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Honorable Vernon A. Williams
Secretary
Surface Transportation Board
395 E Street, S.W.
Washington, DC 20423-0001

**Re: Finance Docket No. 33888 (Sub-No. 101), CSX Transportation, Inc.—
Petition for Declaratory Order**

Dear Secretary Williams:

Enclosed for efilng is the Motion for Leave to Reply, Reply, and Motion for
Procedural Schedule of CSX Transportation, Inc.

Thank you for your assistance. If you have any questions please call or email me.

Sincerely yours,



Louis E. Gitomer, Esq.
Attorney for CSX Transportation, Inc.

Enclosure

BEFORE THE
SURFACE TRANSPORTATION BOARD

FINANCE DOCKET NO. 33388 (Sub-No. 101)

CSX TRANSPORTATION, INC.—PETITION FOR DECLARATORY ORDER

MOTION FOR LEAVE TO REPLY, REPLY, AND MOTION FOR PROCEDURAL
SCHEDULE

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Dated: December 11, 2007

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SURFACE TRANSPORTATION BOARD

FINANCE DOCKET NO. 33388 (Sub-No. 101)

CSX TRANSPORTATION, INC.—PETITION FOR DECLARATORY ORDER

MOTION FOR LEAVE TO REPLY, REPLY, AND MOTION FOR PROCEDURAL
SCHEDULE

CSX Transportation, Inc. (“CSXT”) respectfully requests the Surface Transportation Board (the “Board”) to permit CSXT to reply to the Reply of Frank Vitale and Francis Vitale (the “Vitale Reply”) and to establish a procedural schedule. There are four sections to this pleading: (1) a brief background; (2) justification for the Board accepting this reply to the Vitale reply; (3) a brief reply to the Vitale Reply; and (4) a request for the Board to establish a procedural schedule for the handling of this declaratory order proceeding.

BACKGROUND

By an Agreement dated February 20, 1986 (the “Agreement”)¹ Consolidated Rail Corporation (“Conrail”) contracted to sell to Frank Vitale and Francis Vitale (collectively, the “Vitales”) “all of its right, title and interest in and the premises described in the Schedule attached hereto and enumerated as ‘Schedule A’, comprising approximately seven (7) acres, more or less, subject to a final survey.” Conrail reserved “a seventy-five (75) foot wide easement identified on the attached plans, which easement shall extend upward only to a

¹ The Agreement is attached as Exhibit 1 to the Petition for Declaratory Order filed on October 4, 2007 by CSXT (the “Petition”).

horizontal plane, but running parallel to the underlying rail line and measured twenty-two (22) feet, vertically above top of rail of said Reserved Tracks (hereafter called 'excepted space') the foregoing easement being reserved by Conrail to use, operate, maintain, repair, replace and inspect the Reserved Tracks and Equipment as and when the same may be necessary or desirable." Agreement, Article 2.

In effect, Conrail contracted to sell the Vitales a segment of its railroad line about three (3) blocks long, on a plane above a cut traversed by three bridges, and running alongside the Brooklyn-Queens Expressway, in the Town of Woodside, Borough and County of Queens, City and State of New York. The Vitales intend to build a multi-building apartment complex over the cut and between the three bridges. Conrail retained an easement to continue rail freight operations beneath this development project, while reserving rights with regard to the location of supports, access roads for repair and maintenance, lighting, and like concerns. The Vitales made a down payment to Conrail of \$90,000, but have yet to pay the remaining principal or to take any other steps to fulfill the pre-conditions of the Agreement. The Vitales also have not provided Conrail with the plans and proposals required under the Agreement (see, *e.g.*, Sections 4(a)'s second paragraph, 4(c), 4(d), 5(c), 6(d), 6(e), 8(a), 10, 11, 12, 17, 18, 34, 40, and Agreement Schedule "C" (a) through (bb)).

A Transaction Agreement dated as of June 10, 1997 was concluded among CSXT, CSX Corporation (CSXC), Norfolk Southern Corporation (NSC), Norfolk Southern Railway Company (NSR), Conrail Inc. (CRR), Conrail, and CRR Holdings LLC (collectively referred to as "Applicants") to acquire control of Conrail and split the assets of Conrail (the "Transaction"),

including the Line.² On June 23, 1997, CSXC, CSXT, NSC, NSR, CRR, and Conrail filed a joint application under 49 U.S.C. 11323 for approval of the transaction outlined in the Transaction Agreement. Pursuant to 49 U.S.C. 11324(b and c), the Board granted the application.³ The Transaction was consummated on June 1, 1999, at which time CSXT obtained control of the Line and began operating over the Line. CSXT acquired the Line on August 27, 2003.⁴ As a CSXT line, the Line is about 0.28 miles long between milepost QVK 4.58 and milepost QVK 4.86.

CSXT sought to terminate the Agreement and the Vitales refused to agree to termination of the Agreement. On October 4, 2007, CSXT filed a Petition for Declaratory Order with the Board asking the Board to confirm that the implementation of the Agreement would interfere with the implementation of its acquisition and operation of certain assets of Conrail by CSXT and was therefore preempted under 40 U.S.C. §11321. On October 15, 2007, the Vitales requested a 30-day extension of time to respond to the Petition, and the Board granted the extension.⁵ The Vitales Reply was filed on November 21, 2007, as amended on November 26 and 27, 2007.

THE BOARD SHOULD ACCEPT THIS REPLY

CSXT contends that the Vitales Reply contains misstatements or partial representations that must be clarified. The Board is being asked to institute a proceeding, not enter a final

² *CSX Corp. et al.—Control—Conrail Inc. et al.*, 3 S.T.B. 196, 219 (1998) (“*Conrail I*”).

³ *Conrail I* at 371 and 385.

⁴ *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 [Petition for Supplemental Order]* Decision No. 2, STB Finance Docket No. 33388 (Sub-No. 94) (STB served November 7, 2003) (“*Conrail II*”).

⁵ *CSX Transportation, Inc.—Petition for Declaratory Order*, STB Finance Docket No. 33388 (Sub-No. 101) (STB served October 23, 2007).

decision at this time. Therefore, CSXT contends that the Board will benefit from having a more complete record as to the facts of this situation. The Board has accepted similar replies,⁶ and CSXT respectfully requests the Board to accept the limited reply below.

REPLY OF CSXT

CSXT will generally use the headings in Section 2 of the Vitales Reply as the basis for this reply, for the items to which CSXT is replying.

First. The Vitales contend that CSXT has certified to the New York State Department of Transportation (“NYSDOT”) that the Agreement will not interfere with railroad operations.

Section 18 of the Transportation Law of the State of New York requires that, prior to the disposition of any property which has been abandoned for rail transportation purposes, no railroad property owner shall dispose of such property without having first obtained notification from the Commissioner of the NYSDOT either that the preferential right of acquisition granted to the State under Section 18 does not apply to the property in question, or that a release of such preferential right has been granted. Section 18(1) continues: “Conveyances of property in violation of this section shall be null and void.” In other words, if Section 18 applied to the property proposed to be conveyed under the Agreement, without a Section 18 waiver, conveyance of such property could not be insured by a title insurance company, and if it was made, with or without title insurance, the conveyance would be void or voidable.

CSXT certified to NYSDOT that the retention of the Railroad Easement under the Agreement ensured that the property submitted for Section 18 review was not “abandoned” for

⁶ *Keokuk Junction Railway Company d/b/a Peoria and Western Railway—Lease and Operation Exemption—BNSF Railway Company*, STB Finance Docket No. 34974; *Keokuk Junction Railway Company d/b/a Peoria & Western Railway—Lease and Operation Exemption—BNSF Railway Company between Vermont and Farmington, IL*, STB Finance Docket No. 34918 (STB served December 6, 2007) at 4.

railroad purposes requiring a waiver under that statute. The Section 18 application citation to the Agreement's covenant of the purchaser Vitales that construction "will proceed in a manner that will not unreasonably interfere with the continued operations of the trains" was intended by CSXT to show only that the railroad retained the power as a contract vendor to enforce that covenant, and did not constitute a "certification" that the covenant had been fulfilled or (since CSXT had seen—and to date has seen— no below-grade construction plans or procedures for this development) that CSXT believed it would be fulfilled in a manner guaranteeing no unreasonable interference.

The term "property" as used in Section 18 means all abandoned railroad owned and utilized property except, among other things, "property noncontiguous to line rights of way and yards," and "side and spur track properties not greater than one-fourth mile in length." Section 18(6)(a) and (b), respectively.

The Agreement makes no explicit reference to NYS Transportation Law Section 18, but Section 6(B) noted in pertinent part that "Any local, federal, *state* approvals or any subdivision approval or other requirements required in connection with closing of title shall be accomplished and completed by *Purchaser*" (emphasis supplied). Section 34 of the Agreement states:

As soon as possible after the execution of this Agreement, and upon the effective date, Purchaser, with the cooperation of Conrail, shall act to obtain the approval if required of this entire Agreement and the conveyance proposed thereunder by the New York Public Utility Commissioner and/or the New York Department of Transportation and any other approvals of other agencies that may be required. Purchaser shall be granted a period of one-hundred twenty (120) days to obtain said approval or such longer time as it reasonably deems necessary to effectuate said transaction. In the event Purchaser cannot obtain said approval, it shall have the option to terminate this Agreement in accordance with the express terms hereof, and be entitled to the return of all sums paid on account of the purchase price.

From the date of the Agreement in February 1986, and through its many extensions during which the Vitales maintained their right to cancel the Contract, the Vitales made no attempt to procure a Section 18 waiver (or determination of non-applicability) from the NYSDOT, until by notice to CSXT dated December 27, 2001 (almost 15 years after Section 4 required such action), the Vitales noted that the closing “may” be subject to obtaining a release under Section 18, and requested CSXT’s cooperation in obtaining that release. In another notice to CSXT, dated July 18, 2002, and entitled “Demand for Arbitration and Appointment of Arbitrator”, the Vitales demanded an order “directing [CSXT] to cooperate in obtaining all necessary permits and approvals, including, without limitation, the Section 18 Release.” As a result of the arbitration, the Private Arbitration Award (See Petition, Exhibit 5), in point 2, ordered “Conrail to cooperate in obtaining any required Section 18 release from the Department of Transportation by filing separate applications for each of the three parcels in the property [and] I order Vitale to cooperate with Conrail in pursuing the release.”

CSXT was compelled to submit the Exemption Request Letter by the Private Arbitration Award, for the sole purpose of determining whether the Contract Property was subject to Section 18. The arbitrator’s direction did not speak to any CSXT “certification” of the sufficiency of the Vitales project plans for unimpeded conduct of rail freight operations, and there is no evidence that CSXT thought it was so “certifying” that proposition.

The parties, pursuant to the arbitration order, filed three identical letters, one for each parcel, on December 24, 2004 (the letter text was quoted in the Vitales’ brief, with all three attached as exhibits, collectively, the “Exemption Request Letter”). That Exemption Request Letter, sent over the signatures of both parties’ counsel, noted that “no certificate of abandonment has been issued, and none is sought, because the Railroad does not intend to

abandon the property for railroad transportation services,... [since] that use continues and will continue after the sale of the Property subject to the Railroad Easement.” By letter dated January 12, 2005, NYSDOT determined that the subject lots “are not determined to be abandoned for railroad transportation purposes [and]...the subject lots are exempt from preferential rights of acquisition, and no release is required at this time.”

The statement quoted from the Exemption Request Letter was primarily an argument that the Property was not abandoned, because use as an active rail line would continue, through retention of the Railroad Easement.

Nowhere does the Exemption Request Letter say that CSXT’s intended or then-current frequency and type of use would never change, or that CSXT and its Chief Engineer had previously received and approved plans for the Vitales project, or knew that its construction methods would not so interfere—because none of these statements would have been within the purview of the NYSDOT, or required for disposition of the Exemption Request Letter.

In other words, CSXT did not represent to the NYSDOT that there “will be no interference with railroad operations” because of the Vitales’ development project. Rather, CSXT represented to the NYSDOT that the Line was not abandoned and that under the Agreement the Line would not be abandoned. The Vitale Reply is inaccurate when it states that CSXT or Conrail before it “thus made its own determination that there would be no interference with railroad operations.” Vitale Reply at 6.

Second. The Agreement will not interfere with railroad operations.

The Vitales contend that the Agreement will not interfere with CSXT’s current and potential operations if the Agreement is performed in accordance with its terms and if all of the Vitales’ covenants are fulfilled. CSXT contends that requiring CSXT to transfer the Line to the

Vitales while retaining an easement will interfere with CSXT's implementation of the Transaction.

The Agreement provides not only for a box easement of stated width and height, but also for many other features of location, placement, relocation, and safety systems, which have not been described in plans and specifications, and on which CSXT's Chief Engineer has made no judgment. There is no proof, or authoritative judgment (even by the Vitales' expert witness Gene A. Davis, P.E., who makes no claim to have reviewed prepared plans and specifications, but only to have been "briefed" on the Vitales' plans for that property by Francis Vitale).

Nowhere does Mr. Davis, as an "expert in railroad track structure planning, rehabilitation, engineering and maintenance, design, construction and operations," claim to have read the Agreement. Nowhere in his affidavit does he comment on any of the construction requirements for the Vitales development project.

The Vitales present the testimony of a railroad engineer who (a) did not read the Agreement or become familiar with any of its construction requirements except for the single feature of the box easement, (b) did not review prepared plans and specifications, but relied on a oral description from Mr. Francis Vitale, (c) relied on the use of the Line which he observed during a limited visit, and (d) determined that since much shorter crossings of the Line (46 in all along the line) existed, that the Vitales' project would not interfere with CSXT's operation and implementation of the transaction.

Missing from Mr. Davis's analysis is reference to the Vitales' experience in constructing such projects, or evidence that the Vitales have retained structural or mechanical engineers with experience in designing and constructing such projects. Rather, Mr. Davis is basically swearing that there will be no interference because Mr. Vitale assured him there would be no interference.

It should be noted that there is no supportable analogy between the five different developers bidding to build over the West Side/Hudson Yards and the Vitales. Moreover, those developers responded to a detailed RFP with extensive plans for building over the active rail lines, unlike the Vitales' non-existent plans.

Third. The Agreement ensures that the Vitales' use of the property will not interfere with railroad operations.

The Agreement is a contract, not a guaranty. As noted above, there is no existing proof, in the form of plans and specifications and surveys, presented to, reviewed by, or approved by Conrail or CSXT that, in the opinion of CSXT's Chief Engineer, supports this proposition.

Fourth. CSXT's claim of interference is also negated by the conduct of CSXT and its predecessor-in-interest, Conrail, over the past twenty years.

Conrail's actions prior to CSXT's acquisition of the Line are irrelevant, although it must be noted that Conrail was never presented with any plans by the Vitales and never reviewed, much less approved any plans. CSXT has sought to terminate this contract for years. CSXT only filed the Section 18 application under order of an arbitrator.

Fifth. CSXT's predecessor New York Central Lines LLC ("NYC") did not terminate the Contract in 2002.

NYC did not state that the Agreement was terminated in 2002, merely that it was non-binding. If a contract previously treated as binding by both parties is declared by one of such parties to henceforth be "non-binding," such a declaration is normally understood in the real world to be a declaration of termination. Since NYC stated that the Agreement was non-binding for other reasons, any discussion of interference with railroad operations would have been superfluous.

Sixth. Since 2002, the Vitales have been engaged in litigation and arbitration trying to enforce the Agreement.

Actions taken by the Vitales to enforce the Agreement do not carry any weight as to whether the implementation of the Vitales' proposal would interfere with implementation of the acquisition and split of Conrail by CSXT. As such, this argument carries no weight. CSXT did not raise the issue of interference in any of the other forums because, unlike the Board, those are not qualified and have no jurisdiction to judge the transportation aspects of the Transaction.

Eighth. The real reason for CSXT's desire to terminate the agreement is dissatisfaction with the purchase price.

CSXT believes that implementation of the Vitales' plans will interfere with CSXT's implementation of the acquisition of Conrail by limiting or reducing the ability of CSXT to provide rail service to those portions of New York City east of the East River, continuing the growth of truck transportation in this congested area. Regardless of the fairness of the purchase price, the Vitales' unknown plans will interfere with implementation of CSXT's acquisition of Conrail.

Ninth. This is a contract for a sale of a piece of real estate.

The Vitales are correct that the Agreement is for the sale of real estate. However, it is not raw real estate. Instead it is real estate in one of the most densely developed areas of the United States, where there is a growing demand for transportation and little available room or infrastructure. Moreover, the real estate is part of a valuable rail corridor that provides transportation and the alternative for more energy efficient and environmentally friendlier transportation growth than the use of highways. The real estate is inextricably linked to the rail

line, which relies on unfettered use of the real estate to provide current and future service to this part of New York City.

Conclusion. The Vitales are in essence seeking summary judgment. Although CSXT is seeking a declaratory order and this is not a complaint proceeding, the principles underlying the Board's dismissal of a complaint proceeding apply equally to this proceeding. The Board may only dismiss a complaint if it "does not state reasonable grounds for investigation and action." 49 U.S.C. §11701(b). In making that determination, the Board "must construe factual allegations in a light most favorable to complainant."⁷ Viewing the facts in the light most favorable to CSXT, as described above, warrants denial of the Vitales' request to dismiss or deny CSXT's Petition and granting CSXT's request to open a declaratory order proceeding as set forth in the Petition.

PROCEDURAL SCHEDULE

CSXT hereby respectfully suggests that the Board implement the following procedural schedule to govern the proceedings in relation to the Petition.

Day 1	STB Commences Declaratory Order Proceeding
Day 120	Discovery Concluded
Day 150	CSXT Opening Statement Due
Day 180	Vitales Reply Statement Due
Day 200	CSXT Rebuttal Statement Due

This action will not significantly affect either the quality of the human environment or the conservation of energy resources.

⁷ *Sierra Pac. Power Co. v. Union Pac. R.R. Co.*, STB Docket No. 42012 (STB served January 26, 1998) at 4, citing *Western Fuels Service Corp. v. The Burlington Northern and Santa Fe Railway Company*, STB Docket No. 41987 (STB served July 28, 1997).

CONCLUSION

CSXT respectfully requests the Board to accept the reply filed herein and establish the procedural schedule requested in order to determine that the termination of the Agreement by CSXT is in accord with the preemption provisions of 49 U.S.C. §11321.

Respectfully submitted,



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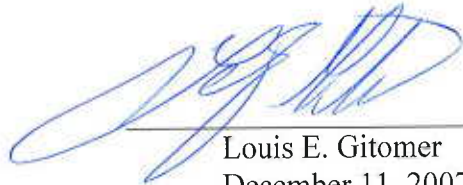
Dated: December 11, 2007

CERTIFICATE OF SERVICE

I hereby certify that I have caused the Motion for Leave to Reply, Reply, and Motion for Procedural Schedule of CSX Transportation, Inc. to be served upon counsel for Mr. Frank Vitale and Mr. Francis Vitale by first class mail, postage pre-paid and by email.

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