

2/8/96

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

CSX CORPORATION AND CSX	)	
TRANSPORTATION, INC., NORFOLK	)	
SOUTHERN CORPORATION AND	)	Finance Docket No. 33388
NORFOLK SOUTHERN RAILWAY	)	(Sub-No. 100)
COMPANY – CONTROL AND	)	
OPERATING LEASES / AGREEMENTS –	)	
CONRAIL INC. AND CONSOLIDATED	)	Petition for Clarification or in the
RAIL CORPORATION	)	alternative for Supplemental Order.

COMMENTS OF CNJ RAIL CORPORATION

Dated: December 1, 2006

**CNJ Rail Corporation
833 Carnoustie Drive
Bridgewater, NJ 08807
(908) 361-2435**

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Statement of Interest in this proceeding:

1. CNJ Rail Corporation, on January 26, 2006 filed its notice of intent to participate as a party of record in the above captioned proceeding via fax and regular mail. The board received CNJ Rail's notice on February 5, 2006.
2. In its filing of January 26, 2006, CNJ Rail clearly gave its mailing address for service in the proceeding as **833** Carnoustie Drive, Bridgewater, NJ 08807. (emphasis added)
3. In all the filings made by Norfolk Southern early in this proceeding, NS and CR in this proceeding correctly served documents upon CNJ Rail at the 833 Carnoustie Drive address.
4. However, NS, and CR have apparently sent copies of filings in this case on numerous occasions since then to an address at **838** Carnoustie Drive. (emphasis added).
5. CNJ Rail never received those pleadings sent to the 838 address. As such, CNJ was never properly served in those filings.
6. CNJ Rail has an interest in the outcome of this case.
7. CNJ Rail, by way of proxy, controls an entity called Eastern Railroad Investment Corporation (Eastern), a NJ corporation. Eastern, in turn, owns 100% of an entity called Somerset Terminal Railroad Corporation (Somerset), also a NJ corporation.
8. Somerset, in turn, is a Class III carrier under the jurisdiction of this board by virtue of its notice of exemption (FD 33999 - SOMERSET TERMINAL

RAILROAD CORPORATION--OPERATION EXEMPTION--A LINE OF
RAILROAD OWNED BY JOSEPH C. HORNER, served 2/13/01)

History

9. The board is fully aware of the events so far in this proceeding. However, the board appears to be unaware of the history of what Bridgewater Resources, Inc. (BRI) and the Board are calling the "Royce Spur".
10. The "Royce Spur" is actually a ***Line of Railroad*** under the jurisdiction of the board. (emphasis added)
11. On **August 24, 1995**, Conrail sold to Mr. Joseph C. Horner (Horner), a non carrier, a right-of-way, from the northerly sideline of the Lehigh Line, near MP 57.25, to the southerly sideline of the CRNJ right-of-way at Milepost 58.4. See the attached Deed copy, which is recorded in the Land Records of Somerset County in Liber BK 2031, folio 320 *et. al.* Mr. Horner then leased this right-of-way to BRI, also a non-carrier. BRI is the petitioner in this proceeding.
12. BRI subsequently invested millions of dollars into this right of way to restore previously removed railroad infrastructure in order to resume rail service to BRI's facilities located in the Township of Bridgewater, NJ. A connection was restored to the CR Lehigh Line near Port Reading Junction, located in the Borough of Manville, NJ to allow rail service to resume to this right of way.
13. The line at first was operated by BRI itself. In 2000, BRI and Somerset Terminal Railroad Corporation, then a non carrier, reached an agreement whereas Somerset would provide common carrier rail service over the restored right of way.
14. Somerset Terminal Railroad acquired a property interest in the line from Mr. Horner in 2000 with the specific intent of creating a Class III rail carrier upon the property.
15. Also it is important to note that BRI filed for Chapter 11 bankruptcy protection in July of 2000. Today's current management of BRI was the successful bidders in bringing BRI out of Chapter 11.
16. Somerset, in turn, filed a notice of exemption to acquire and operate a line of railroad from Mr. Horner as a Class III carrier under the jurisdiction of this board (FD 33999 - SOMERSET TERMINAL RAILROAD CORPORATION--OPERATION EXEMPTION--A LINE OF RAILROAD OWNED BY JOSEPH C. HORNER, served 2/13/01)
17. At the time, the board had one question which, until November 27, 2006, Somerset was unable to answer.

The Board asked: "How did Mr. Horner come into possession of a Line of Railroad?"

18. Somerset accepted Mr. Horner's explanation that Conrail had abandoned the line. Somerset was aware that large portions of the line, including the diamond, and the switches into NJ Transit's Raritan Valley line had been removed since the late 1980's.
19. Somerset forwarded unto the board a copy Mr. Horner's deed from Conrail. Somerset believed that the right of way was not under the jurisdiction of the board at the time the deal was contemplated and executed.
20. Somerset operated the property and held out itself out as a common carrier over the subject property.
21. Somerset, in October of 2002, assigned its interest in its line to the Morristown and Erie Railway (FD 34267 - MORRISTOWN & ERIE RAILWAY, INC.-- OPERATION EXEMPTION--SOMERSET TERMINAL RAILROAD CORPORATION, served 12/20/02)
22. A dispute to title in the line of railroad and other various property interests emerged as a part of that proceeding.
23. On October 08, 2004 Standard Terminal Railroad of NJ filed a notice of exemption (FD 34551 - STANDARD TERMINAL RAILROAD OF NEW JERSEY, INC.--ACQUISITION EXEMPTION--RAIL LINE OF JOSEPH C. HORNER) to acquire the same line of railroad.
24. Bridgewater Resources, Inc. the same entity petitioning the board in this proceeding, filed comments in FD 34551 opposing the transaction and indicating that the land issues in question were being handled by the US Bankruptcy court.
25. The board granted overlapping authorities in the same **line of railroad**. (emphasis added)
26. On November 21, 2006, Mr. James Riffin filed a notice of exemption (FD 34963 - JAMES RIFFIN D/B/A THE RARITAN VALLEY CONNECTING RAILROAD - ACQUISITION AND OPERATION EXEMPTION - ON RARITAN VALLEY CONNECTING TRACK) Mr. Riffin states that he will negotiate to acquire the line from either BRI or Conrail for the rights to the line. The track Mr. Riffin proposes to acquire is also known as the "Royce Spur", the Raritan Valley Connecting Track, Reading Company New York Branch, Conrail Trenton line, the Delaware and Bound Brook RR, etc. It is all the same **LINE OF RAILROAD**. (emphasis added)

27. CNJ Rail wishes the board to note that this filing makes no less 4 filings regarding the same line of railroad.
28. BRI has in this pleading described the track in question as the "Royce Spur". It is in fact, the same line of railroad in the four above mentioned proceedings. It is also important to note that BRI derives its benefit to using what they call the "Royce Spur" from a lease, approved by the US Bankruptcy court, for the same line of railroad from Mr. Joseph C. Horner.
29. On November 28, 2006, Mr. Michael E. Allen, from W R Allen Associates, filed a notice of intent to participate in FD 34963. Mr. Allen is a known person to be closely affiliated with Standard Terminal Railroad of New Jersey and as such likely has detailed knowledge of the results of the bankruptcy court decisions regarding the property interests in the BRI bankruptcy case.
30. Mr. Allen stated the following in his notice:
- "The line in question is the same line which was the subject of STB Finance Docket No.33999_0 *Somerset Terminal Railroad Corporation-Operation Exemption-A Line of Railroad Owned by Joseph C. Horner*; STB Finance Docket No. 34267_0 *Morristown & Erie Railway, Inc. – Operation Exemption – Somerset Terminal Railroad Corporation*; and STB Finance Docket No. 34551_0 *Standard Terminal Railroad of New Jersey, Inc.– Acquisition Exemption – Rail Line of Joseph C. Horner.*"
- "The exact nature of the connection of this line with the General Railroad System of the United States is also currently the subject of STB Finance Docket No. 33388 (Sub-No. 100) *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.*"
- "Further, the undersigned believes that the issue of title to the underlying property was effectively resolved by action of the United States Bankruptcy Court for the District of New Jersey in Docket Number 02-05425-RTL *Horner et al v. Somerset Terminal Railroad Corporation et al.*"**
31. Mr. Allen is the first person of all the parties involved in this line of railroad, including BRI itself, to finally tell the board that the bankruptcy court has finally addressed a portion of the issues raised in previous proceedings.
32. Notwithstanding the bankruptcy courts' decision, a more devastating filing was made by NS in the aforementioned filing of Mr. Riffin in FD 34963.
33. On November 27, 2006, Mr. Robert D'Zuro, a paralegal employed by Conrail, gave a verified statement to NS indicating that the line known called the "Raritan

Valley Connecting Track”, aka the “Royce Spur”, et al., was indeed a *line of railroad* and that no abandonment authority was ever sought for the line.(emphasis added)

34. The main body of Mr. D’Zuro’s verified statement is included herein verbatim:

“1. My name is Robert D’Zuro. I am a paralegal employed in the law department of Consolidated Rail Corporation (“Conrail”). I am giving this statement in support of a motion to stay the subject proceeding being filed this date by Norfolk Southern Corporation.

2. I have been employed as a paralegal by Conrail since February 28, 1995. During most of my employment with Conrail, I have been the principal paralegal assigned to assist with abandonment proceedings filed by Conrail with the Surface Transportation Board (and previously the Interstate Commerce Commission). As part of that responsibility, I maintain and update as necessary the legal files for all of the abandonments that have been filed (or considered for filing) by Conrail since its creation in 1976.

3. In connection with the subject Notice of Exemption, I have reviewed the abandonment files with respect to The Raritan Valley Connecting Track (the “Line”). A Notice of Insufficient Revenue was filed by Conrail with respect to the Line on or about October 31, 1985. I also located in the file a memo from Charles Mechem, Esq., a former attorney in Conrail’s Law Department, dated April 17, 1986, which identified the Line as one of several for which Mr. Mechem had “not drafted or filed applications (for abandonment) for one or more of several reasons, including - (a) low priority... (b) lack of exhibits, and/or (c) lack of senior management approval.” There is no application or notice of abandonment or of discontinuance of service in the file; accordingly, it appears that Conrail never filed for abandonment or discontinuance of service with respect to the Line. *There is an e-mail from a Conrail property manager, dated December 2, 1988, confirming that a notice of abandonment or discontinuance of service for the Line was never filed.* (emphasis added)

VERIFICATION

I, Robert D’Zuro, verify under penalty of perjury that I have read the foregoing verified statement and know its contents, and that it is true; and correct to the best of my knowledge and belief. I further certify that I am qualified and authorized to make this statement.

Executed on November 27, 2006

Robert D’Zuro

35. CNJ rail submits, that in light of the NS’s filing and the verified statement of Mr. D’Zuro, the board should reopen this proceeding and allow for additional discovery in this matter. It clearly appears to CNJ Rail, that without an abandonment filing, the 1995 sale of the Raritan Valley Connecting Track to Mr. Horner would have required the prior approval of the commission. CNJ Rail is fully aware that approval was never sought.

The Issue before this board

36. CNJ Rail will allow the other parties to continue with their arguments regarding the property lines at CP Port Reading Junction. However, CNJ Rail asks that the board include in its discussion the repercussions from the NS admission regarding the status of the Raritan Valley Connecting Track, aka "Royce Spur", et al.

37. While the board is fully aware of its' own rules, it is now faced with a flagrant violation of its rules and as such, will need to address this issue before it can determine what the parties intended at CP Port Reading Junction.

38. 49 U.S.C. § 10901 states a person other than a rail carrier may acquire a railroad line only if the Board issues a certificate authorizing such activity. 49 U.S.C. § 10903 states a rail carrier who intends to abandon any part of its railroad lines, or intends to discontinue the operation of all rail transportation over any part of its railroad lines, must file an application relating thereto with the Board. An abandonment or discontinuance may be carried out only if authorized by the Board. The Board, and its Commission predecessor, has clearly stated: "It is well established that when a non-carrier, including a State, acquires a railroad, it must seek our approval under section 10901. See *United States v. California*, 297 U.S. 175 (1936); *Iowa Term. R. Co. Acquisition and Operation*, 312 I.C.C. 546, 549 (1961)". *Common Carrier Status of States, State Agencies*, 363 I.C.C. 132, 133 (decided July 23, 1980), *affd Simmons v. I.C.C.*, 697 F.2d 326 (D.C. Cir. 1982).¹

39. In *New York Dock Railway "Control - Brooklyn Eastern District Terminal"*, Fin Doc. No. 28250, 360 I.C.C. 60 (Decided February 9, 1979), the Commission promulgated labor protective conditions to be imposed in railroad transactions. Section 4, *Notice and agreement or decision*, (a) and (b) states:

"(a) Each railroad contemplating a transaction which is subject to these conditions and may cause the dismissal or displacement of any employees, or rearrangement of forces, shall give at least ninety (90) days written notice of such intended transaction by posting a notice on bulletin boards convenient to the interested employees of the railroad and by sending registered mail notice to the representatives of such interested employees. Such notice shall contain a full and adequate statement of the proposed changes to be affected by such transaction, including an estimate of the number of employees of each class affected by the intended changes. Prior to consummation the parties shall negotiate in the following manner:"

"(b) **No change in operations, services, facilities, or equipment shall occur until after an agreement is reached** or the decision of a referee has been rendered." (Emphasis added.)

40. In *New York Dock Railway "Control - Brooklyn Eastern District Terminal"*. Fin. Doc. No. 28250, 354 I.C.C. 399, at 411 (Decided April 11, 1978) the Commission quoted as follows from *Southern Ry. Co. "Control - Central of Georgia Ry. Co."*, 331 I.C.C. 151, 163-169 (1967):

"the Commission explained that the employee rights to notice and negotiation were **indispensable prerequisites to approval of the transaction.**" (Emphasis added.)

HIGHLIGHTED CONTRACT LAW

41. Conrail neither sought, nor obtained, prior approval from the Commission for the abandonment of the Raritan Valley Connecting Line, discontinuance of all rail service on the Raritan Valley Connecting Line, or the 1995 sale of the Raritan Valley Connecting Line to Joseph C. Horner. Conrail's unauthorized abandonment and discontinuance of all rail service over the Raritan Valley Connecting Line violated 49 U.S.C. §10903. The 1995 acquisition of the Raritan Valley Connecting Line by Joseph Horner, a non-carrier, violated 49 USC § 10901.

42. 49 U.S.C. §11901 (d) [1994 edition] states:

(d) a person knowingly authorizing, consenting to, or permitting a violation of sections 10901-10907 of this title or of a condition of a certificate or a regulation under any of those sections, is liable to the United States Government for a civil penalty of not more than \$5,000.

43. The courts have many cases in which they have previously addressed contract law. The validity of a contract is determined as of the date the contract is made. *National Dairymen Assn v. Dean Milk Co.*, 183 F.2d 249, cert. denied 340 U.S. 876, 71 S.Ct. 122, 95 L.Ed. 637 (1950). It has long been held that a contract forbidden by an act of Congress or against its policy would be void. *Walworth v. Kneeland*, 56 U.S. 348, 15 How. 348, 14 L.Ed. 724 (1853). A contract which is contrary to public policy and violative of state or federal laws is void. *Broxham v. Bordens Farm Products Co. of Illinois*, 53 F.2d 946 (C.C.A. Ill. 1931). All contracts which provide for doing a thing which is contrary to law, morality, and public policy are void. *Lingle v. Snyder*, 160 F.2d 627, 87 C.C.A. 529 (Who. 1908). A contract in violation of provisions of a statute prohibiting certain acts is void, whether the prohibition is expressed or implied. *Harris v. Runnels*, 53 U.S. 79, 12 How. 79, 13 L.Ed.901. A contract which is expressly within the prohibition of a statute, is void, although the statute does not declare, in so many words, that all such contracts shall be void. *The Pioneer*, Fed. Cas. No. 11, - 177, Deady 72 (D.C. Or. 1864). A contract which is contrary to the requirements of a statute is void, whether expressly made so by the statute or not. *Lakos v. Saliaris*, 116 F.2d 440 (C.C.A. Md. 1941). A contract which cannot be performed without violation of a statute, is void. *National Transformer Corp. v. France Mfg. Co.*, 215 F.2d 343 (C.A. Ohio 1954). Mere words and ingenuity of contractual expression, whatever their effect

between the parties, cannot make permissible a course of conduct which is forbidden by law. *U.S. v. City and County of San Francisco*, 60 S.Ct. 749, 310 U.S. 16, 84 L.Ed.1050 (1940), rehearing denied 60 S.Ct. 1071, 310 U.S. 657, 84 L.Ed. 1420. Any contract is illegal if either the formation or performance is prohibited by statute or the Constitution. *Wolk v. Benefit Assn of Ry. Emp.*, 172 F.Supp. 62 (D.C. Pa. 1959). Every contract made for or about any matter or thing which is prohibited and made unlawful by any statute is a void contract, though the statute itself does not mention that the contract shall be void, but only inflicts a penalty on the offender. *Hutterian Brethren of Wolf Creek as a Church of Sterling, Alberta, Canada v. Haas*, 116 F.Supp. 606 (D.C. Mont. 1953).

44. The Board does not have the authority to exempt any of the labor protective procedures or agreements. See *K & E Railway Co. "Abandonment Exemption - In Alfalfa, Garfield and Grant counties, OK, and Barber County, KS"*, AB 480-0-X, (Decided December 31, 1996), at page 3; *Norfolk and Western Ry. Co. "Abandonment Exemption - In Cincinnati, Hamilton County, OH"*, Docket No. AB 290-184 X (Decided May 13, 1998), at page 9.

45. Prior to: discontinuance of service over the Raritan Valley Connecting Line; removal of Raritan Valley Connecting Line track structure; abandonment of the Raritan Valley Connecting Line Line; and sale of the Raritan Valley Connecting Line to a non-carrier, Conrail:

(A) Failed to enter into any protective labor agreements with any employees adversely affected by the unauthorized abandonment, discontinuance of service, removal of track structure and sale of the Raritan Valley Connecting Line to Mr. Horner; and

(B) Failed to seek or obtain Commission authority to discontinue service on the Raritan Valley Connecting Line of railroad, to abandon the Raritan Valley Connecting Line Line, and to remove the track structure associated with the Raritan Valley Connecting Line, all in contravention of 49 U.S.C. § 10903; and

(C) Failed to properly disclose to the purchasing party the proper status of the line, thereby causing that individual, Mr. Horner, a non carrier, to be in violation of 49 U.S.C. §10901.

46. BRI has made representations in this proceeding believing its claims to the "Royce Spur" were undisputable. However, their claims now may be moot. If they have no interest in the property they call the "Royce Spur" due to the unapproved sale of a line of railroad, this whole proceeding is now a wasted effort.

47. As the board is aware, CNJ Rail participated actively in *AB 156 - 25 X - Delaware and Hudson - Discontinuance of Track Rights*. In that proceeding, then commissioner Mulvey felt compelled to personally comment on his perception of that proceeding.

48. CNJ Rail believes the tone of that comment is appropriate here and reproduces those comments herein:

Commissioner Mulvey, commenting:

“While I vote to approve the draft decision before us today, **I am concerned about the procedures used by the railroads to obtain authorization for their operating arrangements**, especially the trackage rights transactions here. I find that these dealings, when viewed collectively, constitute a significant engagement among the carriers that will undeniably affect a number of their employees and possibly the rail competitive landscape of southern New York State. I am concerned that the interrelated nature of and the significance of these transactions— **though complying with the letter of law—might violate the spirit** of the class exemption for trackage rights agreements. Because the parties to the MOU clearly regarded the transactions as related and, to some degree, interdependent, I call into question the argument that the discontinuance is limited in scope. It would have been preferable if the railroads had filed formal applications for approval of these transactions, and if the Board had held a hearing in these proceedings.”(emphasis added)

49. CNJ Rail believes the highlighted comments herein clearly show that at least one member of this board was concerned over how a transaction was presented to the board by the Class I railroads in that transaction.

50. Both NS, CR and to a much lesser degree, CSX, all objected to the discovery requests of BRI regarding the disposition of the Raritan Valley Connecting Track by arguing it was irrelevant. *Yet, they possessed the very critical piece of information that could render this whole proceeding moot: Information that would directly lead to the possible setting aside of the very transaction that allows BRI to even access the area near CP Port Reading Junction.* (emphasis added)

51. What is even more disturbing to CNJ rail is not that *the spirit of the law was violated*, **BUT THAT THE ACTUAL LAW WAS VIOLATED**. There is no disputing the outcome of a judicial review of this proceeding; the **1995 sale to Horner is in violation of the law.** (emphasis added)

52. Setting aside the unapproved sale of the Raritan Valley Connecting Line to Mr. Horner seems to be the only option available to the Board in light of the CR revelation.

53. Approving the sale would set an undesirable precedent implying the Board’s procedures could be ignored with impunity.

54. In addition, since the legality of a contract is to be judged on the date of its execution, and since selling the Raritan Valley Connecting Line to Mr. Horner without prior Commission approval was contrary to 49 U.S.C. §10901, no amount of exemption can alter the fact that on the date Conrail sold the Raritan Valley Connecting Line to Mr.

Horner, doing so without prior Commission approval, was illegal. And illegal contracts are void *ab initio*.

55. In *Redmond-Issaquah R.R. Preserv. v. Surface Transp.*, 223 F.3d 1057 (9th Cir. 2000), the court upheld the Board's revocation of an acquisition exemption and order compelling reconveyance of the Redmond-Issaquah line back to the BNSF. In that case, the Board found that the purchaser of the line had misused the Board's procedures.

56. CNJ Rail would argue *totally ignoring the Board's abandonment / discontinuance of service / acquisition-of-rail-property procedures is even more egregious* than misusing the Board's procedures. (Emphasis added.)

57. Consequently, it would be appropriate, and in line with the Board's prior precedents, to set aside the unauthorized sale of the line of railroad to Mr. Horner.

58. CNJ Rail will note for the record that the following case is well known to this board and its members. However, this board should remember it, now that it is faced with the realization that there is an unapproved sale of a line of railroad.

In *New York Cross Harbor R.R. v. Surface Transp. BD.*, 374 F.3d 1177 (D.C. Cir. 2004), at 1181, the court stated:

"An agency acts arbitrarily and capriciously if it "reverse[s] its position in the face of a precedent it has not persuasively distinguished," citing *Louisiana Pub. Serv. Comm'n v. FERC*, 184 F.3d 892, 897 (D.C. Cir. 1999). At 1187, the court stated: "Finally, the STB neglected to mention its "statutory duty to preserve and promote continued rail service, [citations omitted] and, specifically in the context of the "abandonments or discontinuance of rail service," that one of its "function[s] ... is to provide the public with a degree of protection against the unnecessary discontinuance, cessation, interruption, or obstruction of available rail service."

60. In addition, Somerset Terminal, BRI, Horner, the Morristown and Erie, and Standard Terminal Railroad would all have significant, valid, financial claims against Conrail for misrepresenting the status of the Reading connector to Mr. Horner.

61. In addition, the land under the Raritan Valley Connecting Line right of way is encumbered with two significant mortgages which total well in excess of \$18 million dollars!. Should it be discovered that the collateral pledged (the right of way itself was pledge as collateral) doesn't exist due to the unapproved sale of a line of railroad, the taxpayer's of Somerset County will be screwed, as will the principle bondholder of BRI, Nuveen Investments. (The County of Somerset holds a \$7 million dollar first mortgage, Nuveen holds the second mortgage)

62. In closing, CNJ Rail asks that the board fully consider in this decision the effects of the unapproved 1995 sale of a line of railroad to Mr. Horner. The outcome of that will have a direct impact on how the board should handle this current proceeding.

63. The board cannot address the issue of defining boundaries at CP Port Reading Junction without address the issue of the unapproved sale of a line of railroad. Further more, to ignore the unapproved sale of a line of railroad would set a very bad precedent that this board will likely regret for years to come.

On behalf of CNJ Rail Corporation

Respectfully submitted,

Eric S. Strohmeier
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY, that on this 1st day of December, 2006, a copy of the foregoing Comments of CNJ Rail Corp, was either emailed, or mailed, postage prepaid, or by fax to each of the parties listed below.

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