SECURITIES AND EXCHANGE COMMISSION
Washington, D.C. 20549

SCHEDULE 14D-1
(Amendment No. 3)
Tender Offer Statement Pursuant to Section 14(d)(1)
of the Securities Exchange Act of 1934

Conrail Inc.
(Name of Subject Company)

Norfolk Southern Corporation
Atlantic Acquisition Corporation
(Bidders)

COMMON STOCK, PAR VALUE $1.00 PER SHARE
(INCLUDING THE ASSOCIATED COMMON STOCK PURCHASE RIGHTS)
(Title of Class of Securities)

208368 10 0
(CUSIP Number of Class of Securities)

SERIES A ESOP CONVERTIBLE JUNIOR
PREFERRED STOCK, WITHOUT PAR VALUE
(INCLUDING THE ASSOCIATED COMMON STOCK PURCHASE RIGHTS)
(Title of Class of Securities)

NOT AVAILABLE
(CUSIP Number of Class of Securities)

JAMES C. BISHOP, JR.
EXECUTIVE VICE PRESIDENT-LAW
NORFOLK SOUTHERN CORPORATION
THREE COMMERCIAL PLACE
NORFOLK, VIRGINIA 23510-2191
TELEPHONE: (757) 629-2750
(Name, Address and Telephone Number of Person Authorized
to Receive Notices and Communications on Behalf of Bidder)

---

with a copy to:
RANDALL H. DOUD, ESQ.
SKADDEN, ARPS, SLATE, MEAGHER & FLOM LLP
919 THIRD AVENUE
NEW YORK, NEW YORK 10022
TELEPHONE: (212) 735-3000

This Amendment No. 3 amends the Tender Offer Statement on Schedule 14D-1 filed on October 24, 1996, as amended (the "Schedule 14D-1"), by Norfolk Southern Corporation, a Virginia corporation ("Parent"), and its wholly owned subsidiary, Atlantic Acquisition Corporation, a Pennsylvania corporation ("Purchaser"), relating to Purchaser's offer to purchase all outstanding shares of (i) Common Stock, par value $1.00 per share (the "Common Shares"), and (ii) Series A ESOP Convertible Junior Preferred Stock, without par value (the "ESOP Preferred Shares" and, together with the Common Shares, the "Shares"), of Conrail Inc. (the "Company"), including, in each case, the associated Common Stock Purchase Rights, upon the terms and subject to the conditions set forth in the Offer to Purchase dated October 24, 1996 (the "Offer to Purchase") and in the related Letter

of Transmittal (which, together with any amendments or supplements thereto, constitute the "Offer"), copies of which were filed as Exhibits (a)(1) and (a)(2) to the Schedule 14D- 1, respectively. Unless otherwise defined herein, all capitalized terms used herein shall have the respective meanings given such terms in the Offer to Purchase or the Schedule 14D-1.

ITEM 5. PURPOSE OF THE TENDER OFFER AND PLANS OR PROPOSALS OF THE BIDDER.

Item 5 is hereby amended to add the following:

(b) On October 31, 1996, Parent issued a press release commenting on CSX's response to the Customer Letter. Parent reiterated its view that the competitive effects of the Offer and the Proposed Merger are superior to the Proposed CSX Transaction.

In addition, on October 31, 1996, Parent sent to its customers certain charts (the "Customer Charts") which illustrate Parent's view that the competitive effects of the Offer and the Proposed Merger are superior to the Proposed CSX Transaction.

ITEM 10. ADDITIONAL INFORMATION.

Item 10 is hereby amended to add the following:

(e) On October 30, 1996, Parent and Purchaser filed with the District Court a Complaint for Injunctive Relief against the Commissioners of the Pennsylvania Securities Commission, the Attorney General of Pennsylvania and the Company, together with a Consent Order agreed to by all parties, seeking to enjoin enforcement of the Pennsylvania Takeover Disclosure Law as it would relate to the Offer.

On October 31, 1996, Parent, Purchaser and the other plaintiff in the Pennsylvania Litigation filed a memorandum of law with the District Court in opposition to defendants' motions to dismiss the Pennsylvania Litigation. The memorandum of law sets forth, among other things, Plaintiffs' arguments that (i) they have standing to sue the Company Board for breach of fiduciary duty, (ii) they are adequate representatives of the Company's shareholders for purposes of Federal Rule of Civil Procedure 23.1, (iii) pre-suit demand upon the Company Board should be excused since it would have been futile, (iv) the Company's proposed amendment to the Company Articles to "opt-out" of the Pennsylvania Control Transaction Law is invalid under Pennsylvania law, (v) plaintiffs' federal claims state a cause of action, and (vi) defendants' unclean hands claim lacks merit.

On November 1, 1996, Parent, Purchaser and the other plaintiff in the Pennsylvania Litigation filed a motion, supporting brief and proposed form of order with the District Court seeking a temporary restraining order in the Pennsylvania Litigation (the "TRO Motion"). In the TRO Motion the Plaintiffs have requested that the District Court temporarily enjoin defendants and all persons acting on their behalf or in concert with them from taking any action to enforce Sections 3.1(n) and 5.13 of the CSX Merger Agreement and any other provisions of the CSX Merger Agreement which purport to limit the ability of the Company Board to take action or make any determination with regard to the Rights Agreement and temporarily enjoin defendants and all persons acting on their behalf or in concert with them from distributing any Rights pursuant to the Rights Agreement. The plaintiffs have also requested that the District Court require the defendants to take such action as is necessary to prevent a "Distribution Date" from occurring pursuant to the Rights Agreement. The District Court has tentatively scheduled a hearing for Noon, Philadelphia time, on November 4, 1996 to hear arguments concerning the TRO Motion.

ITEM 11. MATERIAL TO BE FILED AS EXHIBITS.

Item 11 is hereby amended to add the following:

(a)(18) Press Release issued by Parent on October 31, 1996.

(a)(19) Customer Charts sent on October 31, 1996.

(a)(20) Press Release issued by Parent on November 1, 1996

(g)(3) Memorandum of Law filed by Parent, Purchaser and Kathryn B. McQuade in opposition to Defendants' motion to dismiss (dated October 31, 1996, United States District Court for the Eastern District of Pennsylvania).

(g)(4) Temporary Restraining Order Motion and related brief and proposed form of Order filed by Parent, Purchaser and Kathryn B. McQuade (dated November 1, 1996, United District Court for the Eastern District of Pennsylvania).

SIGNATURE

After due inquiry and to the best of its knowledge and belief, the undersigned certifies that the information set forth in this statement is true, complete and correct.

Dated: November 1, 1996

NORFOLK SOUTHERN CORPORATION

By: /s/ JAMES C. BISHOP, JR.

Name: James C. Bishop, Jr.
Title: Executive Vice President-Law

ATLANTIC ACQUISITION CORPORATION

By: /s/ JAMES C. BISHOP, JR.

Name: James C. Bishop, Jr.
Title: Vice President and General Counsel

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Exhibit Number		Page
(a)(18)	Press Release issued by Parent on October 31, 1996.	
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(g)(4)	Temporary Restraining Order Motion and related brief and proposed form of Order filed by Parent, Purchaser and Kathryn B. McQuade (dated November 1, 1996, United District Court for the Eastern District of Pennsylvania).	

EXHIBIT (A)(18)

FOR IMMEDIATE RELEASE
October 31, 1996

Contact: Robert C. Fort
757 629-2714

NORFOLK, VA -- Norfolk Southern today made the following statement with respect to its recent letter to shippers outlining the competitive advantages of a Norfolk Southern combination with Conrail:

"In its release yesterday, CSX attempted to minimize Norfolk Southern's letter to shippers outlining its commitment to balanced competition. In fact, CSX's release was long on words and short on substance.

"Specifically, CSX did not address the central issue we want to make sure shippers understand--THAT NORFOLK SOUTHERN'S PROPOSED COMBINATION WITH CONRAIL PROMOTES COMPETITION, WHILE CSX'S SUPPRESSES COMPETITION.

"Norfolk Southern believes that clearly communicating this position directly to shippers is far superior to CSX's "fill-in-the-blanks" form letter which, again, is long on words but does not address the central issue of balanced competition. We think that CSX's offer to help them write letters on a subject with which they are quite familiar is an insult to the intelligence of shippers."

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EXHIBIT (A)(19)

COMPARISONS

	NAME PLATE MW	NET GENERATION MWh	CAPACITY FACTOR MW (%)	PROVEN CAPACITY MW	CAPACITY FACTOR BASED ON PROVEN CAPACITY
NS	38,317	180,641,432	53.82%	36,217	56.94%
CR	36,114	160,895,408	50.86%	33,088	55.51%
CSXT	69,622	344,123,926	56.42%	64,818	60.61%
TOTAL	144,053	685,660,766	54.34%	134,122	58.36%
NS/CR	71,091	322,731,308.00	51.82%	66,143	55.70%
NS/CR % GENERATION	50.52%	48.40%		50.51%	
CSXT % GENERATION	49.48%	51.60%		49.49%	
CSXT/CR	105,423.85	503,040,808.00	54.47%	97,596	58.84%
CSXT/CR % GENERATION	73.34%	73.58%		72.93%	
NS % GENERATION	26.66%	26.42%		27.07%	

NOTES
- - 1995 RDI Data from POWERdat.
- - Coal fired utility plants served by the three carriers of interest that are capable of unloading coal. Other plants in the East are not involved in this analysis.
- - Coal fired plants may or may not receive coal by these carriers.
- - NS/CSX, NS/CR, CSX/CR joint plants are included on each of the "nsutils.xls", "crutils.xls", and "csxutils.xls" files.
- - Joint plants are color coded in the above mentioned files: 8 - NS/CSX; 1 - NS/CR AND 1- CSX/CR.
- - The NS/CR joint plant is counted only once in the NS/CR merged data within spreadsheet "compare.xls". The same is true with the CSX/CR joint plant.

NS/CR MERGER
NAMEPLATE CAPACITY (MW)
1995

CSXT (49.48%) CS/CR (50.52%)

CSXT/CR MERGER
NAMEPLATE CAPACITY (MW)
1995

NS/CR MERGER
NET GENERATION (MWh)
1995

CSXT/CR MERGER
NET GENERATION (MWh)
1995

EXHIBIT (A)(20)

FOR IMMEDIATE RELEASE
November 1, 1996

Contact: Robert C. Fort
(757) 629-2714

NORFOLK SOUTHERN ASKS COURT TO BLOCK CONRAIL 'POSION PILL'

NORFOLK, VA -- Norfolk Southern (NYSE:NSC) today asked a federal judge in Philadelphia to block Conrail (NYSE:CRR) from executing a "draconian" plan that would effectively force its shareholders to accept CSX's (NYSE:CSX) merger offer and prevent them from even considering Norfolk Southern's higher offer for Conrail.

In its motion for a temporary restraining order, Norfolk Southern said Conrail's plan represents "the most egregious instance of a company hastily 'locking up' a transfer of control to a favored bidder without regard for the best interests of its shareholders or other constituencies."

Norfolk Southern asked the Court to stop Conrail from distributing its "Poison Pill" rights on November 7. The distribution of the rights would essentially trigger Conrail's "poison pill" defense against any potential buyer except CSX. Judge Donald W. Van Artsdalen has tentatively scheduled a hearing on Norfolk Southern's motion for a temporary restraining order for Noon Monday (November 4).

"Conrail's directors have essentially ceded their fiduciary duties" to CSX, Norfolk Southern said in its filing. Execution of the "Rights Plan" would cause an "enormous dilution" of Conrail stock, Norfolk Southern said.

In its filing, Norfolk Southern said that Conrail, its directors and CSX are attempting "to coerce, mislead and fraudulently manipulate Conrail's shareholders to swiftly deliver control of Conrail to CSX pursuant to a tender offer" in stock and cash with a value of slightly more than $85 per Conrail share (as of October 29, 1996).

Norfolk Southern on October 24 made a $100-a-share all-cash offer for all shares of Conrail common stock.

"We believe that Conrail shareholders should have the right to consider our offer, which is clearly better for them and ultimately for shippers, communities, employees and the public interest," said David R. Goode, Chairman, President and Chief Executive Officer of Norfolk Southern.

In an amended complaint filed Wednesday, Norfolk Southern noted that under the terms of Conrail's deal with CSX, Conrail directors are prohibited from terminating the agreement for 180 days even if their fiduciary duties required them to do so. "Conrail directors have agreed to take a six-month leave of absence during what may be the most critical six months in Conrail's history," Norfolk Southern's complaint said.

Norfolk Southern is a transportation holding company that operates a 14,500-mile rail system in 20 states and a trucking line.

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World Wide Web Site - http://www.nscorp.com

EXHIBIT (G)(3)

IN THE UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF PENNSYLVANIA

NORFOLK SOUTHERN CORPORATION, a Virginia corporation, ATLANTIC ACQUISITION CORPORATION, a Pennsylvania corporation AND KATHRYN B. McQUADE,	:	
Plaintiffs,	:	
	:	C.A. No. 96-CV-7167
-against-	:	
CONRAIL INC., a Pennsylvania corporation, DAVID M. LEVAN, H. FURLONG BALDWIN, DANIEL B. BURKE, ROGER S. HILLAS, CLAUDE S. BRINEGAR, KATHLEEN FOLEY FELDSTEIN, DAVID B. LEWIS, JOHN C. MAROUS, DAVID H. SWANSON, E. BRADLEY JONES, AND RAYMOND T. SCHULER AND CSX CORPORATION,	:	
Defendants.	:	

PLAINTIFFS' MEMORANDUM OF LAW
IN OPPOSITION TO DEFENDANTS' MOTIONS TO DISMISS

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DATED: October 31, 1996

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INTRODUCTION

This action arises from the attempt by defendants Conrail Inc. ("Conrail"), its directors and CSX Corporation ("CSX") to coerce, mislead and fraudulently manipulate Conrail's shareholders to swiftly deliver control of Conrail to CSX pursuant to a tender offer for up to 20% of Conrail's stock for $92.50 in cash, a possible second tender offer and a back-end stock-for-stock merger (the "CSX Transaction"). As of the close of business on October 29, 1996, the blended value of the CSX Transaction was slightly more than $85 per Conrail share.

As the plaintiffs' Complaint (and First Amended Complaint filed on October 30, 19961) describe in detail, Conrail's directors acted precipitously to accede to CSX's proposal without even attempting to determine if Norfolk Southern Corporation ("Norfolk Southern") -- which had expressed interest in both the distant and very recent past in acquiring Conrail -- would offer a better

proposal. Indeed, Conrail's hasty action was specifically designed to forestall any competing, higher bid for Conrail by Norfolk Southern.

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1 The First Amended Complaint adds additional facts developed since the original Complaint was filed and adds additional claims related to, among other things, (a) a provision in the CSX Merger Agreement that prevents Conrail's directors from withdrawing their recommendation that Conrail's shareholders accept the CSX tender offer, terminating the CSX Merger Agreement and recommending or entering into a competing takeover proposal for at least 180 days even if their fiduciary duty would require them to do so; and (b) provisions in the CSX Merger Agreement and Conrail's poison pill plan that prevent Conrail from redeeming, amending or otherwise taking further action with respect to the poison pill for any transaction other than the current CSX Transaction. The Amended Complaint alleges that, under the terms of Conrail's poison pill plan, Conrail's directors will lose, on November 7, their power to make the poison pill inapplicable to any acquisition transaction other than the CSX Transaction, unless CSX agrees to let them postpone that date. Unless the November 7 date is postponed, Conrail will be unable to be acquired other than through the CSX Transaction, under its current terms, for a period of almost nine years.

On October 23, 1996, Norfolk Southern announced its intention to commence a public tender offer for all shares of Conrail common stock at a price of $100 in cash per share (the "Norfolk Southern Offer"). Norfolk Southern further announced that it intends, as soon as practicable following the closing of its offer, to acquire the entire equity interest in Conrail for cash at the same price per share. The Norfolk Southern Offer and proposed merger represent a 40% premium over the closing market price of Conrail stock on October 14, 1996 (the day prior to the announcement of the merger with CSX) and a substantial premium over CSX's offer.

The plaintiffs' underlying case presents the most egregious instance of a company hastily "locking up" a transfer of control. While the Pennsylvania Business Corporation Law allows directors substantial leeway in considering change of control issues, it does not permit, contrary to the defendants' protestations otherwise, directors to completely abdicate their fiduciary duties as they have done here.

The egregious nature of the defendants' conduct relies for support on a view of Pennsylvania corporate law that would purport to totally eliminate the concept of fiduciary duty owed by directors as it relates to the issue of who owns and controls the corporation. At the self-interested urging of defendant LeVan, Conrail's directors have agreed to a transaction that they must have known could and would be bettered by Norfolk Southern. From the inferior CSX Transaction, defendant LeVan stands to gain substantially increased compensation and a pledge that he will succeed CSX's Chairman and Chief Executive Officer John W. Snow.

As alleged in the plaintiffs' Complaint (and First Amended Complaint) and as will be discussed in detail in the plaintiffs' opening brief in support of their motion for preliminary injunction to be filed next week, the defendants' self-serving and distorted view of Pennsylvania corporate law is incorrect. While Pennsylvania's legislature has acted to give directors of Pennsylvania corporations the power to "just say no" to a bidder, it has not given directors the ability to enter

into a merger agreement and cede all of their fiduciary duties to the potential acquiror through the merger contract.

In the same way that the Conrail defendants have tried to ignore Norfolk Southern, their motion to dismiss ignores any statute, case or fact that they do not like. Defendants, for example, suggest that plaintiffs rushed to file this lawsuit "in such haste ... that elementary principles of standing were ignored," but have themselves failed to cite the Pennsylvania statute that expressly gives plaintiffs standing to sue. Similarly, defendants argue that a bidder such as Norfolk Southern cannot be an adequate shareholder representative, but neglect to mention the substantial case authority to the contrary. The list goes on:

* Defendants argue that plaintiffs have not made sufficient allegations of fraud to avoid the demand requirement, but ignore the plain allegations of fraud in plaintiffs' Complaint.

* They argue that Pennsylvania law expressly empowers directors to terminate amendments, but miss the point that the proposed articles amendment distorts and subverts the opt-out provisions of the Pennsylvania Business Corporation Law.

* They argue that plaintiffs breached a confidentiality agreement with CSX, but fail to mention that the agreement was terminated by a signed letter agreement over two years ago.

In addition to being substantively incorrect, the plaintiffs' motions are procedurally deficient in that they rely on numerous alleged facts not taken from the Complaint or the documents incorporated by reference in it. As Rule 12(b)(6) itself makes clear, reliance on matters outside of the Complaint mandates that the motions to dismiss be treated as motions for summary judgment. Given the factual disputes that are apparent from comparison of the allegations of the Complaint with the defendants' briefs, dismissal of the Complaint by motion is inappropriate in this case. Plaintiffs believe the ongoing expedited discovery begun several days ago will result in a record by next week that will provide more than adequate basis for the Court to issue the preliminary injunction sought by the plaintiffs.

COUNTER-STATEMENT OF FACTS

The Plaintiffs

Plaintiff Norfolk Southern is a Virginia corporation "considered by many analysts to be the nation's best-run railroad," according to the New York Times. (Comp. 3) Norfolk Southern is the beneficial owner of 100 shares of common stock of Conrail. (Id.)

Plaintiff Kathryn B. McQuade is, and has been at all times relevant to this action, the owner of Conrail common stock. (Comp. 5)

Plaintiff Norfolk Southern Had Made Known to Conrail on Numerous Occasions Its Interest in Acquiring Conrail

On numerous occasions prior to 1994, senior management of Norfolk Southern spoke to their counterparts at Conrail concerning a possible business combination between Norfolk Southern and Conrail. By early September 1994, negotiations toward such a transaction

were in an advanced stage. Norfolk Southern had proposed an exchange ratio of 1-to-1, but Conrail management was still pressing for a higher premium. On September 23, 1994, Norfolk Southern increased the proposed exchange ratio to 1.1-to-1, and left the door open to an even higher ratio. Conrail discontinued such discussions in September 1994, after the Conrail Board elected defendant LeVan as Conrail's President and Chief Operating Officer as a step toward ultimately installing him as Chief Executive Officer and Chairman.

The 1.1-to-1 exchange ratio reflected a substantial premium over the market price of Conrail stock at that time. If one applies that ratio to Norfolk Southern's stock price on October 14, 1996 -- the day the Conrail Board approved the CSX Transaction -- it implies a per share acquisition price for Conrail of over $101. Thus, there can be no question that Mr. LeVan, if not Conrail's Board, was well aware that Norfolk Southern likely would be willing and able to offer more -- to Conrail's shareholders, rather than management, that is -- than CSX could offer for an acquisition of Conrail.

During the period following September 1994, Norfolk Southern's Chairman, David R. Goode, from time to time had conversations with Mr. LeVan. During virtually all of these conversations, Mr. Goode expressed Norfolk Southern's strong interest in negotiating an acquisition of Conrail. Mr. LeVan responded that Conrail wished to remain independent. Nonetheless, Mr. Goode was led to believe that if and when the Conrail Board determined to pursue a sale of the company, it would do so through a process in which Norfolk Southern would have an opportunity to bid.

At its September 24, 1996 meeting, the Norfolk Southern Board reviewed its strategic alternatives and determined that Norfolk Southern should press for an acquisition of Conrail. Accordingly, Mr. Goode again contacted Mr. LeVan to (i) reiterate Norfolk Southern's strong interest in acquiring Conrail and (ii) request a meeting at which he could present a concrete proposal. Mr. LeVan responded that the Conrail Board would be holding a strategic planning meeting that month and that he would be back in contact with Norfolk Southern after that meeting. Mr. Goode emphasized that he wished to communicate Norfolk Southern's position so that Conrail's Board would be aware of it during the strategic planning meeting. Mr. LeVan stated that it was unnecessary to do so.

Following September 24, Mr. LeVan did not contact Mr. Goode. Finally, on Friday, October 4, 1996, Mr. Goode telephone Mr. LeVan. Mr. Goode again reiterated Norfolk Southern's strong interest in making a proposal to acquire Conrail. Mr. LeVan responded that the Conrail Board would be meeting on October 16, 1996, and assumed that he would contact Mr. Goode following that meeting. Mr. Goode again stated that Norfolk Southern wanted to make a proposal so that the Conrail Board would be aware of it. Mr. LeVan again stated that it was unnecessary to do so.

On the Day Before the Purportedly Scheduled Meeting of Conrail's Board, Defendants Announce the CSX Transaction
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To Norfolk Southern's surprise and dismay, on October 15, 1996, Conrail and CSX announced that they had entered into a definitive merger agreement (the "CSX Merger Agreement") pursuant to which control of Conrail would be sold swiftly to CSX and then a merger would be consummated following required regulatory approvals.

The CSX Transaction, the blended value of which was slightly more than $85 per Conrail share as of October 29, 1996, is structured to include (i) a first-step cash tender offer for up to 19.9% of Conrail's stock; (ii) an amendment to Conrail's charter to opt out of coverage under Subchapter 25E of Pennsylvania's Business Corporation Law (the "Charter Amendment"), which requires any person acquiring control of over 20% or more of the corporation's voting power to acquire all other shares of the corporation for a "fair price," as defined in the statute, in cash; (iii) following such amendment, an acquisition of additional shares that, in combination with other shares already acquired, would constitute at least 40% and up to approximately 50% of Conrail's stock; and (iv) following required regulatory approvals, consummation of a follow-up stock-for-stock merger.

Thus, once the Charter Amendment is approved, CSX will be in a position to acquire either effective or absolute control over Conrail. In its preliminary proxy materials filed with the Securities and Exchange Commission ("SEC"), Conrail states that if CSX acquires 40% of Conrail's stock, approval of the merger will be "virtually certain." CSX could do so either by increasing the number of shares it will purchase by tender offer, or, if tenders are insufficient, by accepting all tendered shares and exercising a stock option granted to it as part of the CSX Transaction (the "Stock Option"). CSX could obtain "approximately 50 percent" of Conrail's shares by purchasing 40% pursuant to tender offer and by exercising its stock options, in which event shareholder approval of the CSX merger will be, according to Conrail's preliminary proxy statement, "certain."

The CSX Transaction includes a breakup fee of $300 million and a lock-up stock option agreement threatening substantial dilution to any rival bidder for control of Conrail. Integral to the CSX Transaction are covenants substantially increasing Mr. LeVan's compensation and guaranteeing that he will succeed John W. Snow, CSX's Chairman and Chief Executive Officer, as the combined company's CEO and Chairman.

CSX Admits That the Conrail Board Approved the CSX Transaction Rapidly
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On October 16, 1996, the New York Times reported that CSX's Mr. Snow, on October 15, 1996, had stated that the CSX Transaction "came together rapidly in the last two weeks." The Wall Street Journal reported on October 16 that Mr. Snow stated that negotiations concerning the CSX Transaction had gone "very quickly," and "much faster than he and Mr. LeVan had anticipated." On October 24, 1996, the Wall Street Journal observed that "[i]n reaching its agreement with CSX, Conrail didn't solicit other bids ... and appeared to complete the accord at breakneck speed."

CSX's Snow Implies That the CSX Transaction Is a Fait Accompli and States That Conrail's Directors Have Almost No Fiduciary Duties
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On October 16, 1996, Mr. Goode met in Washington, D.C. with Mr. Snow, CSX's Chairman, to discuss the CSX Transaction and certain regulatory issues that its consummation would raise. Mr. Snow advised Mr. Goode during that meeting that Conrail's counsel and investment bankers had ensured that the CSX Transaction would be "bulletproof," implying that the sale of control of Conrail to CSX is now a fait accompli. Mr. Snow added that the "Pennsylvania statute," referring to Pennsylvania's Business Corporation Law, was "great" and that Conrail's directors have almost no fiduciary duties.

The Onerous Terms of the CSX/Conrail Merger Agreement: The Poison Pill Lock-In

Consistent with Mr. Snow's remarks that Conrail's advisers had ensured that the CSX Transaction is "bullet-proof" and that Conrail's directors have almost no fiduciary duties, the CSX Merger Agreement contains draconian "lock-up" provisions which are unprecedented.

Perhaps the most onerous of these provisions, in terms of the drastic consequences it threatens to Conrail, its shareholders and its other legitimate constituencies, is the poison pill "lock-in" provision. The CSX Merger Agreement purports to bind the Conrail Board not to take any action with respect to the Conrail poison pill to facilitate any offer to acquire Conrail other than the CSX Transaction. At the same time, the Conrail Board has amended the Conrail poison pill to facilitate the CSX Transaction. Moreover, Conrail has not disclosed the effect of these provisions to its shareholders.

The 180-Day Lock-Out

The CSX Merger Agreement also contains an unprecedented provision purporting to bind Conrail's directors not to terminate the CSX Merger Agreement for 180 days regardless of whether their fiduciary duties require them to do so.

The $300 Million Breakup Fee

The CSX Merger Agreement also provides for a $300 million breakup fee. This fee would be triggered if the CSX Merger Agreement were terminated following a competing takeover proposal.

This breakup fee is disproportionately large, constituting over 3.5% of the aggregate value of the CSX Transaction (and approximately 5% if added to the value of the Stock Option Agreement discussed below in the context of Norfolk Southern's offer). The breakup fee unreasonably tilts the playing field in favor of the CSX Transaction -- a transaction that the defendant directors knew, or reasonably should have known, at the time they approved the CSX Transaction, provided less value and other benefits to Conrail and its constituencies than would a transaction with Norfolk Southern.

The Lock-Up Stock Option

Concurrently with the CSX Merger Agreement, Conrail and CSX entered into an option agreement (the "Stock Option Agreement") pursuant to which Conrail granted to CSX an option, exercisable in certain events, to purchase 15,955,477 shares of Conrail common stock at an exercise price of $92.50 per share, subject to adjustment. If, during the time that the option under the Stock Option Agreement is exercisable, Conrail enters into an agreement pursuant to which all of its outstanding common shares are to be purchased for or converted into, in whole or in part, cash, in exchange for cancellation of the option, CSX shall receive an amount in cash equal to the difference (if positive) between the closing market price per Conrail common share on the day immediately prior to the consummation of such transaction and the purchase price. In relation to Norfolk Southern's offer of $100 per share, the dilution attributable to the Stock Option Agreement would be $119,666,077.50.

Selective Discriminatory
Treatment of Competing Bids

Finally, the Conrail Board has breached its fiduciary duties by selectively rendering Conrail's poison pill rights plan inapplicable to the CSX Transaction, and approving the CSX Transaction and, thus, exempting it from the 5-year merger moratorium under Pennsylvania's Business Combination Statute.

Norfolk Southern Responds With
a Superior Offer for Conrail

On October 23, 1996, Norfolk Southern publicly announced its intention to commence a cash tender offer for any and all shares of Conrail stock for $100 per share, to be followed, after required regulatory approvals, by a cash merger at the same price. Norfolk Southern commenced its offer on October 24, 1996.

ARGUMENT

I. BOTH NORFOLK SOUTHERN AND KATHRYN B. McQUADE HAVE STANDING TO SUE CONRAIL'S BOARD FOR BREACH OF FIDUCIARY DUTY.

A. Section 1782 Of The Business Corporation Law -- Which The Defendants Ignore -- Explicitly Allows Beneficial Owners Of Stock To Bring A Derivative Action.

The defendants argue that the plaintiffs do not have standing to sue under SECTION 1717 because they are not, and never were, record shareholders of Conrail. (Op. Br. at 11). The defendants neglected to bring to the attention of the Court, however, the specific provisions of SECTION 1782 ("Actions Against Directors and Officers") of the Pennsylvania Business Corporation Law (the "BCL") that address this issue in detail. Pursuant to the clear language of SECTION 1782, beneficial ownership of stock is sufficient to give a plaintiff standing to bring a derivative action for breach of fiduciary duty. Section 1782(a) of Subchapter F ("Derivative Actions") specifically relates to actions against directors and officers. It states, in plain English, that:

> in any action or proceeding brought to enforce a secondary right on the part of one or more shareholders of a business corporation against any present or former officer or director of the corporation because the corporation refuses to enforce rights that may properly be asserted by it, each plaintiff must aver and it must be made to appear that each plaintiff was a shareholder of the corporation or owner of a beneficial interest in the shares at the time of the transaction of which he complains.... (Emphasis added.)

An additional indication that the legislature intended to provide standing for a broad range of shareholders seeking to bring a breach of fiduciary duty claim is contained in subsection (b) of SECTION 1782, which states, in relevant part:

> [a]ny shareholder or person beneficially interested in shares of the corporation ... who does not meet [the] requirements [of subsection (a)] may, nevertheless in the discretion of the court, be allowed to maintain the action or proceeding... (Emphasis

added.)(2)

---

2 The defendants rely on BCL SECTIONSECTION 1103 (a definitional section) and 1717 for the proposition that only record owners have standing to bring a derivative action for breach of fiduciary duty. Section 1103 does define "shareholder" as a "record" shareholder. Section 1782, however, expands the class of individuals who may bring a derivative claim to "shareholder or owner of a beneficial interest in the shares." Section 1717 says only that a shareholder may not bring a direct action against a director for breach of fiduciary duty. It does not say who may bring a derivative claim. Section 1782, quoted in the text above, governs who may bring a derivative claim and expressly gives beneficial owners the right to do so. It is a basic precept of statutory construction that where there is a specific statutory provision relating to an issue, that specific provision controls over a more general provision where the two may be viewed as inconsistent. See, e.g., New Bethlehem Volunteer Fire Co. v. Workmen's Compensation Appeal Bd., 654 A.2d 267, 269-70 (Pa. Commw.), appeal denied, 668 A.2d 1140 (Pa. 1995) (specific statutory provisions control over general provision when they conflict).

While the clear language of the statute is enough to establish that beneficial owners may initiate a derivative action on behalf of the corporation, the case law also supports plaintiffs' position.

In Kusner v. First Pennsylvania Corp., 395 F. Supp. 276 (E.D. Pa. 1975) rev'd in part on other grounds, 531 F.2d 1234 (3d Cir. 1976), this Court found that the holder of subordinated debentures could not maintain a derivative action because he was not the holder of a "proprietary interest" in the business entity. Id. at 280. The Kusner Court recognized that the "right to sue derivatively is an attribute of ownership...." Id. at 281. The Court did not distinguish between record and beneficial ownership because such distinctions are of no accord. It is the claim of ownership of the stock, regardless of the capacity in which that ownership occurs, that gives rise to the right to maintain an action on the corporation's behalf. See also, In re Penn Central Transp. Co., 341 F. Supp. 845 (E.D. Pa. 1972); Murdock v. Follansbee Steel Corp., 213 F.2d 570 (3d Cir. 1954)(cases where a beneficial owner brought a derivative action).

The defendants' argument that only record owners of stock may bring derivative suits is not supported by any provision of the BCL or case law interpreting Pennsylvania law. The clear language of Section 1782 is fatal to the defendants' argument. The defendants' position must be rejected by this Court.

B. The Plaintiffs Brought Their Breach Of Fiduciary Duty Claims As Derivative Claims.

The defendants spend an entire section of their brief arguing that shareholders cannot bring a direct action against the directors of a corporation for breach of fiduciary duty, but must, instead, bring a derivative claim. (Op. Br. at 9-11) But the plaintiffs do not dispute that point. They have brought their breach of fiduciary duty claims as derivative claims. (See Am. Comp. 97-99; Count I (Breach of Fiduciary Duty With Respect to the Charter Amendment), Count II (Breach of Fiduciary Duty With Respect to the Poison Pill), Count III (Breach of Fiduciary Duty With Respect to Pennsylvania Business Combinations Statute), Count V (Breach of

Fiduciary Duty With Respect to the Poison Pill Lock-In), Count VII (Breach of Fiduciary Duty With Respect to the 180-Day Lock-Out), and Count VIII (Breach of Fiduciary Duty With Respect to the Lock-Up Provisions)

II. PLAINTIFFS NORFOLK SOUTHERN AND MCQUADE ARE ADEQUATE REPRESENTATIVES OF CONRAIL'S SHAREHOLDERS FOR PURPOSES OF RULE 23.1.

The defendants next argue that even if the plaintiffs have standing to sue pursuant to SECTION 1717, they are not adequate class representatives as required by Rule 23.1, because their interests conflict with those of Conrail's other shareholders. Like the defendants' previous arguments relating to standing, their argument relating to adequacy of representation is not supported by the law or the facts.

The defendants' argument centers around the contention that the economic interests of a shareholder/takeover bidder are "necessarily" divergent from the interests of the target's other shareholders. (Op. Br. at 12) The logic that the defendants use in arriving at this conclusion is faulty, and the case law they cite is inapposite.

First and foremost, the case law is clear on the fact that "every case in which the standing of a shareholder to maintain a derivative suit is disputed must be decided on the basis of what is fair in the particular circumstances and not according to rigid rules." Mobil Corp. v. Marathon Oil Co., No. C-2-81-1402, 1981 WL 1713 at *27 (S.D. Ohio Dec. 7, 1981), citing Davis v. Comed, Inc., 619 F.2d 588 (6th Cir. 1980). The defendants' attempt to put this case into a box and have it decided upon an unyielding set of factors -- rather than the actual circumstances presented -- should be rejected.

This Court's analysis should start with the fact that the burden of proving inadequacy of representation falls squarely on the shoulders of the defendants challenging the plaintiffs' representation. Air Line Pilots Assoc. Int'l. v. UAL Corp., 717 F. Supp. 575, 579 (N.D. Ill. 1989), aff'd, 897 F.2d 1394 (7th Cir. 1990); Shamrock Assocs. v. Horizon Corp., 632 F. Supp. 566 (S.D.N.Y. 1986); Granada Investments, Inc. v. DWG Corp., 717 F. Supp. 533, 538 (N.D. Ohio 1989), aff'd, 962 F.2d 1203 (6th Cir. 1992). In assessing the defendants' contentions in this context, the Court should also be mindful that the defendants have motives in seeking to disqualify representative plaintiffs that are adverse to those of the corporation; the defendants clearly do not want to be sued, even if it is for the corporation's benefit.

Contrary to the misleading impression left by Conrail's brief, numerous courts have held that tender offerors may have standing to bring a derivative action. "A [plaintiff] need not necessarily be disqualified from bringing a derivative action against the corporation merely because that shareholder is also a potential acquiror." Newell Co. v Vermont American Corp., 725 F. Supp. 351, 368 (N.D. Ill. 1989); Air Line Pilots Assoc., 717 F. Supp. at 579; MacAndrews & Forbes Holdings, Inc. v. Revlon, Inc., C.A. No. 8126, 1985 WL 21129 (Del. Ch. Oct. 9, 1985).

Additionally, and more generally, a plaintiff should not be disqualified under Rule 23.1 "merely because of the existence of interests beyond those of the class he seeks to represent, so long as he shares a common interest in the subject matter of the suit." G.A.

Enters. v. Leisure Living Communities, Inc., 517 F.2d 24 (1st Cir. 1975); Tyco Laboratories, Inc. v. Kimball, 444 F. Supp. 292, 299 (E.D. Pa. 1977). The Court's primary focus should be to "consider any indications that suggest the existence of extrinsic factors which `render it likely that the representative may disregard the interests of the class members.'" Granada Investments, 717 F. Supp. at 538 (citations omitted).

There are numerous cases where courts have found that the interests of a takeover bidder are not economically inconsistent with the interests of other shareholders. For example, in Granada, the court found that Granada, a takeover bidder, was an adequate representative of the class. In clear language directly on point here, the Granada Court found that:

> Although derivative plaintiff brings this suit primarily to force the consideration by DWG of a merger proposal, Granada's interests do not appear to be economically antagonistic to the interests of the other shareholders. While Granada is a potential buyer and the other shareholders are potential sellers, their interests are not inevitably in conflict. Both Granada and the other shareholders share an interest in preventing DWG's directors from locking up control of DWG. Moreover, in its proposal, Granada has offered to purchase DWG stock at a price of $22.00 per share, a price significantly higher than the stock's current listing on the exchange. Conceivably, this offering price does not reflect the true value of the DWG stock; yet by bringing this suit, Granada hopes to create an opportunity for the shareholders to make that determination. By either rejecting or accepting Granada's price (or a price offered by another bidder), the shareholders, rather than the Court, ultimately decide whether plaintiff's interests are antagonistic to their own. (Emphasis added; footnote omitted.)

717 F. Supp. at 538. The Granada court's rationale provides compelling support for a finding that Norfolk Southern has standing to pursue its claims here.

The Granada Court's view is accepted by other courts that have considered this issue. In Air Line Pilots Assoc., 717 F. Supp. at 579, and Mobil Corp. v. Marathon Oil Co., 1981 WL 1713 (S.D. Ohio 1981), for example, the courts came to the same conclusion that the Granada Court reached. In Air Line Pilots and Mobil, the courts rejected the argument that the defendants have advanced here -- namely that the economic interests of the plaintiffs are in conflict because the bidder/shareholder seeks the lowest possible price and the other shareholders desire the highest price they can get for their shares. In both of those cases, the courts reasoned that the bidder/shareholder had the "best opportunity and incentive to see that the target corporation `plays fair'" and accordingly serves as an adequate representative for the class. Mobil Corp. v. Marathon Oil Co., 1981 WL 1713 (S.D. Ohio 1981)

Even the case that defendants rely most heavily upon to support their argument, Baron v. Strawbridge & Clothier, 646 F. Supp. 690 (E.D. Pa. 1986), in fact supports the view that the plaintiffs urge this Court to adopt. The Baron Court noted that:

> In finding that economic antagonisms exist between the plaintiffs and the other shareholders, the court is not suggesting that interests automatically diverge in all cases where a derivative plaintiff is a potential purchaser and other shareholders are potential sellers. (Emphasis added.)

646 F. Supp. at 695.

Norfolk Southern has the same interests as the other shareholders of Conrail -- prohibiting the Conrail Board from locking up the sale of the company without giving due consideration to the alternatives. For the reasons set forth in the Air Line Pilots, Mobil and Granada cases, this Court should find that the plaintiffs are adequate representatives of the class in this case.(3)

III. PRE-SUIT DEMAND SHOULD BE EXCUSED ON THE FACTS PLED BY THE PLAINTIFFS.

Defendants contend that the plaintiffs' Complaint contains insufficient allegations of "fraud" on the part of individual defendant directors to excuse the formality of a demand on the board of directors under Pennsylvania law. This contention is meritless. The defendants have misread the case law and the plaintiffs' Complaint.

Under Pennsylvania law, a shareholder need not make a demand on the board of directors before filing a derivative action if that demand would be "a vain or useless thing." See Glenn v. Kittanning Brewing Co., 103 A. 340, 343 (Pa. 1918). In Garber v. Lego, 11 F.3d 1197 (3d Cir. 1993), the Third Circuit recognized that a demand is unnecessary under Pennsylvania law where the defendant directors are alleged to have acted to further their own self-interest at the expense of Conrail's shareholders and other constituencies. Garber, 11 F.3d at 1204-05. See also Glenn, 103 A. at 343 (demand would be "vain or useless" where plaintiff alleged that board members issued stock to one of the defendants to gain control of the corporation); Treat v. Pennsylvania Mut. Life Ins. Co., 52 A. 60 (Pa. 1902) (demand excused where plaintiff challenged managers' conduct in voting themselves unreasonably large salaries and granting the president and treasurer back pay). Similarly, the Pennsylvania Supreme Court has held that a demand would be futile where it was alleged that the board acted to ratify the self-dealing of the corporation's president. See Bailey v. Jacobs, 189 A. 320, 330 (Pa. 1937) (demand would be "futile" where the board "not only took no action to protect the interests of the stockholders but passed resolutions seeking to ratify defendant's acts").

---

3 The defendants also argue that plaintiff McQuade is not an adequate representative of the class because she suffers from the same problems the defendants allege Norfolk Southern to have. As described above, Norfolk Southern is an adequate representative. Ms. McQuade, therefore, is also an adequate representative of Conrail's shareholders.

Here, plaintiffs' allegations make it plain that any demand upon the defendant directors would have been a waste of time. Plaintiffs' complaints are packed with specific allegations that the individual defendant directors engaged in fraudulent activity, acted to further their own interests at the expense of Conrail's shareholders and other constituencies, and stand to benefit personally from the challenged conduct. (See generally Am. Comp. 98 (a)-(h)) By way of example, plaintiffs allege:

* that the individual directors "acted fraudulently by pursuing defendants' campaign of misinformation, described [in the complaint], in order to coerce, mislead

and manipulate Conrail shareholders to swiftly deliver control of Conrail to the low bidder." (Am. Comp. 98(a))

* that the individual defendant directors were "motivated by their personal interest in entrenchment" to engage in the challenged conduct at the expense of shareholders. (Am. Comp. 98(c)-(d), (f))

* that, in dealing with CSX, the defendant directors were motivated by the fact that the CSX deal contains "executive succession and compensation guarantees for Conrail management and board composition covenants effectively ensuring Conrail directors of continued board seats." (Am. Comp. 3)

* that the defendant directors fraudulently adopted extraordinary entrenchment mechanisms, such as the "continuing directors" requirement, designed to further their own personal interests and disenfranchise shareholders. (Am. Comp. 80-88)

Moreover, not only do plaintiffs allege that the individual board members acted to further their own personal interests, but they also allege that the defendant directors acted to ratify defendant LeVan's individual self-dealing as well. The Complaint sets forth in detail the lucrative deal that defendant LeVan worked out with CSX, which was approved by the defendant directors as part of the CSX Merger Agreement. (Am. Comp. 71-73, 98) Given the plain allegations of the defendant directors' self-dealing, and the allegations of defendant LeVan's own self-dealing that was ratified by the defendant directors, there can be no question that a demand on the Conrail Board would have been futile. In such a situation, the Board could not be expected "to sue for a redress of wrongs which they had sought to validate." Bailey, 189 A. at 330.

Nothing in the cases relied on by defendants changes this conclusion or supports their contention that the allegations in plaintiffs' Complaint are insufficient to excuse a demand. In Garber, for example, the plaintiff challenged the grant of incentive compensation plans to key executives by the corporation's Compensation Committee. Unlike this case, the shareholder plaintiff did not allege fraud or self-dealing by the individual defendant directors.

The Pennsylvania Supreme Court's decision in Wolf v. Pennsylvania R.R., 45 A. 936 (Pa. 1900), is similarly inapposite. In Wolf, the plaintiff' shareholders did not even attempt to allege fraud or self-dealing, but claimed that the defendant directors "allowed themselves to be `kept in absolute ignorance of [the corporation's] business.'" Wolf, 45 A. at 937 (citations omitted). The Pennsylvania Supreme Court simply held that such allegations of "erroneous judgment" were not sufficient to excuse demand. Id.; see also Kelly v. Thomas, 83 A. 307 (Pa. 1912) (complaint that named only three of seven directors and failed to allege any specific fraudulent conduct was insufficient to excuse demand).

Finally, demand would have been futile here because the defendant directors have set a schedule designed to rush the CSX deal through shareholder approval. The CSX Merger Agreement was announced on October 15, 1996. Defendants scheduled a shareholders meeting for November 14, 1996, only one month after the announcement. At that meeting, defendants intend to ask shareholders to vote on the Charter Amendment that would allow

CSX to acquire up to 50% of Conrail's stock without triggering certain provisions of Pennsylvania's anti-takeover law. If that amendment passes, Conrail's own proposed proxy materials state that approval of the merger is virtually certain. Given the expedited schedule set by defendants, requiring shareholders to make a demand on the Conrail Board would effectively deny them a remedy.

IV. THE CHARTER AMENDMENT IS INVALID UNDER PENNSYLVANIA LAW.

Defendants argue that Pennsylvania law "expressly empower[s]" the directors to withhold at their discretion the filing of the proposed Charter Amendment opting out of Subchapter 25E of the Pennsylvania BCL even if the shareholders approve it. (Op. Br. at 18) Defendants are simply wrong on the law - the Pennsylvania BCL does not authorize a discriminatory, deal-specific opt-out; nor does it contemplate a process in which the directors can initiate a shareholder vote, but only abide by its results if they feel like it. Moreover, while defendants accuse plaintiffs of relying on a "snippet" of the BCL to support their claim, it is defendants that cherry pick a phrase from plaintiffs' allegations and distort plaintiffs' points to fit their arguments.

The CSX Merger Agreement, between CSX and Conrail, provides that CSX will purchase 40% of Conrail stock via a tender offer or offers for $92.50 a share. CSX also has an option to purchase an additional 15,955,477 shares of common stock that would, in combination with the 40% purchased through the tender offer, bring its holdings to 50% of Conrail stock. Once that happens, according to Conrail's own proposed proxy statement, approval of the merger by the Conrail shareholders would be certain.

One stumbling block stands between CSX and expedited approval of the merger. The Pennsylvania BCL, Subchapter 25E, requires that any person who acquires control over more than 20% of the voting shares of a Pennsylvania corporation must purchase the remaining shares, if tendered, for a "fair price." Fair price is defined as not less than the highest price per share paid by the acquiring person during the 90 days prior to obtaining control over more than 20% of the voting shares plus an increment representing the proportionate value of any control premium. Thus, if CSX purchases more than 20% of Conrail's shares for $92.50 in its initial tender offer, it would have to purchase 100% of the shares for at least $92.50.

To remedy this problem, and lock-up CSX's control over Conrail, a November 14, 1996 shareholders meeting has been scheduled. At that meeting, shareholders will be asked to approve an amendment to Conrail's articles of incorporation "opting out" of this provision of the BCL and paving the way for CSX to purchase a controlling interest in Conrail. The directors, however, are not planning to file the amendment, even if passed by the shareholders, unless the CSX deal is moving forward. Thus, the amendment would pave the way for the CSX deal, but the anti-takeover impediments would remain for competing takeover proposals (that might be less favorable to Mr. LeVan and/or the other defendant directors).

In their motion to dismiss briefing, defendants suggest that plaintiffs' sole support for their argument that the proposed deal-specific opt-out is unlawful is a "snippet" from Section 1914(a) of the BCL that requires an articles amendment to be adopted if it is passed by the shareholders. (Op. Br. at 18) Defendants have missed the point. Plaintiffs' claim is not simply that

the proposed Charter Amendment process violates the procedural rules for filing amendments passed upon by the shareholders. Rather, plaintiffs claim that the Charter Amendment is an attempt to subvert the opt-out provisions of the Pennsylvania BCL. (Am. Comp. at 218-221)

The Pennsylvania BCL makes no provision for a discriminatory opt-out as contemplated by defendants. Section 2541(a) of the Pennsylvania BCL allows corporations to opt out of Subchapter 25E. Nothing in the statute, however, authorizes the type of deal-specific opt-out proposed by the Conrail Board. Indeed, the defendants' proposed procedure undermines the very purpose of the opt-out provision. That provision was designed to allow shareholders to free the corporation from the impediments of the anti-takeover provisions in Subchapter 25E and to loosen the directors' grip of control on the corporation. Here, to the contrary, the discriminatory opt-out provision is being used as part of defendants' plan to tighten that grip.

Defendants' argument that the Pennsylvania BCL gives them the authority to "terminate" amendments if provisions for termination are included in the resolution passed by the shareholders similarly misses the point. The section of the statute upon which they rely -- SECTION 1914(d) - says nothing about the procedure for opting out of Subchapter 25E. Moreover, the so-called "termination" provision here purports to allow the directors to ignore the shareholder vote if they do not like the way things are going (i.e., if too few shareholders tender their shares to CSX). Common sense and logic dictate that such an outcome cannot be a proper reading of the statute.

In short, defendants are attempting to stand the Pennsylvania BCL on its head. Defendants are using the opt-out rights in the anti-takeover provisions of the BCL, designed to increase shareholder freedom, to further their own personal interests in locking up control over Conrail. It is this misuse of the opt-out procedure -- wholly ignored in defendants' motion to dismiss briefing -- that provides the basis for plaintiffs' claim that the Charter Amendment is unlawful.

V. PLAINTIFFS' FEDERAL CLAIMS BASED ON INADEQUATE DISCLOSURES STATE A VALID CAUSE OF ACTION.

In a classic example of "too little, too late," defendants attempt to argue that the plaintiffs' federal disclosure claims are moot because of subsequent disclosures. Defendants' argument flies directly in the face of case law decided by this Court.

In Klein v. Boyd, No. Civ. A. 95-5410, 1996 WL 230012 (E.D. Pa. May 3, 1996), Judge Yohn denied a motion to dismiss certain federal securities claims and RICO claims based on subsequent curative disclosures. In Klein, the defendant argued that all of the alleged misrepresentations and omissions were corrected with later written disclosures. 1996 WL 230012, at *7. In rejecting that argument, the Court held that a motion to dismiss is generally based on the information contained in the complaint. Id. The Court found that it was only proper to consider extraneous information if such information was integral to the complaint. Id. Since the documents that formed the basis of the plaintiffs' claims were included in the complaint, the Court saw no reason to consider the defendants' additional documents on the motion to dismiss.

The same logic applies here. The plaintiffs' federal claims are based upon inadequate disclosures in the defendants' Schedule 14D-9 and proxy statement.

Those documents are false and materially misleading, and those documents form the basis of the Complaint. Accordingly, this Court should not consider the additional disclosures on a motion to dismiss.

If this Court decides that examining the subsequent disclosure documents is appropriate at this stage of the proceedings, a motion to dismiss must still be denied. An analysis of the content of the defendants' disclosures and whether those additional disclosures adequately inform the Conrail shareholders of the impact of the CSX and Norfolk Southern offers are substantial questions of fact. See In re Sunrise Sec. Litig., MDL No. 655, 1987 WL 19343 (E.D. Pa. July 7, 1987). Since the motion presently before this Court is a motion to dismiss, and not a motion for summary judgment, defendants' argument is not properly before the Court.

In any event, the Amended Complaint filed on October 30, 1996 adds new disclosure claims relating to, among other things, events since the original Complaint was filed on October 23. The revised claims demonstrate that even the supplemented disclosures made by the defendants are misleading and inadequate.

The defendants' motion to dismiss should be denied.(4)

VI. THE DEFENDANTS' UNCLEAN HANDS CLAIM IS WITHOUT BASIS.

The defendants' last argument is that the plaintiffs are not entitled to equitable relief because they breached a 1994 Confidentiality Agreement they entered into with Conrail.(5) The defendants' claim is not supported by the facts.

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4 In its joinder in Conrail's motion to dismiss, CSX argues that the plaintiffs' civil conspiracy claim must be dismissed based on the United States Supreme Court's decision in Central Bank of Denver, N.A. v. First Interstate Bank of Denver, N.A, 114 S. Ct. 1439 (1994). The defendants, in yet another blatant oversight, fail to cite In re Towers Financial Corporation Noteholders Litig., 936 F. Supp. 126 (S.D.N.Y 1996). In Towers, the Court noted that Central Bank clearly stands for the proposition that there is no private right of action for an aiding and abetting claim under the federal securities laws. Id. at 128. However, the Towers Court also found that conspiracy liability, which contemplates the intentional wrongdoing of a party, is a separate and distinct concept that is not covered under the precedent set forth in Central Bank. Id. at 130.

As the defendants correctly state, Norfolk Southern and Conrail entered into an agreement on August 17, 1994 to exchange certain proprietary information in order to facilitate the evaluation of a potential strategic transaction between the companies. The information exchange was subject to a confidentiality agreement whereby the parties agreed not to reveal any of the information to any third party.

However, the story as to the August 17, 1994 agreement does not end with that one document. On October 3, 1994, the parties entered into a brief letter agreement that terminated all of the provisions of the August 17 agreement (Attached as Exhibit A). Despite the fact that the October 3 agreement was executed by Conrail, and in fact initiated by Conrail, the defendants have failed to bring it to the Court's attention. A

simple reading of the subsequent October 3 agreement establishes that the defendants' claim of unclean hands is completely meritless.

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5 Of course, the easy answer to the defendants' unclean hands argument is that unclean hands is an affirmative defense which is not relevant on a motion to dismiss, which looks only to the allegations of the Complaint. However, the plaintiffs respond to the merits of the argument in order to bring to the attention of the Court certain dispositive facts that rebut the defendants' argument in full.

CONCLUSION

For the reasons stated in this brief, the defendants' motions to dismiss should be denied.

Respectfully submitted,

/s/ MARY A. McLAUGHLIN

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DATED: October 31, 1996

EXHIBIT (G)(4)

IN THE UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF PENNSYLVANIA

NORFOLK SOUTHERN CORPORATION, a Virginia corporation, ATLANTIC ACQUISITION CORPORATION, a Pennsylvania corporation, AND KATHRYN B. McQUADE, Plaintiffs, -against- CONRAIL INC., a Pennsylvania corporation, DAVID M. LEVAN, H. FURLONG BALDWIN, DANIEL B. BURKE, ROGER S. HILLAS, CLAUDE S. BRINEGAR, KATHLEEN FOLEY FELDSTEIN, DAVID B. LEWIS, JOHN C. MAROUS, DAVID H. SWANSON, E. BRADLEY JONES, AND RAYMOND T. SCHULER AND CSX CORPORATION, Defendants.	C.A. No. 96-CV-7167

MOTION FOR TEMPORARY RESTRAINING ORDER

Pursuant to Federal Rule of Civil Procedure 65(b), plaintiffs Norfolk Southern Corporation, Atlantic Acquisition Corporation, and Kathryn B. McQuade hereby move this Court for temporary injunctive relief as follows:

1. To temporarily enjoin defendants and all persons acting on their behalf or in concert with them from taking any action to enforce Sections 3.1(n) and 5.13 of the Agreement and Plan of Merger by and among Conrail Inc., Green Acquisition Corp. and CSX Corporation and any other provisions of such Merger Agreement which purport to limit the ability of the Board of Directors of Conrail to take action or make any determination with regard to Conrail's Rights Agreement, as amended.

2. To temporarily enjoin defendants and all persons acting on their behalf or in concert with them from distributing any rights pursuant to Conrail's Rights Agreement and to require the defendants to take such action as is necessary to prevent a "Distribution Date" from occurring pursuant to such Rights Plan.

The grounds for the relief requested are set forth in the plaintiffs' memorandum of law.

_____
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DATED: November 1, 1996

IN THE UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF PENNSYLVANIA

NORFOLK SOUTHERN CORPORATION, a Virginia corporation, ATLANTIC ACQUISITION CORPORATION, a Pennsylvania corporation AND KATHRYN B. McQUADE,	
Plaintiffs,	
-against-	C.A. No. 96-CV-7167
CONRAIL INC., a Pennsylvania corporation, DAVID M. LEVAN, H. FURLONG BALDWIN, DANIEL B. BURKE, ROGER S. HILLAS, CLAUDE S. BRINEGAR, KATHLEEN FOLEY FELDSTEIN, DAVID B. LEWIS, JOHN C. MAROUS, DAVID H. SWANSON, E. BRADLEY JONES, AND RAYMOND T. SCHULER AND CSX CORPORATION,	
Defendants.	

PLAINTIFFS' OPENING BRIEF IN SUPPORT OF
THEIR MOTION FOR A TEMPORARY RESTRAINING ORDER

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DATED: November 1, 1996

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INTRODUCTION

This case presents the most egregious instance of a company hastily "locking up" a transfer of control to a favored bidder without regard for the best interests of its shareholders and other constituencies. While the matters raised in the plaintiffs' Amended Complaint will be the subject of a preliminary injunction hearing on November 12, plaintiffs now seek immediate injunctive relief with respect to one particularly draconian feature of Conrail's arsenal of defensive weapons which threatens immediate irreparable harm before November 12.

Plaintiffs seek to prevent the occurrence of a "Distribution Date" under defendant Conrail's Rights Plan (the "Rights Plan") and prevent the distribution on November 7 of rights issued pursuant to the Rights Plan. Under the terms of the Rights Plan, the rights certificates are required to be issued on the tenth business day following the commencement of an offer by someone other than CSX (which Conrail has exempted from its Rights Plan). Since Norfolk Southern commenced its tender offer for all of Conrail's shares on October 24, 1996, a Distribution Date will occur on November 7, 1996, unless the Board determines otherwise.

What makes Conrail's attempt to "lock-up" control so particularly egregious in this case is the fact that Conrail's Board can no longer "determine otherwise." Conrail's directors and CSX have agreed in Section 5.13 of the Conrail/CSX Merger Agreement not to amend the Rights Plan or take any other action with respect to the Rights Plan, such as delaying the date on which the rights would be distributed. Conrail's directors are thus prohibited, as a result of their own misconduct, from taking any action to prevent distribution of the rights to Conrail's shareholders on November 7, 1996. Conrail's directors have essentially ceded their fiduciary duties in this regard to CSX.

If the rights are distributed, any person who thereafter becomes the beneficial owner of 10 percent or more of Conrail's common stock, will trigger the "flip-in" or "flip-over" features of the Rights Plan, thereby causing enormous dilution of the stock interest held by the acquiring person. The practical effect of the occurrence of a Distribution Date and the distribution of the

rights is that Conrail's directors will no longer be able to remove the rights as an obstacle to any transaction other than the pending transaction with CSX.

While this Court has scheduled a preliminary injunction hearing for November 12, 1996 to consider Norfolk Southern's request for preliminary injunctive relief, there may be nothing for this Court to decide by November 12 if the status quo cannot be maintained as to the rights until then. Unless a temporary restraining order is granted, a Distribution Date will occur under Conrail's draconian Rights Plan on November 7, 1996 and the rights will become exercisable. The Conrail Board would then be unable to consider any transaction (other than the favored CSX Transaction) until the Rights Plan expires in 2005. Thus, if a Distribution Date occurs, Conrail will have ensured that no higher offer could be consummated until the year 2005.

Temporary injunctive relief is warranted so that a fuller record may be developed and so that this Court will have a meaningful opportunity on November 12, 1996 to render effective relief on the plaintiffs' claims. Plaintiffs seek, among other relief, an order requiring the defendants to take such action as is necessary to prevent a Distribution Date from occurring and enjoining the defendants from distributing the rights to shareholders pursuant to a Distribution Date related to Norfolk Southern's pending tender offer.

STATEMENT OF FACTS

The Competing Proposals

This action arises from the attempt by defendants Conrail, its directors, and CSX to coerce, mislead, and fraudulently manipulate Conrail's shareholders to swiftly deliver control of Conrail to CSX pursuant to a tender offer for up to 20% of Conrail's stock for $92.50 in cash, a possible second tender offer and a back-end stock-for-stock merger (the "CSX Transaction"). As of the close of business on October 29, 1996, the blended value of the CSX Transaction was slightly more than $85 per Conrail share. The CSX Transaction contains a variety of lock-up devices designed to forestall any competing higher bid for Conrail. Such devices are described in detail in paragraphs 36-70 of the Amended Complaint (filed on October 30, 1996) and at pages 12-15 of the Plaintiffs' Memorandum of Law in Opposition to Defendants' Motions to Dismiss (filed on October 31, 1996).

On October 24, 1996, Norfolk Southern commenced a public tender offer for all shares of Conrail common stock at a price of $100 in cash per share (the "Norfolk Southern Offer").

Conrail's Rights Plan

Poison pill rights plans of the type adopted by Conrail are normally designed to make an unsolicited acquisition prohibitively expensive to an acquiror by diluting the value and proportional voting power of the shares acquired. (V. Am. Comp. 40)(1)

Under such a plan, stockholders receive a dividend of originally uncertificated, unexercisable rights. The rights become exercisable and certificated on the so-called "Distribution Date," which under the Conrail Rights Plan is defined as the earlier of 10 days following public announcement that a person or group has acquired beneficial ownership of 10% or more of Conrail's stock or 10 days following the commencement of a tender offer that would result in 10% or greater ownership of

Conrail stock by the bidder. On the Distribution Date, Conrail would issue certificates evidencing the rights, each of which would allow the holder to purchase a share of stock at a set price. Once rights certificates were issued, the rights could trade separately from the associated shares of stock. (V. Am. Comp. 41)

The provisions of a rights plan that cause the dilution to an acquiror's position in the corporation are called the "flip-in" and "flip-over" provisions. Rights typically "flip in" when, among other things, a person or group obtains some specified percentage of the corporation's stock; in the Conrail Rights Plan, 10% is the "flip-in" level. Upon "flipping in," each right would entitle the holder to receive common stock of Conrail having a value of twice the exercise price of the right. That is, each right would permit the holder to purchase newly issued common stock of Conrail at half price (specifically, $410 worth of Conrail stock for $205). The person or group acquiring the 10% or greater ownership, however, would be ineligible to exercise such rights. In this way, a rights plan dilutes the acquiror's equity and voting position. Poison pill rights "flip over" if the corporation engages in a merger in which it is not the surviving entity. Holders of rights, other than the acquiror, would then have the right to buy stock of the surviving entity at half price, again diluting the acquiror's position. The Conrail Rights Plan contains both a "flip-in" provision and a "flip-over" provision. (V. Am. Comp. 42)

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1 "V. Am. Comp." refers to Plaintiffs' Verified First Amended Complaint filed on October 30, 1996.

So long as corporate directors retain the power ultimately to eliminate the anti-takeover effects of a rights plan in the event that they conclude that a particular acquisition would be in the best interests of the corporation, a poison pill plan can be used to promote legitimate corporate interests. Thus, typical rights plans reserve power in a corporation's board of directors to redeem the rights in toto for a nominal payment, or to amend the plan, for instance, to exempt a particular transaction or acquiror from the dilutive effects of the plan. (V. Am. Comp. 43)

The Effect Of The Merger Agreement On The Conrail's Directors Ability to Make Decisions Relating To The Rights Plan

The Conrail Rights Plan contains provisions for redemption and amendment. However, an unusual aspect of the Conrail Rights Plan is that the power of Conrail's directors to redeem the rights or amend the plan to exempt a particular transaction or bidder terminates on the Distribution Date. While the Conrail Rights Plan gives Conrail's directors the power to effectively postpone the Distribution Date, the CSX Merger Agreement purports to bind them contractually not to do so. Thus, the Distribution Date under Conrail's Rights Plan will occur on November 7, 1996 -- ten business days after the date when Norfolk Southern commenced its Offer -- and Conrail's directors have entered into an agreement which purports to tie their hands so that they cannot do anything to prevent it. (V. Am. Comp. 44)

Ironically, the specific provisions of the CSX Merger Agreement which purport to prevent the Conrail directors from postponing the Distribution Date are the very same sections which require Conrail to exempt the CSX Transaction from the Conrail Rights Plan -- Sections 3.1(n) and 5.13. Section 3.1(n) provides, in pertinent

part:

> Green Rights Agreement and By-laws. (A) The Green Rights Agreement has been amended (the "Green Rights Plan Amendment") to (i) render the Green Rights Agreement inapplicable to the Offer, the Merger and the other transactions contemplated by this Agreement and the Option Agreements and (ii) ensure that (y) neither White nor any of its wholly owned subsidiaries is an Acquiring Person (as defined in the Green Rights Agreement) pursuant to the Green Rights Agreement and (z) a Shares Acquisition Date, Distribution Date or Trigger Event (in each case as defined in the Green Rights Agreement) does not occur by reason of the approval, execution or delivery of this Agreement, and the Green Stock Option Agreement, the consummation of the Offer, the Merger or the consummation of the other transactions contemplated by this Agreement and the Green Stock Option Agreement, and the Green Rights Agreement may not be further amended by Green without the prior consent of White in its sole discretion. (emphasis added)

Section 5.13 provides, in pertinent part:

> The Board of Directors of Green shall take all further action (in addition to that referred to in Section 3.1(n)) reasonably requested in writing by White (including redeeming the Green Rights immediately prior to the Effective Time or amending the Green Rights Agreement) in order to render the Green Rights inapplicable to the Offer, the Merger and the other transactions contemplated by this Agreement and the Green Stock Option Agreement. Except as provided above with respect to the Offer, the Merger and the other transactions contemplated by this Agreement and the Green Stock Option Agreement, the Board of Directors of Green shall not (a) amend the Green Rights Agreement or (b) take any action with respect to, or make any determination under, the Green Rights Agreement, including a redemption of the Green Rights or any action to facilitate a Takeover Proposal in respect of Green.

(V. Am. Comp. 45)

Thus, although under the Conrail Rights Plan the Conrail Board is empowered to "determine[] by action ... prior to such time as any person becomes an Acquiring Person" that the Distribution Date will occur on a date later than November 7, the Conrail board has contractually purported to bind itself not to do so. (V. Am. Comp. 46)

If the Distribution Date is permitted to occur, Conrail, its shareholders, and its other constituencies face catastrophic irreparable injury.(2) If the Distribution Date occurs and then the CSX Transaction does not occur for any number of reasons -- for instance, because (i) the Conrail shareholders do not tender sufficient shares in the CSX offer, (ii) the Conrail shareholders do not approve the CSX merger, (iii) the merger does not receive required regulatory approvals, or (iv) CSX exercises one of the conditions to its obligation to complete its offer -- Conrail will be essentially incapable of being acquired or engaging in a business combination until 2005. This would be so regardless of the benefits and strategic advantages of any business combination which might otherwise be available to Conrail. In the present environment of consolidation in the railroad

industry, such a disability would plainly be a serious irremediable disadvantage to Conrail, its shareholders and all of its constituencies. (V. Am. Comp. 47, 48, see also 18, 38, 121, 126)

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2 Indeed, counsel for plaintiffs are aware of no situation in the ten year history of rights plans in which a distribution of rights actually occurred pursuant to a rights plan of the type adopted by Conrail.

ARGUMENT

I. PLAINTIFFS AND CONRAIL'S OTHER STOCKHOLDERS WILL SUFFER IRREPARABLE, IMMINENT INJURY UNLESS THE COURT RESTRAINS THE DISTRIBUTION OF THE RIGHTS.

A. Standards For The Issuance Of A Temporary Restraining Order.

"To obtain a temporary restraining order in this Circuit, the moving party has the burden of showing (a) a reasonable likelihood of success on the merits; (b) that it will suffer irreparable harm absent such relief and (c) that on balance the equities and the public interest favor such relief." Graphic Management Assoc. v. Roger Honegger & Ferag, Inc., 1994 U.S. Dist. LEXIS 1981, at *2 (E.D. Pa. Feb. 25, 1994) (citing American Greetings Corp. v. Dan-Dee Imports, Inc., 807 F.2d 1136, 1140 (3d Cir. 1986)). "[P]roper judgment entails a 'delicate balancing' of all elements.... [W]here factors of irreparable harm, interests of third parties and public considerations strongly favor the moving party, an injunction might be appropriate `even though plaintiffs did not demonstrate as strong a likelihood of ultimate success as would generally be required.'" Constructors Ass'ns of W. Pa. v. Kreps, 573 F.2d 811, 815 (3d Cir. 1978) (quotations omitted)

B. The Harm Is Irreparable.

If the Distribution Date is permitted to occur, Conrail, its shareholders, and its other constituencies face catastrophic irreparable injury. If the Distribution Date occurs and then the CSX Transaction does not occur for any reason, Conrail will be essentially incapable of being acquired or engaging in a business combination until 2005, regardless of the benefits and strategic advantages of any business combination which might otherwise be available to Conrail. Such a disability would plainly be a serious irremediable disadvantage to Conrail, its shareholders and all of its constituencies.

The commentators and cases have uniformly recognized that no bidder would proceed with a tender offer if a rights plan would thereby be triggered. As one commentator has noted, "[n]o bidder has proceeded, or indeed can proceed, with a tender offer in the face of a poison pill, because if the pill is triggered, the resulting dilution is too great a cost for any bidder to bear." Mark J. Lowenstein, The SEC and the Future of Corporate Governance, 45 Ala. L. Rev. 783, 790 (1994). See also Facet Enters, Inc. v. Prospect Group, Inc., C.A. No. 9746, 1988 WL 36140, at *3 (Del. Ch. Apr. 15, 1988)(noting that poison pill would deter any tender offer for all of target corporation's shares because of potential loss of $50 million from dilution of shares); Dynamics Corp. of Am. v. CTS Corp, 794 F.2d 250, 258 (7th

Cir. 1986)(describing destructive effect of triggering of poison pill on acquiror and target corporations), rev'd on other grounds, 481 U.S. 69 (1987).(3)

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3 Indeed, for these reasons, as noted above, counsel for plaintiffs knows of no situation in which a distribution of rights has been permitted to occur pursuant to a rights plan of the type adopted by Conrail.

Thus, if the rights are distributed on November 7, Norfolk Southern will have lost its opportunity to acquire Conrail, Conrail's shareholders will have lost the opportunity to choose an immediate $100 cash value for their shares, Conrail's other constituencies will have lost the substantial benefits of a merger with a corporation "considered by many analysts to be the nation's best-run railroad" (according to The New York Times) and Conrail will have ensured that it could not take advantage of a merger opportunity until the year 2005. The injuries suffered by Norfolk Southern and Conrail's shareholders constitute irreparable harm. See A. Copeland Enters., Inc. v. Guste, 706 F. Supp. 1283, 1294 (W.D. Tex. 1989)(finding irreparable harm because poison pill prevents plaintiff from making a tender offer). See also Amalgamated Sugar Co. v. NL Indus., 644 F. Supp. 1229, 1239 (S.D.N.Y. 1986)(finding irreparable harm because tender offerer "cannot present to the shareholders of [target], in any meaningful way, its offer so long as this rights plan is in place."), aff'd, 825 F.2d 634 (2d Cir. 1987); Buckhorn, Inc. v. Ropak Corp., 656 F. Supp. 209, 235 (S.D. Ohio), aff'd mem., 815 F.2d 76 (6th Cir. 1987); Mills Acquisition Co. v. Macmillan, Inc., C.A. No. 10168, 1988 WL 108332, at *18 (Del. Ch. Oct. 18, 1988)(finding poison pill irreparably harms shareholders by depriving them of right to consider higher bid), aff'd in pertinent part, 559 A.2d 1261 (Del. 1989).

C. The Harm is Imminent.

As things currently stand, the distribution of the rights is set to occur on November 7, 1996. If the rights are distributed, the rights will no longer be redeemable by the Conrail Board, and the Rights Plan will no longer be capable of amendment to facilitate any takeover or merger proposal that Conrail's board might wish to pursue until the Rights Plan expires in 2005. Put simply, once the Distribution Date occurs, Conrail's directors will have no control over the Conrail poison pill's dilutive effect on an acquiror.

Moreover, if the distribution of the rights is not enjoined before November 7, the Court will be unable to unscramble the eggs at the preliminary injunction hearing set for November 12 as the rights will have been distributed to third parties who are free to trade them in the marketplace.

II. PLAINTIFFS ARE REASONABLY LIKELY TO SUCCEED ON THE MERITS OF THEIR CLAIMS.

A. The Conrail Board of Directors has Contracted Away Its Fiduciary Duties In Violation of Pennsylvania Law.

The "business and affairs of every [Pennsylvania] business corporation shall be managed under the direction of a board of directors." Pa. B.C.L. SECTION 1721 Additionally, a director of a Pennsylvania corporation "shall stand in a fiduciary relation to the corporation

and shall perform his duties as a director...in good faith, in a manner he reasonably believes to be in the best interest of the corporation and with such care, including reasonable inquiry, skill and diligence, as a person of ordinary prudence would use under similar circumstances." Pa. B.C.L. SECTION 1721 The Pennsylvania B.C.L. makes perfectly clear that the directors of Pennsylvania corporations must, without exception, manage the business of the corporation and they must do so with due care and in good faith.

The Merger Agreement between Conrail and CSX, which purports to allow Conrail's directors to make a decision with regard to the distribution of rights under the Conrail Rights Plan only with the approval of CSX's directors, is a blatant violation of the mandate of the Pennsylvania B.C.L. This Court should reject any agreement which allows the directors of a Pennsylvania corporation to contract away their fiduciary obligations, as the Conrail directors have done here.

Case law from across the country makes clear that directors may not contract away their fiduciary duties. See Jewel Cos. v. Pay Less Drug Stores Northwest, Inc., 741 F.2d 1555, 1560 n.5 (9th Cir. 1984)(noting that a number of "[c]ourts have held invalid attempts to curtail the board's traditional management function by contract"); ConAgra, Inc. v. Cargill Inc., 382 N.W.2d 576, 587 (Neb. 1986)(noting that "directors could not enter into an agreement to violate their fiduciary obligations"); Great W. Producers Coop. v. Great W. United Corp., 613 P.2d 873, 878 (Colo. 1980)(holding that where a decision "lies `at the heart' of the directors' corporate management duties, and the directors may not lawfully agree to abrogate the continuing duty to exercise their independent judgment with respect to that determination").

Perhaps the most recent decision directly on point is Paramount Communications Inc., v. QVC Network, Inc., 637 A.2d 34 (Del. 1994). In Paramount, the directors of Paramount signed a merger agreement with Viacom, Inc. which contained, as defensive provisions, a no-shop provision, a termination fee and a stock option agreement, as well as an amendment to Paramount's rights plan. Pursuant to the no-shop provision, the Paramount Board was prohibited from soliciting, discussing, or negotiating or endorsing any competing transaction. Soon after the announcement of the Viacom/Paramount merger, QVC sought to enter into a merger with Paramount. QVC was told by the Paramount directors that the Viacom/Paramount merger agreement prohibited them from talking to QVC. In affirming a preliminary injunction granted by the trial court, the Delaware Supreme Court held that

> The No-Shop Provision could not validly define or limit the fiduciary duties of the Paramount directors. To the extent that a contract, or a provision thereof, purports to require a board to act or not act in such a fashion as to limit the exercise of fiduciary duties, it is invalid and unenforceable. Despite the arguments of Paramount and Viacom to the contrary, the Paramount directors could not contract away their fiduciary obligations. (emphasis added)(citations omitted).

637 A.2d at 51. See also Abercrombie v. Davies, 123 A.2d 893, 899 (Del. Ch. 1956)("this Court cannot give legal sanction to agreements which have the effect of removing from directors in a very substantial way their duty to use their own best judgment on management matters"); Grimes v. Donald, C.A. No. 13358, 1995 WL 54441, at *9 (Del. Ch. Jan. 11, 1995), aff'd, 673 A.2d 1207 (Del.

1996)("[t]he board may not either formally or effectively abdicate its statutory power and its fiduciary duty to manage or direct the management of the business and affairs of this corporation"); Chapin v. Benwood Foundation, Inc., 402 A.2d 1205, 1210 (Del. Ch. 1979), aff'd sub nom, Harrison v. Chapin, 415 A.2d 1068 (Del. 1980)("the directors of a Delaware corporation may not delegate to others those duties which lay at the heart of the management of the corporation").

The case law and the statute mandate that this Court enjoin Conrail's directors from taking a sabbatical from their fiduciary duties.

III. THE BALANCE OF EQUITIES AND THE PUBLIC INTEREST FAVORS THE ISSUANCE OF A TEMPORARY RESTRAINING ORDER.

A balancing of the equities and the public interest demonstrably favors the issuance of a temporary restraining order. If interim relief is denied, the plaintiffs and Conrail's other stockholders and constituencies will suffer immediate, irreparable harm. On the other hand, a temporary restraining order would impose no substantial hardship on Conrail. As noted, Conrail has numerous other defensive weapons in its arsenal. As the court recognized in Hanson Trust PLC v. ML SCM Acquisition, Inc., 781 F.2d 264, 283 (2d Cir. 1986), in granting a preliminary injunction, "[t]his remedy, of course, does not preclude [the target company] from renewing its defensive efforts on other legitimate terms, or on a basis that is beyond challenge...." Here, Conrail will not be prejudiced in any way by maintenance of the status quo until plaintiffs' application for a preliminary injunction can be heard as scheduled on November 12, 1996 after the development of an adequate record.

A temporary restraining order in the form requested is warranted and should be issued.

CONCLUSION

For the foregoing reasons, the plaintiffs respectfully request that their Motion for a Temporary Restraining Order be granted.

_____
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DATED: November 1, 1996

IN THE UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF PENNSYLVANIA

NORFOLK SOUTHERN CORPORATION, a Virginia corporation, ATLANTIC ACQUISITION CORPORATION, a Pennsylvania corporation, AND KATHRYN B. McQUADE,	:	
Plaintiffs,	:	C.A. No. 96-CV-7167
-against-	:	
CONRAIL INC., a Pennsylvania corporation, DAVID M. LEVAN, H. FURLONG BALDWIN, DANIEL B. BURKE, ROGER S. HILLAS, CLAUDE S. BRINEGAR, KATHLEEN FOLEY FELDSTEIN, DAVID B. LEWIS, JOHN C. MAROUS, DAVID H. SWANSON, E. BRADLEY JONES, AND RAYMOND T. SCHULER AND CSX CORPORATION,	:	
Defendants.	:	

TEMPORARY RESTRAINING ORDER

AND NOW, on this ___ day of November ___, 1996, having heard argument from counsel for the parties on Plaintiffs' Motion for a Temporary Restraining Order and upon review of Plaintiffs' Motion and supporting brief, and it appearing to the Court that Plaintiffs have satisfied the standards necessary for the granting of a temporary restraining order, and that unless the temporary restraining order sought by Plaintiffs is granted, irreparable harm will result to the Plaintiffs and shareholders of Conrail before the matter can be heard at the preliminary injunction hearing set for November 12, 1996, it is hereby ORDERED that plaintiffs' motion is GRANTED and that:

1. Defendants and all persons acting on their behalf or in concert with them are enjoined from taking any action to enforce Sections 3.1(n) and 5.13 of the Agreement and Plan of Merger by and among Conrail Inc., Green Acquisition Corp. and CSX Corporation and any other provisions of such Merger Agreement which purport to limit the ability of the Board of Directors of Conrail to take action or make any determination with regard to Conrail's Rights Agreement, as amended.

2. Defendants and all persons acting on their behalf or in concert with them are enjoined from distributing any rights pursuant to Conrail's Rights Agreement and required to take such action as is necessary to prevent a "Distribution Date" from occurring pursuant to such Rights Plan.

3. This temporary restraining order shall expire on _____, unless extended.

BY THE COURT:

_____
J.