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BEFORE THE
SURFACE TRANSPORTATION BOARD

FINANCE DOCKET NO. 34319

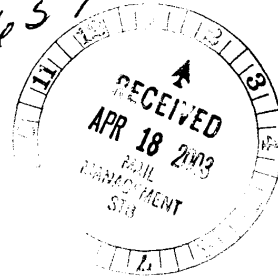
CONSOLIDATED RAIL CORPORATION –
DECLARATORY ORDER PROCEEDING

CONRAIL'S REPLY TO AT&T'S "RESPONSE IN OPPOSITION
TO CONSOLIDATED RAIL CORPORATION'S PETITION FOR
INSTITUTION OF A DECLARATORY ORDER PROCEEDING"

FILED
Office of Proceedings

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In its Response to Consolidated Rail Corporation's Petition for Institution of a Declaratory Order Proceeding, AT&T fundamentally misconstrues the nature of the requested proceeding before the Board and the relevant jurisdictional authority. The issue here is *not* whether AT&T is ultimately entitled to any contractual relief. That is for the district court to decide under Pennsylvania law *after* the Board makes its determinations on the questions presented by Conrail's petition. The only issue here is whether three narrow claims regarding Conrail's post-Split Date obligations are preempted under 49 U.S.C. § 11321(a). As AT&T's own response indicates, the issues arising from those questions are somewhat involved, and the Board should initiate a proceeding in which the parties can present full evidence and argument focused on those three limited claims implicating the scope of the Board's decision in *CSX Corp. et al. – Control and Operating Leases/Agreements – Conrail Inc., et al.*, 3 S.T.B. 196 (1998) ("Decision No. 89").

ARGUMENT

I. AT&T's Arguments Are Largely Irrelevant To The Board's Determination Of Whether It Should Grant Conrail's Petition For The Board To Resolve Three Narrow Legal Questions Arising From Decision No. 89.

AT&T asserts that “[t]he STB has no jurisdiction to award any of the relief sought by AT&T” (AT&T Response at 4) and that “the ICA simply does not confer authority on the STB to resolve *all disputes* resulting from or related to an approved transaction” (*Id.* at 12). To bolster these strawmen arguments, AT&T pulls one sentence from the Board’s decision in *Consolidation Coal Sales Co. v. Consolidated Rail Corp.*, F.D. No. 34169, 2002 STB LEXIS 317 (served May 24, 2002) (“*Consolidation Coal*”) to argue that “[i]ssues arising under State contract law, however, are not within [the Board’s] primary jurisdiction.” AT&T Response at 12 (quoting *Consolidation Coal*, 2002 STB LEXIS 317, at *10 n.4). But AT&T ignores the Board’s very next sentence in *Consolidation Coal*, which precisely states Conrail’s argument here: “Rather, we address here the more fundamental question of whether federal rail merger law (section 11321(a)) preempts CCSC’s contract claims at the outset.” That was the issue in *Consolidation Coal*, and that is the issue here.

AT&T also asserts that its Complaint “does not fall within the jurisdiction of the STB because it involves Conrail’s obligations under a pre-acquisition contract that is not at all pertinent to the Conrail Transaction.” AT&T Response at 14. But that assertion completely ignores the fact – as discussed in Conrail’s Petition and as acknowledged by AT&T (*see* AT&T Response at 6) – that the CSX/NS/Conrail Transaction Agreement as approved by the Board in Decision No. 89 specifically provided for the treatment of fiber optic contracts. *See* CSX/NS/Conrail Transaction Agreement at 21. AT&T’s fiber optic contract was more than just pertinent to the CSX/NS/Conrail transaction; it was an express part of it. For AT&T to argue otherwise is simply to ignore the facts.

The question before the Board is not – as AT&T argues in its response – whether AT&T’s payments to Conrail should be reduced or whether AT&T is entitled to terminate its agreement with Conrail under Pennsylvania law. *See* AT&T Reply at 15-16. Instead, the district court will decide those contract issues after receiving the STB’s determination on the three limited questions that Conrail has presented to the Board: to wit, (1) whether Decision No. 89 preempts any claims by AT&T that Conrail breached the MFN clause by “disabling itself” of the ability to perform its obligations under the MFN clause after the Split Date; (2) whether Decision No. 89 preempts any claims against Conrail arising from the application of the MFN clause to fiber optic contracts entered into independently by CSX/NYC and NS/PRR along former Conrail lines after the Split Date; and (3) whether Decision No. 89 preempts any claims arising from the application of the MFN clause to the extent the ownership and operation of former Conrail right of way by CSX/NYC and NS/PRR after the Split Date renders Conrail’s compliance with that clause commercially impracticable or impossible.

Indeed, Conrail’s Petition appears to have already had some effect on the basis of the claims pressed by AT&T. In its response, AT&T attempts to distance itself from the language used in its own Complaint by arguing that it “is not claiming that Conrail is liable to it for transferring the right of way and related assets to NYC and PRR in the STB-approved Conrail Transaction.” AT&T Response at 4. AT&T then accuses Conrail of “seiz[ing] on and distort[ing], a single clause in AT&T’s complaint to argue that AT&T challenges that *divestment* as an *improper attempt* by Conrail to ‘disabl[e] itself of the ability to perform its obligations’ under the MFN clause.” *See id.* at 15. But the language that Conrail directly quoted from the Complaint is not only clear, but reinforced by other language in the Complaint. *See, e.g.,* Compl. ¶ 4 (Conrail “has breached the MFN Covenant, and repudiated the [FOC] License Agreement, by

transferring to [NYC and PRR] its interests” in the right of way); *id.* ¶ 39.d (seeking to hold Conrail liable for “divesting itself of the ability to perform its obligations”). There was no distortion, as AT&T’s Complaint speaks for itself.

AT&T complains about the unfairness that would attach were Conrail to continue to receive annual license fees from AT&T, even while, as AT&T puts it, AT&T is not receiving the benefit of its MFN bargain. *See* AT&T Response at 16. But what AT&T ignores is that, as Conrail has always accepted, Conrail is obligated under the MFN clause for all the pre-Split Date fiber optic agreements it entered between 1984 and 1999, which, as AT&T is aware, no doubt include all of AT&T’s major competitors. The only contracts at issue in Conrail’s Petition are the post-Split Date, non-Conrail fiber optic contracts entered into by CSX/NYC and NS/PRR along former Conrail right of way, and one Conrail agreement, the Qwest contract, that was materially affected by Decision No. 89.

More to the point, Conrail is not asking the Board to make decisions about the ultimate contractual implications of preemption of some of AT&T’s claims, as AT&T’s recasting of the issue implies. The issue for the Board is not interpretation of AT&T’s contract with Conrail, but whether AT&T’s claims conflict with the transaction approved in Decision No. 89. This is an issue that can and should be explored more fully if the Board grants Conrail’s Petition,¹ but

¹ AT&T suggests, for example, that the MFN provision can be applied to contracts that CSX/NYC or NS/PRR independently enter into post-Split Date because a Quitclaim Deed between Conrail and NYC for a portion of the Conrail right of way states that the financial and property rights in the AT&T fiber optic contract are reserved to Conrail. *See* AT&T’s Response at 7 and Exh. 2. Aside from the fact that this does not mean that the MFN clause can or should be applied to fiber optic contracts that CSX/NYC or NS/PRR separately enter into, there are other deeds conveying Conrail right of way to NYC and PRR containing language that clearly undermines AT&T’s position. *See, e.g.*, Quitclaim Deed dated June 1, 1999 between Conrail and NYC (attached as Exh. A hereto) (reserving to Conrail a non-exclusive easement to keep existing fiber optic facilities in effect, “PROVIDED THAT such easement and rights shall be exercised in a manner which does not interfere with . . . Grantee’s [NYC’s] right to grant other
(cont’d)

undeniably the MFN clause cannot be applied where most of Conrail's right of way was divested (pursuant to a Board-approved transaction) to two railroads that not only compete against one another, but that can enter into fiber optic contracts without providing notice to Conrail or seeking Conrail's approval. To the extent that the Board ultimately finds that the MFN clause is inapplicable in these circumstances because of its decision approving the divestment of Conrail's lines to NYC and PRR, the district court can then decide – as a matter of Pennsylvania contract law or equity – the question of whether AT&T is entitled to terminate the contract and/or whether AT&T is entitled to monetary relief. The Board never has to – and never should – reach those questions.

II. AT&T Misconstrues The Relevant Jurisdictional Authority Under Section 11321.

AT&T principally relies upon two cases that supposedly demonstrate the narrow jurisdictional limits of the STB. *See* AT&T Response at 11-14. Neither case cited by AT&T, however, is applicable to Conrail's Petition. And even if applied, both cases demonstrate the necessity of this Board granting Conrail's Petition.

AT&T first points to *Harris v. Union Pacific Railroad*, 141 F.3d 740 (7th Cir. 1998), but that case is fundamentally different from the instant case. In *Harris*, the issue was the effect of a labor collective bargaining agreement that was reached after the Board approved the control transaction. The Seventh Circuit was understandably concerned about "the legal effect of agreements reached after the merger has been approved." *Id.* at 743. Here, of course, the AT&T License Agreement was entered into in 1984 – years before Decision No. 89 – and was explicitly

(... cont'd)

such nonexclusive easements or licenses within the Premises." The Board should not decide this and other issues presented by Conrail's petition without the benefit of complete evidence and argument.

included in the Transaction Agreement that the Board approved after extensive review and some modification, and after formal proceedings allowing full opportunity for public comment.

AT&T's reliance on the Fifth Circuit's decision in *City of Palestine, Texas v. ICC*, 559 F.2d 408 (5th Cir. 1977), is similarly misplaced, as that case involved a petition for review of the ICC's control decision itself – not the collateral attack now waged by AT&T in the district court – and stands for the unremarkable proposition that the Board cannot preempt agreements that are not necessary to carry out the approved transaction. That is precisely the question that Conrail is asking the Board to resolve by granting its Petition and then evaluating the merits of the parties' full evidence and arguments.

Moreover, *City of Palestine* fails to address whether the Board has exclusive jurisdiction in the first instance to determine the scope of preemption under Section 11321. *See Railway Labor Executives' Ass'n v. Southern Pacific Transp. Co.*, 7 F.3d 902, 906 (9th Cir. 1993) (“[B]ecause the ICC had exclusive authority to approve the Rio Grande merger and thereby exempt the Railroads from any procedural or substantive law which might otherwise impede that merger, it should have exclusive authority to clarify the scope of its own approval and the corresponding breadth of the [section 11321(a)] exemption”); *accord Union R.R. Co. v. United Steelmakers of Am.*, 242 F.3d 458, 468 (3d Cir. 2001) (“the STB has the exclusive jurisdiction to adjudicate challenges to such an implementation [of a STB-approved consolidation]”). Because of the Board's special responsibility to provide guidance regarding the scope of preemption under section 11321(a), the Board should resolve any doubt in favor of initiating a proceeding to allow both parties to present full evidence and argument on the issue.

CONCLUSION

For the foregoing reasons, the Board should grant Conrail's Petition for Institution of a Declaratory Order Proceeding.

Respectfully submitted



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Attorneys for Consolidated Rail Corporation

Dated: April 18, 2003

CERTIFICATE OF SERVICE

I hereby certify that on this 18th day of April, 2003, I caused copies of the foregoing Motion of Consolidated Rail Corporation for Leave to File a Reply to a Reply and Conrail's Reply to AT&T's "Response in Opposition to Consolidated Rail Corporation's Petition for Institution of a Declaratory Order Proceeding" to be served by Third Party Commercial Carrier upon:

Robert J. Higgins, Esq.
Howard N. Feldman, Esq.
Laura H. Hamilton, Esq.
Jorge Kotelanski, Esq.
Dickstein Shapiro Morin & Oshinsky LLP
2101 L Street, NW
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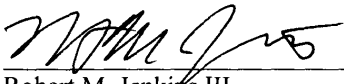

Robert M. Jenkins III

Exhibit A

CONFIRMATORY QUITCLAIM DEED

This instrument prepared by
or under the direction of:
Richard Clinton Keene,
Attorney for Grantee
Business Address:
800-C Third Street
Neptune Beach, Florida 32266
Phone: (904) 247-1600
Fax: (904) 247-1696

Tax Reference(s):
(N.J.S.A. 46:15 - 2.1; N.J.S.A. 46:16-3)
or () No property tax identification
number(s) is/are available on the date
of this Deed; Exempt per N.J.S.A. 46:15-8.

RETURN RECORDED DEED TO GRANTEE:

c/o CSX Transportation, Inc.
ATTN: Real Estate Department
500 Water Street, S/C J-915
Jacksonville, FL 32202

THIS QUITCLAIM DEED, made as of the 1st day of June, 1999, between CONSOLIDATED RAIL CORPORATION, a Pennsylvania corporation, whose mailing address is Two Commerce Square, 2001 Market Street (19-B), P.O. Box 41419, Philadelphia, PA 19101-1419, hereinafter called "Grantor", and NEW YORK CENTRAL LINES LLC, a Delaware Limited Liability Company, whose tax and mailing address is 500 Water Street (J-910), Jacksonville, FL 32202, hereinafter called "Grantee", WITNESSETH:

(Wherever used herein, the terms "Grantor" and "Grantee" may be construed in the singular or plural as the context may require or admit, and for purposes of exceptions, reservations and/or covenants, shall include the successors and assigns of each.)

WHEREAS, as part of a plan of corporate reorganization, Grantor has created Grantee as its wholly owned subsidiary; and

WHEREAS, as part of that plan of reorganization, Grantor has agreed to a tax free contribution to the capital assets of Grantee of certain real estate interests, including lines of railroad thereon, in several states within the United States and certain provinces in the Dominion of Canada;

This Quitclaim Deed confirms the conveyance of a portion of a line of railroad located in and constructed in more than one county and previously recorded with the New Jersey Secretary of State.

NOW THEREFORE, pursuant to the authority given by its board of directors, for and in consideration of the premises above, Grantor does by these presents RELEASE, REMISE and forever QUITCLAIM unto Grantee, all right, title and interest of Grantor in and to certain portions of Grantor's railroad rights-of-way and real property, operating and nonoperating and regardless of

width, including any permanent easement for rail carriage, railroad use or purpose, located within three (3) Segment(s) in the County of Hudson, New Jersey, and consisting of 6.93 miles of right-of-way, and 263.72 acres, more or less, and two parcels of land containing 10.52 acres, more or less, collectively containing 274.24 acres, more or less, herein designated "the Premises";

ALL as generally shown on Exhibit A, and more particularly described on Exhibit B, with Beginning and Ending Points of each Segment shown on Exhibits B-1 through B-9, all of which are attached hereto and incorporated herein;

NOTE: Reduced prints of each Valuation Section Map referenced herein are attached hereto and incorporated herein as collective Exhibit C; print reduction may alter any scale stated on such Maps.

TOGETHER WITH: (a) all buildings, structures, fixtures and improvements on the Premises, in "as is, where is" condition, including but not limited to all tracks, rails, ties, ballast, grading, switches, crossings, bridges, trestles, supports, culverts, signals, crossing diamonds and protection devices, radio antennae, communication lines, poles and facilities, loading platforms, depots, and any other associated structures, that are affixed as of the date of this deed to the Premises, (b) all strips and gores, (c) all and singular the rights, alleys, ways, waters, minerals and mineral rights, timber and timber rights, air rights, hereditaments, franchises, privileges, advantages and appurtenances to the same belonging or in anyway incident or appertaining, including any items, rights or interests retained, excepted or reserved in any post-acquisition conveyances (other than reserved herein), (d) all reversions, remainders, rents, issues and profits thereof, (e) any easements for support or retention rights in streets, waterways or adjacent lands, (f) any rights to cross any river, stream, creek or other body of water within the Premises, or to cross or lay tracks in any streets adjacent to or connecting parcels herein conveyed, (g) all right, title and interest of Grantor, or any predecessor of Grantor in the Premises, created and/or held by the hostile, actual, visible, exclusive and notorious occupation of any portion thereof for a continuous period of twenty-one (21) years or more prior to the date of this Deed, (h) all connected and/or contiguous sidetracks, spur tracks, lead tracks and yards, and facilities thereon, and (i) all contracts, leases, licenses, agreements, and all rights in and third party easements or occupations in, on, under, over or along the Premises;

It being the intent of this Deed to include all right, title and interest held by Grantor in and to any lands and improvements within said County, between said Beginning Point and said Ending Point, whether in any recorded or unrecorded deeds (other than identified in Exhibit B);

RESERVING unto Grantor all right, title and interest in the Fiber Optic Agreement(s) mentioned below, including the right to collect all rents, profits, issues and fees therefrom, and the right(s), if any, to effect any renewals thereof, and rights in said renewals, and other rights and protections thereunder; AND EXCEPTING unto Grantor a nonexclusive easement to keep those existing fiber optic facilities in effect, and, under said Agreement(s), to install, construct, operate, repair, renew, replace therein, and remove therefrom, such fiber optic communication facilities (cable, wire, associated electronics, conduit, repeaters, terminals, shelters, connection boxes, power supplies, etc., as defined in said Agreement(s)), and the right of access thereto; PROVIDED THAT such easement and rights shall be exercised in a manner which does not interfere with the railroad operations or safety of Grantee, or Grantee's right to grant other such nonexclusive easements or licenses within the Premises;

TO HAVE AND TO HOLD the Premises, all mentioned and described herein and intended to

NJ, HUDSON CO CONFIRMATORY

be quitclaimed herein, and the appurtenances thereto, and all the estate, right, title, lien, interest and claim whatsoever of Grantor therein, either in law or equity, (other than Reserved herein), UNTO the proper use, benefit and behoof of Grantee, Grantee's successors and assigns, forever, including the continuation of operation of a line of railroad thereon.

SUBJECT TO: (A) reservations, exceptions, easements, covenants, restrictions and limitations of record or platted affecting the same; (B) any existing rail crossings, public utilities and roadways; (C) any, pipes, wires, poles, cables, conduit, culverts, drainage courses or systems (and appurtenances) now in, on, under, over or across the same (and any contracted rights to retain, same); (D) any streams, rivers, creeks or other navigable waterways passing under or across the same; and (E) any agreements for location and use of fiber optic cable, conduit and related facilities in, on or along a portion of the Premises (the "Fiber Optic Agreement(s)").

THIS INSTRUMENT is executed and delivered by Grantor, and accepted by Grantee, subject to the covenants set forth herein, which shall be deemed part of the consideration of this conveyance and shall be in lieu of any rights, rule, law, custom or statute of the State of New Jersey, now or hereafter in force with respect to any covenants. Grantor, however, does warrant and covenant to assign or convey to Grantee any right, title or interest in and to the Premises acquired by Grantor after the date of this Deed.

Grantor hereby declares that this conveyance is deemed not subject to State or County excise taxes because it is a deed from a parent corporation to its subsidiary for no consideration other than a contribution to capital and issuance of stock therein. However the undersigned officer of Grantor certifies, in accordance with Section 46:15 - 5, New Jersey Statutes, that the full and actual value of all land or property hereby conveyed, or of all property rights herein quitclaimed and released, within the County described above, including any property exchange and/or financing, is \$0.00.

IN WITNESS WHEREOF, CONSOLIDATED RAIL CORPORATION, pursuant to due corporate authority, has caused its name to be signed hereto and on its behalf by its officer(s) hereunto duly authorized, and its corporate seal, duly attested, to be hereunto affixed.

Signed, sealed and delivered
in the presence of:

(1) [Signature]
Print Name: Michael K. Gligan
(2) [Signature]
Print Name: Allan J. Baer

CONSOLIDATED RAIL
CORPORATION

By: [Signature]
Print Name: Robert W. Ryan
Print Title: Director - Real Estate

Attest [Signature] (SEAL)
Assistant Corporate Secretary
Print Name: James D. McGeehan

COMMONWEALTH OF PENNSYLVANIA)
) SS.

COUNTY OF PHILADELPHIA)

Before me, ROBERT B D'ZURO, a Notary Public of the Commonwealth of Pennsylvania and the County of Philadelphia, on the date below, in said County, came Robert W. Ryan, and James D. McGeehan, both (X) to me known and/or () satisfactorily proven by sufficient current evidence to be the person(s) whose name(s) is/are subscribed to the above instrument as Director - Real Estate and Assistant Corporate Secretary respectively, who, being by me first duly sworn, did each acknowledge and say that effective as of June 1, 1999: she/he is/are the aforesaid designated officer(s) of CONSOLIDATED RAIL CORPORATION, the corporation described in and which executed said instrument; she/he is fully informed of the contents of the instrument; she/he knows the seal of said corporation; the seal affixed to said instrument is such seal; it was so affixed by authority of the Board of Directors of said corporation; each signed his/her name thereto voluntarily and freely for said corporation, pursuant to proper Board resolution; and said instrument is the voluntary and free act and deed of said corporation, as a capital transfer or conveyance of the property and/or assets of the Grantor herein to its subsidiary.

GIVEN under my hand and official notarial seal, this 18 day of May, 1999.

Robert B. D'Zuro (SEAL)
Notary Public
Print Name: **ROBERT B D'ZURO**
My commission:

NOTARIAL SEAL
ROBERT B. D'ZURO, Notary Public
City of Philadelphia, Phila. County
My Commission Expires Sept. 13, 2000

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