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December 1, 2006

**Via electronic mail**

Honorable Vernon A. Williams  
Secretary  
Surface Transportation Board  
1925 K Street, N.W.  
Room 700  
Washington, D. C. 20006

RE: Finance Docket No. 33388 (Sub-No. 100) – *Comments of CSX Corporation and CSX Transportation, Inc. to Petitioners' Supplement to Petition For Clarification Or In The Alternative For Supplemental Order — North Jersey Shared Assets Area*

Dear Secretary Williams:

Transmitted herewith please find the Comments of CSX Corporation and CSX Transportation, Inc. (collectively, "CSX") to Petitioner's Supplement to Petition For Clarification Or In The Alternative For Supplemental Order — North Jersey Shared Assets Area in the above-captioned proceeding.

CSXT is efilng this document.

Thank you for your assistance.

If you have any questions please call or email me.

Sincerely yours,

Steven C. Armbrust

Enclosures

BEFORE THE  
SURFACE TRANSPORTATION BOARD

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Finance Docket No. 33388 (Sub-No. 100)

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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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COMMENTS OF CSX CORPORATION AND CSX TRANSPORTATION, INC.  
TO PETITIONERS' SUPPLEMENT TO PETITION FOR  
CLARIFICATION OR IN THE ALTERNATIVE FOR SUPPLEMENTAL  
ORDER – NORTH JERSEY SHARED ASSETS AREA

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CORPORATION AND CSX  
TRANSPORTATION, INC.

Dated: December 1, 2006

BEFORE THE  
SURFACE TRANSPORTATION BOARD

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Finance Docket No. 33388 (Sub-No. 100)

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CSX CORPORATION AND CSX TRANSPORTATION, INC.  
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COMMENTS OF CSX CORPORATION AND CSX TRANSPORTATION, INC.  
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CSX Corporation (“CSX Corp.”) and CSX Transportation, Inc. (“CSXT” and, together with CSX Corp., “CSX”) respond below to petitioners Bridgewater Resources, Inc (“BRI”) and ECDC Environmental L.L.C. (“ECDC” and, together with BRI, the “Petitioners”) Supplement to Petition For Clarification Or In The Alternative For Supplemental Order — North Jersey Shared Assets Area, filed on November 3, 2006 (the “Supplement”).

**BACKGROUND**

On January 20, 2006, Petitioners filed a joint “Petition For Clarification Or In The Alternative For Supplemental Order — North Jersey Shared Assets Area” (the “Petition”), which, among other things, asked the Surface Transportation Board (the “Board” or “STB”) to clarify whether BRI’s waste transfer facility (the “BRI Facility”) is located within the limits of the North Jersey Shared Assets Area (the “NJSAA”) near Port Reading, New Jersey.

Norfolk Southern Corporation and Norfolk Southern Railway Company (collectively, “NS”) filed a motion to dismiss the Petition, including a request for a protective order to quash discovery (collectively, the “NS Motion”), arguing, among other things, that the terms set forth in and the maps attached to (i) the Transaction Agreement and the NJSAA, by and among NS, CSX and, Conrail Inc. and Consolidated Rail Corporation (collectively, “Conrail” and, together with NS and CSX, the “Respondents”) and (ii) the deed pursuant to which Conrail conveyed to Pennsylvania Lines, LLC (the “Deed” and, together with the Transaction Agreement and the North Jersey Shared Assets Agreements, the “Subject Agreements”) the Lehigh Line, conclusively demonstrate that the BRI Facility is not within the NJSAA as a matter of law. Although the Board denied certain portions of the NS Motion in its decision, served on July 31, 2006 (the “July Decision”), it did note that “NS has presented strong evidence, based on the transaction agreement, to support its claim that the BRI facility is located outside the NJSAA.” (July Decision at 4.)

In addition, with respect to the Petitioners’ discovery requests, the Board provided that BRI could only request “limited discovery for BRI to obtain evidence to further develop the record as to what the parties intended in their original transaction agreement.” (Id. at 4.) Specifically, the Board allowed “for limited discovery pertaining to the parties’ intent in defining the NJSAA boundaries in the original transaction agreement . . . [and was] . . . particularly interested in what the parties meant by the use of the term ‘CP,’ or control point, in defining the SAAs.” (July Decision at 5.)

Accordingly, Petitioners revised the initial discovery requests that they submitted on January 30, 2006 in response to the July Decision. Unlike the initial discover

requests, which were not served on CSX, the revised discovery requests asked CSX to provide information and various documents in connection with this proceeding.

Since the July Decision, the Respondents have provided Petitioners with discovery on these issues (subject to various objections, including objections based on relevancy, which were upheld by the Board in a decision served on November 30, 2006), including maps, documents and answers to interrogatories (collectively, the “Discovery Responses”). As Petitioners have noted in their Supplement, the Respondents (i.e., the parties to the Transaction Agreement) have provided similar responses to the Petitioners’ interrogatories to the extent they were applicable to each of them, especially with respect to the location of the “CP at Port Reading Jct.”. The reason for the similarity of the Respondents’ responses regarding the “CP at Port Reading Jct.” is simple – the parties are not, and never have been, in dispute regarding its location (and the means of identifying such location).

Based on the Supplement, it appears that the Petitioners’ main argument incorrectly assumes that references to “CP Port Reading Jct.” in the Transaction Agreement are intended to define the boundary between the NJSAA and the Lehigh Line as a geographic area extending more than two miles both west and east of that point, where the “approach” signals to the interlocking at Port Reading Junction are located. This argument is based on a self-serving definition of the term “Control Point” adopted by Petitioners and the incorrect notion that because Conrail was assigned responsibility for controlling and maintaining the interlocking signals at CP Port Reading Junction, the

parties must have intended that its operational control of the interlocking should reflect the allocation of service territories among NS, CSX and Conrail.<sup>1</sup>

Contrary to the Petitioners' argument, as Respondents have repeatedly stated and Mr. Hinsdale's Verified Statement, attached hereto as Exhibit A (the "Hinsdale V.S."), affirms, "CP Port Reading Jct.", as used in the Transaction Agreement, is a single point on the Lehigh Line (where the Trenton Line once crossed the Lehigh Line – specifically, at Milepost 35.92 of the Lehigh Line ("Milepost 35.92"), as set forth in the recorded deed from Conrail to NS. (See NS Motion, Exhibit 5, Page 7.) This point is east of where NS' Royce Running Track connects to NS' Lehigh Line and is a short distance west of the current switch connection between the Lehigh Line and CSX's Trenton Line. Because the "CP Port Reading Jct." is well to the east of where the BRI Facility's industrial spur connects to the Royce Running Track, it is clear that the BRI Facility is not within the NJSAA.

The division of railroad lines requires a great deal of specificity as indicated by Mr. Hinsdale. Railroads cannot decide that ownership of a line will occur within a certain area, but must be specific as CSX and NS were in defining CP Port Reading Jct. as Milepost 35.92. If the ownership were defined amorphously as proposed by Petitioners, the railroads could not determine the responsibility, obligations, and liability for the rail operations, service to shippers, maintenance of property, transfer of the property, payment of taxes, and ability of its employees to enter the property. The Board recognizes the need for this level of specificity when it requires in consolidation applications that the parties "[b]riefly describe the principal routes and termini of the

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<sup>1</sup> It is worth noting that Conrail's control of the interlocking at Port Reading Junction is simply the result of an operating agreement among the parties that operate within the interlocking (i.e., the Respondents), which agreement can be changed without the Board's review or approval.

lines involved, the principal points of interchange on the routes....” 49 CFR §1180.6(a)(7)(vi).

CSX and NS have always been very clear about defining CP Port Reading Jct. as Milepost 35.92. It was part of the bargain that was struck for the division of Conrail in the Transaction Agreement. The Transaction Agreement was the result of lengthy and difficult bargaining between CSX and NS. It is difficult to conceive that the Petitioners, who were not parties to the negotiation of the Transaction Agreement and were not tasked to specify the “CPs,” would have a better idea of the location of CP Port Reading Jct. than CSX and NS, who did negotiate the Transaction Agreement and defined CP Port Reading Jct. as part of the Transaction Agreement. Indeed, from a real estate, taxation, and liability point of view, the definition of CP Port Reading Jct. must be specific to avoid future problems on these issues.

In addition, the NS Motion also correctly states the following with respect to the prohibition on Conrail with respect to switching activities outside of the SAAs:

“The Transaction Agreement also provides that operations of Conrail, NS and CSXT within the SAAs, including the NJSAA, are to be governed by separate Shared Assets Agreements. *See* Transaction Agreement, Sections 1.1 and 2.5. The NJSAA Agreement, like the other SAA agreements, defines “Shared Assets” as tracks, rights of way and other property “which CRC [Conrail] owns, leases or has the right to operate over,” and defines “Shared Asset Areas as “the geographical area comprising the Shared Assets and Operator [i.e., NS or CSX] Facility and Jointly Operated Facility directly (without intermediate connection to another railroad) attached to trackage included within the Shared Assets . . . .” NJSAA Agreement §§1(ss) and (tt). Most importantly, each Shared Assets Agreement gives Conrail the right to perform switching service only “within the Shared Assets Area.” *See* NJSAA Agreement § 3(d)(i). Conrail has no authority to provide switching or otherwise operate over tracks that are not part of the Shared Assets Area, with certain exceptions that are not relevant to BRI’s claim.” (Footnote omitted.)

Accordingly, Petitioner's request to permit Conrail to provide switching services outside the NJSAA should be denied.

## **ARGUMENT**

### **PETITIONERS ARE SEEKING REOPENING AND HAVE NOT EVEN TRIED TO MEET THE CRITERIA FOR REOPENING**

The Board granted the application filed by Respondents seeking the joint control and division of Conrail by CSX and NS. In granting the application, the Board approved the Transaction Agreement, which allocated the property of Conrail and specifically identified CP Port Reading Jct. as Milepost 35.92. The approved Transaction Agreement is clear that CP Port Reading Jct. is Milepost 35.92. As such, Petitioners are not truly seeking clarification from the Board of an unclear issue, but are actually seeking to have the Board reopen the approved transaction and change the decision with respect to the definition of CP Port Reading Jct. from Milepost 35.92 to the area within a couple of miles of Milepost 35.92.

Under 49 U.S.C. §722(c), the Board may reopen and reconsider an action because of material error, new evidence, or substantially changed circumstances. *See also* 49 CFR §1115.4. Petitioners have failed to carry this burden.

The evidence that Petitioners seek to introduce was available at the time the Board granted the application. Petitioners have not produced any new evidence.

Circumstances have not changed from the proposal that the Respondents initially provided to the Board in the application. The Transaction Agreement has not been altered, nor has the identification of CP Port Reading Jct. as Milepost 35.92 changed.

Finally, the Board did not make a material error in approving the application, including the definition of CP Port Reading Jct. in the Transaction Agreement.

Petitioners have failed to demonstrate that there is any reason for the Board to reopen this proceeding and impose on Respondents the bizarre definition of CP Port Reading Jct. proposed by Petitioners.

Even if the Board were to determine that Petitioners had made a case for reopening, which they have not, the Board is restricted in the type of relief that can be granted to avoid disrupting the bargain between the parties that was the basis for consummating the transaction. *See B. & O. R. Co. v. United States*, 386 U.S. 372, 389 (1967).

#### **THE BOARD SHOULD REJECT THE SUPPLEMENT**

As discussed in the Background section above, a determination of the merits of the Petitioners' claims should be based on the Subject Agreements, which are clear and unambiguous with respect to the parties' intent regarding the limits of the NJSAA.

As the Discovery Responses (*see e.g.*, Exhibit 2 to Supplement) and the Hinsdale V.S. have demonstrated, the parties intended that following the execution of the Transaction Agreement the boundaries of the NJSAA, including, but not limited to, the exact end points of the various railroad lines agreed to by representatives of the parties ultimately would be recorded in deeds and other documents, such as the Deed. The exact end points were commonly referred to as "cut points", and following the execution of the

Transaction Agreement, the recordation thereof was performed after “cut point” teams from NS and CSX determined the exact boundaries between NS, CSX and Conrail (i.e., the SAAs) territories in accordance with the Transaction Agreement. Specifically, with respect to “CP Port Reading Jct.”, the intent of the parties to the Transaction Agreement, as manifested by the final determinations of the cut point teams, was that it serve as the point on the Lehigh Line where the Trenton Line once crossed the Lehigh Line (i.e., Milepost 35.92).<sup>2</sup>

Milepost 35.92 is west of the NJSAA. Accordingly, because the BRI Facility’s industrial spur connects only with NS’s Royce Running Track, and the Royce Running Track connects to NS’ portion of the Lehigh Line west of “CP Port Reading Jct.” (i.e., west of Milepost 35.92 and outside of the NJSAA), the BRI Facility must be deemed to be located outside the NJSAA.

Furthermore, because the BRI Facility is located outside the NJSAA, Petitioner’s request to permit Conrail to provide switching services for it should be denied.

## **CONCLUSION**

CSX respectfully submits that the Board should deny the Supplement in all respects.

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<sup>2</sup> In addition to the foregoing, Petitioner’s expert, Mr. Reistrup, in his Second Supplemental Verified Statement (“Reistrup V.S.”), attached to the Supplement, has acknowledged that “[t]he division of property ownership of the Lehigh Line as between Conrail and NS as a result of the Conrail control transaction is at Valuation Station 2244+97 (Milepost 35.92).” Reistrup V.S. at 2.

Respectfully submitted,



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Attorney for: CSX  
CORPORATION AND CSX  
TRANSPORTATION, INC.

Dated: December 1, 2006

**Exhibit A**

**Mark A. Hinsdale Verified Statement**  
**[Please see attached]**

BEFORE THE  
SURFACE TRANSPORTATION BOARD

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Finance Docket No. 33388 (Sub-No. 100)

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CSX CORPORATION AND CSX TRANSPORTATION, INC.  
NORFOLK SOUTHERN CORPORATION AND  
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VERIFIED STATEMENT OF MARK A. HINSDALE

My name is Mark A. Hinsdale and presently I serve as Assistant Vice President, Capacity Management and Network Planning, for CSX Transportation, Inc. ("CSXT"), and I am providing this statement to clarify what the parties to the Transaction Agreement intended by using the term "CP Port Reading Junction" to define the boundaries of the NJSAA near Port Reading Junction, New Jersey. (Any defined terms set forth in the comments of CSX Corporation and CSXT (collectively "CSX"), to which this statement is attached, will be used in my statement with the same meaning.)

I have reviewed the comments of CSX and the various discovery responses provided by CSX in this proceeding, and my statement below is in support of those comments. I have been asked to provide this statement because of my experience and intimate knowledge with respect to this matter. Specifically, I was a senior member of the CSX team that participated in the negotiation and implementation of the Transaction Agreement, and the various related agreements, on behalf of CSX.

Dividing a railroad is a complex process. The allocation of assets between two railroads requires a general understanding of the allocation of lines and then a specific designation of the lines to be allocated. The process involving CSXT, Consolidated Rail Corporation (“Conrail”), and Norfolk Southern Railway Company (“NS”) was more difficult because lines would be allocated to CSXT, NS, and for retention by Conrail in the shared asset areas. Specific allocation of the lines was required (1) so that appropriate deeds transferring the property could be recorded, (2) to delineate each railroad’s commercial and operational access over each segment (including control, maintenance and the rights and responsibility otherwise associated with railroad rights on a line), and (3) to permit the appropriate railroad to pay taxes on the property it owned.

To achieve these objectives, NS and CSX initially agreed on broad terms to define the lines to be allocated to each of the parties, the SAAs and their boundaries. Nevertheless, each party recognized that these broad descriptions would ultimately be refined to pinpoint the specific endpoints of the routes to be allocated to each party with enough detail and specificity to be incorporated in the deeds that conveyed those routes. Accordingly, after the Transaction Agreement was negotiated, teams for NS, CSX and Conrail spent several months designating the precise “cut points” that would define the endpoints of various routes in such deeds and other documents. It is important to note that at no time did the teams for each party have any authority to alter the allocation of routes or access to customers established by the Transaction Agreement, and they certainly could not violate the intent of the Transaction Agreement.

In the case of the Transaction Agreement, the reference to the term “CP” in “CP Port Reading Jct.” (as with all other references to a “CP”), was intended to designate a

specific point on a railroad line, and, contrary to Petitioners' claim, was not intended to signify a geographic area defined by the approach signals or the home signals to the interlocking controlling movements through that point. As I mentioned previously, deeds, railroad operations, and tax responsibility require specific points for the division of the rail lines. Adopting the vague definition of "CP" proposed by Petitioners would result in uncertainty. Specifically, Petitioners proposal would make it unclear which railroad would operate over which line, which railroad would be responsible for serving shippers on a line, which railroad would have to maintain which line, which railroad's employees would be entitled to work on the line and which railroad would control dispatching over the line. Petitioners' proposed definition of "CP" would lead to chaotic and unsafe conditions on the lines. In addition, Petitioners' proposal would create uncertainty as to property ownership and the responsibility for taxes.

Specifically, it is my understanding that the term "CP Port Reading Jct." was intended to be the point where the Trenton Line, which was to be allocated to CSX, joined the Lehigh Line. This is clearly reflected on the map that is a part of the Transaction Agreement.

Subsequently, cut point teams from CSX, NS and Conrail determined that the precise point reflecting the "CP Port Reading Jct." was located at Milepost 35.92 on the Lehigh Line. This point is where the right of way of the Trenton Line once crossed the Lehigh Line and continued northward to Bound Brook, NJ. It is several hundred feet to the west of the current switch connection where the Trenton Line now connects to the Lehigh Line and is east of where NS' Royce Running Track connects to Lehigh Line.

As a final note, of the more than 40 locations in the Transaction Agreement that contained end points marked by a "CP", only the designation of six or seven "CPs" were ever discussed at length or in disagreement for any time, and the "CP at Port Reading Jct." was not one of them, nor has it been to date.

The CSX cut point team intended for the term "CP" to be a finite point for the reasons I have stated, not just an area as suggested by Petitioners. The specific point is Milepost 35.92.

## VERIFICATION

I, Mark A. Hinsdale, declare under penalty of perjury that the foregoing verified statement is true and correct to the best of my knowledge and belief. Further, I certify that I am qualified and authorized to file this statement.

Executed on this 1<sup>st</sup> day of December, 2006.

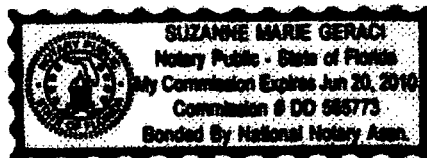
*Mark A. Hinsdale*

Mark A. Hinsdale

*Subscribed and sworn to me this 1st day of December 2006.*

*Suzanne Marie Geraci*  
*(Notary Public)*

*My Commission Expires*  
*June 20, 2010.*



### **CERTIFICATE OF SERVICE**

I hereby certify that on this 1<sup>st</sup> day of December, 2006, I served copies of the foregoing Comments of CSX Corporation and CSX Transportation, Inc. to the Supplement upon counsel for the Petitioners and upon Eric Strohmeier, VP and COO of CNJ Rail Corporation, in each case by electronic mail and overnight DHL express mail.

  
Steven C. Armbrust