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CSX/NS-2

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

STB FINANCE DOCKET NO. 33388 (SUB-NO. 94)



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

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**PETITIONERS' RESPONSE TO COMMENTS AND RESPONSE
TO MOTION FOR MODIFICATION OF PROCEDURAL SCHEDULE**

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Of Counsel

Dated: September 17, 2003

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CSX CORPORATION AND CSX TRANSPORTATION, INC.,
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**PETITIONERS' REPLY TO COMMENTS AND RESPONSE
TO MOTION FOR MODIFICATION OF PROCEDURAL SCHEDULE**

Petitioners CSX Corporation ("CSXC"), CSX Transportation, Inc. ("CSXT"),
Norfolk Southern Corporation ("NSC"), Norfolk Southern Railway Company ("NSR"), Conrail
Inc. ("CRR"), and Consolidated Rail Corporation ("CRC")¹ (collectively, "Petitioners"),²
respectfully submit their Reply to comments and their opposition to the Motion of the New York

¹ CSXC, CSXT and other wholly owned affiliates of CSXC are collectively referred to herein as "CSX." NSC, NSR and other wholly owned affiliates of NSC are collectively referred to herein as "NS." CRR, CRC and other wholly owned affiliates of CRR are collectively referred to herein as "Conrail."

² On June 4, 2003, Petitioners filed a Petition for Supplemental Order in STB Finance Docket No. 33388 (Sub-No. 94), which seeks a supplemental order authorizing the consolidation of New York Central Lines LLC ("NYC") with CSX and of Pennsylvania Lines LLC ("PRR") with NS, including certain intermediate and related transactions, in order to effectuate the acquisition of full ownership and control of the assets and business of NYC by CSX and of PRR by NS. CSX and NS are already authorized to control and manage NYC and PRR, respectively, and to operate their respective assets, pursuant to Decision No. 89. See "Petition for Supplemental Order," 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, STB Finance Docket No. 33388 (Sub-No. 94) CSX/NS-1 (June 4, 2003).

City Economic Development Corporation for a Modification of the Procedural Schedule (Aug. 28, 2003), in the above-referenced proceeding.³ As Petitioners explain below, the very few comments and inquiries submitted by interested parties raise no real objections to the transaction, and the lack of objections or any other substantive opposition to the transactions during the comment period (which closed on August 28, 2003) is powerful evidence that the Petition should be granted. The NYCEDC provides no adequate or persuasive reason for the Board to change the procedural schedule it set in Decision No. 1 (July 9, 2003), and the Board should deny NYCEDC's motion to revise the schedule.

I. THE PETITION SHOULD BE APPROVED BECAUSE NO PARTY IN INTEREST HAS OBJECTED TO THE PROPOSED TRANSACTIONS, AND THE FEW COMMENTS FILED DEMONSTRATE THAT THE PROPOSED TRANSACTIONS ARE APPROPRIATE AND IN THE PUBLIC INTEREST.

One of the most compelling arguments for approval of the Petition is the complete absence of objections to the substance of the proposed transaction. Conspicuous by their absence are comments from the overwhelming majority of the approximately one hundred (100) interested parties who submitted comments objecting to the original Conrail transaction in previous phases of this proceeding. Despite ample notice, not one shipper or association of shippers has objected or filed a comment in this proceeding. Similarly, not one rail carrier or other transportation service provider has submitted a comment or objection. No representative of labor or employees has objected or even filed comments. No unit of government or government agency or authority has filed any objection or request for modification, or stated that it opposes

³ Movant and commenter New York City Economic Development Corporation is referred to hereinafter as "NYCEDC."

the transaction.⁴ Finally, even the single comment filed by certain Conrail debtholders expressed no substantive opposition to the transaction, but rather sought only a procedural condition (which, as explained below, would be both inappropriate and inconsistent with governing law and long-established precedent). *See* Comments of the Conrail Ad Hoc Bondholders' Committee at 2-4 (Aug. 28, 2003), STB Finance Docket No. 33388 (Sub-No. 94) (hereinafter, "Bondholder Comments").

The absence of opposition and objections to the proposed transactions is further, and indeed compelling, evidence that the proposed transactions will not affect rail operations, service or competition generally, and will have no adverse impact on shippers, other rail carriers, or Petitioners' employees. *See* Petition at 2, 11-12. The proposed transactions simply will permit CSX and NS to acquire direct ownership and exclusive control of Conrail properties that they already own indirectly (through their joint ownership of Conrail), and that they are already authorized to operate and manage separately as part of their respective rail systems. In practical effect, the proposed transactions would make more effective the division of the Conrail "Allocated Assets" between CSX and NS that the Board previously approved (in Decision No. 89), thereby allowing CSX and NS greater and more efficient management control and independence over the assets of NYC and PRR, respectively.⁵ In the following sections,

⁴ The comments of NYCEDC pose a series of questions regarding the proposed restructuring, but NYCEDC has expressly advised the Board that it has not taken a position regarding the proposed transactions described in the Petition. *See* NYCEDC Comments at 1.

⁵ As the Petition made clear, the proposed transactions will preserve the existing rail operating structure in the Conrail "Shared Assets Areas" in North Jersey, South Jersey/Philadelphia and Detroit, and will preserve the balanced competitive rail service in the eastern United States that resulted from the creation of the Shared Assets Areas and otherwise from the Conrail Transaction. *See* Petition at 3-4.

Petitioners address the brief comments of four interested entities, which comprise the entire universe of comments submitted in this proceeding.

A. The Bondholders' Comments Simply Express a Procedural Preference for Negotiations Concerning Their Consent to Debt Restructuring, Which is Precisely the Procedure the Petition Contemplates Will Commence Upon Board Approval of the Transactions.

On behalf of itself and four other unidentified debtholders, Dodge and Cox submitted comments describing its interest in the proposed transaction, and requesting that the Board “allow consent negotiations [between Conrail debtholders and Petitioners] to proceed in a neutral environment.” Bondholder Comments at 2, 4. Significantly, the Bondholders do not oppose the proposed reorganization and implementing transactions themselves, or claim that the proposed debt restructuring necessary to implement the reorganization is unfair or unreasonable. *See id.* Moreover, the bondholders essentially endorse Petitioner’s preferred process for achieving the debt restructuring necessary to implement the proposed transactions – negotiations to obtain bondholder consent. *See* Bondholder Comments at 3-4. Petitioners reiterate that it is their intent, shortly after Board approval of the proposed transactions and issuance of the requested supplemental order, to commence negotiations with relevant debtholders aimed at obtaining those debtholders’ consent to the proposed debt restructuring. Petitioners’ strong preference would be to develop fair and reasonable terms for the necessary debt restructuring through negotiations, rather than to invoke the authority of the Board to make a binding and overriding fairness determination.

The only area of apparent disagreement regarding the Petition arises in the last page of the comments submitted by the Bondholders. *See* Bondholder Comments at 4, IV. In the concluding sentence of their comments, the Bondholders appear to request that the Board condition its approval of the proposed transactions on “the completion of the consent solicitation

process through registered exchange offers.” *Id.* To the extent this request seeks to foreclose Petitioners from exercising their right to ask the Board to conduct a fairness proceeding in the event negotiations do not result in the consents necessary to complete the proposed transactions, Petitioners oppose Bondholders’ request.⁶ Petitioners believe the law is clear regarding the Board’s authority and responsibility to make a fairness determination in the event the parties are unable to reach a negotiated agreement regarding the terms of the necessary debt restructuring. *See, e.g., Schwabacher v. United States*, 334 U.S. 182 (1948). Because Petitioners prefer to resolve the terms of the debt restructuring through negotiations, they have not at this time asked the Board to convene a fairness proceeding as part of the pending Petition. Nonetheless, in the event that the parties are not able to reach agreement through negotiations, the Board should reserve its statutory power and responsibility to make a binding determination regarding fair terms of the necessary debt restructuring. The Board’s statute and precedent make clear that the Board – not the Bondholders or any other private party – is the final arbiter of the public interest in this proceeding.

⁶ It is not entirely clear that the condition the Bondholder Comments request is intended to preclude a Board proceeding to determine the fairness of the terms of the proposed reorganization transaction, which a long line of ICC and Board precedents hold is the Board’s responsibility in the event affected parties are unable to agree on the financial terms of a rail carrier reorganization transaction. *See, e.g., Penn-Central Merger and N&W Inclusion Cases*, 389 U.S. 486, 511 (1968); *Schwabacher*, 334 U.S. 18; *Zatz v. U.S.*, 149 F.3d 144 (2nd Cir 1998); *Union Pacific Corp., et al. – control – Missouri Pacific Corp. et al.*, 366 I.C.C. 462 (1982). If, instead, the Bondholders are requesting that the Board condition its approval of the transactions upon Petitioners’ resolution of issues concerning Bondholders’ consent through negotiations, and that Petitioners not ask the Board to commence a fairness proceeding unless consent negotiations with the bondholders fail to reach sufficient agreement(s), then their position is consistent with Petitioners’ position, and the parties have no material disagreement with respect to the Petition and the supplemental order it seeks.

B. NYCEDC Does Not Oppose the Proposed Transactions or Propose Any Modification to Those Transactions, and its Comments Primarily Seek Information that is Already Available in the Public Record.

The Comments submitted by NYCEDC do not oppose the proposed transactions, acknowledge that Petitioners have adequately described those transactions, their purpose, and intended effects, and “applaud the efforts of the Petitioners to enhance efficiency with the ultimate goal of improving operations”. Comments of NYCEDC, Acting on Behalf of the City of New York, NY at 1-2, EDC-1, Finance Docket No. 33388 (Sub-No. 94) (Aug. 28, 2003) (hereinafter “NYCEDC Comments”). NYCEDC then poses several questions seeking information to facilitate its evaluation of certain representations in the Petition, most prominently the representation that “the proposed transaction will not have any effect on either the ownership or operation of the Shared Assets areas.” NYCEDC Comments at 2-3. Petitioners believe that NYCEDC’s questions have largely been addressed in previous filings, or seek information that is not relevant to the supplemental authorization the Petition seeks. Petitioners will nonetheless attempt to provide answers to NYCEDC’s questions, summarizing them and then providing responses in the general order in which they appear in the comments. *See* NYCEDC Comments at 3.

1. The Original CSX/NS/Conrail Transaction and Organizational Structure, and Reasons for the Proposed Restructuring

NYCEDC’s questions regarding Petitioners’ current structure, and their structure after the proposed reorganization, are thoroughly addressed in the original Conrail transaction Application filed in 1997, and in the pending Petition. The existing structure of Conrail, NYC, and PRR and the reasons for that structure were thoroughly explained in the original Application. *See, e.g.,* Conrail Control Application Volume I at 9, 12-13, 22-24, 29-58, *CSX Transportation, Inc. et al. – Control and Operating Leases/Agreements Conrail Inc., et al., CSX/NS-18* in STB Finance

Docket No. 33388 (June 1997) ("Conrail Control Application"). The Application also advised the Board that Petitioners intended in the future to restructure Conrail in the manner proposed in the pending Petition. *See* Conrail Control Application Vol. 8B, CSX/NS-25 at 61-63 (Transaction Agreement Section 8.9). After careful review and thorough consideration of thousands of pages of comments, and public hearings, the Board found the original Conrail transaction was in the public interest and approved the original Application, including the present organizational structure, in 1998. *See* Decision 89, STB Fin. Docket No. 33388 (July 23, 1998), 3 STB 196. That structure was approved by the Board, and there is no reason for the Board to revisit that approval in the context of this proposal.

The reasons that Petitioners seek to reorganize the existing entities and rationalize their structures are set forth in the Petition, filed on June 4, 2003. *See, e.g.*, Petition at 2-4, 8-11, 17-20. Based on their 4 ½ years of experience with the current shared ownership structure, NS, CSX, and Conrail have determined that they can reduce costs and improve efficiency, reduce unnecessary entanglement between NS and CSX, and enhance the independence of the two Eastern Class I carriers by effecting a permanent division of ownership of the Conrail Allocated Assets between CSX and NS. As the Petition explains, the proposed transactions will enhance the transparency and visibility of the overall financial results and performance of CSX and NS; will consolidate the ownership and management functions for the portions of the Allocated Assets now managed by NS (*i.e.* PRR) and CSX (*i.e.*, NYC), thereby eliminating a number of costs and inefficiencies resulting from the current joint ownership structure; will simplify the corporate structures of NS, CSX, and Conrail; and will provide NS and CSX greater independence to manage their respective shares of the Allocated Assets in accordance with the parent railroad's individual goals, needs, and opportunities. *See id.*

2. Conrail's Financial Condition After the Consummation of the Proposed Transactions

Upon completion of the proposed restructuring, Petitioners expect that Conrail's remaining assets will have a book value in excess of \$1.0 billion and will include 1,200 miles of track, three (3) major classification yards, and twenty-five (25) support yards serving the North Jersey, South Jersey/Philadelphia and Detroit areas. If all of the holders of Conrail's unsecured debentures elect to participate in the proposed exchange, the restructuring will result in the removal of approximately \$800 million in unsecured debt from Conrail's balance sheet, so Conrail's remaining liabilities will comprise mostly deferred tax and pension liabilities, casualty reserves, and equipment and other lease-related obligations. However, Petitioners expect that all of Conrail's equipment and lease related obligations would be supported by leases or subleases between Conrail and either CSXT or NSR. These supporting leases/subleases will have terms, conditions and cash flows matching the controlling agreements between Conrail and the relevant debtors/equipment lessors. Additionally, the 1997 Keepwell Agreement (detailed in Section 4.3 of the original Transaction Agreement) will remain in full force and effect following the restructuring. *See* Petition at 20-21; Conrail Control Application, CSX/NS-25, Vol. 8B at 49.

Moody's Investors Service and Standard & Poor's have reviewed the proposed restructuring and concluded (as more particularly described in Exhibits 5 and 6 to the Petition) that they would rate Conrail's secured debt A1/A respectively, a level commensurate with Conrail's current secured debt ratings from those same credit agencies. These prominent credit ratings companies are in a good position to assess Conrail's ability to pay its debts post-restructuring, and their judgement should provide adequate comfort as to Conrail's on-going financial viability.

3. Future Role and Commercial Viability of Conrail

Questions 3, 5, 6 and 7 address related aspects of the same general questions, *viz.*, after the consummation of the proposed transactions, what will be Conrail's role, and will Conrail remain commercially viable? Petitioners address those four questions together, because they are closely related. Conrail's mission after the proposed restructuring will be unchanged from its present mission, except that its role as landlord for the Allocated Assets will come to an end. After the STB approved the original Conrail Transaction pursuant to Decision 89, Conrail's principal activity changed from that of a Class I line-haul carrier to operator of the Shared Assets Areas. The services provided by Conrail in the Shared Assets Areas allow CSXT and NSR to provide competitive rail service in, to, and from, North Jersey, South Jersey/Philadelphia and Detroit. The proposed restructuring will preserve this balanced, competitive rail service and Conrail's operations in these areas will be unaffected by the restructuring.

As the owner/operator of the Shared Assets Areas, after the proposed restructuring, Conrail will continue to receive fair-market value rent and operating fees for the services it provides to CSXT and NSR.⁷ Conrail will receive lease/sublease rental payments from NSR and CSXT in amounts sufficient for Conrail to pay its debt and lease rental obligations as they become due. Also, Conrail will continue to generate annual revenues from fiber optics, signboard licensing, and real estate and right-of-way sales and leasing. For further support, the 1997 Keepwell Agreement (*see* Response No. 2, *supra*) remains in full force and

⁷ Conrail will no longer receive rents from the lease of the Allocated Assets, but, on the other side of the ledger, it will no longer pay (or be liable for) the debt service for those Assets. *See generally*, Petition Exhibits 2-4.

effect, and provides additional assurance that Conrail's cash flows will be adequate to maintain financial and operating stability.

4. Petitioners Do Not Currently Plan Any Additional Financial and/or Organizational Changes for Conrail

Petitioners have no current plans to make significant changes in the organization or operations of Conrail beyond those necessary to implement the transactions and restructuring described in the Petition. Of course, NS, CSX, and Conrail will evaluate opportunities and conditions as they develop, and they cannot predict future developments, let alone predict how they might respond to such unknown developments. *See* Petition at 3, n.4. Presently, however, Petitioners do not plan any additional material changes in Conrail's organization or functions.

C. Conrail has Fully Responded to the Questions Posed by Residco.

Petitioners believe they have fully responded to three narrow questions posed in the comment letter filed by Residual Based Finance Corporation ("Residco"). *See* Residco Comments (Aug. 20, 2003). Like other commenters, Residco does not oppose the proposed transaction. Rather, its comments simply sought limited additional information concerning the proposed transactions' effect on a specific Conrail lease obligation. Shortly after Residco filed its comment letter, a Conrail representative contacted Residco to discuss Residco's questions regarding the effect of the proposed transactions on an equipment conditional sale agreement between Residco and Conrail. On behalf of all Petitioners, Conrail explained to Residco that, while Conrail would remain primarily liable for debt payments to Residco, NSR and CSXT would also be directly liable under subleases to Conrail, whose terms would mirror those of the conditional sale agreement between Residco and Conrail. At Residco's request, Conrail memorialized its responses in a letter. *See* Letter from T. McFadden to S. Lorenz (Aug. 26,

2003) (copy attached hereto as Exhibit A). Petitioners believe their response fully and adequately addresses the inquiry and concerns of Residco.

D. The Comments of the Commonwealth of Massachusetts Essentially Support the Proposed Transactions.

CSX appreciated the Commonwealth of Massachusetts' support for the Conrail Transaction in 1997 and appreciates the Commonwealth's present support for the Petition for Supplemental Order. As stated in the letter of August 26, 2003 from Daniel A. Grabauskas, Secretary of Transportation, "[t]he Commonwealth supports simplification of the ownership structure, with the expectation that such simplification will redound to the benefit of the Commonwealth and its constituents through increased efficiency and economy in rail service."

The Commonwealth understandably expresses the desire that CSX continue to live up to the commitments of the Agreement between the Commonwealth and CSX dated October 31, 1997. CSX believes that it has complied with those commitments to date, and both parties continue to work to meet the commitments in the Agreement. The Commonwealth correctly states that the Board's oversight period for the underlying Transaction extends until June 2004.

As CSX reported in its annual submissions in the General Oversight proceeding, CSX agreed in 2000 and 2001 to add a total of six round-trip schedules to the Massachusetts Bay Transportation Authority's (MBTA's) commuter service between Framingham and Worcester on the Boston Main Line, and has cooperated with MBTA regarding other proposed extensions of commuter service.⁸ CSX is presently working with the Commonwealth to complete one of those

⁸ See Finance Docket No. 33388 (Sub-No. 91) (General Oversight): First Submission by Applicants CSX Corporation and CSX Transportation, Inc. 60 (CSX-1) (filed June 1, 2000); Second Submission by Applicants CSX Corporation and CSX Transportation, Inc. 46-47 (CSX-4) (filed June 1, 2001); Third Submission by Applicants CSX Corporation and CSX Transportation, Inc. 28-29 (CSX-9) (filed June 3, 2002).

proposed projects – extension of commuter service to Greenbush – and believes that this project is on target for completion within the timeframe contemplated by the parties.

Representatives of CSX also continue to meet on a quarterly basis with representatives of the Commonwealth to discuss a full range of immediate issues and the long-term interests of CSX and the Commonwealth (including operational, engineering, passenger rail, real property and economic development issues). CSX believes that these discussions have been very productive in the past and that these regularly scheduled meetings will continue to provide a constructive forum for future communication. Approval of the Petition for Supplemental Order would facilitate CSX's ability to make plans with the Commonwealth to implement future projects in their common interest.⁹

* * * *

In sum, no person or entity has indicated that it opposes the proposed transactions, or that it seeks any substantive modification to those transactions. None of the four commenters has taken the position that the proposed transactions is not in the public interest, or that there is any substantive basis for opposition to the proposed restructuring. Petitioners have addressed the minor concerns and requests for clarification submitted by the four commenters, and there is no outstanding concern that would warrant any modification to the proposed transactions, or any additional conditions beyond those proposed in the Petition. The Board should approve the

⁹ As Massachusetts' comments recognize, the sale of certain of the Allocated Assets is a good example of the type of transaction that will be facilitated by the restructuring proposed in the Petition.

Petition as submitted, and issue the requested Supplemental Order, authorizing Petitioners to complete the proposed restructuring transactions.¹⁰

II. THE PROCEDURAL SCHEDULE IS ADEQUATE, AND THE MOTION FOR MODIFICATION OF THAT SCHEDULE SHOULD BE DENIED.

The Board should deny NYCEDC's Motion for modification of the procedural schedule as untimely, unnecessary, and inconsistent with Board practice and precedent. Petitioners filed the subject Petition on June 4, 2003. More than a month later, the Board issued a decision that, *inter alia*, summarized the proposed transactions, established a procedural schedule governing the submission of comments and responses in this proceeding, and directed that Petitioners serve a copy of the Board's decision (which included the schedule) on all parties of record in the Conrail transaction docket, and all known Conrail debtholders and lease obligees. *See* STB Decision No. 1, STB Finance Docket No. 33388 (Sub-No. 94) (July 9, 2003) ("Decision No. 1"). The Decision (which Petitioners served on NYCEDC) unambiguously requires that:

[a]ny person (including, but not limited to, persons served with copies of this decision) who wishes to file comments respecting the petition **must file such comments by August 28, 2003.**

Decision No. 1 at 16 (emphasis added). On August 28, the last day allowed for filing comments, NYCEDC filed a motion requesting that the Board revise and extend its procedural schedule to allow NYCEDC to file additional "rebuttal" comments fifteen (15) days after Petitioners file their Reply to the comments of interested parties. Motion of NYCEDC . . . For A Modification

¹⁰ The Petition requests that the Board issue a supplemental order approving the transaction, subject to a condition that Petitioners will seek to obtain the consent of debtholders through negotiations or, in the event those negotiations do not result in the consents necessary to consummate the transactions, Petitioners may propose further proceedings before the Board to determine outstanding issues regarding such consents (including the fairness and reasonability of the terms of exchange and compensation offered by Petitioners). *See* Petition at 20-24.

of the Procedural Schedule, EDC-2, STB Finance Docket 33388 (Sub-No. 94) (Aug. 28, 2003) (NYCEDC's motion is in addition to the separate comments it filed the same day). For at least three independently sufficient reasons, NYCEDC's Motion lacks merit and should be denied.¹¹

First, the motion is untimely. The Board issued Decision No. 1 on July 9, 2003, clearly advising all interested persons that the deadline for submitting any and all comments in this matter was August 28, 2003. If NYCEDC believed it needed more time or information to submit comments, it should have advised the Board and Petitioners of this promptly after the Board issued the procedural schedule in Decision No. 1. In the intervening seven weeks, however, NYCEDC provided no notice or other indication that it believed the time for filing comments was insufficient, or that it believed it needed more time to file comments. Nor did NYCEDC contact Petitioners in a timely manner to request any additional information it thought it needed in order to develop its position or submit comments.¹² NYCEDC offers no justification or excuse for the tardiness of its request for more time. The Motion should be denied as untimely.

Second, the schedule change the Motion seeks would deprive Petitioners of their right to respond to comments. It is well-established that applicants in a railroad consolidation proceeding (i.e., the Petitioners in this proceeding) are entitled to file the final evidence and close the record in that proceeding. *See, e.g.,* ICC Finance Docket No. 32549, *Burlington Northern R. Co. et al. - Control and Merger - Atchison, Topeka and Santa Fe Ry. et al*, Decision No. 16

¹¹ All interested parties are subject to the same procedural schedule. Notably, however, no other party has suggested that the procedural schedule was inadequate, or that the schedule should be extended to allow it more time to submit additional comments.

¹² NYCEDC first disclosed its questions to Petitioners less than two days before the deadline for filing comments.

(served Apr. 20, 1995), at 11 (“[A]pplicants . . . have the right to close the evidentiary record on their case. . . . Allowing [commenting] parties to file rebuttal evidence would deprive the primary applicants of their right to close the evidentiary record on their case.”). The Board has made abundantly clear – both in this proceeding and in many other rail consolidation cases – that non-applicant parties-in-interest are simply not allowed to file rebuttal comments. *See, e.g.*, STB Finance Docket No. 33388, Decision No. 6 (served May 30, 1997) (“We will not allow parties filing comments, protests, and requests for conditions to file rebuttal in support of those pleadings. Parties filing inconsistent and/or responsive applications have a right to file rebuttal evidence, while parties simply commenting, protesting, or requesting conditions do not”), *citing* ICC Finance Docket No. 32760, *Union Pacific R. Co. et al - Control and Merger - Southern Pacific Rail Corp. et al.*, Decision No. 6 (served Oct. 19, 1995), at 7-8 (“We will not allow parties filing comments, protests, and requests for conditions to file rebuttal in support of those pleadings.”).¹³ NYCEDC offers no good reason for the Board to depart from its established rule prohibiting commenters from filing rebuttal comments, and the Motion should be denied as contrary to Board practice and precedent.

Third, granting NYCEDC’s belated request to extend the procedural schedule would unduly delay the Board’s consideration and determination of this Petition. If the Board were to grant the Motion and extend the schedule for 15 days to allow NYCEDC to file additional comments, it would presumably allow Petitioners at least the same amount of time to

¹³ *Accord*, STB Finance Docket No. 33388, Decision No. 64 (served January 29, 1998) (“parties filing comments, protests, and requests for conditions . . . are not permitted to file rebuttal in support of those pleadings. Parties filing inconsistent and/or responsive applications have the right to file rebuttal evidence, while parties simply commenting, protesting, or requesting conditions do not”); STB Finance Docket No. 33388, Decision No. 65 (served January 28, 1998) (same); STB Finance Docket No. 33388, Decision No. 66 (served February 3, 1998) (same).

prepare and file a response (to vindicate Petitioners' right to close the evidentiary record).¹⁴ The result would be to delay by at least 30 days the submission of the full record for the Board's consideration and determination.¹⁵

NYCEDC had ample opportunity to develop and submit comments on the Petition. If it believed it needed more time or information to submit comments, NYCEDC could have filed a timely request for extension or more information, rather than filing the present Motion on the day of the deadline for comments of interested parties. The schedule provided in Decision No. 1 was fair and reasonable, and NYCEDC has offered no adequate reason for the Board to change that schedule. Accordingly, the Motion should be denied.

CONCLUSION

The Petition is fully consistent with the public interest, and no modifications or additional conditions are necessary or appropriate. Accordingly, the Board should issue the

¹⁴ If the Board grants the Motion, or provides NYCEDC any opportunity to submit additional comments, Petitioners hereby request that the Board preserve their right to close the record by granting Petitioners the opportunity to file a response to NYCEDC's rebuttal or other supplemental submission, within a reasonable period of time after NYCEDC submits any such supplement.

¹⁵ For business reasons, Petitioners wish to complete the proposed transactions as expeditiously as possible. Accordingly, Petitioners requested that the Board issue its decision within 45 days of this Reply (Petition at 23), and the Board has indicated that it "will endeavor to issue its decision on the merits of the petition as soon as possible after the filing of the petitioners' reply." Decision No. 1 at 16. To facilitate an expeditious decision, Petitioners have filed this Reply 8 days earlier than required by the Board's schedule. NYCEDC's unnecessary request for an extension, however, would effectively consume 30 of the first 45 days following Petitioners submission of this Reply.

Supplemental Order requested in the Petition.

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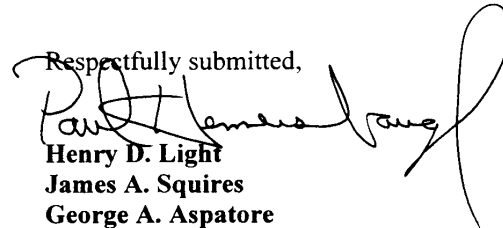
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Of Counsel

Certificate of Service

I hereby certify that I caused copies of the foregoing Petitioners' Response to Comments and Response to Motion for Modification of Procedural Schedule in STB Finance Docket No. 33388 (Sub-No. 94) to be served, by first class mail or more expeditious method of delivery, upon counsel for each party that submitted comments concerning the pending Petition in Sub-docket No. 94

September 17, 2003

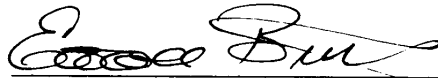
A handwritten signature in black ink, appearing to read "Edward B. Smith", is written over a horizontal line.

Exhibit A

CONRAIL[®]



August 26, 2003

Ms. Susan Lorenz
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Chicago, IL 60602

Dear Susan,

It was a pleasure speaking with you on the phone yesterday regarding the proposed Conrail transaction referred to in your letter to the Surface Transportation Board dated August 20, 2003. During our phone conversation you suggested that I respond in writing to the three questions that you raised in the above-noted STB letter.

Regarding question #1, assuming that the IRS and the STB approve the transaction, Conrail will remain primarily liable for all secured debt and lease payments and will continue to make all payments to the secured parties. Conrail will sublease approximately 58% of its encumbered equipment to Norfolk Southern Railway Company (NSR), and approximately 42% to CSX Transportation, Inc. (CSXT). As a result, NSR will be directly liable, as sublessee, to Conrail for 58% of the total debt service (or lease payments) under the applicable head lease (or secured agreement), and CSXT will be directly liable, as sublessee, for 42% of those payments.

As I mentioned in our phone call in response to question #2, I will send you the latest financial statements for both Norfolk Southern Corporation and CSX Corporation. You should already be receiving quarterly and annual financial statements from Conrail, and will continue to receive Conrail's financial statements in the event the proposed transaction is approved.

Finally, as I noted during our call, the "guarantor for payments" raised in your question #3 is not really applicable for Conrail's secured debt and lease transactions. Again, as noted in my answer to question #1, Conrail is proposing to sublease its encumbered equipment directly to NSR and CSXT. Those subleases are expected to have terms and payment schedules that are identical to the head-leases between Conrail and the secured parties, and all sub-leases will be junior and subordinate to the head-lease agreements. In summary, we expect that the subleases will comply in all respects with the requirements of Section 15.2 of the Agreement between Conrail and Residco.

If you find the above-noted answers satisfactory, we would appreciate you advising the STB that your questions have been adequately answered and that your comments are withdrawn. Should you or Vince Kolber require additional clarification, I would be pleased to speak with both of you at your earliest convenience.

Best Regards,

Tom McFadden
Consultant