

Voting Conference, February 23, 2005

Statement of Paul Markoff
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CSX Corporation and CSX Transportation, Inc.,
Norfolk Southern Corporation and
Norfolk Southern Railway Company
— Control and Operating Leases/Agreements —
Conrail Inc. and Consolidated Rail Corporation
[General Oversight]
STB Finance Docket No. 33388 (Sub-No. 91)

Chairman Nober, Vice Chairman Buttrey, Commissioner Mulvey, good morning.

In the decision issued last October in the Conrail “General Oversight” proceeding, the Board concluded, as scheduled, the Conrail Transaction’s formal 5-year oversight process. In that decision, the Board considered, among other things, a number of claims that CSX and Norfolk Southern had failed to comply with various Board-imposed conditions. Two such claims were raised by the Department of Community and Economic Development on behalf of the Commonwealth of Pennsylvania and by the Philadelphia Industrial Development Corporation on behalf of the City of Philadelphia. The Department and the Corporation argued unsuccessfully that CSX and Norfolk Southern had violated the Board’s representations condition by failing to comply with the representations they had made in two 1997 letter agreements with the Commonwealth’s Governor and the City’s Mayor.

The Department has now filed, on behalf of the Commonwealth, a request for reconsideration. The Department contends that it was not given appropriate notice that the Board would address the issue of compliance with the two agreements. The Department further contends that the Board, in addressing that issue, violated Board precedent that holds that contractual disputes should be resolved in judicial proceedings before courts, not in administrative proceedings before the Board. The Department also asks that the Board clarify that the prior decision will not have preclusive effect in any future proceeding.

We recommend that the Board take action as follows. First, we recommend that the Board deny the request for reconsideration. The Department cannot fairly claim that it did not have notice of an issue that it raised. Nor can the Department fairly claim that the Board should have considered the issue but should not have decided whether the issue had merit. Furthermore, although the Department is right that disputes alleging breach of contract should be resolved in court, the claim that CSX and Norfolk Southern had violated the Board’s representations condition alleged breach of a Board-imposed

condition, not breach of contract. Second, we recommend that the Board clarify that the Board's ruling that CSX and Norfolk Southern have substantially honored their commitments for purposes of their compliance with a Board-imposed merger condition does not address the Department's state-law claim that CSX and Norfolk Southern have breached their contracts. However, whether the Board's ruling will have any preclusive effect in a future proceeding will need to be determined in that proceeding, not this one.

We would be happy to take any questions.