Impossible Odds: Contributions of Legal Counsel and Public Relations Practitioners in a Hostile bid for Conrail Inc. by Norfolk Southern Corporation

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The contingency theory of accommodation in public relations advances the role of public relations beyond its publicity and media relations roots to a crucial place in conflict management. In advancing the theory, Cameron and his colleagues have identified a matrix of variables that might affect an organization’s stance toward an individual public. Contingency theory offers a more complex and realistic portrayal of changing public relations activity along a continuum from pure advocacy to pure accommodation of a given public at a given time. Further, prescriptive variables (e.g., legal factors, regulatory agencies) add parsimony to the theory by establishing ground rules that affect a stance toward a public at a given time. The following case study, an in-depth analysis of Norfolk Southern’s hostile takeover of Conrail, illustrates the dynamism of conflict management in public relations as well as the proscriptions on how an organization handles conflicts.

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David R. Goode, chairman and chief executive officer of Norfolk Southern Corporation, told the Wall Street Journal that he always expected his company would win the hostile takeover of competitor Conrail, Inc. Goode marshaled all the resources at his disposal to thwart a friendly takeover of Conrail, Inc. by rail rival CSX Corporation.

As Goode expected, Norfolk Southern Corporation, parent company of Norfolk Southern Railway based in Norfolk, Virginia, did eventually win the battle for Conrail, but it took a collaborative combination of public relations and legal maneuvering to achieve the success. Such cooperation is often difficult because of the different worldviews that public relations practitioners and legal counsel bring to the crisis communications table (e.g., Fitzpatrick 1993/1994; Martinelli & Briggs, 1998; McCann, 1994). But the relationship between the public relations and legal departments at Norfolk Southern was unusually collaborative and may be illustrative of a changing relationship between legal and public relations counselors (e.g., Lee, Jares, & Heath, 1999; Reber, Cropp, & Cameron, 2001). The encroachment by the legal department into public relations territory that often occurs in such instances was absent (e.g., Lauzen, 1992; R. C. Fort, personal communication, March 29, 2000; F. Kauffman, personal communication, March 29, 2000; W. C. Wooldridge, personal communication, March 30, 2000).

The professional relationships and cooperation were not the only unusual couplings in this hostile takeover campaign. The CEOs of the competing companies also had uncommon relationships. Goode was set on a Norfolk Southern/Conrail marriage—he even kept small model trains of the two railroads on a bookshelf in his office (Machalaba & Mathews, March 5, 1997). If Goode was set on a merger, Conrail’s CEO David M. LeVan seemed equally intent on keeping Norfolk Southern from acquiring his company. John W. Snow, CEO of rival CSX Corporation, was the beneficiary of this apparent enmity.

The drama of this hostile takeover serves as a case study in how public relations and legal personnel each can contribute to a successful organizational outcome. It illustrates both the omnipresence of contingencies in the ideal practice of public relations and the proscriptions that inhibit accommodation of specific publics. It further demonstrates how leadership and marshaling of publics behind a company’s cause can make possible what many, if not most, would have predicted was impossible.

THEORETICAL BACKGROUND

1987; Murphy & Dee, 1996; Pearson, 1989; Plowman, 1998; Plowman et al., 1995; Pollack, 1984, 1986; Sallot, 1993; Schneider, 1985a, 1985b; Springston, Keyton, Leichty, & Metzger, 1992; Tompkins & Cheney, 1985; Turk, 1986; Vasquez, 1996). The contingency theory argues for a continuum of accommodation ranging from pure accommodation on one end to pure advocacy on the other (see Figure 1). The advocacy-to-accommodation continuum represents an organization’s possible wide range of stances taken toward an individual public … True excellence in public relations may result from picking the appropriate point along the continuum that best fits the current need of the organization and its publics. (Cancel, Cameron, Sallot, & Mitrook, 1997, p. 35)

In elaborating and specifying the excellence theory, Cameron and his colleagues have noted that an accommodative stance, which resembles two-way symmetrical communication, may not be inherently ethical. In fact, accommodation of morally repugnant publics may be unethical …. From the worldview of an organization and its public relations professionals, the organization’s position may be the only morally defensible one. This position holds greater moral force than a belief in dialogic process. Further, in spite of charges of paternalism, the organization’s conviction that it operates in the public interest and that it knows more about the situation comes into play. (Cancel, Mitrook, & Cameron, 1999, p. 173)

The contingency theory offers an additional qualification of the excellence theory. It sorts out clusters of activity and techniques that may be typified as models (e.g., publicity model, public information model, etc.) from the strategic position or stance taken by an organization. This is done by focusing on stance alone and arguing that techniques may be used interchangeably, regardless of stance. Public information techniques, for example, may be used to cooperate with a public or be a first move in a highly adversarial exchange. Tools and techniques such as press agentry, persuasion, and public information do not necessarily align with a particular stance or location along the continuum from advocacy to accommodation. Con-

Pure —————————————————— Pure

Advocacy                             Accommodation

FIGURE 1 Advocacy–accomodation continuum.
tingency theory focuses on the stance of the organization, leaving implementation through various tactics out of the equation.

Cameron and colleagues have amassed a matrix of wide-ranging factors that may affect how much accommodation—manifested as negotiation, compromise, collaboration, dialogue, two-party mediation, and so on—will be feasible and effective in achieving departmental and organizational objectives in the short and long term. Previous contingency theory studies using in-depth interviews (Cancel, Mitrook, & Cameron, 1999) and a case study (Yarbrough, Cameron, Sallot, & McWilliams, 1998) illustrate the remarkable sophistication of practitioners in considering numerous, intertwined factors as the stance toward a given public changes.

In an attempt to simplify the matrix, Cameron, Cropp, and Reber (2001) organized the variables into thematic groups, noting that it is one thing for practitioners to monitor the environment and to weigh many factors in arriving at a stance. It is another for teachers and theorists to manage over 80 distinct factors in any useful way. Parsimony, or simplification, is needed, resulting in thematic groups. In this case study we assess whether six variables from the matrix can be grouped as prescriptive variables that limit, prevent, preclude, or prohibit any degree of accommodation by an organization of a given public at a given time. Six variables emerged as prescriptive: moral conviction, multiple publics, regulatory constraints, management pressure, jurisdictional issues, and legal constraints.

Moral Conviction

Cameron (1997) argued that an accommodative or dialogic stance may not be inherently ethical. On the contrary, accommodation of morally repugnant publics may be unethical, at least from the perspective of those whose fundamental beliefs define that public’s behavior/beliefs as immoral. For example, Cameron argued that the worldview of an organization, a view usually held also by its public relations professionals, may lead to an intractable stance based on strongly held convictions that the organization’s position is the only morally defensible one. This stance can take on a paternalistic cast with the public relations professional displaying a conviction that he or she is using superior, more comprehensive knowledge about the situation to act in the best interests of all parties or for a greater societal good. This is true of a company that feels its technical expertise enables a better grasp of risk factors and circumstances than do activist publics. It is also true of an activist group that feels institutions must take off their blinders and wake up to some clear threat to global viability that only the group sees and fully understands.

Multiple Publics

Using examples from the 1996 Atlanta Olympic Games, Yarbrough et al. (1998) offered case studies that point to problems with accommodation when two publics
are diametrically opposed and each wants the organization to accommodate its demands. From this perspective, to accommodate one public will by definition be an act of advocacy against an opposing public. Yarbrough et al. emphasized that the proscription of accommodation manifested as symmetrical communication is not only practically difficult, but not sound even as a normative theory describing how public relations should be practiced.

Regulatory Constraints

In many circumstances, two companies may not be allowed to engage in collaboration based on state or federal laws. Furthermore, how an organization behaves and communicates is often subject to government regulations. Cameron et al. (2001) found this proscription present in six of eight interviews with top public relations professionals, including several companies that were unable to communicate among themselves or with key publics because of the threat of anti-trust suits.

Management Pressure

Cameron (1997) quoted one top practitioner who flatly stated that if his department adopted the two-way symmetrical model, management would eliminate the function in a week. The contingency theory posited that indiscriminate adoption of accommodative public relations would strain organizational resources, especially time and energy. It also holds that excessive accommodation of publics will erode management’s confidence in the practitioner’s judgment, even in his or her loyalty to the organization.

Jurisdictional Issues

Within an organization, turf battles may result in a clear division of responsibility. For example, labor relations is a complex and highly constrained process of negotiation in many countries. Knowledge of appropriate methods is specialized in ways that preclude public relations from taking either a highly accommodative or adversarial stance toward employee groups or unions. Cameron et al. (2001) provided examples in which divisional or regional turf battles precluded such approaches.

Legal Constraints

Cancel et al. (1999) pointed out that accommodation may be legally prohibited under anti-trust laws. One of the simplest, most direct legal constraints in most democracies is the law forbidding taxpayer funded agencies from using public relations on behalf of budgetary and legal matters that benefit the agency. Laws limit and constrain representation of foreign governments. Lobbying efforts are simi-
larly constrained by law in ways that may preclude a single ideal model of public relations. Laws also restrict dialogue or negotiation by public relations counsel when there is a clear conflict of interest in doing so.

This case study provides illustrations of each of these proscriptive variables. The case was constructed through extensive review of news accounts, Norfolk Southern Corp. public relations materials, court records, SEC filings, legal analyses, and in-depth interviews with three members of the Norfolk Southern public relations and legal staff and outside public relations counsel. As the case unfolds the researchers will capitalize on the strength of case studies to examine, reinforce, or reevaluate the legitimacy of these proscriptions. Case studies are a time-tested means of evaluating business practices (Wimmer & Dominick, 1997); however, there is a relative dearth of such illustrative research for public relations practitioners, students, and scholars. Therefore the authors believe it is instructive to note how, as Norfolk Southern attempted a takeover of Conrail, both sides battled these variables simultaneously, and both moved along the continuum with many of their publics. Throughout the case narrative, elements traditionally found in the discussion section will be lifted out in bold typeface to highlight when proscriptive variables were at work. A time line of important events is available in the Appendix.

PROLOGUE

A coy response to an offer by Norfolk Southern Railroad to acquire Conrail, and the clandestine deal with rival railroad CSX to lockup acquisition of Conrail set the stage for this drama. Although David R. Goode of Norfolk Southern Railroad had discussed the possibility of an acquisition of Conrail with Conrail’s David LeVan as early as 1994, Conrail insisted it was not interested in entertaining a bid at that point. On October 4, 1996, LeVan assured Goode they would talk after Conrail’s board met on October 16, 1996 (Memorandum of Law, 1996).

In late September 1996 and again on October 4, 1996, Goode contacted LeVan “to reiterate our strong interest in acquiring Conrail and request a meeting at which I could present a concrete proposal [to Conrail’s board of directors].” But he recalls LeVan said on both occasions that “it was unnecessary for me to do so.” So, “it came as a disappointment to me when it was announced on October 15 that [the Conrail board] had agreed to the proposed acquisition of Conrail by [rival railroad] CSX Corporation,” Goode wrote (Goode, 1996).

Precisely why LeVan put off Goode’s overtures is uncertain. Some speculated it was a difference of management styles. Certainly Goode’s style, and Norfolk’s corporate culture generally, was more buttoned-down than LeVan’s and Conrail’s. Maybe LeVan, with his penchant for Harley-Davidson motorcycles, thought he was better matched with John W. Snow, CEO of railroad rival CSX. LeVan and
Snow said the corporate cultures of their companies were highly compatible (Lipin & Machalaba, October 16, 1996).

LeVan lived in a converted firehouse and encouraged Conrail employees to wear “Friday casual” dress every day. Goode, on the other hand, lived in a modest ranch-style house and could be seen wearing a suit and tie even as he worked in the office on a Saturday. One Norfolk employee recalls arriving at work on a Saturday “dressed in chino slacks and casual shoes.” Goode saw the employee in a hallway and remarked, “Did someone change the dress code and not tell me?” (Machalaba & Mathews, March 5, 1997).

Whatever the reason, LeVan’s rebuff of Goode and Norfolk Southern set in motion a 5-month battle for control of the Pennsylvania-based company. Norfolk Southern launched a legal and public relations attack, with Goode at the forefront. Conrail and CSX, on the other side, believed their deal was unassailable because of Pennsylvania’s anti-takeover law—the strongest in the nation—and Conrail’s poison pill that would water down stock value if another company tried to buy substantial amounts of stock (W. C. Wooldridge, personal communication, March 30, 2000). The battle ended in a $10 billion deal—the most expensive railroad acquisition in history (Machalaba, April 9, 1997).

It Wouldn’t Be Easy

“We went in to win,” Goode told one reporter. “We never saw ourselves as the spoiler—we were there to achieve results. We understood that we had to play aggressively on Wall Street, we had to be skillful, effective and pay the price that was necessary” (Thomas, 1997). As Goode’s statement makes clear, Norfolk Southern’s top management clearly intended to win the fight for Conrail. There was no room for compromise or accommodation; public relations was expected to advocate for one position only—the successful acquisition of Conrail by Norfolk Southern.

After the Conrail/CSX announcement it was obvious that Norfolk Southern would have to move quickly to have a competitive opportunity. Norfolk Southern operated railroads with more than 14,500 miles of track in 20 states—predominantly in the Southeast and Midwest—and one Canadian province (Memorandum of Law, 1996). Conrail was a logical addition to the Norfolk operation, according to Goode. With Conrail’s 11,000 miles of routes in the northeast and its virtual lock on rail freight in and out of New York City, acquiring the Philadelphia-based railroad would substantially enhance Norfolk Southern’s value. Conrail was the fifth largest railroad in the country; CSX, based in Richmond, Virginia, was the third largest (Lipin & Machalaba, October 16, 1996); Norfolk Southern was the fourth largest (Machalaba & Mathews, March 5, 1997).

But Conrail and CSX had surrounded themselves with a legal moat and razor wire fence to keep out interlopers such as Norfolk Southern. Legal con-
straints to accommodation were plentiful. Goode met in Washington, DC, on October 16 with Snow to discuss the CSX proposal and regulatory concerns. “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,” Norfolk Southern’s legal counsel reported to the court. “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” (Memorandum of Law, 1996).

In 1990, the Pennsylvania legislature passed a statute aimed at protecting not only shareholders, but other company stakeholders such as customers, community members, and employees as well. When the law was passed it was perceived as so tough that the Securities and Exchange Commission (SEC) and shareholder groups opposed it. Critics of the bill labeled it “The Fat Cat Protection and Shareholder Rip-Off Act” because it protected poor management (Hecht, 1997, p. 944). The Pennsylvania statute changed the state’s approach to corporate fiduciary duties by saying that directors were no longer required to see shareholders’ interests as dominant. It required directors to protect the corporation’s best interests, which includes the concerns of shareholders, members, employees, suppliers, customers and creditors, and communities (Hecht, 1997, p. 947).

In the Conrail case, it would not allow the purchase of any more than 19.9% of Conrail stock by another company without shareholders opting out of the protective provision. Therefore, Conrail hoped to encourage stockholders to opt out of the statute’s protections, allowing CSX to quickly buy 40% of Conrail (Lipin, Machalaba, & Mathews, October 24, 1996). Robert C. Fort, Norfolk Southern vice president for public relations, told the Wall Street Journal that “the Pennsylvania law is a primary obstacle, and for that reason we intend to contest Conrail’s interpretation of the law” (Lipin & Mathews, October 28, 1996).

Additionally, Conrail had developed a “poison pill.” This “pill” forced Conrail shareholders to negotiate only with CSX. Conrail’s poison pill diluted share value when one person or group bought more than 10% of outstanding shares. Therefore, Norfolk Southern could not purchase more than 9.9% of Conrail’s stock without triggering the diluting mechanism. However, Conrail’s board had made the poison pill inapplicable to CSX. Conrail’s poison pill also had a “no-shop” clause with CSX that prohibited Conrail’s board from negotiating with other suitors (Hecht, 1997, pp. 961–962). These protections effectively shut Norfolk Southern out of discussions with Conrail’s board.

With discussions between Norfolk Southern and Conrail precluded by the pill’s protections, Norfolk had to aim its persuasion at other publics. Following Conrail’s October 15, 1996 announcement, several problems demanded immediate attention. Norfolk needed to win the hearts and minds of a number of stakeholders—Conrail stockholders, shipping customers, regulatory enti-
ties such as the federal Surface Transportation Board (STB), and others. Norfolk’s public relations department led that battle. Fort and his 22-member staff were joined by Fleishman-Hillard Public Relations as outside PR counsel (R. C. Fort, personal communication, October 1997).

While Fort and his colleagues worked to gain the support of a variety of stakeholders, James C. Bishop, Jr., executive vice president for law, and William C. Wooldridge, vice president for law, managed the in-house team, as well as several outside attorneys in Washington, DC, New York City, and Philadelphia, in filing motions for injunctions, appeals, and preparing appropriate documents for the STB and SEC (W. C. Wooldridge, personal communication, March 30, 2000). With the legal department involved, jurisdictional issues between law and public relations became apparent. Norfolk’s efforts were to become a battle fought on at least two fronts: legal and public relations.

Heard on the Radio

Goode learned about the October 15, 1996, Conrail-CSX announcement through an early morning phone call from his administrative assistant who had heard about it on the radio. “We felt a little bit affronted that CSX had not shown us the courtesy of calling and giving us a little heads up on this,” Fort said.

The railroad industry has always been somewhat of a fraternity. Even though we are hot competitors we’ve always been pretty ethical to each other in terms of letting each other know when things like this are going on … So we were caught completely off-guard. (R. C. Fort, personal communication, March 29, 2000)

Goode immediately called together his executive team to plan an aggressive strategy. By 11 a.m., after an initial briefing of his executive team, Goode had brought together a larger group to begin strategizing bit by bit (R. C. Fort, personal communication, March 29, 2000).

Norfolk’s outside experts were just as surprised by the news. Frank Kauffman, senior vice president with Fleishman-Hillard in Washington, DC, got a phone call while in an airport on the way back from a meeting. He learned that CSX had just announced the proposed merger and that Norfolk Southern wanted Fleishman-Hillard to help work on the project. “So, on an airplane from Atlanta to Washington the next morning, I wrote what I regard as a tough Norfolk Southern response to the CSX announcement,” Kauffman recalls. The draft served as a point of departure for discussion regarding what messages Norfolk Southern would employ, he said. But even before Kauffman wrote his hard-hitting press release, within hours of the October 15 announcement, the Norfolk Southern public relations department set to work on an initial statement to release to the press. Eventually, Kauffman would be so involved he would take residence in his Norfolk, Vir-
Virginia, apartment during the week, returning to Washington, DC, on weekends (F. Kauffman, personal communication, March 29, 2000).

Goode was serving as maestro over this bombastic symphony of activity. He was well aware that the success of this venture depended on him leading the way, representing Norfolk Southern very publicly and visibly to its most important stakeholders. He was convinced “that a big corporation’s chief executive can and should be its best spokesperson,” Fort recalls. “[He] led the charge … using the mass media and other communications outlets effectively and resourcefully” (R. C. Fort, personal communication, 1997). The same day Conrail and CSX made their announcement—October 15—Norfolk Southern released a statement: “Whatever happens in this process initiated by our competitor, Norfolk Southern will be part of it” (Lipin & Machalaba, October 16, 1996).

So, from the beginning, Norfolk Southern made sure its name was associated with the Conrail/CSX plan. An excerpt of the Norfolk Southern statement appeared in the Wall Street Journal story announcing the Conrail/CSX agreement. And within a week, Norfolk had made an aggressive counter-offer to Conrail shareholders. Norfolk Southern’s activities were proscribed by the necessity to meet the needs of multiple publics—shareholders of both Norfolk Southern and Conrail, Conrail employees, rail shippers, the media, state and federal regulatory organizations, and others.

The CSX Deal: “A Merger of Equals”

Conrail’s LeVan and CSX’s Snow first met to talk about a prospective merger on Sunday, October 6, 1996. Within 8 days, they had an agreement that provided Conrail shareholders a cash and stock buyout (Lipin & Mathews, October 17, 1996). At a joint press conference in New York, LeVan and Snow dubbed their deal “a merger of equals” (Machalaba & Mathews, March 4, 1997). CSX offered a two-tiered buyout in which the first 40% of Conrail’s stock would be purchased with cash at $92.50 a share. The remaining 60% would be purchased through a stock-trade at a ratio of 1.856 shares of CSX for each share of Conrail—or about $89 a share based on CSX’s stock value at the time of the announcement (Lipin & Machalaba, October 16, 1996).

Additional concessions from CSX included changing the name of the railroad, moving CSX’s headquarters from Richmond to Philadelphia, and naming LeVan president and chief operating officer of the new company while Snow remained chairman. Furthermore, when Snow retired—2 years hence—LeVan was guaranteed to succeed him (Lipin & Machalaba, October 16, 1996). One insider told the Wall Street Journal, “It was as good a deal as you could ask for” (Machalaba & Mathews, March 4, 1997).

LeVan justified the move because “CSX ‘is both bigger and better than Norfolk Southern’s system in terms of geographic coverage. … CSX offers more [freight]
origins and therefore more opportunities for new single-line service and better port coverage and better potential for cost savings” (Lipin & Machalaba, October 16, 1996). The combination of CSX and Conrail would form the second largest railroad in the United States (Lipin & Machalaba, October 16, 1996). CSX came to the table as the largest rail network east of the Mississippi River (Lipin, Machalaba, & Mathews, October 24, 1996). “This is simply a terrific marriage that benefits shareholders, shippers and the American public,” Snow told the Wall Street Journal (Lipin & Machalaba, October 16, 1996).

Goode and his colleagues disagreed. They recognized that the deal would essentially lock Norfolk Southern out of the potentially lucrative metropolitan New York City market (Lipin, Machalaba, & Mathews, October 24, 1996). They believed it was coercive to Conrail stockholders and would elicit criticism from regulators and shippers because it would create a noncompetitive environment in many cities (R. C. Fort, personal communication, March 29, 2000). Although representatives of Norfolk Southern would not comment on specifics to the Wall Street Journal, the paper reported on October 17 that Norfolk Southern “wouldn’t rule out any options” in addressing the planned Conrail/CSX merger (Lipin & Mathews, October 16, 1996).

Norfolk Southern Strikes Back

On October 23, 1996, Norfolk Southern released news of its plan to offer $100 cash per share for Conrail. Simultaneously, Goode sent a letter to LeVan and the Conrail board of directors announcing his company’s offer and outlining its benefits in comparison to the Conrail/CSX merger. Goode’s letter was also released to the press (“Norfolk Southern Plans,” 1996). Kauffman, the outside public relations counsel, remembers the setting when the legal and public relations staffs were working together—with outside advisors from both professions—putting the finishing touches on the press kit to announce the $100-a-share cash offer. The group was in New York, in the offices of its outside legal counsel. “Picture a big conference room with people hovering over the drafting of the press release and the remarks for the analysts’ meeting the next day,” Kauffman said. “There was a lot of lawyer-to-PR guy/PR guy-to-lawyer discussion” (F. Kauffman, personal communication, March 29, 2000).

“We [public relations and law] were meeting almost every day there for a while at the beginning. We had to be very careful what we said and how we said it and also to get it reported to the Securities and Exchange Commission on a daily basis,” Wooldridge, vice president for law, recalls (W. C. Wooldridge, personal communication, March 30, 2000). Fort said that it was soon apparent to him that, for the first time in his 19 years with the company, there was going to be a true coalition between the public relations and law departments in which public
relations shared equal footing with law. “In the past … eventually, if there is a point of contention between PR and law, law usually wins,” Fort explained.

In this case, the law department was actually asking us, and not only asking us for our advice, but then used it when we gave it to them. I think they recognized that this was an historic event about to take place here and that as it unfolded it was going to have to be won on the basis of public opinion. (R. C. Fort, personal communication, March 29, 2000)

Fort began a series of daily media contacts that he continued for months. “There were several key media players with whom we became involved who regularly covered this story,” he said. He talked with about a dozen key media players daily—reporters for the Wall Street Journal, the New York Times, the Washington Post, and others—even when there was no news to be officially released (R. C. Fort, personal communication, March 29, 2000).

The messages immediately worked to sway public opinion in Norfolk Southern’s direction. Goode was quoted in the initial tender-offer release saying that the Norfolk Southern proposal was “better on every point” than the Conrail/CSX proposal. “A combined Norfolk Southern-Conrail will create a balanced eastern rail system and will do so by increasing, rather than diminishing, competition in the industry,” he said (“Norfolk Southern Plans,” 1996). The initial release noted Norfolk Southern’s all-cash offer of $100 per share represented a 13% increase “over the blended value of CSX’s 40 percent cash and 60 percent stock proposal.” It also announced that finance giants Merrill Lynch and J. P. Morgan had already provided letters guaranteeing $4 billion toward the merger and suggesting the remaining balance would be available for the deal (“Norfolk Southern Plans,” 1996).

In an October 23 letter to the Conrail board, Goode wrote that Norfolk Southern had been analyzing the CSX proposal since it was made public on October 15. He told the board that in addition to the more favorable cash offer, Norfolk Southern was willing “to consider locating the corporate headquarters of the combined company in Philadelphia and to discuss an appropriate position for your Chairman following a transaction with us.” He reported willingness to discuss his proposal with the Conrail board, as he would have “before the hasty attempt to lock up a deal with CSX.” Finally, he told the board that Norfolk Southern was beginning litigation in the Federal District Court for the Eastern District of Pennsylvania to “ensure that your Board fulfills its fiduciary obligations” (Goode, 1996). It appears that Norfolk Southern was morally opposed to the deal that Conrail was trying to force on its stockholders, a moral stance that was not inconsistent with its own interest in tendering a better offer to stockholders. Norfolk Southern believed that a Conrail/CSX marriage would be an inferior deal for customers because the two railroads would have a virtual monopoly on rail shipping in the Northeastern United States.
Although Goode’s letter to the Conrail board was firmly worded, the complaint filed by Norfolk Southern in the Federal District Court made the argument with even more vigor. Mary A. McLaughlin and George G. Gordon from the Philadelphia firm Dechert, Price and Rhoads, prepared the complaint for Norfolk Southern in its litigation with counsel from Steven J. Rothschild of the Wilmington, Delaware offices of Skadden, Arps, Slate, Meagher, and Flom. The complaint accused Conrail and CSX of attempting “to coerce, mislead, and fraudulently manipulate Conrail’s shareholders to swiftly deliver control of Conrail to CSX and to forestall any competing higher bid for Conrail by plaintiff Norfolk Southern Corporation” (Norfolk Southern Corporation v. Conrail Inc., October 23, 1996). The suit alleged that securities filings and tender offer materials were misleading, coercive, and fraudulently manipulated Conrail’s shareholders. They suggested the proposed 25E opt-out vote, required to bypass Pennsylvania’s anti-takeover law, and the merger lock-up provisions were also illegal (Nickerson, 1998).

“It was the coercive structure of the deal, the lock-up. There were a number of elements to it,” Wooldridge, one of Norfolk’s in-house legal counsel, explained. “But the cumulative effect of the elements was that stockholders were deprived of a real choice and we thought that went beyond … what was permissible even under the Pennsylvania anti-takeover law” (W. C. Wooldridge, personal communication, March 30, 2000).

Betrayal Suite or Beefed-Up Battle?

As Norfolk Southern made clear its determination about being a part of the Conrail deal, CSX’s Snow began having discussions with Goode regarding a possible deal. Unbeknownst to LeVan, Snow joked that he and Goode “met at the betrayal suite in the Tranquility Hotel” to talk over a dispersal of Conrail. Snow was described as “an affable but clever former lobbyist who worked in the Transportation Department in the Ford administration” (Machalaba & Mathews, March 4, 1997). Perhaps Snow had always planned to split Conrail with Norfolk Southern. Whatever the case, Snow appeared guarded and unpredictable as he maintained contact with both LeVan and Goode.

“When it became apparent that this had turned into a shareholder value issue,” Fort explained, “and the arbitrageurs and the institutional investors were really getting teed-off at Conrail’s management, I think that’s when CSX—John Snow and his group—began to see that there was going to have to be some discussion. So I think overtures began to be made” (R. C. Fort, personal communication, March 29, 2000).

At 10:40 p.m. on November 3, CSX released a statement admitting it was having conversations with Norfolk Southern about a possible sale by the post merger CSX/Conrail of certain material assets. CSX has advised Conrail of such conversa-
Some industry analysts agreed that splitting Conrail was the most logical move. “Conrail is too important to CSX and Norfolk Southern to allow either railroad to eventually acquire the whole company,” said one analyst. “Eventually they’ll divvy up the pieces” (Machalaba & Lipin, November 7, 1996).

Three days after CSX announced its talks with Norfolk Southern, it raised its bid for Conrail to $110 a share—an 8% increase. The deal remained a 40/60 two-tiered cash and stock offer (Machalaba & Lipin, November 7, 1996). Two days later, Norfolk matched CSX’s $110-a-share bid. The new CSX cash and stock bid had a blended value of $93.27 a share compared to Norfolk’s straight $110 all-cash bid (Lipin & Machalaba, November 8, 1996). “Every time CSX made a move, we responded within eight to 24 hours, so they never had a chance to breathe,” Jack Levy, a merger specialist at Merrill Lynch who was advising Norfolk Southern, told a reporter for *The Institutional Investor* (Picker, 1998).

As the bidding war continued, Conrail shareholders began to wonder why the less lucrative CSX bid was being given favorable treatment by LeVan and the Conrail board. The *Wall Street Journal* noted that two-tier cash and stock offers such as the CSX proposal are often viewed as coercive “because they put shareholders in a difficult situation.” If they don’t try to sell their shares to obtain cash upfront, investors risk being stuck with the lower valued stock swap, if the deal goes through (Lipin & Mathews, November 11, 1996).

There was consensus among investment analysts that Norfolk’s all-cash deal was the better arrangement for shareholders. “For shareholders to take the word of Conrail’s board that in the long term this is in the best interest of everyone, that’s really stretching it. … My opinion as a shareholder would have to be that I want the best price possible for my shares,” one investment analyst told the *Wall Street Journal*. But Snow and LeVan argued that a company should be able to choose a partner in support of an overall strategic vision (Lipin & Mathews, November 11, 1996).

**Legal Setbacks for Norfolk**

Norfolk Southern suffered a blow when Judge Donald VanArtsdalen, of the Eastern Pennsylvania federal district court, denied its petition for preliminary injunction that would have prohibited CSX from buying 19.9% of Conrail stock.

VanArtsdalen began his oral ruling (*Norfolk Southern v. Conrail Inc.*) saying that the arguments presented by the plaintiff—Norfolk Southern—were “nitpicking or insignificant matters.” The judge ruled in favor of allowing CSX to buy 19.9% of Conrail shares. “I do not see any coercion, but only several options, any of which will undoubtedly end up being a net return to most shareholders far in ex-
cess of whatever their original investment may have been,” he said (Norfolk Southern v. Conrail Inc.). VanArtsdalen’s ruling was upheld on appeal by the U.S. Court of Appeal for the Third Circuit on November 20, and CSX purchased 19.9% of Conrail at $110 a share (Mathews & Lipin, November 21, 1996).

Wooldridge, Norfolk in-house legal counsel, said, although the legal team was unsuccessful convincing the court that Conrail stockholders were being deprived of a real choice, there were public relations benefits in pressing the argument. Thus, jurisdictional lines were crossed. “From a PR standpoint we thought that we needed to show the world—the markets and the regulators—that we were extremely serious about opposing this transaction and there were a number of components to that [opposition]” (W. C. Wooldridge, personal communication, March 30, 2000). So, the litigation itself took on importance as a tool for shaping public opinion. Of all the prongs of the legal attack, the litigation one probably had the least direct involvement from public relations staff, Wooldridge said. “It was a fairly technical challenge in the court to a very complicated law” (W. C. Wooldridge, personal communication, March 30, 2000).

In addition to seeking to block the CSX purchase of stock, Norfolk Southern sought a limited preliminary injunction requiring Conrail to hold a special shareholder meeting on December 23, 1996 (Nickerson, 1998). The purpose of the meeting was to approve a proposal that would allow CSX to purchase another 20% of Conrail stock (Lipin, November 26, 1996). Conrail and CSX had been forthright about their intention to cancel the meeting if they were uncertain of passage of the proposal. The proxy stated, “It is expected that the special meeting will not be convened if Conrail has not received sufficient proxies to assure approval of the proposal” (Lipin, November 26, 1996). Norfolk Southern was confident that shareholders would vote down the Conrail proposal, and therefore wanted to require the meeting be held. They won that judgment. Wooldridge felt this was a morale booster, because the courtroom challenges had been relatively unsuccessful to that point (W. C. Wooldridge, personal communication, March 30, 2000).

On December 17, VanArtsdalen required Conrail to hold the December 23 meeting, but he provided an out. Conrail could postpone the meeting if a new tender offer was received (Nickerson, 1998). “When the arbitrageurs got involved in it, what we had to do was make a case to them that, ‘look guys, you’re going to make a lot more money from us than from any other offer they’re giving,’” Fort recalled. “So we didn’t see any reason for them to postpone that shareholders’ meeting” (R. C. Fort, personal communication, March 29, 2000).

Upping the Ante

On December 18, CSX sweetened its offer with an additional $16 per share in preferred stock. Conrail immediately announced a postponement of its December 23 shareholders’ meeting to January 17, 1997 (Nickerson, 1998). Just hours after the
CSX offer, Norfolk Southern raised its all-cash offer to $115 per share for 9.9% of Conrail’s stock immediately following the shareholder vote on January 17, if shareholders rejected allowing CSX to purchase an additional 20% of Conrail (Lipin & Mathews, December 20, 1996). Norfolk Southern assured Conrail shareholders that the purchase of 9.9% would be spread proportionately among them. **Norfolk wanted to convince shareholders and other stakeholders that they provided the better, and fairer, deal.**

By now, many Conrail shareholders were livid. “This is absolutely egregious,” one Conrail shareholder told the *Wall Street Journal*. “How can, by contract, the board take away the auction process from the shareholders? It’s prejudicial” (Lipin & Mathews, December 20, 1996). “I’ve never seen a board let something like this happen,” said another institutional shareholder. “It’s more and more obscene” (Lipin, Machalaba, & Mathews, December 16, 1996).

CSX faced a major problem because its second tier—the stock portion of its offer—kept moving. When Norfolk Southern offered $115 cash, the current CSX offer of $110 had a blended value of only about $102. Additionally, Conrail shareholders were set to receive $16 worth of CSX convertible preferred stock—worth only about $9.60 a share at the time of Norfolk’s new offer. Investors were unimpressed (Lipin & Mathews, December 20, 1996). “The best piece of convertible paper for me is a dollar bill, which is convertible into 100 pennies,” one institutional investor told the *Wall Street Journal* (Lipin & Mathews, December 20, 1996). Another institutional investor summed up the attitude of Conrail’s shareholders: “My opinion as a shareholder would have to be that I want the best price possible for my shares” (Lipin & Mathews, November 11, 1996).

**Addressing Stakeholders’ Needs**

“One of the key factors in this whole thing is that the majority of Conrail shareholders are institutions, 90 percent or more,” Fort explained. “These institutions, these guys, are in it for the money to a great degree. And then the arbiters got into it and what we were basically doing is just going after a relative handful of investors in Conrail. To win this thing, all we needed was a little time to get them won over,” he said. “We really had the pressure on by this time with institutional investors. Let me tell you, they were calling not every day, not every hour, but sometimes every fifteen minutes asking what was happening” (R. C. Fort, personal communication, March 29, 2000).

Wooldridge, from the Norfolk Southern legal department, said one of the extremely successful pieces of the takeover campaign, from his perspective, was a series of full-page ads run in several major newspapers. **He recalled that, although the public relations arm of Norfolk Southern put the ads together and placed them, the legal department reviewed the ads. “It was a very close collabora-**
tion,” he said. He said the ads were strong “because what we had to say was irrefutable” (W. C. Wooldridge, personal communication, March 30, 2000).

“I think the most important weapon in our arsenal was our message,” Fleishman- Hillard’s Kauffman said. “We had a better message regarding the anti-competitive nature of the Conrail/CSX proposition, and … we had … the better financial offer. So essentially, our message was better offer, better railroad” (F. Kauffman, personal communication, March 29, 2000).

Goode delivered this message to a variety of publics. Such appearances were particularly important given the make-up of the Conrail shareholders—primarily institutional investors who owned tens or hundreds of thousands of shares. Among the many appearances made by Goode during this period of wooing investors, customers, and others, was a January 10, 1997 speech to the Council of Institutional Investors in Washington, DC (Goode, January 10, 1997). Goode told his audience that Conrail’s behavior was anti-democratic and contrary to the Council’s “Shareholder Bill of Rights.” He noted LeVan’s recent comment reported in the Wall Street Journal: “If you don’t like the [Pennsylvania anti-takeover] law, don’t buy the stock.”

“While a very candid comment, this is reminiscent of the days when railroad magnates like William Henry Vanderbilt could snort, ‘the public be damned,’ and get away with it,” Goode told his audience.

But Vanderbilt added something else in 1882. After damning the public, he still insisted, ‘I am working for my stockholders.’ I ask you today—when weighing the merits for Conrail shareholders—whether the days of the robber barons are over when Conrail and CSX claim that their deal is a good one for Conrail constituents. (Goode, January 10, 1997)

He urged the institutional investors to vote because CSX and Conrail knew that they maximized their chances of success if investor participation was minimal. “It’s clear to me,” he said, “that Conrail and CSX must believe that they can succeed only by limiting the ability of shareholders to participate in a crucial decision affecting the future of the company owned by the shareholders” (Goode, January 10, 1997). Goode made similar hard-hitting speeches to a variety of Conrail constituent groups.

At the same time Norfolk Southern was making its case for shareholder rights with the investment community, it began to make its case for competition in the shipping community, Fort said. To make that case, they put together a list of five principles of balanced competition and released the principles in a Norfolk Southern press release on October 30, 1996 (R. C. Fort, personal communication, March 29, 2000). Norfolk Southern claimed that balanced rail competition required that rail systems be of comparable size and scope, that large markets be served by multiple railroads, that owned routes are essential, that terminal access is key, and that competition is costly (“NS outlines,” October 30, 1996). These principles became a theme the railroad used throughout its campaign.
Fleishman-Hillard’s Kauffman said Norfolk Southern delivered its public policy argument to office holders, transportation officials, and shippers who would be directly affected by the merger as CSX proposed it. “We let transportation systems and port authorities and so forth in key states and key cities know that [the Conrail/CSX] combination would result in a transportation loss for their communities,” he said (F. Kauffman, personal communication, March 29, 2000).

Kauffman recalls that the CSX/Conrail combination would mean that one rail carrier would have controlled over 70% of the market in the East, leaving cities like Baltimore, Philadelphia, and Pittsburgh with only one major railroad. “That would upset the competitive balance that had given most shippers a choice between railroads,” he said. “Had the deal gone through it could have marginalized Norfolk Southern and that’s something that David Goode wasn’t about to let happen” (F. Kauffman, personal communication, March 29, 2000).

The Key Shareholder Vote

On January 17, 1997, Conrail shareholders presented their board with a resounding defeat. The shareholders voted against Conrail’s request to opt out of Pennsylvania’s anti-takeover law, allowing CSX to buy another 20% of the company. The Wall Street Journal predicted a winning vote for Conrail could be easy, but Norfolk Southern’s superior offer and message won over Conrail’s shareholders (Lipin, Machalaba, & Mathews, December 16, 1996). “I felt that when we won that shareholder vote that we had climbed a hill. I thought that was a significant turning event,” Fleishman-Hillard’s Kauffman said (F. Kauffman, personal communication, March 29, 2000).

The vote looked like it should be a shoo-in for Conrail. CSX held 19.9% of shares. Conrail employee trusts held another 13% of shares. The law required only a majority of shares voted to allow CSX to buy another 20% of Conrail (Lipin, Machalaba, & Mathews, December 16, 1996). Norfolk Southern claimed to receive the support of 90% of shares voted—apart from the approximately 33% of Conrail shares held by CSX and the Conrail employee trust (Lipin & Mathews, January 20, 1997). Norfolk Southern knew that it had won the battle.

Within a week, Linda Morgan, chairwoman of the federal STB, in a Washington Post interview, urged the three railroads to reach an agreement. A business reporter at the Washington Post who has a genuine understanding of the railroad industry and STB did the interview, Norfolk Southern’s Fort said. “He knows our company well, he knows the industry well and he knows Linda Morgan well,” Fort said. “And I think she used his article to telegraph the message that she would prefer that we would get together and sort things out” (R. C. Fort, personal communication, March 29, 2000). Regulatory constraints took a strong hold on the takeover attempt, moving players in the drama to entirely new stances toward each other—nearly mandating accommodation.

Snow got the message, but LeVan apparently did not. LeVan had returned from a skiing vacation at Jackson Hole, Wyoming. He sent Snow a “remarkably optimistic”
letter outlining a plan to rally support to keep the Conrail/CSX deal afloat and his company intact. Snow was impatient and fired off a three-page, faxed reply to LeVan, according to a Wall Street Journal account. He wrote, “David, the time has come for us to face the reality, and I know how unpleasant it is for you to accept, that gaining regulatory approval of our merger most probably requires the disposition of some large part [of the Conrail system].” LeVan “looked like he’d lost his best friend,” said someone present when he got the fax. The person told the Wall Street Journal, “The sense of betrayal was all over him” (Machalaba & Mathews, March 4, 1997).

The shareholders had spoken and reality set in. LeVan and Snow sent a letter to Goode on January 22, 1997, inviting him to join them in talks “without any preconditions that would limit our discussions or otherwise prejudice our respective positions.” A spokesman for Norfolk Southern said his company looked forward to setting plans for a meeting and moving toward a competitive resolution (“Norfolk Southern and CSX,” January 23, 1997). Wooldridge said public relations prepared the regulatory climate extremely well. “When we got to the STB, the climate was right for what we were trying to accomplish,” he said (W. C. Wooldridge, personal communication, March 30, 2000).

Public relations, based on the contingency theory, can be viewed as a constructive creator of antecedent conditions for alternative dispute resolution. “Remember, all hostile takeovers go friendly because, by definition, you can’t hostilely buy a company,” a member of Norfolk’s outside legal counsel said. “You can only force management to the table to negotiate. Or in our case, what we did is stop the other guy in his tracks so that everybody, in this case all three parties, come to the table” (Subramanian, 1997).

By March 1997, the three companies had reached an agreement. The Wall Street Journal announced,

After a four-month battle between CSX and rival bidder Norfolk Southern Corp., the three railroads are close to an agreement in which CSX will buy Conrail for $115 a share, then sell about half of Conrail’s routes to Norfolk Southern. (Mathews, March 6, 1997)

As CSX and Norfolk Southern made final arrangements, Conrail’s LeVan was sidelined. When he announced the agreement to Conrail employees, he said CSX “chose not to fight,” thereby leaving Conrail with no option but to be divided, as are the spoils of war (Machalaba, March 10, 1997).

On April 9, 1997, the Wall Street Journal announced that the break-up plan of Conrail was complete. Norfolk Southern walked away with 58% of Conrail’s lines. CSX kept 42%. The companies issued a joint news release stating that Norfolk Southern’s share would cost $5.9 billion at $115 a share, while CSX would spend $4.3 billion for its share. Norfolk took over “routes from Chicago through Ohio and Pennsylvania to the New York City area, as well as routes linking New York City to Buffalo, N.Y., and points south.” CSX ended up with “routes from St. Louis
EPILOGUE

Debates continue as to whether Norfolk Southern pushed the price too high in its bid to take over Conrail. But there is little debate that Norfolk Southern took on a task with odds that looked impossible and, through a combination of legal maneuvering and a diverse set of communication tactics to shape public opinion, won an incredible victory.

“I think that there is often a bit of a tension between lawyers and PR people,” Fleshman-Hillard’s Kauffman observed. “Sometimes the legal advice … conflicts with communications advice and it becomes a business decision for that corporation. In the case of Norfolk Southern I thought the two sides worked particularly well together” (F. Kauffman, personal communication, March 29, 2000).

DISCUSSION

To maintain the context for many of the discussion points supported by the case study, the authors employed boldfaced notes or comments in the text as the case unfolded. To briefly summarize here, the case illustrates how moral conviction, multiple publics, regulatory constraints, management pressure, jurisdictional issues, and legal constraints all came into play to varying degrees as prescriptive variables regarding accommodation by Norfolk Southern of the needs and demands of CSX and Conrail.

We also see a variable such as regulation reversing polarity, so to speak. Contingency theorists argued that regulation would preclude accommodation in some stages of dynamic situations, when in fact the regulatory body essentially mandated accommodation. Our case highlights a key point that is often glossed over by critics of contingency theory. The contingent factors are bivalent; they can move an organization toward more or less accommodation of a given public at a given time. The regulatory body in this case, led by Chairwoman Morgan, made it clear that an accommodation of both CSX and Norfolk Southern was strongly indicated.

Notably, legal proscriptions were not overwhelming in this case. In fact, the two corporate departments that managed conflict for Norfolk Southern worked closely in a coordinated effort that enabled a circumvention of most legal proscriptions. It may be important to sort out instances when legal proscriptions occur as part of a turf war between legal and public relations—more of a jurisdictional factor—from the more likely instances when the legal counsel is using its best judgment about risks of litigation or regulatory violations that preclude, prohibit, or otherwise prevent implementation of a communication strategy.

This case study offers a relatively novel, but promising approach, in U.S. public relations scholarship. The complexity and textures of practicing public relations are particularly well captured in the case study, supporting an underlying
principle of contingency theory: “It Depends!” And it takes a subtle set of judgments to handle the contingencies implied by “It Depends.” Although case studies are limited in their generalizability, they do provide valuable insight about the turbulence, dynamism, and complexity of the external environment analyzed and to some extent managed by public relations practitioners. This particular case affords a valuable sense of reality about specialties in public relations that are not well researched. Ironically, many practitioners spend a great deal of time and attention on investor and stockholder relations, key publics that are not given a great deal of ink in scholarly journals.

Our case also suggests that conflict management should be a key component of public relations scholarship, including the study of how public relations can be conceived as the managed conduct of conflict in public forums. The place of public relations as an antecedent condition to alternative dispute resolution, as well as a factor in dispute solutions, should be pursued. To this point, the contingency theory has been described as a theory of accommodation or a theory of public relations. Perhaps it would be more accurate to cast it as the contingency theory of conflict management.

Finally, this study suggests that law and public relations can and do work hand in hand to solve problems faced by major organizations. While jurisdictional issues did occur, those involved suggested that encroachment onto public relations turf by the legal department did not occur. In fact, the legal department took up the mantle of working to form public opinion in a way that was outside the domain of the public relations staff. While managing public opinion is clearly a public relations function, the contribution of the legal department in this case was only within its domain. Nevertheless, the public relations staff acknowledged that these were unusual circumstances and more commonly, the dominant coalition of the organization deferred to the legal department over public relations counsel. This case provides a dramatic example of how the boundary-spanning role of public relations is important in working through the contingencies involved in a difficult business and regulatory environment and how those contingencies preclude accommodation in some instances but nevertheless led to a successful outcome.

REFERENCES


Memorandum of Law in Support of Plaintiffs’ Motion for Expedited Proceedings (October 23, 1996), at 3, Norfolk Southern Corp v. Conrail Inc. (Nos. 96–2025, 92–2026).


APPENDIX

**Conrail/CSX**

- 10/4/96 LeVan rebuffs Goode
- 10/5/96 LeVan and Snow meet
- 10/15/96 Conrail announces deal
  CSX offers $89/share split 40 cash/60 stock

**Norfolk Southern**

- 10/15/96 Goode learns of news from radio
  Fleishman-Hillard notified
  Outside legal counsel notified
  Executive team meeting by 11 a.m.
- 10/16/96 Goode & Snow meet
  NS quoted in WSJ as planning to be a part of whatever happens
- 10/23/96 NS announces $100/share cash
  NS begins daily media contacts
  Goode sends letter to Conrail board
  Suit filed against Conrail
- 10/30/96 Principles of balanced competition released
- 11/3/96 CSX announces talks with NS

**Conrail/CSX**

- 11/6/96 CSX ups offer to $110/share

**Norfolk Southern**

- 11/6/96 NS matches CSX's $110/share
- 11/20/96 court upholds CSX's right to buy 19.9% of Conrail at $110/share
- 12/17/96 Conrail required to hold stockholder vote pending a new offer
- 12/18/96 CSX ups offer
  Conrail postpones stockholder vote
  Conrail stockholders livid
- 12/23/96 Stockholder vote originally scheduled
- 1/17/97 Conrail stockholders vote in favor of NS offer

**Norfolk Southern**

- 12/18/96 NS offers $115/share
- 1/10/97 Goode speaks to Council of Institutional Investors
- 1/17/97 Conrail stockholders vote in favor of NS offer