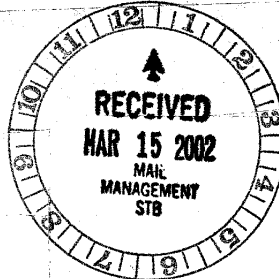


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March 15, 2002



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BY HAND-DELIVERY

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

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

ENTERED
Office of the Secretary

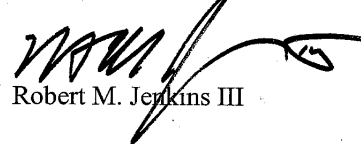
MAR 15 2002

Part of
Public Record

Dear Secretary Williams:

Enclosed for filing in the above-entitled proceeding are the original and ten copies of Consolidated Rail Corporation's Opening Evidence and Argument. Also enclosed are three diskettes containing the text of the Opening Evidence and Argument in electronic format. Please date-stamp the enclosed extra copy and return it to our representative.

Sincerely yours,


Robert M. Jenkins III

RMJ/bs

Enclosures

cc: Kenneth A. Murphy, Esq.

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

STB FINANCE DOCKET NO. 34169

CONSOLIDATION COAL SALES COMPANY

v.

CONSOLIDATED RAIL CORPORATION

**CONSOLIDATED RAIL CORPORATION'S
OPENING EVIDENCE AND ARGUMENT**



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Dated: March 15, 2002

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

STB FINANCE DOCKET NO. 34169

**CONSOLIDATION COAL SALES COMPANY
v.
CONSOLIDATED RAIL CORPORATION**

**CONSOLIDATED RAIL CORPORATION'S
OPENING EVIDENCE AND ARGUMENT**

Pursuant to the Board's February 28, 2002 Order, Consolidated Rail Corporation ("Conrail") hereby submits its opening evidence and argument in the above-captioned proceeding.

INTRODUCTION AND SUMMARY

The issue presented in this proceeding is whether the Board's 1998 decision approving the acquisition, control, and division of Conrail's assets by CSX Corporation and CSX Transportation, Inc. (jointly, "CSX") and Norfolk Southern Corporation and Norfolk Southern Railway Company (jointly, "NS")¹ preempts private law breach of contract claims against Conrail for conduct arising after June 1, 1999, on which date CSX and NS divided most of Conrail's assets ("Split Date"). Consolidation Coal Sales Company ("CCSC") brought such a claim against Conrail, alleging that post-Split Date coal traffic destined for its Baltimore terminal facility was diverted away from that facility in violation of contracts that had been negotiated with Conrail ten years earlier.

¹ CSX Corp. et al. – Control & Operating Leases/Agreements – Conrail Inc. et al., 3 S.T.B. 196 (1998) (hereinafter "CSX/NS/Conrail").

Pursuant to a Board-Approved Transaction Agreement among CSX, NS, and Conrail (“Transaction Agreement”), most of Conrail’s assets were allocated on the Split Date between Pennsylvania Lines LLC (“PRR”) and New York Central Lines LLC (“NYC”).² Assets allocated to PRR are operated by NS, whereas assets allocated to NYC are operated by CSX. Among the Conrail lines allocated on the Split Date to PRR for operation by NS are those of the former Monongahela Railway. However, CSX was granted equal access to all present and future shippers along those lines in the newly-created MGA Mine District, thus providing direct competition between CSX and NS for coal shippers in the Monongahela Valley. See CSX/NS/Conrail, 3 S.T.B. at 228-29. The largest shipper in the MGA Mine District, and hence the greatest beneficiary of the new competition between CSX and NS, is CCSC’s parent company, Consol Energy.

Conrail’s break-up involved months of public and private negotiations and the opportunity for all parties affected by the transaction to voice their concerns before the Board. The result was a carefully-engineered plan, approved by the Board, that increased competition not only in the MGA Mine District, but throughout the region formerly served by Conrail. Now, nearly two years after Conrail’s break-up, CCSC has brought a back-door breach of contract counterclaim to obtain what it could not seek, or chose not to pursue, through the Board’s approval process: both the benefits of having a single carrier ship most Monongahela Valley coal to CCSC’s Baltimore terminal facility and lower rail transportation rates for its parent resulting from having two separate rail carriers compete head-to-head in the MGA Mine District. Because CCSC’s breach of contract counterclaim against Conrail attempts to litigate issues well-

² Conrail retained some of its assets to conduct operations for the exclusive benefit of CSX and NS within three shared asset areas (“SAA”): the North Jersey SAA, the South Jersey/Philadelphia SAA, and the Detroit SAA.

settled in CSX/NS/Conrail, the Board should find – insofar as the parties’ Transfer and Storage Agreement (“T&S Agreement”), as modified by the parties’ 1992 Letter Agreement (jointly, “1991-92 Agreements”), could be interpreted to impose post-Split Date obligations on Conrail regarding the diversion of coal traffic from the CCSC terminal facility – that the continued enforcement of the 1991-92 Agreements or payment of damages based upon such an interpretation is preempted by CSX/NS/Conrail and 49 U.S.C. § 11321.

BACKGROUND

In May 1991, Conrail and CCSC entered into the T&S Agreement, pursuant to which CCSC provided certain coal handling and storage services for Conrail.³ Among the Agreement’s many terms was a requirement that Conrail “pay CCSC at least Four Million Dollars (\$4,000,000) in Terminal Fees per Contract Year.” T&S Agreement at 16.⁴

Prior to the Split Date, Conrail owned the former Monongahela Railway. Since Conrail “had virtual exclusive access” to these lines (CCSC’s Petition for Declaratory Order (“CCSC Petition”) at 7), Conrail was in an excellent position to induce Monongahela Valley coal traffic to move to CCSC’s terminal. Even so, Conrail regularly had difficulty meeting the required

³ Among the services provided by CCSC were “the movement of coal trains through the Terminal for unloading, the unloading of CONRAIL Coal from rail cars, the reassembly of trains after unloading, the stockpiling of CONRAIL Coal, the reclaiming of CONRAIL Coal from stockpiles, the loading of CONRAIL Coal into vessels from stockpiles, the direct loading of CONRAIL Coal from train to vessel without stockpiling, the weighing and sampling of both inbound and outbound CONRAIL Coal, and the creation and maintenance of up-to-date records concerning tonnages of CONRAIL Coal in storage or transferred through the Terminal during the previous forty-eight (48) months.” T&S Agreement at 2-3.

⁴ The \$4 million minimum requirement was subject to fluctuation throughout the life of the twenty-year agreement based on changes in weighted average percentage changes in values of certain price and earnings indices and electric power costs. See T&S Agreement at 12-14, 16.

minimum tonnage.⁵ And CCSC consistently waived the requirement that Conrail pay at least \$4 million in annual terminal fees. As stated by William G. Rieland, Vice President of Transportation and Marketing Services for Consol Energy as of the Split Date,

ConRail was moving from its origins all the volumes it could possibly move to export through CCSC. They were doing everything they could do to generate that type of business. And the relationship between Consol Energy and ConRail was a very, very good relationship.

I can only speculate that the management of the terminal waived the minimums because they felt that ConRail was doing everything in its power to generate business for themselves that would be brought through the terminal for the export market. And that it might appear to be punitive in that light to then assess the minimum charge, again, in light of the overall relationship and the various things that ConRail and Consol Energy did with one another to make each of our corporations more successful.

There was very much a spirit of cooperation in place.

Dep. of William G. Rieland ("Rieland Dep.") (47:8 – 48:2), attached hereto as Exhibit A. For its part, Conrail also waived certain provisions of the parties' T&S Agreement:

Well, because the years that I worked at Conrail we worked as partners with Consol to maximize the amount of coal going to their Baltimore terminal, because it was in our best interests as the transportation supplier and their best interests as the coal producer and terminal operator. And in return, we did a lot of favors for Consol. We didn't charge them [demurrage], which would have been sizeable for not unloading our cars in a timely basis. We did not charge them the market fee, the market – the going market rate for use of our locomotives at the terminal to unload the trains. That was a very cheap sweetheart deal that was – didn't come close to recovering our costs. And in addition, Consol knew the

⁵ The T&S Agreement's minimum payment provision was based on the delivery of non-Consol coal to the CCSC facility. See T&S Agreement § 2(b), at 2 ("CONRAIL Coal' shall mean all coal delivered to the Terminal by CONRAIL for handling by CCSC pursuant to this Agreement. The term shall not include any coal owned by CCSC or Consolidation Coal Company . . ."). Over time, the availability of non-Consol coal declined, making it progressively more difficult for Conrail to deliver the tonnage of non-Consol coal required to meet the minimum terminal fee provision.

entire time that we gave them all the business that we had to their terminal for nonConsoll [sic] exporters. And so, as a result, they never enforced it. It was never in my time working at Conrail when this agreement was in effect, there was ever – the subject was ever even broached.

Dep. of R.A. Listwak, Assistant Vice President of Utilities-North for Norfolk Southern

(“Listwak Dep.”) (57:25 – 58:22), attached hereto as Exhibit B. See also Rieland Dep. (30:3 – 30:8) (answering affirmatively to question: “Were you aware of the fact that the minimum terminal payment in this agreement had never been enforced by CCSC against ConRail?”). With the impending break-up of Conrail, in May 1998 both Conrail and CCSC acknowledged in writing their longstanding practice of waiving various provisions of the parties’ 1991-92

Agreements:

Until the very end when we knew that Conrail was going to be split up, and we decided just to make sure that all the provisions of all of our contracts and all the amendments were taken care of before the new owners took place, that we found reading through the contract that there were minimums. And we wrote to Frank Kologeski, who worked for me, wrote to Gary Dadisman, and asked that we formally in writing memorialize the fact that we never charged minimums, and they were never charged [for demurrage] or locomotives. And at the time we did that, that letter was to cover through split dates. But split date was delayed and ultimately didn’t cover the full period of time until split date.

Listwak Dep. (59:2 – 59:17). See also Dep. of Gary L. Dadisman, CCSC General Manager⁶ (122:7 – 122:19), attached hereto as Exhibit C (noting an interest on the part of both Conrail and CCSC “in formalizing some of the ways the contract had been historically administered”); Feb. 23, 1998 Letter (signed May 1998) from Frank M. Kolojeski to Gary Dadisman, attached hereto as Exhibit E (“During the six years that this agreement has been in place, business conditions

⁶ Apparently, Mr. Dadisman is employed by both CCSC and Consol Energy, as is evident from his business card, a copy of which is attached hereto as Exhibit D.

have warranted a policy of flexibility on the part of both parties, such that certain provisions of the agreement have not been enforced by either party. It is agreed that, during the period prior to December 31, 1998, neither party will enforce those provisions, including collection of moneys specifically linked to such provisions, which would otherwise be enforceable." (emphasis added)).

As a result of the division of Conrail's assets, the line leading into CCSC's Baltimore terminal facility was allocated to PRR for operation by NS. Accordingly, the 1991-92 Agreements were similarly allocated pursuant to guidelines in the parties' Transaction Agreement providing that "[c]ontracts that relate predominantly to . . . PRR Allocated Assets . . . will be designated in the same manner as such Assets." Transaction Agreement at 21. After the Split Date, NS began its shipments of MGA Mine District coal to the CCSC facility. Those NS coal shipments continue to this day.⁷

The dispute before the Board arose when, nearly two years after the Split Date, CCSC filed two breach of contract counterclaims against Conrail.⁸ In Count I of its counterclaim, CCSC sought a \$3.2 million judgment from Conrail, representing the difference between the \$4

⁷ Thus, the Board's statement in its February 28 Order that "NS has not moved any coal via the CCSC terminal either" is incorrect. See attached Verified Statement of Mark H. Bower ¶ 3. In fact, following the Split Date NS has moved millions of tons of coal to CCSC's Baltimore terminal. See id.

⁸ Conrail initially filed a complaint on January 18, 2000 against a shipper, QIT-Fer et Titane, Inc. ("QIT"), after that shipper declined to pay a portion of charges owed to Conrail pursuant to a rail transportation contract on the basis that Conrail had not delivered all of the coal that had been promised to QIT during 1995 and 1996. Conrail also sued CCSC for indemnification on the basis that CCSC had lost and/or mishandled QIT's coal. On September 8, 2000, Conrail amended its complaint by filing two additional claims against CCSC for overpayment of terminal fees and unjust enrichment. Then, over a year after Conrail filed its initial complaint, CCSC filed its answer and counterclaim against Conrail on February 12, 2001. Conrail has settled its claims against both QIT and CCSC.

million in minimum terminal fees for calendar year 1999 and \$800,000 that Conrail actually paid in terminal fees for that year. In Count II of its counterclaim, CCSC restated its demand for a \$3.2 million judgment (again, representing damages for the calendar year 1999) as well as a judgment that would "direct Defendant Consolidated Rail Corporation to compensate Plaintiff for any shortfall in minimum annual terminal fee payments Consolidation Coal Sales Company may experience through 2011, as a result of the diversion of certain linehaul movements of coal away from the CCSC Terminal." Answer to Am. Compl., Affirmative Defenses & Countercl. of Consolidation Coal Sales Company at 9 (emphasis added), attached as Exhibit B to CCSC Petition.

CCSC subsequently stipulated to the dismissal, with prejudice, of "its Counterclaim against Conrail for minimum terminal fees allegedly due for Calendar Year 1999 pursuant to the Transfer and Storage Agreement." Stip. & Order Referring Question to Surface Transportation Board, Placing Matter in Suspension & Dismissing Certain Claims at 2, attached as Exhibit C to CCSC Petition. Accordingly, the remaining dispute between the parties appears to involve CCSC's demand against Conrail for damages representing any shortfall in the minimum annual terminal fee to the extent that such a shortfall is caused by a diversion of coal otherwise destined for CCSC's facility.⁹

⁹ There is some confusion over the scope of relief requested by CCSC. In its Petition to the Board for Declaratory Order ("CCSC Petition"), CCSC requested that the Board issue a declaratory order:

- (ii) that Conrail remains obligated to pay CCSC, or to ensure payment to CCSC, of annual minimum terminal fees, through 2011, under the terms of the Transfer And Storage Agreement; (iii) that the diversion to CSX's Curtis Bay terminal facility of certain linehaul movements of export coal emanating from mines serviced by the former Monongahela Rail Line constitutes a breach of the 1992 Letter Agreement between CCSC and Conrail, for which CCSC is entitled to damages.

ARGUMENT

The Board's approval of the Transaction Agreement in CSX/NS/Conrail terminates any obligations that Conrail may have to CCSC and preempts CCSC's post-Split Date contract claims against Conrail. CCSC belatedly brought its counterclaims against Conrail nearly two years after the Split Date, seeking to enforce its 1991-92 Agreements against Conrail even though those Agreements had been allocated, pursuant to the Board-approved Transaction Agreement, to PRR. Because of the divestiture of all of Conrail's operating and ownership rights in the rail lines leading to the CCSC terminal, including all of the rail lines in the MGA Mine District, it is now impossible for Conrail to perform pursuant to those contracts. CCSC had an opportunity to object to the allocation of the 1991-92 Agreements while the Board was evaluating Conrail's break-up, but chose not to. CCSC's failure to raise such objections does not prevent the Board from issuing a ruling now that, absent preemption, CCSC's counterclaims would undermine the fundamental goals of Conrail's break-up and would render that transaction unworkable.

I. UNDER THE TRANSACTION AGREEMENT, AS APPROVED IN CSX/NS/CONRAIL, CONRAIL HAS NO RIGHTS IN OR OBLIGATIONS UNDER ALLOCATED CONTRACTS AFTER THE SPLIT DATE.

CCSC's belated contract counterclaims are predicated on several erroneous assumptions:

(1) that Conrail is still responsible for rail service to CCSC's terminal; (2) that Conrail still has

CCSC Petition at 9. The relief requested in CCSC's Petition to the Board therefore appears to be broader than the relief requested in Count II of CCSC's counterclaim (which seeks damages for the shortfall in the minimum annual terminal fee resulting from the diversion of coal away from CCSC's facility). In any event, Conrail does not believe that the Board's analysis of the preemptive effect of CSX/NS/Conrail and Section 11321(a) would turn on the scope of relief requested by CCSC in either its counterclaim or Petition. As Conrail will demonstrate, all claims seeking to hold Conrail liable for the post-Split Date performance of the 1991-92 Agreements are preempted. Accordingly, Conrail respectfully requests, for purposes of this proceeding, that the Board read CCSC's counterclaim broadly as though it contained all of the claims described in its Petition to the Board.

access to coal mines in the Monongahela area; and (3) that Conrail could still induce coal shippers to move their coal exclusively through CCSC's terminal. These assumptions were all vitiated by the Transaction Agreement, which the Board approved. Even assuming that CCSC's breach of contract counterclaims might have had validity before the Split Date (an assumption which Conrail disputes), they could have no validity after the Split Date because the Board-approved Transaction Agreement made it impossible for Conrail to meet the requirements cited by CCSC.

After Conrail was acquired by CSX and NS, most of its assets were allocated pursuant to the Board-approved Transaction Agreement. Today, Conrail only operates assets in the three "Shared Asset Areas": the North Jersey SAA, the South Jersey/Philadelphia SAA, and the Detroit SAA. Conrail no longer controls the lines of the former Monongahela Railway or the rail line leading to CCSC's terminal facility. Moreover, as the Board has already noted, after the Split Date

[Conrail] will not hold itself out to the public as performing transportation services directly and for its own account; [Conrail] will not enter into any contract (other than with CSXT or NSR) for the performance of transportation services; and all transportation services performed by [Conrail] will be performed as agent or subcontractor of CSXT or NSR.

CSX/NS/Conrail, 3 S.T.B. at 231. CCSC has thus filed its counterclaim against a railroad that, pursuant to a Board-approved Transaction Agreement, no longer provides transportation services to Baltimore and can no longer carry coal to the CCSC terminal.

CCSC's counterclaim provides a prime example of the necessity of finding that the Board's CSX/NS/Conrail decision and Section 11321 preempt any claims against Conrail for the enforcement of contracts it can no longer perform. According to Section 11321(a):

A rail carrier, corporation, or person participating in that approved or exempted transaction is exempt from the antitrust laws and from

all other law, including State and municipal law, as necessary to let that rail carrier, corporation, or person carry out the transaction, hold, maintain, and operate property, and exercise control or franchises acquired through the transaction.

49 U.S.C. § 11321(a) (2000) (emphasis added). As the Board has already recognized, the sweep of Section 11321 is broad. “In short, the immunity provision in § 11341 means what it says: A carrier is exempt from all law as necessary to carry out an ICC-approved transaction.” Norfolk & W. Ry. Co. v. Am. Train Dispatchers Ass’n, 499 U.S. 117, 129 (1991) (emphasis in original).¹⁰ Since the exemption from all other law “is broad enough to include laws that govern the obligations imposed by contract,” the exemption “effects an override of contractual obligations, as necessary to carry out an approved transaction, by suspending application of the law that makes the contract binding.” Id. at 129-30.

The complexity of the CSX/NS/Conrail transaction necessitates the preemption of CCSC’s breach of contract counterclaim. In many markets in the Northeast and Midwest, Conrail was the only Class I carrier to provide rail service. Also, unlike a typical transaction in which a railroad is merely acquired by another carrier (with the acquiring carrier assuming all of the assets and liabilities of the acquired carrier), Conrail’s assets were generally divided for operation by the two acquiring companies, with certain limited assets remaining under Conrail’s control. Because of the complexity of the transaction and the need to ensure a smooth transition on the Split Date, detailed procedures were developed for the allocation of Conrail’s many

¹⁰ The provisions of Section 11341 were transferred, without substantive changes, to Section 11321 pursuant to the ICC Termination Act of 1995.

assets, including transportation contracts, non-transportation contracts, and physical assets (such as equipment and property). See Transaction Agreement § 2.2.¹¹

Nowhere in the Board's CSX/NS/Conrail decision can it be inferred that parties to a Conrail contract have a right to sue Conrail for post-Split Date conduct arising from an allocated contract. Instead, the contract allocation process approved by the Board was specifically designed to eliminate the right of any party to obstruct the transaction by claiming that it had a continuing right to service by or performance from Conrail. Even shippers were not given the authority to sue Conrail for non-SAA post-Split Date conduct. Instead, their Board-imposed remedy was limited to either continued performance pursuant to their contract or, if the contract contained a non-assignment clause, termination or renegotiation of the contract. See CSX/NS/Conrail, 3 S.T.B. at 272-73. And even then, shippers were prevented from exercising this limited termination remedy for a period of six months following the Split Date. See id.

¹¹ The Transaction Agreement contained specific provisions regarding the allocation of non-transportation contracts such as the 1991-92 Agreements. According to the Transaction Agreement:

(e) Promptly after the date hereof, CSXT and NSR each shall appoint up to five members of a committee (the "Contracts Team"). The Contracts Team shall meet and not later than January 1, 1998 shall negotiate an equitable designation of all Contracts (other than Transportation Contracts and Contracts otherwise allocated or designated under the terms hereof) based on the following guidelines.

(i) Contracts that relate predominantly to either NYC Allocated Assets, PRR Allocated Assets or Retained Assets will be designated in the same manner as such Assets.

Transaction Agreement § 2.2(e). Since the lines of the former Monongahela Railway and the line leading to CCSC's terminal were PRR Allocated Assets, the Contracts Team allocated the 1991-92 Agreements to PRR for operation by NS.

Of course, CCSC is not a shipper. Yet if the Board failed to preserve common law breach of contract remedies for shippers whose “non-assignable” contracts were allocated on the Split Date, then it would be highly inequitable to preserve those claims for the thousands of non-shipper contracts entered into by Conrail. Any other result would open the floodgates to potential claims, years after the fact, that Conrail has somehow or other breached contracts that had been allocated pursuant to the Board-approved Transaction Agreement. Any claims that resulted in liability would then have the effect of rewriting the provisions of the Transaction Agreement years after the parties carefully allocated Conrail’s assets and liabilities.

Such a result is clearly unworkable. Holding Conrail liable for post-Split Date conduct in an allocated contract would have the effect of having that contract not be allocated at all. Yet the allocation of all non-SAA assets and liabilities, including contracts, was fundamental to the Transaction Agreement and was necessary to ensure a smooth transition to competitive rail service in areas formerly served by Conrail. The Board has not hesitated to preempt the rights of non-shipper parties to Conrail contracts when necessary to carry out the CSX/NS/Conrail transaction. See CSX/NS/Conrail, 3 S.T.B. at 307-08 (preempting rights of Providence and Worcester Railroad Company to acquire New Haven station because “applicants’ continued ownership and use of New Haven station is an integral and necessary part of the underlying transaction before us”). In this case, absent preemption, any party to a Conrail contract that insisted that Conrail retain responsibility for an allocated contract after the Split Date could have brought the transaction to a halt. Accordingly, the STB should find that any application of contract law that would hold Conrail responsible post-Split Date as “assignor” for NS’s or CSX’s

performance of contracts is preempted by the STB's approval of the Transaction Agreement and by Section 11321(a).¹²

II. CCSC KNEW THE TRANSACTION AGREEMENT, AS APPROVED IN CSX/NS/CONRAIL, WOULD VITIATE THE CORE PREDICATES OF THE 1991-92 AGREEMENTS BUT FAILED TO RAISE ANY OBJECTION BEFORE THE BOARD.

When CSX and NS proposed the acquisition and break-up of Conrail, CCSC raised no concerns with the Board. To the contrary, CCSC's parent, Consol Energy, pressed for approval and implementation of the provisions of the Transaction Agreement that would ensure more competitive rail service in the Monongahela Valley. As a result of the Board's decision, CSX and NS now compete head-to-head throughout the MGA Mine District, to the benefit of that region's largest shipper, Consol Energy. Now, nearly two years after the Split Date, CCSC has belatedly brought a breach of contract counterclaim against Conrail, attempting to hold Conrail to provisions of the parties' 1991-92 Agreements that had been vitiated by the very Board decision that increased rail competition in the MGA Mine District. CCSC's failure to voice its concerns at the proper time – when the Board was fashioning appropriate remedies for parties affected by the break-up of Conrail – should bar it from obtaining an exception to the Board's determination, pursuant to its approval of the Transaction Agreement, that its contract has been allocated to PRR, thus preempting any post-Split Date Claims against Conrail.

¹² It appears clear as a matter of contract law that a novation has occurred due to CCSC's nearly two-year delay in objecting to Conrail's allocation of the 1991-92 Agreements. See Restatement (Second) of Contracts § 329 (1981) ("If the obligor . . . accepts any performance from the assignee without reserving his rights against the assignor, a novation arises by which the duty of the assignor is discharged . . ."); *id.* cmt. b (noting that obligor's "silent acceptance of the performance operates as acceptance of the offer of novation"). Nevertheless, to remove any issue of whether Conrail could be held liable or found responsible as an assignor of the 1991-92 Agreements, the Board should preempt any contract law interpretation that could hold Conrail liable as an assignor. See *CSX/NS/Conrail*, 3 S.T.B. at 307-08 (preempting potential and disputed contract law claims to avoid any possibility of conflict with Board's decision).

As the largest shipper in the Monongahela Valley, Consol Energy stood to gain from the competition provided by Conrail's break-up and the creation of the MGA Mine District. To that end, Consol Energy was a vigorous supporter of Conrail's break-up. See Rieland Dep. (66:16 – 66:22) (answering affirmatively to the question: "Consol had supported the breakup of Conrail into Norfolk Southern and CSX Do you agree with that position?"). In fact, Consol Energy filed a "Petition for Leave to Intervene, File Comments, and Participate in Oral Argument" in the CSX/NS/Conrail proceedings only when the possibility arose that NS and CSX could not agree on operating terms for the MGA Mine District. As described by the Board,

Consol indicates that it has not previously participated in this proceeding in light of applicants' representations that, although NS will have operational control of Conrail's Monongahela coal lines, CSX will have equal, perpetual access to all current and future facilities in the area. Consol maintains that it only recently learned that applicants have been unable to negotiate an implementing operating plan for the area and that conditions to the CSX/NS/CR transaction may be necessary to protect its interests.

CSX Corp. et al. – Control & Operating Leases/Agreements – Conrail Inc. et al., Finance Docket No. 33388, at 1 (served Apr. 24, 1998) (footnote omitted).

While Consol Energy was eagerly eyeing Conrail's break-up and the resulting surge in rail competition in the MGA Mine District, its wholly owned subsidiary CCSC was conspicuously quiet. CCSC's silence, however, speaks volumes in light of CSX's public pronouncements that it would be shipping Monongahela Valley coal via facilities other than CCSC's Baltimore terminal. See R.R. Control Application Vol. 3A (CSX Operating Plan, Labor Impact Exhibit, Density Charts and Supporting Statements) in CSX Corp. et al. – Control & Operating Leases/Agreements – Conrail Inc. et al., Finance Docket No. 33388, at 55 ("CSX will be able to move MGA coal . . . directly to Baltimore for delivery to the Curtis Bay Pier, Bayside Terminal, and the Consolidation Coal Company ("Consol") piers." (emphasis added)); id. at 170

(“[t]oday CSX moves B&O coal through Cumberland to Baltimore for delivery at the Curtis Bay Pier, Bayside Terminal, and Consolidated Coal Company (‘Consol’) piers for export or coastal shipment. After the acquisition, CSX will be able to deliver both B&O and MGA coal to those piers”); id. at 171 (“Today, virtually no MGA coal moves to Newport News for export. . . . After the Acquisition, the expanded CSX will be able to move MGA coal via single-line service over either of two routes [to Newport News]” (emphasis added)).

CSX’s Railroad Control Application raises two separate problems for CCSC. First, CSX’s application to the Board provided for the shipment of MGA Mine District coal to Curtis Bay and Newport News. To the extent CCSC claims that CSX has “diverted” coal otherwise bound for its Baltimore terminal to Curtis Bay or Newport News, CCSC’s claim is inconsistent with CSX’s application, as approved by the Board. On that basis alone, preemption is necessary to ensure the integrity of the Board’s decision, since any court-imposed liability for CSX’s “diversion” of coal would conflict with explicit provisions of a Board-approved application.

Second, Conrail found it impossible to meet the requirements of the 1991-92 Agreements’ minimum terminal fees provision while it “had virtual exclusive access” to Monongahela Valley coal. Conrail’s break-up could only exacerbate that problem, since after the Split Date NS would compete directly against CSX on Conrail’s former Monongahela Railway lines for coal business. It was therefore obvious that CCSC would be handling a smaller share of the Monongahela Valley’s coal business. Moreover, CSX had publicly stated, in its Railroad Control Application, that it intended to ship MGA Mine District coal to other terminals. Thus, it was clear from the moment that CSX’s and NS’s joint access arrangement for the MGA Mine District was announced that CCSC could not expect that its terminal would continue to be the favored terminal for export coal moving from the Monongahela Valley. While

other parties affected by NS's and CSX's transaction plans did not hesitate to come forward and express any concerns they had to the Board, CCSC said nothing.

CCSC and Consol Energy cannot have it both ways.¹³ Consol Energy cannot both press for and obtain competition in the MGA Mine District, and then two years after it has reaped the benefits of that competition complain that its subsidiary has been harmed because competition has reduced the number of coal shipments to its Baltimore terminal. Yet that is precisely what Consol Energy, through its subsidiary, is attempting to do here. Over two years after the Split Date, CCSC belatedly brought a counterclaim against Conrail, attempting to hold it liable for contracts that had been allocated pursuant to a Board-approved Transaction Agreement. But the clock cannot so facily be turned back. CCSC cannot avoid the effects of CSX/NS/Conrail, particularly in light of its parent's strong support of the very arrangements that voided any obligation Conrail could possibly have under the 1991-92 Agreements to CCSC after the Split Date. As CCSC's parent clearly and beneficially recognized, CSX/NS/Conrail fundamentally changed the nature of rail service in the Northeast and Midwest, and any post-Split Date claims against Conrail for the enforcement of the 1991-92 Agreements should be preempted.

III. THE BOARD CAN AND SHOULD DETERMINE THAT CCSC'S CLAIMS AGAINST CONRAIL ARE PREEMPTED DESPITE CCSC'S FAILURE TO BRING ITS CONCERNS TO THE BOARD'S ATTENTION DURING THE CONRAIL PROCEEDINGS.

That the Board's CSX/NS/Conrail decision does not contain an explicit reference to the 1991-92 Agreements does not undermine the necessity or appropriateness of preempting CCSC's claims. As Justice Stevens explained regarding Section 11321's predecessor, Section 11341 "does not condition exemptions on the ICC's announcing that a particular exemption is

¹³ Consol Energy plays a large role in running its wholly-owned subsidiary, and the two companies market their services together. See, e.g., Ex. D.

necessary to an approved transaction. . . . The breadth of the exemption is defined by the scope of the approved transaction, and no explicit announcement of exemption is required to make the statute applicable.” ICC v. Bhd. of Locomotive Eng’rs, 482 U.S. 270, 298 (1987) (Stevens, J., concurring) (footnote omitted). See also Bhd. of Locomotive Eng’rs v. Boston & Maine Corp., 788 F.2d 794, 801 (1st Cir. 1986) (noting self-executing nature of section 11341); Bhd. of Locomotive Eng’rs v. Chicago & N.W. Ry. Co., 314 F.2d 424, 432 (8th Cir. 1963) (same). To that end, the Board has never required that railroads identify at the time a transaction is approved every law or contract that might be preempted by the Board’s approval of the transaction. See, e.g., CSX Corp. – Control – Chessie Sys., Inc., & Seaboard Coast Line Indus., 8 I.C.C.2d 715, 723 n.12 (1992) (“Section 11341 is self-executing and does not condition exemptions on the Commission’s announcing that a particular exemption is necessary to an approved transaction.”). The 1991-92 Agreements were two of thousands of Conrail contracts that were allocated pursuant to the Board-approved Transaction Agreement. Moreover, CCSC did not object to the allocation of its contract at the time the Board was reviewing the Transaction Agreement.

By filing its counterclaim and petitioning the Board for a declaratory order, CCSC has belatedly brought into focus the issue of whether the enforcement of the 1991-92 Agreements against Conrail is preempted by the Board’s CSX/NS/Conrail decision and Section 11321. The Board can and should now determine that any such enforcement against Conrail is preempted.

CONCLUSION

The Board should find that CCSC's counterclaims against Conrail, as described in its Petition for Declaratory Order, are preempted by CSX/NS/Conrail and Section 11321(a).

Respectfully submitted,

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Attorneys for Consolidated Rail Corporation

Dated: March 15, 2002

Verified Statement of Mark H. Bower

1. My name is Mark H. Bower. I am an Assistant Vice President for Export and Metallurgical Coal Marketing for the Norfolk Southern Railway Company ("NS"). I have held my present position for seven years.

2. In my capacity as Assistant Vice President, I am familiar with our business arrangements with Consolidation Coal Sales Company ("CCSC").

3. In the Surface Transportation Board's Decision No. 32543, released on February 28, 2002 in STB Finance Docket No. 34169, Consolidation Coal Sales Company v. Consolidated Rail Corporation, the Board stated on page two that, after Conrail assigned its interests under the 1991-92 CCSC/Conrail contract to NS, "NS has not moved any coal via the CCSC terminal either." That statement is incorrect. NS has moved several million tons of coal to CCSC's Baltimore facility from June 1, 1999 to the present. NS is currently delivering coal to CCSC's facility under an arrangement with substantially different terms and conditions from the 1991-92 CCSC/Conrail contract. Among the differences is the lack of a minimum terminal fee payment provision.

VERIFICATION

I, Mark H. Bower, declare under penalty of perjury that the foregoing is true and correct. Further, I certify that I am qualified and authorized to file this Verified Statement. Executed on March 13, 2002.

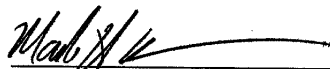

Mark H. Bower

EXHIBIT A

In The Matter Of:

*CONSOLIDATED RAIL CORPORATION v.
QIT-FER ET TITANE, INC., et al.*

*WILLIAM G. RIELAND
September 28, 2001*

*SILVER REPORTING SERVICES, INC.
CERTIFIED SHORTHAND REPORTERS
634 ARENA DRIVE
SUITE 206
TRENTON, NJ 08610
(609) 888-0111 FAX: (609) 888-2497*

*Original File WRIELAND.V1, 82 Pages
Min-U-Script® File ID: 2417975490*

Word Index included with this Min-U-Script®

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Rieland - by Mr. Fiorilla

[1] Norfolk Southern.
[2] Q: Okay. And did you discuss this
[3] agreement or any proposed changes to the
[4] agreement with Norfolk Southern, either before or
[5] after that split date?
[6] A: The only comment that I made to the
[7] Norfolk Southern was the comment that I made
[8] reference to earlier in this testimony, during
[9] the meeting in December of '98.
[10] Q: And what was that comment again?
[11] A: I was asked by Mark Bower how the
[12] company would treat the minimum payment
[13] obligation in this agreement.
[14] MR. FIORILLA: Referring to
[15] R-1, for the record.
[16] A: (Continuing) How the company would
[17] treat the Norfolk Southern with respect to the
[18] minimum payment obligation in this agreement.
[19] And my comment was that we
[20] would treat you the same way that we previously
[21] had treated ConRail.
[22] Q: Now, Mr. Rieland, at the time that
[23] you made that comment, it was December '98; am I
[24] correct?
[25]

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Rieland - by Mr. Fiorilla

[1] A: That is correct.
[2] Q: Were you aware of the fact that the
[3] minimum terminal payment in this agreement had
[4] never been enforced by CCSC against ConRail?
[5] MR. MURPHY: Objection.
[6] You may answer.
[7] A: Yes.
[8] Q: Do you know why CCSC had never
[9] enforced that portion of this agreement against
[10] ConRail since this agreement was signed in 1992?
[11] A: I have no firsthand knowledge of
[12] that.
[13] Q: Well, what knowledge do you have?
[14] A: Commercial convenience. There were
[15] various things, as I was told.
[16] Q: And who told you this, may I ask?
[17] A: Gary Dadisman, most likely.
[18] Various terms and conditions in this agreement,
[19] which neither party paid strict adherence to.
[20] Q: ConRail waived certain portions of
[21] the agreement, too; is that correct?
[22] A: My understanding—and I don't have
[23] firsthand knowledge of that.
[24] Q: Okay. But you understand—and you
[25]

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Rieland - by Mr. Fiorilla

[1] are not a hundred percent sure, but you may have
[2] heard about this from Mr. Dadisman. Is that your
[3] understanding?
[4] A: Yes.
[5] Q: Did you have anything to do with
[6] the—in 1992—let me take you back.
[7] Did you have anything to
[8] do—and I guess at that time—let me just see
[9] that.
[10] Okay. I guess you were still
[11] in Chicago in 1992; is that correct?
[12] A: Yes.
[13] Q: Okay. But in 1994 when you became
[14] vice president of transportation—
[15] A: And marketing services.
[16] Q: —and marketing services.
[17] Transportation is kind of a
[18] really important job when you are in the coal
[19] business, I would think. If you can't get your
[20] coal to market, it isn't really worth very much.
[21] It's an extremely important job.
[22] I assume you were rather
[23] familiar with all the contracts in place when you
[24] got there.
[25]

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Rieland - by Mr. Fiorilla

[1] Can I make that assumption?
[2] A: (No response.)
[3] Q: That you were familiar with the
[4] contracts or became familiar with them as soon as
[5] you took that position?
[6] A: Yes.
[7] Q: Okay. Regarding the transfer and
[8] storage agreement at that time, do you recall
[9] whether or not from year to year, after 1992—or
[10] 1994 when you became vice president of
[11] transportation and marketing sales, you had
[12] discussions with Mr. Dadisman regarding how that
[13] contract was going to be enforced, either by
[14] Consol and/or by ConRail?
[15] MR. MURPHY: Objection.
[16] You are asking him about this
[17] contract between CCSC—
[18] MR. FIORILLA: That's right.
[19] MR. MURPHY: —but then you
[20] are asking him about enforcement by Consol—
[21] MR. FIORILLA: No.
[22] Enforcement by CCSC.
[23] I asked him whether or not he
[24] talked to Mr. Dadisman about enforcement by CCSC?
[25]

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Rieland - by Mr. Fiorilla

[1] him why.
[2] MR. MURPHY: No.
[3] Are you asking whether he
[4] knows?
[5] MR. FIORILLA: If he doesn't
[6] know, he has to tell me he doesn't know. I can't
[7] ask him something he doesn't know because if he
[8] doesn't, he doesn't, but I do object to you
[9] telling him—asking him whether he knows or not.
[10] If he does know, I want to
[11] know. If he doesn't know, Mr. Rieland will tell
[12] me, as he has in the past, by the way. And I
[13] appreciate that. When he doesn't know an answer,
[14] he tells me that he doesn't know.
[15] MR. MURPHY: Understood.
[16] MR. FIORILLA: So I don't see
[17] any problem with this witness answering this
[18] question straight out.
[19] He is telling me that there
[20] are certain things that happened that the parties
[21] decided not to enforce in their agreement. I
[22] want to know what some of those certain things
[23] are in regards to this agreement.
[24] MR. MURPHY: But what he also

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Rieland - by Mr. Fiorilla

[1] told you was that someone told him.
[2] MR. FIORILLA: That's fine.
[3] MR. MURPHY: Okay. What you
[4] are now asking him is what the basis was.
[5] MR. FIORILLA: That's right.
[6] MR. MURPHY: But you are
[7] asking him to give you certain examples of the
[8] reasons why it may have happened. That's
[9] speculation.
[10] Why it actually happened, he
[11] either knows or someone else knows. That's the
[12] fair question to this witness.
[13] MR. FIORILLA: Well, I'd like
[14] to ask him both questions.
[15] He has a lot of experience
[16] with this type of contract, and I would like to
[17] know some of the examples, and then I want to
[18] know if any of these examples would apply here.
[19] And I think I am entitled to ask those questions
[20] and to get his response.
[21] MR. MURPHY: Fair enough.
[22] BY MR. FIORILLA:
[23] Q: Mr. Rieland, can you give us some
[24] examples of things that happened, as you

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Rieland - by Mr. Fiorilla

[1] described them, which would constitute commercial
[2] convenience; that would lead to not enforcing a
[3] minimum tonnage agreement?
[4] A: That's really the only issue I can
[5] speak to.
[6] Q: Okay.
[7] A: ConRail was moving from its origins
[8] all the volumes it could possibly move to export
[9] through CCSC. They were doing everything they
[10] could do to generate that type of business. And
[11] the relationship between Consol Energy and
[12] ConRail was a very, very good relationship.
[13] I can only speculate that the
[14] management of the terminal waived the minimums
[15] because they felt that ConRail was doing
[16] everything in its power to generate business for
[17] themselves that would be brought through the
[18] terminal for the export market. And that it
[19] might appear to be punitive in that light to then
[20] assess the minimum charge, again, in light of the
[21] overall relationship and the various things that
[22] ConRail and Consol Energy did with one another to
[23] make each of our corporations more successful.
[24] There was very much a spirit

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Rieland - by Mr. Fiorilla

[1] of cooperation in place.
[2] Q: Now, do you know if from time to
[3] time mines, which had been other than Consol
[4] mines, were purchased by Consol, and that the
[5] coal that was produced by those mines which were
[6] served by ConRail then went to the terminal under
[7] the freight agreement for Consol coal as opposed
[8] to the agreement for other than Consol coal?
[9] A: I am not sure I understand your
[10] question.
[11] Q: Okay. Let me see if I can explain
[12] it a little bit better.
[13] When the terminal and storage
[14] agreement and the freight agreement—and it
[15] contains part of the freight agreement in this
[16] agreement—for non-Consol coal for export to be
[17] handled at the terminal was agreed to, certain
[18] mines that were producing that coal were not
[19] owned by Consol Energy.
[20] But during the period when
[21] this agreement was in effect, isn't it true that
[22] some of those mines were purchased by Consol?
[23] A: I don't think so. The only mine
[24] that we bought in that time frame that was served

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Rieland - by Mr. Fiorilla

- [1] terminate R-1?
[2]
[3] A: I do not know.
[4] Q: Was it your understanding that come
[5] split-date date, if R-1 had not been changed or
[6] terminated, that Norfolk Southern would be the
[7] party that would be providing the coal that
[8] ConRail had been providing under that agreement?
[9] A: I came to know that at some point,
[10] but I can't recall when I gained that knowledge.
[11] Q: Now, Mr. Rieland, did Consol Energy
[12] take a position at the Surface Transportation
[13] Board regarding the application of ConRail,
[14] Norfolk Southern and CSX to break up ConRail?
[15] A: Yes.
[16] Q: And can you tell me what that
[17] position was?
[18] And I don't mean a brief. I
[19] mean, generally, what the position was?
[20] A: The only formal position that I can
[21] recall we took was objecting to the way it
[22] appeared at a point in time that the former
[23] portion of ConRail, which we have always had
[24] referred to as the MGA—
[25] Q: This is the Monongahela Railroad?

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Rieland - by Mr. Fiorilla

- [1] A: Yes. The Monongahela Railway would
[2] be operated post-split date.
[3] Q: And did Consol make a formal
[4] objection to the Surface Transportation Board
[5] concerning that?
[6] A: Yes.
[7] Q: And can you tell me what happened
[8] to that objection?
[9] A: I believe it was dismissed by the
[10] Surface Transportation Board, but I can't recall
[11] the reasons given for its dismissal.
[12] MR. MURPHY: He didn't ask
[13] that.
[14] THE WITNESS: Okay.
[15] Q: Representatives of Norfolk Southern
[16] told me it was their understanding that Consol
[17] had supported the breakup of ConRail into Norfolk
[18] Southern and CSX, generally speaking.
[19] Do you agree with that
[20] position?
[21] A: Yes.
[22] MR. MURPHY: Objection.
[23] Q: Okay. Do you understand how the
[24] breakup of ConRail came about in regards to why
[25]

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Rieland - by Mr. Fiorilla

- [1] ConRail was forced to be broken up?
[2] A: Yes.
[3] Q: Can you tell me what your
[4] understanding is?
[5] A: I believe it was in the summer of
[6] '96 that ConRail and the CSX agreed to merge.
[7] The Norfolk Southern viewed that as a threat to
[8] their existence, their position in their service
[9] territory would be threatened, and they commenced
[10] a hostile takeover of ConRail, which resulted in
[11] a bidding war between themselves and the CSX for
[12] control of ConRail. And that at some point it
[13] appeared that it would be mutually constructive
[14] to those carriers to continue that hostile
[15] takeover.
[16] Q: You mean CSX and NS?
[17] A: CSX and NS, yes.
[18] And at some point they agreed
[19] to form an alliance to jointly acquire ConRail
[20] and then split it as they would agree to split
[21] it.
[22] Q: Okay. That's a very good
[23] analysis. One of the best I have heard from
[24] somebody who really wasn't working in the split
[25]

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Rieland - by Mr. Fiorilla

- [1] itself.
[2] Now, since split date, has
[3] Consol been losing business because of the way
[4] CSX and NS, as approved by the STB, has split the
[5] ConRail mines?
[6] MR. MURPHY: Objection.
[7] Can I ask that you rephrase
[8] the question?
[9] MR. FIORILLA: Why?
[10] It asks if Consol has been
[11] losing business, Consol Energy. Okay?
[12] MR. MURPHY: You are asking
[13] regarding Consol Energy?
[14] MR. FIORILLA: That's right.
[15] MR. MURPHY: Okay.
[16] MR. FIORILLA: He should know
[17] about Consol Energy.
[18] A: It's a hard question to answer. I
[19] think you should—I would like you to be more
[20] specific about what parts of Consol Energy.
[21] Maybe I could better answer it.
[22] Q: Well, my understanding is that some
[23] of the mines or lines that went to certain of the
[24] mines that had been ConRail mines, as a result of
[25]

EXHIBIT B

1 Listwak
2
3
4
5 IN THE UNITED STATES DISTRICT COURT
6 FOR THE EASTERN DISTRICT OF PENNSYLVANIA
7
8
9 CONSOLIDATED RAIL : CIVIL ACTION
10 CORPORATION
11 vs.
12 QIT-FER et TITANE,
13 INC., and CONSOLIDATED :
14 RAIL COAL SALES COMPANY; NO. 00-CV-338
15
16 November 1, 2001
17 Philadelphia, Pennsylvania
18
19 Pretrial examination of R. A. LISTWAK,
20 taken in the offices of Miller, Alfano &
21 Raspanti, 1818 Market Street, on the above
22 date, commencing at 1:10 p.m., before Janice M.
23 Leaman, a Notary Public and Approved Reporter
24 of the United States District Court for the
25 Eastern District of Pennsylvania.

KAPLAN, LEAMAN & WOLFE
Registered Professional Reporters
The Bourse, 21 South Fifth Street
Philadelphia, Pennsylvania 19106
(215) 922-7112

1 Listwak
2
3 A. Yes.
4 (Whereupon, a Subpoena was marked as
5 Exhibit Number L-1, for identification.)
6 BY MR. MURPHY:
7 Q. Mr. Listwak, I am handing you what's been
8 marked as L-1.
9 As far as you can tell, is L-1 a copy
10 of the Subpoena that you received directing you
11 to appear here today?
12 A. Yes.
13 Q. Now, the Subpoena asked you to bring
14 certain documents with you; do you recall
15 that?
16 A. Yes, I think it said bring any documents
17 that would relate to the attached letter and
18 subpoena.
19 Q. Correct. Do you have any documents that are
20 responsive?
21 A. No, I don't.
22 Q. You are entitled to a witness fee, and I
23 want the record to reflect that you are
24 receiving it now.
25 MR. JOHNSON: Don't spend it in one
place.

1 Listwak
2
3 APPEARANCES:
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5 BY: JOHN K. FIORILLA, ESQUIRE, and
6 IRENE M. ZANETOS, ESQUIRE
7 390 George Street
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9 Attorney for Plaintiff
10
11 MILLER, ALFANO & RASPANTI
12 BY: KENNETH MURPHY, ESQUIRE
13 1818 Market Street, 34th Floor
14 Philadelphia, Pennsylvania 19103
15 Attorney for Defendant
16
17 ALSO PRESENT:
18
19 WILLIAM H. JOHNSON, ESQUIRE
20 Attorney for Witness
21
22 JOHN ENRIGHT, ESQUIRE
23
24
25

1 Listwak
2
3 BY MR. MURPHY:
4 Q. Mr. Listwak, can you state your full name,
5 for the record?
6 A. It's Ronald A. Listwak.
7 Q. And what is your present occupation at this
8 time?
9 A. I'm employed by the Norfolk Southern as
10 assistant vice president of utilities north.
11 Q. What are your duties in that capacity?
12 A. I'm in charge of the marketing and sales to
13 electric utilities for transportation service
14 of coal to utilities located in northeast and
15 midwest and Canada.
16 Q. How long have you been employed in that
17 position?
18 A. Since September 1st, 1998. Little over
19 three years.
20 Q. You said since 9/1/98?
21 A. Yes.
22 Q. So, you were employed by Norfolk Southern
23 before the split?
24 A. Yes.
25 Q. And when I say split, you understand what I
mean?

1 Listwak
2 (It is hereby stipulated and agreed by
3 and among counsel that sealing, certification
4 and filing of the within deposition are hereby
5 waived; that all objections except as to the
6 form of the question be reserved until the time
7 of trial.)
8 R. A. LISTWAK, having been first duly
9 sworn, was examined and testified as follows:
10 MR. JOHNSON: Just put on there that
11 the stipulation, whatever the federal rules
12 require, is what we stipulate to.
13 BY MR. MURPHY:
14 Q. Good afternoon, Mr. Listwak. My name is Ken
15 Murphy. I represent Consolidation Sales Coal
16 Company in a litigation matter that was brought
17 by Conrail against my client, and an entity
18 known as QIT-FER et Titane, commonly referred
19 to as QIT.
20 We are here to talk about some aspects
21 of that litigation, and in particular a
22 counterclaim that my client has brought against
23 Conrail.
24 Am I correct that you are here tod
25 pursuant to a Subpoena?

1 Listwak
2
3 A. Yes.
4 Q. Prior to your employment by Norfolk
5 Southern, by whom were you employed?
6 A. Conrail.
7 Q. And when were you initially employed by
8 Conrail?
9 A. I believe it was April of 1987.
10 Q. Now, starting with your initial employment,
11 can you take me through the various positions
12 and titles that you have held, up until the
13 termination of your employment with Conrail?
14 MR. JOHNSON: Did you say initial
15 employment with Conrail or with Norfolk
16 Southern?
17 MR. MURPHY: Conrail.
18 THE WITNESS: Initially, in 1987 I was
19 hired as director of coal marketing. And then
20 in 1991 I was promoted to senior director of
21 coal marketing and sales. In 1994, I was
22 promoted to assistant vice president, coal
23 marketing and sales. And in 1996, my title was
24 changed to assistant vice president, power
25 tion markets.
MR. JOHNSON: Mr. Murphy, Mr. Listwak

1 Listwak 55
2 A. She's Mr. Forrester's supervisor.
3 Q. And what is her title?
4 MR. JOHNSON: You mean, today or then?
5 MR. MURPHY: Well, at the time.
6 THE WITNESS: I think -- I believe it's
7 assistant vice president of coal resources.
8 MR. JOHNSON: At the time of this
9 memo?
10 THE WITNESS: Yes.
11 BY MR. MURPHY:
12 Q. Did you ever speak with Miss Vaughan after
13 this memo or E mail was issued, about the E
14 mail?
15 A. I don't recall ever speaking to her about
16 it.
17 Q. Okay. Let me ask you this: Do you recall
18 advising Miss Vaughan that Mr. Forrester was
19 incorrect in his belief that the agreement was
20 still in place?
21 MR. JOHNSON: Objection.
22 BY MR. MURPHY:
23 Q. You can answer. He was just objecting to
24 the form.
25 A. I can't recall whether I did or didn't.

1 Listwak 56
2 Q. Do you recall advising any of the
3 recipients of this E mail that Mr. Forrester
4 was incorrect in his belief that the agreement
5 was still in place?
6 MR. JOHNSON: Objection to the form. I
7 think he's asking you did you advise anybody
8 else; is that your question?
9 MR. MURPHY: Yes.
10 THE WITNESS: You mean, after this E
11 mail was written?
12 BY MR. MURPHY:
13 Q. That's correct.
14 A. I believe that I had conversations with
15 several people on that list that -- to the fact
16 that Bill Rieland and Chris Marsh agreed that
17 effective the split date that the terminal
18 service agreement was terminated, and that I
19 had subsequent and recent conversations with
20 them where they reconfirmed that agreement with
21 me, and that they also told me that the Norfolk
22 Southern would not be held liable for any
23 potential damages that would ever be awarded
24 after June 1, 1999. And I talked -- I know I
25 talked about that with Mark Bower, who also

1 Listwak 57
2 said that Mr. Rieland, Mr. Stovash, Mr. Marsh,
3 had also conveyed that same message to him.
4 Q. Just so I am clear, what same message?
5 A. That the Conrail terminal service agreement
6 that's in dispute in this case, that Consol had
7 agreed that it would not apply after June 1st,
8 1999.
9 Q. Directing your attention to number four, it
10 says, "I haven't read the entire agreement,
11 but understand from Jim that it provided for
12 certain tonnage-for-fee minimums from Conrail
13 to Consol for use of their pier. The minimum
14 might be four million dollars per year. Jim
15 says the minimums were never reached and never
16 enforced."
17 Do you see that?
18 A. Yes.
19 Q. Did you have an understanding that the
20 minimums that are referred to here were never
21 enforced?
22 A. Absolutely.
23 Q. Okay. Did you have an understanding of why
24 they were not enforced?
25 A. Well, because the years that I worked at

1 Listwak 58
2 Conrail we worked as partners with Consol to
3 maximize the amount of coal going to their
4 Baltimore terminal, because it was in our best
5 interests as the transportation supplier and
6 their best interests as the coal producer and
7 terminal operator. And in return, we did a lot
8 of favors for Consol. We didn't charge them to
9 merge, which would have been sizable for not
10 unloading our cars in a timely basis. We did
11 not charge them the market fee, the market --
12 the going market rate for use of our
13 locomotives at the terminal to unload the
14 trains. That was a very cheap sweetheart deal
15 that was -- didn't come close to recovering our
16 costs. And in addition, Consol knew the entire
17 time that we gave them all the business that
18 had to their terminal for nonConsol exporters.
19 And so, as a result, they never enforced it. It
20 was never in my time working at Conrail when
21 this agreement was in effect, there was ever --
22 the subject was ever even broached.
23 Q. Was it your --
24 A. Until --
25 Q. I am sorry.

1 Listwak 59
2 A. I am sorry. Until the very end when we knew
3 that Conrail was going to be split up, and we
4 decided just to make sure that all the
5 provisions of all of our contracts and all the
6 amendments were taken care of before the new
7 owners took place, that we found reading
8 through the contract that there were minimums.
9 And we wrote to Frank Kologeski, who worked for
10 me, wrote to Gary Dadisman, and asked that we
11 formally in writing memorialize the fact that
12 we never charged minimums, and they were never
13 charged to demurse or locomotives. And at the
14 time we did that, that letter was to cover
15 through split dates. But split date was delayed
16 and ultimately didn't cover the full period of
17 time until split date.
18 (Whereupon, an off-the-record
19 discussion was held.)
20 BY MR. MURPHY:
21 Q. Mr. Listwak --
22 A. Yes.
23 Q. -- if I understood your testimony
24 accurately, I believe you said that essentially
25 there was -- and I am paraphrasing, please

1 Listwak 60
2 correct me if I misstate -- that there was a
3 practice during your tenure in which Conrail
4 provided CCSC's Baltimore terminal all the coal
5 they could; is that correct, or --
6 A. Yes.
7 Q. That practice, in your view, is that
8 consistent with provision one here that I
9 showed you earlier, in the letter dated
10 February 14, 1992?
11 A. I'm not sure I understand fully from a
12 legal standpoint what they mean by -- what's
13 the word -- promulgate, discriminate, what all
14 that means, or I'm not really familiar with
15 this section of the U. S. Code, but I guess
16 what I am saying is we gave them all the
17 tonnage that we had to haul, as far as I know
18 it went to their terminal.
19 Q. Is it your understanding that the minimums
20 were waived in exchange for Conrail giving all
21 the tons that it could to CCSC?
22 A. I am sure that was part of the
23 consideration.
24 Q. Okay. If I could take you back to L-6, on
25 the second page, the middle of the page there

EXHIBIT C

In The Matter Of:

*CONSOLIDATED RAIL CORPORATION v.
QITFER ET TITANE, INC., et al.*

*GARY LEE DADISMAN
October 4, 2001*

*SILVER REPORTING SERVICES, INC.
CERTIFIED SHORTHAND REPORTERS
634 ARENA DRIVE
SUITE 206
TRENTON, NJ 08610
(609) 888-0111 FAX: (609) 888-2497*

*Original File DADISMAN.V1, 212 Pages
Min-U-Script® File ID: 2524499409*

Word Index included with this Min-U-Script®

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[1] *Dadisman - by Mr. Fiorilla*
[2] length of trains, and notifications, and—among
[3] other things, those are the things that come to
[4] mind.
[5] And it also has a section on
[6] terms for ship loading, and, in fact, it was not
[7] administered according to these terms, and we
[8] talked about dealing with some of those issues.
[9] Q: You are saying these terms were
[10] waived, along with the minimum terminal service
[11] charge, during that period?
[12] A: Some were waived and some were
[13] administered differently.
[14] Q: Was the minimum service terminal
[15] agreement one of the things that was discussed at
[16] these meetings from time to time?
[17] MR. MURPHY: Objection.
[18] A: The minimum service agreement?
[19] Q: The minimum terminal service fee in
[20] that agreement, was that one of the things that
[21] was discussed at these meetings with CONRAIL?
[22] A: No. I don't recall it being
[23] discussed.
[24] Q: When did you become aware that
[25] there was a minimum terminal service fee in the

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[1] *Dadisman - by Mr. Fiorilla*
[2] agreement?
[3] A: In 1995.
[4] Q: When is the first time you recall
[5] discussing it with CONRAIL?
[6] A: Probably 1998.
[7] Q: And what were the discussions that
[8] you had in 1998 that you had specifically with
[9] regard to that provision?
[10] A: There was an interest in
[11] formalizing some of the ways the contract had
[12] been historically administered.
[13] Q: And were you interested in that as
[14] well as CONRAIL?
[15] A: Yes.
[16] Q: And as a result of that interest,
[17] what happened?
[18] A: A letter—a letter agreement was
[19] developed, and both parties signed that.
[20] MR. FIORILLA: Mark that
[21] DAD-6, please, Gary.
[22] (CONRAIL letter, dated
[23] 2-23-98, to Mr. Dadisman from Mr. Kolojeski,
[24] received and marked Exhibit DAD-6 for
[25] identification.)

Page 123

[1] *Dadisman - by Mr. Fiorilla*
[2] BY MR. FIORILLA:
[3] Q: Mr. Dadisman, I show you what has
[4] been marked DAD-6. It's a letter addressed to
[5] you from Frank Kolojeski.
[6] Now, is this the letter
[7] agreement that you just referred to?
[8] A: Yes.
[9] Q: And is that your signature on the
[10] bottom of the letter?
[11] A: Yes.
[12] Q: In the second paragraph of the
[13] letter, the first sentence says: "During the six
[14] years that this agreement has been in place,
[15] business conditions have warranted a policy of
[16] flexibility on the part of both parties..."
[17] Do you know what business
[18] conditions were being referred to in that
[19] sentence?
[20] A: Principally, the—the market
[21] pricing, market volume, availability of CONRAIL
[22] equipment, condition of the tracks, condition of
[23] the shipping mines and the loading points, the
[24] general—or all the various components of the
[25] business.

Page 124

[1] *Dadisman - by Mr. Fiorilla*
[2] Q: The first one you said was "market
[3] conditions"?
[4] A: Yes.
[5] Q: What do you mean by "market
[6] conditions"?
[7] A: The—basically, the domestic and
[8] export market that we serviced, the volumes and
[9] the pricing.
[10] Q: Are you saying that in
[11] administering the DAD-I, that both parties were
[12] taking these things into consideration each year?
[13] A: Yes, uh-huh.
[14] Q: Okay. When you signed this
[15] agreement in February of 1998—May. I am sorry.
[16] You signed it in May. You signed it in May of
[17] 1998—what was your understanding as to when
[18] split-date would occur?
[19] A: I don't specifically know now.
[20] Q: Do you know that split date was
[21] moved several times?
[22] A: Yes.
[23] Q: And did you discuss that with Mr.
[24] Kolojeski or Mr. Carroll from time to time?
[25] A: Discuss what?

EXHIBIT D



GARY L. DADISMAN
General Manager

CONSOLENERGY™

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fax: 410/631-6425
e-mail: garydadisman@consolenergy.com
web: www.consolenergy.com

EXHIBIT E

CONRAIL

MAY 15 RECD



February 23, 1998

Gary Dadisman, General Manager
Consolidation Coal Sales Company, Baltimore Terminal
3800 Newgate Ave.
Baltimore, MD 21224-6417

Dear Gary:

In 1991, Conrail and Consolidation Coal Sales Company (CCSC) entered into a twenty (20) year agreement for transfer and storage services at CCSC's Baltimore Terminal.

During the six years that this agreement has been in place, business conditions have warranted a policy of flexibility on the part of both parties, such that certain provisions of the agreement have not been enforced by either party. It is agreed that, during the period prior to December 31, 1998, neither party will enforce those provisions, including collection of moneys specifically linked to such provisions, which would otherwise be enforceable.

We believe in outlining and obtaining your agreement, via signature to this letter of understanding, those specific provisions within the agreement that have not been complied with during the performance under this agreement.

Conrail has not enforced the free time, constructive placement, and demurrage charge (including escalation) provisions as outlined under Sections 6c1, 6c2, and 6e.

CCSC has not enforced the following provisions:

- 9e: Minimal Annual Terminal Fee
- 9f: Supplemental Annual Terminal Fee
- 9g: Bethlehem Terminal Fee

This will be effective upon signature by both parties and shall terminate on December 31, 1998.

Regards,

Frank M. Kolojeski

In Agreement with the provisions of this letter:

For Conrail:

MANAGER
COAL MARKETING
5/20/98

For Consolidation Coal Sales Company:

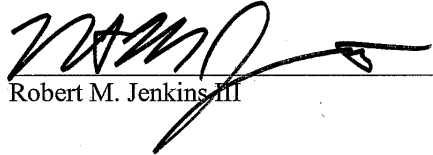
Vice President
May 15, 1998

CERTIFICATE OF SERVICE

CERTIFICATE OF SERVICE

I hereby certify that on this 15th day of March, 2002, I caused copies of the foregoing
Opening Evidence and Argument to be served on the following individuals via facsimile and
third party commercial carrier:

Kenneth A. Murphy, Esq.
MILLER, ALFANO & RASPANTI, P.C.
1818 Market Street
Suite 3402
Philadelphia, PA 19103


Robert M. Jenkins III