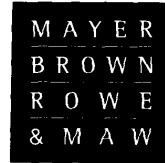


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March 11, 2002

BY HAND-DELIVERY

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

ENTERED
Office of the Secretary

APR 11 2002

Part of
Public Record

Re: STB Finance Docket No. 34169, Consolidation
Coal Sales Company v. Consolidated Rail Corporation

Dear Secretary Williams:

Enclosed for filing in the above-entitled proceeding are the original and ten copies of Consolidated Rail Corporation's Rebuttal Argument. Also enclosed are three diskettes containing the text of the Rebuttal Argument in electronic format. Please date-stamp the enclosed extra copy and return it to our representative.

Sincerely yours,

A handwritten signature in black ink, appearing to read 'RMJ', followed by a stylized flourish.
Robert M. Jenkins III

RMJ/bs

Enclosures

cc: Kenneth A. Murphy, Esq.

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

STB FINANCE DOCKET NO. 34169

CONSOLIDATION COAL SALES COMPANY

v.

CONSOLIDATED RAIL CORPORATION

**CONSOLIDATED RAIL CORPORATION'S
REBUTTAL ARGUMENT**



**ENTERED
Office of the Secretary**

APR 11 2002

**Part of
Public Record**

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Dated: April 11, 2002

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

STB FINANCE DOCKET NO. 34169

**CONSOLIDATION COAL SALES COMPANY
v.
CONSOLIDATED RAIL CORPORATION**

**CONSOLIDATED RAIL CORPORATION'S
REBUTTAL ARGUMENT**

Pursuant to the Board's February 28, 2002 Order, Consolidated Rail Corporation ("Conrail") hereby submits its rebuttal argument in the above-captioned proceeding.

INTRODUCTION AND SUMMARY

In its Reply Brief, Consolidation Coal Sales Company ("CCSC") largely reiterates the requests that it made in its original Petition to the Board for Declaratory Order, while failing to address, let alone rebut, many of the key arguments made by Conrail in its Opening Evidence and Argument. CCSC asks the Board to find that Conrail is obliged (1) to pay CCSC minimum annual terminal fees through 2011 and (2) to pay damages for the "diversion" of export coal traffic from the MGA Mine District by CSX Transportation, Inc. ("CSX") – under agreements (the "1991-92 Agreements") that Conrail made with CCSC when Conrail had virtually exclusive access to the Monongahela Valley coal area and the ability to influence export coal to move to CCSC's Baltimore terminal facility.

CCSC does not deny that Conrail's ability to handle most coal shipments from the Monongahela Valley was a fundamental predicate of the 1991-92 Agreements. Nor does CCSC deny that Conrail lost that ability when the Board approved the division of Conrail's assets,

including, specifically, joint access by CSX and Norfolk Southern Railway Company ("NS") to all of the mines in the MGA Mine District.¹

CCSC absurdly suggests that Conrail controls NS, which now operates the former Conrail lines into CCSC's terminal, but even if that were true (which it is not), NS does not have the exclusive access to the Monongahela coal mines on which the 1991-92 Agreements were predicated. NS cannot influence coal shippers in the MGA Mine District to send all of their export coal to CCSC's terminal, nor can NS require CSX to use CCSC's terminal in preference to CSX's own Curtis Bay terminal and other terminals in Baltimore and Newport News that CSX clearly stated in its application it planned to use.

All of this was quite apparent throughout the Board's proceedings leading up to its decision in CSX/NS/Conrail. CCSC does not deny that its parent and apparent alter ego, Consol Energy, was actively involved in making sure that the kind of competition in the MGA Mine District promised by NS and CSX actually came to fruition. Consol Energy and CCSC obviously placed a much higher premium on getting joint access to the MGA Mine District approved by the Board and implemented by CSX and NS than they did on any contract rights they may have thought they had under the 1991-92 Agreements. CCSC does not address Conrail's argument that Consol Energy and CCSC cannot have it both ways. In fact, CCSC does not even acknowledge Consol Energy's existence.

While CCSC's Reply is more significant for what it ignores than for what it addresses, the arguments that CCSC does make misconstrue both the facts and the relevant legal authority to argue that CSX, NS, and Conrail anticipated continued Conrail liability on contracts that it could no longer perform and the continued enforcement of provisions that no longer make any

¹ CSX Corp., et al. – Control & Operating Leases/Agreements – Conrail Inc., et al., 3 S.T.B. 196 (1988) ("CSX/NS/Conrail").

sense in light of the Board's decision. Contrary to CCSC's assertions, Conrail has no ability to prevail upon either NS or CSX to deliver coal to CCSC's terminal facility, and the parties' use of indemnification provisions does not indicate that they anticipated continued Conrail liability for the post-Split Date performance of the 1991-92 Agreements. CCSC all but ignores Section 11321's self-executing nature and the crucial fact that the allocation of Conrail's contracts (including the 1991-92 Agreements) was necessary to implement the parties' transaction. Without the allocation of those contracts, CSX and NS would not have been able to divide Conrail's assets and introduce competitive rail service in the areas formerly served by Conrail.

ARGUMENT

I. CCSC DOES NOT EVEN ADDRESS, LET ALONE REBUT, THE FUNDAMENTAL CONFLICT BETWEEN THE COMPETITIVE REQUIREMENTS OF CSX/NS/CONRAIL AND THE SOLE SOURCE ASSUMPTION OF THE 1991-92 AGREEMENTS BETWEEN CCSC AND CONRAIL.

A. CCSC Does Not Dispute That The Fundamental Operating Premises Of The 1991-92 Agreements Have Changed.

A fundamental purpose of CSX/NS/Conrail was to increase rail competition in the Northeast and Midwest by allowing CSX and NS to compete against one another in many areas where Conrail previously had been the sole carrier. Nowhere was this more evident than in the MGA Mine District, a region which had previously been served nearly exclusively by Conrail but that now enjoys competitive joint access by CSX and NS over the rail lines of the former Monongahela Railway.

CCSC does not dispute this. Nor does CCSC dispute that a fundamental predicate of the 1991-92 Agreements between CCSC and Conrail was that Conrail, with its near-exclusive service in the Monongahela Valley, was in a position to influence the movement of all Monongahela Valley export coal to CCSC's Baltimore terminal facility. The Board's approval

of joint access for CSX and NS to the MGA Mine District vitiated the sole access predicate of the 1991-92 Agreements and effectively rendered performance of those agreements impossible.

CCSC disingenuously states that “Norfolk Southern apparently granted CSX equal access to these mines” (CCSC Reply at 7), but that assertion completely misstates the derivation of joint access in the MGA Mine District. NS did not separately “grant” CSX equal access to MGA mines; instead, this was negotiated as part of the Conrail transaction. NS and CSX jointly represented in their application to the Board that CSX would have access to the MGA Mine District, and such access was required as an integral part of the approved transaction.

See CSX/NS/Conrail, 3 S.T.B. at 369 (the MGA Mine District is “an important area subject to special arrangements in that NS will operate and maintain the area subject to a joint use agreement with CSX”). CCSC’s claim is, therefore, baseless to the extent it implies that the payment of damages for CSX’s “diversion” of coal is self-inflicted. CSX’s access to – and subsequent “diversion” of – MGA coal derives from the requirements of CSX/NS/Conrail and not from NS’s “granting” of MGA Mine District access to CSX.

Moreover, while CCSC argues that Conrail remains responsible for the 1991-92 Agreements, CCSC acknowledges that the Conrail lines and contracts associated with CCSC’s terminal were allocated to PRR, with the Board’s express approval, and that NS has stepped into Conrail’s shoes at the CCSC terminal. In the Verified Statement of Mark Bower,² NS has stated that the 1991-92 Agreements are no longer in effect. But even if they were, NS could not haul sufficient non-Consol coal to meet the requirements of the minimum terminal fee provision because it is now competing – pursuant to CSX/NS/Conrail – against CSX for export coal shipments. CCSC claims that the “diversion” to CSX’s Curtis Bay terminal facility of

² Mark Bower’s Verified Statement was attached to Conrail’s Opening Evidence and Argument (“Bower VS”).

Monongahela coal constitutes a breach of the 1992 Letter Agreement between Conrail and CCSC (CCSC Reply at 2), but CSX is not (and never has been) a party to that agreement.

CCSC cannot escape these straightforward facts, so it hides behind common law theories of “assignor” liability to try to shove the genie back in the bottle. See CCSC Reply at 17-18. The Board cannot and should not rule on those theories as a matter of contract law. But the Board can and should determine under Section 11321(a) that both the allocation of contracts to PRR and NYC and independent competition between NS and CSX for Monongahela coal business, including CSX’s right to use its own Curtis Bay terminal, is “necessary to carry out the transaction” that the Board approved. That would, and should, preempt any interpretation of assignment law that could hold Conrail liable for nonperformance of agreements which were rendered impossible to perform by the Board’s approval – with Consol Energy’s vigorous support – of the Transaction Agreement.

B. Consol Energy Knew CSX/NS/Conrail Would Undermine The Fundamental Premises Of The 1991-92 Agreements But Did Not Object To The Board.

The guiding principle for the Board’s approval of a railroad transaction pursuant to Section 11321 is that the Board “find the [transaction] to be ‘consistent with the public interest.’” CSX/NS/Conrail, 3 S.T.B. at 245, quoting Missouri-Kansas-Texas R.R. Co. v. United States, 632 F.2d 392, 395 (5th Cir. 1980). To reach its comprehensive determination that the CSX/NS/Conrail transaction was consistent with the public interest, the Board solicited (and received) comments from countless interested parties. CCSC does not dispute that it failed to submit any comments to the Board regarding the potential effect of the CSX/NS/Conrail transaction on the 1991-92 Agreements. CCSC’s admitted silence is especially striking when viewed in light of: (1) the parties’ manifested intentions regarding the MGA Mine District; (2)

the clear impact that the transaction would have on the CCSC terminal; and (3) the sophistication of CCSC and its parent, Consol Energy, as consumers of rail transportation services.

As already discussed in Conrail's Opening Evidence and Argument, CSX clearly indicated in its application that it would be shipping MGA Mine District export coal both to its Curtis Pier facility in Baltimore and to Newport News. See Conrail Opening Evidence and Argument at 16-17. And, as CCSC recognizes in its Reply, CSX asserted that one of the benefits of joint access in the MGA Mine District would be that CSX could "offer single-line service from those mines," thus giving "coal consumers broader – and more competitive source options." See CCSC Reply at 21 n.4 (citation omitted). It was thus abundantly clear from the face of CSX's application that much of the MGA Mine District coal that had previously been moving to CCSC's terminal facility due to Conrail's near-monopoly would move post-Split Date to other facilities.

CCSC nevertheless argues that CSX's representations are "neither contrary to, nor at odds with, the minimum fee obligation set forth in the T&S Agreement" because "CSX never stated that it would deliver MGA coal exclusively to Curtis Bay; nor did it state that it would not comply with the terms of the T&S Agreement." CCSC Reply at 22 n.4. But neither of CCSC's rationales make any sense. First, whether or not CSX "stated that it would deliver MGA coal exclusively to Curtis Bay" is beside the point. CCSC's claim against Conrail for CSX's so-called "diversion" of coal is an independent claim that is not tied to its claims regarding the minimum terminal fee provision.³ See CCSC Reply at 2 (requesting separate relief for "the diversion to CSX's Curtis Bay terminal facility of certain line-haul movements of coal" which "constitutes a breach . . . for which CCSC is entitled to damages"). Thus, CSX is either

³ CCSC's careful choice of the word "diversion" is an obvious attempt to obfuscate the reality: "diversion" really means competition.

“diverting” MGA coal or it is not, and under CCSC’s own legal theories CSX “diverts” MGA coal regardless of whether it delivers coal exclusively to Curtis Bay or splits its coal shipments between Curtis Bay and CCSC’s terminal.

Second, any statement by CSX “that it would not comply with the terms of the T&S Agreement” would be completely unnecessary. CSX was not a party to the 1991-92 Agreements, which were assigned by Conrail to PRR on the Split Date. Thus, there was no basis whatsoever for CSX to claim that it would not be complying with the terms of agreements to which it has had no contractual connection, either before or after the Split Date. On both of these bases, the Board should reject CCSC’s half-hearted attempt to harmonize its ill-conceived “diversion” claims with the Board’s approval of a transaction that expressly provided for CSX to ship MGA coal to other terminals.

However, even if CCSC’s “diversion” claims could somehow be reconciled with CSX’s clearly-stated plans to ship MGA coal to other terminals, preemption is appropriate because the implementation of competition between CSX and NS in the MGA Mine District made impossible the continued enforcement of the minimum terminal fee provision. In this regard, CCSC’s argument that CSX’s statements in its filings in the CSX/NS/Conrail transaction are not “at odds with[] the minimum fee obligation” (*id.* at 22 n.4) demonstrates willful blindness to the facts. Throughout the life of the 1991-92 Agreements, Conrail had difficulty delivering sufficient tonnage of non-Consol coal so as to avoid the minimum fee provision. To that end, CCSC and Conrail even signed an agreement acknowledging that “certain provisions of the agreement have not been enforced by either party,” including the minimum annual terminal fee. See Feb. 23, 1998 letter from Frank M. Kolojeski to Gary Dadisman, attached as Exhibit E to

Conrail's Opening Evidence and Argument.⁴ CCSC also knew that the line leading to its Baltimore terminal was being allocated to PRR (for operation by NS), and that as a result the 1991-92 Agreements would also be allocated to PRR. Finally, CCSC knew from CSX's application that much of the Monongahela Valley coal that was required to be shipped to CCSC's terminal could now be shipped to other terminals. Despite the inevitable conclusion that the minimum terminal fee provision would no longer be met, CCSC said nothing.

Any concerns that CCSC had about the continued validity of the minimum terminal fee provision could and should have been raised before the Board when it was evaluating the merits of CSX/NS/Conrail. Significantly, CCSC does not dispute that it failed to voice its concerns before the Board for strategic reasons, nor does it dispute that its parent, Consol Energy, stood to benefit from competition in the MGA Mine District. As the Board itself explained in approving the transaction,

Now, CSX and NS will directly compete with each other in important markets where Conrail did not compete with other major railroads before. These markets [include] . . . the area served by the Monongahela Railroad.

CSX/NS/Conrail, 3 S.T.B. at 247. The proper time for CCSC and Consol Energy to voice their concerns would have been when the Board was analyzing the transaction, not years after Consol Energy has begun to reap the rewards of direct competition. Accordingly, the Board should find that CCSC's belated contract law counterclaims are preempted.

⁴ CCSC asserts that, except in 1994, Conrail has "substantially met or exceeded" the minimum terminal fee. See Affidavit of Gary L. Dadisman ¶ 10, attached to CCSC's Reply as Exhibit A. However, CCSC never discloses the basis for its assertions. Conrail disputes that it "substantially met or exceeded" the minimum terminal fees, and has attached both deposition testimony and letter agreements between the parties to that effect to its Opening Evidence and Argument.

II. THE STRUCTURE OF THE TRANSACTION DOES NOT INDICATE THAT CONRAIL ANTICIPATED POST-SPLIT DATE LIABILITY FOR THE 1991-92 AGREEMENTS.

CCSC asserts that "Conrail's structuring of the transaction indicates that it fully understood that it could be called to answer for any post-Split Date non-performance on a third-party contract." CCSC Reply at 18. CCSC's argument, however, both misconstrues the relationship among CSX, NS and Conrail and misapplies the indemnification provisions contained in the parties' agreements.

First, CCSC argues that Conrail owns PRR and asserts that "Norfolk Southern simply has an operating agreement with Conrail's subsidiary to perform certain of the tasks that Conrail previously executed on its own behalf." CCSC Reply at 19. CCSC's assertions vastly oversimplify the relationship between CSX, NS, and Conrail, while overestimating the role that Conrail plays in providing rail transportation services. As the Board knows, Conrail is wholly-owned by CSX and NS. Moreover, both CSX and NS appoint all of the members of the boards of directors of NYC and PRR, respectively. Thus, even though Conrail may own PRR and NYC, it has no control over how PRR- and NYC-allocated rail lines are operated. A more thorough review of Jonathan Broder's deposition testimony than that provided in CCSC's Reply reveals as much:

Q: Who controls Pennsylvania Lines LLC, what company or corporate company?

A: Well, I mean, the governance. There's a provision in the transaction agreement that talks about the governance of PRR's operations and it's made up – it's got its own separate board of directors and those board of directors are nominated by Norfolk Southern.

Q: Conrail has no say in who those people are?

A: That would be correct. I don't even know who they are. I don't know who's on the board.

Q: So PRR is controlled, therefore, as to what it does and how it operates, by Norfolk Southern; is that right?

A: Yes.

Dep. of Jonathan Broder, Vice President of Law and General Counsel to Conrail (48:23-49:16), attached hereto. As Mr. Broder's testimony clearly demonstrates, Conrail has no control over contracts that have been allocated to PRR.

Similarly, CCSC argues that indemnification provisions included in both the Omnibus Capital Contribution, Assignment and Indemnity Agreement and the Transaction Agreement "signal quite clearly Conrail's appreciation of its exposure for post-Split Date liabilities under contracts like the ones at issue here." CCSC Reply at 24. Those indemnity provisions, however, actually underscore the importance of preemption in this case. Because Conrail is jointly owned by CSX and NS, any finding of liability against, and subsequent payment of damages by, Conrail would ultimately be absorbed by both parent companies. Thus, indemnification provisions are necessary to protect both Conrail and one of its owners from liability for conduct by the other owner.⁵

In this case, application of the indemnification provisions would result in a perverse outcome. First, CCSC explicitly seeks damages for "the diversion to CSX's Curtis Bay terminal facility" coal that it believes was otherwise destined for the CCSC terminal facility. See CCSC

⁵ An example would help to illustrate the intended operation of the indemnity provisions. In the event of a collision between a NS train and an automobile at a PRR-allocated crossing in which the automobile occupants sue Conrail, the indemnity provision would require NS to indemnify Conrail. However, CSX (which has no relationship to the PRR-allocated asset and has no involvement with the crossing accident) would also be protected against the payment of damages for NS's conduct; since Conrail would be indemnified by NS, there would be no possibility of Conrail's damages "flowing through" to CSX as would happen if there were no indemnity provision.

Reply at 2. Second, it is now impossible for NS to deliver sufficient tonnages of non-Consol MGA coal to the CCSC terminal facility because it is competing against CSX. Yet if CCSC is permitted to proceed with – and ultimately prevails in – its claims against Conrail, the indemnity provisions could expose NS to a claim by Conrail (protecting CSX from paying its share of Conrail’s damages) because the 1991-92 Agreements were PRR-allocated assets.⁶

Far from demonstrating that Conrail appreciated that it would have exposure to liability “under contracts like the ones here at issue,” the indemnity clauses signal quite clearly that no one anticipated that Conrail could be exposed to liability in a situation like this one. CCSC suggests that NS should have to indemnify Conrail (and, hence, CSX) for damages arising from CSX’s board-approved, pro-competitive conduct. This cannot be. It would penalize the very pro-competitive conduct that the Board expected in CSX/NS/Conrail and that was demonstrably “necessary to carry out the transaction” that the Board approved.

III. CCSC MISCONSTRUES BOTH THE PURPOSES AND THE SELF-EXECUTING NATURE OF SECTION 11321.

CCSC insists that preemption is not necessary to allow the parties to effectuate the allocation of Conrail’s assets because the transaction has now been completed and each of the parties “have the ability to satisfy” any monetary shortfall under the terms of the 1991-92 Agreements. See CCSC Reply at 9-10. But CCSC’s argument completely ignores the self-executing nature of Section 11321. The issue is not whether Conrail has the financial ability to pay monetary damages, but whether Conrail should be required to pay damages. The answer to that question is no.

⁶ This would be a particularly absurd result in light of the fact that NS is delivering coal to CCSC’s facility “under an arrangement with substantially different terms and conditions from the 1991-92 CCSC/Conrail contract.” Bower VS ¶ 3. Among the differences between NS’s current arrangement and the 1991-92 Agreements is the current arrangement’s lack of a minimum terminal fee provision. See id.

When the terms of a contract – such as the minimum terminal fee provisions of the 1991-92 Agreements – stand as an obstacle to the implementation of a Board-approved transaction, those terms are preempted by the Board’s approval of the transaction. See Norfolk & W. Ry. Co. v. Am. Train Dispatchers Ass’n, 499 U.S. 117, 129 (1991) (“N&W”).⁷ Conrail’s acquisition by and subsequent split between CSX and NS was an extremely complicated transaction involving three Class I railroads, thousands of shippers, and thousands of contracts. Throughout the transition to competitive rail service in the Northeast and Midwest, a premium was placed on ensuring as smooth a transition as possible with such a large and logistically-difficult transaction. CCSC’s 1991-92 Agreements were allocated to PRR, just as thousands of other contracts were allocated to either PRR or NYC. The allocation of these contracts was necessary to implement the transaction; otherwise, CSX and NS would have had to have individually renegotiated each contract in order to ensure an adequate division of Conrail’s assets.⁸

The allocation of Conrail’s assets would be rendered irrelevant if parties to Conrail contracts, years after the fact, could hold Conrail liable for those allocated contracts. Yet that is

⁷ CCSC relies almost exclusively on cases that pre-date the Supreme Court’s decision in N&W to argue that Conrail bears a heavy burden of demonstrating that preemption of one or more terms of a private contract is “necessary to carry out the transaction.” See CCSC Reply at 10-16. However, the law is clear that where, as here, the enforcement of a contract’s terms acts as an impediment to the implementation of a Board-approved transaction, those terms are preempted. See N&W, 499 U.S. at 133 (“We hold that, as necessary to carry out a transaction approved by the Commission, the term ‘all other law’ in § 11341(a) includes any obstacle imposed by law.” (emphasis added)); CSX Corp. – Control – Chessie Sys., Inc., & Seaboard Coast Line Indus., 8 I.C.C.2d 715, 721 (1992) (“the ‘necessity’ predicate [of section 11341] is satisfied by a finding that some ‘law’ . . . is an impediment to the approved transaction”). The issue is not whether the transaction can be carried out in some other way, or whether the parties to the transaction have the financial ability to pay substantial monetary damages.

⁸ As discussed in Conrail’s Opening Evidence and Argument, even shippers were not given the option of seeking damages for post-Split Date breach of contract claims. Instead, their remedy was limited to renegotiation or termination of their contracts, and then only after a six month waiting period. See Conrail’s Opening Evidence and Argument at 13-14.

precisely what CCSC is attempting to do here, by arguing that Conrail is liable for the continued enforcement of a contract that was allocated to PRR for handling by NS. Preemption in this case virtually defines Section 11321's self-executing nature: The parties to a Board-approved transaction do not need to identify at the time a transaction is approved every law or contract that might be preempted by the Board's approval of the transaction. See, e.g., CSX Corp. – Control – Chessie Sys., Inc., & Seaboard Coast Line Indus., 8 I.C.C.2d at 723 n.12 (“Section 11341 is self executing and does not condition exemptions on the Commission’s announcing that a particular exemption is necessary to an approved transaction.”). Here, there was no apparent conflict until CCSC brought its belated breach of contract counterclaims against Conrail nearly two years after the Split Date. Accordingly, the Board can and should resolve this conflict and find that CCSC’s counterclaims are preempted, even though the transaction has been “completed,” in order to ensure the continuing integrity of CSX/NS/Conrail.

CCSC also argues that Conrail assured the Board that it would work to ensure its contractual obligations were satisfactorily performed post-Split Date. See CCSC Reply at 20. However, CCSC’s argument is nothing more than a bootstrap. Of course, CSX, NS and Conrail have all undertaken great efforts to try to ensure a smooth transition to competitive rail service. But none of the parties took the position that a contract would not be preempted if its performance was fundamentally at odds with implementation of the approved transaction.

Conrail also disputes the notion that it is seeking preemption of contracts that create “the slightest of burdens.” See CCSC Reply at 16. Conrail is here seeking the preemption of a contract that was rendered impossible to perform by the transaction approved in CSX/NS/Conrail. Thus, CCSC’s citation to Township of Woodbridge v. Consolidated Rail Corporation, STB Docket No. 42053, 2000 STB LEXIS 709 (served Dec. 1, 2000), to argue that

the Board has limited Conrail's ability to use preemption as a means of avoiding contractual obligations, is completely inapposite. See CCSC Reply at 16.⁹ Not only did Woodbridge involve a Shared Asset Area where Conrail is still conducting operations, but the Board explicitly found that Conrail "expressly reaffirmed and renewed the original agreement after" the CSX/NS acquisition. Woodbridge, slip op. at 5, 2000 STB LEXIS 709, at *9-*10. Here, not only is Conrail no longer conducting any operations to or from CCSC's terminal, but the railroad that is conducting those operations, NS, has expressly taken the position that the 1991-92 Agreements are terminated. See Bower VS ¶ 3.

Finally, CCSC argues that Conrail's assignment of the 1991-92 Agreements did not extinguish its performance obligations under the common law. This misses the point altogether. The issue before the Board is whether CSX/NS/Conrail preempts any such common law claims. While Conrail believes that a novation has occurred (see Conrail's Opening Evidence and Argument at 15 n.12), the Board should remove any doubt over whether Conrail can be held liable under the 1991-92 Agreements (whether as an assignor, a party, or otherwise) by preempting any contract law interpretation holding Conrail liable as such. See id., citing CSX/NS/Conrail, 3 S.T.B. at 307-08 (preempting potential and disputed contract law claims to avoid any possibility of conflict with the Board's decision).

⁹ CCSC's citations to Joint Petition for Declaratory Order – Boston & Maine Corp. & Town of Ayer, MA, Finance Docket No. 33971, 2001 STB LEXIS 435 (served May 1, 2001) ("Boston & Maine") and Borough of Riverdale – Petition for Declaratory Order – The New York Susquehanna & Western Railway Corp., Finance Docket No. 33466, 2001 STB LEXIS 179 (served Feb. 27, 2001) ("Borough of Riverdale"), are also inapposite. In both cases, the Board preempted local law where it would interfere with railroad operations – even though the Board did not have approval authority over the construction projects involved. See Boston & Maine, slip op. at 10-11; 2001 STB LEXIS 435, at *21-*24; Borough of Riverdale, slip op. at 2-3, 2001 STB LEXIS 179, at *2-*4. Here, the Board has specific authority over the CSX/NS/Conrail transaction, which it approved, and the law is even clearer under Section 11321 that the Board's approval trumps any effort to enforce a contract that would obstruct the implementation of the transaction as approved.

CONCLUSION

The Board should find that CCSC's counterclaims against Conrail, as described in both its Petition for Declaratory Order and its Reply, are preempted by CSX/NS/Conrail and Section 11321(a).

Respectfully submitted,

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Dated: April 11, 2002

DEPOSITION OF JONATHAN BRODER

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Page 47

1 STB that-- everything was generally filed
 2 jointly in that proceeding and signed by
 3 all three parties, in general, what was
 4 called the application, the general merger
 5 application, which we all signed.
 6 There were representations made
 7 in there that the transition would be
 8 seamless for customers and parties and
 9 that, you know, we were going to work to
 10 make sure that, you know, the different
 11 parties who would assume these agreements
 12 would, in fact, pick them up and there
 13 wouldn't be a disruption of commerce,
 14 because there was a great effort after the
 15 Union Pacific-Southern Pacific merger to
 16 avoid a real disruption of commerce.
 17 Q. Let's talk for a minute about
 18 Conrail's claim against CCSC for coal
 19 allegedly lost at the Baltimore facility,
 20 which is the property of QIT or was the
 21 property of QIT. Can you tell me whether
 22 it is Conrail's position that CCSC lost
 23 QIT's coal due to some act of negligence?
 24 A. I don't know. I'm not familiar

1 actually saw such a document for the first
 2 time.
 3 Q. Do you have any understanding of
 4 what this document purports to do?
 5 A. Without reading it, I would just
 6 have to guess from the title.
 7 Q. Well, take a look at the second
 8 full paragraph?
 9 A. The whereas provision?
 10 Q. Correct.
 11 A. (Whereupon, the witness reviews
 12 the document.)
 13 Q. I ask my question again. Do you
 14 have an understanding of what this document
 15 purports to be?
 16 A. Based on that whereas provision,
 17 it meets my expectation of what the
 18 agreement would appear to be based on its
 19 title.
 20 Q. Given your familiarity with the
 21 transaction, in general, and your
 22 expectation of what this document does or
 23 may do, is this the document or the
 24 agreement through which the transfer and

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Page

1 with the details of Conrail's affirmative
 2 claim in this matter.
 3 Q. Do you know what the amount of
 4 the claim is, at this point?
 5 A. No.
 6 MR. MURPHY: Can you mark this
 7 Broder-7?
 8 (Whereupon, Exhibit Broder-7 was
 9 marked for identification.)
 10 BY MR. MURPHY:
 11 Q. Mr. Broder, you've been handed
 12 what's been marked as Exhibit Number 7.
 13 It's entitled, "Omnibus Capital
 14 Contribution, Assignment and Indemnity
 15 Agreement." Are you familiar with this
 16 document?
 17 A. I've seen it before. I'm not
 18 specifically familiar with it.
 19 Q. When did you see this document
 20 first?
 21 A. Frankly, I think it was on June
 22 1st, 1999, when we were doing the closing
 23 of this transaction. We signed tons of
 24 documents and I think this is when I

1 storage agreement was assigned to PRR?
 2 A. I believe this would have been
 3 the specific vehicle by which it would have
 4 been accomplished. Yes.
 5 MR. MURPHY: I have no further
 6 questions.
 7 ----
 8 EXAMINATION
 9 ----
 10 BY MR. FIORILLA:
 11 Q. Mr. Broder, you said that PRR or
 12 Pennsylvania Lines LLC are the same entity?
 13 A. Yes.
 14 Q. That entity is owned by Conrail?
 15 It's a subsidiary of Conrail; is that
 16 right?
 17 A. Correct.
 18 Q. Did the Conrail board of
 19 directors have any control over PRR or
 20 Pennsylvania Lines LLC?
 21 A. No, not in terms of its
 22 day-to-day operations.
 23 Q. Who controls Pennsylvania Lines
 24 LLC, what company or corporate company?

Page 49 1 A. Well, I mean, the governance. 2 There's a provision in the transaction 3 agreement that talks about the governance 4 of PRR's operations and it's made up-- it's 5 got its own separate board of directors and 6 those board of directors are nominated by 7 Norfolk Southern. 8 Q. Conrail has no say in who those 9 people are? 10 A. That would be correct. I don't 11 even know who they are. I don't know who's 12 on the board. 13 Q. So PRR is controlled, therefore, 14 as to what it does and how it operates, by 15 Norfolk Southern; is that right? 16 A. Yes. 17 Q. You testified that Conrail was 18 involved in the transaction agreement in 19 1997, as it was being negotiated by the 20 parties. Did Conrail have any say or give 21 any input to Norfolk Southern, CSX, or to 22 the STB as to how a particular line of 23 railroad or facilities connected with a 24 line of railroad should be distributed in	Page 51 1 it? 2 A. What it says is-- it speaks for 3 itself, that it was assigned from Conrail 4 to PRR effective June 1st, 1999. In 5 essence after June 1st, 1999, Conrail no 6 longer was the party at interest. 7 Q. That was pursuant to the 8 transaction agreement that was approved by 9 the STB; is that right? 10 A. Correct. 11 Q. Does Conrail operate in Baltimore 12 today at all? 13 A. We conduct no operations in 14 Baltimore today. We do not. 15 MR. FIORILLA: Thank you, Mr. 16 Broder. 17 ---- 18 EXAMINATION 19 ---- 20 BY MR. MURPHY: 21 Q. One follow-up question, maybe 22 two. 23 A. Sure. 24 Q. With regard to the transaction
Page 50 1 the breakup of Conrail? 2 A. No. The entire transaction 3 agreement was negotiated privately between 4 Norfolk Southern and CSX. Conrail did not 5 participate in that at all. 6 Q. And they didn't ask Conrail for 7 any of its expertise or any other 8 information in regards to their 9 operations? 10 A. Sadly, no, they did not. 11 Q. What was submitted to the STB was 12 those things, therefore, that had been 13 negotiated by NS and CSX? 14 A. That would be correct. Yes. 15 Q. In Broder-4, your letter of 16 September 14th to Mr. Burns at Consol. 17 That's the big Consol, isn't it? That's 18 the parent corporation of this company; is 19 that right? 20 A. I don't know. I was just writing 21 back to Mr. Burns' business card. 22 Q. Does this letter talk to when the 23 agreement was terminated, as to what 24 Conrail could continue to perform under	Page 52 1 agreement, for what purpose did Conrail 2 function as a signatory if it had no 3 control over the contents of the document? 4 A. Because it was Conrail's assets 5 that had to be conveyed, allocated, 6 etcetera. As a legal matter, Conrail had 7 to be a party, had to be a signatory to the 8 agreement. 9 Q. To your knowledge, were there any 10 aspects of the transaction agreement to 11 which Conrail objected in writing or as a 12 matter of record? 13 A. I'm only personally familiar with 14 one area of where we had a concern before 15 the actual transaction agreement was 16 signed. And what that was about is there 17 were certain provisions in the agreement 18 that had to do with Conrail's ability to 19 conduct business between the time of the 20 transaction agreement and the time that the 21 formal split-up of Conrail were to occur. 22 Basically, we were concerned that 23 they put-- Norfolk Southern and CSX imposed 24 some fairly severe limitations on our

CERTIFICATE OF SERVICE

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I hereby certify that on this 11th day of April, 2002, I caused copies of the foregoing
Rebuttal Argument to be served on the following individuals via third party commercial carrier:

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