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BEFORE THE
SURFACE TRANSPORTATION BOARD



FINANCE DOCKET NO. 33388 192177

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 (SUB-NO. 80)

ENTERED
Office of the Secretary

RESPONSIVE APPLICATION OF
WHEELING & LAKE ERIE RAILWAY COMPANY

NOV 10 1998

Part of
Public Record

WLE-11

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REPLY TO REPORT AND PROPOSAL OF NORFOLK SOUTHERN
REGARDING CONDITIONS IMPOSED BY DECISION NO. 89 CONCERNING
THE WHEELING & LAKE ERIE RAILWAY COMPANY

AND

RESPONSE TO STATUS REPORT FILED BY CSX
ON OCTOBER 21, 1998

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November 10, 1998

ORIGINAL

BEFORE THE
SURFACE TRANSPORTATION BOARD

FINANCE DOCKET NO. 33388

CSX CORPORATION AND CSX TRANSPORTATION, INC.,
NORFOLK SOUTHERN CORPORATION AND
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RESPONSIVE APPLICATION OF
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WLE-11

**REPLY TO REPORT AND PROPOSAL OF NORFOLK SOUTHERN
REGARDING CONDITIONS IMPOSED BY DECISION NO. 89 CONCERNING
THE WHEELING & LAKE ERIE RAILWAY COMPANY**

AND

**RESPONSE TO STATUS REPORT FILED BY CSX
ON OCTOBER 21, 1998**

Wheeling & Lake Erie Railway Company ("W&LE") hereby submits its response to the "Report and Proposal of Norfolk Southern Regarding Conditions Imposed by Decision No. 89 Concerning the Wheeling [&] Lake Erie Railway [Company]" (NS-71), and to CSX's letter of October 21, 1998, reporting to the Board the status of negotiations between CSX Corporation and CSX Transportation, Inc. (collectively, "CSX") and W&LE.

As the Board is now aware by virtue of the reports that various parties filed with the Board on October 21, 1998, W&LE,

Norfolk Southern Corporation and Norfolk Southern Railway Company (collectively, "NS"), and CSX have endeavored to conclude negotiations in accordance with Ordering Paragraph 68 of Decision No. 89.¹ W&LE has been able successfully to progress certain settlement negotiations with NS and CSX, and some of the arrangements necessary to implement the protective conditions extended to W&LE have either been achieved or the parties have reached suitable agreements in principle.

However, as W&LE-10 and NS-71 both reflect, W&LE and NS disagree fundamentally on two key issues -- (1) local access for W&LE in Toledo, and (2) the terms for the extension of the Huron Dock lease. In addition, W&LE has already reported to the Board that it has reached an impasse with CSX concerning -- (1) the scope of W&LE's competitive presence at Lima, and (2) W&LE's access to customers along CSX's line from Benwood to Brooklyn Junction. Finally, as is also noted in W&LE-10, the parties have failed to arrive at any specific terms on aggregate service, because of the preconditions (concerning Benwood-Brooklyn Junction service) that CSX and NS have placed upon any aggregate service arrangements.

NS-71 in many ways illustrates the nature of negotiations between W&LE and NS. Negotiations have been businesslike, but difficult. NS has not only embraced the most narrow interpretation

¹ As W&LE noted in W&LE-10, the scope of the protective relief extended to W&LE, and the motivations therefore, are more thoroughly set forth at pages 107-109 of the Board's Decision No. 89. Thus, W&LE again urges the Board to interpret and apply the provisions of Ordering Paragraph 68 consistent with the related discussion of W&LE at pages 107-109 of Decision No. 89.

of the Board's Ordering Paragraph 68, it also mis-characterizes the nature of the relief the Board extended to W&LE and does not properly portray certain requests contained in W&LE's responsive application, especially with respect to W&LE's access to Toledo and the extension of the Huron Dock lease. For these reasons, and to protect its interests and the essential services it provides, W&LE has chosen to respond.

W&LE is also responding in part to CSX's October 21st letter to the Board. However, considering the brevity of CSX's report of that date, and in light of CSX's own stated intention to respond substantively to W&LE-10 no later than November 10, 1998, W&LE asserts the right to respond more fully to CSX's substantive remarks at a later date, insofar as CSX could have and should have submitted such remarks on October 21st.

Background

The Board may well recall the compliment of protective relief W&LE sought in its responsive application (W&LE-4). W&LE requested, among other things, operating access to Chicago, Toledo, and Brooklyn Junction. It also requested additional access to stone producers and terminals in the Ohio area, and it urged the critical importance of an extension of its lease of and access to NS' Huron Dock facilities. In Decision No. 89, The Board denied large portions of what W&LE had requested. On the other hand, the Board did extend to W&LE certain protective conditions, partly in accordance with what W&LE had requested in W&LE-4.

But the Board did not undertake only a "cut and paste" approach to W&LE-4, and it did not fashion its conditions strictly upon that document. Instead, the Board was motivated primarily to preserve a viable and competitive W&LE -- a rail carrier that the Board has recognized provides essential services. Furthermore, the protective conditions it granted to W&LE reflect the Board's expressed desire to address the concerns of the State of Ohio, Ohio-based stone producers, certain captive shippers in West Virginia such as PPG Industries, the Stark Development Board/Neomodal, and U.S. Senators and Congressmen from Ohio, Pennsylvania, and West Virginia who voiced strong concerns over maintaining W&LE's viability. To interpret and apply the conditions the Board extended to W&LE without considering these additional factors (as NS attempts to do in NS-71) misses the point and unduly restrains not only the intended reach of the conditions but also W&LE's ability to persevere as a regional carrier.

Toledo, Ohio

In NS-71, NS says that it opposes W&LE's efforts to negotiate access (via reciprocal switch) to industry at Toledo. NS bases its position on the misleading assertion that W&LE requested (and got) only overhead trackage rights to Toledo, and that no local access of any kind is contemplated in the Board's Decision No. 89. What is true is that W&LE sought trackage rights between Bellevue and Toledo, but W&LE never construed such rights to preclude it from local access to industry once it reached Toledo.

(Indeed, as NS itself acknowledges, W&LE never requested "overhead" trackage rights.) Obviously, the difference between NS and W&LE -- and the point where NS mis-characterizes W&LE's prior request for relief -- concerns the extent to which W&LE trackage rights to Toledo were to be "overhead," as that term is used by the Board.

W&LE never specifically requested the right to serve all customers along NS' Bellevue - Toledo main line, but it has not relinquished its interest in establishing a competitive presence in Toledo (in order to make its trackage rights viable and the protective condition meaningful). In fact, W&LE intended for its proposed access to Toledo to permit it to compete for local traffic in that market. W&LE identified one particular industry to which it sought direct, physical access at Toledo -- British Petroleum's coke facility. NS seems to forget this point when it claims that, by granting W&LE access to Toledo only for the limited purposes of interchanging traffic there with Ann Arbor and "other railroads," W&LE got exactly what it wanted. In Decision No. 89, the Board said nothing about British Petroleum. It did, however, grant W&LE "access to Toledo," which, when applied to mean that W&LE was provided with local access, would obviate the need for any discussion on the subject of British Petroleum coke traffic.²

² W&LE notes that the Board has recently, in its Decision No. 96, addressed again the fact that the protective conditions it has extended to W&LE are intended to preserve W&LE as a viable and effective regional carrier. In that Decision, the Board recognizes that the conditions it has granted to W&LE must ensure the continuation of the essential services that W&LE provides. Also, W&LE stresses that it has engaged in a most reasonable approach to ensuring effective access to Toledo. Rather than insist upon direct physical access to a number of industries in

As mentioned above, NS makes much of the fact that W&LE did not explicitly describe access to local industry at Toledo in its responsive application (except for British Petroleum), and ignores the fact that the relief extended to W&LE addresses not only W&LE's responsive application, but also the concerns of various interested parties that support or today rely upon W&LE's essential services. Perhaps NS has lost sight of the fact that W&LE did not ask for operating rights to and from Lima. That condition is just another example of where the Board expanded and modified the scope of W&LE's relief beyond what W&LE sought in W&LE-4.

In light of the numerous parties who support W&LE and considering the Board's stated intent to preserve the essential services and future viability of W&LE, the Board clearly has it in its power to expand or otherwise modify the conditions that W&LE requested, and that is exactly what it did in the case of Toledo access. In any event, as W&LE has already pointed out in W&LE-10, it must be afforded access to local industry at Toledo in order to make effective and competitive its trackage rights service to this new market. NS cannot reasonably argue that W&LE's proposed trackage rights operations to and from Toledo -- if permitted solely for interchange with CN and Ann Arbor -- would adequately "prevent further erosion of W&LE's financial viability due to this transaction." See, Decision No. 89 at 109.

that market, W&LE has offered to compete in Toledo by way of much less intrusive reciprocal switch arrangements. See, W&LE-10 at 18.

On a related note, in NS-71, NS attempts to revise the Board's Decision No. 89 by prohibiting W&LE to connect with "other" carriers at Toledo. W&LE has taken the Board's Ordering Paragraph 68 at its plain meaning where it permits W&LE to interchange with Ann Arbor and "other railroads" at Toledo. Specifically, W&LE seeks fully to implement the Board's order by arranging to interchange with those railroads, including CSX and NS, that are now or may in the future be present at Toledo. (Among other things, interchange with NS and CSX at Toledo could improve service to many W&LE customers, including Neomodal for shipments to and from points west.) W&LE submits that, if the Board had intended for its order to preclude interchange with NS and CSX at Toledo, or if it intended for W&LE to interchange only with specific railroads, it would have identified by name each and every railroad with which W&LE was permitted to interchange, rather than employ the general term "other railroads." NS' efforts to limit W&LE's interchange options at Toledo should be rejected accordingly.

Finally, W&LE disagrees with NS' position that negotiations on W&LE's use of trackage at NS' Homestead (sometimes referred to as "Holmstead") Yard in Toledo and the construction of a diamond crossing at Bellevue, OH, are "other matters" which "do not relate to trackage rights access to Toledo." See, NS-71 at 4. To the contrary, these two negotiation topics are directly linked to W&LE's proposed trackage rights operations to and from Toledo, and must be viewed as a component of the Toledo-based conditions the Board granted to W&LE. While negotiations on these two topics

are moving forward, W&LE urges the Board to make clear that these issues are appropriate subjects to be considered by the Board, should an impasse later arise.

Huron Dock

The basic dispute between NS and W&LE concerning the extension of W&LE's lease of the Huron Dock revolves around the level of payments and the term of the extended lease. The full details of the lease extension have proven difficult to complete, because the Board's order mandated only an "extension," without mention of an appropriate extension term. W&LE seeks a fifteen-year extension of the pre-existing lease (with a subsequent renewal, at W&LE's option, for another 15-year term), with lease payments tied to the existing lease rate (with an annual adjustment for inflation). In NS-71, NS argues in favor of what is really a "re-negotiated lease" with terms and lease rates that differ significantly from those found in the existing lease. W&LE has already stated that it requires a lease term longer than the mere five years that NS is offering if W&LE's financial future is to be secure. See, W&LE-10 at 20 (footnote 11).

W&LE maintains that NS is not abiding by the terms of Decision No. 89, insofar as NS offers a re-negotiation of W&LE's use of the Huron Dock, rather than a true extension of the existing lease terms. Moreover, given how important W&LE's continued access

to the Huron Dock is to its future economic health,³ W&LE asserts that NS has in no way supported its position that W&LE should enjoy access to these facilities for only another five years, or that NS is free to impose commodity restrictions and tonnage surcharges on W&LE operations at the Huron Dock. [NS argues that W&LE should prepare itself to be deprived of the Huron Dock facilities within a five year period -- that is, to have enough time to "adjust to the post-Transaction operating environment" (NS-71 at 8) -- and it has engaged in negotiations with W&LE with this mindset.]

Finally, NS takes some exception to W&LE's request for an easing/recision of the commodities restrictions contained in the existing lease,⁴ because, as NS alleges, such proposals go "far beyond the 'extension' of the lease ordered by the Board." Id. In response, W&LE wishes to re-affirm its commitment to negotiations with NS on the Huron Dock and stresses that, if NS continues to insist upon newly-established (i.e., "higher") lease rates (rather than a true extension of the existing rentals with reasonable adjustments for inflation) and new tonnage clauses, then W&LE must

³ W&LE has already highlighted how its continued access to the Huron Dock is critical to W&LE financial future. See, W&LE-10 at 20. Thus, W&LE cannot stress enough the importance of a long-term arrangement for the use of this facility.

⁴ As NS is very well aware, the commodities restrictions and tonnage surcharges effectively permit it to "regulate" the level of competition W&LE will be able to offer at the Huron Dock post-transaction, when W&LE-NS competition will assuredly intensify. Naturally, competition is equally the motivation behind NS' efforts to have the Board impose the shortest possible extension of W&LE's lease. Once W&LE is removed from Huron Dock, NS expects that it will no longer face competition from W&LE at any Lake Erie transload facility.

obtain concessions with respect to the commodity restrictions NS had previously imposed.

Aggregate Service

As NS accurately reports in NS-71, it has discussed other arrangements such as "'allowing W&LE to provide service to aggregate shippers,' but [the parties] have not yet reached agreement." Id. at 4. W&LE wishes again to make clear that NS and CSX have treated the aggregate service matter as a mutually exclusive option to W&LE's concluding arrangements with CSX on Benwood-Brooklyn Junction service. See, W&LE-10 at 26-29. Thus, W&LE requests that the Board make clear to NS and CSX that it must explore aggregate service arrangements with W&LE regardless of what progress W&LE may achieve with CSX concerning the Benwood-Brooklyn Junction service issue. The Board must make clear that the aggregate service and Benwood-Brooklyn Junction issues are not mutually exclusive negotiating subjects, and that progress on one should not and must not preclude progress on the other.

CSX Report

CSX's untitled status report letter filed with the Board on October 21st offers a very abbreviated synopsis of what progress CSX believes it has made with W&LE concerning negotiations mandated under the Board's Ordering Paragraph 68 of Decision No. 89. Most of that short letter deals with CSX's negotiations concerning W&LE's operations to and from Lima, OH, but CSX also indicates that

it is discussing with W&LE "mutually beneficial arrangements for other service to shippers." CSX October 21st Letter at 2.

CSX subsequently issued a letter, dated October 23, 1998, wherein CSX's counsel expressed "surprise" concerning the contents of W&LE-10 and W&LE's reports of certain negotiating impasses (which CSX's counsel seems to have thought had already been resolved). In its October 23rd letter, CSX also asserted the right to reply to W&LE-10. Because of the serious nature of the comments contained in CSX's October 23rd letter to the Board, and because CSX specifically requested certain clarifications from W&LE, W&LE promptly responded to that document with a letter dated October 30, 1998. W&LE's letter of October 30 did not represent (and should not have been interpreted by any party to be) W&LE's reply to CSX's status report letter of October 21st.

By comparison, CSX's report on the status of negotiations with W&LE was far less comprehensive than was NS' or W&LE's October 21st filings, and its brevity surprised W&LE. In fact, W&LE believes that CSX's report falls short of what the Board expected to receive from each of the negotiating parties on October 21st. W&LE anticipates, given CSX's stated intent to file a reply to W&LE-10, that CSX will, for the first time (unlike NS), submit substantive comments on many issues that could have and should have been contained in CSX's October 21st report to the Board. Rather than try to anticipate what CSX is likely to include in its "reply" (a document that W&LE expects will more closely parallel what both NS and W&LE submitted to the Board on October 21st), W&LE hereby

informs the Board that it will respond to CSX's comments within ten days. Unless W&LE is afforded the opportunity to respond to CSX's "reply" at a later date, it will be unfairly prejudiced by CSX's tactic of withholding both its substantive comments concerning the progress of negotiations (and those impasses that remain) and its proposals for their full resolution until much later in the subject proceeding.

Conclusion

For the reasons set forth above and in W&LE-10, the Board should approve and impose the terms proposed by W&LE for the conditions contained in Ordering Paragraph 68 of Decision No. 89. Further, for the reasons set forth above and in W&LE-10, W&LE requests the Board to intervene and offer clarification and further instruction to the parties in those instances where negotiations have failed to progress or where differing interpretations of the Board's orders have resulted in impasse.

Respectfully submitted,

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DATED: November 10, 1998

CERTIFICATE OF SERVICE

I hereby certify that on this 10th day of November, 1998, I have served the foregoing W&LE-11 by hand delivery on the following counsel for Norfolk Southern Corporation and Norfolk Southern Railway Company and CSX Corporation and CSX Transportation, Inc.:

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BEFORE THE
SURFACE TRANSPORTATION BOARD

FINANCE DOCKET NO. 33388



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

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**RESPONSE OF APPLICANTS
CSX CORPORATION AND CSX TRANSPORTATION, INC.
TO PETITION OF PROVIDENCE AND WORCESTER RAILROAD COMPANY
FOR CLARIFICATION OF DECISION NO. 89**

Pursuant to 49 C.F.R. § 1104.13, Applicants CSX Corporation and CSX Transportation, Inc. (collectively, "CSX") hereby respond to the undesignated "Petition of Providence and Worcester Railroad Company for Clarification of Decision No. 89," filed on October 26, 1998 (the "Petition").

BACKGROUND

Despite having received the benefit of a valuable agreement for commercial rights¹ with CSX, for which P&W promised unconditional support for CSX's Application in this matter -- which contained a prayer for overriding any and all provisions which might prevent CSX from obtaining the right to operate and use the assets of Conrail allocated to it for operation "as fully as CRC [Conrail] itself had possessed the right to use them,"² -- P&W continues its efforts to force a sale of the "New Haven Station" to it.

In a variety of forums, P&W has sought to claim that the filing of the Application in this case, or at least the consummation of the "Split" of Conrail's assets upon the "Closing Date" referred to in the Transaction Agreement, triggered or will trigger P&W's right to carry out that forced sale and purchase under an order of the Special Court entered in 1982. In 1997, P&W filed a civil action in the United States District Court for the District of Columbia, as successor to the Special Court, seeking declaratory relief that it then had the right to purchase the properties; that action was dismissed as premature. P&W also sought a necessary certification from the Federal Railroad Administration (the "FRA"), to which the General Counsel of the FRA responded by expressing his opinion

¹ P&W highly praised the benefits it obtained from the August 6, 1997 agreement. In a filing with the Board in this case, it stated that: "P&W is confident that its agreement with CSX will enable P&W to offer a competitive link between New York and New England." P&W-3, filed December 9, 1997, at 3.

² CSX/NS-18, Application, Vol. 1 at 102.

that the Transaction contemplated by the Application in this proceeding did not trigger P&W's right to purchase at all. P&W also participated in the proceedings in this case before the Board. It submitted, on October 17, 1997, a statement (undesigned) of its views as to its rights to the New Haven Station and of its notion that its rights were not to be overridden by the Board. On December 9, 1997, it submitted a rebuttal (P&W-3) to a responsive application which sought rights over routes where P&W itself had trackage rights. On February 23, 1998, it submitted a brief which, among other things, reiterated its position on its rights to the New Haven Station and as to the alleged lack of authority in the Board to affect those rights under 49 U.S.C. § 11321 and the alleged inappropriateness of action by the Board.

The Board, in Decision No. 89, served July 23, 1998, expressed skepticism about whether the transaction contemplated by the Application in this matter even implicated P&W's rights under the 1982 order and whether P&W had retained its rights despite the August 6, 1997 agreement with CSX. Decision No. 96, at 105-06. However, the Board refrained from making any decision on these points, and said the following:

Rather, we will specifically find that applicants' continued ownership and use of New Haven station is an integral and necessary part of the underlying transaction before us, and that any rights that P&W might otherwise have been found to have under the Order, must therefore be preempted under 49 U.S.C. 11321(a). As applicants have explained, a core purpose of that immunity provision is that a successor carrier must be allowed to operate property acquired through a Board-approved transaction.

Id. at 106.

After filing a Petition for a Stay, which the Board denied in Decision No. 92, served August 24, 1998, P&W continued its multi-forum activities. It sought what was essentially judicial review of the Board's order through a filing of a civil action in the United States District Court for the District of Columbia, as successor to the Special Court. Providence and Worcester Railroad Co. v. Consolidated Rail Corp., et al., filed September 15, 1998, No. 98-2195-SS. P&W also filed a Petition for Review in the United States Court of Appeals for the First Circuit raising the issue seeking "reversal of that portion of the Board's Order which preempts petitioner's exclusive right of succession to serve the rail properties in question." Providence and Worcester Railroad Co. v. STB, Petition for Review at 2, 1st Cir., No. 98-2022, filed September 16, 1998. A preliminary injunction freezing the ownership and possession of the New Haven properties was sought by P&W in its action in the United States District Court; on October 16, 1998, Judge Sporkin denied the preliminary injunction, instructing P&W to apply for a stay in the United States Court of Appeals for the Second Circuit.³ CSX was directed by the District Court not to consummate the Transaction, at least insofar as it affected the New Haven properties at issue, except on two weeks' prior notice to the Court and P&W.

³ The Board has filed a motion in the United States Court of Appeals for the First Circuit to transfer P&W's Petition for Review to that court under 28 U.S.C. § 2112 in.

Continuing its multi-forum activities, P&W now seeks an interpretation by the Board as to whether the Board's Section 11321 override (set forth at page 175 of Decision No. 89) is intended to completely annihilate the order of the Special Court or whether it simply makes it inapplicable to the Transaction described in the Application, in effect putting CSX into the shoes of Conrail with respect to the order of the Special Court in question.

DISCUSSION

The Board presumably knows best what its override order means, but since P&W's stated reason for the filing of its Petition is an alleged ambiguity on the part of representations made by CSX, CSX will respectfully state its views as to how the order should be construed.⁴

As prayed for by CSX, and as granted by the Board, under the override CSX may conduct operations of Conrail's routes and may use, operate, perform and enjoy other assets of Conrail allocated for operation by it, "to the same extent as CRC itself could, notwithstanding any provision of any law, agreement, order, document or otherwise,

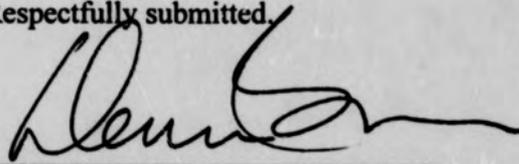
⁴ CSX believes that it has never stated a contrary view to that expressed herein. Indeed, in its Brief (undesignated) filed February 23, 1998, P&W correctly characterized CSX's position as that it "should be allowed to step into the shoes of Conrail without triggering the Order of the Special Court, and that P&W's rights would not be triggered absent some future transaction or event." Brief at 6.

purporting to limit or prohibit CRC's assignment" of the pertinent routes, rights or assets.

See paragraphs 9 and 10, page 175, Decision No. 89.

Thus, CSX's position is that the effect of the override granted by the Board is that CSX will step into and stand in the shoes of Conrail, and that, while as a result of the override the purchase right provided in the order of the Special Court will not be capable of exercise in connection with the Transaction contemplated by the present Application, the order will be applicable to CSX after the consummation of the Transaction as fully as it was applicable to Conrail.

Respectfully submitted,



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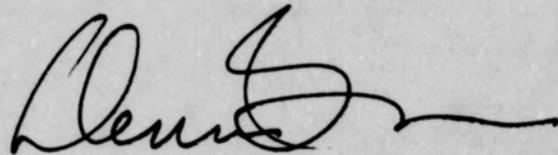
*Counsel for CSX Corporation
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November 10, 1998

. . . .

CERTIFICATE OF SERVICE

I, Dennis G. Lyons, certify that on November 10, 1998, I have caused to be served a true and correct copy of the foregoing CSX-165, "Response of Applicants CSX Corporation and CSX Transportation, Inc. to Petition of Providence and Worcester Railroad Company for Clarification of Decision No. 89" to all parties on the Service List in Finance Docket No. 33388, by first-class mail, postage prepaid, or by more expeditious means.



DENNIS G. LYONS

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RESPONSE OF CSX CORPORATION
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PETITION OF WHEELING & LAKE ERIE RAILWAY COMPANY
FOR CLARIFICATION AND FOR FURTHER INSTRUCTION

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November 10, 1998

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NORFOLK SOUTHERN CORPORATION AND
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RESPONSE OF CSX CORPORATION
AND CSX TRANSPORTATION, INC. TO
PETITION OF WHEELING & LAKE ERIE RAILWAY COMPANY
FOR CLARIFICATION AND FURTHER INSTRUCTION

CSX Corporation and CSX Transportation, Inc. ("CSXT") (collectively, "CSX") hereby submit this response to Wheeling & Lake Erie Railway Company's ("W&LE") Petition for Clarification and For Further Instruction (W&LE-10,) (hereinafter referred to as "October 21 Petition"). In that pleading W&LE petitioned the Board "to clarify, provide further instruction and confirm the scope of the protective conditions" that the Board imposed on behalf of W&LE in STB Finance Docket No. 33388, CSX Corporation, et al. - Control and Operating Leases/Agreements - Conrail, Inc. et al., (Decision No. 89) (served July 23, 1998). WLE-10 at 1. CSX respectfully submits that W&LE's October 21 Petition must be denied for two reasons.

First, W&LE is not in fact seeking "clarification" of Decision No. 89. Instead, what W&LE is really seeking is to expand the scope of the Board's decision. It asks the Board to

reconsider and impose additional conditions on CSX. With respect to the Board's order providing W&LE overhead trackage rights to Lima, Ohio, W&LE asks the Board to impose additional local rights that not only go beyond the condition that the Board imposed in Decision No. 89, but beyond anything that W&LE initially asked for in its responsive application. Such new conditions can only properly be sought through a petition to reopen (with the required showings), not through a petition for clarification. Similarly, with respect to the Board's order instructing the parties to "negotiate concerning mutually beneficial arrangements," W&LE asks the Board to construe its order as including conditions that have no benefit to CSX, including certain conditions previously requested by other parties that the Board specifically denied. As such, W&LE's pleading is not a petition for clarification, but an untimely petition for reconsideration.

Second, even if the Board were to view the October 21 Petition as seeking clarification of Decision No. 89, there is no basis for granting the relief sought by W&LE. The language of Decision No. 89 is plain and requires no clarification. The Board ordered overhead trackage rights to Lima -- not local trackage rights and not reciprocal switching. As to anything besides the overhead trackage rights to Toledo, Lima, and Huron Dock, the Board required the parties to "negotiate . . . concerning mutually beneficial arrangements;" it did not require CSX to enter into arrangements of no benefit to it. The relief sought by W&LE is overreaching and should be denied.

BACKGROUND

W&LE's responsive application (WLE-4) in this proceeding vastly overestimated the financial impact that the Transaction would have on W&LE and sought a panoply of

conditions that were largely unrelated to any allegedly anti-competitive impacts of the Transaction. W&LE claimed potential yearly gross revenue losses of between \$12 and \$15 million, in sharp contrast to applicants' estimate that W&LE could potentially lose approximately \$1.4 million per year from increased competition as a result of the Transaction. Relying on its inflated projections, W&LE claimed that its financial viability would be seriously threatened and that approval of the Transaction without the imposition of numerous measures proposed by W&LE would result in the bankruptcy and ultimate demise of W&LE and thus loss of "essential services" for W&LE's shippers. Against this dire background, W&LE urged the Board to impose conditions designed, not to alleviate direct anti-competitive effects of that Transaction, but in effect to subsidize W&LE's operations. In the words of W&LE Chairman and CEO, Larry Parsons, W&LE sought:

(1) Haulage and trackage rights to Chicago: to Belt Railway of Chicago and rights for interchange with all carriers; (2) Haulage and trackage rights from Bellevue to Toledo, Ohio; (3) Lease to own the Huron Branch (Shinrock to Huron) and Huron Dock on Lake Erie; (4) Trackage rights from Benwood to Brooklyn Junction and its yard facilities for commercial access to captive shippers PPG and Bayer; (5) Stone traffic access: Bucyrus, Alliance, Redlands, Spore, Wooster, Macedonia, Twinsburg and Ravenna, Ohio; (6) Haulage and Trackage rights with commercial access to Wheeling Pittsburgh Steel at Allenport, Pa; (7) Haulage and trackage Rights on CSX New Castle Subdivision for commercial access to Ohio Edison Power plant at Niles, Ohio and to Erie, Pennsylvania for interchange to the Buffalo & Pittsburgh; (8) Lease to own the Randall Secondary from Cleveland, MP 2.5 to Mantua, MP 27.5; (9) Trackage rights and commercial access to Reserve Iron & Metal (2 to 1 shipper); (10) Trackage rights and commercial access to Weirton Steel; (11) Reverse Joint Facility maintenance obligations; (12) Guarantee of fairness and nondiscriminatory treatment on any haulage and trackage rights granted.

WLE-4, Parsons V.S. at 33-34.

In Decision No. 89, the Board found that W&LE's projections of traffic revenue losses of \$12-\$15 million were significantly overstated; that the annual traffic diversion that W&LE would probably experience as a result of the transaction would more likely represent between \$1.4 and \$3.0 million in lost revenue; and that much of that loss would be due to new, more efficient routings rather than to any enhancement of applicants' market power. Decision No. 89 at 108. Moreover, the Board found that the extensive conditions that W&LE sought were "a substantial overreach both in terms of geographic scope and financial impact" and that W&LE certainly "has not justified \$11 million of new traffic" or "such intrusive conditions as permitting it to extend its operation over applicants' lines all the way to Chicago." *Id.* at 109. However, in light of W&LE's current financial condition (unrelated to the Transaction), coupled with the potential revenue losses, the Board determined to grant certain rights to W&LE:

... We will require applicants to provide: (a) overhead haulage or trackage rights access to Toledo, OH, with connections to the Ann Arbor Railroad and other railroads there; (b) an extension of W&LE's lease for the Huron Docks and trackage rights access to the Huron Docks over NS' Huron Branch; (c) overhead haulage or trackage rights to Lima, OH, including a connection to the Indiana and Ohio Railroad. Further, we will require that applicants negotiate with W&LE concerning mutually beneficial arrangements, including allowing W&LE to provide service to aggregate shippers or to serve shippers along CSX's main line from Benwood to Brooklyn Junction, WV. If these parties are unable to agree on a solution with regards to items (a), (b) and (c) within 90 days of the service date of this decision, we will institute expedited proceedings to resolve these matters. Finally, we expect the parties to inform us of any mutually beneficial arrangements that they have reached.

Decision No. 89 at 109.

On August 12, 1998, W&LE filed a timely petition for reconsideration of the Board's decision in which it asked the Board to declare that it had erroneously understated the magnitude of W&LE's projected revenue losses, assertedly because the amount of the revenue losses would be critical to negotiations with the applicants. W&LE asked the Board to rule upon its petition "only in the event that W&LE was unable to reach a suitable agreement within the dictates of the Board's Decision No. 89" in which case "[r]e-assessment of the magnitude of the loss would then be relevant and critically important should the Board be called upon to set the terms for the protective conditions imposed." WLE-9 at 4. No request was made for additional conditions or for modification of the conditions granted by Decision No. 89. The Board denied the petition on the ground that the actual amount of the traffic loss "makes no material difference" as it was not the Board's intention to indemnify W&LE against these losses dollar for dollar. Decision No. 96 at 18 (served Oct. 19, 1998).

Following the Board's issuance of Decision No. 89, sometime after October 2, 1998, W&LE elected to reach Lima by way of trackage rights over a CSX route from Carey, OH to Lima via Upper Sandusky rather than over an NS line and CSX did not object.¹ Accordingly, CSX representatives entered into good faith negotiations with W&LE to establish satisfactory terms for a trackage rights agreement. Upon resolution of all terms covering the grant of overhead trackage rights to Lima, on October 20, 1998, CSX submitted a formal trackage rights

¹ As W&LE elected to reach Toledo by way of trackage rights over NS, issues raised by W&LE concerning arrangements for W&LE's trackage rights to Toledo and issues related to Huron Docks, which is also served by way of NS, are being addressed by NS. In this pleading, CSX will address those issues raised in the W&LE petition that concern W&LE's trackage rights to Lima and negotiations concerning mutually beneficially arrangements, including service to shippers on CSXT's main line between Benwood and Brooklyn Junction, WV.

agreement to W&LE for execution, one day before the October 21, 1998 deadline for the parties to notify the Board if they could not resolve this matter.

CSX representatives also entered into good faith negotiations with W&LE concerning mutually beneficial arrangements, and on October 16, 1998, submitted to W&LE for its consideration a number of proposals. Among these (subject to shipper consent) were proposals concerning movements involving a shipper on the Benwood-Brooklyn Junction line. The details of that proposal cannot be disclosed in the public version of this filing because the proposal is part of ongoing settlement negotiations and has substantial commercial ramifications.

W&LE brushed off CSX's October 16 proposal of mutually beneficial arrangements, saying that while W&LE was "more than willing to discuss any 'mutually beneficial' issues," it wanted one of the list of things it had asked for in its responsive application² but which the Board had quite clearly not given it in Decision No.89: "we believe the STB granted W&LE local rights from Benwood to Brooklyn Junction."³ As to the trackage rights to Lima, W&LE did not execute the overhead trackage rights agreement that had been negotiated by the parties and proffered by CSX. Instead it filed its October 21 Petition in which it alleged that negotiations with CSX were at an impasse because the parties fundamentally disagree concerning the scope of W&LE's access to Lima and the Board's intentions in requiring the parties to negotiate mutually beneficial arrangements. WLE-10 at 4-5. W&LE now claims that in addition to the overhead trackage rights to Lima with rights to interchange with IORY, the

² See item (4) of the quote from WLE-4 on page 3 above.

³ Letter of October 16, 1998, from W&LE's Larry Parsons to CSX's Christopher P. Jenkins ("Parsons October 16 letter"), attached as Exhibit 1 .

Board also intended to include rights to interchange with R. J. Corman Railroad ("RJC")⁴ and trackage rights to Clark Oil Refinery and to the BP refining complex at Lima, access to other industries at Lima through the imposition of reciprocal switching at an arbitrary figure of \$184 per car⁵ and the designation of yard track and related facilities for the assembly and staging of W&LE traffic at Lima. WLE-10 at 23-24.

W&LE also contends in its October 21 Petition that that portion of the Board's order in Decision No. 89 requiring applicants to "negotiate with W&LE concerning mutually beneficial arrangements, including allowing W&LE to provide service to aggregate shippers or to serve shippers along CSX's main line from Benwood to Brooklyn Junction, WV" (Decision No. 89 at 109) should be construed as a direct order to "conclude" such arrangements and that the arrangements must include W&LE service to aggregates producers and W&LE local trackage rights on the Benwood-Brooklyn Junction line, even though no benefits to CSX flowing from either arrangement have been identified. WLE-10 at 25. Moreover, W&LE contends that any such arrangements must also address all issues raised by PPG Industries and Bayer Corporation, shippers located on the Benwood-Brooklyn Junction line, despite the fact that those parties' requests for relief were expressly denied by the Board in Decisions Nos. 89 and 96. WLE-10 at 29. Finally, in its October 21 Petition W&LE again dismisses CSX's October 16 proposal as to

⁴ CSX opposes W&LE's request for additional trackage rights to interchange with RJC at Lima, as well as its requests for trackage rights to local industries. There was no request for interconnection with RJC in W&LE's responsive application and there is nothing in the record that would support such a grant.

⁵ W&LE has presented no evidence to support the \$184 figure.

mutually beneficial arrangements on the ground that while W&LE "welcomes CSX's proposal, this proposal does not satisfy the Board's directions." WLE-10 at 27-28.

In short, W&LE is willing to accept nothing less than full access to industries at Lima and unrestricted trackage rights to CSX's Benwood to Brooklyn Junction line, including direct access to PPG, Bayer and all other shippers on the line, in addition to expanded service access to the aggregates shippers. W&LE asks the Board to "clarify" that it intended all that W&LE now seeks.

ARGUMENT

I. **W&LE'S PETITION FOR CLARIFICATION IMPROPERLY SEEKS RELIEF THAT CAN ONLY BE GRANTED THROUGH A PETITION TO REOPEN OR FOR RECONSIDERATION**

A. **W&LE Seeks Rights at Lima That Not Only Go Beyond the Board's Order, But Also Beyond Anything That W&LE Sought in Its Responsive Application and Request for Conditions**

W&LE's responsive application and request for conditions did not seek access to Lima, as W&LE acknowledges, but rather sought a haulage agreement, with underlying trackage rights, from Bellevue to Toledo, Ohio, for an interchange with AA, CN and IORY. WLE-4, Wait V.S. at 74. The purported purpose of this request was to enhance the scope of W&LE's rail network through the addition of new connections with other rail carriers. As W&LE's operating witness testified:

By the addition of a series of relatively short and simple connections, the W&LE will have the ability to bring many efficiencies to rail transportation in this region. In addition, W&LE seeks the ability to establish new interchanges that will develop traffic patterns that do not exist today. With a location central to a geographic area that includes the heart of Conrail, the W&LE needs to reach out to connections that make sense for our customers, and to provide a *real* transportation alternative.

WLE-4, Wait V.S. at 68 (emphasis in original). W&LE's Vice President of Marketing and Sales also emphasized the importance to W&LE of reaching new connections:

In short, we have the infrastructure and ability to remain a meaningful and competitive railroad in our region with the addition of the relatively modest connections outlined in Messrs. Parsons and Wait's statements.

WLE-4, Thompson V.S. at 92.

In analyzing the "corrections" to the "anti-competitive aspects of the NS/CR combination" that would be necessary to keep W&LE viable, Mr. Thompson stated that W&LE's rationale was to "match the conditions to presently identifiable W&LE traffic flows to preserve competitive alternatives, or to provide operational flexibility which may, in part help preserve W&LE's viability." *Id.* at 97. To that end, he testified that the haulage and underlying trackage rights to Toledo "would replace a connection lost in the Conrail realignment" and "provide a new outlet for inbound and outbound traffic to Canadian National, Ann Arbor and the Indiana and Ohio Railroad." *Id.* at 98. Thus, in its responsive application W&LE's emphasis as to reaching Toledo was unequivocally on gaining access to AA, CN and IORY, thus expanding the reach of its service network for its existing customers.

The Board granted that request by requiring the applicants to provide overhead trackage rights to Toledo with connections to AA and other railroads. Contrary to the apparent understanding of W&LE, there is no available interchange with IORY at Toledo; thus, although the Board could have simply granted trackage rights to Toledo for interchange with the carriers there, the Board granted overhead trackage rights to Lima to enable W&LE to connect with IORY. W&LE elected to reach Lima via trackage rights over a CSX line between Carey, Ohio

and Lima via Upper Sandusky because that line is considerably less congested than the alternative NS Bellevue-Fostoria-Lima route. See Parsons October 16 Letter. Now, however, W&LE claims that it cannot "derive sufficient economic benefit by merely forging a connection with IORY" (WLE-10 at 22) and therefore admittedly is seeking additional conditions:

W&LE requests that the Board extend the scope of the relief at Lima to include direct access to the BP properties and refining complex and to the Clark Oil Refinery at Lima and interchange with the R.J. Corman Railroad Co. – Western Ohio Line (hereafter, "RJC"), a short line rail carrier also serving the Lima area.

WLE-10 at 21 (emphasis added).

W&LE's request is unfounded. There was no request for interchange with RJC or for trackage rights to Clark Oil Refinery anywhere in W&LE's responsive application; nor was there any request for trackage rights to local shippers at Lima in the responsive application, nor any discussion of such access in the accompanying testimony of W&LE's marketing and operating witnesses.⁶ W&LE made clear in its responsive application that it sought to reach IORY through overhead trackage rights. In fact, W&LE took great pains to show that its requests for access to AA, CN and IORY were to preserve service for existing

⁶ In its responsive application, W&LE did seek access to BP for a specific movement of coke to Cressup, WV. WLE-4, Wait V.S. at 74. Other than that, there was no indication of other additional traffic to be generated through local trackage rights at Toledo. Rather, W&LE's operating witness testified that W&LE would commence through service to Toledo by operating one train per day in each direction between an existing connection with NS at Yeomans, OH and Toledo for interchange with the Ann Arbor Railroad ("AA"), Canadian National ("CN") and IORY and that additional traffic would include loaded hoppers of petroleum coke received from BP. WLE-4, Wait V.S. at 82. [[[

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movements through "the addition of relatively modest connections." W&LE-4, Thompson V.S. at 92. W&LE witnesses emphasized that such connections would provide alternatives to congested routes and thus better service for existing customers. WLE-4, Thompson V.S. at 97-98. Similarly, in its Brief filed on February 23, 1998, W&LE distinguished its requests for conditions seeking haulage and underlying trackage rights to protect existing traffic flows (which included its request for haulage or trackage rights to Toledo to connect with other carriers there, including IORY) from those seeking market access to specific customers. See WLE-8 at 37-43. There was no mention of commercial access to industries located at Lima.

Moreover, although W&LE raised the issue of local trackage rights in the initial meeting with CSX and NS, CSX made clear that it would grant only the overhead trackage rights ordered by the Board and the parties accordingly proceeded with negotiations for overhead trackage rights. W&LE's October 16 letter to CSX gives no indication that granting local rights was still an issue. See Parsons October 16 letter. For W&LE now to seek "clarification" that the Board's order includes local trackage rights at Lima is specious.⁷ W&LE clearly is

⁷ See Letter to STB from CSX counsel dated October 23, 1998. As that letter indicates, by October 20, CSX was under the understanding that W&LE had dropped whatever claims of local industry access on the Lima route it had made earlier in the negotiations and was content to work out the terms of overhead trackage rights in satisfaction of the Board's condition insofar as it involved Lima. It now develops that W&LE intended to engage in apparently final negotiations of an overhead trackage rights agreement, and only then to seek local access by W&LE from the Board, without any corresponding renegotiation of the material provisions in the overhead rights agreement, which, of course, might be viewed differently by CSX in the context of local add-on rights. CSX does not believe that this is a constructive and businesslike way to conduct negotiations. A letter of October 30, 1998, from W&LE's counsel to the Board says that CSX should have been aware that the issue of local access was being reserved by W&LE because (i) that issue was discussed at a meeting of W&LE, NS and CSX on August 13, 1998, which launched the negotiations, and (ii) W&LE stated in a letter to Norfolk Southern's John Friedmann that it had reached an impasse with CSX over local access on the Lima line and "cc's" of that letter had gone to two people at CSX (neither of whom was conducting the Lima trackage rights negotiations). Letter of October 30, 1998 at 2 n. 1) But obviously the fact that a

(Continued ...)

attempting to expand the Board's order to gain commercial access that was not even contemplated in W&LE's original requests.

This new request apparently stems from several meetings between W&LE and IORY as a result of which W&LE now claims that the connection will not generate as much benefit as it had anticipated when it originally told the Board how important it was for W&LE to reach IORY. WLE-10 at 22-23. Therefore, W&LE seeks reopening of the Board's decision and the imposition of new conditions granting market access at Lima in order to ensure that W&LE "will generate sufficient traffic and revenue opportunities to permit W&LE to sustain its trackage rights operations." WLE-10 at 23.

The usual purpose of imposing conditions on control transactions is to ameliorate any adverse affects of the transaction on competition or to preserve essential services that will be lost as a direct result of the transaction. The conditions as a general matter are not intended to assure that individual competitors remain viable. In this instance, the Board carefully considered the effects of the Transaction and found it to be pro-competitive and in the public interest. Moreover, it did not find that any W&LE shippers will suffer a direct loss of competitive alternatives as a result of the Transaction or that any shippers will lose essential services. While the Board acknowledged that W&LE provides essential services, it did not make any

negotiating position is taken at the beginning of negotiations is not indicative of what the position is toward the end; characteristically in negotiations the parties abandon their more extreme positions as time goes on. And why the CSX people should have looked at W&LE's letter to Norfolk Southern to find out that the issue of local access was being reserved against CSX (and why the same statement was not made in a W&LE letter to CSX, possibly one directed to the officer conducting negotiations), is not explained by W&LE. Notwithstanding these factors, which suggest a highly unconventional way of negotiating a deal, to put it gently, CSX is willing to stand on the terms in its proffered trackage rights agreement with respect to overhead trackage rights, which the Board's decision contemplates.

determination that loss of such services was even threatened as a result of the Transaction.

Rather, the Board found that W&LE had dramatically overstated its case and sought expansive conditions that were not justified. Nonetheless, the Board granted certain limited conditions designed to give W&LE the opportunity to expand its market reach and to provide a regional network that could offer better service to customers and yield operational benefits for W&LE to help W&LE shore up its shaky financial condition. The Board expressly denied W&LE's numerous requests for direct commercial access. Having been given the opportunity to enhance its rail network through connections with other shortline carriers in order to better serve its customers as it requested in its responsive application, W&LE now argues, in circular fashion, that it does not have enough traffic to support through train operations over its extended network and therefore must seek additional commercial access.

W&LE is actually seeking to reopen the Board's decision to consider entirely new requests for the imposition of local trackage rights and for an interchange with RJC. A petition to reopen may be granted only upon demonstration of material error, new evidence, or substantially changed circumstances. 49 C.F.R. §1115.4. W&LE has neither asserted nor demonstrated any such grounds for reopening. It relies on its failure to derive sufficient benefit from the new connection that it sought with IORY in order to claim additional needs. W&LE's claim that it has not been able to negotiate with IORY a satisfactory level of additional traffic is not sufficient. As W&LE itself proclaimed throughout its responsive application, it did not seek guarantees that it would benefit from conditions the Board might impose, but only the opportunity to do so.

Neither can W&LE claim any changed circumstances. W&LE's claimed need for additional revenues through local service at Lima stems from the Board's denial of W&LE's

requests for direct commercial access to specific shippers at other locations, which would have given W&LE greater opportunities to increase its traffic and revenues than those available through the conditions granted by the Board. However, in Decision No. 89, the Board found that the commercial access W&LE sought was not justified. In Decision No. 96, the Board reaffirmed that finding by refusing to reassess the revenue losses and stating that the amount of the losses was not material. Thus, W&LE has not stated grounds sufficient to justify reopening Decision No. 89 and its petition should be denied.

B. W&LE'S Request for Broad Interpretation of the Board's Order Concerning Negotiations for Mutually Beneficial Arrangements Is in Fact a Petition for Reconsideration of Conditions That the Board Denied or Declined to Impose

In its responsive application, W&LE specifically requested, among other things, local trackage rights on the Benwood-Brooklyn Junction line (WLE-4 at 33-34), trackage rights to PPG and Bayer (WLE-4 at 33-34), access to provide single-line service in moving BP coke traffic from Toledo to Cressup, WV via a more direct route (WLE-4 at 74) and commercial access to various and sundry aggregates shippers (WLE-4 at 33-34). In Decision No. 89, the Board quite properly declined to impose any of these conditions. In addition, it denied PPG's separate request for second carrier service from W&LE. Decision No. 89 at 123. Instead, the Board imposed three specific conditions granting overhead trackage rights to Toledo and to Lima for interchange with other rail carriers and trackage rights and access to Huron Docks. These three conditions were more than sufficient; arguably they went beyond STB/ICC precedent for granting protection to railroads. Nonetheless, the Board went further and -- perhaps to ensure that the parties had indeed examined all private sector opportunities and would continue to seek new opportunities -- directed the parties to negotiate to determine whether there were any

mutually beneficial arrangements that could be reached that would provide W&LE opportunities to increase revenues, including proposals for expanded service to aggregate shippers or trackage rights to serve shippers on the Benwood-Brooklyn Junction line.

With remarkable bravado, W&LE contends that the Board "made clear" that service to aggregate shippers and trackage rights to serve shippers on the Benwood-Brooklyn Junction line "are considered an integral part of protection granted W&LE and are intended, at least in part, to address the concerns of aggregate shippers such as National Lime and Stone Company, Wyandot Dolomite, Inc., Redland Ohio, Inc., (now Lafarge, Inc.), and the competitive concerns of PPG Industries and Bayer Corporation (Natrium, WV facilities)." WLE-10 at 6. W&LE further contends that the negotiations required by the Board must result in arrangements that include all of the above outcomes, even those which were requested in the responsive application and denied in Decision No. 89.

W&LE's interpretation that the parties must reach agreement providing W&LE direct physical access to shippers along the lines mentioned as examples in the final sentence of Ordering Paragraph No. 68 in Decision No. 89, as an integral part of the remedial conditions, is nonsense. If the Board had intended to impose all of those conditions, it would have done so explicitly in the same terms as it did for conditions (a), (b) and (c) and with a similar time limit and a provision for expedited Board resolution in the event that the parties could not reach agreement. The logical interpretation of the directive that the parties attempt to negotiate mutually beneficial arrangements is that the Board intended the parties to explore all options to determine whether there were any arrangements that would benefit both W&LE and applicants.

W&LE's argument that the Board intended to use the word "and" rather than "or" in describing proposals to be considered underscores the flaw in its interpretation.⁸ "Or" or "and" is irrelevant; the references in the final sentence are examples. The Board did not impose any particular arrangement, but required the parties to explore options to determine whether there were any mutually beneficial arrangements and it gave as examples the aggregate shippers and Benwood-Brooklyn Junction line as possibilities for consideration. In that context, use of the word "or" is clearly appropriate, as would have been "and."

The intent of the Board to have the parties pursue private sector negotiations rather than to impose conditions is confirmed by the Board's denial of a request filed by Bayer Corporation on September 21, 1998. Bayer explicitly asked the Board to "clarify" Decision No. 89 by directing the applicants to conclude an arrangement with W&LE permitting W&LE to serve Bayer and other shippers on the line to Brooklyn Junction, WV. The Board denied that request, restating its expectation that CSX would pursue negotiations in good faith regarding Bayer and any other shipper along the line. Decision No. 96 at 18 n.42. Interpreting the Board's order to encourage the parties to find private sector opportunities of mutual advantage without Board intervention is consistent both with the clear language of Decision No. 96 and with Board practice and policy.⁹

⁸ W&LE claims that the Board committed a "drafting error" in using the disjunctive "or" rather than the conjunctive "and" in connection with the requirement to negotiate mutually beneficial arrangements, including service to aggregate shippers or service to shippers on the Benwood-Brooklyn line. WLE-10 at 9.

⁹ See, e.g., STB Ex Parte No. 575, Review of Rail Access and Competition Issues (served Apr. 17, 1998); see also Decision No. 96 at 13 (In denying the Nadler Delegation's request for reconsideration, the Board noted that it encouraged the parties to continue to negotiate mutually beneficial settlements, and observing that it had imposed ample relief for transaction-related harms.)

W&LE also has asserted incorrectly that CSX has refused to negotiate with respect to arrangements for aggregate shippers or for shippers located on the Benwood-Brooklyn Junction line. [[[

]]] Rather, it is W&LE who has refused to consider these proposal as complying with the Board's order, putting them aside because, as Mr. Parsons stated in his October 16 letter to CSX,

[W]e believe the STB granted W&LE local rights from Benwood to Brooklyn Junction. . . . If we cannot agree on the fundamental interpretation of the STB's grant of local rights from Benwood to Brooklyn Junction, then we are at an impasse on this issue and will submit the issue of the STB's intended meaning for determination with our October 21st submission to the Board.

Indeed, W&LE adamantly contends that it is entitled to direct access to aggregate shippers and open access to all shippers on CSX's Benwood-Brooklyn Junction line.¹⁰

¹⁰ In Mr. Parsons' October 2, 1998 letter to John H. Friedmann, attached as Exhibit B to W&LE counsel's October 30, 1998 letter to the Board, Mr. Parsons expressed W&LE's version of what "mutually beneficial" means:

The STB also directed us to negotiate an agreement concerning mutually beneficial arrangements "including allowing W&LE to provide service to aggregate shippers or to serve shippers along CSX's line between Benwood and Brooklyn Junction" and to inform the Board of agreements reached. We believe that the Board expected that the parties would negotiate agreements and asked that we implement them with mutually agreeable terms.

So, according to Mr. Parsons, the essential "deal" was mandatory and the details were all that were left for "mutual agreement."

CSX is willing to continue discussions of its October 16 proposal and to identify other opportunities that are truly mutually beneficial. CSX is not willing to provide W&LE local trackage rights to all shippers on the Benwood-Brooklyn Junction line because it does not make business sense for CSX to allow W&LE to use its line and facilities and directly serve CSX customers with no reciprocal benefits for CSX. Such an outcome would be contrary to the plain language of the Board's order requiring the parties to negotiate mutually beneficial arrangements.

W&LE's request for "clarification" of the scope of the Board's order requiring negotiations concerning mutually beneficial arrangements is, in reality, a request for reconsideration of the Board's Decision No. 89. W&LE wants the Board to impose as conditions a complete package of access rights allowing W&LE to provide direct service to all aggregates shippers, and local access to all shippers on the Benwood-Brooklyn Junction line, including direct access to PPG and Bayer, regardless of whether any benefits flow to CSX. The Board appropriately stopped short of imposing such conditions and left the parties to negotiate private sector arrangements if they could agree to arrangements that were mutually beneficial.¹¹

¹¹ In support of its claim that the Board intended to provide broad remedial assistance to W&LE, W&LE asserts as a basis for such relief that the Board embraced a policy dedicated to promoting and preserving the important functions provided by carriers such as W&LE. W&LE likens such relief on its behalf to the Board's grant trackage rights to Texas-Mexican Railroad in UP/SP to promote NAFTA and international trade objectives. WLE-10 at 11, n.7. However, the policy favoring international trade considerations was not the only basis for granting rights to Tex-Mex. The Board found that "a partial grant of Tex Mex's responsive application is required to ensure the continuation of an effective competitive alternative to UP's routing into the border crossing at Laredo." Finance Docket No. 32760, Union Pacific et al. - Control and Merger - Southern Pacific et al. ("UP/SP"), Decision No. 44 at 149 (served Aug. 12, 1996). Although the grant of trackage rights improved Tex Mex's financial condition and benefited international trade, those incidental results were not the sole grounds for relief. The relief granted alleviated certain adverse effects of the merger and was narrowly tailored to address a specific immediate competitive harm to shippers resulting from the merger. In contrast, here the Board has not found any imminent adverse impact of the transaction on W&LE
(Continued ...)

W&LE's petition should be treated as an untimely request for reconsideration and should be denied. As with reopening, reconsideration of a Board action may be granted only upon a showing of material error, new evidence, or substantially changed circumstances. ICC Finance Docket No. 32549, Burlington Northern Inc. – Control and Merger – Santa Fe Pacific Corp., 1995 ICC Lexis No. 291, at *5 (Nov. 3, 1995). W&LE has not met those criteria.¹²

Moreover, W&LE's October 21 Petition comes over two months after the deadline for filing a petition for reconsideration. W&LE claims that it could not have raised its requests earlier because it became aware of the impasse only at the close of negotiations. The only impasse arose from the fact that applicants read the conditions as they were written. Moreover, W&LE did submit a timely petition for reconsideration/clarification (WLE-9) and expressed no dissatisfaction with the language of the conditions that the Board imposed. Surely, in the course of preparing that petition and contemplating negotiations with applicants, W&LE must have realized that the benefits it sought required either a self-serving interpretation of the scope of the Board's order or reconsideration of denied requests and it could have sought such relief on a timely basis. W&LE's last minute attempt to resuscitate stricken requests or give birth to new ones should be denied.

customers and W&LE is seeking relief based exclusively on the policy favoring preservation of regional carriers.

¹² W&LE has not alleged that the Board's purported "drafting error" is material error, but even if it had, the context of the order makes clear that there was no error.

II. EVEN IF THE BOARD WERE TO ACCEPT W&LE'S PLEADING AS A PETITION FOR CLARIFICATION, THE DECISION DOES NOT REQUIRE CLARIFICATION

As the Board noted in Decision No. 96, a prior decision may be clarified where there appears to be a need for a more complete explanation of the action taken therein. Decision No. 96 at 7. See also UP/SP, Decision No. 57 at 3 (served Nov. 20, 1996). In clarifying prior decisions, the Board has looked at the language of the decision to determine whether there is any ambiguity. The Board also has considered the concerns that prompted it to make its decision and the Board's intent in making its decision. However, the Board has declined to go beyond its original decision by fundamentally altering the conditions it imposed.¹³

There is no need for clarification of the Board's Decision No. 89 concerning the W&LE conditions. The language is unambiguous – the Board explicitly imposed three conditions that conform to requests made by W&LE in its responsive application and further provided an opportunity for the parties to negotiate mutually beneficial arrangements.

A. The Plain Language of the Board's Decision Grants Only Overhead Trackage Rights to Lima

The Board expressly granted W&LE overhead trackage rights to Lima with rights to connect to IORY. The grant of overhead trackage rights for the purpose of connecting with IORY was consistent with W&LE's requests. W&LE did not seek access to Toledo or Lima per

¹³ See, e.g., UP/SP, Decision No. 57 at 6 (refusal of Board to clarify its initial decision with regard to amount of traffic to be opened up to BNSF under the contract modification condition); UP/SP, Decision No. 74 at 5-6 (served Aug. 29, 1997) (refusal of the Board to broaden the definition of 2-to-1 shipper for the purposes of the contract modification condition).

se, but only access to the named carriers, including IORY. Moreover, W&LE sought new connections in order to "bring many efficiencies to rail transportation in this region" (WLE-4, Wait V.S. at 68), to provide operational flexibility and more efficient routes (WLE-4, Thompson V.S. at 97-98) and to provide opportunities to develop new traffic patterns (WLE-4, Wait V.S. at 68). The overhead trackage rights conditions imposed by the Board were intended to enhance W&LE's rail network and to provide W&LE the opportunity to achieve the efficiencies that it sought. The plain language of the order makes clear that local rights at Lima were not included.

W&LE's current request for access to shippers in Lima is at best an afterthought, said by W&LE to arise out of its professed disappointment regarding the amount of new interchange traffic it says it will be able to generate with IORY. Unmet expectations do not justify "clarifying" a condition to expand its scope. Indeed, the Board has frequently stated that a grant of conditions affording opportunities does not guarantee success.¹⁴

¹⁴ W&LE's reliance on the contract modification condition that the Board imposed on the UP/SP merger to assure that BNSF would have access to sufficient traffic to sustain its operations is misplaced. In UP/SP, the trackage rights were granted to BNSF to ameliorate the immediate loss of competitive alternatives to shippers on the line who, prior to the merger, were served by both UP and SP. However, as most of those shippers were under contract to UP or SP, trackage rights without a provision for contract modification would have been useless. The contract modification provision was for the protection of the shippers. It allowed BNSF to hit the ground running, and immediately serve points where loss of competition was imminent. The purpose of the conditions was not to ensure income for BNSF, but to "help ensure that the BNSF trackage rights will allow BNSF to replicate the competition that would otherwise be lost when SP is absorbed by UP." UP/SP, Decision No. 44 at 145. In its November 20, 1996 decision clarifying its initial decision the Board stated:

The contract modification condition opens up traffic to BNSF, but does not guarantee that BNSF will actually receive that traffic. The condition merely allows a 2-to-1 shipper to put up for bidding traffic that had previously been committed by contract either to UP or SP. The shipper need not tender any traffic to BNSF, and is free to reject the contract modification condition in its entirety.

(Continued ...)

In a recent decision in this proceeding, the Board rejected a request for clarification of Decision No. 89 filed by New England Central Railroad ("NECR") in which NECR sought to expand the scope of the condition granted on its behalf. Decision No. 100 (served Nov. 6, 1998). Like W&LE, in its responsive application NECR had overstated the financial impact that it would suffer as a result of the Transaction and sought various conditions, including trackage rights that would enable it to connect with its affiliate, Connecticut Southern Railroad ("CSO"). Like W&LE, NECR argued for relief beyond that granted by the literal language of the Board's condition, arguing that the Board must have intended such broad relief to make NECR whole. The Board rejected that argument, noting that its intent in granting the trackage rights was not to indemnify NECR against losses dollar for dollar, but to give NECR the opportunity to achieve operating cost savings and to obtain additional traffic to ensure that provision of services to existing traffic would not be impaired. *Id.* at 3. The same reasoning should apply here.

B. The Board's Order Concerning Negotiations of Mutually Beneficial Arrangements Is Also Clear on its Face

W&LE's request for clarification of the Board's order concerning negotiations of mutually beneficial arrangements is inconsistent with the plain language of the order. Decision

UP/SP, Decision No. 57 at 5 (emphasis added). Here, the Board has provided opportunities for W&LE to reach new markets through overhead trackage rights and new connections. The purpose was not to ameliorate any immediate loss of competition to shippers, but to provide opportunities for W&LE to enhance its financial situation through more efficient routes or new connections, thus aiding W&LE's ability to continue to provide service to existing customers. The risk of competitive loss in this instance is not imminent (or even likely to occur).

No. 89 requires applicants "to provide" (a) overhead trackage rights to Toledo and connections with regional carriers, (b) access and trackage rights to Huron Docks and (c) overhead trackage rights to Lima with connections to IORY, and provided a time frame for the parties to establish terms and a mechanism for Board intervention if the parties could not agree on terms within that time frame. The Board further stated:

. . . we will require that applicants negotiate with W&LE concerning mutually beneficial arrangements, including allowing W&LE to provide service to aggregate shippers or to serve shippers along CSX's main line from Benwood to Brooklyn Junction, WV. . . . Finally, we expect the parties to inform us of any mutually beneficial arrangements that they have reached.

Decision No. 89 at 108. The Decision clearly distinguishes between conditions (a), (b) and (c) which must be met and as to which the parties must agree on terms or have the terms set by the Board, and the requirement to "negotiate with W&LE concerning mutually beneficial arrangements." There is no language stating that any particular arrangement must be concluded. There is no requirement to come to the Board to establish the terms. There is no time limit or expectation that an arrangement necessarily will be made that provides benefits to both W&LE and applicants. The order simply requires the parties to explore all options to identify "mutually beneficial arrangements" and report any that are reached.

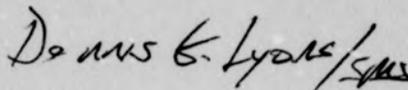
W&LE's request for the imposition of direct physical access to PPG and Bayer is also inconsistent with the plain language in Decisions Nos. 89 and 96. In denying PPG's separate request the Board found that PPG had not demonstrated any harm due to the Transaction. While the Board acknowledged that PPG might gain some relief if the parties should agree on arrangements on the Benwood-Brooklyn Junction line, it did not direct relief for PPG. Similarly, in Decision No. 96, the Board denied Bayer's request to direct the applicants to

conclude an arrangement with W&LE, and required only that the parties negotiate in good faith to find private sector arrangements of benefit to both W&LE and applicants. The Board's Decisions Nos. 89 and 96 are clear and W&LE's petition should be denied.

CONCLUSION

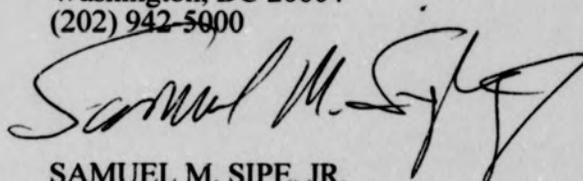
For the foregoing reasons, W&LE's Petition for Clarification and for Further Instruction should be denied.

Respectfully submitted,



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SAMUEL M. SIPE, JR.
CAROLYN DOOZAN CLAYTON
Steptoe & Johnson LLP
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(202) 429-3000

November 10, 1998

Counsel for CSX Corporation
and CSX Transportation, Inc.

WHEELING & LAKE ERIE RAILWAY COMPANY

Larry R. Parsons
Chairman & Chief Executive Officer

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Browns, OH 44613

330-767-3001 (Ext. 1233)

Fax: 330-767-4327

FAX: 904-359-1263
AND U. S. MAIL

October 16, 1998

Mr. Christopher P. Jenkins
VP Chemicals Marketing
CSXT
500 Water Street - J880
Jacksonville, FL 32202

Dear Chris:

This will respond to your letters of October 9th and 16th, Pete Schmidt's letter of the 15th, and follow-up on our October 13th hi-rail trip to Lima on the CSXT route.

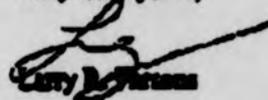
We have elected the CSXT route to Lima primarily because the route has considerably less congestion than the NS Bellevue-Fostoria-Lima route. We believe we had agreed in August that we would accept the "merger" trackage right rate of 29¢/car/mile (and have also agreed with NS for that rate over the NS Toledo route). Because the STB ordered these trackage rights without imposing restrictions, we do not agree to restrict whatever level of traffic we may be able to obtain to a train a day each way.

There are two proposals we would make: 1) we would like to purchase the CR track from the L&O interchange to the Clark refinery and 2) effect interchange with RJ Corman via this CSXT route.

Finally, we have now seen information on what you term "mutually beneficial" commercial issues. While we are more than willing to discuss any "mutually beneficial" items, we believe the STB granted W&LE local rights from Berwood to Brooklyn Junction. We again suggest the "merger" trackage rights rate of 29¢/car/mile would be appropriate. If we cannot agree on the fundamental interpretation of the STB's grant of local rights from Berwood to Brooklyn Junction, then we are at an impasse on this issue and will submit the issue of the STB's intended reasoning for determination with our October 21st submission to the Board.

We look forward to hearing from you.

Very truly yours,



Larry R. Parsons

LRP:sld

C: Peter J. Shultz, Esq. - CSX, Corp. VP Law & General Counsel
David L. Houchin - CSX, Asst. VP Joint Facilities
John H. Friedmann - NS, Director Strategic Planning
James W. McClellan - NS, Senior VP Planning

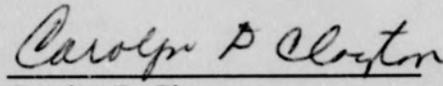
P. WHEELING & LAKE ERIE RAILWAY COMPANY - OH

2'd

267 767 3001 FAX 767 4327

CERTIFICATE OF SERVICE

I, Carolyn D. Clayton, certify that on November 10, 1998, I have caused to be served a true and correct copy of the foregoing CSX-166, "Response of CSX Corporation and CSX Transportation, Inc. to Petition of Wheeling & Lake Erie Railway Company for Petition For Clarification and For Further Instruction" to all parties on the Service List in Finance Docket No. 33388, by first-class mail, postage prepaid, or by more expeditious means.


Carolyn D. Clayton
Carolyn D. Clayton

STB

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9-25-98

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LAW OFFICES

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

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ENTERED
Office of the Secretary

SEP 25 1998

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RICHARD A. ALLEN

September 25, 1998

Via Hand Delivery

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

D

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:

I am writing on behalf of Applicants Norfolk Southern Corporation and Norfolk Southern Railway Company (collectively "NS") pursuant to Ordering Paragraph 25 of Decision No. 89 in this proceeding to report on the status of discussions between NS and the Port of Wilmington, Delaware (hereinafter, the "Port") regarding switching services and charges to the Port.

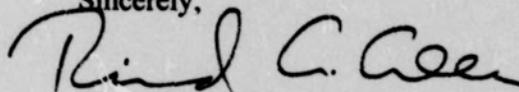
Representatives of NS, the Port and the Delaware Department of Transportation have met together three times since July 23, 1998, the date Decision No. 89 was served, and NS and the Port have had an additional meeting between them. The persons at these meetings discussed various issues relating to present and future rail service to the Port, including switching services and charges, marketing opportunities and other matters of mutual interest. The discussions have been very positive and constructive, and NS believes it is developing a good working relationship with the Port and the Delaware Department of Transportation. NS expects to continue to meet with the Port and the Department as issues arise.

ZUCKERT, SCOUTT & RASENBERGER, L.L.P.

The Honorable Vernon A. Williams
September 25, 1998
Page 2

Should you have any questions regarding this, please call.

Sincerely,

A handwritten signature in cursive script, appearing to read "Richard A. Allen".

Richard A. Allen

Counsel for Norfolk Southern
Corporation and Norfolk
Southern Railway Company

Enclosures

cc: Timothy M. Walsh, Esq.

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Charles M. Rosenberger
Senior Counsel
Admitted in Virginia
Not Admitted in Florida

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Office of the Secretary

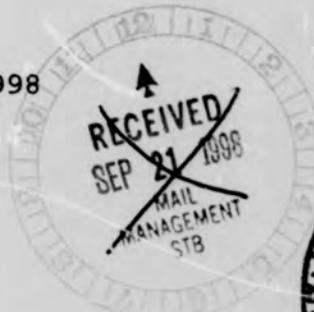
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Telephone (904) 359-3100
Writer's direct telephone line:

(904) 359-1250

September 18, 1998



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

D

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 Mr. Williams:

This refers to Decision No. 89 served July 23, 1998 in the above-captioned proceeding. Ordering paragraph No. 36 in that Decision provides that "CSX must attempt to negotiate, with IC, a resolution of the CSX/IC dispute regarding dispatching of the Leewood-Aulon line in Memphis." CSX and IC are required to advise the Board no later than September 21, 1998, of the status of their negotiations.

Please be advised representatives of CSX and IC are scheduled to meet in Memphis on September 22, 1998 in an effort to resolve this dispute, and anticipate further discussions in connection with this matter. The parties respectfully request that the date for the status report of their negotiations be extended until October 21, 1998.

Very truly yours,

Mr. Vernon A. Williams
Page 2
September 18, 1998

cc: Mr. Ronald A. Lane
Mr. Myles L. Tobin
Illinois Central Railroad Company
455 North Cityfront Plaza Drive
Chicago, IL 60611-5504

Mr. William C. Sippel
Mr. Thomas J. Litwiler
Oppenheimer Wolff & Donnelly
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September 21, 1998

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D

The Honorable Vernon A. Williams
Secretary
Surface Transportation Board
1925 K Street, N.W., Room 711
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

Report of Applicants CSX Corporation and CSX Transportation, Inc.
Concerning Discussions with Port of Wilmington, DE

Dear Secretary Williams:

Pursuant to Ordering Paragraph No. 25 of Decision No. 89 in this proceeding, Applicants CSX Corporation and CSX Transportation, Inc. (collectively, "CSX") hereby submit this report on the status of the discussions to date between representatives of CSX Transportation, Inc. ("CSXT") and the Port of Wilmington, Delaware concerning switching services and charges.

At the June 4, 1998 oral argument in this proceeding, representatives of the State of Delaware and the Diamond State Port Corporation argued to the Board that the Port of Wilmington would be disadvantaged by the Conrail Transaction because the Transaction would not increase the number of rail carriers at the Port and thus restore competition that had existed prior to Conrail's formation.^{1/} The State thus sought inclusion for the Port in the Shared

^{1/} As a consequence of the Transaction, NS will replace Conrail as the rail carrier providing direct service at the Port. See Decision No. 89 at 89. CSX operates into Conrail's West Yard at Wilmington to pick up and deliver interchange traffic, including traffic switched to or from the Port, and will continue to do so after NS steps into Conrail's shoes there.

Assets Areas. The State also expressed concern about the impact on the Port's competitiveness of the level of switching fees at the Port.

In Decision No. 89, the Board took note of Delaware's expression of concern at oral argument regarding switching fee levels. See Decision No. 89 at page 90. Stating that it lacked sufficient information to determine if any remedy concerning switching issues was warranted, and to fashion any such remedy, the Board ordered the Applicants to discuss any problems associated with switching service and charges with the Port and to report to the Board by September 21, 1998. *Id.*

Following the Board's directive, on August 29, 1998, Ms. Kelly Shefelbine, CSXT's Director of International Sales and Marketing met with Mr. Adam McBride, Executive Director of the Diamond State Port and with Mr. John O'Donnell, the Port's Director of Marketing and Trade, to tour the Port facility and to discuss switching and commercial opportunities. During these discussions, the Port's representatives reiterated concerns regarding the \$390 per car reciprocal switching charge that Conrail now applies to Port traffic. Following the Transaction, NS will become the switching carrier at the Port.

Based on its discussions with the Port officials, CSXT believes that there are several mutually advantageous business opportunities that it might pursue that would expand CSXT's role in transporting Port traffic. These include opportunities to transport various types of general cargo (such as linerboard, wallboard and steel products), and possibly other traffic. CSXT believes that these opportunities will be enhanced by the expanded single-line service that it can offer as a result of the Conrail Transaction. CSXT is in the process of further reviewing these opportunities and intends to continue its discussions with Port officials concerning these and other opportunities that emerge in the future.

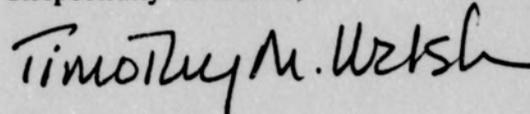
In addition to the competitive benefits of CSXT's greater market reach, CSXT concurs in the Port's assessment that Port traffic will benefit from the reduction of the reciprocal switching charge to \$250 per car, as provided by the Settlement Agreement between Applicants and the National Industrial Transportation League. CSXT believes that the application of a charge at this level will facilitate the movement of the Port's traffic via CSXT.

As noted, CSXT intends to further explore commercial opportunities with the Port and believes that a commercial solution to the Port's concerns is attainable without further regulatory intervention. Given these conclusions, it would not seem necessary to submit any

The Honorable Vernon A. Williams
September 21, 1998
Page 3

additional reports on commercial activity; however CSXT is certainly willing to do so should the Board so desire.

Respectfully submitted,

Handwritten signature of Timothy M. Walsh in cursive script.

Timothy M. Walsh
Counsel for CSX Corporation
and CSX Transportation Inc.

cc: Richard A. Allen, Esquire
Frederick H. Schranck, Esquire

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9-22-98

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September 22, 1998

VIA HAND DELIVERY

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

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- Washington, D.C.

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 -- Transfer of Railroad Line by Norfolk Southern Railway Company to CSX Transportation, Inc.

Dear Secretary Williams:

In Decision No. 89 in the above-referenced docket, the Board granted Livonia, Avon & Lakeville Railroad Corporation's Responsive Application to the extent necessary to permit LAL to operate across Conrail's Genesee Junction Yard to reach a connection with the Rochester & Southern Railroad, Inc. ("RSR").

This letter is to inform you that CSX and LAL have entered into a Trackage Rights Agreement, effective on the date that CSX begins operation of assets allocated to New York Central LLC ("NYC"), granting LAL overhead trackage rights on the line of railroad across Genesee Junction Yard, between the connection of LAL and NYC and the connection of RSR and NYC.

Please contact the undersigned if you have any questions or comments.

Respectfully submitted,

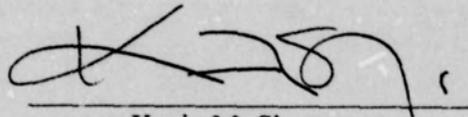
Kevin M. Sheys

cc: Charles M. Rosenberger, Esq.
CSX Transportation, Inc.

* Known as Oppenheimer Wolff & Donnelly LLP
† Known as Oppenheimer Wolff & Donnelly (Illinois).

CERTIFICATE OF SERVICE

I hereby certify that on this 22nd day of September, 1998, a copy of the foregoing was served by first class mail, postage prepaid, upon all Parties of Record on the Service List in Finance Docket No. 33388.

A handwritten signature in black ink, appearing to read 'Kevin M. Sheys', is written over a horizontal line.

Kevin M. Sheys