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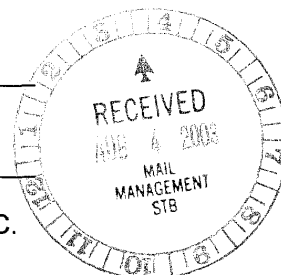
NS-11

BEFORE THE
SURFACE TRANSPORTATION BOARD

FINANCE DOCKET No. 33388 (Sub-No. 91)

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

(GENERAL OVERSIGHT)



REPLY OF NORFOLK SOUTHERN CORPORATION
AND NORFOLK SOUTHERN RAILWAY COMPANY

ENTERED
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Date: August 4, 2003

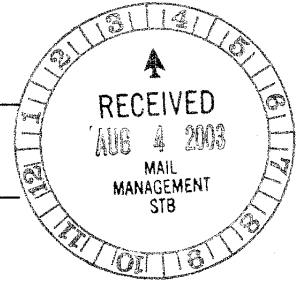
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**REPLY OF NORFOLK SOUTHERN CORPORATION
AND NORFOLK SOUTHERN RAILWAY COMPANY**



Norfolk Southern Corporation and Norfolk Southern Railway Company
(collectively, "NS") hereby reply to the comments submitted by various parties in the
fourth annual round of the Conrail general oversight proceeding.

In this oversight round, only five parties submitted comments, the fewest in any
round so far. They are: (1) National Lime and Stone Company (NLS); (2) the SEDA-
COG Joint Rail Authority (SEDA-COG) and related interests; (3) the "Lackawanna
Coalition;" (4) the New Jersey Department of Transportation (NJDOT); and (5) the North
Jersey Transportation Planning Authority (NJTPA). Most of the commenting parties do
not even request any Board relief, and none provide any basis for the Board to impose
additional conditions on the Conrail transaction, either now or in the future.

This response will address, briefly, the comments of (1) NLS, (2) SEDA-COG, (3) the "Lackawanna Coalition" and (4) because they relate to the same general subject, NJDOT and NJTPA jointly, under the heading "North Jersey Shared Assets Area."

National Lime and Stone Company

In Decision No. 89 approving the Conrail transaction, the Board imposed a limited and temporary condition affecting NLS and another Ohio aggregate shipper, Wyandot Dolomite. Ordering Paragraph No. 43 provides that, with respect to those two shippers, NS and CSX "must adhere to their offer to provide single-line service for all existing movements of aggregates, provided they are tendered in unit trains or blocks of 40 or more cars; and in other circumstances including new movements, for shipments moving at least 75 miles, must arrange run-through operations (for shipments of 60 cars or more) and pre-blocking arrangements (for shipments of 10 to 60 cars)." *CSX Corp. et al.—Control and Operating Leases/Agreements—Conrail Inc. et al.*, 3 S.T.B. 196, 390 (1998).

In Decision No. 96, the STB clarified that this condition was limited to a five-year term beginning on Split Date (June 1, 1999), and thus expiring on May 31, 2004. See *CSX Corp. et al.—Control and Operating Leases/Agreements—Conrail Inc. et al.*, 3 S.T.B. 764, 772, 789 (1998).

In its comments, NLS notes that it and CSX "are negotiating a new service agreement to replace the service [NLS] presently receives under the auspices of Condition No. 43." NLS-3 at 3. NLS seeks no new relief from the Board, but does assert that "to the extent that no such agreement can be reached prior to the expiration of Condition No. 43, [NLS] intends to request that the Commission [sic] issue a

supplemental order pursuant to 49 U.S.C. 11327 revising Condition No. 43” to continue beyond its five-year term. *Id.* at 4.¹

Because NLS is not now requesting any Board action, an extensive response here is not necessary. Nevertheless, it is important to point out that, not only does NLS not seek Board action now, it has provided no basis for seeking an extension of Condition No. 43 in the future.

NLS asserts that it intends to request an extension of the condition at some point in the future if it is unable to negotiate a commercial arrangement with CSX “to replace” the service it presently is receiving—apparently meaning an agreement to continue its current single-line service beyond the termination of Condition No. 43. See NLS-3 at 3 (noting that the CSX has represented that it is willing to “continue” providing such service to NLS, and that the agreement of NS would have to be obtained). NS is, of course, willing to discuss this matter with NLS and explore whether it is possible to reach agreement on commercial terms acceptable to all the parties.²

NLS is incorrect, however, in its apparent belief that failure to reach a commercial agreement that would replicate NLS’ present single-line service for certain major

¹ NLS asserts that it “invested over \$12 million at its Bucyrus and Wooster facilities.” NLS-3 at 2. This, apparently, is the same \$12 million referenced in NLS’ comments in the first round of this proceeding three years ago, see NLS-1 at 1, and in NLS’ comments to the Board in 1997 during the pendency of the main Conrail control proceeding. See Finance Docket No. 33388, NLS-2 at 8-9 (dated Oct. 21, 1997) (identifying \$6.2 million spent for NLS’ sales yard in eastern Ohio and \$6 million for capital improvements in Bucyrus). Thus, evidence of this NLS expenditure was already on the record and known to the Board when the Board imposed condition No. 43 and set its term at five years. It is not new evidence, and it provides no basis for the Board now or in the future to consider extending the term of that condition.

² Indeed, a service proposal has been submitted to NS and is presently under review.

shipments would entitle NLS to a future extension of Condition No. 43. NLS apparently would like to view Condition No. 43 as, in effect, a permanent safety net that would guarantee NLS single-line service in perpetuity. But that is very clearly not what the Board provided or intended; indeed, the Board previously has rejected that very assertion. In Decision No. 96, the Board unambiguously rejected the contention of NLS and others that Condition No. 43 should be permanent. To the contrary, in expressly limiting the condition to a 5-year term, the Board said that permanent relief for NLS and Wyandot would be, among other things, “unnecessary” and “contrary to the public interest.” *CSX Corp. et al.—Control and Operating Leases/Agreements—Conrail Inc. et al.*, 3 S.T.B. 764, 772 (1998). Limiting the duration of Condition No. 43 to a five-year term, said the Board, “is consistent with [the settlement agreement with Martin Marietta Materials, another aggregate shipper] and with the relevant terms of the NITL Agreement.” *Id.* Further, said the Board, “[p]ermanent relief would unduly interfere with the operations of both applicants and impair their operating flexibility, which we believe is the real key to efficient, economical operations from which all shippers ultimately benefit.” *Id.*

Later, in the first annual round of oversight, NLS again tried to modify Condition No. 43, and the Board again declined to do so. At that time, NLS sought to change Condition No. 43 so that it would not automatically terminate at the end of its 5-year term, but rather would continue in effect unless and until NS and CSX obtained Board permission to terminate it. In other words, NLS sought, in effect, to make the condition permanent unless the railroads carried the burden of proving to the Board that it should end. In rejecting that request, the Board made clear yet again that Condition No. 43

was not intended to permanently guarantee NLS single-line service. Rather, the Board observed, the condition was a “*transitional* remedy for the aggregate shippers, providing them 5 years of single-line service for major movements *to give them an opportunity to adjust to their new circumstances*,”—*i.e.*, to the possibility that single-line service might not always be available in the future. *CSX Corp. et al.—Control and Operating Leases/Agreements—Conrail Inc. et al.*, Finance Docket No. 33388 (Sub-No. 91) [General Oversight], Decision No. 5 at 16 (served Feb. 2, 2001) (“*Decision No. 5*”) (emphasis supplied). Condition No. 43, said the Board, “was not designed to guarantee that these aggregate shippers losing single-line service would be insulated from all effects of the merger or from changing markets,” but rather to “permit these shippers to *adjust their businesses to these new circumstances*,” again, referring to the possible loss of single-line service in the future. *Id.* at 17.³

In sum, NLS does not now ask the Board to take any action to extend Condition No. 43 and provides no evidence indicating the Board should do so. NS remains willing to discuss these matters with NLS through normal commercial channels. But even if the parties are unable to reach a commercial agreement to extend NLS’ current single-line service into the future, that state of affairs would not justify extending Condition No. 43 at a future date.

³ NLS argues that CSX and NS “have not presented a scintilla of evidence” that NLS’ single-line service “imposes an operational burden on the railroads.” NLS-3 at 3. Apart from the fact that an actual request to modify Condition No. 43 is not before the Board, NLS asserts a burden of production on the railroads that does not exist. As the Board specifically affirmed in oversight Decision No. 5, Condition No. 43 is self-terminating after five years; the railroads are not required to present evidence in the first instance as to why it should end.

SEDA-COG Joint Rail Authority

SEDA-COG is a rail authority in central Pennsylvania that owns rail lines operated by various railroads controlled by Richard Robey. (Mr. Robey's railroads will be referred to collectively as the "North Shore affiliates.") As it did last year, SEDA-COG submits a verified statement by its Executive Director, Jeffrey K. Stover. Accompanying that statement are a "Joint Statement of Shippers" endorsed by certain shippers located on lines operated by the North Shore affiliates and a "Statement of Rail Line Owner" signed by one other entity that owns a rail line operated by one of the North Shore affiliates.⁴ These statements are very nearly identical in substance to the corresponding statements submitted by those interests last year.

Mr. Stover reiterates his comments of last year to the effect that SEDA-COG does not face service problems as a result of the Conrail implementation. Stover V.S. at 2. He notes SEDA-COG's "previously-expressed concerns" arising from "pre-acquisition service commitments by NS," and asserts that "because of the complexity of service arrangements related to pre-acquisition commitments those issues continue to be a serious concern." Mr. Stover seeks no Board action, but appears to advocate continued dialogue among the parties. See *id.* at 3.

The "Joint Statement of Shippers" is endorsed by six shippers, each located on one of the North Shore affiliates' lines. These shippers filed a similar statement last year.⁵ The shipper statement repeats, verbatim, much of last year's statement, which

⁴ SEDA-COG, the shippers, and the other rail line owner are referred to collectively as "the SEDA COG interests."

⁵ Notably, two shippers who joined the statement last year did not do so this year.

objected to the terms of a September 1, 2001 trackage rights agreement (which the shippers had not seen) between the North Shore affiliates and NS, as allegedly not consistent with the terms of a 1997 letter from Norfolk Southern to Mr. Robey. This year, the shippers state that this matter has not yet been satisfactorily resolved, and they assert that NS and the North Shore affiliates “have agreed to provisions that will attempt to implement the terms and restrictions of the trackage rights agreement.” Joint Statement of Shippers at 1. The shippers admit they do not know the effect this “implementation” will have on traffic the shippers have developed since Split Date, but nevertheless they “object to NS and [the North Shore affiliates] taking any steps to implement an agreement that is not consistent with the original settlement” (referring again, apparently, to the 1997 letter).

The “Statement of Rail Line Owner” essentially repeats a similar statement last year.⁶ The statement simply notes that the West Shore Railroad, which owns a rail line operated by one of the North Shore affiliates, “has the same concerns as SEDA-COG” about the “proposed settlement” between the North Shore affiliates and NS and the “lack of satisfaction of the concerns raised with NS,” and that West Shore Railroad supports “the changes the shippers believe are necessary to fulfill the terms of the original settlement between [the North Shore affiliates] and NS.” Statement of Rail Line Owner at 1.

As NS stated in response to last year’s filings, NS values its relationship with all of the involved entities—SEDA-COG, the North Shore affiliates, other rail line owners,

⁶ One of the two parties to last year’s “Statement of Rail Line Owners” did not join this year’s statement.

and the shippers. NS remains willing to continue discussing these issues with SEDA-COG, and to talk individually with any shipper or other party that asks to do so.

It bears repeating, however, that with respect to the specific issue of the September 2001 trackage rights agreement and the 1997 letter, the real parties in interest (along with NS) are the North Shore affiliates themselves. The Board has specifically so found. *See Decision No. 5* at 22. None of the SEDA-COG interests are parties to either the 1997 letter or the 2001 trackage rights agreement implementing it. Although the shipper statement asserts that “based on” the 1997 letter SEDA-COG and various shippers “supported the [Conrail] transaction,” NS did not enter into a settlement with any of the SEDA-COG interests, and none of them filed statements of support for the transaction, whether “based on” the 1997 letter to the North Shore affiliates, or in exchange for any commitments to them by NS, or otherwise.

The real parties in interest, the North Shore affiliates, have expressed no concern or dissatisfaction with the 2001 trackage rights agreement between them and NS. In fact, it is NS’ understanding that the North Shore affiliates fully agree with NS that the terms of the 2001 trackage rights agreement are consistent with the 1997 letter.

Last year, the Board concluded, correctly, that no intervention was necessary because the SEDA-COG interests asked for none and the parties indicated a continued willingness to discuss issues of concern. *See CSX Corp. et al.—Control and Operating Leases/Agreements—Conrail Inc. et al.*, Finance Docket No. 33388 (Sub-No. 91) [General Oversight], *Decision No. 10* at 5 (“*Decision No. 10*”) (served Nov. 5, 2002). The same holds true this year: The SEDA-COG interests again do not request any Board action, and NS remains willing to discuss issues of concern to the SEDA-COG

interests. But the SEDA-COG interests have shown no sound basis in any event for the Board to involve itself with the privately-negotiated 2001 trackage rights agreement, given that (1) none of the SEDA-COG interests are parties to the 1997 settlement agreement; (2) none of the SEDA-COG interests are parties to the trackage rights agreement implementing it; and (3) the real parties in interest here—the North Shore affiliates—believe that the trackage rights agreement they entered into with NS properly reflects and implements the terms of their settlement with NS.

The “Lackawanna Coalition”

The “Lackawanna Coalition,” which describes itself as “an independent coalition which advocates on behalf of rail riders on New Jersey Transit’s Morris & Essex and Montclair-Boonton Lines,” (Coalition Comments at 1),⁷ submits a letter that raises issues regarding two rail lines: the Boonton Line, a line owned by PRR⁸ and operated by NS between Hoboken and Dover, New Jersey, and the Lackawanna Cutoff Line, an abandoned former Conrail line between Port Morris Junction and the Pennsylvania/New Jersey state line near the Delaware Water Gap.⁹ (The Coalition refers to the Boonton Line as a shared asset, but it is not; it is a PRR-allocated asset operated by Norfolk Southern.)

⁷ The Coalition provides no indication as to what persons or entities comprise it. The Coalition has never before appeared in either the main Conrail control proceeding or in this general oversight sub-docket.

⁸ PRR refers to Pennsylvania Lines LLC.

⁹ The bulk of what the Coalition refers to as the Lackawanna Cutoff Line was abandoned by Conrail in the late 1970’s. The abandoned Lackawanna Cutoff Line connects with an 8.4-mile line segment owned by PRR and allocated to NS’ operation; that PRR line segment has been leased to the Monroe County Rail Authority.

The Coalition makes an astonishing request that the Board step in and simply confiscate significant privately-held property—namely, the Boonton Line—and hand it to someone else, primarily in pursuit of an extraordinarily speculative future commuter operation. The Coalition’s comments are unfounded, and its bald attempt to commandeer PRR property is utterly baseless and should be rejected.

First, the Coalition says it supports a proposal by the New York & Greenwood Lake Railway Co. to operate commuter passenger service on the Boonton Line, following cessation of service by New Jersey Transit (NJT) on September 20, 2002. In this regard, the Coalition expresses “concern” that NS’ “recent removal of one of the tracks” of the formerly double-tracked line has reduced the likelihood of restoring passenger service on the line and that NS “could decide to discontinue operations” on the DB drawbridge, “thereby rendering restoration of commuter service impossible.” Coalition Comments at 1. The Coalition concludes that the STB should simply take the Boonton Line away from NS and give operation and control of the line to some “local, New Jersey-oriented entity.”¹⁰ *Id.* at 2.

Second, the Coalition says it supports the rebuilding of the “Lackawanna Cutoff Line between Morris Jct. and the Pennsylvania side of the Delaware Water Gap” for the restoration of passenger rail service. *Id.* It asserts that the rebuilding could allow access to the New York area by Canadian Pacific/Delaware & Hudson, via the Boonton Line. The Coalition, however, expresses a vague concern that NS “could engage in

¹⁰ The Coalition further suggests that “[s]uch an entity could be either an independent railroad company established to operate the line at issue, or a consortium of existing short line railroads currently operating in the region (such as the Morristown & Erie).” *Id.*

unspecified “practices” that will “have impact of preventing competition from D&H.” *Id.* at 2.¹¹

To respond to the Coalition’s comments, it is necessary, at the outset, to take a step back and recall first principles. Fundamentally, conditions are to be imposed only to ameliorate or eliminate harms that result from the transaction itself; “[c]onditions will generally not be imposed unless the merger produces effects harmful to the public interest that a condition will ameliorate or eliminate.” *CSX Corp. et al.—Control and Operating Leases/Agreements—Conrail Inc. et al.*, 3 S.T.B 196, 277 (1998). In short, a condition “must address an effect of the transaction. . . .” *Id.* at 278.

Based on those principles alone, the Board should reject the Lackawanna Coalition’s request, as the issues it raises and the forced line divestiture it seeks have nothing whatsoever to do with any purported harm arising from the Conrail transaction. With respect to the Boonton Line, the Coalition itself admits that the problem it seeks to address—the loss of certain passenger service on the line—arose from a decision by NJT to make certain changes in its operations that took effect last September. See Coalition Comments at 1; see also NJT “Customer Notice” attached as Exhibit 1. It had nothing to do with the Conrail transaction. Similarly, as NJT notes on its website, the Lackawanna Cutoff Line project is a stand-alone proposal that involves the possible

¹¹ The Coalition also generally asserts that NS “has attempted to entice shippers to move away from locations along [the Boonton Line] . . . in favor of other locations on its line in Pennsylvania,” and leaps to the conclusion that, in essence, NS “does not wish to actively compete with CSX in New Jersey.” Coalition Comments at 1. First, NS has not “enticed” shippers off the Boonton Line. Second, NS, which accesses the North Jersey Shared Assets Area via a number of routes, does compete vigorously with CSX in northern New Jersey and has every intention of continuing to do so. See also the discussion below under the heading “North Jersey Shared Assets Area.”

reconstruction and reactivation of a line that Conrail abandoned in the 1970's—decades before the Conrail transaction. See “Lackawanna Cutoff – Background,” *available at* http://www.njtransit.com/an_capitalprojects_project019.shtm (attached as Exhibit 2). Again, it has nothing whatsoever to do with remedying a “harm” caused by the Conrail transaction. Thus, even if one were to take the Coalition’s allegations and assertions at face value, it is not entitled to relief under the Board’s well-established standards for exercising its conditioning power.

Moreover, the Coalition’s comments contain a number of factual inaccuracies and fail to mention various facts that further undermine its request for Board action. First, the Coalition repeatedly asserts that the Boonton Line is part of the North Jersey Shared Assets Area. As already noted, that is not correct; the Boonton Line is a PRR line allocated to NS’ operation. See, e.g., Finance Docket No. 33388, CSX/NS-25 (Control Application) Vol. 8B pocket part, containing Transaction Agreement Schedule 1 Attachment II (system map). Additionally, as for the “proposal” by the New York & Greenwood Lake Railway Company (“NYGL”) to operate commuter passenger service, there is no agreement in place, and no negotiations in progress, for NYGL to operate such service. NS has repeatedly asked NYGL to provide a viable business plan for such service, including financial information and proof of sufficient liability insurance, neither of which NYGL has provided. In short, NYGL has not demonstrated that it has the capability to provide the service that the Coalition supports, and there is no agreement in place for it to do so. NJT also has recognized as much. See Exhibit 1. Finally, NS believes the Boonton Line is important to NS’ future operating capabilities. NS has no present intention of abandoning the Line; although NS might not presently

operate over a portion of the Line, it is, and will remain, available and accessible in the event future business opportunities arise.

As for restoration of the Lackawanna Cutoff Line, apart from the essential point, discussed above, that the project has no bearing on any “harm” caused by the Conrail transaction, and thus is inappropriate as the subject of a Board-imposed condition here, a number of other points should be made. First, publicly-available information estimates the total project cost for restoring the Lackawanna Cutoff at some \$200-230 million, not including property acquisition costs, and indicates that the project is not funded. See Exhibit 2. The Coalition has provided no evidence to indicate that sufficient funding will be available to accomplish the project anytime in the foreseeable future.

Second, as a group self-described as advocating for rail passengers (Coalition Comments at 1), the Coalition’s primary goal in supporting rebuilding and reactivation of the Lackawanna Cutoff purportedly is the restoration of passenger service over the Line. But even assuming, for the sake of argument, that the Lackawanna Cutoff project were actually completed some time in the future, the passenger service that the Coalition apparently wants could be established over that Line without regard to NS’ Boonton Line. Instead, that service could be routed over NJT’s Morristown Line. In short, restoring passenger service over the Lackawanna Cutoff would not require the extraordinary line divestiture that the Coalition demands.

Perhaps realizing this, the Coalition goes on to add, as a further reason for forcing the divestiture of the Boonton Line, that restoring the Cutoff could allow access to the New York area for freight service by Canadian Pacific/Delaware & Hudson, via the Boonton Line. The Coalition expresses “concern” that NS “could engage in

practices that will have the impact of preventing competition from CP/D&H.” Coalition Comments at 2. This argument is specious. As the Board has recognized, the Conrail transaction created new direct, two-carrier competition between NS and CSX in numerous markets where Conrail did not face competition from other major railroads before, including northern New Jersey. See *CSX Corp. et al.—Control and Operating Leases/Agreements—Conrail Inc. et al.*, 3 S.T.B. 196, 247 (1998). That extraordinarily pro-competitive restructuring, far from being a “harm” that must be remedied, is one of the central public benefits of the Conrail transaction. Nevertheless, the Coalition asks the Board here to accept the utterly remarkable proposition that a transaction that *increased* access from one Class I carrier to two in northern New Jersey (and numerous other areas) must be further conditioned to force access by yet a *third* carrier. There is absolutely no basis in fact or in law for that astounding proposition, and the Board should reject it in no uncertain terms.

Further, the “concern” that the Coalition raises about NS in connection with the Lackawanna Cutoff amounts to nothing more than a prediction that NS might do something in the future that the Coalition would label as “anticompetitive.” See Coalition Comment at 2. Such vague, unsubstantiated and conclusory allegations about possible future unidentified events provide no basis whatsoever for Board action—particularly the draconian step the Coalition advocates of forced divestiture of a significant NS-operated rail line.

NS wishes to be clear that all of the foregoing is not meant to imply that restoring the Lackawanna Cutoff Line may not be a project worthy of pursuit or support as a stand-alone project. NS expresses no view on that question here, and the company is

always ready and willing to discuss with NJT and others possible projects that NS believes make operational and commercial sense. The point here, rather, is that this is not the proper forum for debating the question; in the context of this proceeding, the Coalition has no legal or factual basis for seeking Board-imposed confiscation of PRR property in pursuit of that project.

The North Jersey Shared Assets Area

Two commentors, the New Jersey Department of Transportation ("NJDOT") and the North Jersey Transportation Planning Authority ("NJTPA") discuss issues pertaining to the North Jersey Shared Assets Area ("NJSAA"). Neither NJDOT nor NJTPA seek Board intervention, but rather both support continued discussions among the parties to address issues of concern. Indeed, as NJDOT notes, NS (and CSX) have agreed to confer regarding these matters over the next several months. NJDOT Comments at 3.

NJDOT generally asserts that NS is not actively competing in the NJSAA and that CSX and NS have not yet developed and implemented economic development plans within the port district of the Port Authority of New York and New Jersey ("PANYNJ"). NJTPA essentially concurs with the views of NJDOT. NJTPA suggests that if discussions among the parties do not sufficiently address its concerns, some future "reorganization" of Conrail's "corporate structure" and unspecified change in "the conditions under which [Conrail] operates" in northern New Jersey might be warranted, NJTPA Comments at 2-3; NJDOT similarly alludes to the possibility of a future request for "Board-imposed changes with respect to the NJSAA." NJDOT Comments at 3.

The Conrail transaction, it should be recalled, produced a substantial increase in rail-to-rail competition throughout the territory formerly served by Conrail, as well as new

single-line service throughout the entire eastern United States and into parts of Canada. The New York/New Jersey area is, of course, an enormous consumer market, and access to that market was a key strategic objective for both NS and CSX in their negotiation of the terms of the Conrail transaction. Ultimately, the SAA structure was agreed upon as the best way to ensure that both railroads could serve this market and introduce the two-carrier competition that is one of the principal hallmarks of the Conrail transaction. That structure has been in place for more than four years, and has, in fact, resulted in vigorous and effective competition between NS and CSX in northern New Jersey.¹²

The implication that NS has deliberately sought to discourage rail service into the NJSAA in favor of increased truck traffic is simply untrue. As a rail system that spans the eastern United States, NS has, of course, a network of intermodal, bulk transload and carload facilities across its system, including some in New Jersey and many others outside it. NS has an interest in marketing and developing business at all of those facilities, both inside and outside New Jersey, all in a manner that will most efficiently and effectively serve its customers and enable NS to obtain a greater share of the total transportation market.¹³

¹² In this regard, the fact that one carrier or the other may be carrying the traffic of a particular shipper does not necessarily mean that the other carrier did not compete for the traffic, but simply that the carrying railroad won that competition.

¹³ NS, for example, does have an intermodal facility at Bethlehem, PA, which, in part, serves traffic destined for New Jersey. (Conrail operated a similar facility at Allentown, which operated at volumes not very different from NS' at Bethlehem.) This facility, however, supplements the intermodal facilities in the North Jersey or South Jersey Shared Assets Areas. To the extent that volumes at Bethlehem may increase in the future, such increases would not result from any inherent desire by NS not to compete in northern New Jersey, but rather from accommodating the business decisions of

(continued on next page...)

Indeed, NS has effectively shaped its rail facilities and service offerings to respond to the many changes in transportation market that result from myriad business and economic factors that have nothing whatsoever to do with the Conrail transaction (the implementation of which is now more than four years old), that were not anticipated in the planning for the Conrail transaction, and over which the railroads have no control. For example, the Port of New York and New Jersey has exerted substantial efforts in recent years to capture trans-Pacific traffic that formerly would have moved through West Coast ports and then on to eastern destinations by rail. Due to the success of the Port's efforts, portions of that traffic have shifted now to all-water routes to New York/New Jersey where, in the absence of rail service, it would have to be trucked to destination. NS, however, has responded to this fundamental change in traffic patterns by establishing new intermodal rail service operations to accommodate this traffic.

Indeed, it is this type of responsiveness that demonstrates that NS is far from "opting out" of rail service in the NJSAA. In fact, NS has aggressively marketed services involving facilities in the NJSAA; these include, for example, (1) NS' expedited service, in conjunction with Canadian Pacific Railway, between Montreal and Toronto and the intermodal facility at Dockside, NJ; (2) NS' "Blue Steak" service, in conjunction with Union Pacific Railroad, between points in California and Nevada and points in the east and south, including ERail, NJ; (3) NS' intermodal service, in conjunction with Union Pacific Railroad, between Laredo, Texas and points in the southeast and northeast, including ERail, NJ; and (4) NS' intermodal service, in conjunction with

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shippers that may be shifting production and distribution functions away from the metropolitan area.

Burlington Northern and Santa Fe Railway, between points in California and points on the East Coast including ERail, Dockside and Croxton, NJ.

Moreover, NS has made tens of millions of dollars of investments in its intermodal system to better serve New Jersey. These investments include, for example, expansion and improvement of the ERail and Croxton intermodal facilities in the NJSAA. See NS-3 at 12.¹⁴ Additionally, Conrail has invested significantly in the NJSAA. See, e.g., NS-1 at 12; NS-5 at 13.

Moreover, since Split Date, the annual volume of intermodal traffic (excluding Triple Crown) carried by NS alone in New Jersey has well exceeded half that carried by Conrail in the years leading up to the Conrail transaction. In sum NS has been, and intends to remain, a vigorous competitor in New Jersey, and there is no basis for any conclusion to the contrary.¹⁵

With respect the settlement agreement with the Port Authority of New York and New Jersey, NS (and CSX) have regularly consulted with PANYNJ since Split Date on issues of mutual interest, including economic development matters. Significantly, PANYNJ, the party to the settlement agreement, has not expressed to NS any concern about NS' cooperation on economic development matters, nor does PANYNJ itself raise

¹⁴ Additionally, due to the network-like nature of rail systems, infrastructure investments and improvements in one part of the system can have salutary effects elsewhere in the system. One example of this is NS' previously-reported development of its new intermodal facility at Rutherford Yard in Harrisburg, PA. That facility enables NS to block and classify cars there rather than in the NJSAA, thus improving the flow of cars into and out of the NJSAA. See NS-2 at 58-59.

¹⁵ Triple Crown service to Portside was discontinued, in part because anticipated traffic simply did not develop. The cessation of that service, however, freed up space for Port operations and was done without any objection from the Port.

this issue with the Board. NS believes that the dialogue with PANYNJ has been and is useful, and NS fully intends to continue those consultations.

Again, both NJDOT and NJTPA indicate that they support further discussions among the parties and do not ask for any Board intervention at this time. Nevertheless, NJTPA's suggestion that it might, in the future, seek Board intervention to "change the conditions under which [Conrail] operates" in the Shared Assets Areas should be firmly rejected. As already discussed, the organization and operation of the Shared Assets Areas as negotiated by NS and CSX and implemented since Split Date constitute a fundamental underpinning of the Conrail transaction, providing the mechanism through which NS and CSX have been able over the past four years to introduce new and effective two-carrier competition in northern New Jersey and elsewhere. What NJTPA appears to suggest would amount to a radical and unwarranted restructuring of that arrangement.

In its decision approving the Conrail transaction, the Board stated that it sought not to "undermine the strength and integrity" of the proposed transaction, and in that regard the Board declined to alter "the already procompetitive [Shared Assets Areas] carefully negotiated by applicants." *CSX Corp. et al.—Control and Operating Leases/Agreements—Conrail Inc. et al.*, 3 S.T.B. 196, 250 (1988). There is no basis for the Board to reconsider doing so either now or in the future.

CONCLUSION

In its decision addressing comments in the third annual round of this proceeding last year, the Board found that "the conditions we imposed on the Conrail transaction are working as intended, . . . the Conrail transaction has not resulted in any competitive

or market power problems, and . . . substantial progress has been made in implementing the various environmental conditions and settlement agreements. The reports, comments, and replies further demonstrate that the service problems that occurred immediately after the Split Date have not recurred. The implementation of the Conrail transaction is now largely complete." *Decision No. 10* at 3.

None of the comments filed this year provide any basis for the Board to deviate from those conclusions. The record low number of comments itself indicates that those conclusions remain valid; moreover, all but one of the (few) commenting parties do not even request any Board intervention, but believe that any concerns they have can be worked out among the parties through further discussion. And the one request for active Board intervention—the remarkably overreaching demand by the "Lackawanna Coalition" that the Board force divestiture of a PRR (NS-operated) line—is utterly without legal or factual foundation.

Based on the record in this year's round of oversight, NS respectfully requests that the Board find that no Board action is required or warranted and that there is no reason to alter the conclusions, quoted above, that it reached last year.

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Respectfully submitted,

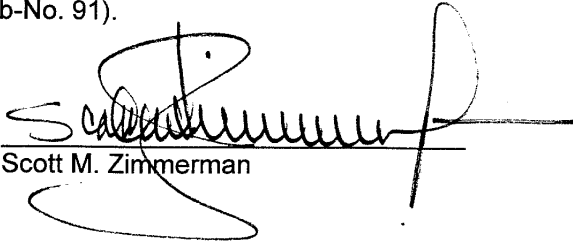


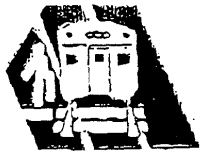
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CERTIFICATE OF SERVICE

I certify that on August 4, 2003 a true copy of NS-11 was served by first class U.S. Mail, postage prepaid, or by more expeditious means, upon all known parties of record in Finance Docket No. 33388 (Sub-No. 91).


Scott M. Zimmerman



Customer Notice

To Our Arlington Station, Rowe Street Station, and Benson Street Station Customers

As many of you know, NJ TRANSIT will be launching direct service to midtown Manhattan and Newark for Boonton and Montclair Branch riders on September 30. This service is a significant benefit for our riders because it opens up travel opportunities previously unavailable for the majority of travelers on these two rail lines. It will result, however, in the closure of three stations, Arlington, Rowe Street, and Benson Street, effective September 20.

Apparently, New York Greenwood Lake Railway has represented that they are planning to operate passenger rail service into Hoboken once NJ TRANSIT ceases its operation on Friday, September 20. This is simply not true and is an inappropriate representation on their part. NJ TRANSIT wants to set the record straight so that you have the necessary information to plan your commute on Monday, September 23.

It is important for you to know that New York Greenwood Lake Railway representatives have not demonstrated the financial capability to operate rail passenger service, have not received the appropriate approvals from the Federal Railway Administration, nor have they received the authority to operate along the line from the owner, Norfolk Southern. They have failed to provide the necessary documentation needed by NJ TRANSIT to assess whether its railroad could safely and efficiently operate into Hoboken, including an overall business plan, proper insurance information, financial documentation, and service plan among others. Lacking this information, there is no agreement for New York Greenwood Lake Railway to provide service from these stations.

As we have reported, Benson Street, Rowe Street and Arlington Stations on the Boonton Line will no longer be served after the last scheduled trip on Friday, September 20. Travel options notices, which include information about rail shuttle buses that will provide service to and from these closed stations to nearby stations, were distributed and will continue to be distributed at stations. This information is also available at Customer Service offices and on our website at www.njtransit.com.

NJ TRANSIT understands that the new Montclair-Boonton Line and the resulting closing of Benson Street, Rowe Street and Arlington stations could impact your daily commute. Because of this, we have been working with your local governments to provide you with alternative service, and have been actively promoting this by visiting your stations and distributing the information via customer notices, posters and newspaper inserts.

NJ TRANSIT will continue to assist each and every one of you during this transition period.

Customer Service - Monday - Friday - 9 a.m. - 5 p.m. - 1 (800) 772-3606 in NJ (973) 491-9400 out-of-state
Transit Information Center - Daily - 5 a.m. - Midnight - 1 (609) 772-2222 in NJ (973) 762-5100 out-of-state



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Lackawanna Cutoff

Background

In the early part of the 20th century, the Delaware Lackawanna and Western Railroad constructed a level-graded route from Roxbury, NJ to just over the Delaware River to serve as a faster, more direct route between existing rail lines in Pennsylvania and New Jersey. The Lackawanna Cutoff, as this route came to be known, includes a series of unique structural features, viaducts and massive fill embankments through the deep valleys of this region. In the 1970s, Conrail, the eventual receiver of this property, abandoned the right of way and the track was removed. The objective of the Lackawanna Cutoff project is to reinstitute passenger rail service on the abandoned rail right of way of the Lackawanna Cutoff and over existing freight right of way in Pennsylvania. The reinstituted rail line would provide service from Scranton to Hoboken and New York Penn Station via transfer to MidTown Direct service by connecting to the existing NJ TRANSIT Montclair-Boonton and Morris & Essex Lines.

[Click here to view a map of the system .](#)

Project Scope

The project includes complete reconstruction of the line including track and signal improvements to approximately 60 miles of right of way, new stations, parking facilities, a train storage yard and additional rail rolling stock. It is assumed that NJ TRANSIT would operate the new service. Proposed stations would serve Blairstown and Andover in New Jersey and Scranton, Mount Pocono, Analomink and East Stroudsburg in Pennsylvania.

Project Cost

The Draft Major Investment Study estimated the project cost at \$200 - \$230 million (2000 Rough Estimate). This estimate does not include property acquisition costs. The project is not funded.

Current Status

In October 2002, NJ TRANSIT's Board of Directors authorized consultant work for conceptual design, completion of the environmental assessment and preparation of the documentation required by the FTA for new transit lines. The State of New Jersey completed the purchase of the Lackawanna Cutoff property in May 2001.

Next Milestone

The next milestone will be the completion of the Major Investment Study and Environmental Assessment. A cost-sharing agreement for both capital and ongoing operating subsidies with Pennsylvania must also be negotiated.

Benefits

The project will provide passenger rail service to New York City from Northwestern New Jersey and Northeastern Pennsylvania.

NJ TRANSIT Department of Capital Planning and Programs
November 2002

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