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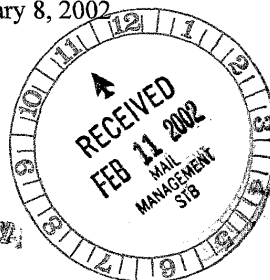
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February 8, 2002

VIA FEDERAL EXPRESS

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

ENTERED
Office of the Secretary
FEB 11 2002
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Public Record



Re: STB Finance Docket No. 34169, Consolidation Coal Sales Company v.
Consolidated Rail Corporation

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Edward L. Webster, Jr. (1950-1987)

Dear Mr. Williams:

Please accept this letter on behalf of Consolidated Rail Corporation ("Conrail"), the respondent in the above-captioned matter, concerning the issues that have been referred to the Surface Transportation Board ("STB" or "Board") for decision and the procedures for parties to file their evidence and argument in this matter.

On January 28, 2002, Conrail received a Petition for Declaratory Order ("CCSC Petition") that Consolidation Coal Sales Company ("CCSC") apparently filed with the Board on January 23, 2002. In its Petition, CCSC notes that the United States District Court for the Eastern District of Pennsylvania has referred certain questions to the STB concerning the nature and extent of Conrail's contractual obligations to CCSC under a terminal services agreement and a related supplemental letter agreement they entered into in 1991-1992 (the "Agreements"). The issue for the STB, as stipulated by the parties and ordered by the District Court, is what

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obligations, if any, Conrail owes CCSC after June 1, 1999 in light of the STB's Decision No. 89, served July 20, 1998, and related rulings in Finance Docket No. 33388 with respect to the joint acquisition and division of Conrail's operations and assets among Norfolk Southern Railway Company ("NS"), CSX Transportation, Inc. ("CSX"), and Conrail.

Conrail does not oppose the institution of a declaratory judgment proceeding in this case. Indeed, Conrail joined with CCSC in requesting that the District Court suspend its proceedings, so that the STB could exercise its primary jurisdiction to determine whether Conrail owes any contractual obligations to CCSC in light of Decision No. 89. Conrail similarly expected to join with CCSC in requesting that the STB institute a declaratory order proceeding and establish a procedural schedule for evidentiary submissions and legal briefing regarding the merits of the issues referred by the Court. While it is certainly within CCSC's prerogative to file its own petition to initiate a proceeding, it might perhaps have been more efficient had the parties done so jointly. CCSC's Petition merely restates the contractual allegations that it made in its Answer and Counterclaim in the underlying litigation. The Petition does not properly frame the issues referred by the Court under Decision No. 89, it does not address their merits, and it completely ignores the extensive record that has been developed on those issues in the District Court proceedings. Procedurally, Conrail finds itself in an uncertain position under the Board's rules. If Conrail replies in kind, with a cursory Answer, this will not be helpful to the Board, since the merits will still have to be addressed. If, on the other hand, Conrail treats CCSC's Petition as its case-in-chief and replies with a full-scale evidentiary filing and legal briefing, CCSC would be sure to attempt a reply to a reply, thereby precipitating a debate under Section 1104.13(c) of the Board's Rules of Practice about whether such a reply should be permitted and, if so, whether Conrail should be permitted a rebuttal.

In Conrail's view, the preferable approach would be for the Board to establish a procedural schedule that establishes when the parties' evidentiary and legal submissions are due. Because of the extensive prior litigation before the District Court, Conrail does not believe that any further discovery is necessary. Also, CCSC and Conrail already know each other's legal positions. Accordingly, Conrail submits that simultaneous filings within 30 days of the Board's issuance of a procedural order would be appropriate. Conrail would not oppose simultaneous replies 15 days thereafter; however, the Board should be aware that the District Court's referral Order dated December 20, 2001 (attached as Exhibit A), seeks a response from the STB "within ninety (90) days of this order or within such longer time period as the court may allow upon application of the STB." That would require a decision by March 21, 2002, absent an amendment to the Court's Order. At the same time, it would appear that the Court would be prepared to grant an extension, since the Court's original referral Order, dated November 28, 2001 (attached as Exhibit B), suspended the Court's proceedings for six months (i.e., until May 28, 2002), and permitted even further suspension "for good cause shown."

Out of an abundance of caution, Conrail wishes to make clear here that it vigorously disputes CCSC's claims that Conrail has any remaining contractual obligations to CCSC.¹ In the first place, long before the Conrail break-up, CCSC and Conrail had established a practice of mutual waivers of certain provisions of their contract, including the provision pertaining to the minimum annual terminal fees, about which CCSC complains in its Petition. The parties acknowledged this longstanding practice in May 1998 and further extended it until December 31,

¹ For the reasons just discussed, Conrail does not believe it is appropriate for it to reply now in full to CCSC's cursory Petition. If, however, the Board wishes such a reply, Conrail would ask the Board to treat this letter as a request for a 30-day extension of the 20-day reply period under Rule 1104.13(a).

1998, the date on which the division of Conrail's assets was scheduled to occur. That date was subsequently postponed to June 1, 1999, at which time NS and CSX took over most of Conrail's operations.

In Decision No. 89, the STB approved a comprehensive Transaction Agreement under which the majority of Conrail's rail assets and related intangible assets such as the Agreements were allocated either to Pennsylvania Rail Lines LLC ("PRR") or New York Central Lines LLC ("NYC"). The operation of PRR and NYC rail assets and performance of any related agreements were undertaken by NS and CSX respectively. Upon transfer of those assets and agreements on June 1, 1999, Conrail was thereafter relieved of any and all rights and obligations related thereto.

Now, however, CCSC claims that Conrail has a continuing responsibility to make coal shipments through the Terminal yielding at least \$4,000,000 in annual fees and, further, ensure that all movements of export coal from the area served by the former Monongahela Railway Company must move through the Terminal.² But Conrail has no physical presence in the Terminal, in the Monongahela area, or on the rail lines between them. Conrail cannot make any coal shipments, much less direct how NS and CSX, which jointly serve the Monongahela area, make their coal shipments. Furthermore, the STB in Decision No. 89 generally addressed the allocation of contracts between NS and CSX.³ The STB preempted the invocation of anti-

² CCSC only dredged up these claims as counterclaims, when it was named as a co-defendant in a suit that Conrail brought regarding past damages for coal that was lost in shipments through the Terminal in 1995 and 1996. The suit over the lost coal shipments has been settled, but the counterclaims live on.

³ Of course, the STB specifically addressed concerns that were raised by parties about the impact that the transaction would have on their particular contracts. *See, e.g.*, Decision No. 89, slip op. at 113-114 (discussing concerns of APL Limited about impact of transaction of its contracts). Where the contractual allegations of a party, if accepted by a court, would have interfered with a necessary and essential part of the transaction, the STB did not hesitate to

assignment clauses for 180 days from the Closing Date precisely to ensure that contracts could be smoothly allocated. Thereafter, the STB provided that parties with anti-assignment clauses in their contracts who were dissatisfied with the allocation could exercise any termination rights they might have. The STB did not say that parties, who were dissatisfied with the allocation itself, or the performance of NS or CSX, could sue for damages.

At bottom, CCSC's effort to pretend that (1) Conrail still serves the Terminal, (2) Conrail still has access to the coal mines of the Monongahela, and (3) Conrail still could induce coal shippers to move their coal exclusively through the Terminal is an effort to reopen Decision No. 89. Under the terms of Decision No. 89, only CSX and NS now have access to all of the coal mines that were formerly served by the Monongahela Railway Company (which Conrail purchased in 1991). Indeed, CCSC's parent, Consol Energy, Inc., which, in the past, has represented to the Board that it is the largest producer of coal in the Monongahela area, strongly supported the CSX-NS joint access to the mines in that area. CSX made clear in its Operating Plan that it planned to carry coal to its own coal export terminal in Baltimore, known as Curtis Bay. CCSC is now here belatedly complaining that CSX is doing precisely what it said it would do. In effect, CCSC seeks to reverse the effects of Decision No. 89 with a claim that it is entitled to sue Conrail for failing to deliver to CCSC all of the coal volume that could have been transported by Conrail to the CCSC Terminal, if there had been no division of Conrail and no joint access granted, pursuant to the approved Transaction Agreement, to the coal originating from the Monongahela mines.

preempt such a result. See, e.g., Decision No. 89, slip op. at 105-106 (preempting right of Providence and Worcester Railroad to acquire New Haven Station, which had been allocated to CSX as part of the transaction).

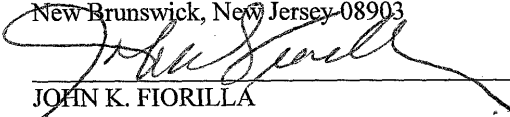
Conrail's position is that if the Agreements were to be interpreted by the District Court as CCSC would have them interpreted, they would fatally conflict with core provisions of the Conrail break-up transaction, as approved, and accordingly would be preempted by Decision No. 89 and related STB decisions.

As discussed above, in order for the parties to have a fair opportunity to fully brief the issues referred to the Board in the Whereas clauses of the District Court's Order dated November 28, 2001, Conrail requests that the Board issue an order in the above-captioned proceeding setting a procedural schedule under which simultaneous filings of evidence and argument would be due from all interested parties 30 days from the date of the Board's order.

Respectfully submitted,

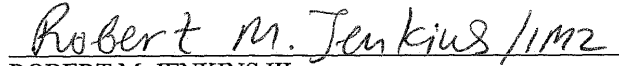
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DATED: 2/8/02 BY


JOHN K. FIORILLA

MAYER, BROWN, ROWE & MAW
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Washington, DC 20006-1101

DATED: 2/8/02 BY


ROBERT M. JENKINS III

CC: Kenneth A. Murphy
Counsel for Consolidation Coal Sales Company

EXHIBIT A

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

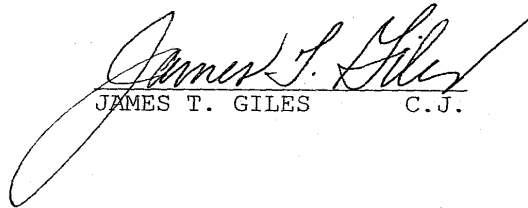
Consolidated Rail Corporation : CIVIL ACTION
:
Plaintiff, :
v. :
:
Consolidated Coal Sales :
Corporation : NO. 00-0338
Defendant. :

FILED DEC 20 2001

ORDER

AND NOW, this 20th day of December 2001, it is hereby
ORDERED that the questions posed in the Stipulation & Order dated
November 29, 2001 are referred to the Surface Transportation
Board ("STB"), pursuant to 28 U.S.C. § 1336(b), and that the STB
shall advise this court of its answers to those questions within
ninety (90) days of this order or within such longer time period
as the court may allow upon application of the STB.

BY THE COURT:


JAMES T. GILES C.J.

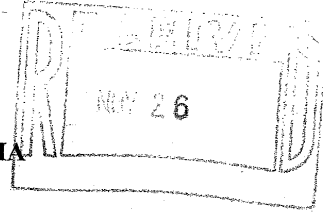
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EXHIBIT B

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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF PENNSYLVANIA



CONSOLIDATED RAIL CORPORATION,
A Pennsylvania Corporation,
Plaintiff,

CIVIL ACTION

v.

DOCKET NO.

QIT FER ET TITANE, INC.,
A Canadian Corporation,

00-CV-338

and

CONSOLIDATION COAL SALES COMPANY,
A Delaware Corporation,
Defendants.

**STIPULATION AND ORDER REFERRING QUESTION TO SURFACE
TRANSPORTATION BOARD, PLACING MATTER IN SUSPENSION AND
DISMISSING CERTAIN CLAIMS**

In connection with the above referenced matter, the existing litigants in this matter, Plaintiff, Consolidated Rail Corporation ("Conrail"), and Defendant, Consolidation Coal Sales Company ("CCSC"), do hereby stipulate and agree to the following.

WHEREAS the parties agree that it would be in the best interest of the Court and the parties to seek from the Surface Transportation Board ("STB") a definitive ruling on the nature and extent of Conrail's obligations, if any, after Split Date, June 1, 1999, to CCSC, under the terms of the Transfer and Storage Agreement, dated May 1, 1991, and the related Supplemental ~~Transfer Agreement~~ dated

ENTERED
NOV 29 2001
CLERK OF COURT

OK

February 14, 1992, in light of the STB's Decision No. 89, dated July 20, 1998, and any related ruling(s), STB Finance Docket No. 33388, issued by the STB with respect to the joint acquisition and division of Conrail's operations among Norfolk Southern Corporation, CSX Transportation, Inc. and Conrail ("Decision No. 89").

WHEREAS the parties agree that the issue of CCSC's entitlement, if any, to minimum terminal fees after Split Date, June 1, 1999, as well as CCSC's entitlement, if any, to delivery of any line haul movements of export coal emanating from mines serviced by the former Monongahela Rail Line be determined by the STB in light of its Decision No. 89.

The parties therefore stipulate and the Court **ORDERS** that the issues contained in the Whereas clauses above are hereby referred to the STB for its opinion.

The parties further stipulate that Conrail dismisses with prejudice its claims in its case in chief against CCSC that relate to losses purportedly sustained by QIT Fer et Titane, Inc.

The parties further stipulate that CCSC dismisses with prejudice its Counterclaim against Conrail for minimum terminal fees allegedly due for Calendar Year 1999 pursuant to the Transfer and Storage Agreement.

The parties further stipulate and the Court hereby **ORDERS** that all proceedings in the present matter are hereby suspended for a period of six months pending the issuance of a definitive ruling by

the STB on the referred issues. Suspension of the proceedings will be extended beyond six months only for good cause shown.

WATSON, STEVENS, FIORILLA, & RUTTER, LLP
Attorneys for Plaintiff
CONSOLIDATED RAIL CORPORATION

DATED: 11/21/01

BY


JOHN K. FIORILLA, ESQ.

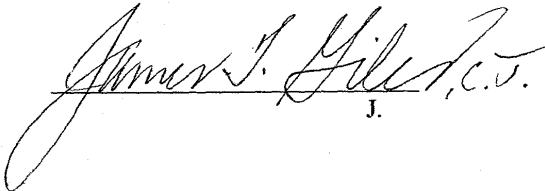
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Attorneys for Defendant
CONSOLIDATION COAL SALES COMPANY

DATED: 11/26/01

BY


KENNETH A. MURPHY, ESQ.

SO ORDERED


J.

DATED: 11/28/2001