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April 29, 2004

**VIA HAND DELIVERY**

The Honorable Vernon Williams  
Secretary  
Surface Transportation Board  
1925 K Street, N.W.  
Room 711  
Washington, DC 20423

ENTERED  
Office of Proceedings

APR 30 2004

Part of  
Public Record

Re: STB Finance Docket No. 33388 (Sub-No. 91),  
CSX Corporation, et al. -- Control and  
Operating Leases/Agreements -- Conrail Inc. et al.  
(General Oversight)

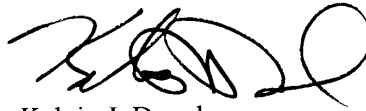
Dear Secretary Williams:

Enclosed for filing on the record of the referenced proceeding please find an original and ten copies of the Verified Statement of John F. Guinan, Assistant Commissioner of the New York State Department of Transportation. Mr. Guinan will be appearing at the May 3, 2004 oversight hearing on behalf of the State of New York and NYSDOT.

The unexpected unavailability of key State officials whose participation and approval were necessary for the preparation and submission of the Statement precluded its submission by August 26, 2004, as provided by the Board's scheduling order. Acceptance of the Statement should not prejudice the rights of any party, however, as copies of the Statement are being served this date on counsel for CSXT and Norfolk Southern, and Mr. Guinan will be present at the hearing to response to any questions. Therefore, New York respectfully requests that Mr. Guinan's Statement be accepted for inclusion in the record of this proceeding.

Mr. Vernon Williams  
April 29, 2004  
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Thank you for your consideration in this matter.  
Sincerely,

A handwritten signature in black ink, appearing to read 'K. Dowd', with a large circular flourish at the end.

Kelvin J. Dowd  
An Attorney for  
The State of New York

KJD:dmb

Enclosure

cc: Mr. David Konschnik  
Richard A. Allen, Esq.  
Dennis G. Lyons, Esq.  
Mr. John F. Guinan

**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 CORP.  
(General Oversight)**

**Verified Statement  
of  
John F. Guinan  
Assistant Commissioner  
New York State Department of Transportation**

**April 28, 2004**

My name is John F. Guinan, and I am Assistant Commissioner of the New York State Department of Transportation (NYSDOT). I am submitting this Statement on behalf of the State of New York and NYSDOT. New York appreciates the opportunity to continue its participation in this proceeding, on behalf of its citizens, communities and resident businesses.

In its principal Comments on the then-proposed acquisition and division of Conrail by CSXT and Norfolk Southern in October, 1997, New York outlined its historic financial, legislative and regulatory support for a sound and efficient freight rail system, and the importance of such a system to the economic health of the State. Particularly as regarded CSXT and Norfolk Southern's plans for Conrail, New York noted the applicants' claims that approval of their proposal would lead to expanded and enhanced freight service at reduced costs; expanded market opportunities for regional shippers;

significant diversions of freight traffic from overburdened highways; and short and long-term synergies and efficiency gains that would benefit all affected constituencies.

Inasmuch as over 90% of the freight tonnage moving to and through in New York was controlled by Conrail, New York was numbered among those who the applicants claimed would gain from the transaction.

New York supported the stated goals of the Conrail acquisition plan, and acknowledged that many elements of the applicants' proposal as they related to the Conrail lines within the State did offer an improvement over the then *status quo*. As New York explained, however, on balance the unconditioned approval of the CSXT/Norfolk Southern proposal would fail to meet the goals set by the applicants and serve the public interest. New York proposed seven (7) specific conditions which, if adopted, would enable the State and the STB to conclude that the applicants' plan was consistent with the public interest. Those conditions were:

1. An order requiring CSXT to grant trackage rights to New York's carrier nominee over the portions of the Hudson Line that would be controlled by CSXT from the Selkirk interchange with CP Rail to the end of Conrail's Fremont Secondary, to permit dual rail carrier service to points east of the Hudson River.

2. A directive that CSXT and NS take steps to open the Buffalo area to rail competition and to improve the rail infrastructure in the region.

3. The establishment of an oversight period to monitor the safe co-existence of CSXT and NS freight service with commuter and inter-city passenger service throughout New York.

4. The full assumption by CSXT and NS of Conrail's continuing obligations under 13 enumerated contracts with New York or its agencies.

5. A commitment by CSXT and NS to continue and expand Conrail's cooperation with and participation in the New York High Speed Passenger Rail Program to upgrade infrastructure between Albany and Buffalo and between Albany and New York City, above and beyond passenger-related contract projects.

6. A commitment by CSXT and NS to enhance and expand the passenger rail infrastructure in New York, in conjunction with Amtrak.

7. The imposition of conditions to protect the interests of New York's short line railroads, including the Livonia, Avon and Lakeville Railroad ("LAL"), which sought the elimination of a restriction on its access to the Genessee Junction Yard that limited LAL to a single Class I line-haul connection.

While CSXT and Norfolk Southern initially opposed the conditions sought by New York, eventually they agreed to assume and fulfill all contracts to which Conrail was a party. They also agreed to work in good faith with New York and other states to address issues regarding passenger service efficiency and safety. These commitments represented progress in two (2) of the key issue areas raised by New York in its Comments.

In its July, 1998 Decision approving CSXT and Norfolk Southern's acquisition and division of Conrail, the STB imposed the following specific conditions for the benefit of New York and its constituents:

1. An order directing CSXT to negotiate unrestricted trackage or haulage rights in favor of CP Rail over the Hudson Line from Selkirk to Fresh Pond.

2. A requirement that CSXT adhere to its representations regarding intended investments in new connections and upgraded facilities in the Buffalo area. These included: (1) upgrading Conrail's computer technology and fueling facilities; (ii) maintaining or increasing current Conrail employment levels; (iii) providing NS with overhead trackage rights to Suspension Bridge; (iv) working with other carriers to schedule switching and through movements to reduce congestion at points like CP Draw;

and (v) "investing substantial funds" in network improvements to reduce shipping time and enhance service reliability.

3. A directive that CSXT cooperate with New York and NYCEDC to study the feasibility of upgrading the New York Cross-Harbor car float and tunnel facilities.

4. A requirement that CSXT establish a committee with New York City officials to develop ways to promote increased truck-rail traffic diversions to and from New York City, and a committee with Buffalo regional and local authorities to promote rail traffic growth in that region.

5. A directive to CSXT to negotiate an agreement that would grant LAL trackage rights over the Genessee Junction Yard sufficient to allow LAL to connect with the Rochester & Southern Railroad ("RSR"), and to both carriers to enter agreements as needed to limit the scope of "blocking" or other restrictive interchange provisions in leases and contracts between Conrail and short lines generally.

In addition, the STB broadly mandated that CSXT and Norfolk Southern must adhere to all of the representations that they made to the STB and various parties during the course of the case. Among other things, the effect of this general condition was to bind CSXT and Norfolk Southern to their commitments to assume Conrail's obligations under its various contracts with New York, as well as to the representations made by both CSXT and Norfolk Southern in their respective Safety Integration Plans.

Over the ensuing years since the STB's Decision, New York carefully monitored CSXT and Norfolk Southern's implementation of their Conrail plan, and their compliance with the conditions imposed by the STB on the transaction. Through NYSDOT, the State legislature, and a number of localities, state agencies and political subdivisions, New York continued its active engagement in the promotion of freight rail service and the enhancement of the freight rail infrastructure, with a specific focus on

working with CSXT and Norfolk Southern to promote the stated goals and claimed benefits of their joint takeover of Conrail.

In many respects, CSXT and Norfolk Southern can claim technical compliance with the STB's New York conditions. The State's contracts with Conrail were assumed and have been performed; CSXT and CP Rail entered into an agreement for unrestricted trackage rights on the Hudson Line; and the Cross-Harbor, Buffalo and New York City study committees were formed and meet as specific issues arise. In the key areas of infrastructure improvements, freight service quality enhancements, expansion of marketing opportunities, and a general commitment to the growth of the New York freight rail transportation system, however, CSXT and Norfolk Southern have failed to live up to the expectations set by their original application. Indeed, New York's experience has shown the carriers retreating from the goals and benefits that they touted in 1997, even as the State has worked to support their achievement. Some examples of this disturbing pattern follow.

#### **Buffalo Region**

Following the completion of CSXT's upgrades to computer and fueling facilities and Norfolk Southern's expansion of Bison Yard, the railroads effectively suspended efforts to enhance infrastructure and improve freight service efficiency in the Buffalo area. CSXT eliminated a crew shift at its Frontier Yard, and closed its Seneca Yard south of Buffalo altogether. The latter yet may be resurrected as an intermodal

facility, due to a \$4 million capital infusion provided by the State. Otherwise, however, we are unaware of any projects or specific plans for the carriers themselves to invest in network improvements to reduce shipping times and enhance service reliability, as they represented they would during the STB's consideration of their Conrail proposal. Additionally, the rail workforce appears to have been reduced in the Buffalo area.

### **General Rail Infrastructure**

From the inception of their takeover of Conrail, CSXT and Norfolk Southern both expressed concerns that the property tax structure in New York, as applied to railroad assets, created a disincentive to new infrastructure investment. In response, the New York legislature enacted--and Governor Pataki signed--the NYS Rail Infrastructure Investment Act of 2002. This legislation is one of many steps by which New York has materially supported rail infrastructure development since the Conrail transaction was completed. Indeed, since 1998 New York has expended or programmed approximately \$185 million in State and federal funds to improve the State's rail network.

The 2002 Act provided significant property tax relief for existing rail property as well as for new railroad infrastructure investment. Essentially, the law created a 10-year property tax valuation exclusion for new investments in rail facilities and infrastructure improvements. The program covers the value of the new investment regardless of the source of the invested capital. Thus, the railroads can claim the exclusion even where the State provides part or all of the funding for the improvements.

Despite this extraordinary outreach by New York in direct response to the carriers' expressed concerns, neither CSXT nor Norfolk Southern has submitted a project for qualification under the program.

Compounding their apparent lack of follow-through on the commitment to improve and enhance the freight rail infrastructure in New York, both railroads have closed economic development offices in the State. These moves adversely impact efforts to promote and market expanded rail freight service in New York, one of the stated goals of the carriers' Conrail plan.

#### **The LAL Railroad**

As I noted above, LAL was the beneficiary of a specific condition imposed by the STB on its approval of the Conrail acquisition. Soon after the STB's Decision, CSXT entered into an agreement with LAL granting the latter access over the Genessee Junction Yard to effect interchange with the RSR, as required by the condition. According to LAL, however, CSXT's commitment to the purpose and intent of the condition has not extended very far beyond the signing of the agreement.

The Genessee Yard is used principally by LAL and RSR. CSXT's only use of the yard is to set off and pick up cars to and from LAL. However, the LAL-CSXT agreement provides that CSXT would rehabilitate and maintain the Yard to FRA Class 1 condition. LAL had sought to acquire the Yard in the Conrail proceeding, but CSXT argued (successfully) that divestiture was unnecessary in light of its commitment to

rehabilitate and maintain the tracks. LAL and RSR thus must rely on CSXT to facilitate smooth and efficient interchanges between them.

In June, 2000, CSXT performed a "safety tie" replacement sufficient to reduce the likelihood that the track would come apart under a train. However, according to LAL, this work did not bring the track up to FRA Class 1 standards, and CSXT has yet to rehabilitate the Yard as promised during the Conrail proceeding and effectively ordered by the STB. Since 2000, track conditions have continued to deteriorate with very little attention from CSXT beyond emergency-type repairs. The results have been rail spreads, derailments, and the closing of tracks in the Yard due to unsafe conditions. Both LAL and RSR have suffered losses because of CSXT's neglect, including lost revenue due to service interruptions and significant cleanup and re-railing costs following derailments.

#### **Southern Tier Rail Lines**

As a result of the Conrail transaction, Norfolk Southern assumed control over two rail lines in New York's Southern Tier. The Southern Tier Mainline extends from Buffalo to the Northern New Jersey port area. The Southern Tier Extension runs from Corry, PA to Hornell, NY, where it connects with the Southern Tier Mainline.

Norfolk Southern is to be commended for its cooperation with the Southern Tier Rail Authority, the State and the Western New York and Pennsylvania Railroad to complete a sale-leaseback arrangement which resulted in the re-establishment of rail service to many local businesses, and a through rail route for the diversion of Norfolk

Southern coal trains. However, New York has concerns regarding the future of the Southern Tier Mainline.

The Portage Bridge over Letchworth Gorge between Buffalo and Binghamton was identified by the FRA as a safety concern during the Conrail proceeding. This segment also is used by CP Rail via trackage rights to connect freight movements from the Canadian border to its rail network at Binghamton. While Norfolk Southern now has an alternate route via the Southern Tier Extension, CP Rail must depend on its trackage rights over the NS lines via Portage Bridge.

Although the FRA report found that the Portage Bridge has a limited life without extensive rehabilitation, Norfolk Southern has not announced any plans to address the Bridge's existing condition or operating plans in the event that the bridge becomes unuseable. This is a matter of great concern to New York and the interests of expanded rail freight service, as loss of the bridge would dramatically reduce CP Rail's effectiveness as a competitor in the western part of the State.

In addition, the portion of the Southern Tier Mainline between Binghamton and Port Jervis, PA is significantly underutilized, and has been identified by Norfolk Southern as a candidate for sale or lease. So long as Norfolk Southern's intentions regarding the Southern Tier Mainline are not clear, the State's transportation capital and freight rail development plans remain incomplete.

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### **Grade Crossings**

Finally, but by no means least, serious concerns have arisen over the prospect of CSXT system downgrades contributing to increased risks at grade crossings, especially in the Rochester, NY area. Investigations are underway by the FRA and others into the specific causes of accidents and grade crossing protective device malfunctions, and the steps that could or should have been taken to avoid them.

Reducing the number of highway grade crossings was among the programs incorporated in CSXT's Safety Implementation Plan, and ensuring that all railroads that operate in New York dedicate the necessary human and financial resources to properly maintain safety devices and other equipment at the crossings which must remain is a State priority. New York will continue to monitor the situation and report further findings to the STB, the FRA, and/or other appropriate federal authorities as they become available.

\* \* \*

New York remains willing and prepared to work with CSXT and Norfolk Southern earnestly and in good faith, to address the matters described above and otherwise try to realize the promise of expanded rail freight service and enhanced transportation efficiency that was part and parcel of the carriers' Conrail plan. Expanding and improving rail transportation is an important goal of New York. The State has worked to fulfill its role by increasing its investment in rail infrastructure and assisting the carriers doing business in New York through initiatives such as the 2002 property tax

legislation discussed above. We ask the STB to provide continued oversight to assure that carriers fulfill their commitments to New York.

**VERIFICATION**

COUNTY OF ALBANY     )  
                                          )     SS:  
STATE OF NEW YORK    )

John F. Guinan, being duly sworn, deposes and says that he has read the foregoing Verified Statement, knows the contents thereof, and that the same are true as stated to the best of his knowledge, information and belief.

\_\_\_\_\_  
John F. Guinan

Sworn to and subscribed before me  
this \_\_\_\_ Day of \_\_\_, 2004.

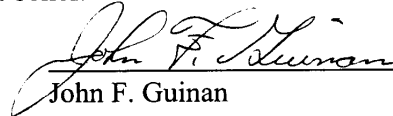
\_\_\_\_\_  
Notary Public for the State of New York

My Commission Expires \_\_\_\_\_.

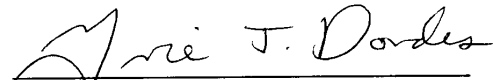
**VERIFICATION**

COUNTY OF ALBANY     )  
                                          )     SS:  
STATE OF NEW YORK    )

John F. Guinan, being duly sworn, deposes and says that he has read the foregoing Verified Statement, knows the contents thereof, and that the same are true as stated to the best of his knowledge, information and belief.

  
John F. Guinan

Sworn to and subscribed before me  
this 28<sup>th</sup> Day of April, 2004.

  
(Notary Public for the State of New York

My Commission Expires July 6, 2007.

**YVONNE J. DONDES**  
Notary Public, State of New York  
No. 4902123  
Qualified in Albany County  
My Commission Expires July 6, 2007