

STB FD 33388 (Sub 75) 9-21-98 I 191271

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September 21, 1998

ENTERED
Office of the Secretary

SEP 22 1998

Part of
Public Record

Sub 75



The Honorable Vernon A. Williams
Secretary
Surface Transportation Board
1925 K Street, N.W., Suite 715
Washington, DC 20423-0001

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

Dear Secretary Williams:

Enclosed for filing please find the original and 25 copies of the Highly Confidential and Public Versions of the Petition of New England Central Railroad, Inc. To Set Terms Of Trackage Rights Agreement or for Clarification. Also enclosed is a 3.5 inch diskette containing the filing in WordPerfect 5.1.

Please time and date stamp the extra copy of the filing and return it with our messenger.

If you have any questions, please contact me.

Respectfully submitted,

Karl Morell
Attorney for:
New England Central Railroad, Inc.

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PUBLIC VERSION

**ENTERED
Office of the Secretary**

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BEFORE THE

SURFACE TRANSPORTATION BOARD

STB FINANCE DOCKET NO. 33388

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

STB FINANCE DOCKET NO. 33388 (SUB-NO. 75)

**NEW ENGLAND CENTRAL RAILROAD, INC.
--TRackage RIGHTS--
CSX TRANSPORTATION, INC.**

**PETITION OF NEW ENGLAND CENTRAL RAILROAD, INC.
TO SET TERMS OF TRackage RIGHTS AGREEMENT
OR FOR CLARIFICATION**

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**Attorney for:
NEW ENGLAND CENTRAL
RAILROAD, INC.**

Dated: September 21, 1998

SURFACE TRANSPORTATION BOARD

STB FINANCE DOCKET NO. 33388

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

STB FINANCE DOCKET NO. 33388 (SUB-NO. 75)

**NEW ENGLAND CENTRAL RAILROAD, INC.
--TRackage RIGHTS--
CSX TRANSPORTATION, INC.**

**PETITION OF NEW ENGLAND CENTRAL RAILROAD, INC.
TO SET TERMS OF TRackage RIGHTS AGREEMENT
OR FOR CLARIFICATION**

New England Central Railroad, Inc. ("NECR"), pursuant to Decision No. 89 in this proceeding, served July 23, 1998 (the "Decision"), requests the Surface Transportation Board ("Board") to set one term of the trackage rights arrangement between NECR and CSX Transportation, Inc. ("CSXT") or, alternatively, to clarify one aspect of the condition granted NECR in the Decision.

In the Decision, the Board granted NECR's responsive application to the extent it sought trackage rights between Palmer, MA, and West Springfield, MA. The Board also ordered the parties to negotiate the details of the trackage rights arrangement and, if the negotiations prove

unsuccessful, to submit separate proposals to the Board by September 21, 1998. Decision at 105 and 180.

Since the Decision was served, the parties have actively negotiated the details of an agreement that would provide NECR trackage rights over the line CSXT is acquiring between Palmer and West Springfield in order to permit NECR to interchange traffic with its affiliate, the Connecticut Southern Railroad ("CSO"). As of this date, the parties are close to reaching an agreement on all but one aspect of the trackage rights arrangement.¹ The one major issue the parties are unable to agree on involves the extent to which the condition granted to NECR by the Board overrides a "blocking" provision in the agreement between CSO and Consolidated Rail Corporation ("CRC").

On September 21, 1996, CSO and CRC entered into an Agreement Relating to Acquisition and Operation of Rail Lines Known as the Connecticut Cluster (the "Agreement"), whereby CSO agreed to acquire from CRC certain rail lines in Connecticut and Massachusetts. Pertinent portions of the Agreement are attached as Exhibit 1. [[

¹ None of the important terms of an agreement have been finalized by the parties. For example, the trackage rights fee NECR will be required to pay, the operating windows NECR will be provided and CSXT's asserted need for a new interchange connection are still under negotiations. Because NECR is reasonably confident that these matters will be settled by the parties in the very near future, NECR is only seeking the assistance of the Board on the one matter as to which the parties are in irreconcilable disagreement. NECR believe that it would be a waste of Board resources to address issues that the parties most likely will resolve in the very near future. NECR, however, seeks a waiver of the September 21, 1998 deadline for bringing disputes to the Board in the event that the parties are unable to reach an agreement on other aspect of the trackage rights agreement.

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CSXT's most recent position in negotiations has been that the CSO blocking provision would continue to apply to all traffic interchanged between CSO and NECR pursuant to the condition granted by the Board, except for traffic that: (1) originates on the CSO and terminates on the NECR; (2) originates on the NECR and terminates on the CSO; and (3) CRC would not have been able to participate in other than over the Palmer to West Springfield line. NECR, on the other hand, has taken the position throughout the negotiations that the condition granted to NECR by the Board overrides the CSO blocking provision to the extent necessary to permit the interchange of any traffic originating or terminating on the CSO and moving over the NECR. In other words, NECR believes that the blocking provision should not apply to the three classes of traffic identified by CSXT as well as to traffic that: (1) originates on the CSO and is interchanged to NECR for a subsequent interchange with a third party carrier; and (2) is interchanged by a third party carrier to NECR for a subsequent interchange with CSO and is terminated on the CSO.² As is explained below, CSXT's interpretation would essentially negate the condition the Board granted to NECR, since there is little, if any, rail traffic available for movement between locations on the NECR and CSO rail systems.

NECR believes that CSXT's position concerning the blocking provision is inconsistent with the Board's Decision for at least three reasons. First, the Board granted NECR's responsive application to the extent it sought trackage rights between Palmer and West Springfield. In its

² NECR is not seeking a windfall for CSO through an override of the blocking provision. Rather, NECR merely seeks an override of the blocking provision to the extent necessary for NECR to perform the interchange operations with CSO contemplated by the Board. The CSO blocking provision would continue to apply to any traffic that is covered by the provision and interchanged directly by CSO with a carrier other than NECR and CSXT.

responsive application, NECR sought, among other conditions, "limited" trackage rights between Palmer and West Springfield, specifically for the purpose of interchanging traffic with CSO at West Springfield.³ In the Decision, the Board expressly granted NECR the trackage rights NECR requested between Palmer and West Springfield, without any limitations. Decision at 103-05 and 180. The trackage rights awarded by the Board authorize NECR to interchange any and all traffic moving between the two rail systems regardless of whether the traffic originates on the NECR or originates off-line and moves over the NECR for interchange with the CSO.

Second, the Board granted NECR's requested condition because of the Board's concern over the financial losses that NECR would suffer as a result of the CRC carve-up. In this regard, the Board specifically found that:

...NECR has shown that it will be financially harmed by this transaction. Moreover, it is clear that NECR provides important services both for its shippers and Amtrak. Accordingly, to ensure NECR's continued ability to provide these services, we will require applicants to grant NECR trackage rights as sought between Palmer, MA, and Springfield, MA. These trackage rights will facilitate through movements with NECR's affiliate, the Connecticut Southern Railroad.

Decision at 105.

In support of the conditions NECR requested, NECR submitted testimony to the Board that most of the new traffic it hoped to generate would originate in Canada and on the shortlines connected to the NECR. *See e.g.*, NECR-4 at 8 ("Most of these revenues would be generated from overhead traffic originating in Canada and moving to New York."). Also, NECR projected revenue gains of up to \$2 million if the condition granting it a connection to the CSO were granted. NECR-4, Carlstrom V.S. at 7. Accordingly, in granting NECR the trackage rights

³ NECR defined the term "limited" as including: (1) the right to operate trains over the lines described; and (2) the right to interchange with all carriers (including shortlines) at all junctions on the lines described. NECR-4 at 3.

connection to the CSO, the Board presumably was fully aware of the fact that most of the traffic that would move between the NECR and CSO would originate or terminate at points beyond the NECR.

The Board's stated purpose in awarding NECR trackage rights between Palmer and West Springfield was to enable NECR to recoup some of the significant revenue losses NECR will experience as result of the CRC carve-up. [[

]] As also explained by Mr.

Carlstrom, there is very little, if any, rail traffic available that would originate on the CSO and terminate on the NECR or originate on the NECR and terminate on the CSO. Consequently, CSXT's interpretation of the CSO blocking provision would effectively negate the trackage rights condition awarded to NECR by the Board and prevent NECR from recouping any of its lost revenues.

Third, CSXT's contention that the CSO "blocking" provision trumps the trackage rights condition granted to NECR is totally at odds with the position taken by CSXT throughout this proceeding. In the Primary Application, CSXT asked the Board to override any contractual provisions that would prohibit CRC from assigning assets to other persons. CSX/NS-18, Vol. 1 at 102-03. In responding to certain parties objecting to the contractual override, CSXT pointed out that:

The objections of these parties ignore the text and legislative history of the STB's statutory authorization to exercise 'exclusive and plenary' authority over rail combinations, and the provisions of the statute that exempt a party to an approved combination 'from all other law, including State and municipal law as necessary to let that rail carrier...carry out the transaction, hold, maintain, and operate property, and exercise control or franchises acquired through the transaction.' 49 U.S.C. § 11321 (a). The Board and its predecessor have ruled, and the Supreme Court has affirmed, that this language permits overriding of private contracts,

inasmuch as the reference 'to State law' includes the law providing for the enforcement of contracts. Norfolk and Western Ry. Co. v. American Train Dispatchers' Ass'n, 499 U.S. 117, 129-33 (1991); see also Schwabacher v. United States, 334 U.S. 182, 201 (1948).

CSX/NS-176 at 95 (footnote omitted).

CSXT went on to note that:

... Section 11321(a) 'enables the carriers to implement...not only the legal and financial, but also the operational aspects of the [merger] transaction upon consummation, without the need to apply to courts... for authority to do so.' ICC, Union Pacific Corporation, Union Pacific Railroad Company and Missouri Pacific Railroad Company -- Control -- Missouri -- Kansas -- Texas Railroad Company, 4 I.C.C. 2d 409, 1988 WL 224716, at *79 (May 13, 1988); see also BN/SF at 82 (noting self-executing nature of statute). The Board's power to override private contracts includes the power to override requirements in trackage rights agreements. UP/SP Decision No. 66, 1996 WL 742738 at *6 (December 30, 1996); UP/SP at 170 & n. 217.

Id. at 95-96. In addressing rail transportation contracts, CSXT claimed that "under its conditioning power, the Board may 'open up' contracts, relieving the shipper or both parties from the duty of observance." *Id.* at 102.

In the Decision, the Board for the most part agreed with CSXT's contentions and overrode contracts that prohibited CRC from unilaterally transferring or assigning its assets to other persons. Having obtained an override of contractual provisions that would have frustrated its authorized transaction, CSXT now takes the incongruent position that certain provisions in a CRC agreement to be assigned to CSXT are not overridden by the granting of NECR's responsive application and can frustrate the trackage rights condition the Board awarded to NECR.

Interestingly, in attempting to preclude any meaningful interchange of traffic between NECR and CSO, CSXT is taking the position that the Board's Decision does not override one provision of the CSO Agreement -- the blocking provision -- but that the Decision overrides another provision in the Agreement. The CSO Agreement contains an anti-assignment clause

which, with certain exceptions not applicable here, prevents either party from assigning the Agreement without the written consent of the other party. *See* Section 12.6 of the Agreement. Accordingly, absent an override of Section 12.6, CRC could not assign the Agreement to CSXT. An override of the blocking provision is no less necessary for the implementation of the condition granted to NECR than is an override of the anti-assignment clause for the implementation of the Primary Transaction. CSXT cannot have it both ways. The Decision either overrides both provisions or neither.

Finally, CSXT's position concerning the CSO blocking provision is internally inconsistent. CSXT has agreed that the trackage rights granted to NECR permit NECR to interchange with CSO traffic originating or terminating on the NECR, without any implication of the blocking provision. In other words, CSXT is apparently conceding a partial -- albeit meaningless -- override of the blocking provision. At the same time, CSXT has steadfastly maintained that the blocking provision remains in effect for any traffic interchanged between NECR and CSO that originates or terminates off-line to the NECR. There is no plausible rationale for the distinction drawn by CSXT, particularly in light of the unrestricted nature of the trackage rights granted to NECR by the Board. As a condition to the approval of the Primary Transaction, the Board granted NECR the right to interchange traffic with CSO, without any limitation as to the ultimate origin or destination of that traffic. Accordingly, as CSXT argued before the Board, any private contract that frustrates the Board's approval of NECR's responsive application is overridden to the extent necessary to implement the Board's approval. The extent of the override is dependent on the scope of the Board's approval and the extent to which a private contract frustrates that approval and not on the willingness of a party to an agreement to acquiesce in an override of the agreement.

As CSXT pointed out, the immunizing power of Section 11321 (a) is self-executing in nature. CSX/NS-176 at 96. The Board's predecessor, the Interstate Commerce Commission, explained that:

The immunizing power of section 11341 (a) is not limited to the financial and corporate aspects of the merger, but reaches all changes that logically flow from that transaction. The Commission, however, has never required control applicants to identify all anticipated changes that might affect rights under CBAs or the RLA. Such a requirement could negate many benefits from changes that only become apparent after consummation. Moreover, there is no legal requirement for identification because section 11341 (a) is 'self-executing,' that is, its immunizing power is effective when necessary to permit the carrying out of a project. We will not limit the use of section 11341 (a) by declaring that it is available only in circumstances identified prior to approval.

Finance Docket No. 32549, Burlington Northern Inc. and Burlington Northern Railroad

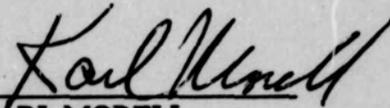
Company -- Control and Merger -- Santa Fe Pacific Corporation and The Atchison, Topeka and

Santa Fe Railway Company (not printed), Decision No. 38, served August 23, 1995.

CONCLUSION

For the foregoing reasons, NECR respectfully urges the Board to clarify its Decision or to otherwise require CSX to grant NECR trackage rights that provide that the blocking provision in the CSO Agreement is overridden to the extent necessary to permit NECR to interchange traffic with the CSO, regardless of whether that traffic originates or terminates on the NECR.

Respectfully submitted,



KARL MORELL

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(202) 638-3307

Attorney for:

**NEW ENGLAND CENTRAL
RAILROAD, INC.**

Dated: September 21, 1998

EXHIBIT 1

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

STB FINANCE DOCKET NO. 33388

**CSX CORPORATION AND CSX TRANSPORTATION INC.
NORFOLK SOUTHERN CORPORATION AND
NORFOLK SOUTHERN RAILWAY COMPANY
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CONRAIL INC. AND CONSOLIDATED RAIL CORPORATION**

STB FINANCE DOCKET NO. 33388 (SUB-NO. 75)

**NEW ENGLAND CENTRAL RAILROAD, INC.
--TRackage RIGHTS--
CSX TRANSPORTATION, INC.**

**VERIFIED STATEMENT
OF
DALE CARLSTROM**

My name is Dale Carlstrom. I am Senior Vice President and General Manager of New England Central Railroad, Inc. (NECR). I previously submitted a verified statement, dated October 16, 1997, and a rebuttal verified statement, dated January 9, 1998, in support of NECR's Responsive Application in this proceeding. My qualifications are set forth in my original verified statement. I am submitting this verified statement in support of NECR's Petition to Set Terms of Trackage Rights Agreement or for Clarification.

I have been in active negotiations with CSX Transportation, Inc. (CSXT) in an attempt to reach an agreement that would implement the trackage rights the Surface Transportation Board (Board) granted to NECR between Palmer and West Springfield, MA, in order to permit NECR

to interchange traffic with its affiliate, the Connecticut Southern Railroad (CSO). While the negotiations are still ongoing, it appears at this point that the parties are close to reaching an agreement on all but one issue. CSXT is insisting that the "blocking" provision in the agreement between CSO and Consolidated Rail Corporation (CRC) would continue to apply to any traffic interchanged between NECR and CSO that does not originate and terminate on the two railroads. According to CSXT, any traffic that originates beyond the NECR and moves over the NECR for an interchange with CSO would be subject to the "blocking" provision. Similarly, any traffic that originates on the CSO and is interchanged with the NECR for subsequent interchange with another carrier would be subject to the "blocking" provision.

Since the Board granted NECR the connection with CSO, NECR's marketing staff has actively pursued traffic that could be interchanged between the two carriers. As of this date, we have been unable to identify any traffic that would move by rail between locations on the two railroads. This is not surprising given the nature of the industries located on the two systems. Most of the customers on the CSO receive shipments of such commodities as paper, steel, lumber, plastics and chemicals. There are no producers of these commodities located directly on the NECR. Potential outbound shipments from the CSO consist of scrap paper and scrap metal. There are, however, no customers of these commodities located on the NECR.

To date we have been able to identify some raw material traffic originating in Canada and the western region of the United States that could move by rail via the NECR to customers on the CSO. We are also exploring the potential of moving scrap materials from the CSO to Canadian destinations. None of these movements would be possible, however, if, as CSXT insists, the "blocking" provisions in the CSO agreement apply to traffic originating or terminating at points beyond the NECR.

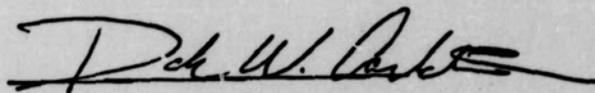
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In summary, the application of the "blocking" provision to traffic interchanged between NECR and CSO, as insisted on by CSXT, would totally negate the trackage rights the Board granted to NECR. We have been unable to identify any traffic that could economically move by rail between locations directly on the NECR and CSO and it is very unlikely that we will be successful in generating any such traffic. The imposition of the "blocking" provision to traffic interchanged between NECR and CSO that originates or terminates off of the NECR would economically block that traffic from moving.

VERIFICATION

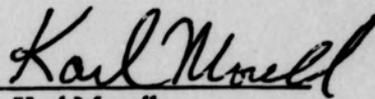
I, Dale Carlstrom, verify under penalty of perjury that the foregoing Verified Statement is true and correct to the best of my knowledge and belief.



Executed on September 18, 1998

CERTIFICATE OF SERVICE

I hereby certify that on this 21st day of September, 1998, I caused a copy of the Petition of New England Central Railroad, Inc. (NECR-10) to be served on counsel for Primary Applicants by Hand Delivery and on Administrative Law Judge Jacob Leventhal and all other Parties of Record by first class mail, postage prepaid.

A handwritten signature in cursive script that reads "Karl Morell". The signature is written in dark ink and is positioned above a horizontal line.

Karl Morell