

STB

FD-33388

6-16-98

I

ID-188603

188603

LAW OFFICES

REA, CROSS & AUCHINCLOSS

SUITE 570

1707 L STREET, N.W.

WASHINGTON, D. C. 20036

(202) 785-3700

FACSIMILE: (202) 659-4934

ENTERED
Office of the Secretary

THOMAS M. AUSTIN

LFC C. FRANEY

JOHN D. HEFFNER

KEITH G. O'BRIEN

BRYCE REA, JR.

BRIAN L. TROIANO

ROBERT A. WIMBISH

JUN 16 1998

Part of
Public Record



June 16, 1998

Hon. 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

WYANDOT - 6

**MOTION TO STRIKE, AND REQUESTS FOR
RECONSIDERATION AND CLARIFICATION
OF WYANDOT DOLOMITE, INC.**

Dear Secretary Williams:

In connection with the Board's approval of the subject CSX-NS-Conrail transaction, Wyandot Dolomite, Inc. ("Wyandot") hereby requests that the Board reconsider and clarify the protective conditions it has at least initially elected to impose in favor of aggregate shippers such as Wyandot. Additionally, for the reasons set forth below, Wyandot requests that all evidence and argument presented by the Primary Applicants in connection with certain settlement agreements entered into and/or offered to the aggregate shipper parties be stricken from the administrative record. Wyandot requests such administrative action because the Board has apparently (and inappropriately) embraced a settlement offered by Primary Applicants and rejected by Wyandot, and because the protective relief generally outlined by the Board's staff does not appear to provide the sort of protection that the Board intended for aggregate shippers such as Wyandot.

The record will reflect that Wyandot requested that the Board impose a trackage rights obligation upon Norfolk Southern, which would effectively replicate the level of single carrier rail service that Wyandot enjoys today. It has endeavored to

make clear that its requested relief would serve to protect the status quo, and would preserve competition within the Ohio aggregate market area. It appears that the condition recommended to the Board on June 8th would fall far short of such protection -- as it is predicated upon an arrangement that restricts single-carrier access for a limited duration to only those customers now on Conrail with which Wyandot currently has contracts.¹ Since the basis for the staff's recommendation is a document that became (if it ever properly did) a part of the administrative record only after the closing arguments, the Board's intended actions, as Wyandot currently construes them, are manifestly unfair.

> BACKGROUND

During the course of this proceeding, three Ohio-based aggregate and limestone producers sought protective relief to ameliorate the adverse impacts of becoming "1-to-2" shippers.² These three companies -- Wyandot, National Lime & Stone Company ("National"), and Martin Marietta ("Martin") -- separately sought conditions that would ensure that each continued to enjoy single-carrier access to the same markets they serve today via Conrail -- markets to which each stood to lose competitive access absent Board-imposed relief.³ On June 3rd, Martin (evidently lacking confidence that the Board would adopt suitable protective relief)

¹ Additionally, the protective conditions recommended by the Board's staff could result in other serious unit train restrictions not currently in place.

² Because of the economics of the aggregate industry, and as Wyandot has established in earlier filings, the harms of becoming a "1-to-2" shipper are uniquely severe to such entities as Wyandot.

³ The "markets" in question involve much more than merely those customers to which each of these three shippers have existing contracts. With respect to Wyandot, its direct access to Conrail affords it access to large portions of eastern Ohio, where Wyandot today has the ability to compete for the business of many other potential aggregate purchasers. The demonstrated loss of single-carrier service that will result from this transaction (unless properly remedied) would not only deprive Wyandot of direct access to its existing customers on Conrail territory, but it also deprives Wyandot of much its ability to compete for other customers in the relevant Conrail-served region.

Hon. Vernon A. Williams
June 16, 1998
Page Three

elected to settle its dispute with the Primary Applicants and withdrew from the proceeding. Wyandot's own records reflect that, at the time Martin notified the Board of its withdrawal, no party had submitted for the record the actual settlement agreement forged between Martin and the Primary Applicants. At about the same time that Martin withdrew from this proceeding, Wyandot and National received settlement offers from the Primary Applicants that were similar in nature to that accepted by Martin, but these two shippers recognized that they would not be made whole by the Primary Applicants' offers and declined to settle.

Rebuffed in their efforts to sell a short-sighted, fundamentally flawed "solution" to Wyandot and National, the Primary Applicants sought to make public the terms of their settlement offer. Indeed, despite that fact that it would unduly prejudice Wyandot's request for conditions, and would never be permitted in traditional civil court litigation, the Primary Applicants have gone so far as to attempt to introduce the proposed settlement into the subject administrative record. At the closing phases of the oral argument in the subject proceeding, the Primary Applicants offered to the Board their characterizations of the settlement proposal accepted by Martin and the related proposals rejected by Wyandot and National. Having thus attempted to introduce into the record this new (incomplete) and highly prejudicial evidence, the Primary Applicants suggested to the Board that their "generous" offers should form the basis for any relief the Board might decide to grant Wyandot and National.

On June 8, 1998, the very same day as the Board's voting conference, National's counsel informed the Board that the actual settlement offered to National (which is comparable in all respects to that offered to Wyandot) differs substantially from that outlined by the Primary Applicants in their closing arguments the previous Thursday evening. As National's counsel so aptly stated: "We write to assure that the Board... does not operate under the false impression that the agreement described by the [Primary Applicants] even begins to remedy the injuries that National will experience if the transaction is approved without conditions assuring... continued single-line service to current destinations."⁴ Despite National's last-ditch effort to

⁴ See, National's June 8, 1998 filing (no acronym designation offered). Wyandot joins with National in this observation. Indeed, the settlement offers rejected by Wyandot and National are not at all what the Primary Applicants described them to be on June 4th. National's filing contained, as an

Hon. Vernon A. Williams
June 16, 1998
Page Four

set the record straight, the Board's staff nonetheless recommended to the Board a protective condition in favor of both Wyandot and National that seems to be patterned upon the terms of the Martin settlement.

> ARGUMENT

The recommended protective conditions fall far short of making Wyandot whole

If Wyandot is to avoid harm as a consequence of the subject transaction and if it is to enjoy the same level of service post-transaction as it does today, then the Board must ensure that Wyandot will have preserved, not for some short duration of time but permanently, single-carrier access to all of the eastern Ohio market area in which it competes today. Indeed, Board Chairman Linda Morgan observed in her own closing comments at the voting conference that the protective conditions to be adopted by the Board are intended to ensure that entities "such as aggregate shippers... will be better off after the merger than they were before, and that none will have less service than they had before." If the Chairman's words mean what they say, then Wyandot should expect that it will enjoy well into the future single-carrier access to all points that it can reach today in that manner. Indeed, there is nothing in the Chairman's comments that would suggest that the protections the Board would seek to impose in favor of Wyandot carry the sort of significant time and operational limitations found in the Martin settlement.

Unfortunately, the staff recommendation, as has already been noted, refers to the Primary Applicants' settlement with Martin -- a settlement rife with restrictions and likely to remain in effect for only five (5) years.⁵ Wyandot has seen the Primary Applicants's settlement with Martin, and, not only is it much less than the Primary Applicants held it up to be at the oral argument, but its terms, if imposed elsewhere by the Board, will neither make Wyandot "better off after the merger," nor will they even protect the status quo. Instead, conditions modeled after the Martin settlement will mean that Wyandot will have "less service than they had before" the transaction.

attachment, the terms of the Primary Applicants' settlement proposal for purposes of comparison.

⁵ Wyandot notes that, if such restrictive conditions were imposed upon it, the five year effective period for the conditions would expire at the same time as the Board's oversight of the transaction is set to expire!

In order for Wyandot to be made whole by protective conditions -- if it is to enjoy the same level of service as it has today -- then the Board must ensure that the conditions it imposes provide for the following:

1. That, for aggregate traffic (a commodity that cannot move economically in two-carrier service) Wyandot will have single-carrier service to all points where it can obtain such service today;
2. That the protective condition(s) are designed not only to protect those cases where Wyandot currently ships product, but must also ensure that Wyandot can compete in all of the same markets as it does today, regardless of whether or not Wyandot presently has a contract with any given customer able today to receive single-carrier service from Wyandot's quarry;
3. That the condition(s) do not impose new operating or service restrictions; and
4. That the conditions are permanently imposed, and do not apply only for a limited number of years (and thus do not serve merely as a "stay of execution").

Should the Board adopt the "solution" proposed by the Primary Applicants, conditions predicated on the Martin settlement utterly will fail to ensure any of the four protections outlined immediately above. Any conditions founded upon the Martin settlement would, at the end of a five year period, deny single-line service for Wyandot to every stone purchaser located on the current Conrail system in eastern Ohio. Simply put, the Primary Applicants cannot argue, and the Board cannot fairly assume, that imposing a condition modeled after the Martin settlement will ensure that Wyandot will have tomorrow the same level of service as it has today. The Primary Applicants' proposal (which only would ensure limited single-carrier service to but one point on Conrail's vast network of lines in eastern Ohio) effectively guarantees that, at the close of a five year period, Wyandot will be substantially harmed as a consequence of the transaction.⁶ Such a harsh result contrasts glaringly with Chairman Morgan's own spoken commitments to fully protect aggregate shippers and promote competition.

⁶ Wyandot has already established for the record what loss of single-carrier service will mean to Wyandot's revenues.

**The Board should not accept into evidence the
highly prejudicial settlement offer rejected by
Wyandot**

As far as the staff recommendations adopted by the Board go, the facts reveal three disquieting developments, all of which would seriously compromise the integrity of the subject proceeding. Consider the following:

1. The Primary Applicants (or some other party) filed with the Board a copy of both the Martin settlement and the proposed Wyandot and National settlement offers, which were not timely served upon Wyandot's counsel (thus depriving Wyandot the opportunity to object to their introduction into the record before the voting conference);⁷
2. The Primary Applicants did not submit the Martin settlement (and/or the Primary Applicants' settlement offers to Wyandot and National) in sufficient time for meaningful and thorough administrative review, and the one-sided Board staff recommendations based on the Martin settlement are therefore arbitrarily centered upon

⁷ In yet another of its egregious efforts to subvert the procedural schedule and deny interested parties a fair opportunity to respond, CSX's counsel submitted to the Board a letter (without the usual "CSX-__" designation), which contains, as an attachment, a "List of Proffered Conditions." One of the so-called "proffered conditions" are the terms of the settlement the Primary Applicants offered to Wyandot. To Wyandot's knowledge, this is the first time that the specific terms of the proposed settlement offer to Wyandot were disclosed to the Board. The letter in question is dated June 6, 1998 (a Saturday), but indicates that it was delivered to the Board "via hand delivery." Even assuming that the Board received this letter before Monday, June 8th (the next date upon which the Board was open to receive such documents), it was served upon Wyandot's counsel by standard mail only. Thus, Wyandot did not receive a copy of the subject letter until one day after the Board's voting conference. That CSX apparently assumed that the Board would accept with open arms such materials at such a late date -- given their significance, prejudicial nature, and Wyandot's obvious inability to respond accordingly before the voting conference -- smacks of the highest form of arrogance and lends itself to unadulterated procedural impropriety.

mere speculation as to the content of those documents; and

3. In accepting into the record at such an extremely late date evidence and argument concerning the details of settlement proposals offered by the Primary Applicants to the aggregate shippers, the Board deprived Wyandot any opportunity to address such items before the Board's voting conference and denied Wyandot the chance to explain why such a "solution" is wholly deficient.

Presumably the Board is at least generally aware of the contents of the Martin settlement, for the Board would surely not arbitrarily impose protective conditions on the basis of instruments not admitted into the administrative record.⁸ Wyandot, of course, cannot object to the mere recording of a settlement agreement with the Board.⁹ However, assuming the Martin settlement had been admitted into the record, Wyandot objects strenuously to the Primary Applicants' use of this agreement to argue -- at the very last opportunity -- that it should be the benchmark for conditions elsewhere. Under the circumstances, when and how was Wyandot supposed to respond that the Martin settlement is not a suitable solution to Wyandot's concerns? The administrative record should clearly reflect that Wyandot was deprived any reasonable opportunity to respond to the

⁸ It is possible, as National seems to have surmised in its letter of June 8th, that the Board's staff was motivated to recommend the conditions that it did based solely on the description of the settlement offer presented at closing argument. Given that the Board could not have seen the contents of the rejected settlement offer any sooner than June 6th (assuming the Board waived its current policy not to accept filings during non-business hours), it may be that the Board's staff was not well-acquainted with the specifics of that settlement, and is therefore not aware of the inadequacies of the Primary Applicants' "solution."

⁹ In their efforts to introduce into the record the terms of their settlement proposal to Wyandot, the Primary Applicants drafted the Martin settlement agreement to contain the terms of the proffered settlements to both Wyandot and National. The Primary Applicants' under-handedness is shocking and ought not be condoned. If the Primary Applicants and Martin were properly to have filed their respective settlement without undue prejudice to other parties they should have at least redacted that agreement to remove all mention of Wyandot and National.

Hon. Vernon A. Williams
June 16, 1998
Page Eight

Primary Applicants "thirteenth hour" argument that "what is good enough for Martin is good enough for Wyandot and National." Indeed, the record should reflect that the conditions imposed "in favor" of Wyandot are based upon a settlement agreement that could not have been before the Board any earlier than a mere few hours before the Board's vote on the subject transaction.

Sadly, the record shows that the Primary Applicants have endeavored throughout the closing phases of this proceeding improperly to introduce new, highly prejudicial evidence and raise new arguments. When, for example, the Primary Applicants attempted at the closing phases of this proceeding to introduce new evidence regarding settlement negotiations with Indianapolis Power & Light Company ("IP&L"), the Board struck such evidence from the record at IP&L's request. Similarly, the Board appropriately thwarted CSX's last-minute efforts to introduce new evidence about anti-assignment clauses in Conrail contracts (an effort roundly rejected by the Board in its Decision No. 84). The Primary Applicants have been correctly "stopped in their tracks" before, and likewise should not be permitted to abuse the procedural schedule at the expense of either Wyandot or National.

Unlike IP&L, Wyandot did not (and could not have) become aware of the Primary Applicants' attempts to introduce evidence pertaining to their settlement offer to Wyandot in time to file a motion to strike before the oral argument, since it was not until the closing argument itself that any party made reference to the details of the rejected settlement proposal. Allowing the Primary Applicants to address at closing argument the outline of a settlement offer rejected by Wyandot -- and subsequently to attempt to introduce into evidence the specific terms of its offer -- is highly prejudicial and contrary to the Federal Rules of Evidence. Indeed, there is virtually no distinction between what the Primary Applicants attempted to do (but were barred from doing) to IP&L, and what they attempted to do (and by waiting until even later, evidently were able to accomplish) to Wyandot. So much of what IP&L asserted in IP&L-14 applies to the Wyandot's case that this filing should be read in the same context as IP&L's latest submission.

> CONCLUSION

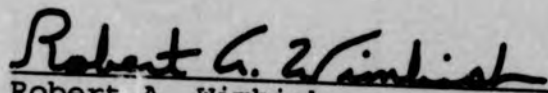
Wyandot was deprived of any meaningful opportunity to respond to the Primary Applicants' "thirteenth hour" argument that, if the Board should elect to impose any relief in favor of Wyandot, it should be fashioned after the Martin settlement. Moreover, Wyandot cannot conceive of how the Board was able to embrace conditions based upon Martin settlement when that highly

Hon. Vernon A. Williams
June 16, 1998
Page Nine

prejudicial document could not have been before the Board any earlier than a few hours before the Board's vote. Wyandot submits that the Board will commit serious error if it abides by its initial recommendation to model conditions upon the Martin settlement. In fact, if the Board insists upon fashioning a protective condition on the basis of the Martin settlement, such a "remedy" appears to contradict Chairman Morgan's stated determination to make sure that aggregate shippers such as Wyandot are not harmed by the subject transaction.

For these reasons, Wyandot requests that the Board reconsider the staff recommendation to, in their own words, "hold applicants to their representations to provide single-line service by either CSX or NS for the existing movements of certain Ohio aggregate shippers (National Lime and Stone, and Wyandot Dolomite), just as they have agreed to provide for Martin Marietta." As Wyandot has endeavored to explain in this filing, such a condition will not make Wyandot whole. The Board should strike the Martin settlement (and all reference to the terms of the Primary Applicants' proffered settlements with Wyandot and National) from the record, as well as Primary Applicants' statements and representations at its closing arguments regarding its settlement negotiations with Wyandot and National. Finally, Wyandot urges the Board to clarify the scope of the specific conditions it intends to impose to protect aggregate producers such as Wyandot to assure that such conditions are not temporary and do not otherwise deprive Wyandot of access to markets in which it is now competitive.

Respectfully submitted,


Robert A. Wimbish

Counsel for Wyandot Dolomite, Inc.

cc: Chairman Morgan (by hand)
Vice Chairman Owen (by hand)
Administrative Law Judge Levanthal
Richard A. Allen, Esq. (by hand)
Dennis G. Lyons, Esq. (by hand)
Clark Evans Downs, Esq., Kenneth Driver, Esq. (by hand)
All parties of Record

CERTIFICATE OF SERVICE

I, Robert A. Wimbish, hereby certify that I have this 16th day of June, 1998, served true copies of the foregoing Motion to Strike and Requests for Reconsideration and Clarification of Wyandot Dolomite, Inc., upon counsel for the Primary Applicants via messenger delivery and upon ALJ Jacob Leventhal and all parties of record by means of U.S. mail, first class postage prepaid, or by means of more expeditious delivery.

Robert A. Wimbish
Robert A. Wimbish

STB

FD

33388

6-15-98

I

188544

188544

ARM-56

ENTERED
Office of the Secretary

JUN 15 1998

Part of
Public Record

BEFORE THE
SURFACE TRANSPORTATION BOARD

Finance Docket No. 33388

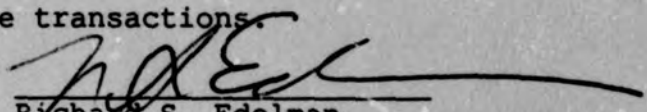


CSX Corporation and CSX Transportation, Inc.,
Norfolk Southern Corp. and Norfolk
Southern Ry. Co.--Control and Operating
Leases/Agreements--Conrail Inc.
and Consolidated Rail Corporation
Transfer of Railroad Line by Norfolk
Southern Railway Company to CSX Transportation, Inc.

I

**NOTICE OF WITHDRAWAL OF NATIONAL COUNCIL OF FIREMEN
AND OILERS/SEIU FROM PARTICIPATION IN
FILINGS OF ALLIED RAIL UNIONS**

The National Council of Fireman and Oilers/SEIU ("NCFO") has recently entered an agreement with Applicants which commits the NCFO to drop its opposition to STB approval of the transactions at issue in these proceedings. Accordingly, the NCFO and Allied Rail Unions ("ARU") hereby give notice that NCFO is withdrawing from participation in the ARU and from the ARU filings with respect to opposition to the transactions.

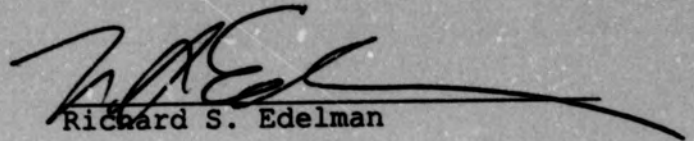

Richard S. Edelman
Of Counsel
O'DONNELL, SCHWARTZ & ANDERSON, P.C.
1900 L Street, N.W., Suite 707
Washington, D.C. 20036
(202) 898-1824
(202) 429-8928 (fax)

Counsel for Allied Rail Unions

June 15, 1998

CERTIFICATE OF SERVICE

I hereby certify that I have this 15th day of June, 1998 caused to be served a copy of the foregoing Notice of Withdrawal of National Council of Firemen And Oilers/SEIU From Participation in Filings of Allied Rail Unions, by first class mail, upon all parties of record on the service list in this proceeding.



Richard S. Edelman

G:\RSE\CR-NCFO.wd

STB

FD-33388

6-9-98

J

ID-PUBLIC

FILE IN DOCKET

70-33388

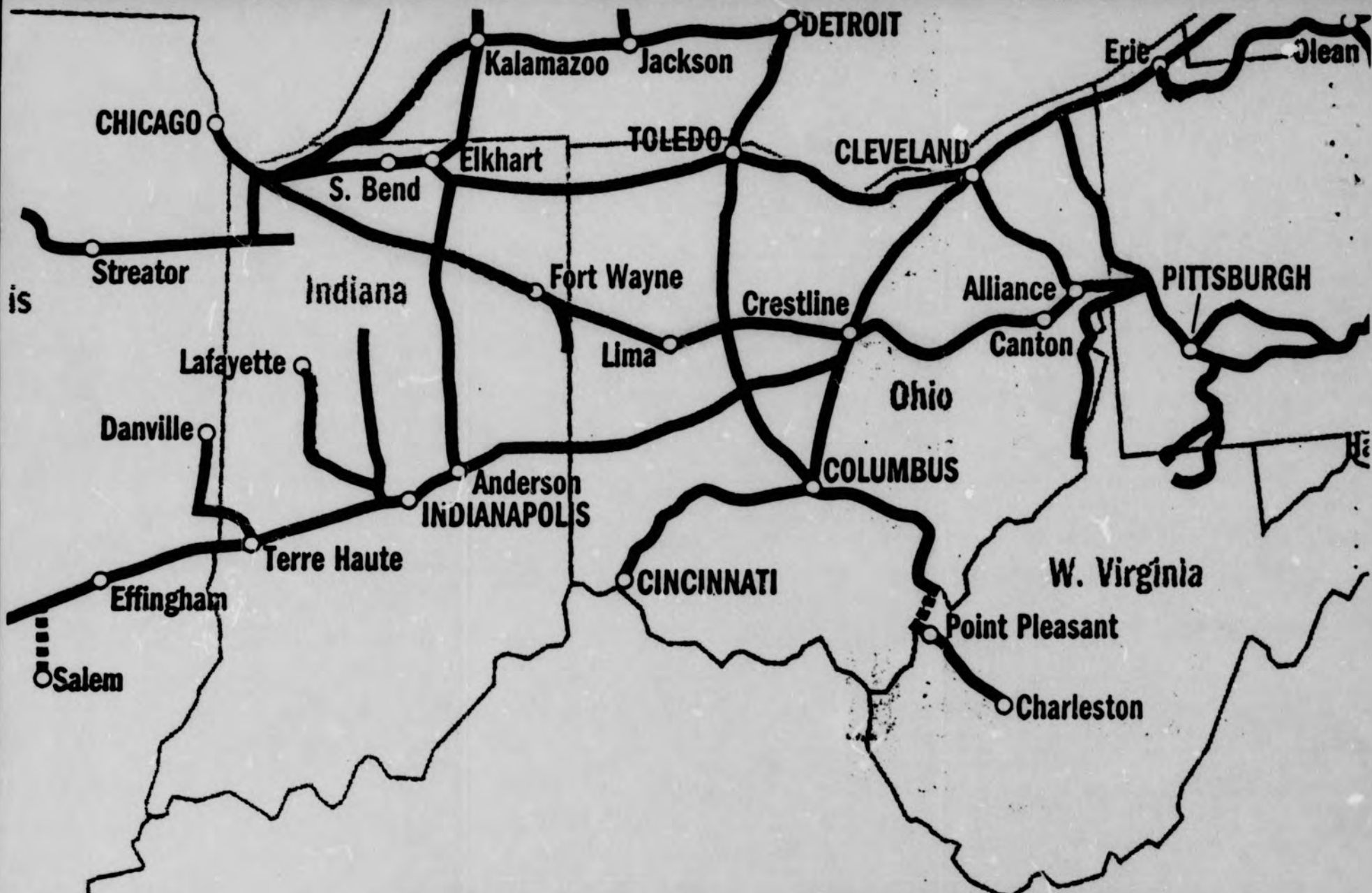
CHAIRMAN MORGAN

JUN 9 3 28 PM '98

RECEIVED
SURFACE TRANSPORTATION

The Reason why
CSX should have taken
All of The ex-New York Central
and
Norfolk Southern should have taken
All of The ex-Pennsylvania
recently came to light
in Cleveland

James Burke
5-27-98



THE CLEVELAND BYPASS

STB

FD-33388

6-8-98

I

ID-ORALARG

Voting Conference

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**

June 8, 1998

Motion offered by Chairman Morgan on environmental issues

I move that the Board adopt the mitigation proposed by SEA, as modified by negotiated agreements arrived at later, as necessary by comments on the Cloggsville connection in the Cleveland area, and as necessary by requests for clarification.

With respect to **environmental justice**, while we will not disavow the legal finding upon which SEA based its recommendations, which carries with it no moral or civic judgment, the decision adopting the mitigation will make clear that by willingly complying with the recommended mitigation, the transaction will not, and cannot be viewed as, disproportionately impacting minority and low income areas.

With respect to **negotiated agreements** and their imposition, those entered into to date will be imposed as a condition unless both sides to an agreement within 2 weeks advise us that they do not want it imposed; for those imposed, clearly the Board does not intend to, and will not, go beyond its jurisdiction in enforcing them; and with respect to the terms of negotiated agreements imposed, there is no precedential effect associated with those terms in the context of appropriate mitigation for future cases.

With respect to **noise**, the Board by approving noise mitigation is not indicating a preference for sound barriers; however, noise mitigation must be adequate, and certainly any negotiated agreements addressing noise would control.

With respect to **grade crossing upgrading**, mitigation can be governed by a negotiated agreement.

With respect to **real time monitoring** for emergency response delay, mitigation also can be by mutual agreement.

With respect to **monitoring** of mitigation, it ends with overall oversight of the transaction.

I recommend that the Board direct conversations between the applicants and **Wellington and North Ridgeville**, Ohio about their environmental concerns.

A **120-day period** is requested by Ohio for negotiation with the applicants on 29 grade crossing upgrades based on a corridor approach. This recommendation is not inconsistent with SEA's recommendations, and I recommend that we adopt it. We encourage other states to continue to negotiate on grade crossing protection within the two-year period provided in the EIS.

There have been questions raised as to when negotiated agreements are an acceptable alternative to what is proposed in EIS. Whether or not the EIS specifically provides for this alternative, the Board clarifies that this alternative is always available.

Any other substantive suggestions for modification in the environmental mitigation being adopted today must be submitted in the form of an administrative appeal following the issuance of our final written decision.

In connection with any charges that we make in accordance with this motion, if adopted, there will be an opportunity to comment by way of administrative appeal.

STB

FD

33388

6-5-98

I

188097

188097

ORIGINAL

LAW OFFICES
Fritz R. Kahn, P.C.
SUITE 750 WEST
1100 NEW YORK AVENUE, N.W.
WASHINGTON, D.C. 20005-3934
(202) 371-8037
FAX (202) 371-0900



ENTERED
Office of the Secretary

JUN - 5 1998

Part of
Public Record

I

VIA MAIL AND FAX 565-9004

Hon. Vernon A. Williams
Secretary
Surface Transportation Board
Washington, DC 20423

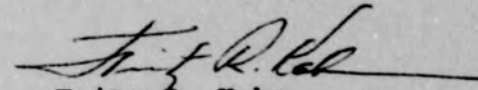
Dear Secretary Williams:

Enclosed for filing in STB Finance Docket No. 33388, CSX Corporation, et al.--Control and Operating Leases/Agreements--Conrail, Inc., et al., are the original and twenty-five copies of the Notice of Withdrawal of Martin Marietta Materials, Inc., MMM-4.

Additional copies of this letter and of the Notice of Withdrawal are enclosed for you to stamp and return to me in the enclosed stamped and self-addressed envelope

By copy of this letter, service is being effected upon counsel for Applicants.

Sincerely yours,


Fritz R. Kahn

enc.
cc: Counsel for applicants
Ms. Bettye J. Uzzle

18897
ORIGINAL

MMM-4

ENTERED
Office of the Secretary

JUN - 5 1998

Part of
Public Record

BEFORE THE
SURFACE TRANSPORTATION BOARD
WASHINGTON, D.C. 20423



STB Finance Docket No. 33388

CSX CORPORATION, et al.,
-- CONTROL AND OPERATING LEASES/AGREEMENTS --
CONRAIL, INC., et al.

NOTICE OF WITHDRAWAL OF
MARTIN MARIETTA MATERIALS, INC.

Martin Marietta Materials, Inc. (MMM), has reached a voluntary settlement with Applicants of the matters raised by MMM's Comments and Request for Conditions, MMM-2, filed October 21, 1997, and Brief, MMM-3, filed February 23, 1988. Accordingly, MMM hereby withdraws its Comments and Request for Conditions and Brief, relinquishes its time to present oral argument on Thursday, June 4, 1998, and asks to be dismissed as a party of record in this proceeding.

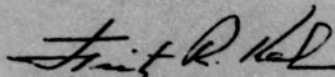
Respectfully submitted,
MARTIN MARIETTA MATERIALS, INC.

Bruce A. Deerson
Vice Pres. & General Counsel
Martin Marietta Materials, Inc.
P. O. Box 30013
Raleigh, NC 27622
Tel.: (919) 783-4506

Of Counsel:

Donelan, Cleary, Wood
& Maser, P.C.

Suite 750 West
1100 New York Avenue, NW
Washington, DC 20005-3934
Tel.: (202) 371-9500



Fritz R. Kahn
Fritz R. Kahn, P.C.
Suite 750 West
1100 New York Avenue, NW
Washington, DC 20005-3934
Tel.: (202) 371-8037

Dated: June 3, 1998

CERTIFICATE OF SERVICE

Copies of the foregoing Notice of Withdrawal this day were served by me by facsimile transmitting and mailing copies thereof, with first class postage prepaid, to counsel for the Applicants.

Dated at Washington, DC, this 3rd day of June 1998.



Fritz R. Kahn

STB

FD

33388

6-4-98

I 188063

**TRANSPORTATION • COMMUNICATIONS
INTERNATIONAL UNION**



AFL-CIO, CLC

LEGAL DEPARTMENT

**ENTERED
Office of the Secretary**

June 4, 1998

JUN 04 1998

VIA HAND DELIVERY Part of
Public Record

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

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

Dear Mr. Williams:

Enclosed please find an original and twenty-five copies of
the Transportation Communications International Union's Petition
for Postponement (TCU-17) in the above-captioned matter.

Thank you for your attention to this matter.

Very truly yours,

Mitchell M. Kraus
General Counsel

MMK:fm

Enclosures

CC: The Honorable Jacob Leventhal
All Parties of Record (per Service List)

ROBERT A. SCARDELLETTI
International President
MITCHELL M. KRAUS
General Counsel
CHRISTOPHER J. TULLY
Assistant General Counsel



188063
EXPEDITED CONSIDERATION REQUESTED

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

Finance Docket No. 33388



**ENTERED
Office of the Secretary**

JUN 04 1998


**Part of
Public Record**

**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.**

**TRANSPORTATION•COMMUNICATIONS INTERNATIONAL UNION'S
PETITION FOR POSTPONEMENT**

The Transportation•Communications International Union (TCU) joins in the Petition for Postponement filed on June 3, 1998, by Brotherhood of Maintenance of Way Employes, Transport Workers Union of America, Brotherhood of Locomotive Engineers and American Train Dispatchers Department.

Respectfully submitted,

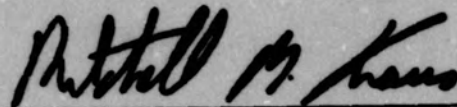


Mitchell M. Kraus
General Counsel
Christopher Tully
Assistant General Counsel
Transportation•Communications
International Union
3 Research Place
Rockville, MD 20850
(301) 948-4910

Dated: June 4, 1998

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing Transportation•Communications International Union's Petition for Postponement were served this 4th day of June, 1998, by first-class mail, postage prepaid, upon all parties of record in this proceeding.



Mitchell M. Kraus

STB

FD

33388

6-3-98

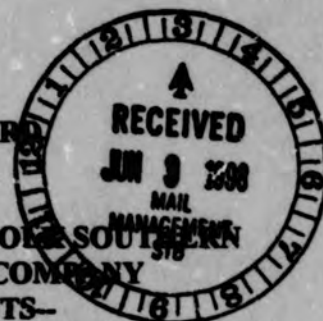
I 188038

188038

EXPEDITED CONSIDERATION REQUESTED

BEFORE THE SURFACE TRANSPORTATION BOARD

**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**



ENTERED
Office of the Secretary

JUN 04 1998

Part of
Public Record

FINANCE DOCKET NO. 33388

PETITION FOR POSTPONEMENT

**BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYEES
TRANSPORT WORKERS UNION OF AMERICA
BROTHERHOOD OF LOCOMOTIVE ENGINEERS
AMERICAN TRAIN DISPATCHERS DEPARTMENT**

The labor unions that are a party to this filing respectfully ask the Surface Transportation Board ("Board") to postpone the voting conference, originally scheduled for June 8, 1998, in the above captioned proceeding. The Board, consistent with its mandate to protect the public interest, cannot proceed to rule on the largest rail merger in the history of the United States given the serious nature of the unresolved ethical questions that have been levied against Board Member Gus Owen. These ethical questions are further complicated by the fact that the Board is already operating with only two of the three members that are authorized to sit on the Board. While we understand the difficulty that this request poses for certain parties, we feel it is the only remedy available that will allow the Board to issue a decision that will have the full weight and authority of law.

When the Board issued its original procedural schedule, it believed that the time allotted would "ensure that all parties are accorded due process and allow us time to consider fully all of the issues

in this proceeding..." Decision No. 6, at 2, served May 30, 1997. However, much has changed since that determination was rendered. Most notably, allegations have been raised by the Congressional Accountability Project in a letter dated February 23, 1998, to the Senate Commerce, Science and Transportation Committee that Mr. Owen may have violated a number of government ethical standards. The Accountability Project asked the Committee to determine whether Mr. Owen has been improperly active in various business interests while he served on both the Interstate Commerce Commission ("ICC") and on this Board. In addition, the Accountability Project has asserted that Mr. Owen was deficient in completing financial disclosure reports, failed to disclose ongoing business activities and participated in lobbying activities of an organization that was involved in a proceeding before the Board. In refusing a request to recuse himself from this proceeding, Mr. Owen admitted that the Senate Commerce Committee has instructed the Department of Transportation's Inspector General's Office to investigate the allegations that have been raised by the Accountability Project. While we have no doubt that Mr. Owen "is cooperating fully with the investigation" the fact that such a serious investigation has been instituted, the results of which have not been publicly disclosed, mandates the granting of our petition.

As detailed in the recusal request letter sent to Mr. Owen dated May 22, 1998, the charges raised by the Accountability Project and investigated by the IG's Office, if true, constitute a violation of the standards of conduct established for government officials. See 5 C.F.R. § 2635.101. We would also note that the charges are contrary to the specific rules for ethical conduct established by the ICC for its members and staff to follow. See Supplemental Standards of Ethical Conduct for Employees

of the ICC, 9 I.C.C.2d 838 (1993).¹

Specifically, the ethical rules established by the ICC (which still apply to this Board) require that a Board member receive prior approval of any outside employment. 9 I.C.C.2d at 840-41. In applying for this approval, the member must certify that "no official time or Government property, resources, or facilities not available to the general public will be used in connection with the outside employment." 49 C.F.R. § 5001.104. It would appear that the charges levied against Mr. Owen and widely reported in the press would violate both the broader ethical requirements of the Executive Branch and the ICC/Board specific standards. See William Roberts, Ethics Issues Raised Regarding STB Incumbent, J. Com. February 2, 1998; Jodi Wilgoren, Group Calls for Inquiry On O.C. Businessman's Financial Disclosure, Los Angeles Times, February 24, 1998.

These charges were serious enough for the Senate Commerce Committee to ask the IG to investigate these charges. It has been reported that this investigation has been completed, and while the contents of the finding have not been made public, the Senate Commerce Committee has not proceeded with its intention to begin the Confirmation process of Mr. Owen for a full term. William Roberts, Owen Report Goes to Senate, But Not Public, J. Com., May 12, 1998. Given the critical issues that the Board is considering, the refusal by the Senate Commerce Committee to even hold a hearing on Mr. Owen's pending nomination is significant and cannot be ignored by this Board. In addition, it would appear from recent press reports that the investigation is turning even more serious as investigators with IG's office have met with attorneys from the U.S. Justice Department to review

¹It is significant that the ICC decision specifically mandates that the rules established by the ICC serve as a "supplement to the executive branch-wide standards and Members and employees of the Interstate Commerce Commission also are subject to the Standards of Ethical Conduct for Employees of the Executive Branch..." Supp. Standards, 9 I.C.C.2d at 839.

the allegations against Mr. Owen. Bruce Ingersoll, Rail Labor is Pressing for the Ouster of Regulator, Delay in Conrail Vote, Wall St. J., June 3, 1998, at D8.

If the Board proceeds to conduct a voting conference on June 8th, it faces the possibility that a decision will be handed down with two-thirds of its membership either not present or confronting ethical charges so serious as to question whether that person has legal authority to sit on the agency. There is little disagreement that the pending Conrail transaction will have a tremendous impact on our nation's rail transportation system and the thousands of employees who support the system. The decision in this case, like the recent decision in the Union Pacific/Southern Pacific merger, will no doubt be subject to years of interpretation or even challenges by some parties. It is incumbent on the Board to ensure the decision it does render can be supported not only on the merits of the Application and the argument made by interested parties, but also based on the proper exercise of authority that Congress has vested in the Agency. Simply put, we question how much legal authority a decision will have given the countless unresolved questions that have been raised concerning the current membership of the Board.

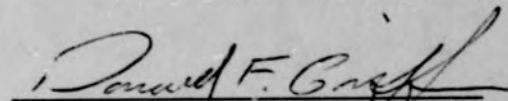
We are therefore requesting a reopening of the evidentiary proceeding in this case so that the voting conference can be postponed until the allegations against Mr. Owen have been resolved or until a full complement of members has been appointed and confirmed. It should be noted that the Board still has a great deal of flexibility in its ability to lengthen the schedule. Under the statute that governs mergers, the Board needs only to complete an evidentiary proceeding within one year after the publication of the notice that the primary application has been accepted. 49 U.S.C. § 11325(a)(3). The Board must then issue a final decision within 90 days after the evidentiary proceeding has been closed. Id. In this case, the notice of application was issued on July 23, 1997 allowing the Board until

October 23, 1998 to issue a final decision. This should allow the Board and others sufficient time to fully investigate and resolve the personnel problems that we have detailed.

This petition for postponement is not without precedent in this proceeding. The Board, subsequent to its original schedule, lengthened the procedural schedule to allow full consideration of the Applicants Safety Integration Plans (SIPs). This action was deemed necessary since the SIPs were not required when the Board issued Decision No. 6 and therefore it was not anticipated that this additional time would be necessary. Similarly, the Board must recognize that sufficient facts concerning the membership of the Board have changes that make the original schedule (as modified by subsequent decisions) inappropriate.

A postponement of the voting conference is the only course the Board can take that will allow the personnel crisis at the Board to be fully resolved. This action is consistent with past Board actions and it will not preclude the Board from completing consideration of the Conrail transaction within the period mandated by statute.

Respectfully Submitted,



Donald F. Griffin
Assistant General Counsel
Brotherhood of Maintenance of Way Employees
10 G Street, Suite 460
Washington, D.C. 20002
(202) 638-2135

Of Counsel

Richard S. Edelman
O'Donnell, Schwartz & Anderson, P.C.
1900 L Street, N.W. Suite 707
Washington, D.C. 20036
Counsel for Transport Workers Union of America
and American Train Dispatchers Department

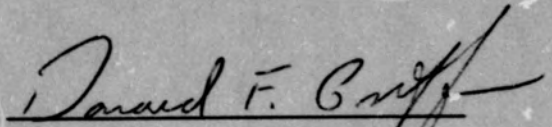
Harold Ross
Ross and Kraushaar
1370 Ontario Street
Cleveland, OH 44113
Counsel for Brotherhood of Locomotive Engineers

David Rosen
O'Donnell, Schwartz, Glanstein & Rosen
60 East 42nd Street, Suite 1022
New York, NY 10165
Counsel for Transport Workers Union of America

June 3, 1998

CERTIFICATE OF SERVICE

I, Donald F. Griffin, hereby certify that, on this the 3rd day of June 1998, I have served, by first-class mail, postage prepaid, or by more expedient means, a copy of the foregoing document to all parties of record in Finance Docket No. 33388.

A handwritten signature in dark ink, appearing to read "Donald F. Griffin", is written over a horizontal line.

Donald F. Griffin

STB

FD

33388

6-3-98

I

188032

185032
LAW OFFICES
KELLER AND HECKMAN LLP

1001 G STREET, N.W.
SUITE 500 WEST
WASHINGTON, D.C. 20001
TELEPHONE (202) 434-4100
FACSIMILE (202) 434-4848

BOULEVARD LOUIS SCHMIDT 87
J-1040 BRUSSELS
TELEPHONE (32) 732 52 60
FACSIMILE (32) 732 53 92

ENTRANCE
Office of the Secretary

JUN 04 1998

Part of
Public Record

June 3, 1998

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

JOSEPH E. KELLER 1907-1994
JEROME H. HECKMAN
WILLIAM H. BOWEN-SANL JR.
MALCOLM B. MACARTHUR
WAYNE V. BLACK
TERENCE B. JONES
MARTIN W. BERCOVICI
JOHN S. EBERD
RONALD J. LEIGHTON
ALFRED S. REISHERY
DOUGLAS J. BEHR
RAYMOND A. KOHNLSKI
SHIRLEY A. COFFIELD
MICHAEL F. MORRONE
JOHN B. RICHARDS
JEAN SAVIGNY
JOHN B. DURECK
PETER L. DE LA CRUZ
NELVIN S. DE OREN
LAWRENCE R. WALSH
RALPH A. BIRNONS
RICHARD F. HANN

C. DOUGLAS JARRETT
SHEILA A. MILLAR
GEORGE S. MISKO
SARAH E. BODGE
PATRICK J. HARG
JUDITH BAPP
DAVID S. SARVADI
CATHERINE R. NIELSEN
JEAN-PIERRE MONTFORT
JUSTIN C. POWELL
JONATHAN R. SPENCER
AMY H. RODGERS
ELLIOT BELLOS
HARRI L. ITTHOFF
ARTHUR S. GARRETT III
ROBBIE S. MITT
ELIZABETH H. HARRISON
CAROL MOORE TOTH
JOAN C. SYLVAN
MARTHA E. MARRAPESE
JOHN E. REESE

NICOLE S. DONATH
DEBORAH ROSEN WHITE
DAVID A. JOY
FREDERICK A. STEARNS
TODD A. HARRISON
JOHN F. FOLEY
TOMMY RUSSELL EPPS
THOMAS C. BERGER
RACHA S. DEHA
JOHN F.C. LIESKE
RONALD J. HERNBERG
PAULA DEZA
MICHAEL C. HECKMAN
JOHN B. O'LOUGH
JENNIFER A. O'SHEA
DEVON WILHELM
DANIEL GUNTZAT
DAVID C. LA SHAW
TAMAR J. LEVY
AMY E. FOP (CHERRY)

*NOT ADMITTED IN D.C.
*RESIDENT BRUSSELS

SCIENTIFIC STAFF
DANIEL S. DIXLER, Ph. D.
CHARLES V. BREDER, Ph. D.
ROBERT A. MATHEWS, Ph. D., D.A.B.T.
JOHN R. HODDERMAN, Ph. D.
HOLLY HUTNER FOLEY
JANETTE HOUK, Ph. D.
LESTER BOY, CHIEF, Ph. D.
THOMAS C. BROWN
MICHAEL T. FLOOD, Ph. D.
ANDREW P. JOHANOVICH, Ph. D.
ANNA GENSELY, Ph. D.
STEPHANIE M. CORBITT
JUSTIN J. FREDERICK, Ph. D.
RACHEL F. JOYNER

TELECOMMUNICATIONS
ENGINEER
RANDALL D. YOUNG
WRITERS DIRECT ACCESS

ARCO-7

(202) 434-4144

Bercovici@khlaw.com



Re: CSX Corporation and CSX Transportation, Inc., Norfolk Southern Corporation and Norfolk Southern Railway Company — Company and Operating Leases/Agreements — Conrail, Inc. and Consolidated Rail Corporation; STB Finance Docket No. 33388;
WITHDRAWAL OF ARCO CHEMICAL COMPANY

Dear Secretary Williams:

Please be advised that ARCO Chemical Company has reached a settlement with applicants in the above-captioned proceeding. Consequently, ARCO withdraws from this proceeding, and accordingly will not be participating in oral argument before the Board on this date.

Your attention to the foregoing is appreciated.

Very truly yours,

Martin W. Bercovici

Enclosure

cc: All Parties of Record

STB

FD

33388

6-2-98

I

187989

LAW OFFICES

ZUCKERT, SCOTT & RASENBERGER, L.L.P.

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

RICHARD A. ALLEN

ENTERED
Office of the Secretary

JUN 02 1998

Part of Public Record June 2, 1998

Via Hand Delivery

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

ENTERED
Office of the Secretary

JUN 02 1998

Part of Public Record



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

Dear Secretary Williams:

Enclosed for filing in the above-referenced docket are an original and twenty-five copies of NS-67/BRL-8, "Joint Submission of Settlement Agreement By and Between Norfolk Southern Corporation and Norfolk Southern Railway Company and City of Bay Village, City of Rocky River and City of Lakewood."

Also enclosed is a 3 1/2" computer disk containing the submission in Wordperfect 5.1 format, which is capable of being read by Wordperfect 7.0.

Should you have any questions regarding this, please call.

Sincerely,

Richard A. Allen

Counsel for Norfolk Southern
Corporation and Norfolk
Southern Railway Company

Enclosures

cc: All Parties of Record
Elaine K. Kaiser

NS-67
BRL-8

BEFORE THE
SURFACE TRANSPORTATION BOARD

Finance Docket No. 33388

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



JOINT SUBMISSION OF SETTLEMENT AGREEMENT
BY AND BETWEEN NORFOLK SOUTHERN CORPORATION AND
NORFOLK SOUTHERN RAILWAY COMPANY AND
CITY OF BAY VILLAGE, CITY OF ROCKY RIVER AND
CITY OF LAKEWOOD

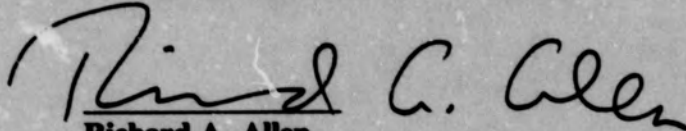
Applicants Norfolk Southern Corporation and Norfolk Southern Railway Company (collectively, "NS") have today entered into a settlement with the City of Bay Village, City of Rocky River and City of Lakewood, Ohio (collectively, "BRL"). A conformed copy of the Memorandum of Agreement ("Agreement") between these parties is attached hereto.

Pursuant to the terms of the Agreement, NS and BRL hereby request that the Board adopt the terms of the attached Agreement as a condition of the Board's approval of the Conrail Application.

Pursuant to and in consideration of the Agreement, BRL hereby withdraws its pending request for conditions other than those encompassed in the Agreement to be imposed on NS or affecting NS to mitigate environmental impacts of the Conrail Transaction.

Furthermore, in consideration of the settlement between the parties, BRL hereby
withdraws its request to participate in the oral argument in this proceeding.

Respectfully submitted,



Richard A. Allen

Andrew R. Plump

Zuckert, Scoutt & Rasenberger, LLP

888 Seventeenth Street, N.W.

Suite 600

Washington, D.C. 20006-3939

(202) 298-8660

***Counsel for Norfolk Southern Corporation and
Norfolk Southern Railway Company***



Steven J. Kalish

McCarthy, Sweeney & Harkaway, P.C.

Suite 1105

1750 Pennsylvania Ave., NW

Washington, D.C. 20006

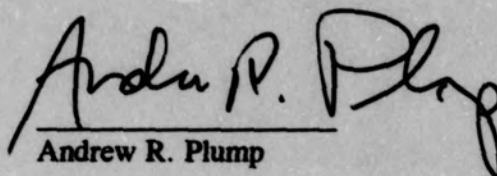
(202) 393-5710

***Counsel for City of Bay Village, City of Rocky
River and City of Lakewood***

Dated: June 2, 1998

CERTIFICATE OF SERVICE

I, Andrew R. Plump, certify that on June 2, 1998, I caused to be served by U.S. mail, postage prepaid, or by more expeditious means, a true and correct copy of the foregoing NS-67/BRL-8, Joint Submission of Settlement Agreement By and Between Norfolk Southern Corporation and Norfolk Southern Railway Company and City of Bay Village, City of Rocky River and City of Lakewood, on all parties of record on the service list in STB Finance Docket No. 33388.


Andrew R. Plump

Dated: June 2, 1998

MEMORANDUM OF AGREEMENT

This Memorandum of Agreement is entered into this 2nd day of June, 1998 by and between the Cities of Bay Village, Ohio, Rocky River, Ohio, and Lakewood, Ohio (hereafter collectively "BRL") and Norfolk Southern Corporation.

WHEREAS, Norfolk Southern Corporation and Norfolk Southern Railway Company (collectively, "NS") is an Applicant in the railroad control application currently pending before the United States Surface Transportation Board (the "STB") under Finance Docket No. 33388 (the "Conrail Application"), in which NS and CSX Corporation and CSX Transportation, Inc. (collectively, "CSX") are seeking authority to jointly acquire Conrail, Inc. and Consolidated Rail Corporation (collectively, "Conrail") and to thereafter separately operate parts of the rail lines, facilities and other assets of Conrail; and

WHEREAS, NS submitted to the STB an Operating Plan and Environmental Report as part of the Conrail Application, which submissions describe certain changes in rail traffic and operations that are projected to result from the Conrail Transaction (the "Transaction"); and

WHEREAS, the changes in rail traffic and operations projected to result from the Transaction include changes on the NS' Nickel Plate rail line, which runs through BRL; and

WHEREAS, the Cities of Bay Village, Ohio, Rocky River, Ohio, and Lakewood, Ohio (hereafter collectively "BRL") have participated as parties in the proceedings at the STB regarding the Conrail Application and have in filings and comments submitted to the STB requested that the STB order NS to revise certain terms of the Transaction

agreements and/or revise its Operating Plan to avoid what the BRL have described as significant adverse environmental impacts of the Transaction upon BRL and their residents, or alternatively, that the STB condition any approval of the Conrail Application on the imposition of various conditions designed to mitigate such impacts; and

WHEREAS, the STB's Section of Environmental Analysis ("SEA") issued a Draft Environmental Impact Statement ("DEIS") with respect to the Conrail Application in December 1997 which, among other things, characterized the western suburbs of Cleveland, Ohio, which area includes BRL, as a community with "unique circumstances," and directed NS to consult with government agencies, elected officials and interested parties in BRL regarding certain projected train traffic increases on the Nickel Plate line through BRL post-Transaction; and

WHEREAS, NS and BRL have engaged in such consultations with the goal of reaching agreement on mitigation measures to ameliorate the environmental impacts in BRL of the projected changes in rail traffic and operations on rail lines and facilities to be operated by NS post-Transaction resulting from the Transaction; and

WHEREAS, NS and BRL have reached agreement on such mitigation measures and have made certain commitments to each other as described hereinafter, including but not limited to certain commitments by NS to make certain changes to its Operating Plan, certain capital investments and certain financial contributions for mitigation of Transaction impacts and for the benefit of BRL; now therefore

IT IS HEREBY STIPULATED AND AGREED AS FOLLOWS:

I. Modifications to Operating Plan. In consideration of the concerns of BRL and other communities in the Greater Cleveland area about increases in train frequencies projected for certain of the lines that NS will operate following approval by the Surface Transportation Board of the Conrail Application, NS agrees to modify its original Operating Plan. The modifications to the Operating Plan are described in NS' Mitigation Proposal for Train Frequencies in Greater Cleveland and Vicinity, which was submitted to the STB on April 16, 1998 (hereinafter, the "Mitigation Proposal"), and these modifications are summarized herein. NS agrees to modify its Operating Plan by constructing what is termed the "Cloggsville Connection," as described more particularly in subsection A hereof; by revising the routing of certain trains that would have been routed on the Nickel Plate east of Cloggsville under the original Operating Plan to a different routing on existing Conrail lines, as described more particularly in subsection B hereof; and by revising the projections of train frequencies for lines to be controlled by NS post-Transaction from the numbers contained in the original Operating Plan to a different set of numbers, as described more particularly in subsection C hereof.

A. Cloggsville Connection Construction: NS agrees to construct the Cloggsville Connection, which construction is comprised of two main elements: upgrading the rail lines and facilities between the NS Nickel Plate line at Cloggsville and the Conrail Lakefront line at CP-190 to double-track main line standards through changes and improvements to tracks, bridges, connections, signals and other appurtenant rail facilities, as described more fully in the Mitigation Proposal; and building a double connection at Vermilion between NS' Nickel Plate line and the Conrail

Chicago line to be operated by NS post-Transaction, instead of the single connection described in NS' original Operating Plan, as described more fully in the Mitigation Proposal.

1. Funding: The cost of the construction and improvements to the rail lines and facilities between Cloggsville and CP-190 is currently estimated at \$24,350,000. The cost of constructing a double connection at Vermilion is currently estimated at \$3,000,000 more than constructing the single connection originally proposed in the Operating Plan. NS hereby commits to fund up to the full cost of these Cloggsville Connection projects. (NS previously committed in its Operating Plan to spend the approximately \$2,587,000 needed to construct a single connection at Vermilion.) NS' commitment to fund up to the full cost of these projects is not limited to the current cost estimates contained herein.

2. Schedule: NS estimates that construction of the double connection at Vermilion will take three to five months to complete, and that construction of the improvements to the rail lines and facilities between Cloggsville and CP-190 will take 18 to 24 months to complete. NS hereby agrees to use its best efforts to complete these construction projects within these time frames. Promptly upon execution of this Agreement, NS shall commence design and planning work for the Cloggsville Connection projects.

Once the STB's approval of the Conrail Application has become effective, NS will promptly commence construction of the Cloggsville Connection projects, and NS will advance completion thereof with reasonable expedition in view of operating, engineering and other constraints, the projects' cost and complexity, and any need to obtain additional governmental approvals.

3. Government Approvals. NS' commitment to construct the Cloggsville Connection project and to so in accordance with the schedule detailed above is subject to the acquisition of any necessary federal, state and local regulatory, governmental, environmental and other permits, approvals and authorizations for the projects specified herein, including but not limited to any necessary and applicable STB approvals.

B. Rerouting of Trains from Nickel Plate to Conrail Lines: NS agrees that promptly upon completion of construction of the double connection at Vermilion, NS will reroute approximately 10.6 trains per day from a Rochester, PA -- Youngstown, OH -- Ashtabula, OH -- Cleveland (Cloggsville) -- Vermilion routing through Cleveland and BRL via the NS Nickel Plate line (as provided in the original Operating Plan), to a Rochester, PA -- Alliance, OH -- White, OH -- Cleveland (CP 181) -- Berea, OH -- Vermilion routing through Cleveland via Conrail lines to be operated by NS post-Transaction. Once this rerouting is accomplished, NS projects that average daily freight train traffic on the Nickel

Plate line between Cleveland (Cloggsville) and Vermilion will be approximately 23.5 trains.

C. Rerouting of Trains from Nickel Plate to Cloggsville Connection

Route: NS agrees that promptly upon completion of the construction and improvements to the lines and facilities between Cloggsville and CP-190, NS will reroute approximately 9.6 trains per day from a Cleveland (Cloggsville) to Vermilion routing via the NS Nickel Plate line (as provided in the original Operating Plan) to the Cleveland (Cloggsville)—CP-190—Berea—Vermilion routing created by virtue of the aforesaid construction and improvements. Once this rerouting is accomplished, NS projects that average daily freight train traffic on the Nickel Plate line between Cleveland (Cloggsville) and Vermilion will be approximately 13.9 trains.

D. Revisions to Traffic Projections: Table 1, attached hereto, contains the average daily freight train traffic projections from NS' original Operating Plan for the lines to be operated by NS in Cleveland and the Greater Cleveland area post-Transaction. NS agrees to modify its Operating Plan by substituting the average daily freight train traffic projections contained in Table 2, attached hereto, for these lines. The traffic projections contained in Table 2 depend upon completion of the full Cloggsville Connection, i.e., completion of both the double connection at Vermilion and the upgrades and improvements to the line between Cloggsville and CP-190. As demonstrated in the attached Table 2, the modifications to the NS Operating Plan associated with the Mitigation Proposal result in a projection that the number of trains running on the Nickel Plate line through BRL following

full completion of the Cloggsville Connection and implementation of the Operating Plan (as revised) will be 13.9 trains per day (an increase of 0.4 trains per day over the base year 1995 traffic level of 13.5 for this line segment).

E. Representations Regarding Traffic Projections. NS represents that it has applied all relevant and appropriate information available to it to project that the number of freight trains on the Cleveland (Cloggsville) to Vermilion rail line segment through BRL will average 13.9 trains per day following full completion of the Cloggsville Connection and through at least the remainder of the period to which the projections in NS' Operating Plan pertains. NS further represents that it is not aware of any information that would render this projection incorrect or unreliable. NS agrees that, in the event that its projection should materially understate the actual average number of freight trains operated on this line segment during such period and thereafter, BRL shall not be deemed to have waived in this Agreement such rights as it may have at such time to seek reopening of the STB's approval of the Conrail Application, pursuant to applicable laws and regulations governing reopening of such proceedings, for the limited purpose of reconsideration of the adverse environmental impacts of the Transaction upon BRL and of the conditions imposed by the STB for mitigation of such adverse impacts. NS further agrees that in the event that BRL were to seek reopening on such grounds, if BRL were to request at that time that the STB utilize an expedited schedule for consideration of the request for reopening and for any proceedings upon reopening, NS will not oppose the utilization of an expedited schedule. The parties further agree that none of them shall be deemed,

by virtue of this Agreement, to have waived any right to seek appellate review of any final order issued by the STB with respect to or following proceedings on such a request by BRL for reopening of the approval of the Conrail Application.

F. Modifications in the Event of Operating Changes. To preserve NS' operating flexibility while affording a mechanism for addressing certain future impacts of any substantial increases in NS train traffic over the projections described in subsection D of this section, the parties agree as follows: If during the period beginning on the date on which construction of the Cloggsville Connection has been fully completed and concluding on the later of (i) the date eight years from the Cloggsville Connection completion date or (ii) the date ten years from the date on which the STB's approval of the Conrail Application becomes effective, there is any period of twelve consecutive months in which the average daily number of trains on the Nickel Plate line between Cleveland (Cloggsville) and Vermilion equals or exceeds 26 trains per day on an annualized basis, NS shall contribute \$1,000,000 (one-million dollars) in additional funds to the Community Impacts Fund established pursuant to Section V hereof for mitigation projects. Such payment shall be made within 90 days after the end of such twelve-month period. The provisions of this subsection shall not apply to train movements prior to the date on which construction of the Cloggsville Connection has been fully completed, and none of the twelve-month periods of traffic increases referred to in this subsection shall include any period prior to such Cloggsville Connection project completion date.

G. NS Reports to BRL. In furtherance of this Section I of the Agreement, NS agrees to provide BRL on a monthly basis with an accurate written report on the average daily number of freight trains that operated over the Nickel Plate line through BRL. Each such report shall be provided to BRL by NS within 30 days of the end of the applicable month, and shall be contemporaneously submitted by NS to the STB. NS shall provide such monthly reports until the later of (i) the date eight years from the Cloggsville Connection completion date or (ii) the date ten years from the date on which the STB's approval of the Conrail Application becomes effective. In furtherance of this Section I, NS also agrees to promptly notify BRL in writing of the date on which construction of the Vermilion double connection has been fully completed and the date on which construction of the remainder of the Cloggsville Connection project has been fully completed.

II. Grade Crossing Improvements. NS hereby commits to work cooperatively with BRL and other interested communities adjacent to the Nickel Plate line between Cleveland (Cloggsville) and Vermilion in seeking the support of and funding from the applicable state and other governmental authorities for upgrading the crossing protection (e.g., installing gates and flashing lights) at the 19 public at-grade highway rail crossings on the Nickel Plate line between Cloggsville and Vermilion, which includes those grade crossings located in BRL. NS will work with and cooperate with the pertinent state authorities in developing prioritization of and a timetable for installation of these upgrades. NS commits to act with all deliberate speed to expedite the engineering, state review and approval and construction phases of such projects. NS agrees to contribute

the customary railroad share of the cost of such upgrades, and to promptly commence construction following state approval of the projects in accordance with established practices for grade crossing upgrade projects.

III. Electronic Notification Regarding Train Locations. BRL has requested that NS provide for electronic notification to BRL emergency service providers as to the location of NS trains on the Nickel Plate line within BRL. In recognition of the fact that there are several possible methods for providing such electronic notification, some of which are experimental and some of which may not be appropriate for BRL, NS and BRL hereby agree to negotiate in good faith the issues of whether any of the available methods are appropriate for BRL and, if so, whether and on what terms such method shall be provided to BRL, or to any one or more of the cities comprising BRL.

IV. Clague Siding. In response to community complaints about noise associated with NS train operations in the Clague Siding, NS has recently imposed an operating restriction on eastbound trains. Eastbound trains are now restricted by a Superintendent's Bulletin from stopping at the easternmost end of the siding. The Bulletin states as follows in pertinent part:

When train lengths permits, eastbound movements having to stop at Elmwood, Milepost B-194, will stop as far west of Elmwood Road as possible and still be in a position to observe the eastbound signal and not block Columbia Avenue. . . .

When eastbound trains are going to be stopped at Elmwood, they are to stop trains west of Milepost B-194.2 and do not leave that point until they have positive knowledge that they will be allowed east of signals at Elmwood (east end of Clague siding).

NS agrees to abide by and enforce this restriction. NS has erected an "Engine Stop Here" sign to further advise crews of this stopping point. If at the expiration of a period of one year from the date on which the STB's approval of the Transaction shall have taken effect BRL notifies NS that the above-described operating restriction has failed to adequately remedy the community's concern about noise at Clague Siding, NS agrees to enter into further discussions with BRL on this subject.

V. Community Impacts Fund. In consideration of BRL's concerns about adverse environmental impacts from the Transaction, including the fact that during the interim period between Day One (i.e., the date following control on which NS and CSX split the lines and facilities of Conrail and begin operating those properties separately pursuant to each of their respective Operating Plans) and the date on which NS fully completes construction of the Cloggsville Connection projects, NS train traffic on the Nickel Plate line through BRL could potentially increase over current and historic levels, NS will provide a total amount of \$150,000 to BRL to fund a Community Impacts Fund (the "Fund"). BRL may utilize the Fund for mitigation of what BRL determines to be adverse environmental impacts resulting from the projected train frequency increases on the Nickel Plate line during the interim period, including but not limited to use for enhancements to emergency response capabilities and for other projects related to vehicular delay and pedestrian and vehicular safety, and BRL may also utilize the Fund

for other purposes and expenses determined by BRL to have been or to be related to the impacts of the Conrail Transaction upon BRL. NS will make payment of this total amount of \$150,000 to BRL no later than 30 days after the date on which the STB's approval of the Transaction has become effective. The Fund shall be established and administered solely by BRL or their duly appointed designee(s), and BRL shall have sole responsibility for selecting, managing and maintaining the projects funded by the Fund. Additionally, in the event that NS becomes obligated to make the payment of \$1,000,000 to the Fund pursuant to the terms of Section I. F. hereof, such payment may be used by BRL, in its sole discretion, for mitigation of what BRL determines to be adverse environmental impacts resulting from the train frequency increases on the Nickel Plate line and for other purposes and expenses determined by BRL to have been or to be related to such impacts.

VI. FRA Study of Horn Noise. The parties understand that the Federal Railroad Administration ("FRA") is considering issuing new rules on procedures for blowing of train horns at highway/rail at-grade crossings, which rules may allow communities to apply for an exception to horn blowing at certain grade crossings that meet explicit criteria and could be designated as "quiet zones." In the event that the FRA does issue rules with such provisions, and in the further event that Bay Village, Rocky River, Lakewood or any one or more of them decides to seek to qualify one or more of the grade crossings in its community as such a "quiet zone," NS agrees to engage in discussions with such community or communities with respect to such an effort.

VII. Other Understandings and Undertakings.

A. BRL agrees that through NS' consultations with the officials and elected representatives of BRL, which consultations have culminated in this Agreement, NS has complied with the directives in the DEIS regarding consultations with BRL with respect to potentially significant impacts resulting from the Transaction.

B. BRL agrees not to seek any conditions or mitigation with respect to the STB's approval of the Conrail Application other than as provided in this Agreement at the STB, in any court, or in any other forum. By so agreeing, BRL shall not be deemed to have waived such rights as it may have in the future to seek reopening of the STB's approval of the Conrail Application, pursuant to applicable laws and regulations governing reopening of such proceedings, for the limited purpose of reconsideration of the adverse environmental impacts of the Transaction upon BRL and of the conditions imposed by the STB for mitigation of such adverse impacts.

C. NS acknowledges that it is bound by any system-wide mitigation measures mandated by the STB for hazardous materials transport and intends to apply NS' own system-wide program for the safe transportation of hazardous materials (as further described in Attachment A hereto) to the lines and facilities it will operate in BRL post-Transaction. Additionally, NS agrees to work with BRL to provide hazardous materials response training to BRL emergency service providers. NS also agrees to provide each of Bay Village, Rocky River and

Lakewood with an Operation Respond software package, to install such software for each of the cities and to train each city's personnel in the use of such software.

VIII. STB Notification. Promptly upon execution of this Agreement:

A. BRL and NS will notify the STB in writing that they have entered into this Agreement and will advise the STB of the terms of this Agreement. BRL and NS will further request at that time that the STB adopt the terms of the Agreement as a condition of the STB's approval of the Conrail Application; and

B. BRL will advise the STB in writing that, in consideration of this Agreement, it is withdrawing its request for conditions to be imposed on NS or affecting NS to mitigate environmental impacts of the Transaction.

IX. Conditions. The commitments set forth above, with the exception of the commitments made in the third sentence of Section I. A. 2. hereof and in Section VIII. hereof, are conditioned on:

A. The STB's approval of the Conrail Application, provided that such approval does not include the imposition upon NS of any conditions for mitigation in BRL that are both: (1) other than the conditions recommended in the Final Environmental Impact Statement ("FEIS") issued by the STB's Section of Environmental Analysis on May 22, 1998, and (2) materially inconsistent with, in lieu of, or supplemental to the commitments in this Agreement, including but not limited to any imposed condition requiring further study and evaluation of impacts and mitigation options for BRL as related to the operations of NS; and

B. The approval of the Application by the STB having become effective.

IN WITNESS WHEREOF, the undersigned have duly executed this Agreement, all as of the day and year first above written.

THE CITY OF BAY VILLAGE, OHIO

By: /s/
Hon. Thomas L. Jelepis
Mayor

THE CITY OF ROCKY RIVER, OHIO

By: /s/
Hon. Don Umerley
Mayor

THE CITY OF LAKEWOOD, OHIO

By: /s/
Hon. Madeline A. Cain
Mayor

NORFOLK SOUTHERN CORPORATION

By: /s/
David R. Goode
Chairman, President and
Chief Executive Officer

Table 1 NS Original Operating Plan

Segment	Freight Trains per Day		
	Pre	Post	Change
Rochester to Youngstown	12.6	17.7	5.1
Youngstown to Ashtabula*	11.7	23.8	12.1
Ashtabula to Cleveland (Cloggsville)	13.0	36.6	23.6
Cleveland (Cloggsville) to Vermilion	13.5	34.1	20.6
Rochester to Alliance	37.9	26.3	-11.6
Alliance to White	26.4	30.1	3.7
White To Cleveland (CP-181)	12.5	29.7	17.2
Cleveland (CP-181) to CP-190**	48.4	42.9	-5.5
CP-190 to Berea	48.4	42.9	-5.5
Cleveland (Cloggsville) to CP-190	2.0	4.2	2.2
Berea to Vermilion	48.4	34.9	-13.5
Vermilion to Bellevue	15.6	27.0	11.4
Bellevue to Oak Harbor	7.7	27.2	19.5
Vermilion to Oak Harbor	48.3	41.4	-6.9
Vermilion Connection west of Coen Road	0	7	7
Vermilion Connection east of Coen Road	n/a	n/a	n/a

* Post numbers include 7 CSX trains per day

** Post numbers include 10 CSX trains per day

*** Post numbers include 2 CSX trains per day

n/a = not applicable

Table 2 NS Revised Cloggsville Connection Mitigation Proposal

Segment	Freight Trains per Day		
	Pre	Post	Change
Rochester to Youngstown	12.6	7.1	-5.5
Youngstown to Ashtabula*	11.7	13.2	1.5
Ashtabula to Cleveland (Cloggsville)	13.0	26.0	13.0
Cleveland (Cloggsville) to Vermilion	13.5	13.9	0.4
Rochester to Alliance	37.9	36.9	-1.0
Alliance to White	26.4	40.7	14.3
White To Cleveland (CP-181)	12.5	40.3	27.8
Cleveland (CP-181) to CP-190**	48.4	53.5	5.1
CP-190 to Berea	48.4	63.1	14.7
Cleveland (Cloggsville) to CP-190	2.0	13.8	11.8
Berea to Vermilion	48.4	55.1	6.7
Vermilion to Bellevue	15.6	26.0	10.4
Bellevue to Oak Harbor	7.7	26.2	18.5
Vermilion to Oak Harbor	48.3	42.4	-5.9
Vermilion Connection west of Coen Road	0.0	0.9	0.9
Vermilion Connection east of Coen Road	0.0	11.6	11.6

* Post numbers include 7 CSX trains per day

** Post numbers include 10 CSX trains per day

*** Post numbers include 2 CSX trains per day

n/a = not applicable

ATTACHMENT A.
NORFOLK SOUTHERN'S COMMITMENT TO
SAFE TRANSPORTATION OF HAZARDOUS MATERIALS

Safety, including safe transport of hazardous material is Norfolk Southern's (NS') highest priority. This unflagging commitment, which goes beyond simply complying with existing regulations and accepted industry practices, has resulted in NS' industry-leading safety performance. NS is dedicated to being a responsible member of the communities it serves and is also motivated by the tenet that safety is good business. Simply put, accidents are both damaging and expensive, and NS is devoted to preventing them. The following summarizes NS' ongoing commitment to safe transportation of hazardous materials.

WHAT IS HAZARDOUS MATERIAL?

The U.S. Department of Transportation (DOT) defines a hazardous material as "*Any substance or material in a quantity or form which poses an unreasonable risk to health, safety, and property when transported in commerce.*" This includes a rather extensive list of chemicals of varying degrees of hazard.

Norfolk Southern has transported over 250,000 loads of hazardous materials annually for the last several years with an excellent safety record. Overall, 99.96 percent of the hazardous materials shipped on NS arrive without incident, and NS is continually working to improve their safety and environmental performance. System-wide, hazardous materials traffic amounts to about five percent of the 3.8 to 4.0 million total carloads of freight handled by NS each year. Completion of the Conrail Transaction will increase hazardous materials loads on some rail line segments, and decrease loads on others. However, NS expects the system-wide percentage of hazardous materials to other freight to remain about five percent post-Transaction.

NS' EXISTING RISK MANAGEMENT PROGRAM FOR HAZARDOUS MATERIALS

Prevention is the primary objective of the NS Risk Management Program for Hazardous Materials. Prevention means minimizing risks while maximizing employee safety and protection of the environment. NS achieves this objective through effective training, regulatory compliance, safe operating practices, equipment and right-of-way maintenance, risk assessment, and contingency planning.

Employee Training - Effective employee training is the cornerstone of hazardous materials incident prevention. Since 1993, over 20,000 NS employees have successfully participated in the NS hazardous materials training program. Since then, NS has provided refresher training annually to employees with key hazardous materials management and handling responsibilities - even though federal regulations only require such refresher training every three years. Environmental Awareness training is also conducted for all employees on a regular basis.

Regulatory Compliance - NS must abide by several federal laws and regulatory programs designed to ensure the safe handling and transport of hazardous materials, including:

- U.S. DOT hazardous materials regulations (49 CFR 170-179)
- Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (CERCLA)
- Resource Conservation and Recovery Act of 1976 (RCRA)

The DOT regulations closely regulate the transportation of hazardous materials. For example, each rail car (or block of cars) containing hazardous materials must have the proper documentation, including identification of the material and an emergency telephone number. Most cars containing hazardous materials must display a placard or other markings to identify the contents and the associated hazards. The regulations also control the placement of hazardous materials cars in a train. Cars containing incompatible materials are not to be placed next to each other to reduce the risk of a chemical reaction. Similarly, incompatible cars are not to be placed next to each other. For example, a hazardous materials tank car may not be placed next to a flat car carrying steel pipe, as the pipe could shift and damage the tank car.

NS also must comply with Federal Railroad Administration (FRA) regulations covering track and signal safety standards, locomotive and freight car safety standards, and railroad operating rules and practices, all of which reduce the risk of hazardous materials releases from accidents.

Safe Operating Practices - Industry recommended safe operating practices for the transportation of hazardous materials are provided in the American Association of Railroads (AAR) Circular OT-55. There are four main areas addressing incident prevention:

- **Key Trains** are trains that carry a specified amount of hazardous materials, and have certain restrictions such as a maximum speed of 50 mph and procedures for meeting and passing other trains.
- **Key Routes** are any rail line segments with an annual volume of 10,000 car loads (or greater) of any hazardous materials. Key routes are subject to specific track maintenance requirements (twice yearly inspections of main track and annual inspections of sidings), and a maximum distance of 40 miles between track-side safety detectors (sensors that monitor performance of passing train cars, including such items as wheels and dragging equipment). *Since 1992, NS has applied key route requirements to rail line segments with 9,000 car loads of hazardous materials. Track-side safety detectors are placed only 11 to 15 miles apart over the entire NS system.*
- **Yard Operating Procedures** establish safe train car switching operations in rail yards, often going beyond the federal regulations. *NS has even tighter restrictions*

limiting the number of cars of certain commodities which can be cut-off, prohibiting any tank cars containing flammable gas from being cut-off in motion, and limiting loaded hazardous materials car coupling speeds to 4 mph or less.

Storage Distance defines the minimum distances from railroad mainline tracks and passenger operations for storage and handling of hazardous materials. *In addition, NS has a general policy against transloading hazardous materials on company property. Where transloading is approved, special precautions are taken to provide spill containment and environmental protection.*

Although compliance with each of these areas is totally voluntary, NS has adopted OT-55 as part of its operating policy and practice.

NS is also a member of the Chemical Manufacturers Association (CMA) Responsible Care partnership program. This program focuses on prevention of accidents by adopting a code of management practices established by the CMA for safer handling and transport of chemicals. The program includes chemical transport risk management, compliance review and training, safety performance reviews and recommendations, handling and storage practices, and emergency preparedness procedures. *The incorporation of these elements into NS' existing safety and environmental programs further strengthens NS' risk management of hazardous materials transportation.*

Maintenance - Maintenance of the railroad infrastructure and equipment is an extremely important element in preventing accidents. Large annual expenditures are made to keep NS rails in "tip-top" shape and ensure the safest travel for all traffic, including hazardous materials. Most tank cars are privately owned and NS is not responsible for their maintenance other than ensuring safe running gear. Nonetheless, accidents with hazardous materials cars can result from other cars in the train. Therefore, NS has an effective maintenance and inspection program in place to keep all railroad owned equipment up to the required standards of safety.

Contingency Planning - NS has two types of plans that address potential hazardous materials incidents. These are the *NS Emergency Action Plans for Hazardous Materials Incidents* and *Division Emergency Action Plans for Hazardous Materials Incidents*. Both of these contingency plans emphasize finding and fixing the source of the spill or release, containing and controlling the spill or release, identifying the material and notifying the proper authorities, and cleaning up the spill and restoring the environment. Both plans are updated as required by regulation, and when warranted by changes in NS operations. In addition, NS uses internal and external Hazardous Materials audits to evaluate their emergency response plans and hazardous materials training programs.

Additional emergency response resources include private, on-call contractors, who provide supplemental hazardous materials handling knowledge, personnel, and equipment.

These resources are located strategically throughout the NS system, and are available to support railroad personnel and local police and fire departments during incidents.

ADDITIONAL SAFETY MEASURES TO BE TAKEN BY NS IN RESPONSE TO POST-TRANSACTION INCREASES IN HAZARDOUS MATERIALS TRAFFIC

Implementation of the Conrail Transaction will affect the volume of hazardous materials shipped on NS lines, and the routes used to move the hazardous materials to customers. Some NS rail line segments will experience increases in hazardous materials traffic, while other line segments will experience decreases. The Draft Environmental Impact Statement (DEIS) on the Transaction, prepared by the Surface Transportation Board (STB), identifies NS rail line segments which are anticipated to experience increases in hazardous materials traffic. The DEIS recommends specific safety measures for rail line segments projected to experience increases in hazardous materials traffic above the key route threshold of 10,000 cars annually as a result of the Transaction, with additional safety measures for rail line segments where hazardous materials traffic is expected to double and exceed 20,000 car loads annually.

NS concurs with the DEIS recommendation that the increases in hazardous materials transportation warrant additional safety measures. In keeping with the DEIS recommended mitigation strategy and NS' own proactive approach to safety, and contingent on the STB's approval of the joint CSX-NS application to acquire control of Conrail, NS commits to the following:

System-Wide Safety Measures

NS will implement its existing Risk Management Program for Hazardous Materials across the entire post-Transaction NS system. This will include the following specific actions:

1. **NS will develop and maintain Emergency Action Plans for Hazardous Materials system-wide.** NS has two types of plans that address potential hazardous materials incidents. These are NS *Emergency Action Plans for Hazardous Materials Incidents* and *Division Emergency Action Plans for Hazardous Materials Incidents*. Similar plans will be prepared and implemented for the newly-acquired Conrail rail lines and facilities.
2. **NS will maintain and continue to improve its safety policies and procedures to reduce the risk of hazardous material incidents.** NS has established a Risk Management Program for Hazardous Materials within its Environmental Protection department. In addition, NS corporate operating policies and procedures incorporate the safety policies and procedures of AAR Circular OT-55 for the safe transport of hazardous materials and the CMA Responsible Care program for the safe transport and handling of chemicals. These operating policies and procedures will be implemented throughout the expanded NS system. A Safety Integration Plan (SIP) was prepared by NS and submitted

with it's application to the STB. The SIP details NS' plans to incorporate the NS safety policies and procedures into the Conrail operations acquired by NS.

Local Safety Measures - Key Routes

NS will provide the following risk management measures to rail line segments that become "Key Routes":

1. **NS will implement the AAR Circular OT-55 guidelines for the safe transportation of hazardous materials, including:**
 - Wayside defective bearing detectors shall be placed a maximum of 40 miles apart on key routes, or an equivalent level of protection may be installed based on improvement in technology.
 - Main track on key routes must be inspected by rail defect detection and track geometry inspection cars or any equivalent level of inspection no less than two times each year; and sidings must be similarly inspected no less than one time each year.
 - Any track used for meeting and passing key trains must be Class 2 or better. If a meet or pass must occur on less than Class 2 track due to an emergency, one of the trains must be stopped before the other train passes.
 - Training of employees who handle shipments of hazardous materials on a key route must be conducted on an annual basis.
2. **NS will provide hazardous materials contingency plan information to counties along key routes for distribution to the Local Emergency Planning Committees (LEPCs).** These contingency plans will contain information on NS hazardous materials emergency response plans, key sources and contacts for additional emergency assistance, and NS contacts. The information provided by NS will supplement existing contingency planning efforts by the LEPCs, but is not intended to take the place of local planning. It is neither necessary nor cost-effective for every local firefighter and policeman to have the expert skills and equipment to respond personally to any hazardous materials emergency. Through the proper awareness training and contingency planning, states and local communities will be able to pool their response capability with those of federal agencies and NS to provide for a more coordinated and better managed emergency response system.
3. **NS has an established 24-hour toll-free telephone line which can be used to obtain hazardous materials emergency response information.** The emergency response

information "hotline" is established in the NS Police Communications Center in Roanoke, Virginia, which can immediately access all NS dispatch centers.

Additional Safety Measures on Routes Where Hazmat Traffic is expected to Double and Exceed 20,000 car loads annually

NS will provide the following risk management measures to rail line segments where hazardous material traffic doubles and exceeds 20,000 car loads annually:

1. NS will implement the mitigation measures noted above for Key Routes, including implementation of the OT-55 guidelines for Key Routes, provision of hazardous materials contingency planning information to affected counties for dissemination to LEPCs, and a 24-hour toll-free "hotline" for hazardous materials emergency response information.
2. NS will provide hazardous materials emergency response training drills for each rail line segment within two years after Approval of the Transaction. These drills will be held in cooperation with the LEPCs, and interested federal and state agencies.

STB

FD

33388

6-2-98

I

187987

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

A LIMITED LIABILITY PARTNERSHIP INCLUDING PROFESSIONAL CORPORATIONS

1875 CONNECTICUT AVENUE, N.W.
WASHINGTON, DC 20009-5728

(202) 986-8000

TELEX: 440274 FACSIMILE: (202) 986-8000

WRITER'S DIRECT DIAL:

(202) 986-8050

June 2, 1998

EXPEDITED HANDLING REQUIRED

NEW YORK
WASHINGTON
ALBANY
BOSTON
DENVER
HARRISBURG
HARTFORD
JACKSONVILLE

ENTERED
Office of the Secretary

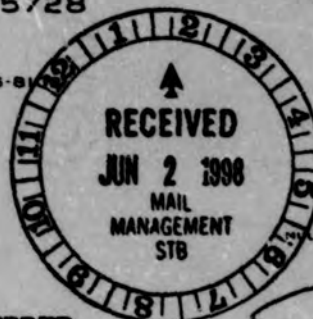
JUN 02 1998

Part of
Public Record

ENTERED
Office of the Secretary

JUN 02 1998

Part of
Public Record
LOS ANGELES
NEWARK
PITTSBURGH
PORTLAND, OR
SALT LAKE CITY
SAN FRANCISCO
BRUSSELS
MOSCOW
ALMATY
LONDON
IA LONDON BASED
MULTINATIONAL PARTNERSHIP



VIA HAND DELIVERY

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

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

Dear Secretary Williams:

Enclosed are the original and 25 copies of "Motion of Indianapolis Power & Light Company ("IPL") to Strike 'Notice of Willingness of Applicants CSX Corporation and CSX Transportation, Inc. to Accept Additional Conditions in the Public Interest (CSX-152),' and Motion in Limine Objecting to Any Reference to Same" (IP&L-14) in the above-referenced proceeding. Also enclosed is a 3.5" diskette containing the Motion in WordPerfect format, and three additional copies of the Motion for time-stamping and return via our messenger. In view of the fact that IPL requires a ruling on this Motion before CSX presents oral argument about it, we request your assistance in expediting its handling.

Respectfully submitted,

Michael F. McBride

Michael F. McBride
Attorney for Indianapolis Power &
Light Company

cc(w/encl.): All Parties of Record
The Honorable Linda J. Morgan (courtesy copy)
The Honorable Gus K. Owen (courtesy copy)

EXPEDITED CONSIDERATION REQUIRED

IP&L-14

**UNITED STATES OF AMERICA
DEPARTMENT OF TRANSPORTATION
SURFACE TRANSPORTATION BOARD**

Finance Docket No. 33388



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

**MOTION OF INDIANAPOLIS POWER & LIGHT COMPANY
TO STRIKE "NOTICE OF WILLINGNESS OF APPLICANTS
CSX CORPORATION AND CSX TRANSPORTATION, INC. TO
ACCEPT ADDITIONAL CONDITIONS IN THE PUBLIC INTEREST (CSX-152),"
AND MOTION IN LIMINE OBJECTING TO ANY REFERENCE TO SAME**

Late in the afternoon on Monday, June 1, 1998, with less than 48 hours to go before the start of oral argument in this massive proceeding in which the Joint Application has been pending for almost one year, Applicants CSX Corporation and CSX Transportation, Inc. (collectively, "CSX") filed a "Notice of Willingness of Applicants CSX Corporation and CSX Transportation, Inc. to Accept Additional Conditions in the Public Interest (CSX-152)" ("the Notice") designed to defeat any meaningful relief for Indianapolis Power & Light Company ("IPL").

The Motion (1) is an outrageous effort to evade the procedural schedule adopted in the proceeding largely at Applicants' request which IPL has scrupulously adhered to but CSX has not¹, (2) constitutes "sandbagging" by coming in at the

¹ Just last week, in Decision No. 84, the Board properly rejected CSX's last-minute effort to supplement the record with additional evidence about anti-assignment clauses in Conrail
(continued...)

"thirteenth hour" while trying to distract IPL's counsel from preparing for oral argument, (3) violates the accepted rule -- in Rule 408 of Federal Rules of Evidence -- against admission into evidence of settlement offers and responses, and, ironically, (4) violates the very Settlement Agreement (CSX-151) with the City of Indianapolis simultaneously filed with the Board by CSX and which provides, in ¶8, that "CSX and the City [of Indianapolis] understand and stipulate that this Agreement is not intended to settle and shall not prejudice the position of any party with respect to the Joint Application." Nevertheless, on page 10 of the Notice, CSX argues, inconsistently with its Stipulation with the City of Indianapolis, that the Settlement Agreement is beneficial to IPL and Indiana Southern Railroad and should be used to deny those two parties any other relief, thus violating the very language that IPL asked the City of Indianapolis to include in the Settlement Agreement and quoted above so that it could not be used as CSX now seeks to use it. That is simply outrageous, and evidence of bad faith on the part of CSX. The Notice and Attachments thereto should be stricken from the record, and all parties should be directed not to refer to them, quote from them, or otherwise rely on them in any way in their oral arguments or in any other submission in this proceeding.

1. Procedural Schedule. The Notice constitutes 10 pages of thinly disguised argument and distorted or erroneous presentation of IPL's circumstances that could have, and should have, been filed no later than February 23, 1998, when final

¹(...continued)
contracts.

briefs were due. (The additional 10 pages also violates the Board's page limits on briefs, since CSX used nearly all of its allotment already.) There is no new evidence in the Notice except for (a) the joint settlement offer of CSX and its 89-percent owned subsidiary, Indiana Rail Road, and (b) IPL's response. IPL has had no time to respond to the substantive claims and arguments presented in the Notice, and strenuously objects to the introduction of that Notice now, or the attachments to the Notice, which were in CSX's possession on or before May 12, 1998. As the Board put it so well in Decision No. 84:

"CSX . . . presents no valid reason why it could not have submitted the proffered evidence in a more timely manner. Accepting the evidence at this late stage would seriously deviate from the well-established procedural schedule in this case. It would also prejudice the opponents who have consistently challenged, in one manner or another, [the matter in dispute therein].

Decision No. 84 (at 2), served May 28, 1998. All the same reasons justify striking CSX-152, which comes in even later in the proceeding and without even a motion for leave to file it.

2. "Sandbagging." Apparently concerned that IPL would get relief from the Board, despite CSX's consistent arguments that IPL was entitled to none other than the crumbs offered in the Joint Application, CSX engaged in sham settlement discussions by offering IPL -- ironically, together with Indiana Rail Road, its purported competitor² -- what IPL regards as inconsequential

² Mr. Sharp, Vice President-Coal Marketing for CSX, is the author of the theory -- now abandoned by CSX -- that "[w]here traffic was available to either Indiana Railroad [sic] or to CSX, we would be competitors." ISRR-9, Weaver V.S., Attachment 1, (continued...)

changes in the "Rube Goldberg"-like arrangement proposed by CSX in the Joint Application, purportedly to restore the competition that it admits would be lost in Indianapolis. Then, after IPL responded to the joint CSX/Indiana Rail Road settlement offer and rejected it, CSX has the temerity to ask the Board to unilaterally impose on IPL competitive "fixes" (which are nothing of the sort) that IPL, knowing its needs better than anyone, rejected. If what CSX/Indiana Rail Road proposes were truly an improvement over IPL's current circumstances, does the Board really believe IPL would reject it? Merely to state CSX's theory is to reject it.

The Board does not have before it the Contract with Conrail and Indiana Southern (ICC-C-CR-4553) that applies to IPL's movements of coal originating on Indiana Southern, and so it could not possibly know whether the crumbs CSX offered IPL would in any way restore the competition that IPL is losing. IPL can assure the Board, without discussing the merits of CSX's purported settlement offer to IPL, that the offer was totally unsatisfactory, which is why IPL rejected it. Without knowing what is in the IPL/Conrail-Indiana Southern Contract, so as to compare the CSX/Indiana Rail Road settlement offer with what IPL has now, the Board could not conclude otherwise. IPL needs structural relief, not the crumbs offered by CSX and Indiana Rail Road, which is why it rejected the joint settlement offer.

²(...continued)
page 3 of 3, filed January 14, 1998. Given that the CSX/Indiana Rail Road offer to IPL was a joint offer, Mr. Sharp's theory was obvious nonsense.

3. Public Policy Militates Strongly Against Accepting Into Evidence Settlement Offers That Have Been Rejected, so as to Discourage the Type of Behavior Displayed in the Notice, and There Is No Authority for Accepting Into Evidence a Settlement Offer That Was Rejected. There is simply no authority -- NONE -- for accepting into evidence, over the strenuous opposition of the opposing party, settlement offers which have been rejected.³ There is, however, ample authority for not admitting rejected settlement offers into evidence. See Rule 408 of the Federal Rules of Evidence:

"Evidence of (1) furnishing or offering or promising to furnish, or (2) accepting or offering or promising to accept, a valuable consideration in compromising or attempting to compromise a claim which was disputed as to either validity or amount, is not admissible to prove liability for or invalidity of the claim or its amount. Evidence of conduct or statements made in the compromise negotiations is likewise not admissible...."

The Rule provides for certain exceptions (such as for preexisting evidence or to prove bias), but none of them apply here. Thus, the Rule -- which serves the important public policy and benefit of encouraging offers of compromise and frank discussion of the merits of the matter without fear that the tribunal will see them -- would be turned upside down by allowing CSX's tactics to succeed.

³ In contrast, the Board has a long-established practice of accepting settlement agreements which resolve matters in controversy. CSX ought to know the vast difference between accepting into the record, at any time and presumably with the agreement of all settling parties, a settlement agreement, and using offensively a settlement offer -- which, in this case and as one might expect in the circumstances, was a sham drafted for this purpose -- against the party who has, wholly within its rights, rejected it.

4. CSX's Effort to Use the Settlement Agreement with the City of Indianapolis Violates That Agreement. CSX-151, filed simultaneously with the Notice, provides in ¶8 that "this Agreement is not intended to settle and shall not prejudice the position of any other party with respect to the Joint Application" (emphasis added). CSX, despite having agreed to that provision which the City of Indianapolis insisted on at IPL's request, immediately proceeds to violate it by relying on the Settlement Agreement with the City in the Notice (at page 10) as an additional reason for denying the relief sought herein by IPL. That type of conduct should cause the Board to reject the position urged by CSX in the Notice because it demonstrates that CSX is not providing the Board with a complete presentation of the circumstances affecting IPL's interests, and demonstrates the unfairness of waiting until the eve of oral argument to file such a new, complex, and misleading pleading. It should be rejected for that reason alone.

Motion in Limine. Lastly, IPL seeks to bar CSX or any other party from referring to, discussing, or otherwise relying on, the Notice or the Attachments thereto. A motion *in Limine* is appropriate to bar specific evidence or arguments that may be unnecessarily cumulative, create unfair prejudice, or confuse the issues based upon the grounds available under the Federal Rules of Civil Procedure and the Federal Rules of Evidence. See Fed. R. Civ. P. 16(c)(4); Fed. R. Evid. 103, 403. In recent years, the motion *in limine* has "become widely recognized as a salutary device to avoid . . . unfairly prejudicial evidence. . . ."

Gendron v. Pawtucket Mutual Ins. Co., 409 A.2d 656, 659 (Me.

1979). The Board's Rules of Practice, explicitly consistent with the Federal Rules of Evidence, specifically preserve "the substantial rights of the parties." 49 C.F.R. § 1114.1 (1997). IPL's rights would be violated if it were to be "sandbagged" by admission into the record a settlement offer it regarded as inaccurate, self-serving and misleading, and which it rejected. For CSX to use that as an excuse to further brief most of the major issues in the proceeding, even acquisition premiums, three and one-half months after briefs were due, is inexcusable.

IPL refuses to get drawn into a substantive discussion of CSX's settlement offer or IPL's response, in view of its position that this Motion to Strike should be granted and, in this Motion in Limine, that CSX should be barred from even discussing the matter before the Board on June 3-4 at the oral argument. IPL intends to object vigorously, during oral argument by CSX or by any party, to any reference to CSX-152 or the attachments thereto. Public policy should strongly discourage the Board from permitting CSX to engage in the behavior that is evidenced by the filing of the Notice. If it were to permit CSX to use its sham settlement offer to IPL, and IPL's good-faith response thereto, against IPL, the Board will send the following message to all who receive settlement offers from railroads appearing before it: **"BEWARE -- THIS SETTLEMENT OFFER MAY BE USED AGAINST YOU AND YOU SHOULD NOT RESPOND SUBSTANTIVELY AND IN GOOD FAITH, FOR THE BOARD MAY IMPOSE THE SETTLEMENT OFFER ON YOU EVEN**

IF YOU REJECT IT, AND ALLOW RAILROADS TO TRY TO DISTORT YOUR WORDS IN RESPONSE."⁴

Conclusion

The Board should: (1) reject the Notice and the Attachments thereto (CSX-152) as a violation of the procedural schedule in this proceeding, IPL's rights, and the Board's own procedural rules; (2) grant IPL's Motion *in Limine* and bar counsel for CSX or any other party from quoting, referring to, or otherwise relying on in any way any matter set forth in the Notice or the Attachments thereto; and (3) grant IPL such other and further relief, including additional oral argument, as may be necessary because of the unauthorized filing of CSX-152 and the disruption it has caused counsel for IPL on the eve of oral argument. We so pray.

⁴ We hasten to add that IPL stands by what it wrote but that, as a matter of the highest principle, the Board should not rely on IPL's letter any more than it should rely on the joint CSX/Indiana Rail Road "settlement offer." Our point is that CSX is now trying to distort and belittle IPL's position, and twist its words against it, rather than have the Board decide the matter on the pleadings filed to date. IPL is perfectly content to decide this matter on the record to date, but apparently CSX was not. Litigation, unfortunately for CSX, is like that. The Board should not allow parties another "shot" just because they think they are losing. There is no other conceivable reason for filing the Notice and Attachments thereto.

In view of the prejudice to IPL from the filing of CSX-152, we ask the Board to rule on this matter before allowing CSX to refer to, rely on, or otherwise to address any of the matters set forth in CSX-152.

Respectfully submitted,

Michael F. McBride

Michael F. McBride
Brenda Durham
LeBOEUF, LAMB, GREENE &
MacRAE, L.L.P.
Suite 1200
1875 Connecticut Ave., N.W.
Washington, D.C. 20009-5728
(202) 986-8000 (Telephone)
(202) 986-8102 (Fax)

Attorneys for Indianapolis
Power & Light Company

June 2, 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**

CERTIFICATE OF SERVICE

I hereby certify that I have served, this 2nd day of June, 1998, a copy of the foregoing "Motion of Indianapolis Power & Light Company to Strike 'Notice of Willingness of Applicants CSX Corporation and CSX Transportation, Inc. to Accept Additional Conditions in the Public Interest (CSX-152),' and Motion in Limine Objecting to Any Reference to Same" (IP&L-14), by first-class mail, postage prepaid, or by more expeditious means, upon all parties of record. The following persons were served by hand delivery or facsimile:

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

Mr. Vernon Williams, Secretary
Surface Transportation Board
Mercury Building
1925 K Street, N.W.
Washington, DC 20423-0001
VIA HAND DELIVERY

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

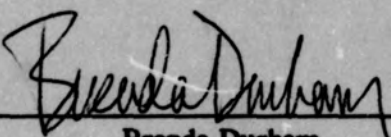
Honorable Jacob Leventhal
Administrative Law Judge
Federal Energy Regulatory
Commission
Office of Hearings, Suite 11F
888 First Street, N.E.
Washington, DC 20426
VIA HAND DELIVERY

John V. Edwards, Esq.
Patricia Bruce, Esq.
Zuckert, Scoutt
& Rasenberger, L.L.P.
Brawner Building
888 17th Street, N.W.
Washington, DC 20006-3939
VIA FACSIMILE

Drew A. Harker, Esq.
Paul T. Denis, Esq.
Susan Cassidy, Esq.
Dennis G. Lyons, Esq.
Arnold & Porter
555 12th Street, N.W.
Washington, DC 20004-1202
VIA FACSIMILE

David A. Coburn, Esq.
Steptoe & Johnson
1330 Connecticut Avenue, N.W.
Washington, DC 20036
VIA FACSIMILE

Gerald P. Norton, Esq.
Harkins Cunningham
1300 19th Street, N.W.
Suite 600
Washington, DC 20036
VIA FACSIMILE


Brenda Durham

STB

FD

33388

6-2-98

I

187985

187585

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

SLOVER & LOFTUS
ATTORNEYS AT LAW
1884 SEVENTEENTH STREET, N.W.
WASHINGTON, D. C. 20036

June 2, 1998

ENTERED
Office of the Secretary

JUN 02 1998



TELEPHONE:
(202) 347-7170

FAX:
(202) 347-3619

WRITER'S E-MAIL:

cam@sloverandloftus.com

BY HAND DELIVERY Part of
Public Record

The Honorable Vernon A. Williams
Secretary
Surface Transportation Board
Case Control Branch
ATTN: STB Finance Docket 33388
1925 K Street, N.W.
Washington, D.C. 20423-0001

I

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

Dear Secretary Williams:

Enclosed for filing in the above-referenced proceeding
are an original and twenty-five (25) copies of the Notice of
Withdrawal of Potomac Electric Power Company ("PEPCO")
(PEPC-10). We have also enclosed a diskette containing this
filing in WordPerfect 5.1 format, as well as an additional copy
of the filing to be date-stamped and returned to the bearer of
this letter.

In view of this filing, PEPCO hereby withdraws its
request to participate in the oral argument in this proceeding
scheduled for June 3-4, 1998. PEPCO suggests that the five
minutes of argument time allotted to it be re-allocated to the
other "coal" parties with which it is grouped.

Sincerely,

Christopher A. Mills

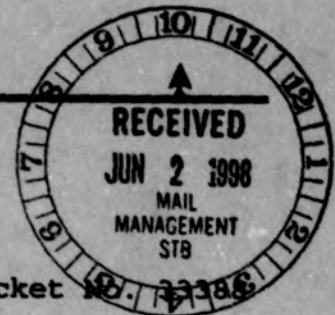
CAM/mfw
Enclosures

cc: Bettye Uzzle
Parties of Record

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

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

Finance Docket No. 33386



**NOTICE OF WITHDRAWAL OF
POTOMAC ELECTRIC POWER COMPANY**

Potomac Electric Power Company ("PEPCO") has reached a voluntary settlement with Applicants of the matters raised by PEPCO's comments and request for conditions in this proceeding. Accordingly, PEPCO hereby withdraws its comments and request for conditions, and further withdraws as a party of record in this proceeding.

Respectfully submitted,

John J. Sullivan
Potomac Electric Power Company
1900 Pennsylvania Avenue, N.W.
Washington, D.C. 20068

C. Michael Loftus
Christopher A. Mills
Andrew B. Kolesar III
Slover & Loftus
1224 Seventeenth Street, N.W.
Washington, D.C. 20036
(202) 347-7170

Dated: June 2, 1998

Attorneys for Potomac Electric
Power Company

CERTIFICATE OF SERVICE

I certify that I have this 2nd day of June, 1998,
served copies of the foregoing Notice of Withdrawal by hand upon
Applicants' counsel:

Dennis G. Lyons, Esq.
Arnold & Porter
555 Twelfth Street, N.W.
Washington, D.C. 20004-1202

Samuel M. Sipe, Esq.
Steptoe & Johnson L.L.P.
1330 Connecticut Ave., N.W.
Washington, D.C. 20036-1795

Richard A. Allen, Esq.
Patricia E. Bruce, Esq.
Zuckert, Scoutt & Rasenberger,
L.L.P., Suite 600
888 Seventeenth Street, N.W.
Washington, D.C. 20006-3939

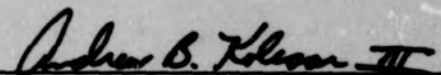
Paul A. Cunningham, Esq.
Harkins Cunningham
1300 Nineteenth Street, N.W.
Suite 600
Washington, D.C. 20036

I further certify that copies of the foregoing Notice
of Withdrawal were served by first class mail, postage prepaid
on:

The Hon. Rodney E. Slater
Secretary
U.S. Dept. of Transp.
400 7th Street, S.W.
Suite 10200
Washington, D.C. 20590

The Hon. 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

and upon all other parties of record in Finance Docket No. 33388.


Andrew B. Kolesar III

1
STB

FD

33388

6-2-98

I 187984



McHALE COOK & WELCH

PROFESSIONAL CORPORATION

ATTORNEYS AT LAW
ESTABLISHED 1933

CHAMBER OF COMMERCE
BUILDING

SUITE 1100

320 NORTH MERIDIAN STREET

INDIANAPOLIS, INDIANA

46204-1781

317-634-7588

FACSIMILE 317-634-7598

E-MAIL mcw@mchalelaw.com

WILLIAM E. WELCH

DONALD W. BUTTREY

DANIEL P. BYRON

RANDOLPH L. SEGER

MICHAEL K. GUEST

MICHAEL L. ECKERLE

BRIAN W. WELCH

S. ANDREW BOWMAN

J. PETER MILLER

ROBERT L. TAGGAR

SCOTT R. LEISZ

THOMAS F. SCHNELLENBERGER

ROBERT B. SCOTT

JEFFREY T. BENNETT

WILLIAM J. KAISER, JR.

WILLIAM M. BRAMAN

JAMES J. MCGRATH

STEVEN G. CRACRAFT

MARK J. ROMANIUK

LESLIE VAN NATA REX

STEPHAN L. HODGE

JAN KEPLY KEEFER

THOMAS A. JENSEN

STEVEN D. HARDIN

SHARON L. BOHNENKEMPER

MATTHEW M. PRICE

JENNIFER F. PERRY

STACY L. DIMITRI

DAVID L. HATCHETT

FRANK D. OTTE

MICHAEL P. MAXWELL, JR.

AMIE PEELE CARTER

OF COUNSEL

JOHN I. BRADSHAW, JR.

E. ANDREW STEFFEN

PHILLIP A. TERRY

PAUL R. BLACK*

JOHN S. CHAPPELL

SUE A. BEESLEY

* ALSO ADMITTED IN FLORIDA & CALIFORNIA

OFFICES IN

INDIANAPOLIS AND JASPER

June 1, 1998



VIA FEDERAL EXPRESS

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

RE: 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, STB Finance Docket No. 33388

Dear Secretary Williams:

Enclosed for filing with the Board is an original and 25 copies of Request of the City of Indianapolis to Withdraw Comments and Supporting Evidence of the City of Indianapolis in Opposition to the Application of CSX Corporation, et al., Unless Competitive Conditions are Imposed (CI-5 and CI-6) and Statement of Intent to Remain on the Schedule for Oral Arguments.

Also enclosed is a diskette formatted in WordPerfect 5.2 with the document.

Very truly yours,

McHALE, COOK & WELCH, p.c.

Michael P. Maxwell, Jr.
Counsel for City of Indianapolis, Indiana

ENTERED
Office of the Secretary

JUN 02 1998

Part of
Public Record

mja
Enclosures
cc: U.S. Secretary of Transportation
U.S. Attorney General
Judge Leventhal

3317 NPM J:\DOCS\NPM\Publ\260H_1 101969

UNITED STATES OF AMERICA
DEPARTMENT OF TRANSPORTATION
SURFACE TRANSPORTATION BOARD



Finance Docket No. 33388

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

**REQUEST OF THE CITY OF INDIANAPOLIS TO WITHDRAW
COMMENTS AND SUPPORTING EVIDENCE OF THE CITY
OF INDIANAPOLIS IN OPPOSITION TO THE APPLICATION
OF CSX CORPORATION, et al., UNLESS COMPETITIVE
CONDITIONS ARE IMPOSED (CI-5 AND CI-6)**

and

**STATEMENT OF INTENT TO REMAIN
ON THE SCHEDULE FOR ORAL ARGUMENTS**

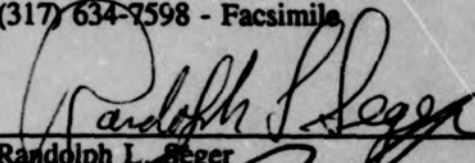
The City of Indianapolis (the "City"), by counsel, requests that the Surface Transportation Board (the "Board") allow the City to withdraw its Comments and Supporting Evidence of the City of Indianapolis in Opposition to the Application of CSX Corporation, et al., Unless Competitive Conditions are Imposed (CI-5 and CI-6) on condition that the Board order that approval of the Joint Application by the Board is subject to the terms of the Settlement Agreement entered June 1, 1998, between the City and CSX (and approved by NS), a copy of which Settlement Agreement is attached hereto as Exhibit "A." Under the Settlement Agreement, the transportation and competitive alternatives for rail shippers and shortline carriers within the City will be enhanced as compared to the proposal of the Joint Application. The

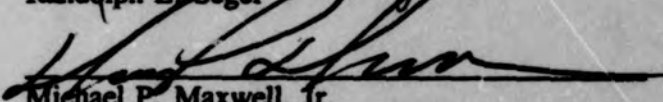
City, therefore, supports the Joint Application, except as the Joint Application may be inconsistent with competitive issues for specific shippers in the Indianapolis area. CSX and the City understand and agree that the City's position of support for the Joint Application is with respect to competition issues for the City in general and does not extend to competition issues for specific shippers in the Indianapolis area due to their particular circumstances. CSX and the City further understand and agree by their Settlement Agreement that the Agreement is not intended to settle and shall not prejudice the position of any other party with respect to the Joint Application.

Although the City is requesting to withdraw its Comments in Opposition to the proposed Joint Application, the City intends to remain on the schedule for oral arguments for June 4, 1998, so that the City may make a statement as to its position on the Joint Application and answer any questions that the Board may have in regard to the Settlement Agreement. The City will strictly limit its statements to its position on the Joint Application in light of the Settlement Agreement reached between CSX and the City and approved by NS.

Respectfully submitted,

McHALE, COOK & WELCH, p.c.
1100 Chamber of Commerce Building
320 N. Meridian Street
Indianapolis, IN 46204
(317) 634-7588
(317) 634-7598 - Facsimile



Randolph L. Seger

Michael P. Maxwell, Jr.
Attorneys for City of Indianapolis

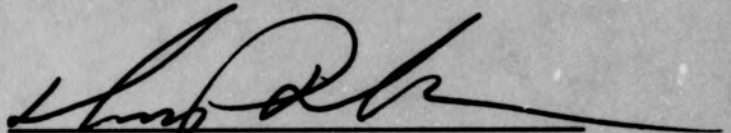
**UNITED STATES OF AMERICA
DEPARTMENT OF TRANSPORTATION
SURFACE TRANSPORTATION BOARD**

Finance Docket No. 33388

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

CERTIFICATE OF SERVICE

I hereby certify that I am serving a copy of the foregoing Request of the City of Indianapolis to Withdraw Comments and Supporting Evidence of the City of Indianapolis in Opposition to the Application of CSX Corporation, et al., Unless Competitive Conditions are Imposed (CI-5 and CI-6) and Statement of Intent to Remain on the Schedule for Oral Arguments to Applicants' attorneys and on all other persons of record in this proceeding.


Michael P. Maxwell, Jr.

3317 NPM J:\DOCS\NPM\PUBL\26NP_1 101905

SETTLEMENT AGREEMENT

This Settlement Agreement is entered into as of this ^{June} ~~1st~~ day of ~~May~~, 1998, by and between CSX Corporation ("CSXC") and CSX Transportation, Inc. ("CSXT"), (collectively, CSXC and CSXT are ("CSX")), on the one hand, and The City of Indianapolis ("City"), on the other.

Whereas, CSX and Norfolk Southern ("NSR") have filed with the Surface Transportation Board ("STB") a Joint Application in F.D. No. 33388 for their acquisition of Conrail, which provides for the operation of various lines of Conrail ("CR") by CSX and NSR, and under such Joint Application the lines of Conrail within the City will be principally operated by CSX;

Whereas, the City has actively participated in the STB proceeding seeking to enhance the transportation and competitive alternatives for rail shippers and short line carriers within the City relative to the proposal of the Joint Application, thereby promoting the economic development of the City; and,

Whereas, through discussions and negotiations with CSX, the City has secured certain understandings from CSX that will promote the goals of the City, and as consequence thereof the City and CSX desire to set forth their understandings and to enter into this agreement so that the City may support the Joint Application, except as the Joint Application may be inconsistent with competitive issues for specific shippers in the Indianapolis area, and withdraw the City's opposition to the Joint Application and its request for conditions before the STB

Now, Therefore, in consideration of the premises the parties, intending to be legally bound, Agree as Follows:

1. NSR/CSX Switching Arrangements. CSXT intends to perform switching services for NSR to and from industries in Indianapolis in accordance with a proposed Agreement appearing as Exhibit X to volume 8C of the Joint Application, pages 501-525. At the request of the City, CSX shall, subject to the agreement of NSR, amend that proposed Agreement in the following respects:

- (a) By clarifying and expanding the coverage of the Agreement by adding the following sentence to the end of Section 1 (a):

Exhibit I is hereby modified and shall be updated from time to time to include any Industry now or hereafter located on the rail lines of the former Indianapolis Union Belt Railroad ("Belt") as well as any 2 to 1 Industry in the Indianapolis area not located on the Belt. As used herein, a "2 to 1 Industry" shall mean an industry meeting that definition as used by the STB in ruling on the Joint Application.

- (b) By providing NSR an option with respect to a portion of Hawthorne Yard by adding the following subsection 1(e)

CSX shall enter into negotiations with NSR to allow NSR to build trackage, for NSR's exclusive use, at Hawthorne Yard within thirty (30) days of notice by NSR of NSR's desire to enter into those negotiations. CSX will conduct those negotiations in good faith and, if at such time unoccupied space is in Hawthorne Yard, CSX will offer to NSR a proposal allowing NSR to build trackage, for its exclusive use at Hawthorne Yard, at NSR's own expense on commercially reasonable terms.

- (c) By amending the provisions governing service by adding a new subsection 2(d) as follows:

CSXT shall switch, transfer and deliver NSR cars to and from connections or origin/destination facilities within Indianapolis in a timely and nondiscriminatory manner when compared to the manner in which CSXT switches, transfers and delivers to and from Hawthorne Yard its own cars within Indianapolis. In the event that CSXT should discontinue or substantially reduce its use of Hawthorne Yard and NSR continues its use so that the foregoing comparison of CSXT and NSR switching, transfer and delivery is no longer feasible, then CSXT and NSR will develop another mutually acceptable means to evaluate CSXT's switching, transfer and delivery services to NSR at Hawthorne Yard considering all relevant factors affecting such services at that time, including the levels of such CSXT and NSR service prior to such discontinuance or substantial reduction.

- (d) By capping the switching charge for a period of time by adding a new subsection 5(j), as follows:

Notwithstanding anything to the contrary in subsections 5(a) and (b), for a period of five (5) years after closing on the proposed transaction, the switching charge for CSXT's switching of NSR's cars in Indianapolis shall be no more than the switching cost as determined by the joint CSX/NSR cost study or, (subject to RCAF-U adjustments), \$250.00 (subject to such RCAF-U adjustments) whichever amount is less. Thereafter, the switching charge shall be no more than the switching cost as determined by the joint CSX/NSR cost study (subject to RCAF-U adjustments). The City shall have the right to appoint an independent auditor to participate in the joint CSX/NSR cost study in order to observe all aspects of the study and to make comments with respect to the accuracy and fairness of the study and to make his own determination with respect thereto and the auditor shall have access to all documents and information directly related to such study that may be reasonably necessary for the auditor to do this.

- (e) By providing a new form of Arbitration procedure between CSXT and NSR by substituting the following provision for the existing Section 8:

Any dispute, controversy or claim (or any failure by the parties to agree on a matter as to which this Agreement expressly or implicitly contemplates subsequent agreement by the parties, except for matters left to the sole discretion of a party) arising out of or relating to this Agreement, or the breach, termination or validity hereof, shall be finally settled through binding arbitration by a sole, disinterested arbitrator in accordance with the Commercial Arbitration Rules of the American Arbitration Association. The arbitrator shall be jointly selected by the parties but, if the parties do not agree on an arbitrator within 30 days after demand for arbitration is made by a party, they shall request that the arbitrator be designated by the American Arbitration Association. The arbitration hearing shall be commenced within 30 days after the selection or designation of an arbitrator and the arbitrator shall render an award and judgment thereon as soon as practical after the completion of the arbitration hearing. The award of the arbitrator shall be final and conclusive upon the parties. Each party to the arbitration shall pay the compensation, costs, fees and expenses of its own witnesses, experts and counsel. The compensation and any costs and expenses of the arbitrator shall be born equally by the parties. The arbitrator shall have the power to require the performance of acts found to be required by this Agreement, and to require the cessation or nonperformance of acts found to be prohibited by Agreement. The arbitrator shall not have the power to award consequential or punitive damages. The arbitrator's award shall be binding and conclusive upon the parties to the fullest extent permitted by law. Pending the award of the arbitrator, there shall be no interruption in the transaction of business under this Agreement and all payments in respect thereto shall be made in the same manner as prior to the dispute until the matter shall have been fully determined by arbitration. Judgment upon the award rendered may be entered in any court having jurisdiction thereof, which court may award appropriate relief at law or in equity. All proceedings relating to any such arbitration, and all testimony, written submissions and award of the arbitrator therein, shall be private and confidential as among the parties, and shall not be disclosed to any third party, except as required by law and reasonably necessary to prosecute or defend any judicial action to enforce, vacate or modify such arbitration award.

2. NSR/CSX Trackage Rights. CSXT has provided certain overhead trackage rights to NSR pursuant to a proposed Master Trackage Rights Agreement appearing as Exhibit C-1 to Volume 8B of the Joint Application, pages 220-252. At the request of the City, CSXT shall, subject to the agreement of NSR, amend the Master Trackage Rights Agreement as it pertains to NSR trackage rights to/from Indianapolis in the following respects:
 - (a) By deleting in Section 8(f) the following language: "and in such manner as will afford the most economical and efficient movement of all traffic," and by ending the sentence immediately prior to the deletion.
 - (b) By substituting for the Arbitration clause in Article 16 the same Arbitration Clause pertaining to Switching as set forth in Section 1(e) hereof.

- (c) The parties understand that the foregoing modifications to the Master Trackage Rights Agreement pertain to CSXT's grant of trackage rights to NSR as specified in Form A appearing at pages 480-488 of the aforesaid Volume 8B and not to other trackage rights granted between CSXT and NSR and covered by the Master Agreement.

3. Shortline switching.

- (a) In order to promote connectivity between CIND, L&I, INDR and ISRR, the City has requested and CSXT agrees to establish, for a period of ten (10) years, a switch charge applying to freight moving between an origin or destination on one of those carriers and an origin or destination on another of those carriers. CSXT's charge for this service will be as separately agreed to between the parties hereto. The service will be rendered in all material respects on the terms and conditions currently contained in the Conrail tariffs for intermediate switching at the points in question, it being understood that the special charge will be in all material respects for the same services as are currently provided by Conrail for such switching.
- (b) In order to promote traffic growth on CIND, L&I, INDR and ISRR, the City has requested and CSXT agrees to establish, for a period of ten (10) years, a special switch charge applying to traffic originating or terminating at an industry on one of the above shortlines and interchanged with NSR, but only if the involved traffic from such industry is not capable of being directly served by CSXT in single line service. The special switch charge applying to such traffic will be as separately agreed to between the parties hereto. The service will be rendered in all material respects on the terms and conditions currently contained in the Conrail tariffs for intermediate switching at the points in question, it being understood that the special charge will be in all material respects for the same services as are currently provided by Conrail for such switching. In addition, this service will be subject to CSXT and the shortline carriers establishing procedures to ensure compliance with the traffic restrictions applicable to this special switch charge.
- (c) The parties understand that the foregoing charges referred to in Sections 3(a) and 3(b) hereof represent special, reduced concessionary rates and that such charges will not be used by any party in the determination of the switching charge established from time to time between NSR and CSXT under the Switching Agreement or any dispute or arbitration with respect thereto. The parties also understand that this Section 3 applies to the existing shortlines and not to any affiliate or extension thereof by consolidation, purchase or otherwise.
4. Railroad Transportation Contracts. The City requested CSXT to provide an arbitration procedure in the event of service deficiency by CSXT to those CR shippers in the Indianapolis area which have railroad transportation contracts with CR as of the Closing Date under the Joint Application (an "Existing CR RTC"). This provision would apply to those CR shippers located on CR lines being operated by CSXT in the Indianapolis area which shippers are subject to the switching arrangements under the Switching Agreement between CSXT and NSR, as amended by this Settlement Agreement. The agreed to

arbitration procedure is based upon the NITL Settlement arbitration procedure under Article II (c) thereof, which provision does not apply to CR patrons within the Indianapolis area. The procedure agreed to by the City and CSXT is as follows:

If a shipper is dissatisfied with the RTC service it receives from CSX under an existing CR RTC, it may at any time after six months from the Closing Date (after written notice to CSX as to claimed operating or other deficiencies below the level at which Conrail provided performance of the contract, and an opportunity of thirty (30) days for CSX to improve its performance and to cure those deficiencies going forward), submit the issues to expedited binding arbitration by a sole disinterested arbitrator in accordance with the Commercial Arbitration Rules of the American Arbitration Association. The arbitrator shall be jointly selected by CSX and the shipper but, if the parties do not agree on an arbitrator within thirty (30) days after demand for arbitration is made, they shall request that the arbitrator be designated by the American Arbitration Association. Arbitration is to be concluded within thirty (30) days from the date the arbitrator is selected. In that arbitration, the issue shall be whether there is just cause because of such deficiency in performance to allow the shipper to terminate the existing transportation contract with CSX and rebid its traffic to other carriers without penalty or further liability or obligation under the existing transportation contract except in respect of movements already performed.

5. Interline Services. The City requested CSX to reaffirm to shippers the provisions of the NITL Settlement dealing with Interline Services as it may apply in the Indianapolis area which provisions are set forth below:

"This paragraph does not apply to a shipper who has an existing Conrail transportation contract if a more favorable treatment is provided under Section 2.2(c) of the Transaction Agreement. NSR and CSX agree to take the following actions with respect to transportation services to Conrail shippers on routes (i.e. origin-destination pairs) over which at least fifty (50) cars were shipped in the calendar year prior to the Control Date in single line Conrail service (i.e. origin and destination served by Conrail) where that service will become joint line NSR-CSX after the Closing Date. Upon request by the affected shipper, NSR and CSX will, for a period of three years, (a) maintain the Conrail rate (subject to RCAF-U increases); and (b) work with that shipper to provide fair and reasonable joint line service. If a shipper objects to the routing employed by NSR and CSX, or to the point selected by them for interchange of its traffic, its disagreement over routing or interchange, or both, shall be submitted to binding arbitration under the procedures adopted by the STB in Ex Parte 560. The arbiter in such an arbitration shall determine whether the route employed by NSR or CSX or the point of interchange selected by them, or both, satisfies the requirements of 49 U.S.C. Sec. 10705; and if it not, the arbiter may establish as the sole award in such arbitration, a different route or point of interchange for such traffic."

CSX hereby reaffirms these provisions as equally applicable in the Indianapolis area.

6. Consent. The parties understand that Sections 1, 2 and 3(c) of this Settlement Agreement involve an agreement between NSR and CSX, and, accordingly require the consent of NSR to become and remain effective. CSXT will undertake to seek such consent from NSR and will advise the City of NSR's position on or before May 29, 1998. In the event that NSR does not consent to any or all of the Sections requiring NSR's consent, the City may in its sole discretion either accept the Settlement Agreement as modified by the deletion of section(s) not consented to by NSR, in which case the Settlement Agreement as so modified shall remain in effect, or not accept the Settlement Agreement in which case the Settlement Agreement shall terminate; provided, however, that any such consent must be for a section or a subsection in its entirety without modification; provided, further, that notwithstanding the foregoing, if NSR does not consent to Section 3(c) then CSXT may in its sole discretion not accept the Settlement Agreement in which case the Settlement Agreement shall terminate.
7. Confidentiality. The special reduced concessionary rate for switching referred to in Sections 3(a) and 3(b) shall be maintained in a confidential manner by the parties hereto and may be provided only to the shortlines identified in Section 3 hereof. CSX shall furnish the rates to the shortlines in writing on a confidential basis with copies thereof to the City. The City's obligation to maintain confidentiality shall be subject to any applicable Indiana law that may require the City to do otherwise and/or not allow the City to maintain said confidentiality, provided, however, that should the City be required to disclose the confidential materials, it shall provide prior notice thereof to CSXT and afford it an opportunity to oppose any such disclosure before the appropriate governmental or judicial entity.
8. Support. The City desires to express its support before the STB for the Joint Application, except as the Joint Application may be inconsistent with competitive issues for specific shippers in the Indianapolis area, and withdraw the City's opposition to the Joint Application and its request for conditions before the STB. The parties understand that the City's position is with respect to competition issues for the City in general and does not extend to competition issues for specific shippers in the Indianapolis area due to their particular circumstances. CSX and the City understand and stipulate that this Agreement is not intended to settle and shall not prejudice the position of any other party with respect to the Joint Application.
9. Arbitration. Any dispute, controversy or claim between the parties hereto arising out or related to this Settlement Agreement shall be subject to arbitration in accordance with the terms and conditions set forth in Section 1(e) hereof.
10. Effective Date. This Agreement shall take effect immediately but is subject to the consent provided in Section 6 above and to securing any necessary regulatory approval from the STB. The parties shall cooperate in securing any such consent and approval, and in the event the parties are unable to secure same and/or the City or CSXT does not accept the

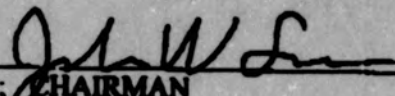
STB. The parties shall cooperate in securing any such consent and approval, and in the event the parties are unable to secure same and/or the City or CSXT does not accept the Settlement Agreement as modified pursuant to Section 6 or in the event the STB denies the Joint Application or makes any material change to CSX's proposed use of CR's Indianapolis lines, then this Agreement shall be terminable by either party by written notice.

In Witness Whereof, the parties have executed this Settlement Agreement as of the day and year first above written.

The City Of Indianapolis

CSX Corporation
CSX Transportation, Inc.

By: _____
Title: _____

By: 
Title: CHAIRMAN

Settlement Agreement as modified pursuant to Section 6 or in the event the STB denies the Joint Application or makes any material change to CSX's proposed use of CR's Indianapolis lines, then this Agreement shall be terminable by either party by written notice.

In Witness Whereof, the parties have executed this Settlement Agreement as of the day and year first above written.

The City Of Indianapolis

CSX Corporation
CSX Transportation, Inc.

By: *[Signature]*
Title: *mayor*

Title: _____

STB

FD

33388

5-28-98

I

187875

TROUTMAN SANDERS LLP

ATTORNEYS AT LAW
A LIMITED LIABILITY PARTNERSHIP

1300 I STREET, N.W.

SUITE 500 EAST

WASHINGTON, D.C. 20005-3314

TELEPHONE: 202-274-2950

FACSIMILE: 202-274-2994

18787
ENTERED
Office of the Secretary

MAY 20 1998

Part of
Public Record

William A. Mullins

202-274-2953

May 28, 1998

HAND DELIVERY

The Honorable Vernon A. Williams
Secretary

Surface Transportation Board

1925 K Street, NW

Room 711

Washington, D.C. 20423

ENTERED
Office of the Secretary

MAY 28 1998

Part of
Public Record



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

Dear Secretary Williams:

Enclosed for filing in the above captioned docket are the original and twenty-six copies of the Motion of The Gateway Western Railway and The Gateway Eastern Railway to Deny Motion of CSX Corporation and CSX Transportation, Inc. for Leave to File Verified Statement of Michael C. Sandifer Concerning Study of Incidence of Antiassignment Clauses in Conrail Rail Transportation Contracts.

The text of this pleading is contained on the enclosed 3.5-inch diskette. Please date stamp the enclosed extra copy of the pleading and return it to the messenger for our files.

Sincerely,

William A. Mullins
Attorney for The Gateway Western
and Gateway Eastern Railway

cc: The Honorable Jacob Leventhal
All Parties of Record

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

FINANCE DOCKET NO. 33388



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

**MOTION OF THE GATEWAY WESTERN RAILWAY AND THE GATEWAY
EASTERN RAILWAY TO DENY MOTION OF CSX CORPORATION AND
CSX TRANSPORTATION, INC. FOR LEAVE TO FILE VERIFIED STATEMENT
OF MICHAEL C. SANDIFER CONCERNING STUDY OF INCIDENCE OF
ANTIASSIGNMENT CLAUSES IN CONRAIL RAIL TRANSPORTATION
CONTRACTS**

**Richard P. Bruening
Robert K. Dreiling
KANSAS CITY SOUTHERN LINES
114 West 11th Street
Kansas City, Missouri 64105
Tel: (816) 983-1392
Fax: (816) 983-1227**

**William A. Mullins
Ivor Heyman
TROUTMAN SANDERS LLP
1300 I Street, N.W.
Suite 500 East
Washington, D.C. 20005-3314
Tel: (202) 274-2550
Fax: (202) 274-2994**

**Attorneys for The Gateway Western
Railway and The Gateway Eastern
Railway**

May 28, 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**

**MOTION OF THE GATEWAY WESTERN RAILWAY AND THE GATEWAY
EASTERN RAILWAY TO DENY MOTION OF CSX CORPORATION AND
CSX TRANSPORTATION, INC. FOR LEAVE TO FILE VERIFIED STATEMENT
OF MICHAEL C. SANDIFER CONCERNING STUDY OF INCIDENCE OF
ANTIASSIGNMENT CLAUSES IN CONRAIL RAIL TRANSPORTATION
CONTRACTS**

This motion addresses the Motion by CSX Corporation and CSX Transportation, Inc. filed May 15, 1998 (the "Motion") for leave to file a verified statement concerning a study (the "Antiassignment Study") of the incidence of antiassignment clauses in Conrail Rail Transportation Contracts.

SUMMARY OF ARGUMENT

Pursuant to 49 C.F.R. § 1117.1, The Gateway Western Railway and The Gateway Eastern Railway (collectively, "GWWR") hereby move to deny the Motion for leave to file a verified statement concerning the Antiassignment Study on the grounds that: (i) the Antiassignment Study and Motion represent the improper submission of new evidence and argument in violation of the procedural schedule established by the Board in Decision No. 6 (STB served May 30, 1997) of the Acquisition Proceeding;¹ and (ii) acceptance of the Motion and Antiassignment

¹ *CSX Corp. et al. – Control and Operating Leases/Agreements – Conrail Inc. et al.*, Finance Docket No. 33388.

Study would deprive GWWR of due process because GWWR would have insufficient time to conduct its own antiassignment study and file a response.

The Board should not allow the Motion and Antiassignment Study to form part of the record in view of repeated denials by the Board of petitions for leave to file late submissions. The Board should apply the 3-part test that it set forth in Decision No. 56 (STB served November 28, 1997) which provides that a petition for leave to file out-of-time will be denied where: (i) it was filed long after the filing deadline has already passed; (ii) the petitioner's reasons for asking the Board to accept the late petition are not exceptional or compelling; and (iii) acceptance of the petition would seriously undermine the Board's management of the proceeding and diminish the meaning of deadlines in the proceeding.²

Notwithstanding Board precedent, on May 15, 1998, approximately 3 months after the final deadline for the filing of written submissions had passed, CSX filed its Motion and Antiassignment Study. As will be seen below, the Motion and Antiassignment Study violate each part of the 3-part test established by the Board in Decision No. 56 and accordingly ought not to be accepted into the record.

CSX has further indicated that it will be relying on the Antiassignment Study in oral argument even though the purpose of the oral argument is to answer questions relating to the overall record³ and not to reopen the record for new arguments which have not been made in the

² In three subsequent decisions, the Board applied a test similar to the 3-part test to deny petitions for the late filing of comments by parties wishing to intervene. *See* Decision No. 76 at 2 (STB served April 17, 1998), Decision No. 77 at 1-2 (STB served April 24, 1998) and Decision No. 79 at 1-2 (STB served May 8, 1998).

³ *See* Decision No. 6 at 6 (Board should be given the opportunity to take the time necessary to consider fully the overall record).

responsive comments or briefs and to which the other parties have not had an opportunity to respond.

PROCEDURAL BACKGROUND

In Decision No. 6, the Board set forth a 350-day procedural schedule to ensure that (i) all parties were accorded due process; and (ii) to allow the Board time to consider fully all of the issues in that proceeding. Decision No. 6 at 2. The Board stated further that the procedural schedule that it was adopting should provide the parties ample time to build a sufficient record for it to make a reasoned decision and that it did not intend to permit this proceeding to be marred by filings which "may curtail the ability of parties to respond fully and adequately to the record within the time frames we have established." Decision No. 6 at 7.

In Decision No. 12 (STB served July 23, 1997) the Board filled in all the dates of the procedural schedule that it had adopted in Decision No. 6 and attached the completed procedural schedule as Appendix B to Decision No. 12. In Decision No. 52 (STB served November 3, 1997) the Board extended its previously established procedural schedule by 45 days to accommodate certain environmental filings. The Board has granted no other extensions to the procedural schedule.

The procedural schedule provides that responsive applications, comments, protests and requests for conditions to the Application⁴ were required to be filed on or before October 21, 1997. Responses to these applications, comments, protests and requests for conditions were due on or before December 15, 1997 and rebuttal in support of responsive applications was due on or

⁴ The Application refers to the application by CSX Corporation and CSX Transportation, Inc. (collectively, "CSX") and Norfolk Southern Corporation and Norfolk Southern Railway Company (collectively "NS") seeking approval and authorization under 49 U.S.C. 11323-25 for: (i) the acquisition by CSX and NS of control of Consolidated Rail Corporation ("Conrail"); and (ii) the division of Conrail's assets by and between CSX and NS.

before January 14, 1998. The final date for any written submissions was February 23, 1998 by which date briefs by all parties were due.

ARGUMENT

I. The CSX Motion and Antiassignment Study Were Filed Too Long After the Established Deadline and Are Too Late to be Accepted into the Record

CSX argues that the Board should admit the Antiassignment Study because the Board's procedural schedule in Decision No. 6 indicates that the record will not close until the date of the oral argument. However, the Board rejected this suggestion in Decision No. 56 at 2 when it held that a petition filed almost one month after the established deadline would be too late to be accepted into the record. In this case, the Board is being asked to accept a submission filed more than 4 months after the deadline for rebuttal evidence (January 14, 1998), leaving no question that this submission is too late to be accepted into the record.

II. CSX's Reasons for Asking the Board to Accept the Late Motion Are Not Exceptional Or Compelling

The Board has uniformly rejected requests for leave to file out-of-time because the petitioner did not furnish compelling and extraordinary reasons for the late filing. Furthermore, the Board's denial of such requests has been supported by CSX in the past.⁵ CSX now argues that it should be permitted to introduce its Antiassignment Study into evidence since it did not have an opportunity to reply to the antiassignment arguments contained in the briefs filed on or before February 23, 1998 (to which there was no right of reply). While CSX is correct that it did not technically have an opportunity to reply to the arguments in the briefs, CSX clearly knew of the existence of this issue throughout the proceeding because a number of parties made

⁵ In Decision No. 56, CSX opposed a petitioner's late filing on the basis that the petitioner (i) had furnished no explanation for its failure to follow established procedures; and (ii) had sufficient

antiassignment arguments in their responsive comments filed on October 21, 1997.⁶ CSX had ample opportunity to reply to the same arguments made by the same parties in their Comments filed on October 21, 1997 in the Applicants' Rebuttal filed December 15, 1997 and in its brief filed February 23, 1998. CSX responded to these arguments in the Applicants' Rebuttal but, for whatever reason, it did not do so in its brief.⁷ The Board cannot allow CSX to supplement its Rebuttal at this late stage. To do so, the Board would either have to deprive the other parties of the opportunity to respond or, alternatively, reopen discovery, reopen the record and allow the parties to relitigate the case. This would be "unfair gamesmanship and an abuse of the administrative process," which the Board has never condoned.⁸

CSX argues in its Motion that the Antiassignment Study should be admitted into the record because it is non-argumentative and non-controversial. However, the Board is well aware that surveys invariably attract criticism for a whole host of reasons, including the methodology that they use and the conclusions that they reach. Surveys are therefore rarely uncontroversial and the Antiassignment Study is no exception.⁹ Moreover, CSX has utilized the Motion to put

time to prepare and submit its comments before the deadline. CSX is now seeking to do exactly the same thing that it opposed in Decision No. 56.

⁶ See, e.g., Kodak (EKC-2 at 5), the Chemical Manufacturers Association and The Society of the Plastics Industry, Inc. (CMA-10 at 35-36), the National Industrial Transportation League, U.S. Clay Producers Traffic Association, Inc., and the Fertilizer Institute (NITL-7 at 38), the National Railroad Passenger Corporation (AMTRAK) (NRPC-7 at 8) and GWWP (GWWP-3 at 4-15).

⁷ In contrast, NS responded to the antiassignment arguments in its brief filed February 23, 1998. NS-62 at 19-21.

⁸ See *Potomac Power Co. v. CSX Transportation, Inc.*, STB Docket No. 41989 (STB served November 24, 1997).

⁹ The Antiassignment Study could be criticized for: (i) failing to set out clearly its reasons for selecting certain contracts for review but omitting others; (ii) not being representative of all RTC's entered into with Conrail because, as Mr. Sandifer readily concedes, there was a

forward arguments concerning the Antiassignment Study that it plans to use at the oral hearing.¹⁰ These arguments flatly contradict CSX's claim that the Motion and Antiassignment Study are non-argumentative and clearly show that if the Antiassignment Study is allowed into the record, it will cause serious prejudice to those parties who have not had an opportunity to respond to the claims that they make.

For example, CSX argues that the antiassignment clauses, owing to their uniform nature, do not represent individual bargaining and that they are the sort of "boilerplate" clause that public policy as expressed in 49 U.S.C. § 11321 and related provisions ought clearly to override. That argument is not compelling. CSX fails to distinguish contracting parties who have objected to the assignment of any rights under their contracts and contracting parties who have not objected. Those parties who have not objected can be deemed to have waived their rights to prevent an assignment, notwithstanding the terms of their contracts. In contrast, the small number of parties who have objected, including GWWR, have not waived their right to prevent an assignment and in these cases the Board must carefully weigh their reasons for opposing such assignment to determine whether such opposition is valid. Failure to do so would render the process of filing comments and briefs in opposition to the Application completely meaningless.

substantial number of RTC's that were not provided to his firm; and (iii) allowing for a substantial degree of overlap in the classification of the different kinds of assignment provisions (See, e.g., the immaterial distinctions drawn between types A1 to A5 cited in the Antiassignment Study).

¹⁰ One argument that appears in the Motion is the statement that "Applicants would argue that the commonness and banality of the antiassignment clauses in Conrail's RTC's supports their argument that enforcing them ... would create enormous disruptions on and after the "Closing Date," when Conrail's lines will be split between CSX and NS." Another argument which appears in the Motion is the statement that "Applicants could also argue that such clauses do not represent individual bargaining and they are the sort of "boilerplate" clause that public policy, as clearly expressed in 49 U.S.C. § 11321 and related provisions, most clearly ought to override."

Furthermore, it would be inappropriate for the Board to place the trackage rights agreements between Conrail and GWR in the same category as the Rail Transportation Contracts ("RTC's") between Conrail and shippers. As GWR points out in its brief filed February 23, 1998, Section 11102 of the Interstate Commerce Termination Act (the "ICTA")¹¹ sets out a specific procedure (the filing of a terminal trackage rights application) which must be followed before a rail carrier may obtain access to another carrier's terminal trackage without that carrier's consent. The reason for this procedure is that the ICTA seeks to ensure that an owner of rail facilities will not be deprived of its property or the value thereof without adequate due process of law, adequate compensation and an opportunity to resolve operational difficulties.¹² CSX has not followed the procedure prescribed by 49 U.S.C. § 11102 and instead requests a statutory exemption from the Board under 49 U.S.C. § 11321.

If CSX wishes to obtain a statutory exemption under the provisions of 49 U.S.C. § 11321, then it must satisfy the requirements of that section and demonstrate that a statutory exemption from all applicable laws (including 49 U.S.C. § 11102) is "necessary" to carry out the Application. Except for a bald statement in its Primary Application that use of the trackage rights is essential to the realization of the benefits of the transaction,¹³ CSX has not set out any reasons why it is "necessary" to override the antiassignment clauses contained in the trackage rights agreements between GWR and Conrail or why it has failed to pursue less burdensome alternatives, such as privately negotiating the contracts with those parties who object to assignments. Only if the parties are unable to reach agreement on the terms and conditions of a

¹¹ 49 U.S.C. § 11102.

¹² See GWR-4 at 7-8.

¹³ App. Vol. 1 at 94.

new contract through private negotiation should they approach the Board for relief under 49 U.S.C. § 11102. GWWR has repeatedly suggested in its comments and briefs that CSX pursue the alternative of negotiation.¹⁴ However, to date CSX has disregarded this alternative entirely.

Furthermore, the terminal trackage rights agreements between GWWR and Conrail should not be treated the same as the RTC's because the provisions of 49 U.S.C. § 11102 only apply as between rail carriers¹⁵ and do not apply to RTC's between shippers and rail carriers. Since RTC's form the basis of the Antiassignment Study, even if the Antiassignment Study is admitted into the record, it is dubious whether the Board could rely upon its findings when it considers the arguments of GWWR because GWWR's case relates to the assignment of trackage rights agreements and not RTC's.¹⁶

III. The Board's Acceptance of the Petition Would Seriously Undermine its Management of the Proceeding and Diminish the Meaning of its Deadlines

It is clear from Decision No. 6 that the Board adopted a procedural schedule in this proceeding to ensure that all issues would be raised in an orderly and sequential fashion. The Board expressly acknowledged that the procedural schedule was longer than the Applicants had proposed but that it was necessary to ensure due process.¹⁷ If the Board were to allow the Antiassignment Study to become part of the record, then due process would require it to give

¹⁴ See GWWR-3 at 16 and GWWR-4 at 13-14. This is consistent with the Board's preference that trackage rights should be negotiated privately by the parties to the agreement. *Burlington Northern Inc., et al., -- Control - Santa Fe Pacific Corp.*, Finance Docket 32549 (ICC served August 23, 1995).

¹⁵ 49 U.S.C. § 11102 provides that "the Board may require terminal facilities ... owned by a rail carrier ... to be used by another carrier ..."

¹⁶ See GWWR-4 at 3-5.

¹⁷ See, e.g., Decision No. 6 at 2 (350-day procedural schedule will ensure that all parties are accorded due process and allow the Board time to consider fully all of the issues).

leave to interested parties who are affected by the evidence (e.g., those parties making antiassignment arguments) to analyze the methodology and conclusions which form the basis of the Antiassignment Study and submit additional written comments and argument in response thereto.¹⁸ This would require oral argument to be significantly delayed and would diminish the value of the procedural schedule and the deadlines contained therein.

CONCLUSION

For the foregoing reasons, GWWR respectfully requests that the Board deny the Motion and strike from the record the Antiassignment Study so that (i) CSX does not improperly rely on this information during oral argument; or (ii) the Board does not improperly rely on this information in its scheduled decision on the merits of the Application. If the Board accepts the Motion and Antiassignment Study into the record, then GWWR requests an extension of the procedural schedule by 20 days in order to allow GWWR and other parties sufficient time to analyze and reply to the Antiassignment Study. In view of the imminence of the date for oral argument, expedited consideration is requested.

¹⁸ The failure to afford opposing parties an opportunity to reply to evidence introduced at a late stage violates the rules of the Commission and all notions of due process. *San Antonio, TX v. Burlington Northern, Inc.*, 362 I.C.C. 161, 164-165 (1979).

Respectfully Submitted, this 28th day of May, 1998.

Richard P. Bruening
Robert K. Dreiling
KANSAS CITY SOUTHERN LINES
114 West 11th Street
Kansas City, Missouri 64105
Tel: (816) 983-1392
Fax: (816) 983-1227

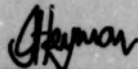


William A. Mullins
Ivor Heyman
TROUTMAN SANDERS LLP
1300 I Street, N.W.
Suite 500 East
Washington, D.C. 20005-3314
Tel: (202) 274-2950
Fax: (202) 274-2994

Attorneys for The Gateway Western
Railway and The Gateway Eastern Railway

CERTIFICATE OF SERVICE

I hereby certify that a true copy of the foregoing "Motion of The Gateway Western Railway and The Gateway Eastern Railway to Strike the Motion of CSX Corporation and CSX Transportation, Inc. for Leave to File Verified Statement of Michael C. Sandifer Concerning Study of Incidence of Antiassignment Clauses in Conrail Rail Transport Contracts" (GWWR-5) was served this 28th day of May, 1998, by hand delivery to Applicants' representatives and to Judge Leventhal, and by first class mail to all parties of record in this proceeding.



Ivor Heyman
Attorney for The Gateway Western Railway
and The Gateway Eastern Railway

STB

FD

33388

5-26-98

I

187825

187825

SLOVER & LOFTUS

ATTORNEYS AT LAW

1804 SEVENTEENTH STREET, N. W.

WASHINGTON, D. C. 20006

WILLIAM L. SLOVER
C. MICHAEL LOFTUS
DONALD G. AVERY
JOHN H. J.E SEUR
KELVIN J. DOWD
ROBERT D. ROSENBERG
CHRISTOPHER A. MILLS
FRANK J. PERCOLIZZI
ANDREW B. KOLESAR III
JEAN M. CUNNINGHAM
PETER A. PFOHL

ENTERED
Office of the Secretary

MAY 28 1998

Part of
Public Record

TELEPHONE:
(202) 347-7170

FAX:
(202) 347-3619

WRITER'S E-MAIL:

kjd@sloverandloftus.com

May 26, 1998

BY HAND DELIVERY

The Honorable Vernon A. Williams
Secretary
Surface Transportation Board
Case Control Unit
ATTN: STB Finance Docket 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 are an original and 25 copies of the Motion of Consumers Energy Company For Leave to File Supplemental Verified Statement on Newly-Revealed Contract Assignment Issues (CE-12).

An additional copy of this pleading is also enclosed. Kindly indicate receipt and filing by time-stamping this extra copy and returning it with our messenger.

Thank you for your attention to this matter.

Sincerely,

Kelvin J. Dowd
An Attorney for Consumers
Energy Company

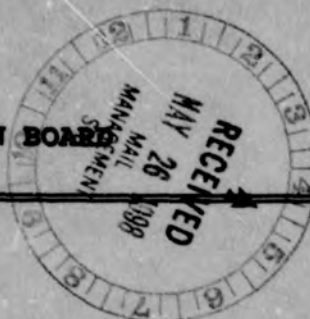
KJD:cef
Enclosures

ENTERED
Office of the Secretary

MAY 28 1998

Part of
Public Record

BEFORE THE
SURFACE TRANSPORTATION BOARD



CE-12

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

**MOTION OF CONSUMERS ENERGY COMPANY
FOR LEAVE TO FILE SUPPLEMENTAL VERIFIED STATEMENT
ON NEWLY-REVEALED CONTRACT ASSIGNMENT ISSUES**

CONSUMERS ENERGY COMPANY ("Consumers") hereby moves for leave to file the enclosed seven-page "Supplemental Verified Statement of William E. Garrity," which describes a significant problem that has arisen regarding the Applicants' plans for divvying up Conrail's existing transportation contracts. As Mr. Garrity explains, the problem in question did not become apparent until very recently, after all of the evidence had been filed in this proceeding, and final briefs had been submitted.

Consumers notes that the Applicants' plans for assignment of existing contracts have become the object of increasing controversy in recent weeks. Indeed, just eleven days ago, CSX itself, responding to arguments made in the briefs filed by certain parties on February 23, sought leave to supplement the record with additional evidence regarding "antiassignment clauses in Conrail rail transportation contracts" (CSX-147, May 15,

1998). CSX argued *inter alia* that the need for such evidence became apparent only after briefs were filed, and that the Board should accept the proffered evidence in order to "be informed" about the matters discussed. (CSX-147 at 8).

Consumers does not object to the acceptance of CSX's supplemental evidence. However, Consumers submits that the Board should show the same flexibility vis-a-vis similar requests from other parties, including Consumers. In order to be fully informed about the Applicants' plans for assignment of Conrail's existing contracts under Section 2.2(c) of their June 10, 1997 Transaction Agreement, and in particular about their apparent plan for CSX (rather than NS, the logical successor) to take over the coal transportation contracts that Consumers had deliberately entered into with Conrail in preference to CSX, the Board should accept the enclosed Supplemental Verified Statement of William E. Garrity, and give Mr. Garrity's testimony due consideration in its deliberations.

Respectfully submitted,

CONSUMERS ENERGY COMPANY

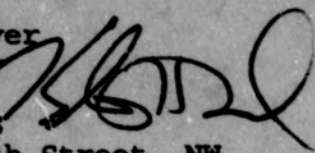
By: A. T. Udry
Assistant General Counsel
Consumers Energy Company
212 West Michigan Avenue
Jackson, MI 49201

OF COUNSEL:

Slover & Loftus
1224 Seventeenth St., NW
Washington, DC 20036

Date: May 26, 1998

William L. Slover
Donald G. Avery
Kelvin J. Dowd
SLOVER & LOFTUS
1224 Seventeenth Street, NW
Washington, DC 20036
(202) 347-7170



Certificate of Service

I hereby certify that I have this 26th day of May, 1998, caused copies of the foregoing document to be served on the following parties by hand:

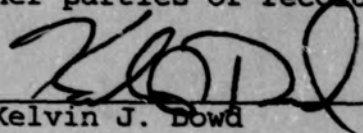
Drew A. Harker, Esq.
Arnold & Porter
555 Twelfth Street, N.W.
Washington, D.C. 20004-1202
(202) 942-5999 (fax)

John V. Edwards, Esq.
Patricia E. Bruce, Esq.
Zuckert, Scoutt & Rasenberger,
L.L.P., Suite 600
888 Seventeenth Street, N.W.
Washington, D.C. 20006-3939
(202) 342-1608 (fax)

David H. Coburn, Esq.
Steptoe & Johnson L.L.P.
1330 Connecticut Ave., N.W.
Washington, D.C. 20036-1795
(202) 429-3902 (fax)

Gerald P. Norton, Esq.
Harkins Cunningham
1300 Nineteenth Street, N.W.
Suite 600
Washington, D.C. 20036
(202) 973-7610 (fax)

and by first class mail upon all other parties of record.


Kelvin J. Dowd

**SUPPLEMENTAL VERIFIED STATEMENT OF
WILLIAM E. GARRITY**

My name is William E. Garrity, and my business address is 1945 West Parnall Road, Jackson, Michigan 49201. I am Executive Manager of Fuels and Power Transactions for Consumers Energy Company ("Consumers"). I previously submitted testimony in this proceeding, in support of Consumers' Comments on the proposed transaction, on October 21, 1997.

The purpose of this supplemental statement is to apprise the Board of recent, adverse developments regarding the Applicants' plans for assignment of responsibility for Consumers' existing Coal Transportation Contracts with Conrail, and to ask the Board to require that NS, rather than CSX, assume responsibility for those contracts.

To recapitulate briefly, Consumers relies upon bituminous and sub-bituminous coal to fuel over three-quarters of its baseload generation capacity. Consumers operates five (5), coal-fired generating plants: the J.H. Campbell Station near West Olive, Michigan; the D.E. Karn and J.C. Weadock Stations near Essexville, Michigan; the B.C. Cobb Station at Muskegon, Michigan; and the J.R. Whiting Station near Erie, Michigan. Together, the twelve (12) generation units operated at these plants have a capacity of 2,830 megawatts (MW) and produce approximately 17.3 million megawatt hours (Mwh) of electricity each year, through the combustion of about 7.5 million tons of coal.

The Cobb, Karn-Weadock and Whiting facilities, each of which is over thirty (30) years old, collectively constitute about one-half of Consumers' total coal-fired capacity, and as I explained in my prior testimony in this case, a combination of age, boiler design specifications and state and federal environmental laws limit both the range of coal sourcing options and the available transportation alternatives for those plants. In particular, all three stations are largely dependent on higher Btu, lower sulfur coals from Central Appalachia origins in Eastern Kentucky and Southern West Virginia, and historically, CSX and its predecessors have dominated coal transportation to the Cobb, Karn-Weadock and Whiting facilities from those origins. This is so, even though both Cobb and Karn-Weadock have lake vessel access, and Karn-Weadock has access to a second rail carrier, because CSX's control over many of the eastern mines that Consumers must look to for fuel, along with the incremental cost of transferring coal from railcars to vessels -- and the additional costs associated with interline rail hauls -- have greatly reduced the impact of any such competitive threat.

Consumers long has been concerned about CSX's dominance over its coal transportation requirements, which in Consumers' experience has led to higher costs and inconsistent service. In a nutshell, CSX has seemingly taken our traffic for granted while it has focused its attention on other, more hotly-contested markets. Accordingly, despite the complexity and higher cost of interline and rail-water movements, Consumers has whenever

possible tried to award a portion of its coal traffic to CSX's potential competitors -- especially including Conrail -- in order to encourage the competitors' continued interest in our traffic and to exert at least some competitive pressure on CSX.

Against this backdrop, Consumers' interest was piqued when the Fola mine, a major new West Virginia source of high-Btu, low-sulfur coal, opened a few years ago with direct rail access to both CSX and Conrail. Consumers entered into coal purchase agreements with Fola for a portion of our Cobb, Whiting, and Karn-Weadock plants' requirements, and it entered into coal transportation contracts with Conrail and its connections to move the coal to those destinations. This coal today moves via Conrail through Columbus to Toledo, where it is interchanged to the Grand Trunk Western ("GTW") for delivery to Whiting, or to Karn-Weadock via a further interchange to the Central Michigan Railroad ("CM") at Durand, Michigan. (The coal destined for our Cobb plant moves via Conrail through its Ashtabula Dock and connecting lake vessels to destination.)

Under the CSX-NS proposal for the division of Conrail, the Conrail line from the Fola mine to Columbus is slated for assignment to NS, which also has its own line running from Columbus to Toledo. The Conrail line from Columbus to Toledo, however, would be assigned to CSX, which as I already mentioned has separate trackage from the mine all the way to both Whiting and Karn-Weadock. The two carriers would share use of Conrail's Ashtabula Dock.

Under § 2.2(c)(i) of the Applicants' June 10, 1997

"Transaction Agreement," NS and CSX are each to assume responsibility for performance of Conrail's obligations under its existing contracts using the Conrail assets assigned to them. Read in isolation, I suppose, this could have meant that NS would assume responsibility for moving Consumers' Fola coal as far as Columbus, and that CSX would move it from there to the Toledo interchange with GTW.

Undercutting any such literal reading, however, § 2.2(c)(ii) of the Transaction Agreement provides that "CSXT and NSR shall allocate the responsibilities to serve customers under the Existing Transportation Contracts in a manner to achieve *reliability and proper service to the customers*," and the prefatory paragraph of § 2.2(c) proclaims that the Applicants "recognize the importance of assuring that the acquisition of CRC does not create *shipping disruptions* for CRC customers." Given the adverse impact on cost and service that would likely come from inserting yet another carrier into these interline hauls, we had always understood that a single carrier would take over Conrail's entire portion of the Fola-to-Whiting/Karn-Weadock movements, all the way to the Toledo interchange. That understanding apparently remains valid.

Most importantly, we also understood that NS, which after all was the carrier which was stepping into Conrail's shoes at the Fola origin, would be the single carrier assuming Conrail's portion of our joint line Fola coal movements. Not only

did this make the most sense from an operating standpoint (the Fola-Columbus segment is longer than the Columbus-Toledo line), but it was the arrangement that best preserved the fundamental purpose of our Conrail contract. Unfortunately, that understanding has now been called into question by the Applicants. Specifically, after everyone's briefs had been filed and the record had for all practical purposes closed in Finance Docket No. 33388, we began hearing from CSX representatives for the first time that our contracts might not be treated in the manner we had expected, after all. Rather, CSX intimated, because CSX could serve both the Fola origin and Karn-Weadock -- albeit via a different routing -- CSX might take over the Conrail portion of those hauls. CSX representatives indicated that the railroad's themselves retained the "flexibility" to allocate contract service along Conrail routes in cases such as ours, in the manner that best suited their own priorities and preferences -- even if (as here) those were different from the contracting shipper's. Similar uncertainty now exists with respect to our other Conrail contract arrangements, including the Ashtabula Dock movements, since both NS and CSX will be able to serve that dock.

To be sure, we understand that the rates set under our Conrail contracts will be preserved, regardless of which Applicant steps into Conrail's shoes. But that misses the point. It was and is of great importance to Consumers that NS, and not CSX, step into Conrail's shoes on the Fola coal traffic, since Conrail is the marquee player in the alternative routing that competes

with CSX direct service. If CSX were to take over that alternative routing, its efficacy as a counterweight or constraint on CSX would be obliterated, and our long-standing strategy to encourage alternatives to CSX would be compromised. This would be especially troubling to Consumers at this time, since our existing CSX contracts expire in 1999, and we want to maximize our competitive alternatives in order to obtain the lowest possible freight rates. If CSX takes over this routing, the division of Conrail will have caused an even greater reduction of competition for coal movements to our plants than we had previously thought. This is directly contrary to the Applicants' public assurances that competition would be preserved.

After we heard that CSX might take over our Fola coal transportation contracts, we wrote to the Applicants reiterating our strong objections to any such assignment. In line with our longstanding expectations we asked for their assurances that NS would in fact be the one to assume responsibility for Conrail's portion of our Fola coal movements. Exhibit __ (WEG-02). Unfortunately, the Applicants' responses were non-committal. Exhibits __, __ (WEG-03, -04). Subsequent attempts to press them for a final decision, most recently in telephone calls within the past week, have met with no greater success. It is for that reason that Consumers is now forced to seek this Board's help.

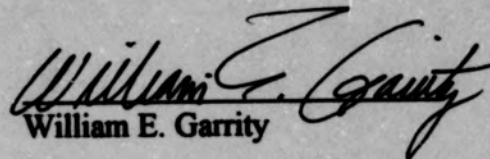
We ask that the Board, if it decides to approve the NS/CSX acquisition of Conrail, require as a further condition on that approval that NS assume responsibility for performance of

Conrail's transportation obligations under Conrail's existing contracts with Consumers, both for Conrail-origin coal interchanged to GTW at Toledo for delivery to our Whiting and/or Karn-Weadock plants, and for Conrail-origin coal moving through the Ashtabula Dock for subsequent water movement to our Cobb plant. NS is fully capable of handling this traffic, and only in this manner can the central purpose of Consumers' deliberate election to contract with CSX's competitors be preserved.

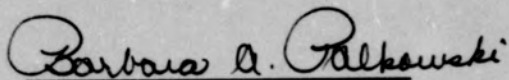
Verification

State of Michigan :
: ss:
County of :

William E. Garrity, being duly sworn, deposes and says that he has read the foregoing statement, knows the contents thereof, and that the same are true as stated.


William E. Garrity

Subscribed and sworn to
before me this 26 day
of May, 1998:


Notary Public in and for
the State of Michigan

My Commission Expire 10-24-2000

A CMS Energy Company

1945 West Parnall Road
Jackson, MI 49201-8643Tel: 517 788 2129
Fax: 517 788 5882William E. Sharkey
Executive Manager of
Fuels and Power Transactions**CERTIFIED**

March 26, 1998

Mr J. W. Fox, Jr
Vice President
Norfolk Southern Corporation
110 Franklin Road
Roanoke, VA 24042-0026

Mr. R. L. Sharp
Vice President
CSX Transportation
500 Water Street
Jacksonville, FL 32202

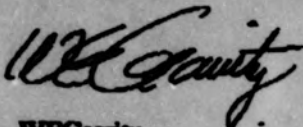
As you are aware, Consumers Energy has two existing Conrail contracts for transportation of coal from the Fola mine in West Virginia to our Karn/Weadock facility in Essexville, Michigan, our Whiting plant in Erie, Michigan, and to Ashtabula docks. Based on discussions with Norfolk Southern (NS), Consumers Energy had the understanding that after approval of the Conrail acquisition by the Surface Transportation Board, NS would provide service from Fola under our existing Conrail contracts. Our understanding appeared and appears logical and reasonable to us because it is clear that NS will take over the existing Conrail line that serves Fola (via trackage rights on the Vaughan Railroad).

I was very disturbed when I recently heard from a representative of CSX claiming that under the provisions of Article II, Section 2.2(c) of the Transaction Agreement, CSX would provide this service. As all parties are well aware, the purpose of our Conrail contracts was and is to provide an alternative to CSX service. This purpose would clearly be undermined if CSX were to take over the service under our Conrail contracts. Because of our great concern and clear desire to obtain this service from NS we sought assurances from NS that would unequivocally confirm our previous understanding. Unfortunately, we are still awaiting such an answer.

Therefore, at your very earliest opportunity, please provide us with unambiguous answers to the following questions:

1. Which railroad will provide service from Fola under our existing Conrail contracts, how will revenues be treated and what is the proposed role of the connecting railroads (Canadian National and Central Michigan)?
2. Will all tonnage shipped under our existing Conrail contracts be treated in the same manner or are there limitations, special conditions or other matters which may alter the answer to the above.

I am very concerned that the division of Conrail might result in reduced competition for coal movements to our plants. Competition would clearly be diminished if CSX were to provide service under the above described Conrail contracts. In presenting the case for the acquisition and division of Conrail, CSX and NS assured the public of continued competition, while we have had every belief that NS would step into Conrail's shoes with respect to service from the Fola mine. I truly hope that your expeditious answers to the above questions confirm that our competitive alternatives will be maintained.



WEGarriy

cc: Surface Transportation Board
Peter Marshall, Canadian National
CAPinkerton, III, Central Michigan Railway
WHDickey, Jr, Aarvest Coal Sales
TPDwyer, Consolidated Rail Corporation



Exhibit
(WEG-03)

Norfolk Southern Corporation
Coal Marketing Department
110 Franklin Road
Roanoke, Virginia 24042-0026
540 985-6707
540 985-6398 FAX

Thomas E. Rappold
Assistant Vice President
Domestic Utility and
Industrial Coal Marketing

April 7, 1998
Consumers Energy
74 - CR/CSXT

Mr. William E. Garrity
Executive Manager of Fuels and Power Transactions
Consumers Energy
1945 West Parnall Road
Jackson, MI 49201-8643

Dear Bill:

This refers to your letter of March 26, 1998, regarding your concerns about the disposition of Consumers' Conrail contracts after Closing Date. As I indicated to you during our telephone conversation of several weeks ago, and as reiterated in your conversation with Tom Bayrer, it has not yet been determined which carrier, NS or CSXT, will assume the CR contract service obligations.

Without the benefit of reviewing the contracts, it is difficult to answer your questions with certainty, but we expect the roles of the connecting railroads would not be changed in any way.

Furthermore, as we discussed, the assigning of the service obligation will pertain only to the minimum tonnage obligations in the respective contracts. Tonnage in excess of the minimums can be handled by either NS or CSXT.

We will be sure to keep you informed as this entire process continues. From the very beginning of our involvement in the Conrail transaction NS, like Consumers, has been pursuing an approach to provide balanced competition. We share your concerns in this regard, and we believe the transaction will accomplish this goal.

Sincerely,

cc: Mr. J. W. Fox, Jr., Norfolk Southern
Mr. R. L. Sharp, CSX Transportation
Surface Transportation Board
Mr. Peter Marshall, Canadian National
Mr. C. A. Pinkerton, III, Central Michigan Rwy.

Mr. W. H. Dickey, AMVEST Coal Sales
Mr. T. P. Dwyer, Consolidated Rail Corp.
Mr. R. D. Carter, Norfolk Southern
Mr. T. E. Bayrer, Norfolk Southern
Mr. W. D. Arrington, Norfolk Southern



Thomas R. Howard
Chief Commercial Officer

Exhibit _____
(WEG-04)

935 Seventh Avenue
Huntington, WV 25701-2313
Office (304) 522-5511
Fax (304) 522-5187
Email Tom_Howard@csx.com

April 5, 1998

Mr. William E. Garrity
Executive Manager of Fuels and Power Transactions
Consumers Energy
1945 West Parnall Road
Jackson, MI 49201-8543

Dear Bill:

This letter is a followup to your March 26, 1998 letter to Bill Fox of Norfolk Southern and Ray Sharp of CSX Transportation concerning the division of Conrail contracts.

The intent of Section 2.2(c) of the Transaction Agreement is to maintain current contract rates and transportation obligations through their term. The Transaction Agreement Section 2.2(c) does not diminish either party's contractual obligations or affect applicable competitive options available. Its purpose is to designate which carrier will undertake responsibility to perform Conrail's obligations under each contract. Also, the application of Section 2.2(c) does not obligate Consumers Energy to extend or to commit its shipments for future contract delivery to either the NS or CSX Transportation.

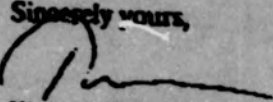
The two key considerations involved are contract term and volume commitment. For example, if the Conrail contract for Fola movements expire at the end of 1998, Section 2.2(c) has no application as Consumers Energy seeks to replace these movements with new contracts. The other issue is the volume commitment of the current Conrail contract. Section 2.2(c) applies only to the contractually committed business. Only the contract annual volume commitment, if any, would be allocated by Section 2.2(c).

The status of the joint movement to Essexville involving the Canadian National (GTW) and the Central Michigan Railway Company (CMGN) will remain unchanged. At this time, however, we cannot respond specifically to your questions until the Conrail contracts with Consumers Energy have been made available to us.

A unit of CSX Transportation

As is the case today, Consumers Energy will be serviced by multiple railroads and lake options to these destinations. Consumers Energy will not experience a decrease in the competitive situations at Essexville, Whiting and the lower Lake Erie docks including Ashtabula Harbor. Neither the Conrail acquisition by CSXT and the NS, nor the administration of the Transaction Agreement, will in any way lessen the options available to Consumers Energy in the future.

Sincerely yours,


Thomas R. Howard
Chief Commercial Officer

cc: Mr. J. W. Fox, Jr.
Mr. R. L. Sharp
Surface Transportation Board
Peter Marshall, Canadian National
C. A. Pickerton, Jr., Central Michigan Railway
W. H. Dickey, Jr., Amvest Coal Sales
T. P. Dwyer, Consolidated Rail Corporation

STB

FD

33388

5-22-98

I

187688

187688

CSX/NS-206

ENTERED
Office of the Secretary

BEFORE THE
SURFACE TRANSPORTATION BOARD

MAY 26 1998

Finance Docket No. 33388

Part of
Public Record

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



MOTION OF APPLICANTS
FOR AMENDMENT OF THE PROTECTIVE ORDER

Applicants NS¹, CSX² and Conrail³ file this motion to request the Board to further amend the protective order issued in Decision No. 1 in this proceeding on April 16, 1997 ("Protective Order").⁴ Specifically, Applicants request that the Protective Order be amended specifically to authorize NS and CSX personnel to gain access to information relating to transportation contracts in effect between Conrail and Conrail customers, and the service provided by Conrail thereunder, for certain limited and specified purposes if and when the Board indicates a decision to approve the Transaction, either with or without conditions, at the voting conference, now scheduled for June 8, 1998. The purpose of the request is to permit NS and CSX to move forward as quickly as possible with the lengthy process first of allocating the performance of those contracts between them as specified in the Transaction Agreement

¹ "NS" refers to Norfolk Southern Corporation and Norfolk Southern Railway Company ("NSR").

² "CSX" refers to CSX Corporation and CSX Transportation, Inc. ("CSXT").

³ "Conrail" refers to Conrail Inc. and Consolidated Rail Corporation.

⁴ Previously amended by Decision No. 4, served May 2, 1997.

and then of putting the contract information into their information systems to ensure the best possible accuracy and service in routing, billing and handling the traffic of the customer when the Transaction is consummated.⁵ Applicants believe that granting this request is clearly in the interests of the public and Conrail's shippers. A proposed Amendment to the Protective Order is attached to this motion.

REASONS FOR GRANTING THE MOTION

As explained more fully in the Application, the Rebuttal and the briefs filed by the Applicants, the Transaction Agreement between CSX and NS provides for the division of the operation of Conrail's lines and other assets between CSX and NS as soon as possible after the effective date of the Board's approval of the Transaction. The effective date of the Board's approval of the Application is referred to in the agreements and pleadings as the "Control Date," and the date on which the operation of Conrail's assets is actually divided and separate operations by NS and CSX commence is referred to as the "Closing Date," or sometimes as "Day One." Applicants believe it is very much in the interest of the public and their shippers that the Closing take place as soon after the Control Date as possible consistent with safe, orderly and efficient operations, so that the many benefits of the Transaction, including the competitive benefits, be maximized and the period during which an undivided Conrail operates under common control of NS and CSX be minimized. Indeed, in their settlement agreement with NITL, Applicants, at NITL's instance, agreed that "NS and CSX will, consistent with safe and efficient rail operations, implement the transaction as soon after Control Date as possible." See NITL Settlement, § I.C. (CSX/NS-176 at 770).

⁵ Abbreviations and capitalized terms have the same meaning here as in the Application (continued...)

Applicants, however, cannot commence divided operations of Conrail that are orderly and efficient until a number of things have been accomplished. For example, in response to concerns expressed by NITL and other shippers and shipper groups about whether the division will be implemented smoothly and efficiently, Applicants have agreed in the NITL Settlement that "[p]rior to the Closing Date, NS and CSX will advise the STB that management information systems designed to manage operations on the former Conrail system within the SAA's and interchanges between the NS/Conrail and CSX/Conrail systems, including the necessary car tracking capabilities, are in place." NITL Settlement, § I.D. (CSX/NS-176 at 770-771).

Another one of the critical tasks that must be accomplished before Closing can occur is the allocation of the performance of Conrail's existing transportation contracts between NS and CSX. To date, however, NS and CSX personnel have been unable to obtain access to those contracts and information related to the historical performance of those contracts. The Transaction Agreement provides that those contracts will remain in effect through their stated terms and will be performed after Closing by CSX or NS. The way in which the performance of the contracts will be allocated between NS and CSX is set forth in Section 2.2(c) of the Transaction Agreement (see CSX/NS-25 at 25-29). This allocation method is described generally in the Application at CSX/NS-18 at 40-41.⁶ A large portion of Conrail's traffic

(...continued)

(CSX/NS-18) and the Rebuttal (CSX/NS-176).

⁶ In addition, in response to the concerns of some shippers that the carrier designated to succeed to Conrail's performance of their contract may not provide satisfactory service, the NITL Settlement establishes a mechanism whereby shippers who could have had their contracts allocated to either NS or CSX and who, after six months' experience, are dissatisfied with the service they are receiving, can submit to expedited arbitration a request to have the (continued...)

currently moves under contracts, and it will obviously be essential at Closing for NS, CSX and the shippers involved to know which carrier is to provide the service and under what terms. Finalizing operating plans, train schedules and arrangements for power, crews and equipment also depend on the allocation of contract performance between CSX and NS.

A related task that is also of the utmost importance is putting the terms of the existing contracts -- rates, routings, volume commitments, etc. -- into NS's and CSX's information systems. This is essential to enable CSX and NS, when they begin moving commodities under the contracts, to generate accurate waybills and other shipping documents, which will be necessary for accurate billing, routing, and tracking of the movements and otherwise proper performance of the contracts. This inputting task cannot effectively be progressed until access to all contracts is obtained and allocation of contract performance is completed.

Both of these tasks are very time consuming. The Transaction Agreement specifies that allocation of the performance of the contracts shall be made "in a manner to achieve reliability and proper service to the customers" and to "promote the use of efficient routes, high-quality service and consistency of service to customers." Section 2.2 (c)(ii) and (iv). Carrying out that task will require careful evaluation of, among other things, what the contracts require with respect to volumes, routing and equipment, as well as an indication of Conrail's historic underlying costs associated with each particular contract movement. Conrail contracts number in the thousands (including material supplements and amendments), and many involve not only customers, but also one or more other railroads. Except in cases where the other railroad is

(...continued)

responsibility for service transferred to the other carrier. NITL Settlement § II.C (CSX/NS-176 at 771-72).

the one of CSX or NS to which allocation of the Conrail portion of the movement is being made, interchange or other joint service data will also have to be inputted with respect to those contracts. Although it is difficult to estimate precisely at this time, without access to the contracts, the time required, each of the tasks is likely to take a significant amount of time to complete.

In addition to the time it will take to allocate the contracts and input the data, it will also take time to provide information to the appropriate operations personnel at each railroad with respect to the particular contracts which have been allocated to the respective railroad. Train schedules may have to be modified in order to reflect volumes of traffic. Early access to all information relating to the performance of transportation contracts is necessary to assure that the appropriate information may be organized and furnished to operations personnel in sufficient time for adequate, complete, and thorough transportation preparation, which will accordingly assist in promoting an efficient transition to the new services provided by each railroad.

Hundreds of people at NS and CSX are now fully engaged in the myriad tasks needed to prepare for Closing and for operations thereafter, and have been thus engaged for more than a year. Those people and their activities through December 1997 were described in the Rebuttal and the supporting verified statements of Nancy S. Fleischman and Michael J. Ward. CSX/NS-176 at 708-712; CSX/NS-177, 2A, at 88-115; CSX/NS-177, 2B, at 597-629. Those activities have continued unabated.

With regard to the allocation of Conrail transportation contracts, the inputting of information from them into NS and CSX information systems and the planning of operations to perform the required service, however, NS and CSX have been constrained by their inability to

obtain access to those confidential contracts and information related to historical Conrail performance and costing of such contracts. Because Conrail quite properly regards its contracts as proprietary and confidential, as the terms of the contracts typically provide, and has not considered itself authorized by the Protective Order to give in-house NS and CSX personnel access to them unless and until Board approval of the Application becomes effective, it has provided information about them only to outside counsel or consultants of NS and CSX under a "Highly Confidential" designation.

Unless the Board specifically provides otherwise, the CSX and NS staff who must review and carry out the Conrail contracts cannot begin that process unless and until the authority sought by NS and CSX to control Conrail and carry out the Transaction is granted and becomes effective. Under the regulations, effectiveness occurs 30 days after the service of the Board's written decision granting such authority, unless otherwise provided. The Board, however, in its Protective Order may specifically authorize Conrail to provide such information to NS and CSX in-house personnel for specified purposes and may authorize such personnel to have access to such information if the Board finds that doing so would be in the public interest and would not be likely to harm any party significantly. Applicants submit that permitting certain NS and CSX personnel access to such information immediately after the Board publicly indicates a decision to approve the Application would greatly benefit shippers and the general public and would not harm any party. Such authorization would be limited to the CSX and NS personnel for whom access to the information is necessary in order to carry out the specified purposes.

If the Board is disposed to approve the Application, the sooner CSX and NS complete the processes of allocating the contracts between them and putting the information about them

into their systems, the better for everyone. If those processes are not completed by the time the other steps needed for Closing have taken place, the need to complete them will further delay the Closing, and thus the realization of the Transaction's public benefits. Furthermore, the more quickly those processes move forward, the more time NS and CSX will have to refine their ongoing operational preparations and to work on and test their information systems, particularly as they deal with the new data, before Closing occurs.

At the same time, permitting NS and CSX access to information about Conrail's transportation contracts at the time a decision to approve the Application is indicated publicly should not prejudice any party. If the Board decides to grant the control application, shippers at that time will know that NS and CSX will, in the ordinary course, have full control of Conrail, including access to Conrail's transportation contracts, in two and a half months. Many shippers have informed NS and CSX that they strongly favor NS and CSX commencing those processes as soon as a decision granting the Application is issued.

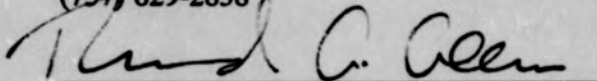
Under the amendment to the Protective Order Applicants propose, until the decision approving the Application becomes fully effective, access to the information would be provided solely for the limited purposes of allocating performance of the contracts between CSX and NS, putting information regarding the contracts into the information systems of NS and CSX and planning and preparation of rail operations, and would be appropriately limited to the necessary NS and CSX personnel.⁷

⁷ Paragraph 4 of the protective order already provides for the return or destruction of confidential documents and information if the Application is denied or is approved but control is not effected.

For the foregoing reasons, Applicants respectfully request the Board to amend the Protective Order to authorize Conrail to provide to NS and CSX personnel, and for those personnel to receive, information regarding transportation contracts between Conrail and Conrail customers upon any indication at the voting conference of the Board's decision to approve the Application. A proposed Amendment to the Protective Order is attached.

Respectfully submitted,

James C. Bishop, Jr.
William C. Wooldridge
J. Gary Lane
Robert J. Cooney
George A. Aspatore
Roger A. Petersen
Norfolk Southern Corporation
Three Commercial Place
Norfolk, VA 23510-9241
(757) 629-2838



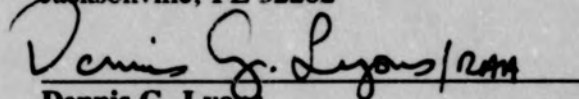
Richard A. Allen
John V. Edwards
Zuckert, Scoutt & Rasenberger, LLP
888 Seventeenth Street, N.W.
Suite 600
Washington, D.C. 20006-3939
(202) 298-8660

Scot B. Hutchins
Skadden, Arps, Slate, Meagher & Flom, LLP
1440 New York Avenue, N.W.
Washington, D.C. 20005-2111
(202) 371-7400

*Counsel for Norfolk Southern Corporation
and Norfolk Southern Railway Company*

Mark G. Aron
Peter J. Shudtz
CSX Corporation
One James Center
901 East Cary Street
Richmond, VA 23219
(804) 782-1400

P. Michael Giftos
Paul R. Hitchcock
CSX Transportation, Inc.
500 Water Street
Jacksonville, FL 32202

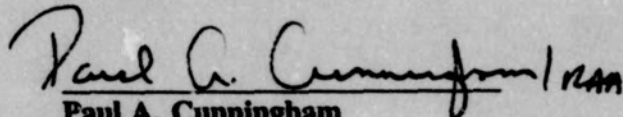


Dennis G. Lyons
Arnold & Porter
555 12th Street, N.W.
Washington, D.C. 942-5000

Samuel M. Sipe, Jr.
David H. Coburn
Stephoe & Johnson LLP
1330 Connecticut Avenue, N.W.
Washington, D.C. 20036
(202) 429-3000

*Counsel for CSX Corporation and CSX
Transportation, Inc.*

Timothy T. O'Toole
Constance L. Abrams
Consolidated Rail Corporation
Two Commerce Square
2001 Market Street
Philadelphia, PA 19103
(215) 209-4000

A handwritten signature in dark ink, appearing to read "Paul A. Cunningham", followed by a vertical line and the letters "nan".

Paul A. Cunningham
Gerald P. Norton
Harkins Cunningham
1300 Nineteenth Street, N.W.
Suite 600
Washington, D.C. 20036
(202) 973-7600

Counsel for Conrail Inc. and
Consolidated Rail Corporation

Dated: May 22, 1998

ATTACHMENT

AMENDMENT TO PROTECTIVE ORDER

The Protective Order issued in Decision No. 1 in Finance Docket No. 33388 on April 16, 1997, as amended, is further amended to add the following paragraph:

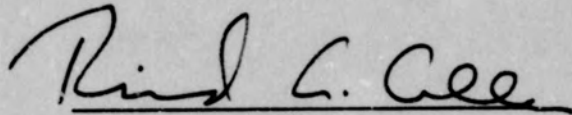
19. Conrail may provide to personnel of CSX and NS, and personnel of CSX and NS may receive, copies of or other information regarding transportation contracts to which Conrail is a party, their historic performance and cost of performance by Conrail, and related operations by Conrail, at any time after any voting conference in this proceeding at which the Surface Transportation Board indicates its approval of the Application, with or without conditions. Until such decision becomes fully effective, information regarding transportation contracts may be provided and received solely for the purposes of allocating performance of the contracts between NS and CSX 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; further, the CSX and NS personnel allowed access to such contracts or information shall be limited to those requiring such access in order to carry out such permissible purposes.

In all other respects, the Protective Order shall remain unchanged and in effect.

CERTIFICATE OF SERVICE

I, hereby certify that on this 22nd day of May, 1998, I have served the foregoing CSX/NS-206, Motion of Applicants for Amendment of the Protective Order, on all parties of record by first class mail, postage pre-paid, or by more expeditious means, and by hand delivery on the following:

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



Richard A. Allen
Zuckert Scoutt & Rasenberger, LLP
888 17th Street, N.W.
Suite 600
Washington, D.C. 20006-3939

Dated: May 22, 1998

STB

FD-33288

5-18-98

I

ID-187622

187622

**NEW ORLEANS TRAIN CAR LEAKAGE FIRE LITIGATION
PLAINTIFF MANAGEMENT COMMITTEE**

3748 North Causeway Blvd., Suite 301
Metairie, Louisiana 70002
(504) 838-8383

DAVID P. BAINS
JOSEPH M. BRUNO
HARRY F. CANTRELL
FRANK J. D'AMICO, JR.
CALVIN C. FAYARD, JR.
JACK W. HARANG
C. JOSEPH MURRAY
DAVID W. ROBISON
H. EDWARD SHERMAN
THOMAS L. SMITH
VERNON THOMAS
DARLEEN JACOBS
T. ALLEN USRY
WENDELL GAUTHIER

ENTERED
Office of the Secretary

May 11, 1998

MAY 19 1998

Part of
Public Record



HENRY T. DART
COUNSEL

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

Re: 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, DOT 3

Dear Mr. Williams:

In further support of our motion for reconsideration to participate in the hearing on June 4, your news release of March 12, advised that any party interested in participating in oral argument must advise the Board no later than April 10. Inasmuch as our application to become a party of record included a request to appear at the June 4 hearing and was filed on March 20, I believe we have timely filed a request to appear.

By copy of this letter, we are advising your Case Control Unit that our clients intend to

Mr. Vernon Williams, Secretary
Surface Transportation Board
May 11, 1998

page 2

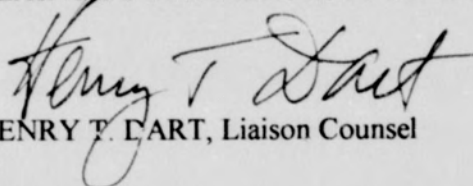
appear at the hearing and request an opportunity to be heard, individually or through counsel, as follows:

1. We intend to address the issue of railroad safety , including the current operations of CSX and potential effects on safety of the proposed merger;
2. We oppose the primary application;
3. We require 30 minutes of speaking time.

Please give us your immediate response.

Yours very truly,

PLAINTIFF MANAGEMENT COMMITTEE


HENRY T. CART, Liaison Counsel

HTD/bjt

cc: Case Control Unit, Surface Transportation Board
Mr. & Mrs. Charles Givens
Mr. George Rigamer
Hon. John Breau
Hon. Mary Landrieu
Hon. William Jefferson

STB

FD-33388

5-18-98

I

ID-187598

487598

SLOVER & LOFTUS

ATTORNEYS AT LAW

1224 SEVENTEENTH STREET, N. W.

WASHINGTON, D. C. 20036

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

ENTERED
Office of the Secretary

MAY 19 1998

Part of
Public Record



NRPC-14

May 18, 1998

VIA HAND DELIVERY

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

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

Dear Secretary Williams:

On behalf of the National Railroad Passenger Corporation ("Amtrak"), I request that you file this letter in Finance Docket No. 33388 to evidence the withdrawal by Amtrak of its previously-filed requests for conditions and comments.

On October 21, 1997, Amtrak filed with the Surface Transportation Board ("STB") its requests for conditions and comments in this proceeding. Those requests and comments were set forth in a pleading identified as NRPC-07 and entitled "National Railroad Passenger Corporation (Amtrak) Comments and Requests for Conditions on the Proposed NS/CSX Acquisition and Division of Conrail" ("NRPC-07"). Amtrak hereby notifies the STB that Amtrak has reached agreements with Norfolk Southern Corporation ("NS"), CSX Corporation ("CSX") and Consolidated Rail Corporation ("Conrail") that address the concerns raised by Amtrak in connection with the applicants' proposed transactions

Hon. Vernon A. Williams
May 18, 1998
Page 2

that are subject to STB review in Finance Docket No. 33388. As provided in the "Principles of Cooperation Concerning the Northeast Corridor" recently signed on behalf of Amtrak, NS, CSX and Conrail, Amtrak hereby withdraws all its requests for conditions and comments set forth in NRPC-07. Amtrak also withdraws its request to participate in oral argument.

Amtrak is pleased to advise the STB that Amtrak now supports in all respects the transactions proposed by the applicants in Finance Docket No. 33388 as set forth in their Transaction Agreement dated June 10, 1997, subject to the imposition by the STB of the limited oversight condition as described in the next paragraph.

Consistent with the "Principles of Cooperation Concerning the Northeast Corridor," NS and CSX have authorized Amtrak to represent to the STB that neither opposes action by the STB in Finance Docket No. 33388 consistent with the following terms:

The STB should require oversight, for a 3-year period, of the implementation and effect of the transactions subject to STB review and approval in Finance Docket NO. 33388 to the extent they may affect the on-time performance of Amtrak intercity passenger train services. As part of this continuing oversight, the STB should require quarterly reports from NS and CS and provide Amtrak an opportunity to comment. NS, CSX and Amtrak shall jointly recommend to the STB objective, measurable standards to be used in such reports: on-time performance standards should reflect measurements employed in calculating incentive payments under the applicable Amtrak operating agreements. The foregoing condition is not intended to limit the STB's authority to continue oversight beyond the 3-year period.

Please file this letter in STB Finance Docket No. 33388 to evidence Amtrak's withdrawal of its requests for conditions and comments in this proceeding, and to evidence the acquiescence

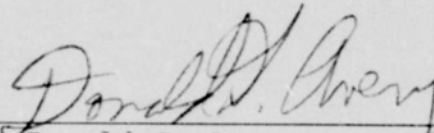
Hon. Vernon A. Williams
May 18, 1998
Page 3

of both CSX and NS in the imposition of a 3-year oversight period as described above. Copies of this letter are being served upon all parties of record.

Respectfully submitted,

NATIONAL RAILROAD PASSENGER
CORPORATION

By:



Donald G. Avery
An Attorney for the
National Railroad Passenger
Corporation

cc: Honorable Jacob Leventhal
Hon. Linda Morgan, Chairman
Hon. Gus Owen, Vice-Chairman
All Parties of Record

STB

FD-33388

5-18-98

I

ID-187589

1

OF

2

187589

SLOVER & LOFTUS

ATTORNEYS AT LAW
1224 SEVENTEENTH STREET, N. W.
WASHINGTON, D. C. 20036

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



I

EXPEDITED CONSIDERATION REQUESTED

May 18, 1998

ENTERED
Office of the Secretary

BY HAND DELIVERY

MAY 19 1998

**Part of
Public Record**

The Honorable Vernon A. Williams
Secretary
Surface Transportation Board
Case Control Branch
ATTN: STB Finance Docket 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

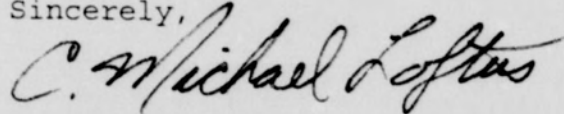
Dear Secretary Williams:

Enclosed for filing in the above-referenced proceeding, please find an original and twenty-five (25) copies of the Motion to Strike of the Cities of East Chicago, Indiana; Hammond, Indiana; Gary, Indiana; and Whiting, Indiana (collectively, The Four City Consortium) (FCC-16). Also enclosed, please find a computer diskette containing the text of this document in WordPerfect 5.1 format. Because of the urgency of the subject matter of this Motion, the Four City Consortium requests expedited consideration.

The Hon. Vernon A. Williams
May 18, 1998
Page 2

We have included an extra copy of the filing. Kindly indicate receipt by time-stamping this copy and returning it with our messenger.

Sincerely,

A handwritten signature in cursive script that reads "C. Michael Loftus".

C. Michael Loftus
An Attorney for
The Four City Consortium

Enclosure

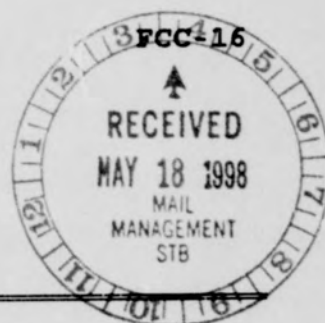
cc: Elaine K. Kaiser

(courtesy copies to:
The Hon. Linda J. Morgan
The Hon. Gus A. Owen
David M. Konschnik)

EXPEDITED CONSIDERATION REQUESTED

BEFORE THE

SURFACE TRANSPORTATION BOARD



Finance Docket No. 33388

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

Dated: May 18, 1998

EXPEDITED CONSIDERATION REQUESTED

FCC-16

BEFORE THE
SURFACE TRANSPORTATION BOARD

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

MOTION TO STRIKE
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, the Cities of East Chicago, Indiana; Hammond, Indiana; Gary, Indiana; and Whiting, Indiana (collectively the "Four City Consortium") hereby move to strike from the record the following materials submitted by CSX to the Board's Section of Energy and Environment ("SEA"):

1. The portions of the letter dated May 12, 1998 from counsel for CSX to Elaine K. Kaiser ("May 12 CSX letter") which attempt to introduce inappropriate surrebuttal evidence on the Applicants' planned post-transaction operations and the transaction's environmental impacts. The specific material to be stricken from the May 12 CSX letter begins with the third sentence of the second complete paragraph on page 3 (beginning with the word "Second") and extends through the end of the letter, including the attachment thereto.

2. The portions of the letter dated March 5, 1998 from David H. Coburn to Elaine K. Kaiser ("March 5 CSX letter") dealing with "the Four City Consortium re-routing proposals".
3. The letter dated April 3, 1998 from Mary Gabrielle Sprague to Michael J. Dalton, III.
4. The Supplemental Environmental report prepared by ICF Kaiser and dated April 23, 1998.
5. The letter dated May 6, 1998 from Mary Gay Sprague to Elaine K. Kaiser, including the Verified Statement of James E. Roots enclosed therewith.¹

The Four Cities do not see any practical alternative to striking this material. Given the short time available before SEA's release of its Final Environmental Impact Statement ("EIS") in this case, providing the Four City Consortium an adequate opportunity to review and appropriately respond to these materials, as well as underlying workpapers utilized by CSX and/or its consultant in preparing these materials, would require the Board to hold in abeyance completion and publication of the Final EIS as well as the Board's voting conference scheduled for June 3 and 4, 1998.

Because of the late date, the Four Cities request that expedited consideration be taken by the Board on this motion.

¹ Copies of all of these materials are contained in the Appendix attached to the copies of this motion being filed with the Board and served on counsel for the Applicants. In the interest of time, the Appendix is not attached to the copies of this motion being served on other parties of record. Copies of the Appendix will be provided to any other party upon request to the Four City Consortium's undersigned counsel.

The grounds for this motion to strike are that the indicated material constitutes new evidence, improper surrebuttal, improper ex parte communications in a contested adjudicatory proceeding,² and an improper and untimely alteration of CSX's prior responses to discovery by the Four Cities in this proceeding, all in violation of the Board's Rules of Practice and its prior decisions and orders in this proceeding. In particular, the May 12 CSX letter constitutes an improper and last ditch desperate attempt by CSX to rebut and discredit the Four Cities' evidentiary submission and to put on a new affirmative case. The other materials also constitute improper surrebuttal (in the case of the March 5 CSX letter) and questionable ex parte communications between counsel for a party and Board staff which cast doubt on the entire environmental review process for this case,

² The May 12 CSX letter was served on counsel for the Four Cities. However, neither the March 5 CSX letter nor the other materials requested to be stricken were served either on counsel or on officials of any of the Four Cities. The Four Cities became aware of these materials only on May 14, 1998, by follow-up inquiry by their counsel to CSX counsel after receiving the May 12 letter.

These materials may eventually find their way into the Board's public docket in this proceeding; however, this does not alter their status as improper ex parte communications. They contain new evidence going to the merits of the Application; they were transmitted to SEA by counsel for one of the Applicants; and they were never served on the Four Cities or any other party of record as required by Decision No. 6 in this proceeding. See, also, 49 C.F.R. § 1102.2(c).

including the equal treatment of parties, the ability of the Four Cities to get a fair opportunity to present their case, and, possibly, the impartiality of the SEA.³

For example, most of the March 5 CSX letter critiques the Four Cities' requested conditions and attempts to bolster CSX's reasons for opposing those conditions. This ex parte letter was submitted despite the fact that CSX already had two meaningful opportunities on the record to rebut the Four Cities' proposals, and, indeed, thoroughly critiqued the Four Cities' Alternative Routing Plan both in its response to the Draft EIS and in its Brief. Apparently, these responses were not sufficient for CSX, so it submitted additional rebuttal evidence in the guise of providing supplemental information to SEA at the latter's request.

SEA's conduct is also questionable. By affording CSX an additional "shot" at critiquing the Four Cities' plan, without providing the Consortium an adequate opportunity to respond, SEA,

³ The Four Cities do not move to strike a letter dated May 6, 1998 from Peter J. Shudtz to Elaine K. Kaiser because, although it should have been served on the Four Cities, this letter does not attempt to change the facts of record in the proceeding (as earlier established through discovery and filings of record) that have been relied upon by both the Four Cities and SEA. Rather, the letter reports on voluntary mitigation measures CSX is willing to undertake. Comparison of these measures to the facts of record will establish that they are inadequate to ameliorate the principal adverse impacts of the transaction demonstrated by the Four Cities.

at a very minimum, has raised doubts about the independence and impartiality of its analysis.

I. Background.

On October 21, 1997, the Four City Consortium filed its Comments and Request for Conditions (FCC-9) ("October 21 Comments") in this proceeding pursuant to the procedural schedule established in Decision No. 6. In its October 21 Comments, the Four City Consortium presented and substantiated an Alternative Routing Plan designed to mitigate certain significant adverse incremental impacts of the Conrail transaction on the Four Cities region (including, in particular, the increase in vehicle delay times and safety problems likely to result from the transaction at rail/highway grade crossings of CSX's "BOCT line" between Pine Junction, Indiana and Calumet Park, Illinois). The Alternative Routing Plan was based in part on an analysis of the effects of the transaction conducted by various expert economic and engineering consultants retained by the Four Cities, information in the CSX and NS Operating Plans, and other information contained in the Railroad Control Application and produced by CSX and NS in response to the Four Cities' discovery requests. The adverse impacts of the Conrail transaction on the Four Cities region, as well as the need for mitigating conditions such as the Alternative Routing Plan, were documented in the testimony and other evidence contained in the Four Cities' October 21 Comments.

CSX and NS responded to the Four Cities' October 21 Comments, and critiqued the Alternative Routing Plan, in their Rebuttal filing on December 15, 1997. These filings were also made pursuant to the procedural schedule established in Decision No. 6.

On December 12, 1997, SEA served its Draft EIS for this proceeding. Under the Board's procedural schedule, as supplemented by Decision No. 52 served November 3, 1997, interested parties were requested to submit comments on the Draft EIS within 45 days after it was made available to the public.⁴ On February 2, 1998, the Four City Consortium filed its Comments on the Draft EIS (FCC-13) ("Environmental Comments"). CSX and NS also filed comments on the Draft EIS on that date.

The Four Cities' Environmental Comments presented additional analysis supporting the adoption of their Alternative Routing Plan as an environmental mitigation condition to the Board's approval of the Application. The basics of the Plan, as presented in the Four Cities' October 21 Comments, were not

⁴ Since issuing its December 12, 1997 Draft EIS, the Board in Decision No. 62 (served January 12, 1998) issued an Errata to the Draft EIS, and in Decision No. 63 (served January 21, 1998) issued a Supplemental Errata to the Draft EIS. Two other decisions were also issued by the STB containing additional environmental information, including Decision No. 69 (served February 27, 1998) and Decision No. 72 (served March 19, 1998). In Decision No. 52, the Board also required the Applicants to prepare and file Safety Integration Plans ("SIPs"), which were filed on December 3, 1997, and included by the Board as part of its Draft EIS.

modified in their Environmental Comments, although a revised quantification of the adverse impacts resulting from the Conrail transaction (and the comparative benefits of the Alternative Routing Plan as compared with the Applicants' operating plans for the Four Cities region) was presented based on additional analysis of the information provided in the Application and the Draft EIS and produced by CSX in discovery.³

Subsequent to the issuance of the Draft EIS, representatives of the Four City Consortium met with representatives of CSX and NS in an effort to reach a settlement agreement that would address the Four Cities' concerns. The settlement negotiations were unsuccessful, and by letter dated May 7, 1998, counsel for the Four City Consortium so advised the Board and renewed the Consortium's request that SEA recommend the imposition of the Alternative Routing Plan as an appropriate environmental mitigating condition to approval of the Conrail transaction. The May 12 CSX letter purports to respond to the Four Cities' letter of May 7, but in fact attempts to introduce additional evidence for the record (in the guise of supplemental comments on the Draft EIS)

³ In particular, the Four Cities revised their earlier estimates of vehicle crossing delays on the two principal lines of concern -- the BOCT line and the former Pennsylvania Railroad line between Hobart and Clarke Junction, Indiana -- based on the probable post-transaction average train speeds on these lines rather than the maximum timetable speeds. In its comments on the Draft EIS (as in its Rebuttal evidence filed on December 15, 1997), CSX disputed the Four Cities' analysis, claiming that it understated the likely train speeds on these lines.

in a manner that far exceeds the bounds of the Board's regulations as well as its prior orders in this case.

II. ARGUMENT

A. The May 12 CSX Letter Improperly Attempts to Introduce New Evidence/Surrebuttal

In Decision No. 12 (served July 23, 1997), the Board accepted for consideration the Applicants' filed application in this case. Under the Board's governing rules, a railroad merger/consolidation application must present a "*prima facie* case" that the proposal is consistent with the public interest. 49 C.F.R. § 1180.4(c)(8). In its Notice of Final Scope of Environmental Impact Statement (served October 1, 1998), the Board made it clear that SEA's Draft and Final Environmental Impact Statements would be based on information provided in the Application, and specifically, information included in the Applicants' Operating Plans and Environmental Report ("ER"). In completing its assessment of the proposed Conrail control transaction, and in crafting their Alternative Routing Plan, the Four Cities spent countless hours analyzing the Application, the Draft EIS (and relevant supplemental EIS decisions), and the Applicants' discovery responses -- all to determine the precise impact of the Applicants' post-transaction operations on north-west Indiana.

Through its May 12 letter, in particular, CSX is now asserting that much of the critical data it reported earlier, and which has been relied upon by the Four Cities in assembling its case, as well as the SEA in completing its Draft and Final EIS, was erroneous. Apparently, since "Plan A" has failed, CSX has moved on to "Plan B." At the last hour, CSX has introduced certain "corrected" data to perform additional analysis on the impacts of its transaction. CSX now proclaims that based on this new "corrected" data -- which has not previously been relied upon by Applicants, submitted into evidence in this proceeding, or otherwise provided to the Four Cities' during discovery -- it has determined that vehicular traffic congestion resulting from railroad operations over certain line segments in the Four Cities will actually be reduced below baseline levels under the Applicants' plan.

The May 12 CSX letter purports to be a response to the Four Cities' May 7, 1998 status report to SEA on negotiations. It is not. Rather, the letter is a transparent attempt to introduce new rebuttal evidence into the record of this case. As such, it constitutes the improper submission of new evidence and surrebuttal, in violation of the Board's procedural schedule and its rules. See 49 C.F.R. Part 1112.⁶

⁶ The same is true of the March 5 CSX letter and the other materials the Four Cities seek to have stricken from the record in this proceeding.

The procedural schedule adopted in this proceeding makes it abundantly clear that the Board will not permit parties to file supplemental evidence altering earlier submissions.

Errata filings. The procedural schedule that we are adopting should provide parties ample time to build a sufficient record for us to make a reasoned decision in this proceeding. We do not intend to permit this process to be marred by the filing of errata sheets significantly altering the evidence and conclusions contained in earlier submissions, as such filings may curtail the ability of parties to respond fully and adequately to the record within the time frames we have established.

Decision No. 6 (served May 30, 1997) at 7.

It is extremely important that the Board understand that the new evidence submitted by CSX not only severely prejudices the Four Cities in the environmental review process being conducted by SEA, but undermines their case on the merits as well. Under the Board's rules, parties' environmental submissions, even if made only to SEA, are made part of the record that is considered by the Board when deciding a merger/consolidation Application. See 49 C.F.R. § 1105.10(f) ("[t]he environmental documentation (generally an EA or an EIS) and the comments and responses thereto . . . will be part of the record considered by the [Board] in the proceeding involved").⁷ By its March 5 and May

⁷ The Board's Notice of Intent to Prepare and EIS for this proceeding, served July 3, 1997, also indicates that environmental comments submitted by a party of record "will be placed in the formal Public Record for this case." (Notice of Intent at 3.)

12 letters, CSX is attempting to introduce new and untested evidence that would severely prejudice the Four Cities' case both before the SEA in completing its Final EIS and before the Board in making its final decision on the merits as to whether the conditions sought by the Four Cities should be imposed if the Application is approved.

It is well established that notions of due process do not permit a party to submit new evidence or studies upon closure of the evidentiary phases of a proceeding.⁸ See Pittsburgh & Lake Erie R.R. v. I.C.C., 796 F.2d 1534, 1543 (D.C. Cir. 1986) (verified statement containing new study based on new method of analysis was properly stricken); San Antonio, TX v. Burlington Northern, Inc., 362 I.C.C. 161, 164-65 (1979) (introduction of evidence at late stage in proceeding whereby other party has no opportunity to reply is violative of the Commission's Rules and all notions of due process); Chrysler De Mexico, S.A. v. Penn Central Transportation Co., 353 I.C.C. 512, 515-16 (1977) (party prohibited from changing the scope of a proceeding through the submission of new evidence as a result of an inadequate initial presentation of evidence).

The timing of the May 12 CSX letter, in particular, is especially questionable in light of the fact that the new evidence has been submitted so close to SEA's completion of its

⁸ See, also, 49 C.F.R. §1103.27(d).

Final EIS. Because of the late date, the Four Cities do not have an adequate opportunity to review and respond to CSX's detailed evidentiary filing prior to completion of the Final EIS.⁹ Therefore, if the Board does not reject CSX's new evidentiary submissions, the Four Cities will be severely and unfairly prejudiced unless the entire proceeding is held in abeyance until the Consortium has an adequate opportunity to respond to the May 12 CSX letter (as well as the other ex parte CSX materials, which were not received by the Four Cities until the afternoon of May 14, 1998).

B. CSX's New Evidence is Inconsistent with
Evidence CSX Produced in Discovery

The May 12 CSX letter is not only improper procedurally, it is also inappropriate substantively. Specifically, the new evidence submitted by CSX includes amended analytic data on train length and weight, traffic types (e.g., intermodal, unit, automotive, etc.), traffic counts, operating speeds, etc. The Four Cities have not yet had an opportunity to fully review or scrutinize this new data; nor have they had an opportunity to determine exactly how this data comports with the previous data submitted by CSX in this proceeding as well as data utilized by

⁹ Based on the preliminary and limited review the Four Cities have been able to conduct of the ICF Kaiser study attached to the May 12 CSX letter, the Four Cities have been unable to reconcile or replicate the numbers shown in the tables that accompany the study. Additional information is needed to do so.

SEA in its Draft EIS. What is clear is that the new data advanced by CSX in its May 12 letter is totally inconsistent with data provided to the Four City Consortium in discovery and which was relied upon by the Consortium in completing its October 21 Comments, Environmental Comments, and Brief. Much of this data was also relied upon by SEA in its Draft EIS (which was, in turn, utilized and relied upon by the Four Cities in their Environmental Comments and Brief).

In particular, the ICF Kaiser study attached to the May 12 CSX letter, among other things, describes the manner in which CSX has corrected its earlier errors as follows:

- [S]ince the FCC prepared its comments, CSX identified an error in the unit train counts, and the post-Transaction gross tonnage estimate on the Pine Junction-Barr Yard line segment.
- [T]here were some errors in the information provided with respect to the Pine Junction-Barr Yard segment.
- CSX has now determined that the information provided to the Four Cities about train counts, gross tonnage and average cars per train (the information used by the Cities to calculate the train length) for the Pine Junction-Barr Yard line segment was incorrect. Both the pre-Transaction and post-Transaction train numbers must be adjusted, as well as the post-Transaction gross tonnage estimate.
- The traffic delay analysis of the DEIS and the Four Cities is based on the train counts presented in the DEIS. Those counts should be adjusted

Not surprisingly, all of the so called "errors" that have been discovered by CSX and now "corrected" work to the significant advantage of CSX in computing the environmental impacts of the transaction.

Unfortunately, this is not the only time that CSX has attempted to induce the Board to accept for the record the introduction of new and untested data after the close of an evidentiary record, and after it failed to produce such data as requested by its opponent during discovery. In response to a similar attempt to circumvent the Board's evidentiary procedures through the introduction of substantive evidence in the form of an errata filing in a recent maximum rate case, the Board swiftly rejected CSX's attempts to supplement the record at a late date in the proceeding:

Apparently, after the close of the evidentiary record, CSX concluded that it was not as "burdensome" or "oppressive" as it had thought to compute the exact amount of refunds given to particular traffic. . . . To accept that evidence, we would have to either deprive [the shipper] of the opportunity to respond, or reopen discovery, reopen the record, and allow the parties to relitigate this case. We will not do so. It is unfair gamesmanship and an abuse of the administrative process for a party to withhold information during discovery and then introduce that information, after the record has closed, in an errata filing only after it proves to be beneficial to its case.

Docket No. 41989, Potomac Electric Power Co. v. CSX

Transportation, Inc. (Decision served Nov. 24, 1997). The Board

similarly should reject the dubious new evidentiary filings by CSX that are the subject of this motion.¹⁰ This entire episode does nothing but cast doubt on the accuracy of all of the operational data that has been submitted by CSX in this proceeding.

CONCLUSION

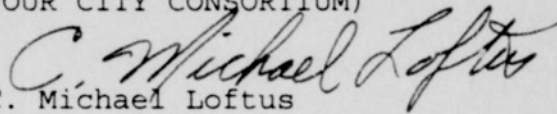
For the foregoing reasons, the Four City Consortium respectfully requests that the Board strike from the record the materials enumerated on pages 1 and 2 of this motion so that these materials are not improperly relied upon by SEA in the Final EIS or by the Board in its scheduled decision on the merits of the Application. Given the late date, only by such a ruling can the issuance of the Final EIS as well as the oral argument

¹⁰ Cf. Fed.R.Civ.Proc. 37(c)(1) (precluding the admission of evidence withheld from discovery); Orjias v. Stevenson, 31 F.23d 995, 1004-1005 (10th Cir. 1994) (affirming trial court's exclusion of evidence as a result of the sponsoring party's failure to provide adequate discovery responses).

and voting conference proceed in a manner that is consistent with the Board's rules and basic principles of fairness.

Respectfully submitted,

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

OF COUNSEL:

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

Dated: May 18, 1998

Attorneys for The Four City
Consortium

CERTIFICATE OF SERVICE

I certify that I have this 18th day of May, 1998,
served copies of the foregoing Motion to Strike By the Cities of
East Chicago, Indiana; Hammond, Indiana; Gary, Indiana; and
Whiting, Indiana by hand delivery upon Applicants' counsel:

Drew A. Harker, Esq.
Arnold & Porter
555 Twelfth Street, N.W.
Washington, D.C. 20004-1202

David H. Coburn, Esq.
Steptoe & Johnson L.L.P.
1330 Connecticut Ave., N.W.
Washington, D.C. 20036-1795

John V. Edwards, Esq.
Patricia E. Bruce, Esq.
Zuckert, Scoutt & Rasenberger,
L.L.P., Suite 600
888 Seventeenth Street, N.W.
Washington, D.C. 20006-3939

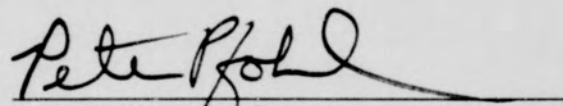
Gerald P. Norton, Esq.
Harkins Cunningham
1300 Nineteenth Street, N.W.
Suite 600
Washington, D.C. 20036

I further certify that copies of the foregoing Motion
(without the attached Appendix) were served by first class mail,
postage prepaid on:

The Honorable Rodney E. Slater
Secretary
U.S. Department of Transportation
400 7th Street, S.W., Suite 10200
Washington, D.C. 20590

The Honorable Janet Reno
Attorney General of the United States
U.S. Department of Justice
10th & Constitution Ave., N.W., Room 4400
Washington, D.C. 20530

and upon all other parties of record in Finance Docket No. 33388.


Peter A. Pfohl

APPENDIX

ARNOLD & PORTER

555 TWELFTH STREET, N.W.
WASHINGTON, D.C. 20004-1202

MARY GABRIELLE SPRAGUE
(202) 942-5773

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

NEW YORK
DENVER
LOS ANGELES
LONDON

May 12, 1998

VIA HAND DELIVERY

Elaine K. Kaiser, Chief
Section of Environmental Analysis
Surface Transportation Board
1925 K Street, NW
Washington, DC 20423

Re: Finance Docket No. 33388, CSX and Norfolk Southern –
Control and Operating Agreements – Conrail/
Response to May 7, 1998 Letter from Four City Consortium

Dear Ms. Kaiser:

This letter responds to a May 7, 1998 letter to you from C. Michael Loftus, counsel for the Four City Consortium. In that letter Mr. Loftus stated that the Alternative Routing Plan proposed by the Four City Consortium has "the broad-based support of local community groups, planners, and federal, state and local officials including the Indiana Department of Transportation." It is not clear to CSX, however, that the Alternative Routing Plan is supported by anyone outside of the Four Cities (East Chicago, Gary, Hammond and Whiting).

First, CSX is not aware of any support by federal officials for the Four Cities plan. The United States Department of Transportation ("DOT"), in its comments on the DEIS, encouraged CSX and NS to negotiate settlement agreements with communities, including the Four City Consortium, and encouraged SEA to provide clear guidelines that would facilitate such settlements (see DOT-5 at 13-18). DOT did not, however, endorse any particular mitigation plan or even conclude that any mitigation was warranted in the Four Cities area.

Second, CSX does not believe that the April 13, 1998 letter from the Indiana Department of Transportation ("INDOT") to Chairman Morgan, enclosed with the May 7, 1998 letter from the Four Cities, expresses INDOT's endorsement of the particular alternative routing plan proposed by the Four Cities because, to the knowledge of CSX, INDOT had not undertaken any detailed analysis of the plan as of the date of the letter. Rather, Commissioner Wiley urges the Board to take seriously the concerns of the

Elaine K. Kaiser

May 12, 1998

Page 2

Four Cities regarding increased train traffic at rail/highway grade crossings and to give serious consideration to the alternative routing plan. Based on requests from SEA for information about the alternative routing plan, CSX understands that SEA is giving the Four Cities' comments and requests for conditions serious consideration, as Commissioner Wiley requests.

As explained below, however, INDOT has not itself studied the Four Cities' proposal. INDOT has not been involved in the discussions between the Four Cities and Applicants. INDOT has made no determination that Applicants' proposed operations would cause significant adverse effects in the Four Cities. INDOT has made no determination as to whether the Four Cities' routing plan is operationally feasible. Although CSX has been engaged in discussions with INDOT personnel for months, the primary focus of the discussion has been CSX's upgrade of the B&O corridor, the only CSX rail corridor in Indiana that is expected to experience a significant increase in traffic as a result of the Transaction. CSX has requested that INDOT broaden its focus to include other line segments within Indiana where lesser increases in traffic are projected, including lines within the Four Cities area, but INDOT has not yet completed any detailed review of these other line segments.

In mid-April, INDOT requested that CSX provide a briefing on its proposed operations in the Four Cities area. CSX did so on April 23, 1998. CSX representatives J. Randall Evans, Robert Garner and Pamela Savage met with Commissioner Wiley and other INDOT representatives (Larry Goode, Steve Hull and Jack Riggs) for about two hours. Michael Cervay, Director of the Department of Planning and Community Development for the City of Gary, Indiana, also attended at the request of Commissioner Wiley. The agenda for the meeting prepared by INDOT is enclosed. With respect to the subject of "Northwest Indiana Routing of Trains," the agenda describes the purpose of the meeting as "Education and information sharing of issues and concerns." As is evident from the agenda item, this was the first time that CSX had consulted with INDOT at any level of detail about its proposed operations in the Four Cities area or about the reasons for its opposition to the Four Cities Alternative Routing Plan. At no time during this meeting did any of the INDOT representatives suggest that INDOT had undertaken any analysis of the Four Cities' Alternative Routing Plan, much less reached a conclusion favoring the plan. Indeed, it was not entirely clear to CSX that the INDOT representatives were fully cognizant of the details of the Four Cities Alternative Routing Plan. CSX understood that the meeting was the beginning of a dialogue about the Four Cities area, not the end. Among other subjects that require INDOT's ongoing involvement in the Four Cities area are proposed upgrades of grade crossing warning systems at specific crossings, closure of crossings, and long-term capital projects (such as

Elaine K. Kaiser
May 12, 1998
Page 3

the rehabilitation of the elevated portion of the IHB sought by the Four Cities) which would require public funding.

It thus came as quite a surprise when Mr. Loftus suggested in his letter of May 7, 1998 that the letter signed by Commissioner Wiley ten days before the April 23 meeting constituted INDOT's endorsement of the Four Cities' Alternative Routing Plan. CSX respectfully submits that the letter does not contain such an endorsement, but merely urges the Board to give serious consideration to the concerns raised by the Four Cities, which it no doubt will.

As you are aware, CSX opposes the Four Cities' requests for conditions on two separate grounds. First, as CSX has previously demonstrated in submissions to the SEA and the Board, the Four Cities' alternative routing plan is not operationally feasible. Second, and more importantly, CSX does not believe that there is any predicate for mitigation because the Transaction will not exacerbate the existing vehicle delay situation in the Four Cities. Apart from the Willow Creek-Pine Junction segment of the B&O corridor which extends into the east side of Gary, the CSX line segments and CSX-allocated line segments within the Four Cities area are projected to experience only modest increases in traffic (from about 2 to 5 additional trains per day). Indeed, as CSX has previously stated in submissions to the SEA, CSX expects that the Transaction will reduce vehicle delay in the Four Cities because increased average speeds will more than offset the slight increase in the number of trains. Enclosed with this letter is an analysis prepared by CSX's consultant ICF Kaiser that quantitatively demonstrates the beneficial effect of the expected increased train speeds.

With such small projected changes in traffic patterns, it is not possible for SEA to conclude in advance that the Transaction will cause any adverse effect that warrants mitigation. CSX has made a good faith effort to project variables such as train numbers, train length and post-Transaction operating speeds within reasonable ranges. Even if CSX's projections with respect to one or more of these variables turn out to vary somewhat from actual post-Transaction conditions, however, it is unlikely that the projections will be so erroneous that the Transaction will actually be found to have an adverse effect. CSX believes that the voluntary mitigation that CSX is willing to undertake in the Four Cities area (as outlined in the May 8, 1998 letter to you from Peter J. Shudtz) will more than adequately address any potential adverse effect that might result from Transaction-related traffic changes. The SEA should thus not recommend the far-reaching conditions sought by the Four Cities.

ARNOLD & PORTER

Elaine K. Kaiser
May 12, 1998
Page 4

Please let me know if you have any questions about this matter.

Sincerely,



Mary Gabrielle Sprague
Counsel for CSX Corporation and
CSX Transportation, Inc.

Enclosures

cc (w/enc.):

Steven Lee
Michael Johnson
John Morton

C. Michael Loftus
Commissioner Curtis A. Wiley

Robert Allen
David Coburn
J. Randall Evans
Robert Garner
Carl Gerhardstein
Pamela Savage
Peter Shudtz

Bruno Maestri
Andrew Plump
Constance Sadler

GRADE CROSSING DELAY ANALYSIS
IN THE
FOUR CITY CONSORTIUM AREA

May 8, 1998

Submitted to:

CSX Corporation and CSX Transportation, Inc.

Submitted by:

ICF Kaiser
9300 Lee Highway
Fairfax, Virginia 22031

Summary

This report analyzes grade crossing delay issues discussed in the Four City Consortium ("FCC" or "the Cities") comments on the DEIS (FCC-13) filed with the Board on February 2, 1998. The FCC makes a questionable assumption to claim a 73 percent increase in post-Transaction traffic delays from CSX operations.¹ In particular, the Cities assume unreasonably low operating speeds on CSX track segments. In addition, since the FCC prepared its comments, CSX identified an error in the unit train counts, and the post-Transaction gross tonnage estimate on the Pine Junction-Barr Yard line segment. When this error is corrected, the FCC's conclusion that there will be a very large increase in train length (1,300 feet) on this line segment must also be amended. The projected increase is actually half that or even less. Finally, the train counts on a number of line segments in the Four Cities reported in the DEIS must be amended to reflect the Canadian Pacific ("CP") haulage right-of-way traffic, the error in the unit train counts and some rerouting of trains from the Pine Junction-Barr Yard line segment, as CSX has informed the Section of Environmental Analysis ("SEA"). When reasonable assumptions are used, errors corrected, and reroutings taken into account, it is seen, as illustrated in the attached Summary and Detailed Tables, that the Transaction will not result in an increase in traffic delay time within the Four Cities, but should actually decrease traffic delay below levels presently experienced.

Detailed Analysis

Train Length

The DEIS traffic delay analysis (including its supplemental errata) assumes a uniform 200-foot increase in train length on CSX line segments and a uniform 600-foot increase on Conrail segments to be allocated to CSX. Based on information provided by CSX in response to interrogatories of the Cities, the Cities calculated specific train lengths for individual line segments. As explained below, there were some errors in the information provided with respect to the Pine Junction-Barr Yard segment. When those errors are corrected, the calculation results in a much smaller difference between pre- and post-Transaction average length per train for the Pine Junction-Barr Yard line segment.

The FCC calculated an increase of around 1,300 feet on the critical Pine Junction-Barr Yard line segment (see Verified Statements in the FCC comments of Burris at pp. 24-26 and Andrew at pp. 11-12). CSX has now determined that the information provided to the Four Cities about train counts, gross tonnage and average cars per train (the information used by the Cities to calculate the train length) for the Pine

¹ It appears that the FCC may have conducted their detailed analysis prior to issuance of the DEIS Supplemental Errata, and only had time to adjust their text and summary tables to reflect the corrections made in the Supplemental Errata. It appears that their detailed tables should therefore be disregarded, and the reader should focus on their results as presented in the text and summary results.

Junction-Barr Yard line segment was incorrect. CSX has determined that it incorrectly overstated the number of unit trains on the Pine Junction-Barr Yard line segment. Both the pre-Transaction and post-Transaction train numbers must be adjusted, as well as the post-Transaction gross tonnage estimate. The pre-Transaction gross tonnage figure does not have to be adjusted because it was determined independently of the train numbers (by observation, not estimation) and thus was not affected by the error.

The train numbers in the CSX Operating Plan include eight unit trains on this line segment both pre-Transaction and post-Transaction. The 1995 base unit train traffic on this line segment should be 3.5 unit trains per day (a decrease of 4.5 unit trains per day from the 8.0 reported in the Operating Plan) and the post-Transaction unit train traffic should be 2.5 unit trains per day (a decrease of 5.5 unit trains per day from the 8.0 reported in the Operating Plan). Post-Transaction gross tonnage was estimated in the CSX Operating Plan based on the assumption that one unit train per day equals 2.2 million gross tons ("MGTs") on an annual basis. The subtraction of 5.5 unit trains per day post-Transaction thus results in a reduction of 12.1 MGTs on the Pine Junction-Barr Yard line segment.

Train Length Calculation

	<u>1995 Base</u>	<u>Post-Transaction</u>
MGT	40.89	52.6 ²
Trains per day ³	23.1	27.8
Gross Tons per Train	4,850	5,184
Gross Tons per Freight Car ⁴	61.2	61.2
Cars per Train	79.25	84.71

The increase in gross tons per train is thus 334 gross tons. Assuming that an average freight car weighs in the range of 60-70 gross tons the increase in train length is about five cars. Assuming further (as the Four Cities does) that the average freight car is about 60 feet long, the average increase in train length should be in the range of 300-360 feet.

² The 5.5 overcounted unit trains multiplied by 2.2 MGT per unit train annually equals 12.1 MGT. 64.7 MGT minus 12.1 MGT equals 52.6 MGT.

³ These figures correct for the error in unit train counts but do not include the Canadian Pacific haulage trains or take into account the rerouting of the two merchandise trains discussed below. This train count is used only as the basis for calculating average train length on the Pine Junction-Barr Yard segment. The delay calculations take into account the Canadian Pacific haulage trains and rerouting.

⁴ Four Cities calculated an average freight car weight of 61.2 tons for the Pine Junction-Barr Yard segment, which we accepted here for the sake of argument and used in our train length calculations. CSX reports that the average gross ton per freight car is about 70 on a system-wide basis. However, the difference does not materially change the outcome of the analysis.

Another way to evaluate whether there will likely be an increase in train length as a result of the Transaction is to evaluate whether a change in the mix of traffic on a line segment is expected as a result of the Transaction. The mix of traffic is important in predicting average train length because intermodal trains are substantially longer than unit or merchandise trains. The CSX Operating Plan includes the following traffic types on the Pine Junction-Barr Yard line segment:⁵

	<u>1995 Base</u>	<u>Post-Transaction</u>
Intermodal	4.0	9.3
Unit	3.5	2.5
Automotive	2.0	1.0
Merchandise	<u>13.6</u>	<u>15.0</u>
Total	23.1	27.8

A significant increase in the relative proportion of intermodal trains is expected on this line segment. Assuming that the average intermodal train is about 3,000 feet longer than the average merchandise or unit train, the total length of trains on this line segment would increase by about 16,000 feet per day (5.3 additional intermodal trains x 3,000 feet). Distributing this increase over the 27.8 trains on the line, the average increase in train length would be about 575 feet.

For the purpose of our analysis here, we conservatively assume an average increase in train length of 650 feet, or half that predicted by the Four Cities. When average train length is corrected on the Pine Junction-Barr Yard line segment, the change in total pre- and post-Transaction delay predicted by the Four Cities is reduced from 73.1 percent to 36.0 percent.

Amended Traffic Figures

The traffic delay analysis of the DEIS and the Four Cities is based on the train counts presented in the DEIS. Those counts should be adjusted to include the Canadian Pacific haulage traffic that the SEA had deleted from the CSX line segments, and to account for the correction of the unit train counts and train reroutings in the Four Cities area, as described in letters submitted by CSX to the SEA. The following updated counts should be used for the traffic delay analysis:

<u>Segment</u>	<u>Pre-Transaction</u>	<u>Post-Transaction</u>	<u>Difference</u>
Willow Creek-Ivanhoe	9.6	13.4	+ 3.8
Willow Creek-Pine Junction	22.1	36.6	+ 14.5
Pine Junction-Barr Yard	30.0	31.7	+ 1.7

⁵ These figures correct for the error in unit train counts but do not include the Canadian Pacific haulage trains or take into account the rerouting of the two merchandise trains discussed below.

Because the increase on the Pine Junction-Barr Yard line segment -- the line segment with the heaviest vehicular traffic delays crossing the line -- has decreased from 5.7 to 1.7 trains, the projected traffic delay in the Four Cities also decreases. As shown on the accompanying summary table, when using the FCC methodology and correcting for train length and number of trains, the increase in traffic delay is reduced from 73.1 to 21.2 percent. As discussed below, with increased operating speed on the Pine Junction-Barr Yard Line segment, traffic delay is further reduced, even to below pre-Transaction levels.

Train Operating Speed Assumptions

The FCC uses a figure of 12 mph for the pre-Transaction operating speed on the Pine Junction-Barr Yard segment. Their assumptions and treatment of this particular segment are paramount to this analysis, as approximately 80 percent of FCC's claimed traffic delay is attributable to this line segment. For the sake of argument, ICF Kaiser accepts all of the FCC's assumptions of current (pre-Transaction) operating speeds in this analysis. FCC also asserts, without supporting analysis, that the post-Transaction operating speed on this segment will be 13.2 mph, a critical assumption that is responsible for most of the asserted increase in delay. ICF Kaiser understands that CSX expects that speeds of 19 mph to 25 mph will be achieved on this segment post-Transaction due to investments in track and signal improvements, directional routing plans, and other operational improvements made possible by the transaction. The summary and detailed tables show the results of our analysis. Average speed on the Pine Junction-Barr Yard line segment only has to increase to 15.0 mph in order to eliminate any Transaction-related increase in traffic delay in the Four Cities. If CSX achieves the higher speeds it has projected, the Transaction will actually reduce traffic delay in the Four Cities. For example, as seen in the summary and detailed tables, at 20 mph, traffic delay would be reduced by one-third and at 25 mph, traffic delay would be reduced by almost one-half.

FCC further assumes that the Hobart-Tolleston-Clarke Junction segment would be able to operate at only 14.6 mph, or 36.6 percent of the 40 mph planned maximum operating speed. The FCC bases this assumption on an arbitrary, FCC-selected sample of other CSX segments allegedly in "dense, metropolitan areas" (see Andrew statement at pp. 14, 16). However, the majority of these segments are 35 miles or greater in length (up to 128 miles long), with only a small portion of their length within any city, and appear to have been selected by FCC on the basis of having long run times. FCC examines the total run times for these segments, performs division over the entire length of the segments to calculate "average" speeds, and asserts that these speeds must be due to urban congestion, despite the fact that many of these segments are predominantly rural.⁶ There is therefore little credibility to FCC's selection

⁶ For example, the first segment listed by FCC runs 93 miles from Cincinnati, Ohio to Anchorage, Kentucky, and has a run time of 6.90 hours. FCC asserts that trains on this segment are therefore operating at 13.48 miles per hour,

of these segments or this speed. While higher operating speeds on these segments would even further reduce the amount of delay in the region, ICF Kaiser has accepted FCC's questionable comparison to simplify the analysis.

The FCC asserts that pre- and post-Transaction trains on all other segments in the region⁷ can operate no faster than half of the maximum permissible operating speed. While this assertion is unsubstantiated, ICF Kaiser's analysis again accepts FCC's assumption for simplicity's sake.

only 27 percent of the 50 mph maximum operating speed, and that this is due to being in a dense metropolitan area for a short distance. The FCC seems to assume that trains on this segment spend most of their time crawling along for 93 miles, blocking grade crossings. The Cities ignore that this segment runs mostly through rural areas, and that the run time is more likely associated with low priority trains sitting at sidings. If scheduled and non-scheduled stoppages are taken into account, the typical speed when the train is moving and potentially blocking grade crossings is undoubtedly much higher.

⁷ The term region in this memorandum refers to the immediate impact area of the crossings and segments referred to in the FCC comment letter: Willow Creek to Ivanhoe.; Willow Creek to Pine Junction; Pine Junction to Barr Yard, IL (Calumet); Warsaw (Wheeler) to Tolleston.; Hobart to Pine Junction; Tolleston to Clarke Junction; Gary to Illinois State Line; Van Loon to Osborne; Osborne to Michigan Ave. Yard; and Tolleston to IHB Connection.

Summary Table

Assumptions and Corrections Used	Pre-Acquisition			Post-Acquisition			Traffic Delay Impact	
	Crossing Delay per Stopped Vehicle (min/veh)	Average Delay for All Vehicles (sec/veh)	Total Delay (minutes)	Crossing Delay per Stopped Vehicle (min/veh)	Average Delay for All Vehicles (sec/veh)	Total Delay (minutes)	Change in Delay (minutes)	Change in Delay (percent)
FCC Assumptions	3.72	10.76	89,311	4.14	18.63	154,630	65,319	73.1%
Train Length Corrected on Pine Junction-Barr Yard Segment	4.33	14.15	117,458	4.21	19.25	159,795	42,337	36.0%
Train Length Corrected on Pine Junction-Barr Yard Segment and Train Counts Corrected	4.36	15.29	126,900	4.17	18.54	153,860	26,960	21.2%
Train Length Corrected, Train Counts Corrected, and 15 MPH Train Speed Corrected on Pine Junction-Barr Yard Segment	4.36	15.29	126,900	3.73	15.29	126,900	(0)	0.0%
Train Length Corrected, Train Counts Corrected, and 20 MPH Train Speed Corrected on Pine Junction-Barr Yard Segment	4.36	15.29	126,900	2.97	10.30	85,495	(41,405)	-32.6%
Train Length Corrected, Train Counts Corrected, and 25 MPH Train Speed Corrected on Pine Junction-Barr Yard Segment	4.36	15.29	126,900	2.56	7.91	65,658	(61,242)	-48.3%

FCC Assumptions

			PRE-ACQUISITION						POST-ACQUISITION					
Assumptions and Corrections Used	ADT	Road Queue Dispersal Rate	Number of trains per day	Train Speed (mph)	Train Length (ft)	Crossing Delay per Vehicle	Average delay for all vehicles	Total Delay (min)	Number of trains per day	Train Speed (mph)	Train Length (ft)	Crossing Delay per Vehicle	Average delay for all vehicles	Total Delay (min)
						(min/veh)	(sec/veh)					(min/veh)	(sec/veh)	
Willow Creek, IN to Ivanhoe, IN	81,788	1,400	9.6	20.0	4,910	2.13	5.60	5,765	11.4	20.0	4,554	2.00	5.86	6,030
Willow Creek, IN to Pine Jct, IN	26,181	1,400	22.1	24.5	4,335	1.55	7.15	3,118	38.6	24.5	5,141	1.78	16.48	7,185
Pine Jct, IN to Barr Yard, IL	112,500	811	27.6	12.0	4,193	4.17	42.90	80,430	33.3	13.2	5,490	4.88	70.73	132,622
Warsaw (Wheeler) to Tolleston, IN	47,508	1,400	0	0	-	0.00	0.00	-	5	14.6	5,306	2.78	6.77	5,358
Tolleston, IN to Clarke Jct, IN	23,720	1,400	0	0	-	0.00	0.00	-	5	14.6	5,306	2.88	5.50	2,176
Osborne, IN to Michigan Ave. Yard, IN	31,570	1,400	0	0	-	0.00	0.00	-	2	12.5	5,306	3.36	2.01	1,059
Tolleston, IN to IHB Connection	12,700	1,400	0	0	-	0.00	0.00	-	2	20.0	4,554	1.85	0.95	201
Total	498,009	1,400	25.11	13.95	4,286	3.72	10.78	89,311	29.70	15.09	6,200	4.14	18.63	154,630

Train Length Corrected on Pine Junction-Barr Yard Segment

			PRE-ACQUISITION						POST-ACQUISITION					
Assumptions and Corrections Used	ADT	Road Queue Dispersal Rate	Number of trains per day	Train Speed (mph)	Train Length (ft)	Crossing Delay per Vehicle	Average delay for all vehicles	Total Delay (min)	Number of trains per day	Train Speed (mph)	Train Length (ft)	Crossing Delay per Vehicle	Average delay for all vehicles	Total Delay (min)
						(min/veh)	(sec/veh)					(min/veh)	(sec/veh)	
Willow Creek, IN to Ivanhoe, IN	81,788	1,400	9.6	20.0	4,910	2.13	5.60	5,765	11.4	20.0	4,554	2.00	5.86	6,030
Willow Creek, IN to Pine Jct, IN	26,181	1,400	22.1	24.5	4,335	1.55	7.15	3,118	38.6	24.5	5,141	1.78	16.48	7,185
Pine Jct, IN to Barr Yard, IL	112,500	811	27.6	12.0	4,957	4.85	57.91	108,577	33.3	13.2	5,807	4.97	73.49	137,786
Warsaw (Wheeler) to Tolleston, IN	47,508	1,400	0	0	-	0.00	0.00	-	5	14.6	5,306	2.78	6.77	5,358
Tolleston, IN to Clarke Jct, IN	23,720	1,400	0	0	-	0.00	0.00	-	5	14.6	5,306	2.88	5.50	2,176
Osborne, IN to Michigan Ave. Yard, IN	31,570	1,400	0	0	-	0.00	0.00	-	2	12.5	5,306	3.36	2.01	1,059
Tolleston, IN to IHB Connection	12,700	1,400	0	0	-	0.00	0.00	-	2	20.0	4,554	1.85	0.95	201
Total	498,009	1,400	25.39	13.73	4,906	4.33	14.15	117,458	29.75	15.06	6,200	4.21	19.25	159,795

Notes:

1. The FCC Comments included analysis of three segments used only in their proposed plan. Since these segments will not be used by CSX and are not included in the DEIS, they are omitted here.
2. The FCC uses a road queue dispersal rate of 811 vehicles per lane per hour on the Pine Junction-Barr Yard segment, based on their field observations, rather than the 1400 assumed by the DEIS. While this figure seems unreasonably low on roads averaging less than 6000 ADT and less than 2200 ADT per lane, this FCC assumption has been accepted here for the sake of argument and to simplify the analysis.

Train Length Corrected on Pine Junction-Barr Yard Segment and Train Counts Corrected

			PRE-ACQUISITION						POST-ACQUISITION					
Assumptions and Corrections Used	ADT	Road Queue Dispersal Rate	Number of trains per day	Train Speed (mph)	Train Length (ft)	Crossing Delay per Vehicle		Total Delay (min)	Number of trains per day	Train Speed (mph)	Train Length (ft)	Crossing Delay per Vehicle		Total Delay (min)
						Stopped	Average delay for all vehicles					Stopped	Average delay for all vehicles	
Willow Creek, IN to Ivanhoe, IN	61,786	1,400	9.6	20.0	4,910	2.13	5.60	5.765	13.4	20.0	4,554	2.00	6.88	7.087
Willow Creek, IN to Pine Jct, IN	26,161	1,400	22.1	24.5	4,335	1.55	7.15	3.116	38.8	24.5	5,141	1.78	15.63	6.813
Pine Jct, IN to Barr Yard, IL	112,500	611	30.0	12.0	4,957	4.85	62.94	118.019	31.7	13.2	5,607	4.97	69.96	131.166
Warsaw (Wheeler) to Tolleston, IN	47,508	1,400	0	0	-	0.00	0.00	-	5	14.6	5,306	2.76	6.77	5.358
Tolleston, IN to Clarke Jct, IN	23,720	1,400	0	0	-	0.00	0.00	-	5	14.6	5,306	2.86	5.50	2.176
Osborne, IN to Michigan Ave. Yard, IN	31,570	1,400	0	0	-	0.00	0.00	-	2	12.5	5,306	3.36	2.01	1.059
Tolleston, IN to IHB Connection	12,700	1,400	0	0	-	0.00	0.00	-	2	20.0	4,554	1.85	0.95	2.01
Total	498,009	1,400	27.55	13.61	4,910	4.36	15.29	126.900	28.15	15.15	6,200	4.17	18.54	153.860

Train Length Corrected, Train Counts Corrected, and 15 MPH Train Speed Corrected on Pine Junction-Barr Yard Segment

			PRE-ACQUISITION						POST-ACQUISITION					
Assumptions and Corrections Used	ADT	Road Queue Dispersal Rate	Number of trains per day	Train Speed (mph)	Train Length (ft)	Crossing Delay per Vehicle		Total Delay (min)	Number of trains per day	Train Speed (mph)	Train Length (ft)	Crossing Delay per Vehicle		Total Delay (min)
						Stopped	Average delay for all vehicles					Stopped	Average delay for all vehicles	
Willow Creek, IN to Ivanhoe, IN	61,786	1,400	9.6	20.0	4,910	2.13	5.60	5.765	13.4	20.0	4,554	2.00	6.88	7.087
Willow Creek, IN to Pine Jct, IN	26,161	1,400	22.1	24.5	4,335	1.55	7.15	3.116	38.8	24.5	5,141	1.78	15.63	6.813
Pine Jct, IN to Barr Yard, IL	112,500	611	30.0	12.0	4,957	4.85	62.94	118.019	31.7	15.0	5,607	4.43	55.58	104.205
Warsaw (Wheeler) to Tolleston, IN	47,508	1,400	0	0	-	0.00	0.00	-	5	14.6	5,306	2.76	6.77	5.358
Tolleston, IN to Clarke Jct, IN	23,720	1,400	0	0	-	0.00	0.00	-	5	14.6	5,306	2.86	5.50	2.176
Osborne, IN to Michigan Ave. Yard, IN	31,570	1,400	0	0	-	0.00	0.00	-	2	12.5	5,306	3.36	2.01	1.059
Tolleston, IN to IHB Connection	12,700	1,400	0	0	-	0.00	0.00	-	2	20.0	4,554	1.85	0.95	2.01
Total	498,009	1,400	27.55	13.61	4,910	4.36	15.29	126.900	27.85	16.56	6,200	3.73	15.29	126.900

Notes

1. The FCC Comments included analysis of three segments used only in their proposed plan. Since these segments will not be used by CSX and are not included in the DEIS, they are omitted here.
2. The FCC uses a road queue dispersal rate of 611 vehicles per lane per hour on the Pine Junction-Barr Yard segment, based on their field observations, rather than the 1400 assumed by the DEIS. While this figure seems unreasonably low on roads averaging less than 6000 ADT and less than 2200 ADT per lane, this FCC assumption has been accepted here for the sake of argument and to simplify the analysis.

Train Length Corrected, Train Counts Corrected, and 20 MPH Train Speed Corrected on Pine Junction-Barr Yard Segment

			PRE-ACQUISITION					POST-ACQUISITION						
Assumptions and Corrections Used	ADT	Road Queue Dispersal Rate	Number of trains per day	Train Speed (mph)	Train Length (ft)	Crossing Delay per Stopped Vehicle (min/veh)	Average delay for all vehicles (sec/veh)	Total Delay (min)	Number of trains per day	Train Speed (mph)	Train Length (ft)	Crossing Delay per Stopped Vehicle (min/veh)	Average delay for all vehicles (sec/veh)	Total Delay (min)
Willow Creek, IN to Ivanhoe, IN	61,786	1,400	9.6	20.0	4,910	2.13	5.60	5,765	13.4	20.0	4,554	2.00	6.88	7,087
Willow Creek, IN to Pine Jct, IN	26,161	1,400	22.1	24.5	4,335	1.55	7.15	3,116	36.8	24.5	5,141	1.78	15.63	6,813
Pine Jct, IN to Barr Yard, IL	112,500	611	30.0	12.0	4,957	4.85	62.94	118,019	31.7	20.0	5,607	3.44	33.49	62,901
Warsaw (Wheeler) to Tollestons, IN	47,508	1,400	0	0	-	0.00	0.00	-	5	14.6	5,306	2.76	6.77	5,358
Tollestons, IN to Clarke Jct, IN	23,720	1,400	0	0	-	0.00	0.00	-	5	14.6	5,306	2.86	5.50	2,176
Osborne, IN to Michigan Ave. Yard, IN	31,570	1,400	0	0	-	0.00	0.00	-	2	12.5	5,306	3.36	2.01	1,059
Tollestons, IN to IHB Connection	12,700	1,400	0	0	-	0.00	0.00	-	2	20.0	4,554	1.85	0.95	201
Total	498,009	1,400	27.55	13.61	4,910	4.36	15.29	126,900	27.15	20.01	6,200	2.97	10.30	85,495

Train Length Corrected, Train Counts Corrected, and 25 MPH Train Speed Corrected on Pine Junction-Barr Yard Segment

			PRE-ACQUISITION					POST-ACQUISITION						
Assumptions and Corrections Used	ADT	Road Queue Dispersal Rate	Number of trains per day	Train Speed (mph)	Train Length (ft)	Crossing Delay per Stopped Vehicle (min/veh)	Average delay for all vehicles (sec/veh)	Total Delay (min)	Number of trains per day	Train Speed (mph)	Train Length (ft)	Crossing Delay per Stopped Vehicle (min/veh)	Average delay for all vehicles (sec/veh)	Total Delay (min)
Willow Creek, IN to Ivanhoe, IN	61,786	1,400	9.6	20.0	4,910	2.13	5.60	5,765	13.4	20.0	4,554	2.00	6.88	7,087
Willow Creek, IN to Pine Jct, IN	26,161	1,400	22.1	24.5	4,335	1.55	7.15	3,116	36.8	24.5	5,141	1.78	15.63	6,813
Pine Jct, IN to Barr Yard, IL	112,500	611	30.0	12.0	4,957	4.85	62.94	118,019	31.7	25.0	5,607	2.85	22.91	42,964
Warsaw (Wheeler) to Tollestons, IN	47,508	1,400	0	0	-	0.00	0.00	-	5	14.6	5,306	2.76	6.77	5,358
Tollestons, IN to Clarke Jct, IN	23,720	1,400	0	0	-	0.00	0.00	-	5	14.6	5,306	2.86	5.50	2,176
Osborne, IN to Michigan Ave. Yard, IN	31,570	1,400	0	0	-	0.00	0.00	-	2	12.5	5,306	3.36	2.01	1,059
Tollestons, IN to IHB Connection	12,700	1,400	0	0	-	0.00	0.00	-	2	20.0	4,554	1.85	0.95	201
Total	498,009	1,400	27.55	13.61	4,910	4.36	15.29	126,900	26.59	22.96	6,200	2.56	7.01	65,658

Notes:

Notes:

1. The FCC Comments included analysis of three segments used only in their proposed plan. Since these segments will not be used by CSX and are not included in the DEIS, they are omitted here.
2. The FCC uses a road queue dispersal rate of 611 vehicles per lane per hour on the Pine Junction-Barr Yard segment, based on their field observations, rather than the 1400 assumed by the DEIS. While this figure seems unreasonably low on roads averaging less than 6000 ADT and less than 2200 ADT per lane, this FCC assumption has been accepted here for the sake of argument and to simplify the analysis.

THURSDAY, APRIL 23, 1998

AGENDA

PLACE: N755 Executive Conference Room

TIME: 1:30 PM

<u>TIME</u>	<u>SUBJECT</u>	<u>PURPOSE</u>
1:30-2:30	Northwest Indiana Routing of Trains	Education and information sharing of issues and concerns
2:30-3:30	Railroad Corridor Safety Agreement	Content resolution of draft agreement

ARNOLD & PORTER

555 TWELFTH STREET, N.W.
WASHINGTON, D.C. 20004-1202

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

MARY GABRIELLE SPRAGUE
(202) 942-5773

NEW YORK
DENVER
LOS ANGELES
LONDON

May 14, 1998

COPY

VIA HAND DELIVERY

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

Re: Finance Docket No. 33388, CSX and Norfolk Southern --
Control and Operating Agreements -- Conrail/
CSX Submissions to Section of Environmental Analysis
Relating to the Four Cities

Dear Mike:

Pursuant to your request of yesterday, enclosed are copies of the submissions CSX has made to the Section of Environmental Analysis ("SEA") that relate to the Four Cities area. These submissions were made in response to requests for information from Elaine Kaiser. Where a submission also addresses matters apart from those relating to the Four Cities, we have redacted the discussion of those other matters. The following letters are enclosed:

- Letter to Elaine Kaiser from David Coburn Re Reply to Your February 17, 1998 Letter Concerning Design and Engineering Issues (March 5, 1998)
- Letter to Michael Dalton from Mary Gabrielle Sprague Re Canadian Pacific Haulage Rights Between Detroit and Chicago (April 3, 1998)
- Supplemental Environmental Report on Willow Creek, Indiana to L. Anhoe, Indiana Line Segment (C-693), prepared by ICF Kaiser (April 23, 1998)
- Verified Statement of James E. Roots (May 6, 1998)
- Letter to Elaine Kaiser from Peter J. Shultz Re CSX Proposed Voluntary Mitigation (May 8, 1998)

ARNOLD & PORTER

C. Michael Loftus
May 14, 1998
Page 2

With best regards.

Sincerely,

Mary Gabrielle Sprague
Mary Gabrielle Sprague

Enclosures

bcc (w/out encls.): Robert Allen
David Coburn
J. Randall Evans
Robert Garner
Pamela Savage
Peter Shudtz

STEPTOE & JOHNSON LLP

ATTORNEYS AT LAW

1330 CONNECTICUT AVENUE, N.W.
WASHINGTON, D.C. 20036-1795

PHOENIX, ARIZONA
TWO RENAISSANCE SQUARE

TELEPHONE: (602) 257-5200
FACSIMILE: (602) 257-5299

(202) 429-3000

FACSIMILE: (202) 429-3902

TELEX: 89-2503

STEPTOE & JOHNSON INTERNATIONAL
AFFILIATE IN MOSCOW, RUSSIA

TELEPHONE: (011-7-501) 258-5250
FACSIMILE: (011-7-501) 258-5251

DAVID H. COBURN
(202) 429-8063
dcoburn@step toe.com

March 5, 1998

REDACTED MATERIALS

REVISED

ADMINISTRATIVELY CONFIDENTIAL

Via HAND DELIVERY

Elaine K. Kaiser
Chief
Section of Environmental Analysis
Surface Transportation Board
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 Agreements –
Conrail, Inc. and Consolidated Rail Corporation

Reply to Your February 17, 1998 Letter Concerning Design and
Engineering Issues

Dear Ms. Kaiser:

This will respond to your February 17, 1998 letter addressed to Peter Shudtz in which you have requested information concerning the design and engineering features, including cost estimates, for various alternative alignments and other projects and proposals made by CSX, NS or others. By letter dated March 4, 1998, CSX has separately responded to your request number (2), concerning

to items (4) –

(5) --

This letter will respond

and (6) – the Four City Consortium re-routing proposals.

CSX understands that NS will be separately responding to your letter. We trust that the information provided here will allow SEA to fully assess and evaluate the proposals that have been made by

; and the Four Cities Consortium.

REDACTED MATERIALS

Item 6 - Four Cities Consortium Re-routing Proposals

On February 2, 1998, the Four Cities Consortium (FCC) filed Comments on the DEIS, proposing -- as it did in its Comments on the Primary Application -- that CSX (1) reroute traffic that CSX planned to move over the rehabilitated Fort Wayne (PRR) line over the NS line from Hobart to Van Loon and then over the EJE line to EJE's Kirk Yard to serve steel mills along the Lake Michigan shore; and (2) reroute traffic off the BOCT/CSX line by rehabilitating an

elevated 2.1 mile out-of-service section of the IHB from Virginia Street to Chase Street in Gary, IN, and connecting that segment to the Porter Branch on the East and the Ivanhoe Interlocking on the West. You have asked Applicants to provide any information developed to evaluate the proposed reroutings, as well as information about planned track and signal improvements for the CSX rail line segments between Hobart and Clarke Junction, IN and between Pine Junction and Barr Yard, IN.

Before analyzing the specific areas of concern to the FCC, it is crucial to point out that the CSX Operating Plan focuses heavily on improving traffic flows to, from and through the Chicago terminal area (1) by investing substantial sums to improve the track and yard facilities; (2) by reconfiguring traffic patterns to make more efficient use of yards and mainline routes; (3) by improving blocking patterns to overhead more traffic or move traffic into Chicago in larger blocks to reduce the number of cars switched and classified in the Chicago terminal area; and (4) by improving dispatching.

CSX is making substantial investments, not only in Chicago proper, but on major service routes into Chicago in order to improve service to the Chicago area. A \$220 million track and signal improvement project is underway to upgrade CSX's mainline (the former B&O line) into Chicago to a 70 MPH route for time sensitive traffic. In addition, CSX is investing \$6.5 million to upgrade and rehabilitate parts of the NS Fort Wayne Line that CSX will operate after the Transaction in order to provide another 40 MPH route for bulk unit train traffic into Chicago, as well as an alternate route for traffic within Chicago. The separation of time-sensitive traffic and bulk traffic will greatly improve the efficient flow of traffic into Chicago.

In addition, substantial CSX improvements within the Chicago area are designed to improve the fluidity of traffic through the metropolitan area. CSX will invest \$2.0 million to upgrade the tracks and signal system on the Barr Subdivision. The track configuration at Pine Junction will be changed to eliminate a speed restriction at an estimated cost of \$100,000. Grade crossing signal circuit improvements (removing insulated joints and installing motion sensors) will be made to raise speeds between Pine Junction and Blue Island Junction to accommodate 40 MPH traffic. CSX anticipates that the portion between Pine Junction and Calumet Park -- the area of concern to FCC -- will account for approximately half of the total expenditure. On the Chicago mainline between Blue Island and Dolton, \$2.5 million will be invested to install TCS signaling. FCC claims that because trains may be required to stop and start up again, especially at interlockings, actual train speeds are slower than the permissible speeds and therefore trains will not attain 40 MPH speeds. Through radar tests, FCC found that the actual speed of certain trains on lines with 25 MPH authorized speeds was about 12-14 MPH. The CSX train control department determined that with a proportionally similar difference in authorized and actual speeds on the upgraded 40 MPH lines, trains would move at speeds of between 19 and 25 MPH - which would substantially improve traffic flow and reduce existing delay time at crossings.

Improvements at interlockings are also being made. CSX recently modernized the Forest Hill (75th Street) interlocking - where the previous manual interlocking often failed during heavy

storms – and relocated the interlocker to an office shared by the BOCT and BRC dispatchers in the BRC dispatching center in Clearing, facilitating coordination with BRC on trains entering the interlocking. Additional measures to keep trains up to speed are also being considered, including closing crossings where there is little traffic and other crossing options exist (such as the Wabash Avenue crossing in Hammond, IN) and co-locating area dispatchers to facilitate communications and smooth operations.

To further ease train movements within Chicago, CSX will invest \$14.9 million for new or upgraded connections at the periphery of Chicago and between the lines of local switching companies within Chicago to facilitate access to their yards and provide multiple routes to and from the yards so trains can traverse quickly as they enter and exit Chicago. These connections include: a crossover from BOCT lines to IHB lines for eastbound trains at Lincoln Ave.; an upgraded connection between Conrail and BRC at Rock Island Junction to allow more direct movements between Bedford Park and the lakefront mainline; a connection at 75th Street between the BOCT line at Forest Hill and the BRC in the southwest quadrant of the 75th Street interlocking; rehabilitation of a connection at Tolleston between the Conrail line and the NS line in the southwest quadrant for movement of trains from IHB's Blue Island Yard and CSX's proposed reactivated Fort Wayne Line; and a connection in the southwest quadrant at Willow Creek, IN (East Chicago area) to allow progressive east/west movements between CSX's Garrett Subdivision and Conrail's Porter Branch. Together with approximately \$45 million in improvements to intermodal yards, a \$10 million rehabilitation of Blue Island Yard, and additional funds for increased maintenance, these improvements should substantially improve the fluidity of traffic throughout Chicago and relieve some of the train congestion that has caused FCC concern.

FCC's Proposed Alternative Routing in Lieu of Rehabilitating the Fort Wayne (PRR) Line

The CSX Operating Plan calls for a \$2.8 million rehabilitation of a portion of the NS Fort Wayne Line between Hobart and Clarke Junction, which includes \$1.0 million on track improvements and \$1.8 million for reinstalling signals (primarily crossing warning devices). Investment in this line segment is an important part of the overall Chicago operating plan because it provides CSX with an efficient route for bulk traffic that will also be adequate to serve as an alternative route for other trains as needed to avoid congestion in the Chicago area.

CSX has not developed any specific design, engineering or cost analyses, or made any specific calculations with respect to FCC's proposed routing over the NS/EJE lines because, as Applicants pointed out in their December 15, 1997 Rebuttal (CSX/NS-177, Vol. 2B, Rooney/O'Connor R.V.S. at HC-300-303), the FCC Alternative Routing Plan is flawed and should be rejected for four reasons.¹ The FCC plan:

¹ Moreover, as CSX does not own or in any way control the NS and EJE lines over which CSX would operate under the FCC proposed alternative routing plan, CSX is not the

- creates safety hazards
- causes congestion and delay
- promotes awkward and inefficient operations
- requires more locomotives.

First, as described more fully below, operating trains in the manner proposed by FCC requires a complex and dangerous shoving movement on an elevated line that presents unacceptable risks to the safe operation of trains and the protection of employees from injury.

Second, the proposal misperceives the purpose of CSX's acquisition of the Fort Wayne line. The proposed use of the line is not limited to serving customers along the lake shore. CSX's primary motives for acquiring the Fort Wayne Line are (1) to promote efficient operations by diverting all types of slower moving bulk trains from CSX's high-speed mainline (the former B&O line) to improve flow of traffic over the latter, and (2) to provide an improved 40 MPH route that will improve bulk commodity train service and also provide a fully adequate alternative route for other trains as needed to maintain fluid train operations through Chicago. Id. at HC-301. The FCC proposed alternative would require trains destined to customers and connecting carriers not on the lake shore to move several miles out of route, over foreign carrier lines, including a line with a steep grade. This would significantly add to the transit time and, most important, to the potential for delay and congestion. It would also increase the costs of the movements by between \$1.0 and \$2.0 million for trackage rights fees and an unquantified increase in fuel, locomotive, and possibly crew costs. Id. at HC-302.

Third, because the EJE line is elevated to avoid interference with the mainlines along the lake shore, "its physical location on bridges above the intersection of CSX, Conrail (NS), the Fort Wayne Line (CP501), and the CSX/BOCT at Pine Junction greatly complicates access to the CSX mainline at Pine Junction and to other connecting carriers including direct access to either the CSX/BOCT or Rock Island Junction." Id. at HC-302. Messrs. Rooney and O'Connor explained that "through trains attempting to reconnect with the CSX mainline through CSX's Curtis Yard would have to pull almost across the bridge, reverse and make a backing move down

appropriate party to develop engineering plans or cost analyses. However, CSX notes that the NS Nickel Plate line over which FCC proposes that CSX operate is a single track line and use of that line by both CSX and NS would probably require some capacity improvements. Moreover, the route proposed by FCC has 32 highway crossings as contrasted with 23 on the Fort Wayne Line routing proposed by CSX.

the inclined connecting track to Curtis Yard, negotiate the yard, and pull north (west) onto the mainline . . . movements further complicated by the existence of gradients on both ends of the bridges." Id. at HC-302.

Fourth, the FCC proposed route with its high line grade characteristics and complex shoving movement would require CSX to use additional locomotive power (helper service). A conservative estimate of the incremental expense for locomotive ownership (assuming 1.5 units) and operating costs, including fuel, servicing and crews is \$825,000 per year. Id. at HC-303.

In his February 2 statement, Mr. Burris states that from conversations with EJE personnel he has learned that "NS coal and coke trains currently move over the elevated portion of the EJE using three six axle 3,000 horse power units, without any assistance from [sic] locomotive helpers" and then incorrectly asserts that "This is the same locomotive consist that CSX uses to move its coal and coke trains into the Chicago area." He concludes, therefore, that no locomotive helper service is required. FCC-13, Burris V.S. at 45, n.22.

This analysis of helper service requirements errs in two important respects. First, it is not true that CSX uses three units to move its coke and coal trains into Chicago. For westbound coke and coal trains -- for example, the Coke Express trains -- the operating plans call for two SD40-2, 3,000 horsepower or equivalent units. Indeed, for eastbound trains over CSX's nearly gradeless line, or the proposed Fort Wayne Line, tonnage ratings for locomotives are significantly higher and would actually permit the assignment of only one high horsepower A/C locomotive to some trains.

Second, the nature of the shoving movement proposed by Messrs. Rooney and O'Connor as described above and picked up by Mr. Burris (Burris V.S. at 46) requires considerably more starting and continuous rated tractive effort than is apparent from any comparison of horsepower. In this case, the train is stopped just beyond the switch points at the top of the hill with all of the train facing downhill towards Kirk Yard with its slack run-in. The entire train must then be reversed, started and shoved uphill and around the curve to the lead track to Curtis Yard. This starting movement requires considerably more tractive effort than the head-in pull attributed to NS, because, for that move some or all of the NS train will be on the level or on a compensating downgrade and, most importantly, will be moving and therefore possess momentum. For comparison, the three 3,000 horsepower SD40-2 units used by NS possess 249,000 pounds of combined minimum continuous speed tractive effort at 11 MPH and four SD38-2 units observed on EJE trains possess 320,000 pounds at 7 MPH.² We believe there is no possibility a consist of two locomotives (even the high horsepower A/C's) could produce enough starting and slow-speed tractive effort to perform the shoving movement described by Mr. Burris and Messrs. Rooney and O'Connor for the average trains.

² Tractive force data are taken from CSXT Special Instructions for Helper Service, April 1, 1990.

In his February 2 statement, Mr. Burris describes the proposed shoving movement for trains using the EJE elevated tracks as described above and then comments that "This is the same move that is made currently to interchange traffic from EJE to CSX." Burris V.S. at 46. This is not true. CSX trains currently enter Curtis Yard from the East or are made up in the yard. Movements to and from EJE begin or end on level track in the yard with the power facing in the proper direction for movement, and do not entail a shoving move on the hill as described above.³

The shoving movement that would be required under the FCC plan would undermine efficient operations. First, the complex movement would be time-consuming and would block the track and switches to the Kirk and Curtis yards for the duration of the maneuver, further causing congestion and delay. Second, as CSX's operating plan is based on two-unit (and possibly even one-unit) locomotive consists, the FCC Alternative would require CSX to increase its power requirements, disrupting the balance of resources in the operating plan and undermining the efficiency of the proposed CSX movements.

In sum, the FCC Alternative Routing Plan is unsafe and inefficient. From a safety standpoint, it is operationally much less desirable than the CSX operating plan routing because it requires shoving heavy bulk unit trains back up over a bridge and around a curve, which because of both the grade and the curvature is dangerous.

It is less efficient than the CSX proposed routing because (1) it requires moving heavy bulk trains over steep gradients, consuming additional tractive effort, (2) it requires moving trains out of route, increasing the transit time and complicating connections with other carriers, (3) it increases the costs of the movement through trackage rights fees and additional fuel, locomotive, crew costs, and (4) it reduces CSX's flexibility to move trains over efficient alternate routes to provide and maintain the fluidity of train operations in Chicago.

FCC's Alternative Rerouting of Trains From the BOCT Line to the Elevated IHB Line

In conjunction with the \$2.0 million project discussed above to increase the speed and fluidity of traffic on the Pine Junction to Barr Yard segment (Barr Subdivision), the CSX Operating Plan anticipates other improvements that will further relieve congestion and move

³ To avoid the complicated and dangerous shoving movement, CSX trains would have to move north on the EJE line to Clarke Junction, then turn East on the EJE all the way to EJE's Kirk Yard, run around the train and pull back out on the EJE line, over the bridge and then East again over the EJE line into CSX's Curtis Yard. From there, run around the train again, pull out of Curtis Yard onto the CSX mainline to Pine Junction and then West over the BOCT line to destination. This movement would consume approximately 3 hours and very likely would require recrewing.

traffic more quickly and efficiently through Chicago. New blocking strategies and coordinated use of yards within the Chicago area will reduce the number of cars classified at Barr Yard, which means that the traffic will move more quickly through the yard with less congestion and delay awaiting access to the yard.

Barr Yard currently handles about 1,200 cars per day, with 70 percent processed for interchange, 10 percent switched to or from BOCT-served industries and 20 percent classified for industries located on CSX's New Rock Subdivision. After the Transaction, much of the traffic for interchange from western carriers will be blocked to move through Chicago. IHB's Blue Island Yard and BRC's Clearing Yard will handle classification for all eastbound and southbound interchange traffic that cannot move overhead in through trains from western carriers. In addition, as a result of the combined volumes of CSX and Conrail traffic, CSX will be able to build larger blocks of traffic moving into Chicago and to use Blue Island Yard and Barr Yard in tandem to move traffic more efficiently. Much of the CSX and Conrail traffic that is currently routed through the BRC's Clearing Yard will shift to Blue Island or Barr, or to overhead moves directly to the western carriers. Blue Island will continue to handle the Chicago-Northwest Indiana industrial traffic now handled by IHB and Conrail. Barr Yard will handle local industrial traffic for CSX line-haul movements as well as for direct interchange to other carriers, and, because of its strategic location on the major BOCT-IHB route, will be well suited for block-swapping east/west and north/south traffic, as well as for handling unit train operations. In addition, although specific capital improvement plans are not yet finalized, CSX anticipates improvements to the lead track, hump lead track, retarder signalization and eventually to the hump processor in Blue Island Yard. The significant reduction in intermediate car handling, and the proposed yard improvements, will improve both operations at the yards and the flow of traffic within and through Chicago, thus greatly improving the flow of traffic on the double-track BOCT line and ameliorating the congestion and delays that FCC is concerned about.

CSX has not made any further engineering or cost analyses of the FCC proposed routing beyond the conservative analysis presented by Messrs. Rooney and O'Connor in its Rebuttal, Rooney/O'Connor R.V.S. at HC-303-305. As Messrs. Rooney and O'Connor noted, the proposed IHB route is a viable long-term option, although it would require substantial planning, coordination (including approval and cooperation of IHB) and public funding that is not currently available, and therefore could not be completed in time for anticipated Day One Operations. As Messrs. Rooney and O'Connor pointed out, the track structure must be replaced for the entire line from Virginia Street to Chase Street. From Chase Street to the Ivanhoe Interlocking, the track would have to be upgraded from Class 2 to Class 3 (or a crossover constructed to the Porter Branch, which could entail purchasing and clearing land). In addition, the super and substructure of approximately 5 of the existing railroad/highway bridges on the elevated line would have to be repaired, wooden trestles filled in and the track subgrade replaced as necessary. Messrs. Rooney and O'Connor estimated that this would require at least an additional \$2.7 million above the \$1.6 million estimated by FCC, for a total cost of \$4.3

Elaine K. Kaiser
March 5, 1998
Page 16

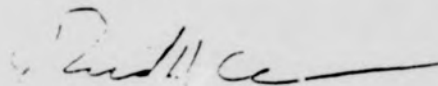
million. Id. at HC-304-305. FCC has accepted this incremental cost in its February 2 Comments. FCC-13, Burris V.S. at 41.

CSX is willing to work with FCC in seeking funding and appropriate approval and cooperation to reactive the 2.1 mile segment. Reactivation of the double-track elevated IHB line would provide the additional capacity needed for CSX to reroute traffic off the BOCT line. Until the project is completed, however, CSX has only limited leeway to move traffic off the double-track BOCT line onto the single-track Porter Branch. As this project cannot be completed in time for anticipated Day One operations, it should not be imposed as a condition to approval of the Transaction. Delay pending completion would result in unquantifiable costs of lost benefits over and above the out-of-pocket costs of the project. Nor should the Board impose any absolute cap on the number of trains that CSX can operate over the BOCT line. An absolute cap on the number of trains that could be operated over the line segment would severely limit CSX's flexibility to use alternate routes as needed to maintain fluidity throughout Chicago.

Improved track, improved signaling, improved speeds, improved interlockings, more efficient routing of traffic, availability of alternate routes, and reduced car handling in the Chicago terminal should substantially ameliorate, if not entirely offset, the impact of increased traffic that is the root of FCC's concern. Therefore, the Alternative Routing Plans should be rejected.

Please let us know if any of the above requires further clarification.

Sincerely,



David H. Coburn

cc: Peter Shudtz
Carl Gerhardstein
Mary Gay Sprague
Bruno Maestri

ARNOLD & PORTER

555 TWELFTH STREET, N.W.
WASHINGTON, D.C. 20004-1202

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

MARY GABRIELLE SPRAGUE
(202) 942-5773

NEW YORK
DENVER
LOS ANGELES
LONDON

April 3, 1998

VIA HAND DELIVERY

Michael J. Dalton, III
Section of Environmental Analysis
Surface Transportation Board
1925 K Street, N.W.
Washington, DC 20423-0001

Re: Finance Docket No. 33388, CSX and Norfolk Southern -- Control
and Operating Agreements -- Conrail/
Canadian Pacific Haulage Rights Between Detroit and Chicago

Dear Mr. Dalton:

This letter responds on behalf of CSX Corporation to your letter of March 30, 1998 to Bruno Maestri and Peter J. Shudtz regarding the assignment of Canadian Pacific ("CP") haulage traffic between Detroit and Chicago to certain line segments for purposes of the environmental review of the Conrail Transaction.

CSX is currently handling this business for CP, as CSX has previously informed SEA. CSX would like to continue hauling CP's traffic. CSX understands that NS is competing for this business. To the knowledge of CSX, CP has not yet decided whether it will contract with CSX or NS for all of its traffic after the Transaction or whether CP will apportion its business between CSX and NS.

We understand from your letter that SEA has included seven CP trains per day on average in the traffic figures presented in the DEIS. CSX believes that a better figure would be 8.9 trains per day on average (eight trains which operate seven days a week and a ninth train which operates six days a week). Your letter correctly identifies the current route between Detroit and CP 501, IN: Detroit, MI to Plymouth, MI (CSX line); Plymouth MI to Grand Rapids, MI (CSX line); Grand Rapids, MI to Waverly, MI (CSX line); Waverly, MI to Porter, IN (CSX line); Porter, IN to CP 501, IN (Conrail line to be allocated to NS with CSX trackage rights). Your letter does not correctly identify the current route between the Porter-CP501 line segment and Chicago points. At present, two CP trains operate between CP 501 through Indiana Harbor, IN to South Chicago, IL. You should thus add two trains to the pre-Transaction train count for the Indiana Harbor-South Chicago line segment (N-47). It is not clear from your letter how

ARNOLD & PORTER

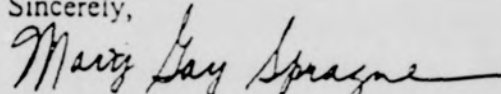
Michael J. Dalton, III
April 3, 1998
Page 2

many CP trains you included in the DEIS on the CP 501-Indiana Harbor line segment (N-42). The correct number is two. The remaining CP trains (6.9 per day on average) presently operate over the CSX Pine Junction-Barr Yard line segment. Two of the trains enter or exit the CSX system at Calumet Park on that line segment and from there operate over the IHB. The remaining CP trains (4.9) operate over the CSX Barr Yard-Blue Island Junction and Blue Island Junction-Clearing line segments.

CSX expects to operate the CP trains after the Transaction over the same routes, with one exception. CSX proposes to reroute one CP train (a seven day a week train) that presently operates from CP 501 over the Pine Junction-Barr Yard, Barr Yard-Blue Island Junction, Blue Island Junction-Clearing line segments to the CP 501-Indiana Harbor and Indiana Harbor-South Chicago line segments.

Please let me know if you need any further information about this matter.

Sincerely,


Mary Gabrielle Sprague

cc: Robert Allen
Carrie Clayton
David Coburn
Carl Gerhardstein
Pamela Savage
Peter Shudtz

Bruno Maestri
Andrew Plump
Constance Sadler

Steven Lee
Winn Frank
John Morton

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

SUPPLEMENTAL ENVIRONMENTAL REPORT
ON WILLOW CREEK, INDIANA TO IVANHOE, INDIANA LINE SEGMENT
(C-693)

Prepared by:

ICF Kaiser
9300 Lee Highway
Fairfax, Virginia 22037

for CSX Corporation and CSX Transportation, Inc.

April 23, 1998

1.0 INTRODUCTION

CSX has proposed a minor change in the traffic routings provided in the Environmental Report filed with the Application on June 23, 1997 that would cause one additional segment in Northwest Indiana to meet the environmental analysis thresholds of the Surface Transportation Board ("STB" or "Board"). CSX proposes to reroute two merchandise trains from the Willow Creek-Pine Junction (C-027) and Pine Junction-Barr Yard (C-023) line segments to the Willow Creek-Ivanhoe (C-693) line segment. The Willow Creek-Ivanhoe line segment is now projected to experience a post-Transaction increase of 3.8 trains per day on average instead of the previously predicted 1.8 trains per day.

Table 1-1

Rail Line Segment		Current Operator	Length in Miles	Passenger Trains per Day	Freight Trains Per Day			% Change in Gross Ton Miles ¹
From	To				Pre-Transaction	Post-Transaction	Change	
Willow Creek, IN	Ivanhoe, IN	CR	13	0	9.6	13.4	3.8	25

Under the Board's environmental regulations at 49 CFR Part 1105.7(e)(5), this increase exceeds the threshold for analysis of air quality impacts, as Lake County is a nonattainment area under the Clean Air Act. In addition, the scope of the EIS also requires analysis for vehicle delay where an increase in average daily traffic of three trains per day or more is projected.

¹ The revised change in gross ton miles on the Willow Creek to Ivanhoe segment was derived by: (1) determining the ratio of post-Transaction gross ton miles to post-Transaction trains for the Willow Creek-Pine Junction and Pine Junction-Barr Yard segments; (2) using that ratio to estimate the gross ton miles for the two trains being rerouted to the Willow Creek-Ivanhoe segment; (3) adding the gross ton miles for those two trains to the original post-Transaction gross ton miles for the Willow Creek-Ivanhoe segment; and (4) calculating the revised percentage change between the pre- and post-Transaction gross ton miles.

The Four Cities Consortium (East Chicago, Gary, Hammond and Whiting) has expressed concern about the projected increase in traffic on the Pine Junction-Barr Yard line segment. This proposed reroute partially mitigates that concern.

2.0 ENVIRONMENTAL IMPACTS

2.1 AIR QUALITY

The proposed shift of two trains from one line within Lake County to a parallel line within Lake County (about 1 to 2 miles south of the first line) does not materially change the analysis of air emissions within Lake County presented in the Draft Environmental Impact Statement.

2.2 TRANSPORTATION: ROADWAY CROSSING DELAY

There are three roadway crossings along the Willow Creek to Ivanhoe segment that have average daily traffic greater than 5,000: Ripley St., Broadway, and Clark Rd. As set forth in Table 2-1, an increase of 3.8 trains per day would have no significant impact on roadway crossing delay along the Willow Creek-Ivanhoe line segment. The largest increase in maximum queue would be five vehicles. There would be a minimal increase in delay per stopped vehicle. The levels of service under post-Transaction conditions would range between B and C.

Table 2-1
Highway/Rail At-Grade Crossing Vehicle Delay and Queues

County	Segment No.	FRA ID #	Roadway Name	No. of Lanes	ADT	Pre-Acquisition								Post-Acquisition							
						Trains per Day	Train Speed (mph)	Length of Train (ft)	No. of Vehicles Delayed per Day	Max No. of Veh. In Queue per Lane	Crossing Delay per Stopped Vehicle (min/veh)	Average Delay for all Vehicles (sec / veh)	LOS	Trains per Day	Train Speed (mph)	Length of Train (ft)	No. of Vehicles Delayed per Day	Max No. of Veh. In Queue per Lane	Crossing Delay per Stopped Vehicle (min/veh)	Average Delay for all Vehicles (sec/veh)	LOS
Lake	C-693	5227781	Ripley St	2	14,370	9.6	20	5,600	353	53	3.22	9.47	B	13.4	20	6,200	538	58	3.51	15.79	C
Lake	C-693	5227891	Broadway St	4	13,690	9.6	20	5,600	336	25	2.31	6.81	B	13.4	20	6,200	512	28	2.53	11.35	B
Lake	C-693	52264611	Clark Rd	2	7,500	9.6	20	5,600	184	28	2.37	6.98	B	13.4	20	6,200	281	30	2.59	11.63	B

3.0 NO MITIGATION MEASURES ARE WARRANTED

The Four Cities Consortium suggested in its Comments and Request for Conditions (FCC-9) (filed October 21, 1997) and in its Comments on the DEIS (FCC-13) (filed February 2, 1998) that the Board should require CSX to reroute traffic from the Pine Junction-Barr Yard line segment to the Conrail Porter Branch (the Willow Creek-Ivanhoe line segment that is the subject of this Supplemental Environmental Report). The basis of this request is that the Conrail Porter Branch crosses fewer heavily traveled roads than the Pine Junction-Barr Yard line segment. This proposed rerouting thus constitutes mitigation. No mitigation of the minimal impacts on the Willow Creek-Ivanhoe line segment is warranted.

ARNOLD & PORTER

555 TWELFTH STREET, N.W.
WASHINGTON, D.C. 20004-1202

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

MARY GABRIELLE SPRAGUE
(202) 942-5773

NEW YORK
DENVER
LOS ANGELES
LONDON

May 6, 1998

VIA HAND DELIVERY

Elaine K. Kaiser, Chief
Section of Environmental Analysis
Surface Transportation Board
1925 K Street, NW
Washington, DC 20423

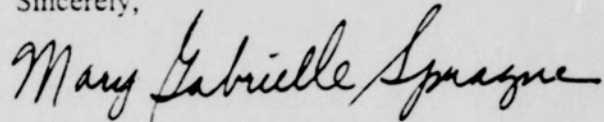
Re: Finance Docket No. 33388, CSX and Norfolk Southern –
Control and Operating Agreements – Conrail/
Verified Statement on Changes in CSX Traffic Figures

Dear Ms. Kaiser:

Enclosed is the Verified Statement of James E. Roots. The Verified Statement documents a few relatively small changes in the traffic figures reported in the CSX Operating Plan that have been made to correct errors or to account for train reroutings.

Please let me know if you have any questions about this matter.

Sincerely,



Mary Gabrielle Sprague
Counsel for CSX Corporation and
CSX Transportation, Inc.

Enclosure

cc w/ encl: Steven Lee
Michael Johnson
John Morton

ARNOLD & PORTER

Elaine K. Kaiser
May 6, 1998
Page 2

Robert Allen
Carrie Clayton
David Coburn
Carl Gerhardstein
James Roots
Pamela Savage
Peter Shudtz

Bruno Maestri
Andrew Plump
Constance Sadler

VERIFIED STATEMENT

OF

JAMES E. ROOTS

CSX TRANSPORTATION, INC.

I am James E. Roots. I am presently General Manager, Network Services Operations Planning of CSX Transportation, Inc. I assisted John W. Orrison in the development of the CSX Operating Plan which was submitted to the Surface Transportation Board as part of the Railroad Control Application (Vol. 3A, CSX/NS-20) in June 1997. Since then, I have continued to work on matters relating to implementation of the CSX Operating Plan, including analyzing objections to the CSX Operating Plan made by parties in Finance Docket No. 33388. Since the Application was filed in June 1997, a few relatively small changes have been made in the traffic figures reported in the CSX Operating Plan to correct errors in the original traffic figures or to account for train reroutings. Those changes are identified below:

I. Correction of Errors

1. CSX incorrectly included NS Roadrailer traffic (1.2 trains per day on average) currently operating over Conrail lines from Crestline, Ohio to Rochester, New York in its post-Transaction train counts. CSX had not been aware that the NS Operating Plan had rerouted this traffic to other lines. Thus, 1.2 trains should be deleted from the following CSX line segments:

Crestline-Greenwich, OH
Greenwich-Berea, OH
Drawbridge-Quaker, OH
Quaker-Ashtabula, OH
Ashtabula, OH-Buff Seneca, NY
Buff Seneca-Buff Crk Jct, NY
Buff Crk Jct-Draw, NY
Draw-Buffalo, NY
Buffalo-Frontier, NY
Frontier-Chili, NY
Chili-Rochester, NY

2. CSX incorrectly included 2.0 NS trains on the Marcy-Short, OH and Short-Berea, OH line segments. These trains should be deleted. CSX now understands that NS plans to operate two auto trains from Rockport Yard through CP Short to Parma on the Marcy-Short line segment, a distance of only one to two miles. The inclusion of 2.0 NS trains on the Marcy-Short line segment thus overstates this limited use. NS does not plan to operate any trains over the Short-Berea line segment.

3. CSX overstated the number of unit trains on the Pine Junction-Barr Yard, IN line segment. Both the pre-Transaction and post-Transaction train numbers must be adjusted, as well as the post-Transaction MGT estimate. The pre-Transaction MGT figure does not have to be adjusted because it was determined independently of the train numbers and thus was not affected by the error.

The train numbers in the CSX Operating Plan include eight unit trains on this line segment both pre-Transaction and post-Transaction. The 1995 base unit train traffic on this line segment should be 3.5 unit trains per day (a decrease of 4.5 unit trains/day) and the post-Transaction unit train traffic should be 2.5 unit trains per day (a decrease of 5.5 unit trains per day). Post-Transaction gross tonnage was estimated in the CSX Operating Plan based on the assumption that one unit train per day equals 2.2 MGTs on an annual basis. The subtraction of 5.5 unit trains thus results in a reduction of 12.1 MGTs on the Pine Junction-Barr Yard line segment.

II. Train Reroutings

1. CSX proposes to reroute two merchandise trains (2.0 trains per day) from the Willow Creek-Pine Junction and Pine Junction-Barr Yard line segments to the Willow Creek-Ivanhoe line segment for both commercial reasons and to accommodate the objection of the Four Cities Consortium (East Chicago, Gary, Hammond and Whiting, Indiana) to increased train traffic on the Pine Junction-Barr Yard line segment.
2. Although the CSX Operating Plan traffic figures do not include trains operating via trackage rights and haulage rights, at the request of the Section of Environmental Analysis CSX did include such traffic in its traffic figures submitted with the Environmental Report (Vol. 6 of the Application, CSX/NS-23). CSX proposes to reroute one Canadian Pacific haulage train (1.0 train per day) that presently operates over the Pine Junction-Barr Yard, Barr Yard-Blue Island Junction, Blue Island Junction-Clearing line segments to the NS-allocated Conrail lakefront main line (the CP 501-Indiana Harbor and Indiana Harbor-South Chicago line segments). This reroute will further reduce the projected increase in traffic on the Pine Junction-Barr Yard line segment.
3. A limited number of train reroutings have been proposed in connection with the settlement with the Louisville and Indiana Railroad. These reroutings were described in the Verified Statement of William M. Hart, dated March 6, 1998. I will not repeat that discussion here.

STB

FD-33388

5-18-98

I

ID-187589

2

OF

2

VERIFICATION

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

Executed on the 4 day of MAY, 1998.

James E Roots
James E. Roots

STB

FD-33388

5-15-98

I

ID-187563

ENTERED
Office of the Secretary

MAY 18 1998

Part of
Public Record

BEFORE THE

SURFACE TRANSPORTATION BOARD

Finance Docket No. 33388

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

CSX-147



**MOTION OF APPLICANTS CSX CORPORATION
AND CSX TRANSPORTATION, INC. FOR
LEAVE TO FILE VERIFIED STATEMENT OF
MICHAEL C. SANDIFER CONCERNING STUDY
OF INCIDENCE OF ANTIASSIGNMENT CLAUSES
IN CONRAIL RAIL TRANSPORTATION CONTRACTS**

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

**DENNIS G. LYONS
SUSAN T. MORITA**
Arnold & Porter
555 12th Street, N.W.
Washington, D.C. 20004-1202
(202) 942-5000

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

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

**Counsel for CSX Corporation
and CSX Transportation, Inc.**

May 15, 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

**MOTION OF APPLICANTS CSX CORPORATION AND
CSX TRANSPORTATION, INC.
FOR LEAVE TO FILE VERIFIED STATEMENT OF
MICHAEL C. SANDIFER CONCERNING
STUDY OF INCIDENCE OF ANTIASSIGNMENT CLAUSES
IN CONRAIL RAIL TRANSPORTATION CONTRACTS**

Applicants CSX Corporation and CSX Transportation, Inc. (collectively, "CSX"),¹ hereby move the Board for leave to file the attached Verified Statement of Michael C. Sandifer (CSX-148), submitting the results of a study of Conrail Rail Transportation Contracts ("RTC's") which indicates the extent to which such contracts contain antiassignment clauses.

¹ We refer herein to Norfolk Southern Corporation and Norfolk Southern Railway Company collectively as "NS", and Consolidated Rail Corporation and Conrail Inc., collectively as "Conrail."

I. PURPOSE OF THE SUBMISSION

In the filing of simultaneous briefs which occurred on February 23, 1998, in this case, issues were raised as to whether, and to what extent, antiassignment clauses were present in Conrail's RTC's. By "antiassignment" clauses, we mean clauses purporting to restrict the assignment by the carrier of rail transportation contracts, couched in language broad enough so as to purport to indicate that the contracts would not (or arguably might not) pass to the successor of the railroad contracting party in a Board-approved rail combination transaction.

These issues relate to Section 2.2(c) of the Transaction Agreement, which provides an orderly procedure for the succession of CSX and NS to the existing RTC's of Conrail, and for the honoring of those contracts by the successor and by the shipper, in accordance with their terms. In connection with this, the Applicants included in their Application a prayer for relief that provisions in Conrail RTC's (as well as in other agreements defining or establishing assets of Conrail) which purport to limit or prohibit Conrail's assignment of its rights to use, operate and perform such assets, be overridden by the Board. See Application, Prayer for Relief *l.c.*, CSX/NS-18, Vol. I at 102-03; Proposed Findings and Order, CSX-140, App. A. at F-3-F-4, O-3; NS-62, at F-3-F-4, O-3. While the positions of the various parties to this case are now clear as to whether or not these antiassignment clauses should be overridden, there is little or no information in the Record as to the extent to which these clauses exist.

The United States Department of Transportation ("DOT") addressed the antiassignment clause issue for the first time in its February 23, 1998, brief (DOT-6), to

which the Applicants had no right of reply under the procedural schedule. (Decision No. 6 as amended by Decision No. 52.) DOT there took the view that the application of Section 2.2(c) should turn, at least in part, on the existence or nonexistence of an antiassignment clause, so that a difference in treatment should prevail between those Conrail RTC's in which an antiassignment clause was present and those in which there was none. (DOT-6 at 8, 40-42.) While under the DOT's "best" (*id.* at 41) view of the subject, all of the contracts should be subject to Section 2.2(c), those shippers, it urged, who had antiassignment clauses should be entitled to choose which of CSX or NS (if each was capable of performing the contract) was to perform the Conrail contract under Section 2.2(c), which would in other respects be applicable to them; while those shippers whose contracts had antiassignment clauses but whose service could not be provided by each of CSX or NS, and those whose contracts did not have any antiassignment clauses, would all be subject to the entirety of the provisions of Section 2.2(c), including the clauses governing the allocation of performance of Conrail contracts between the two carriers, CSX and NS. While DOT speculated that "many" of the Conrail RTC's "apparently" contained antiassignment clauses (DOT-6 at 43), it never provided evidence as to how common these clauses were in the Conrail RTC's, and thus the practical effect of its position is hard to ascertain without that information.

On the other hand, in a brief filed on February 23, 1998 (EKC-4), Eastman Kodak Company ("EKC") suggested that antiassignment clauses were not "boilerplate" clauses routinely included in Conrail's rail transportation contracts, but had to be individually bargained for and accordingly, one would think, might be relatively rare. Indeed, EKC

would have the Board believe that these provisions are "a provision seldom agreed to by Conrail." (EKC-4 at 4.)²

APL Limited ("APL") is the principal opponent of Section 2.2(c) before the Board. In its brief filed February 23, 1998, APL for the first time took the position that the presence of an antiassignment clause in a Conrail RTC should, in and of itself, prevent the operation of Section 2.2(c) of the Transaction Agreement. (APL-18 at 1-2.) It had not taken that position before, although it had earlier vigorously opposed Section 2.2(c) on other grounds, both of a policy and an operational nature, and of an *ad hominem* nature addressed to CSX.³ APL opposed Section 2.2(c) generally, and,

² EKC claims that unidentified Conrail representatives told them that during the negotiations. EKC-4 at 4. However, the clause in EKC's contract (*see* EKC-4 at 3) is a type A-16 (as identified in the attachment to the Sandifer V.S.), which is similar to hundreds of other clauses in the 821 Conrail RTC's reviewed in the study reported on by the Sandifer V.S. *See* in particular Type A-1 (399 examples) and Type A-8 (110 examples) which are slight variants on A-16. EKC in its October 1997 Comments relied primarily on a specialized antiassignment clause which it claimed was in the EKC contract but which, upon discovery, turned out to be simply a clause proposed by EKC that was not accepted by Conrail. *See* CSX/NS-176, Vol. I, at VI-11-VI-12.

³ Analytically, there was good reason for APL not to stress, or even mention, its antiassignment clause. Under the Transaction Agreement and the Joint Application, Conrail on the "Closing Date" will cease active operations as an operating rail carrier everywhere throughout its system except in the Shared Assets Areas (where its operations will be solely for the account of CSX and NS). Thus, as a party to the Transaction Agreement, Conrail, to the extent that its rail transportation contracts contained antiassignment clauses, was consciously and deliberately proposing to render itself incapable of performing those contracts, an act generally characterizable as a breach of contract. By approving and authorizing the Transaction, the STB would, accordingly, be implicitly overruling the antiassignment clauses; if the STB intended to uphold the antiassignment clauses it would have to deny approval of the Transaction. Thus, in its original, very extensive comments in October 1997, APL asserted various policy, operational, and *ad hominem* arguments, but placed no reliance on its antiassignment clause. *See* APL-4, *passim*. Apparently the prospect that DOT would light upon the antiassignment clauses as a proposed decisional basis caused APL to change its mind in February 1998.

alternatively, in Section 2.2(c)'s application to APL itself. The fact that APL had not urged the antiassignment clause as part of the case in its October 1997 Comments was stressed by the Applicants in their Rebuttal. (CSX/NS-176, Vol. I, at IX-14 n.11, filed December 15, 1997.) The Applicants did this in making the point that boilerplate antiassignment clauses should not stand in the way of the succession of assets, including RTC's, from Conrail to the party to which they were allocated in the Transaction Agreement submitted to the Board for its approval.

The significance of these antiassignment clauses to the issues before the Board, in the light of the attack by some shippers on Section 2.2(c)⁴ thus became plain upon the simultaneous filing of briefs that occurred on February 23, 1998, and those briefs made it important that the Board have information concerning the frequency of those clauses in Conrail's RTC's.

This emphasis on antiassignment clauses in the February 23, 1998, filings, led CSX to consider that it might be useful to the Board, in passing on the issues before it concerning the Conrail RTC's, to have information as to what percentage of them in fact

⁴ The opposition to Section 2.2(c) was hardly universal among shippers. The NITL, the largest shipper organization, in its partial settlement with the Applicants embraced Section 2.2(c), subject to an "escape hatch" it negotiated permitting shippers whose contracts were capable of assignment to or performance by either of CSX or NS under Section 2.2(c), upon dissatisfaction with the service provided by the assigned carrier, to have the quality of service issues arbitrated against a standard provided in the settlement agreement, and to win a change of carriers performing the service. NITL Settlement Agreement, Clause II.C, CSX/NS-176, Appendix B, at B4-B5. Obviously, the NITL recognized the importance of the stability promoted by Section 2.2(c) in effectuating a smooth transition from the operations of the unitary Conrail to the divided operations of the expanded CSX and expanded NS, each operating their allocated portions of Conrail as part of its own system.

contain antiassignment clauses. Accordingly, the study described in the Sandifer Verified Statement was undertaken. Its completion required a good deal of time, since first the Conrail contracts -- over a thousand of them -- had to be assembled by Conrail, shipped to CSX's outside counsel, and then reviewed, one by one, in the process described in the Sandifer V.S.⁵

The results of the study indicate that antiassignment clauses are overwhelmingly present in the Conrail RTC's. No less than 76% of the contracts contain such clauses with flat prohibitions. (Type A) The language is generally similar and often identical.

⁵ Certain categories of contracts were eliminated from the study as set forth in the Sandifer V.S. It was decided to eliminate contracts prepared by another railroad for joint contractual service by that other railroad and Conrail; these contracts were not even furnished to CSX's outside counsel. Similarly, contracts prepared under Conrail's supervision but for itself and another railroad were eliminated and while furnished to CSX's outside counsel were not examined otherwise than to ascertain that they were in this category. The purposes of these eliminations was to make the study illustrative of what Conrail contracts looked like in one-on-one dealings with shippers, and, because of the huge quantity of contracts involved, to make performance of the study less time-consuming by reducing its size. Also, modifications of contracts to add other routings or the like, if they did not contain a fresh set of general provisions but incorporated the basic general provisions, were not counted as separate contracts. This was because the purpose of the study was to determine the incidence of a particular general provision, the antiassignment clause. Such modifications might well be considered separately if the purpose of the analysis had been to determine how best to perform the contracts, since from an operational standpoint a contract amended to provide for a second destination-origin pair of movements would more closely resemble two contracts rather than a single contract.

All of the contracts were treated as "Highly Confidential." No in-house personnel at CSX were permitted to look at the contracts or made aware of their provisions. The study was performed by a legal assistant at CSX's outside counsel who had executed the "Highly Confidential" undertaking. The lawyers with the outside counsel with whose assistance the Verified Statement was prepared also had subscribed to the "Highly Confidential" undertaking. The study aggregates the results in a way that does not permit inferences (other than statistical inferences) to be drawn as to what clauses are contained in what contracts. (EKC produced a redacted partial copy of its RTC in which its antiassignment clause was "Public." (EKC-3 at 3.))

One clause is found identically in 399 of the 821 contracts in the study; another, quite similar to the first is found in another 110; and a third, again quite similar in wording in another 63 (Types A-1, A-8 and A-12, respectively). Together these three types alone account for 572 of the contracts or 70% of those studied. Many other contracts contain antiassignment clauses containing some exceptions, as set forth in the Sandifer V.S.

II. REASONS FOR GRANTING THE MOTION

We are mindful that this Motion and proposed filing come late in the procedural schedule. Yet the Board's procedural schedule indicates that the Record in this case will not close until the date of the oral argument. See Decision No. 6, as amended by Decision No. 52. The Board should make use of that provision here and admit the study. There is good cause why the study was not made earlier and no prejudice will attend its receipt now. Some of the reasons for not presenting it earlier are discussed in Part I above. In addition, the Board should consider the fact that the study set forth in the Sandifer V.S. is neutral and, indeed, mechanical. It simply reflects a headcount of contracts which are in Conrail's files. It contains no argumentation and should itself be noncontroversial. No opinions are presented in it.

The parties can, of course, make varying arguments based on the study. The Applicants would argue that the commonness and banality of the antiassignment clauses in Conrail's RTC's supports their argument that enforcing them, as EKC and APL urge, would create enormous disruptions on and after the "Closing Date," when Conrail's lines will be split between CSX and NS. APL and EKC's position thus is that upon that date almost all of the Conrail shippers who had contracts should be released from their

contracts. The Applicants could also argue that such clauses do not represent individual bargaining and that they are the sort of "boilerplate" clause that public policy, as expressed in 49 U.S.C. § 11321 and related provisions, most clearly ought to override. Opponents might argue that the near universality of these clauses indicates that there was a legitimate expectation on the part of shippers that only the then-existing Conrail would perform their contracts.

By accepting the attached Verified Statement in the Record, the Board will itself be informed as to the almost universal prevalence of antiassignment clauses in Conrail RTC's.⁶ As reviewed above, the stress and prominence given in the parties' urgings as to the presence of these boilerplate clauses by the major commentators did not take place until the February 23, 1998, briefs. It could be argued that the issue was somehow latent before then; but the parties who put stress on it later did not make the point at all in their October 1997 comments. The DOT said nothing about it in its

⁶ The study is quantitative, not qualitative. No effort was made to exercise judgment as to which contracts were more important, to analyze the carload or tonnage volumes of those that contained antiassignment clauses and those which did not, or the like. If these are limitations to the study, they go to its weight, and we believe that this quantitative study is useful in any event. One of the purposes in performing the study was to avoid exercising judgment as to the relative "importance" of the contracts, and to avoid identification of individual contracts, so that the study could be presented without classification as "Confidential" or "Highly Confidential" even though the individual contracts themselves are "Highly Confidential." (It should be noted that the broad, quantitative discussion of them herein is not a waiver of this Highly Confidential status.) In any event, in view of the overwhelming presence of antiassignment clauses, the statistical likelihood of the existence of a division of "important" and "less important" contracts between those containing antiassignment clauses and those not containing them, in a manner significantly different from the division indicated by the study, would be highly remote.

October 1997 Comments;⁷ APL said nothing about it in its October 1997 Comments; and EKC in October 1997, while mentioning the boilerplate clause, stressed a special antiassignment clause, said to be tailor-made, which it claimed was in EKC's contract, but which Applicants later demonstrated was rejected by Conrail and never contained in its contract. (CSX/NS-176, Rebuttal, Vol. 1 at VI-10-VI-12.) EKC then, in the February 23, 1998, Brief, shifted its reliance entirely to the boilerplate clause. (EKC-4 at 3.) As to the major shippers' groups: NITL in its October 1997 Comments raised various objections to Section 2.2(c) (NITL-7 at 38-39) but relegated a plea for special treatment of shippers with antiassignment clauses to a footnote. (*Id.* at 38 n.11.) The entire antiassignment issue and objection to Section 2.2(c) were abandoned by NITL in the December 12, 1997, Settlement Agreement. As to CMA/SPI, they said nothing at all about antiassignment clauses; its Comments called for a general two-year "open season" for all contract shippers and a complete rejection of Section 2.2(c) (with the shippers keeping their Conrail contracts only if they wanted to) without reference to the presence or absence of antiassignment clauses. *See* CMA-10 at 3-35; Attachment 1 (Proposed Conditions) at 2. That remains the position of CMA and SPI. Brief, CMA-19/SPI-13 at 6, Attachment 1 (Proposed Conditions) at 2.

The evidence we seek to submit should not be controversial; the Board should be fully informed when it acts on this subject; and the parties should be permitted to argue it at oral argument on the basis of the facts. It is better to have an informed argument than an uninformed one. It is best that the Board have a clear understanding of

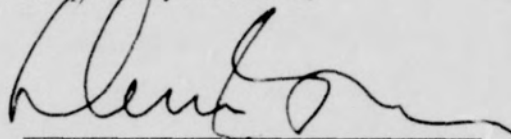
⁷ (DOT-3) These were devoted entirely to safety issues.

what it will be doing if it permits the opponents of Section 2.2(c) to treat these boilerplate clauses as fortresses against Section 11321. No real prejudice would occur to any party through the introduction of the study in question.

CONCLUSION

For the reasons stated, this Motion should be granted, and the attached Verified Statement should be received as part of the Record.

Respectfully submitted,



DENNIS G. LYONS
SUSAN T. MORITA

Arnold & Porter
555 12th Street, N.W.
Washington, D.C. 20004-1202

SAMUEL M. SIPE, JR.
TIMOTHY M. WALSH
Steptoe & Johnson LLP
1330 Connecticut Ave., NW
Washington, D.C. 20036-1795

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

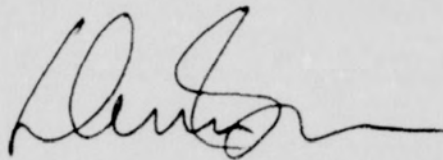
P. MICHAEL GIFTOS
PAUL R. HITCHCOCK
CSX TRANSPORTATION, INC.
500 Water Street
Speed Code J-120
Jacksonville, FL 32202
(904) 359-3100

*Counsel for CSX Corporation and CSX
Transportation, Inc.*

May 15, 1998

CERTIFICATE OF SERVICE

I, Dennis G. Lyons, certify that on May 15, 1998, I have caused to be served a true and correct copy of the foregoing CSX-147, "Motion of Applicants CSX Corporation and CSX Transportation, Inc., for Leave to File Verified Statement of Michael C. Sandifer Concerning Study of Incidence of Antiassignment Clauses in Conrail Rail Transportation Contracts," to all parties on the Service List in Finance Docket No. 33388, by first-class mail, postage prepaid, or by more expeditious means.



BEFORE THE
SURFACE TRANSPORTATION BOARD

FINANCE DOCKET NO. 33388

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

**VERIFIED STATEMENT
OF
MICHAEL C. SANDIFER**

My name is Michael C. Sandifer. I am a legal assistant at the law firm of Arnold & Porter, which serves as counsel to CSX. I have worked on the CSX, and later CSX/Norfolk Southern, acquisition of Conrail since October of 1996. I received a bachelor's degree in political science from the University of Maryland, College Park in 1987.

On or about March 27, 1998, Consolidated Rail Corporation ("Conrail") provided Arnold & Porter with copies of railroad transportation contracts ("RTCs") to which Conrail is the sole railroad contracting party. My understanding is that Conrail represented to Arnold & Porter that the RTCs it supplied Arnold & Porter with constitute all such RTCs to which Conrail is currently the sole railroad party.

We were also provided with a considerable number of railroad transportation contracts to which Conrail and another rail carrier or carriers were parties. We did not include these "multi-railroad" contracts in the study I am about to describe, and neither I nor, to my knowledge, anyone else at Arnold & Porter or representing CSX has made any review of these multi-railroad contracts to see which of them contains antiassignment clauses. We understand from Conrail that there is a substantial number of other multi-railroad contracts that were not provided to us. We also did not include in the study contracts that appeared on the basis of the documents provided to us to have expired on or before April 30, 1998. Finally, we did not count as separate contracts amendments to RTCs when those amendments contained rates or other terms related to specific rail segments or periods of time, but did not amend the general terms and conditions (including any assignment clause) in the main contract.

A total of 821 contracts were included in the study.

I have been asked to review each of the current single-railroad RTCs provided by Conrail from the standpoint of provisions prohibiting, limiting or permitting assignment of the RTC by the railroad. With the assistance of attorneys at Arnold & Porter, I have been asked to assign each of the RTCs to various categories based on the form of anti-assignment clause (if any) in the RTC. The results of that review and assignment are summarized in Appendix A attached hereto.

As indicated on Appendix A, 698 of the 821 RTCs, or 85%, prohibit or limit to some degree Conrail's ability to assign the RTC. 399 of the RTCs, or 48%, contain the following clear prohibition on assignment:

"No party(ies) may assign this Contract, in whole or [in] part, without the prior written consent of the other party(ies)."
(Type A-1)

Another 224 of the RTCs, or 27%, contain slight variations on this clear prohibition. (Type A other than Type A-1) Examples include the following provisions:

"No party [hereto] may assign this contract, in whole or in part, or any rights hereunder, without the prior written consent of the other party." (Type A-8)

"None of the parties hereto shall assign or transfer this Agreement, in whole or in part, or any interest arising under this Agreement, without the prior written consent of the other parties." (Type A-7)

Thus, there are 623 flat prohibition clauses or 76% of the study.

Thirty-two of the RTCs, or approximately 3.9%, contain provisions that prohibit assignment except to certain categories of successors in interest or affiliated companies.

(Types C, D & E) For example, 10 of the RTCs contain the following provision:

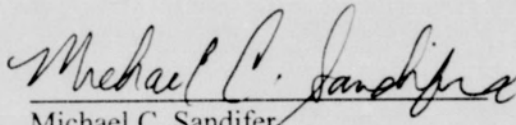
"No prior written consent of the parties will be required where assignment is to a parent company or successor in interest of part or all of the assets of such party by way of merger, consolidation or sale of substantially all its assets, divestiture pursuant to an order or decree of a court, or a similar corporate reorganization."
(Type D-1)

Ninety-one RTCs, or 11%, contain no provision restricting assignment at all.

(Category G) An additional 13 RTCs, or 1.6%, contain anti-assignment clauses that limit the customer's ability to transfer the contract but appear to permit Conrail fully to assign the contract. (Type F)

VERIFICATION

I, Michael C. Sandifer, declare under penalty of perjury that the foregoing is true and correct. Further, I certify that I am qualified and authorized to file this Verified Statement. Executed this 15th day of May, 1998.


Michael C. Sandifer

APPENDIX A

TYPES OF ANTIASSIGNMENT CLAUSES IN CONRAIL TRANSPORTATION CONTRACTS	Number
A. Flat Prohibition on Assignment.	
A 1. "No party(ies) may assign this Contract, in whole or [in] part, without the prior written consent of the other party(ies)."	395*
A 2. "None of the parties may assign this Contract, in whole or in part, without the prior written consent of the other parties."	11
A 3. "No party hereto may assign this Contract, in whole or in part, without the prior written consent of the other party."	3
A 4. "Neither party hereto may assign this Contract, in whole or in part, without the prior written consent of the other party."	1
A 5. "Neither party may assign or transfer this Contract, in whole or in part, without the prior written consent of the other party."	1
A 6. "No party may assign or transfer this Contract, in whole or in part, or any interest arising hereunder, without the other parties' prior written consent."	1
A 7. "None of the parties hereto shall assign or transfer this Agreement, in whole or in part, or any interest arising under this Agreement without the prior written consent of the other parties."	4
A 8. "No party [hereto] may assign this contract, in whole or in part, or any rights hereunder, without the prior written consent of the other party."	110
A 9. "Neither party may assign, delegate or transfer this Agreement, in whole or in part, or any interest arising hereunder without the prior written consent of the other. Any purported or attempted assignment of this Agreement, without such consent, shall be null and void."	2
A 10. "No party hereto may assign this Agreement, in whole or in part, or any rights granted herein, or delegate to another party any of the duties hereunder, without the prior written consent of the other parties."	1"
A 11. "Neither party, without the consent of the other party, may assign this Agreement without the written consent of the other party."	1
A 12. "Neither Customer nor Conrail may assign its rights or obligations under this Master Contract nor any or all of the Implementing Agreements without the prior written consent of the other signator(s)."	63
A 13. "Neither [Customer] nor Conrail may assign the Master Railroad Transportation Contract or any or all of the Implementing Agreements without the prior written consent of the other signator(s)."	1
A 14. "Neither Conrail nor Shipper may assign or transfer this Contract or any of its rights and privileges under this Contract without the written consent of the other party, signed by an authorized	1

officer."	
A 15. "This Contract may not be assigned by the parties, in whole or in part, without the prior written consent of the other party."	1
A 16. "This Contract is not assignable in whole or in part by one party without the prior written consent of the other party(ies)."	3
A 17. "This Agreement [shall] [may] not be assignable [assigned], in whole or in part, by either party without the express written consent of the other [party]."	2"
A 18. "This Contract is intended for the sole benefit of Conrail and {Customer}. Nothing in this Contract is intended or may be construed to give any person, firm, corporation, or other entity, other than Conrail and {Customer}, their permitted successors [and] permitted assigns, and their Affiliates any legal or equitable right, remedy, or claim under this Contract. This Contract may not be assigned by either party to a third party without the express written consent of both Conrail and {Customer}."	11
A 19. This Contract is intended for the sole benefit of Conrail and {Customer}. Nothing in this Contract is intended or may be construed to give any person, firm, corporation, or other entity, other than Conrail and {Customer}, their successors and assigns, including any successor corporation into which Conrail may be merged, or their Affiliates any legal or equitable right, remedy, or claim under this Contract. This Contract may not be assigned to either party to a third party without the express written consent of both Conrail and {Customer}."	1
A 20. "This Agreement shall inure to the benefit of and be binding upon the heirs, administrators, executors, successors and assigns of the parties hereto, but shall not be assigned or transferred in whole or in part without the prior written consent of the other party hereto and without an express assumption by such assignee or transferee of all past, present and future obligations of this Agreement. No assignment or transfer shall be effective until all defaults under the Agreement have been cured."	1
A 21. "No party(ies) may assign this Contract, in whole or in part, without the prior written consent of the other party(ies). Any transfer, assignment or delegation of this Agreement, or of any right or duties herein granted or imposed, whether voluntary, by operation of law, or otherwise, without consent in writing shall be absolutely void, and at the option of the party whose written consent should have been obtained, this agreement may be terminated."	1
A 22. "[Neither] [No] party hereto may assign this Contract, in whole or in part, or any rights granted hereunder, or delegate to another party any of the duties hereunder, without the prior written consent of the other party. Any transfer, assignment, delegation, or attempted transfer, assignment or delegation under this Contract or of any of the rights or duties herein granted or imposed, whether	2

voluntary, by operation of law or otherwise, without such consent in writing, shall, at the option of the party whose written consent should have been obtained, cause this Contract to be terminated."	
A 23. "Notwithstanding anything herein to the contrary, neither party shall assign or otherwise transfer, by operation of law or otherwise, all or part of its rights and obligations under the Agreement or any amendment or addendum thereto without prior written consent of the other party hereto."	1
A 24. "This Agreement shall not be assignable by either party without the prior written consent of the other party, and any attempted assignment without such consent will be null and void."	1
TOTAL OF ALL FLAT PROHIBITION CLAUSE CONTRACTS:	623
B. "Rule of Reason" Provision.¹	
B 1. "No party [hereto] may assign this contract, in whole or in part, or any rights hereunder, without the prior written consent of the other party, but such consent shall not be unreasonably withheld."	3
B 2. "No party may assign this Contract, in whole or in part, without the prior written consent of the other party, whose consent may not be unreasonably withheld."	1"
B 3. "No party(ies) [hereto] may assign this Contract, in whole or in part, without the prior written consent of the other party, which consent shall not be unreasonably withheld."	5***
B 4. "No party(ies) may assign this Contract, in whole or in part, without the prior written consent of the other party(ies), however an assignment will not be unduly withheld."	1
B 5. "No party(ies) may assign this [Master] Contract, in whole or in part, without the prior written consent of the other party(ies), which consent shall not be unreasonably withheld."	3
B 6. "No party may assign this Contract, in whole or in part, without the prior written consent of the other parties, but such consent shall not be unreasonably withheld."	6
B 7. "No party(ies) may assign this Contract, in whole or in part, without the prior written consent of the other party(ies) not unreasonably withheld and timely given."	1
B 8. "No party(ies) may assign this Contract, in whole or in part, without the prior written consent of the other party(ies). Such consent shall not be unreasonably withheld."	1
B 9. "No party may assign this contract, in whole or in part, without the prior written consent by each of the parties hereof to each	1

¹ The assignment provision in one contract which might otherwise have been placed in this category appears to be missing some words. It reads: "This Contract shall be binding upon and inure to the benefit of the parties, their successors and permitted without the prior written consent of the other parties, but such consent will not be unreasonably withheld. Any attempt at assignment without such prior written consent shall be void." This contract is not included in this study.

of the parties hereof, which consent shall not be unreasonably withheld."	
B 10. "Neither party may assign this Contract in whole or in part, without the prior written consent of the other party, but such consent shall not be unreasonably withheld."	3
B 11. "Neither party [hereto] may assign this Contract, in whole or in part, without the prior written consent of the other party, which consent [shall] [will] not be unreasonably withheld."	4
B 12. "Neither party may assign this Agreement, in whole or in part, without the prior written consent of the other party, which, however, shall not be unreasonably withheld."	3
B 13. "No party may assign this contract, in whole or in part, without the prior written consent of the other parties which consent will not be unreasonably withheld."	1
B 14. "Neither party shall assign its rights under this Contract without prior written consent of the other party, which will not be unreasonably withheld."	1
B 15. "Neither [Customer] nor Conrail shall assign its rights under this Agreement without the prior written consent of the other. Neither party shall withhold its consent unreasonably."	1
B 16. "No party may assign this [Agreement] [Contract] or any rights or obligations [t]hereunder without the prior written consent of the other parties, which consent shall not be unreasonably withheld."	2
B 17. "Neither party shall assign or transfer this Contract or any interest arising thereunder without prior written consent of the other party, which permission shall not be unreasonably withheld."	1
B 18. "[Neither] [no] party hereto may assign this Agreement, in whole or in part, or any rights granted herein, or delegate to another party any of the duties hereunder, without the prior written consent of the other party, which consent shall not be unreasonably withheld. [Any transfer, assignment, or delegation of this Agreement, or any rights or duties herein granted or imposed, whether voluntary, by operation of law, or otherwise, without such consent in writing, shall be absolutely void, and at the option of the party whose written consent should have been obtained, this Agreement may be terminated.]"	2
B 19. "[Conrail] may not assign, delegate or subcontract all or any portion of its rights and/or duties under this Agreement without the prior written consent of Customer, which consent shall not be unreasonably withheld."	1
TOTAL OF ALL "RULE OF REASON" PROVISION CONTRACTS:	41

C. <u>Consent Required Except Where Assignment Is to Successor in Interest or Purchaser.</u>	
C 1. "The rights and obligations covered herein are personal to each party hereto and for this reason this agreement shall not be assignable by either party in whole or in part, except to any successor to the business and assets of the assignor, without the prior written consent of the other party."	5
C 2. "No party(ies) may assign this Contract, in whole or in part, without the prior written consent of the other party(ies). However, either party may assign this agreement to an affiliated company or to a successor which purchases all or substantially all of the affected parties assets for indebtedness incurred or to be incurred."	1
TOTAL OF ALL SUCCESSOR IN INTEREST OR PURCHASER PROVISION CONTRACTS:	6
D. <u>Consent Required Except Where Assignment Is to a Successor by Way of Merger, Consolidation, Sale, Etc.</u>	
D 1. "No party hereto may assign this Contract, in whole or in part, without the prior written consent of the other parties, which consent shall not be unreasonably withheld. Any assignment of this Contract, whether voluntary, by operation of law, or otherwise, without such consent in writing, shall be absolutely void, and at the option of the party whose written consent should have been obtained, this Contract may be terminated. . . . No prior written consent of the parties will be required where assignment is to a parent company or successor in interest of part or all of the assets of such party by way of merger, consolidation or sale of substantially all its assets, divestiture pursuant to an order or decree of a court, or a similar corporate reorganization; provided, however, that no such assignments shall be effective unless and until such assignee shall assume in writing the obligations of the assignee."	10
D 2. "No party may assign this Agreement or any rights or obligations hereunder without the prior written consent of the other party, except that no such Consent will be required where assignment is to a successor in interest of a part or all of the assets of such [assigning] party by way of merger, consolidation or sale of substantially all of its assets, divestiture pursuant to an order or decree of a court or similar corporate reorganization."	5
D 3. "No assignment of this Agreement or of any right or obligation hereunder shall be made without the written consent of the other Party which consent shall not be unreasonably withheld or delayed. Change of control or ownership, merger or recapitalization of either Party shall not require an assignment."	1
D 4. "No party may assign this Contract, in whole or in part, without the prior written consent of the other party; provided, however, that such consent shall not be required where the assignment	1

is made to a purchaser or assignee of substantially all of the assets of such party by way of merger, consolidation, transfer, sale or lease of substantially all of its assets."	
D 5. "None of the parties hereto may assign this Contract in whole or in part without the prior written consent of the other parties, where consent shall not be unreasonably withheld. PROVIDED, HOWEVER, that nothing in this Contract shall be deemed to restrict the right of CR to assign or transfer its rights, duties and obligations under this Contract to any corporation into or with which CR shall have become merged or consolidated or which shall have acquired CR."	1
D 6. "Neither Customer nor Railroad shall assign or transfer this Contract, or any interest arising hereunder, without the prior written consent of the other parties, except that no consent shall be required in the event of a merger or a sale of all or substantially all, of the assets of one of the parties or in the event of sale by Railroad to another carrier of any part of a line normally utilized by Railroad in its performance hereunder."	1
D 7. "No party(ies) may assign this Contract, in whole or in part, without the prior written consent of the other party(ies), which consent shall not be unreasonably withheld. Except that no such consent shall be required where assignment is to a successor in interest of all of the assets of such party by way of merger. Any assignment of this Contract, whether voluntary, by operation of law or otherwise, without such consent in writing, shall be absolutely void, and at the option of any party whose written consent should have been obtained, this Agreement may be terminated. Subject to this Section, this Consent shall be binding upon and insure to the benefit of the party(ies) hereto, their successors and assigns. Except that no such consent shall be required where assignment is to a successor in interest of all or substantially all interest."	1
TOTAL OF ALL MERGER, CONSOLIDATION, SALE PROVISION CONTRACTS:	20
<u>E. Affiliated Companies.</u>	
E 1. "None of the parties may assign this Contract, in whole or in part, without the prior written consent of the other parties listed in the appropriate Appendix. Notwithstanding any other provision of this Contract, assignment of any part or all of the duties, rights and obligations under this Contract to successors in interest, or, to a corporation under a common ownership with the assignor is expressly permitted without prior consent of the parties."	1
E 2. Consent required except if to any "corporation which controllingly owns, is controllingly owned by or is under common controlling ownership with the assignor, or succeeds to all or substantially all of the assignor's assets relating hereto, and which	1**

assumes in writing all of the assignor's obligations hereunder; but no such assignment shall relieve the assignor of any of those obligations.	
E 3. Consent required except if to "a corporation at least 50% owned, indirectly or directly, by such party, to such party's parent corporation, to a corporation owned at least 50%, directly or indirectly by such party's parent corporation, or to a successor."	1
E 4. "Neither this Agreement nor any rights or interest created hereunder shall be transferred, conveyed or assigned by either party without the prior written consent of the other party, and any such transfer, conveyance or assignment without such consent shall be null and void; provided, however, that either party may assign this Agreement to any of its subsidiaries, divisions or affiliates, which assignment shall become effective upon written notice to the other party without any such prior written consent."	1
E 5. Consent required except if to "a parent, affiliate or subsidiary corporation of either party. Such consent shall not be unreasonably withheld."	2
TOTAL OF AFFILIATED COMPANIES PROVISION CONTRACTS:	6
<u>F. Railroad May Apparently Assign.</u>	
F 1. "Industry shall not assign its rights under this Contract without prior written consent of Conrail."	6
F 2. "Industry shall not assign its rights under this Agreement without the prior written consent of Conrail, which shall not be unreasonably withheld."	1
F 3. "Industry shall not assign its rights under this Contract without prior written consent of Conrail. Such consent shall not be unreasonably withheld."	2
F 4. "This Contract shall be assigned to Conrail's successors or assigns."	1
F 5. "This agreement shall inure to the benefit of and be binding upon the heirs, administrators, executors, successors and assigns of the party hereto, but shall not be assigned or transferred in whole or in part by Customer without the prior written consent of Railroad and without an express assumption by such assignee or transferee of all past, present and future obligations of this Agreement; provided, however, Customer may assign or transfer its interest in this Agreement to any of its subsidiaries or affiliates without prior written consent."	3
TOTAL OF ALL RAILROADS MAY APPARENTLY ASSIGN PROVISION CONTRACTS:	13

G. <u>No Antiassignment Clause.</u>	91
TOTAL OF ALL CONTRACTS WITHOUT PERTINENT PROVISIONS:	91
H. <u>General Prohibition on Assignment, But Contemplates CSX/NS Or Similar Acquisition.</u>	
H 1. "In the event the Surface Transportation Board approves the Proposal of NS and CSX to acquire control of Conrail, this contract will be assumed pursuant to that transaction at that time."	1
H 2. Contract contains prohibition on assignment, but expressly contemplates CSX/NS acquisition: "Carrier (Conrail) and Shipper acknowledge that CSX Corporation ("CSX") and Norfolk Southern Corporation ("NS") have filed a joint application to the Surface Transportation Board to acquire control over the business and properties of Carrier, which application – if approved – will result in the business and properties of Carrier being divided and made available to CSX Transportation, Inc. and Norfolk Southern Railway Company, the railroad subsidiaries of CSX and NS. Shipper acknowledges and agrees that at any time within 180 days after the entry of a formal written order by the STB approving such transaction, this contract may, on written notice be reopened for renegotiation by CSX Transportation, Inc. or Norfolk Southern Railway Company, or both as the case may be . . . or by Shipper; and if no renegotiation is consummated within ninety days after such notice, this contract shall terminate immediately. ² "	14
H 3. "Neither this Agreement, nor the rights or obligations of either party hereunder, shall be assigned, sublet, subcontracted, or transferred or pledged, in whole or in part, without the prior written consent of the other party. In the event that any merger or reorganization involving Conrail, or any part of Conrail, with any competitor or competitors of Conrail is consummated during the term of this Agreement, the parties agree solely with respect to the movement of [commodity] hereunder, as follows: [specific provisions omitted as commercially sensitive]."	2
H 4. Contract provides for termination on or shortly after Control Date.	2
TOTAL OF ALL CSX/NS ACQUISITION PROVISION CONTRACTS:	19
I. <u>Miscellaneous Provisions</u>	
I 1. "Neither party shall assign or attempt to assign any of its rights or obligations hereunder without the prior written consent of the other, except that either party may assign its rights to receive	1

² This provision was included in contracts or amendments to contracts, the earliest execution date of which appears to be March 1997.

payments due under this Agreement.”	
I 2. General prohibition on assignment except that claims for money due from customer may be assigned to “a bank, trust company, or other financing institution.”	1
TOTAL OF ALL MISCELLANEOUS PROVISION CONTRACTS:	2
GRAND TOTAL OF ALL CONTRACTS:	821

* This number includes four contracts that permit the Customer to assign its interest in specified circumstances.

** This number includes one contract that permits the Customer to assign its interest in specified circumstances.

*** This number includes three contracts that permit the Customer to assign its interest in specified circumstances.

STB

FD-33388

5-12-98

I

ID-187477

MAY 12 1998

Part of
Public Record

NEW ORLEANS TRAIN CAR LEAKAGE FIRE LITIGATION
PLAINTIFF MANAGEMENT COMMITTEE

3748 North Causeway Blvd., Suite 301
Metairie, Louisiana 70002
(504) 838-8383

DAVID P. BAINS
JOSEPH M. BRUNO
HARRY F. CANTRELL
FRANK J. D'AMICO, JR.
CALVIN C. FAYARD, JR.
JACK W. HARANG
C. JOSEPH MURRAY
DAVID W. ROBISON
H. EDWARD SHERMAN
THOMAS L. SMITH
VERNON THOMAS
DA'LEEN JACOBS
T. ALLEN USRY
WENDELL GAUTHIER

HENRY T. DART
LIAISON COUNSEL

FEE RECEIVED

MAY 12 1998



SURFACE
TRANSPORTATION BOARD

May 4, 1998

Mr. Vernon Williams, Secretary
Surface Transportation Board
1925 K St., N.W.
Washington, D. C. 20423

Re: 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, DOT 3

ENTERED
Office of the Secretary
12
MAY 21 1998

Part of
Public Record

MAY 21 1998

ENTERED
Office of the Secretary

Dear Mr. Williams:

Enclosed please find our check in the amount of \$150.00 which was inadvertently omitted in our April 24th letter, a copy of which is enclosed, wherein we were filing our Motion For Reconsideration of the Surface Transportation Board's Order Denying Plaintiff Richard and Judith Bell and George Rigamer's Motion To Become Party of Record, in reference to the above captioned matter.

Thank you for your courtesy and consideration in this matter.

With regards, I am

Yours very truly,
PLAINTIFF MANAGEMENT COMMITTEE

HENRY T. DART, Liaison Counsel

HTD/bjt
encl.

cc: All counsel of record
Plaintiffs Management Committee

**NEW ORLEANS TRAIN CAR LEAKAGE FIRE LITIGATION
PLAINTIFF MANAGEMENT COMMITTEE**

3748 North Causeway Blvd., Suite 301
Metairie, Louisiana 70002
(504) 838-8383

DAVID P. BAINS
JOSEPH M. BRUNO
HARRY F. CANTRELL
FRANK J. D'AMICO, JR.
CALVIN C. FAYARD, JR.
JACK W. HARANG
C. JOSEPH MURRAY
DAVID W. ROBISON
H. EDWARD SHERMAN
THOMAS L. SMITH
VERNON THOMAS
DARLEEN JACOBS
T. ALLEN USRY
WENDELL GAUTHIER

HENRY T. DART
LIAISON COUNSEL

April 24, 1998

Mr. Vernon Williams, Secretary
Surface Transportation Board
1925 K St., N.W.
Washington, D. C. 20423

Re: 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, DOT 3

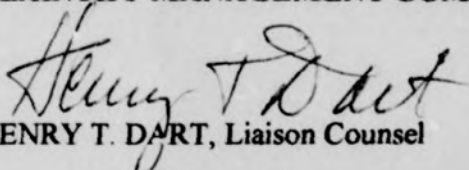
Dear Mr. Williams:

Enclosed herewith for filing, please find the original and 26 copies of our **Motion For Reconsideration of the Surface Transportation Board's Order Denying Plaintiff Richard and Judith Bell and George Rigamer's Motion To Become Party of Record**, in reference to the above captioned matter.

Please return a date stamped and conformed copy of the Motion to me in the enclosed self-address and postage paid envelope.

With regards, I am

Yours very truly,
PLAINTIFF MANAGEMENT COMMITTEE


HENRY T. DART, Liaison Counsel

HTD/bjt
encl.

cc: All counsel of record
Plaintiffs Management Committee

187477

NEW ORLEANS TRAIN CAR LEAKAGE FIRE LITIGATION
PLAINTIFF MANAGEMENT COMMITTEE

3748 North Causeway Blvd., Suite 301
Metairie, Louisiana 70002
(504) 838-8383

ENTERED
Office of the Secretary

12
MAY 21 1998

Part of
Public Record April 24, 1998

Mr. Vernon Williams, Secretary
Surface Transportation Board
1925 K St., N.W.
Washington, D. C. 20423

Re: 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, DOT 3

Dear Mr. Williams:

Enclosed herewith for filing, please find the original and 26 copies of our Motion For Reconsideration of the Surface Transportation Board's Order Denying Plaintiff Richard and Judith Bell and George Rigamer's Motion To Become Party of Record, in reference to the above captioned matter.

Please return a date stamped and conformed copy of the Motion to me in the enclosed self-address and postage paid envelope.

With regards, I am

FEE RECEIVED

MAY 12 1998

SURFACE
TRANSPORTATION BOARD

HTD/bjt
encl.

cc: All counsel of record
Plaintiff's Management Committee

Yours very truly,
PLAINTIFF MANAGEMENT COMMITTEE

Henry T. Dart
HENRY T. DART, Liaison Counsel

DAVID P. BAINS
JOSEPH M. BRUNO
HARRY F. CANTRELL
FRANK J. D'AMICO, JR.
CALVIN C. FAYARD, JR.
JACK W. HARANG
C. JOSEPH MURRAY
DAVID W. ROBISON
H. EDWARD SHERMAN
THOMAS L. SMITH
VERNON THOMAS
DARLEEN JACOBS
T. ALLEN USRY
WENDELL GAUTHIER

HENRY T. DART
LIAISON COUNSEL

ENTERED
Office of the Secretary

MAY 12 1998

Part of
Public Record

187477

FEE RECEIVED

DOT - 3

MAY 12 1998

ENTERED
Office of the Secretary

MAY 12 1998

Part of
Public Record

Before the
Surface Transportation Board
Washington, D. C.

SURFACE
TRANSPORTATION BOARD



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

Finance Docket No. 33388

**MOTION FOR RECONSIDERATION
OF THE SURFACE TRANSPORTATION BOARD'S ORDER
DENYING PLAINTIFFS RICHARD AND JUDITH BELL AND GEORGE RIGAMER'S
MOTION TO BECOME PARTY OF RECORD**

On April 15, 1998, this Board issued an order denying Plaintiffs' Motion to Become Party of Record, thereby denying Plaintiffs the opportunity to testify at the June 6th hearing regarding the proposed merger of CSX and Norfolk with Conrail. The Board found that movants "have made no showing why they could not have appeared prior to the October 21, 1997 deadline to testify and regarding plaintiffs' concerns about CSX's safety practices." Further, the Board found that movants "have not offered any evidence, other than bare allegations, of CSX's safety practices or policies", and that "this action will not significantly affect the quality of the human environment or the conservation of energy resources."

The Plaintiffs wish to clarify several statements made to the Board by CSX in its Opposition that have led to erroneous conclusions by the Board. First, CSX represented to the Board that the "judgment of the trial court" was vacated and set aside, and the Board interpreted this statement to mean "movant's jury verdict was vacated and set aside." CSX inaccurately states their position vis-a-vis their liability as a result of this litigation.

1. The jury verdict of \$2,500,000,000 against CSX remains intact. Only the Final Judgment on the Jury Verdict, an Order signed by the trial judge, was vacated. Louisiana Code of Civil Procedure requires the trial judge to execute such an order to begin post-trial motion practice. Vacating the formal order has no effect whatsoever on the \$2.5 billion liability that is being carried by CSX.

As pointed out in the Opposition, the jury verdict was rendered on September 9, 1997 against CSX. Shortly thereafter, the judge signed a Final Judgment on the Jury Verdict. While post-trial motions were filed, the defendants also filed an emergency writ to the Louisiana Supreme Court arguing that the Louisiana Code of Civil Procedure forbids a trial court from signing a Final Judgment on the issue of damages when all issues of liability for all the plaintiffs had not yet been determined.

The Supreme Court found that since specific causation for only 20 plaintiffs had been determined in the first trial and that claims of the remaining 8000 or so plaintiffs were yet to be heard, all liability issues had not been determined. Therefore, the Court vacated the Final Judgment and remanded the case to the trial court to continue the proceeding according to a plan not inconsistent with the Court's decision. However, as all parties agree on this critical point, the jury verdict is intact and will remain intact until it becomes subject to review by the trial court and then predictably the appeal court. It is only on a post-trial ruling by the trial court or on a ruling by the court of appeal that the jury verdict may be adjusted, though not necessarily so. Post-trial motion practice can begin only after the trial court signs a Final Judgment on the Jury Verdict.

2. Plaintiffs could not have testified before the deadline of October 21, 1997. The trial verdict was not a certainty until October 31, 1997.

CSX has not clearly stated the situation regarding plaintiffs testimony before the October 21 deadline. In the CSX litigation, the jury returned the verdict on September 9, 1997 after several months of trial. Shortly thereafter the court signed its Judgment on the Jury Verdict, on which the writ to the Louisiana Supreme Court, discussed above, was immediately taken. It was not until October 31, 1997, that the Louisiana Supreme Court issued its ruling leaving intact the jury verdict and only vacating the trial court's Judgment.

Plaintiffs did not appear prior to October 21, 1997 because of the uncertainty of the status of the case. While it is true that several additional months passed before plaintiffs submitted the request to the Board, we had no Notice of these deadlines. Again, because the Board is the arm of the federal Government responsible for determining the effect of this merger on the quality of human environment, plaintiffs submit that CSX had a duty to advise the Board, fully and accurately, of the company employees' and management's wanton and reckless acts and failure to act regarding CSX's safety practices that formed the basis for this enormous punitive verdict. CSX apologized at the end of the trial to the jury and to the community for its lack of safe operating practices, but these statements have proven only to be self-serving and insincere. Not one promise has been carried out; not one reparation made.

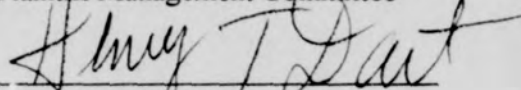
Movers urge the Board to reconsider its Order of April 15, 1998 denying their Motion to Become a Party of Record. Movers submit that their testimony presents a rare opportunity for the Board to gain first-hand knowledge regarding the impact on the human environment of the

expansion of a company such as CSX at this critical, decision-making time. We offer to the Board the entire trial transcript of testimony regarding the reckless safety procedures of CSX that led the jury - as allowed by law - to punish the company so severely. We will also testify that CSX had no emergency warning system or procedures in place to protect the community in emergencies such as the butadiene explosion, even though the rail yard is located adjacent to a resident area in New Orleans; that CSX gave no information to the residents that a carcinogen had permeated neighborhood and sewer system, permeated the streets, sidewalks, atmosphere and eventually exploded and burned for 36 hours; that CSX abandoned any clean-up efforts, leaving burned residue coating the area like a fine powder, and made no effort to advise to the residents regarding safety precautions for the adults and children to follow.

Conclusion

For these reasons, Plaintiffs Move this Board to Reconsider its Order of April 15, 1998, denying Plaintiffs Motion to Become a Party.

Respectfully submitted,
Plaintiff Management Committee



HENRY T. DART (Bar #4557)

Liaison Counsel

3748 N. Causeway Boulevard, Suite 301

Metairie, Louisiana 70002

(504) 838-8383

Plaintiffs Management Counsel:

Mr. David P. Bains, Esq.

Attorney at Law

2900 Ridgelake Drive, Suite 201

Metairie, Louisiana 70002

Phone: 835-5111

Fax: 835-2650

Mr. Joseph Bruno, Esq.

Bruno & Bruno

Attorney at Law

825 Baronne St.

New Orleans, Louisiana 70113

Phone: 525-1335

Fax: 581-1493

Mr. Harry E. Cantrell, Jr.
2900 Energy Centre
1100 Poydras Street
New Orleans, Louisiana 70163-2900
Phone: 585-7347
Fax: 585-7340

Mr. Frank J. D'Amico, Jr., Esq.
629 Barone St.
New Orleans, Louisiana 70130
Phone: 525-9561
Fax: 525-9522

Mr. Calvin C. Fayard, Jr., Esq.
Attorney at Law
519 Florida Boulevard
Denham Springs, Louisiana 70726
Phone: (504) 664-4193
Fax: 664-6925

Mr. Jack W. Harang, Esq.
Attorney At Law
3500 N. Hullen Street
Metairie, Louisiana 70002
Phone: 456-8658
Fax: 456-8641

Mr. C. Joseph Murray, Esq.
Murray Law Firm
3813 N. Causeway Blvd., #200
Metairie, Louisiana 70002
Phone: 838-6100
Fax: 838-9555

Mr. David W. Robinson, Esq.
Attorney at Law
P. O. Box 314
Baton Rouge, Louisiana 70821
Phone: (504) 924-4226
Fax: 924-2446

Mr. H. Edward Sherman, Esq.
Attorney at Law
1001 Howard Avenue
Suite 4201
New Orleans, Louisiana 70113
Phone: 522-5021
Fax: 529-5575

Mr. Thomas Smith, Esq.
Attorney at Law
FNBC Building, Suite 1040
210 Baronne Street
New Orleans, Louisiana 70112
Phone: 522-8858
Fax: 528-9399

Mr. Vernon P. Thomas, Esq.
Attorney at Law
1524 North Claiborne Ave.
New Orleans, Louisiana 70116
Phone: 944-9703
Fax: 945-6910

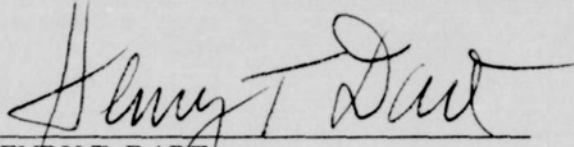
Mr. Wendell H. Gauthier, Esq.
3500 N. Hullen Street
Metairie, Louisiana 70002
Phone: 456-8600
Fax: 456-8624

Ms. Darleen Jacobs, Esq.
Attorney at Law
823 St. Louis Street
New Orleans, Louisiana 70112
Phone: 522-0155
Fax: 522-3819

Mr. T. Allen Usry, Esq.
Attorney at Law
2800 Veterans Boulevard
Metairie, Louisiana 70002
Phone: 833-4600
Fax: 833-4748

CERTIFICATE OF SERVICE

I DO HEREBY CERTIFY that I have on this 24th day of April, 1998, served a copy of the foregoing pleading on counsel for all parties to this proceeding, by mailing the same by United States mail, properly addressed, and first class postage prepaid.


HENRY T. DART