

September 25, 2003

*By Messenger*

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

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FD 33388 Sub 91  
RE: *Docket No. 33388; CSX Corporation and CSX Transportation, Inc., Norfolk Southern Corporation and Norfolk Southern Railway Company-Control and Operating Leases/Agreements-Conrail Inc. and Consolidated Rail*

Dear Secretary Williams:

Enclosed please find an original and ten (10) "PUBLIC" copies of the Status Report and Comments of Cargill, Incorporated.

Also enclosed is an additional copy of the Status Report and Comments for stamp and return. Kindly date-stamp the additional copy for return to this office by messenger.

Sincerely,

Jeffrey O. Moreno

Enclosures

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BEFORE THE  
SURFACE TRANSPORTATION BOARD

STB 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]

STATUS REPORT AND COMMENTS  
OF CARGILL, INCORPORATED

Cargill, Incorporated ("Cargill") hereby submits this Status Report and Comments in the above-captioned proceeding, concerning the protection of Cargill as a so-called "2-to-1" shipper at Sidney, Ohio. This Status Report responds to the proposal of CSX Corporation and CSX Transportation, Inc. (collectively "CSX") and Norfolk Southern Corporation and Norfolk Southern Railway Company (collectively "NS") to protect Cargill in the "Joint Report of Norfolk Southern and CSX Regarding Cargill, Incorporated" (CSX/NS-4), filed on June 9, 2003 (hereinafter "Joint Proposal").

Background and Procedural Status

Cargill initially brought its concerns to the Board in Comments filed over a year ago, on August 5, 2002 (CARG-5). Specifically, Cargill expressed alarm that recent developments involving the fees charged by CSX to NS to preserve two-carrier access at Sidney, Ohio were inconsistent with the merger decision by not adequately protecting Cargill's shipments of agricultural products from Sidney, Ohio to NS-served destinations, effectively negating the



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protections that both carriers assured Cargill, as a 2-to-1 shipper at Sidney, would preserve two-carrier competition post-merger.

CSX and NS had designated Sidney a 2-to-1 point in their merger application and listed Cargill as a 2-to-1 shipper. See Verified Statement of James W. McClellan, CSX/NS-18, Vol. 1 at 546 and 549. In order to preserve two carrier competition at Sidney, they entered into a trackage rights agreement and a switching agreement to give NS access to Sidney shippers over approximately 33 miles of CSX track extending north from Sidney to Lima, Ohio. See CSX/NS-25, Vol. 8B, at 543-50; CSX/NS-25, Vol. 8C, at 616-39, respectively. Even before the division of Conrail, however, CSX and NS concluded that these agreements did not establish a convenient interchange at Sidney. Therefore, a new interchange was established at Marion, Ohio, approximately 60 miles east of Sidney on the former Conrail line. This plan never was submitted to the Board for its approval. Thus, the original plan approved by the Board to preserve two carrier competition at Sidney never was implemented, and instead, Cargill has accessed NS under the agreement establishing the Marion interchange.

In July 2002, however, Cargill learned that the interchange fee charged by CSX to NS would be increased, retroactively, from \$200 per car to more than \$600 per car, to be adjusted annually by the RCAF-U. This rate increase purportedly was based upon CSX's costs, which included an interchange operation that required Cargill's traffic to move nearly 100 miles west to Indianapolis and then move 160 miles east over the same track to reach the NS interchange at Marion, Ohio. This contrasted sharply with Cargill's pre-merger access to a second carrier via a short reciprocal switch at Sidney, for which Cargill paid only \$205 per car.

The increased CSX fee prompted NS to announce rate increases of \$450-480 per car on soybean meal from Sidney, effective October 1, 2002. Although Cargill was to have had access

to NS via switching at Sidney, the relocation of the interchange to Marion, 60 miles to the east, along with the preceding 200 mile round trip move west on CSX before heading to Marion, effectively converted those single line moves to two carrier movements, for which CSX sought to charge NS an additional \$450 per car. These facts prompted Cargill to bring its concerns to the Board.

At the request of CSX and NS, and without objection from Cargill, the Board extended the time for filing Reply Comments to Cargill until September 25, 2002, in order to allow the parties to reach a negotiated resolution of Cargill's concerns. See Decision No. 9 (served Sept. 13, 2002). During that time NS agreed to absorb the increased charges from CSX and deferred its previously announced rate increase. CSX and NS separately filed comments on September 25, 2002, stating that CSX had sent a written proposal to Cargill. Both railroads expressed hope that a negotiated resolution could be reached, although NS expressed some preliminary concerns regarding CSX's proposal.

The CSX proposal offered four alternative solutions to Cargill. After carefully considering each option, Cargill selected the first option, which would implement the plan originally approved by the Board in the merger decision to preserve two carrier competition at Sidney. CSX and NS initiated discussions to address the operating details of that option.

After nearly seven months without any agreement between CSX and NS, Cargill asked the Board, on April 28, 2003, to set a firm deadline. (CARG-7) In a joint response filed on May 19, 2003, CSX and NS informed the Board that they had intensified their efforts and hoped to submit a final proposal to the Board by June 9, 2003. (CSX/NS-3)

On June 9, 2003, CSX and NS submitted the Joint Proposal to the Board, which contains their final plan to address Cargill's concerns as a 2-to-1 shipper at Sidney. (CSX/NS-4) After a series of further discussions with CSX and NS, Cargill hereby responds to the Joint Proposal.

**Cargill's Comments**

The June 9<sup>th</sup> Joint Proposal of CSX and NS does not implement the original plan approved by the Board to preserve two carrier competition at Sidney. Instead, it continues the operating plan of interchanging cars with NS at Marion, Ohio that has been in place since the Conrail split, but never was approved by the Board. Cargill also understands that its cars no longer move 100 miles west on CSX to Indianapolis before returning east to the Marion interchange with NS, although there still is some back-tracking. This operational change, however, is not part of the Joint Proposal. The *only* change offered in the Joint Proposal itself is a reduction in the CSX switching charge to NS from \$600 to { } for a period of five years, subject to annual adjustment. This amount, however, still is a { } increase over the amount that had been charged since the Conrail split.

The only explanation that CSX and NS have provided for not implementing the original plan that was proposed in their merger application and approved by the Board to preserve two carrier competition at Sidney, and that Cargill had selected from the four options proposed by CSX in response to Cargill's initial comments in this proceeding (CARG-5), is the following statement:

The central difficulty confronted is that, operationally speaking, a transfer of cars between NS and Cargill is a costly and difficult process. Physical access to Sidney by NS involves substantial cost and operational difficulty.

CSX/NS-3 at 2. In recent conversations with Cargill, NS restated these points and emphasized that, if Cargill insisted upon implementing the original plan, the costs to NS would be greater and consequently so would the potential increase in Cargill's rates.

This is extremely troubling because it indicates that CSX and NS *never* performed *any* analysis of the economic or operational feasibility of their original plan to preserve 2-to-1 competition at Sidney prior to including that plan within their application for control of Conrail. The traffic patterns and volumes at Sidney have not significantly changed such that the original plan only became unfeasible after the application. To the extent there have been operational changes, those would have been within the control of both railroads. Instead, it appears as if CSX and NS presented a plan that looked good on paper in order to induce Cargill's support for, and the Board's approval of, their acquisition of Conrail.

As a consequence of this misrepresentation, Cargill has become a 2-to-1 shipper without a real 2-to-1 remedy. In recent discussions with Cargill, NS has insisted that the Joint Proposal constitutes all that is required in a 2-to-1 remedy as long as Cargill's traffic still moves to NS-served destinations under the resulting rates. Under that logic, captive shippers would be no worse off than shippers with two carrier service as long as the traffic still moved by rail. Of course, no one subscribes to that logic, which would completely undermine the concept of differential pricing between captive and competitive traffic.

The whole point of remedying 2-to-1 situations is to preserve the competitive benefits of two carrier service. Prior to the Conrail transaction, Cargill was served directly by Conrail at Sidney, Ohio and had access to CSX via a short reciprocal switch at a \$205 rate. The Joint Proposal asserts that the reciprocal switch rate was \$390, which would be comparable to the { } fee that CSX will charge NS under the Joint Proposal. But, Cargill received a rebate from

Conrail that rendered the effective switch rate only \$205. Therefore, a 60-mile switch to NS at Marion, Ohio for { } is not a 2-to-1 remedy. That switch fee between CSX and NS is for a limited 5-year duration, after which it can be changed at the whim of CSX without concern for competitive constraints. As a consequence, Cargill must rely upon Board oversight as a surrogate for actual competition. By contrast, a true 2-to-1 remedy would not require such a degree of oversight, since rates would be regulated by direct competition.

For the time being, NS has committed to absorb the higher CSX charge in the NS rates to Cargill. As long as NS continues this practice, Cargill will not suffer substantial immediate harm. NS, however, will not commit to absorb these charges even for the 5-year duration of the Joint Proposal. In the absence of a true 2-to-1 remedy at Sidney, as originally proposed to and approved by the Board, Cargill could suffer immediate and irreparable harm on short notice (*i.e.* the notice required to increase common carrier rail rates). Therefore, in order to protect Cargill in that circumstance, Cargill requests the Board to clarify that

1. it retains jurisdiction and will maintain oversight over the 2-to-1 situation at Sidney in order to remedy any harm to Cargill caused by the failure of CSX and NS to provide a 2-to-1 remedy at Sidney; and
2. the original 2-to-1 remedy, apparently proposed by CSX and NS without any analysis of its economic or operational feasibility, and approved by the Board, remains available to Cargill, in the event that the economic and operational issues become more favorable.

With these clarifications from the Board, Cargill's immediate concerns will be addressed.

Respectfully submitted,



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*Attorney for Cargill, Incorporated*

September 25, 2003

**CERTIFICATE OF SERVICE**

I, Pamela D. Plummer, a secretary at the law firm of Thompson Hine LLP, do hereby certify that on this 25th day of September, 2003, a copy of the Status Report and Comments of Cargill, Incorporated was served by first-class mail, postage prepaid, or more expedited method to the following:

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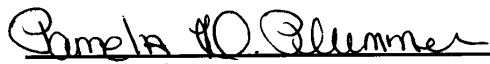
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