subject to a number of conditions. The Board currently is preparing a final written decision that implements the vote at the voting conference, which is scheduled for issuance on July 23, 1998.

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Sincerely,

Linda J. Morgan

Linda J. Morgan

Enclosure

Surface Transportation Board
Washington, D.C. 20423-0001

Office of the Chairman

July 17, 1998

The Honorable Paul Gillmor
U.S. House of Representatives
Washington, D.C. 20515

Dear Congressman Gillmor:

Thank you for your letter regarding the proposal by CSX and Norfolk Southern (NS) to acquire control of Conrail and to divide certain assets of Conrail between the two acquiring railroads. The proceeding remains pending before the Surface Transportation Board (Board) as STB Finance Docket No. 33388.

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Sincerely,

Linda J. Morgan

Linda J. Morgan

Enclosure

Surface Transportation Board
Washington, D.C. 20423-0001

Office of the Chairman

July 17, 1998

The Honorable Robert W. Ney
U.S. House of Representatives
Washington, D.C. 20515

Dear Congressman Ney:

Thank you for your letter regarding the proposal by CSX and Norfolk Southern (NS) to acquire control of Conrail and to divide certain assets of Conrail between the two acquiring railroads. The proceeding remains pending before the Surface Transportation Board (Board) as STB Finance Docket No. 33388.

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Sincerely,

Linda J. Morgan

Linda J. Morgan

Enclosure

Surface Transportation Board
Washington, D.C. 20423-0001

Office of the Chairman

FILE IN DOCKET
FD - 33388

July 17, 1998

The Honorable Thomas C. Sawyer
U.S. House of Representatives
Washington, D.C. 20515

Dear Congressman Sawyer:

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Sincerely,

Linda J. Morgan

Linda J. Morgan

Enclosure

Surface Transportation Board
Washington, D.C. 20423-0001

Office of the Chairman

July 17, 1998

The Honorable Ralph Regula
U.S. House of Representatives
Washington, D.C. 20515

Dear Congressman Regula:

Thank you for your letter regarding the proposal by CSX and Norfolk Southern (NS) to acquire control of Conrail and to divide certain assets of Conrail between the two acquiring railroads. The proceeding remains pending before the Surface Transportation Board (Board) as STB Finance Docket No. 33388.

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Marcy Kaptur
Member of Congress

Steven C. LaTourette
Member of Congress

Paul Gillmor
Member of Congress

Robert W. Ney
Member of Congress

STB FD-33388 7-7-98 I ID-189277

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July 7, 1998

BY HAND DELIVERY

The Honorable Vernon A. Williams
Secretary
Surface Transportation Board
ATTN: STB Finance Docket No. 33388
1925 K Street, N.W.
Washington, D.C. 20423-0001

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

Dear Secretary Williams:

Enclosed for filing in the above-referenced proceeding, please find an original and twenty-five (25) copies of the Petition for Clarification and Modification of the Cities of East Chicago, Indiana; Hammond, Indiana; Gary, Indiana; and Whiting, Indiana (collectively The Four City Consortium) (FCC-17). Also enclosed, please find a computer diskette containing the text of this document (in WordPerfect 8.0 format).

We have included an extra copy of the filing that we request be time-stamped and returned with our messenger.

Sincerely,

Christopher A. Mills
An Attorney for
The Four City Consortium

Enclosure

FCC-17

BEFORE THE
SURFACE TRANSPORTATION BOARD

CSX CORPORATION AND CSX TRANSPORTATION, INC., AND NORFOLK SOUTHERN CORPORATION AND NORFOLK NORFOLK SOUTHERN RAILWAY COMPANY-- CONTROL AND OPERATING LEASES/ AGREEMENTS -- CONRAIL INC. AND CONSOLIDATED RAIL CORPORATION	Finance Docket No. 33388

PETITION FOR CLARIFICATION AND MODIFICATION BY THE CITIES OF EAST CHICAGO, INDIANA; HAMMOND, INDIANA; GARY, INDIANA; AND WHITING, INDIANA (COLLECTIVELY, THE FOUR CITY CONSORTIUM)

THE CITIES OF EAST CHICAGO, INDIANA; HAMMOND, INDIANA; GARY, INDIANA; AND WHITING, INDIANA (COLLECTIVELY, THE FOUR CITY CONSORTIUM)

By: C. Michael Loftus
Christopher A. Mills
Peter A. Pfohl
1224 Seventeenth Street, N.W.
Washington, D.C. 20036
(202) 347-7170

Attorneys for The Four City Consortium

OF COUNSEL:

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

Dated: July 7, 1998

FCC-17

BEFORE THE
SURFACE TRANSPORTATION BOARD

CSX CORPORATION AND CSX TRANSPORTATION, INC. AND NORFOLK SOUTHERN CORPORATION AND NORFOLK SOUTHERN RAILWAY COMPANY -- CONTROL AND OPERATING LEASES/AGREEMENTS -- CONRAIL INC. AND CONSOLIDATED RAIL CORPORATION	Finance Docket No. 33388

PETITION FOR CLARIFICATION AND MODIFICATION BY THE CITIES OF EAST CHICAGO, INDIANA; HAMMOND, INDIANA; GARY, INDIANA; AND WHITING, INDIANA (COLLECTIVELY THE FOUR CITY CONSORTIUM)

Pursuant to 49 C.F.R. § 1117.1 and the Board's June 8, 1998 Open Voting Conference ("June 8 Voting Conference") decision, the Cities of East Chicago, Indiana; Hammond, Indiana; Gary, Indiana; and Whiting, Indiana (collectively the "Four City Consortium") hereby file this Petition for Clarification and Modification of the conditions included in the May 29, 1998 Final Environmental Impact Statement ("EIS") for the proposed acquisition of Conrail Inc. et al. ("Conrail") by Norfolk Southern Corporation, et al. ("NS") and CSX Corporation, et al. ("CSX") (collectively "Applicants").

During its June 8 Voting Conference, the Board adopted as a condition to its approval of the Conrail control application, among other things, the staff Merger Team's final recommendation number 33, which proposed that the Board impose the specific mitigation measures recommended by the Section of Environmental Analysis ("SEA") in the Final EIS.[1] The Board also approved SEA's recommendation that the Board reserve the right to clarify and/or modify the conditions contained in the Final EIS as necessary, based on further review of the transaction, and input by parties, as follows:[2]

> SEA also recommends that the Board reserve the right to fine tune SEA's recommended conditions and make technical changes in the Board's final written decision based on the continuing environmental input the Board will receive over the next few weeks.
>
> Adopting this approach will not prejudice any party. Every party will have an opportunity to address the environmental conditions imposed by the Board in its final written decision by filing an administrative appeal of that decision after it is issued.

---

[1] The Merger Team's Final Recommendations adopted by the Board consist of 45 separate conditions. The environmental conditions directly applicable to the Four City Consortium are set forth in Chapter 7 of the Final EIS and include, among others, Conditions 1, 6, 8, 24, and 65.

[2] SEA indicated at the June 8 Voting Conference that it "believes the environmental mitigation process should continue to be flexible." June 8 Voting Conference Transcript, at 115.

June 8 Voting Conference Transcript, at 115.

By this petition, and pursuant to the Board's guidance as described above, the Four Cities hereby request that the Board clarify and modify the environmental mitigation for post-transaction rail operations in the Four Cities region as set forth in the Final EIS. In particular, the Four Cities urge the Board to take specific action to: (1) enhance accountability and ensure that the Applicants' representations made to the Board and to the Four Cities are actually realized, (2) address CSX's recent July 1, 1998 filing requesting the Board to relieve it from certain obligations pertaining to operations over line segments in the Four Cities area as specified in the Final EIS, and (3) ensure that certain inaccuracies in the conclusions set forth in the Final EIS pertaining to environmental justice are corrected and that appropriate mitigation is imposed as warranted.[3]

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[3] In Decision No. 88 served June 19, 1998, the Board indicated that it is not, at this time, entertaining petitions for clarification, or other responsive pleadings pertaining to non-environmental aspects of its decision until after the final written decision is served on July 23, 1998. Conversely, the Board has specified that it will entertain petitions addressing the environmental conditions of the transaction. See July 8 Voting Conference Transcript at 115, 127; Decision No. 88, at 2. This petition is timely because it is directed at the environmental conditions as adopted by the Board at the July 8 Voting Conference and thus comports with the Board's decisions in this case.

The need for these additional Final EIS refinements cannot be overstated. In particular, the Board should be aware that on June 18, 1998, another fatal accident occurred in the Four Cites region, resulting in the death of three train passengers and injuries to six others, when a commuter train plowed into a 22-ton, 72 foot-long truck that was apparently trapped between two at-grade crossings in Portage, Indiana. This is the third fatal crash that has transpired in the Four Cities region since the application in this case was filed. Collectively, these accidents have resulted in the deaths of six people, and injuries to many others. These continuing tragic accidents underscore the real rail safety problems occurring in northwest Indiana, and the dangers that will be caused by the incremental increases in rail traffic scheduled for the Four Cities as a result of the Conrail transaction unless the Board imposes adequate mitigation.[4]

I. Reporting Requirements Necessary to Ensure Compliance with Board-Imposed Environmental Conditions

Throughout this proceeding, in their October 21, 1997 Comments and Request for Conditions (FCC-9), their February 2, 1998 Comments on the Draft EIS (FCC-13), their February 23, 1998

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[4] See Exhibit 1, containing press clippings on the tragic June 18, 1998 rail/highway crossing accident.

Brief (FCC-15), and elsewhere (including the June 4, 1998 oral argument), the Four Cities have questioned the myriad assurances made by the Applicants that their operational plans for northwest Indiana will mitigate the environmental, safety, and associated rail traffic congestion harms associated with the transaction. The Applicants' response to any questioning of their proposed operating plans has generally been: "trust us, we will improve the situation." The Four City Consortium remains skeptical about whether the Applicants' self-serving promises actually can and will be realized.[5] What is clear is that, if the Board is going to take the Applicants' word for it that certain operational improvements will be made that will ameliorate the adverse environmental impacts the transaction would otherwise have on the Four Cities region, the Board must implement appropriate oversight mechanisms to ensure accountability.

At its June 8 Voting Conference, the Board approved the imposition of certain reporting requirements as conditions to approval of the application, namely, the requirement that Applicants regularly report on their construction and other

---

[5] The Board need only look to the pledges made by the Union Pacific Railroad to the Board in the Union Pacific/Southern Pacific merger proceeding on post-transaction "efficiencies" and "operational improvements" to realize that vague promises made by carrier applicants in the context of a railroad merger proceeding often are not based on reality and, at best, should be closely scrutinized.

capital improvements as well as on their operations in the Chicago terminal area.[6] While these conditions no doubt will be helpful to the Board and the parties in determining the Applicants' progress in carrying out their merger plans, such reporting must be augmented to include operational and construction-related information relating specifically to the Four Cities region. This reporting requirement should be included as part of the Board's final written decision in this case. Accordingly, the Four Cities request that the Board add a new subsection (j) to Final EIS Condition 24 implementing certain additional reporting requirements, as follows:

> **j) The Applicants shall provide reports to the Four City Consortium on a monthly basis commencing on the effective date of the Board's written decision containing the following information:**
>
> **(1) On a daily average basis (calculated monthly), the number of trains per day operated in both (and separately in each) direction over the following rail line segments:**
>
> - **The Pine Junction-to-State Line Tower portion of the Pine Junction-to-Barr Yard line segment (C-023)**

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[6] Included in the adopted recommendations are recommendation number 35, requiring Applicants to submit monthly reports about the status of each of their construction and capital projects, including those in the Chicago terminal area, and recommendation number 42, requiring Applicants to provide weekly reports about the operation of the Chicago Terminal Area, including construction projects.

- **The Tolleston-to-Clarke Junction rail line segment (C-024)**

- **The Tolleston-to-Hobart portion of the Warsaw-to-Tolleston line segment (C-026)**

- **The Hobart-to-State Line Tower portion of the Hobart-to-Burnham Yard line segment (N-469)**

(2) On a daily average basis (calculated monthly), the average speed of trains operating over the Pine Junction-to-State Line Tower portion of the Pine Junction-to-Barr Yard line segment (C-023). The speed should be calculated on an average miles-per-hour basis based on the recorded time of train departure from Pine Junction and the recorded time of train arrival at State Line Tower for westbound trains, divided by the length of the line segment; and vice versa for eastbound trains.

(3) Status of CSX's project to restore to service and upgrade the Tolleston-to-Clarke Junction rail line segment (C-024) and the Tolleston-to-Hobart portion of the Warsaw-to-Tolleston line segment (C-026) in the event that the Board determines, based on further review,[7] that these currently-inactive line segments may be restored to service.

(4) A detailed description of the Applicants' compliance with the environmental conditions imposed herein, including each of Conditions 24 (a) through (i), as well as Conditions 1, 6, and 8 as applicable.

The imposition of these reporting requirements will provide the Board and the Four Cities with sufficient information to monitor the Applicants' progress toward achieving promised

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[7] A discussion of the planned construction and improvement of the Tolleston-to-Clarke Junction rail line segment (C-024) and the Tolleston-to-Hobart portion of the Warsaw-to-Tolleston line segment (C-026) is set forth in Part III below.

improvements in rail operations in the Four Cities. These additional reporting requirements are especially important because the Final EIS recommendations adopted by the Board, as applicable to the Four Cities, are to a large degree either non-binding on the Applicants or qualified by language such as "to the extent practicable" -- leaving it to the Applicants' discretion as to whether promised mitigation will actually be undertaken to the full extent necessary to achieve the intended results.[8] Also, because the Board's imposition of the environmental mitigation measures included in the Final EIS was largely based on the Applicants' assurances that certain planned operational and construction-related improvements will more than offset the transaction's harms on the Four Cities, the reporting requirements suggested above are absolutely necessary to ensure that such promises actually will be realized.[9]

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[8] See e.g. June 4, 1998 Oral Argument Transcript, at 14-18 (statement by Congressman Peter Visclosky, criticizing the provisions of the Final EIS for a lack of accountability).

[9] For example, a typical response by SEA to one of the many concerns raised by the Four Cities about safety and public health impacts associated with the transaction was as follows:

> The Applicants have committed to improvements that would allow an increase in freight train speed to 40 miles per hour and would change the highway/rail at-grade warning devices to state-of-the-art constant warning time devices. These changes would decrease the amount of time that trains block highway/rail

Only with these augmented protections will the Four Cities be able to determine whether the Applicants are complying fully with the Board's decision, and fulfilling their pledge to mitigate the environmental impacts of the Conrail transaction on northwest Indiana.

II. RESPONSE TO CSX's JULY 1, 1998 REQUEST THAT IT SHOULD BE RELIEVED FROM ITS BOARD IMPOSED FINAL EIS OBLIGATIONS

In its July 1, 1998 Report on the Final EIS, CSX requests the Board to modify certain recommended conditions contained in the Final EIS as adopted by the Board at its July 8, 1998 Voting Conference. In order to mitigate traffic delay and safety problems, Condition 24(a) of the Final EIS requires CSX to upgrade present highway/rail at-grade crossing signal warning systems in the Four Cities by installing constant warning time circuits at a total of eight crossings on the Pine Junction-to-Barr Yard (C-023) and Tolleston-to-Clarke Junction (C-024) rail line segments.

> at-grade crossings by shortening train pass-through time and gate down time at crossings. . . . SEA maintains that the improvements undertaken by CSX and NS would mitigate the effects associated with the increased number of trains.

Final EIS, Chap. 5, at 5-143.

CSX's July 1, 1998 Report alleges that installing such circuits at three of the eight crossings would be infeasible, and CSX has requested that the Board modify Condition 24(a) to require CSX to upgrade the crossings as follows:

- Install constant warning time circuits as recommended in the Final EIS at the following crossings:

  -- Calumet Avenue

  -- Indianapolis Boulevard (U.S. 20)

  -- Railroad Avenue

  -- Kennedy Avenue

  -- 5th Avenue (U.S. 20)

- Install constant warning time circuits for westbound trains and upgrade to motion detectors for eastbound trains at the following crossings:

  -- Hohman Avenue

  -- Sheffield Avenue

- Upgrade to motion detectors at the Columbia Avenue crossing, and upgrade to constant warning time circuits if and when a planned configuration of trackage and interlockings in the vicinity of the crossing is completed.

CSX's objections to the Board-ordered mitigation are troublesome for several reasons. First, as the Board is well-aware, CSX disavowed at oral argument any previous concerns it may have had with these Final EIS provisions. In particular, at oral argument, CSX counsel urged the Board to adopt, without

qualification, all of the environmental conditions included in condition 24 as pertaining to the Four Cities.[10] Apparently, now that the Board has approved the application, CSX's position has changed, and it is suddenly unable or unwilling to abide with the specific mitigation requirements of the Final EIS. The Four Cities urge the Board to deny CSX's latest backtracking on environmental mitigation. In particular, the Board should resist CSX's efforts to relitigate an issue of which it had full

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[10] CSX counsel declared several times at oral argument that the Board should impose on the Applicants all of the Final EIS conditions pertaining to the Four Cities, without exception. In particular, counsel reassured the Board that:

-- "We believe that the Final Environmental Impact Statement correctly analyzed all of the environmental issues that were raised here in the last two days, and that the Board can rely on that analysis with confidence that all the relevant information was taken into account and that it was correctly and carefully analyzed." June 4, 1998 Oral Argument Transcript, at 446.

-- "I understand that the Four Cities say that they want accountability. We believe the recommendations in the Final Environmental Impact Statement provide that accountability. There are detailed recommendations in condition 24 that we are willing to live by . . ." Id. at 449.

-- "[W]e stand here willing to undertake the many aspects of condition 24. We will continue to work with the Four Cities. We understand their concerns. But we believe that this transaction, as we have presented it and as the Board -- or as the section of environmental analysis has recommended that it be conditioned, is adequate to satisfy their concerns." Id. at 453.

knowledge prior to oral argument, which it specifically disavowed as being a problem at oral argument, and which clearly would erode the Board-ordered protections included in the Final EIS.

CSX's efforts to unravel the imposition of some of the Final EIS protections places the residents of northwestern Indiana at heightened risk of environmental harm, as the crossing upgrades mandated in Condition 24(a) are virtually the only non-discretionary conditions imposed by the Board for the Four Cities. Even if the so-called technical problems cited by CSX in connection with the three crossing upgrades are, in fact, legitimate,[11] any removal of such protections from the Final EIS will leave a large void in the environmental mitigation ordered by the Board for the Four Cities.

The Four Cities suggest that, if the Board decides that CSX's July 1, 1998 Report has merit, it should take the following actions to address the situation. First, the Board should establish a 120-day negotiation period for discussions between CSX and the Four Cities (with appropriate consultation with the

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[11] The Four Cities did not receive CSX's July 1, 1998 Report until the afternoon of July 2, and thus have not yet been able to undertake an engineering analysis of the three particular crossings that the Applicants have cited as presenting technical difficulties to upgrade. Thus, the Four Cities are unable at this time to determine the merits of the Applicants' objections to the Final EIS's provisions -- although the Four Cities note SEA's conclusion in the Final EIS that installation of such at-grade crossing upgrades is, in fact, technically feasible.

Indiana Department of Transportation) to address the three problem crossings, and to negotiate alternative mitigation strategies that will be taken if the parties mutually agree that the upgrades are technically infeasible to implement.

Second, during this 120-day negotiation period (and thereafter until final resolution of the matter), CSX should be required to cap traffic over the affected Pine Junction-Barr Yard line segment at current average daily train-frequency levels, and/or implement appropriate rush-hour curfews that would restrict scheduled train operations over the affected rail line segments during certain critical hours of the day (6:00 to 9:30 AM and 3:00-6:30 PM) to no more than three trains in each direction. In addition, the Board should require CSX to maintain the current inactive status of the Hobart-to-Clarke Junction line segment during this 120-day period.

Finally, the parties should be required to report back to the Board by the end of the 120-day negotiation period on whether any agreement has been reached on the crossing upgrades. If no agreement has been reached, the Board should either impose appropriate upgraded crossing protection, or maintain in place the cap and/or curfew until appropriate alternative mitigation can be considered and imposed by the Board. By imposing such a 120-day moratorium, the Board would maintain the status quo for

train movements over the impacted Four Cities rail lines, at least until the parties can reach agreement on an appropriate alternative mitigation protection strategy.[12]

III. CLARIFICATION OF FINAL EIS ENVIRONMENTAL JUSTICE INACCURACIES

In Chapter 5, pages 5-154 and 5-155 of the Final EIS, SEA summarized its conclusions pertaining to the environmental justice impacts of the transaction on the Four Cities. In particular, SEA concluded that the Hobart-to-Tolleston and Tolleston-to-Clarke Junction rail line segments in Gary (collectively the "Hobart-Clarke Junction line") failed to meet the Board's initial threshold requirements for analysis of environmental justice impacts, and, thus, that no review of such impacts was necessary.[13] However, as counsel for the Four Cities advised the Board at oral argument,[14] this conclusion is squarely at odds with SEA's own factual determinations. Accordingly, the Board should reconsider whether environmental justice concerns warrant the imposition of additional mitigation

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[12] This approach is similar to the 120 day negotiation period approved by the Board at its June 8, 1998 Voting Conference between the Applicants and the State of Ohio relating to 29 grade crossing upgrades.

[13] A similar conclusion was reached in the Draft EIS (see Appendix K, page K-19).

[14] See June 4, 1998 Oral Argument Transcript, at 165.

with respect to CSX's proposal to restore the inactive Hobart-Clarke Junction line to service.

In Table K-15 of the Draft EIS, SEA determined that both segments of the Hobart-Clarke Junction line segments do, in fact, meet the Board's requirements for environmental justice analysis.[15] SEA (and the Board) thus clearly erred in failing to consider whether mitigation is appropriate for this line, as requested by the Four Cities. In light of this error, the Four Cities request the Board to find that SEA incorrectly concluded, at pages 5-154 and 5-155 of the Final EIS, that the two segments comprising the Hobart-Clarke Junction line do not meet the Board's initial environmental justice criteria for further analysis. In addition, the Board should add the following new subsection (k) to Chapter 7, Condition 24 in the Final EIS:

> **(k) The Applicants shall suspend any action, construction or otherwise, to restore the inactive Tolleston-to-Clarke Junction rail line segment (C-024) and the inactive Tolleston-to-Hobart portion of the Warsaw-to-Tolleston rail line segment (C-026) to service until the Board has conducted an investigation of whether**

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[15] SEA incorrectly cites Appendix K, page K-19 of the Draft EIS as the appropriate reference for the Hobart-Clarke Junction line. Portions of this line are actually referenced at pages K-22 and K-23. SEA's environmental justice summary table K-15 confirms that both the Tolleston-to-Clark Junction segment (C-024) and the Warsaw-to-Tolleston segment (C-026) meet the Board's threshold for environmental justice analysis (with the Tolleston-to-Clarke Junction line segment having a total minority population of 98.7 percent).

environmental-justice impacts warrant mitigation, which investigation shall afford interested parties the opportunity to submit additional evidence on the matter prior to making a final determination as to the future status of the line and appropriate mitigation. If it is ultimately determined that the line may be restored to service, the Board will consider whether the Applicants shall be required to implement appropriate mitigation such as noise/safety mitigation for rail operations in the vicinity of the low-income Roosevelt Manor Housing Project in Gary and accommodation of the proposed expansion of the Gary-Chicago Airport (with appropriate Board oversight if necessary).

This modification of the recommended environmental mitigation conditions will ensure that the residents of the Four Cities are protected from the harms associated with the Applicants' planned reopening of the long-inactive former PRR line between Hobart and Clarke Junction, and that the Board satisfies its mandate to protect the interests of minority and low income populations from the environmental harms associated with the transaction.

CONCLUSION

In order to adequately protect the residents of northwest Indiana from the safety and environmental harms associated with this transaction, the Four City Consortium respectfully urges the Board to clarify and/or modify the Final EIS, and, in particular, to impose the several modifications to the conditions recommended in the Final EIS discussed herein to

ensure that the Applicants' post-transaction operations over area rail line segments will not cause environmental harm.

Respectfully submitted,

THE CITIES OF EAST CHICAGO, INDIANA; HAMMOND, INDIANA; GARY, INDIANA; AND WHITING, INDIANA (COLLECTIVELY, THE FOUR CITY CONSORTIUM)

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Dated: July 7, 1998

EXHIBIT 1

Chicago Sun Times

June 18, 1998

BY MARK SKERTIC, PHILIP FRANCHINE AND JOHN CARPENTER

Three passengers were crushed to death and six injured this morning when a Chicago-bound commuter train plowed into atruck stopped on tracks in Indiana, sending a 22-ton coil of steel barreling down the aisle of the train.

The South Shore line expects service to be operating normally by this afternoon's rush hour, after a morning that passengers who survived the crash in Portage, Ind., described as something out of nightmare.

"It was just a jolt like you wouldn't believe," said John Madden, 40, a passenger who was injured. "The lights went out. Sparks were everywhere. We were ripping down [electrical] power poles as we were pushing the tractor trailer. I thought this was it. I thought I was history."

Portage Fire Department Capt. T.J. Chavez, who arrived on the scene at 4:35 a.m., said the victims were killed when the coil of steel rolled off the truck and cut through the aluminum train car.

"We climbed in the hole in the front that was made by the coil," Chavez said. "The thing that catches your eye is that coil sitting in the aisle."

Pulling two flatbed trailers, the truck driver was crossing a series of railroad tracks to enter Midwest Steel Co., when the gate on a Conrail line track came down and he was forced to wait for a passing freight train, authorities said.

The back end of the second trailer was on the South Shore tracks when that gate came down and a two-car train camethrough, traveling at 75 m.p.h.

Realizing the crash was unavoidable, the engineer of the electrically powered train jammed on the emergency brake, so he and the conductor could run from the cab into the passenger section to warn passengers to move to the back, authorities said.

The three victims were sitting in the front of the lead car. The train hit the trailer broadside, dislodging the coil of steel. It crushed 10 rows of seats, fire officials said.

Dead were William J. McCombs, 57, of LaPorte, Ind.; Gary G. Berndt, 53, of Baroda, Mich.; and Glenn Walker, 38, of Michigan City, Ind. Walker was a South Shore employee riding as a passenger, said a spokesman for the Porter County Coroner's Office.

Mark Veselica, 31, of Valparaiso, Ind.; John Verde, 39, of Chesterton, Ind., and Jackie Siegel, 64, and Salwa Agemy, 27, two women from Michigan City, Ind., were treated at Porter Memorial Hospital in Valparaiso.

Ronald McBride, 50, of Sauk Village, and Madden, 40, of Valparaiso, were treated at St. Mary's Medical Center in Hobart, Ind.

The truck driver, identified as Keith Lintz, 39, of Top Line Express, of Lima, Ohio, was cited for being at least 35 tons overweight and not properly securing his load, among other violations.

June 19, 1998

Signs point to gate jump

BY MARK SKERTIC SUBURBAN REPORTER

Paint scrapings found on the trailer of a truck involved in the fatal crash of a South Shore Line train could indicate the driver tried to go through the intersection as the gates were coming down, federal authorities said today.

"There are some scrape marks with some paint" on the trailer involved in the collision, said Michael Martino, National Transportation Safety Board chief investigator. What appeared to be fresh red paint scrapes also were found on the south crossing gate, he said. The truck's trailers were red.

"We are taking samples of the paint from both the trailer and the gate and sending it back to our laboratory in Washington" to see if they match, he said.

The gate would have had to be down for the truck to be scraped on the side where paint was found, Martino said. According to police, the driver has said the gates were up when he entered the intersection.

Investigators were back at the scene early today, still trying to piece together how a tandem truck carrying three 20-ton steel coils became trapped between two sets of railroad track early Thursday. One of the two trailers driver Keith Linz was hauling sat on the South Shore track while he waited for a westbound Conrail train to pass.

Seconds later, three South Shore riders were killed when their train slammed into the rear trailer, dislodging a steel coil that burst through the first car and rolled about 35 feet. Linz, 39, of Niles, Mich., was not hurt.

Testing of the intersection gates and lights continued today. Investigators are trying to determine if the trucker had enough warning that trains were coming before he turned north off Route 12 to go to Precoat Metals.

The National Transportation Safety Board said today that South Shore reported the crossing gates and lights had been tested the day before the crash and were working properly.

Investigators will return to the scene about 3 a.m. Saturday to re-create the accident under similar pre-dawn conditions.

CERTIFICATE OF SERVICE

I hereby certify that this 7th day of June, 1998, I have served copies of the foregoing Petition for Clarification and Modification by hand upon Applicants' counsel:

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and by first-class mail, postage pre-paid upon:

The Honorable Rodney Slater
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The Honorable Janet Reno
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The Honorable Jacob Leventhal
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and upon all other Parties of Record in Finance Docket No. 33388.

Peter A. Pfohl