APPENDIX C: CLASS I RAILROADS AND RELATED INTERESTS

Association of American Railroads. The Association of American Railroads (AAR)[70] is concerned that the rules proposed in the NPR emphasize the creation of governmentally mandated, non-remedial competition as a preeminent public benefit in rail mergers. That policy shift, AAR claims, would be a stark departure from the existing requirement of statute and case law that the Board address adverse effects on competition. It is one thing, AAR argues, for the Board to encourage market-based, private-sector initiatives that result in more vigorous competition and to recognize such initiatives as public benefits; but it is quite another thing, AAR insists, for the Board to use its merger review authority to restructure railroad markets by mandating conditions that are unrelated to any harms caused by a proposed merger. Enhanced competition, AAR believes, should flow from voluntary, market-based initiatives, not from government mandates.[71]

AAR therefore urges that we modify our proposed new policy to provide that it will recognize as a public benefit enhanced competition that flows from the voluntary initiatives of merger applicants but will not impose, as a prerequisite for merger approval, conditions unrelated to the effects of a merger. The Board, AAR believes, should remain vigilant in ensuring that mergers do not reduce competition, but it should not assume the role of industrial planner in the merger process.

AAR contends that the rules proposed in the NPR: would treat railroads more harshly than any other U.S. industry; would jeopardize the very public interest the Board is charged with protecting; and would complicate and delay merger review proceedings that are already cumbersome. The possibility of Board-imposed non-remedial conditions, AAR argues, would be an invitation for expanded litigation in merger proceedings over conditions having nothing to do with anticompetitive effects of a merger. And, AAR adds, the suggestion that merger applicants will be forced to implement competitive "fixes" that are not designed to remedy specific competitive harms is particularly disturbing. This suggestion, AAR argues, portends a departure

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[70] AAR represents the interests of the nation's major freight railroads. AAR notes, however, that Canadian National did not participate in the pleadings (the initial comments, the reply comments, and the rebuttal comments) filed by AAR in response to the NPR.

[71] AAR insists that the statutory public interest standard that governs the Board's oversight of rail mergers does not entail the concept of mandatory, non-remedial competition; the Board, AAR argues, is not authorized to engage in industrial planning to carry out the role contemplated for it by Congress. And, AAR adds, the ICC and the Board have repeatedly found that the merger conditioning authority does not go beyond the correction of competitive harms created by the merger.

both from reliance on market forces and from the logic of "cause and effect" remediation that has guided the Board and its predecessor in prior merger cases. AAR insists that, if the Board were to require merger applicants to make structural changes that the companies would not otherwise implement and that are not intended to remedy specific competitive harms, the Board would be engaged in industrial planning, not in promoting competition.[72]

AAR insists that the three "presumptions" on which the rules proposed in the NPR are based (the presumption of unremediable harm, the presumption that permanent non-remedial competitive conditions will be necessary to offset transitory merger-related service disruptions, and the presumption of no significant merger efficiencies) are unwarranted. Sound administrative decisionmaking, AAR argues, should be based on a careful review of evidence in the record, and presumptions should be used only when a solid factual record has been created that supports the inferred facts without the need for any additional factual development. Such a factual record, AAR insists, does not exist in this proceeding. (1) There is, AAR insists, no tangible evidence in the record of this rulemaking to support a presumption that any anticompetitive effects of future mergers could not be remedied through conditions narrowly tailored to address the particular competitive harm. Merger applicants, AAR argues, should be given the opportunity to prove that any merger-related harms can be remedied or that any unremedied losses will be offset by competitive benefits such as increases in intermodal competition. (2) AAR insists that, even if the Board were to conclude that the increased focus on service and operating issues in future merger proceedings will not eliminate the risk of service disruptions, it would be unreasonable to require merger applicants to implement permanent structural changes to address or compensate for possible temporary service disruptions. The duration of service-related remedies, AAR argues, should be linked to the duration of the problems; permanent structural changes, AAR contends, are not appropriate as a remedy for temporary service problems. And, AAR adds, a requirement that merger applicants implement

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[72] AAR adds that increased reliance on regulatory mandates to restructure competition in the rail merger context would have several potentially dangerous implications for the rail sector of the economy: (1) a proposed rail merger that would yield substantial net public benefits (and no unremedied competitive harms) might not be undertaken because the applicants would be required to sacrifice too large a share of private benefits through compliance with the new competitive conditions; (2) there would be an unacceptable level of uncertainty in the merger review process, because merger applicants would have no way of knowing in advance what would be sufficient to pass Board muster (and, AAR adds, the Board's apparent intent to monitor the implementation of non-remedial conditions would compound this uncertainty); and (3) this vast expansion of the Board's role in the structuring of rail markets, which would correctly be perceived as a step toward increased economic regulation of the industry, would further imperil the rail industry's financial health, potentially leading to reductions in the size and scope of the railroad network to the detriment of the public.

structural changes in rail-to-rail competition would be counterproductive if the mandatory competitive conditions had the effect of compounding service disruptions. (3) AAR insists that, just as we should not presume that efficiency gains would necessarily flow from a future merger, we should also not presume that such gains will not occur. Our rules, AAR argues, should call upon applicants to make convincing demonstrations of any efficiencies that will flow from future combinations. And the Board, AAR adds, should make clear that it will recognize such efficiency gains, including any enhanced intermodal competition that they generate, as public benefits.

Other restructuring proposals. AAR insists that we should summarily reject the extreme versions of restructuring (post-merger rate regulation; mandatory creation of multiple carrier options; gateway regulation; mandatory terminal access and reciprocal switching with Board oversight of charges; reversal of the Bottleneck rules; and elimination of paper barriers) advocated by various shipper interests. AAR argues that proposals of this nature are unrelated to the effects of rail mergers, lack any foundation in the statutory public interest standard, and are flatly inconsistent with the principles of market-based regulation in the Staggers Act.

Case-by-case approach. AAR insists that, in lieu of presumptions, our merger rules should ensure a thorough case-by-case examination of particular merger proposals to determine whether any adverse effects on competition are likely and whether remedies for those adverse effects can be fashioned. The broad application of pro-forma conditions, AAR warns, would undermine the public interest.

Intermodal competition. AAR insists that, when applying the statutory public interest standard, we should not ignore the role of intermodal competition. The governing statute, AAR explains, does not recognize a distinction between enhanced intramodal competition resulting from the voluntary undertakings of merger applicants and enhanced intermodal competition; both, AAR argues, are public benefits. It would be inconsistent with the statutory public interest standard, AAR contends, for the Board not to give full credit to the benefits of enhanced intermodal competition in reviewing an application for merger approval.

Market impact analyses. AAR insists that, although a requirement that merger applicants submit market impact analyses would generally be appropriate, we should recognize that reliable data respecting some aspects of the matters described in NPR § 1180.7 do not always exist, particularly (AAR claims) as to non-rail traffic. And, AAR adds, we should be flexible as to the types of market analyses that we require of the merging parties. It would be, AAR warns, inappropriate and counterproductive to impose rigid or inflexible format or data requirements on the merger parties; that approach, AAR explains, could impose unnecessary burdens on the merger applicants and result in studies that do not address the market and competition issues likely to be most relevant to a particular transaction.

Service assurance plans. AAR, though it supports the need for service assurance plans (SAPs),[73] asks that we clarify that, in evaluating the adequacy of these plans and in monitoring their implementation, we understand that railroads have limited ability to predict and control future events. AAR contends: that the degree of precision required in SAPs should be evaluated in light of the inherent uncertainty about future conditions in railroad markets; that, in addition, we should not lock the merged carrier into the operations described in the SAPs (AAR explains that, if a newly merged carrier is to operate efficiently, it must have the flexibility to respond to future changes in demand and operating conditions); and that, furthermore, we should not allow our preference for privately negotiated agreements to confer undue bargaining power on non-applicant parties to merger proceedings (AAR insists, in particular, that applicants should not be penalized if they are unable to reach negotiated agreements on service assurances).

Service assurance plans: technical matter. AAR contends that NPR § 1180.10(a) should require applicants to use data from the most recent 12 month period for which data are available (AAR explains that, depending on the date the application is filed, data for "the year immediately preceding the filing date of the application" may not be available).

Service assurance plans: new legal remedies. AAR insists that, although we should encourage the parties to negotiate the terms of service assurances on a case-by-case basis, we should not create new legal remedies (involving financial penalties and arbitration proceedings) for merger-related service disruptions. Railroads, AAR explains, already have financial and commercial incentives to avoid service disruptions; the increased costs and lost revenues that result from service disruptions, AAR notes, are incentive enough for merging railroads to avoid them. And, AAR adds, numerous remedies for service-related disruptions are already available (AAR explains that shippers frequently protect themselves by negotiating service guarantees and remedies for inadequate performance in rail transportation contracts; AAR further explains that civil court remedies, including damages, are available in appropriate cases).

Cumulative impacts and crossover effects. AAR is concerned that the NPR's treatment of cumulative impacts and crossover effects places too much weight on speculation; merger applicants, AAR explains, cannot realistically be expected to quantify, with precision, the public benefits of a proposed merger in light of anticipated downstream effects (AAR explains that, even if the merger applicants can correctly anticipate which other firms will seek to combine, they cannot know how the proposed combination will be structured, where the downstream merging firms will redirect traffic, what efficiencies the downstream merger will hope to achieve, or any number of other characteristics of the downstream transaction that would be critical to any

[73] AAR contends that it is appropriate for the Board to modify its existing merger rules in ways that will minimize or eliminate the possibility that future mergers will produce transitional service disruptions of the type that have been experienced in some recent mergers.

quantitative analysis). And, AAR adds, the proposal that the merging parties identify new conditions that might be required as the result of future mergers is particularly inappropriate (AAR explains that, given the broad range of variables that would have to be anticipated to propose future conditions related to future mergers, such "springing conditions" proposed by the merger applicants could well be inapplicable or irrelevant to the precise concerns raised by future transactions). AAR insists that it is not sound policy to require merger applicants to propose contingent conditions based on speculation about the future.

Class II and Class III railroads. AAR, which recognizes the vital role of Class II and Class III railroads in creating and maintaining a strong national rail transportation system,[74] agrees that the interests of Class II and Class III railroads should be addressed in the merger application process. Applicants, AAR believes, should address anticipated effects of a proposed merger on regional and shortline railroads, should identify benefits that those railroads and their customers will realize as a result of the transaction, and should develop remedies for any anticipated harms to the public interest by virtue of a merger's impacts on regional and shortline railroads.[75]

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[74] AAR cites, in particular, the 1998 Rail Industry Agreement (RIA) between AAR and ASLRRA, which (AAR notes) addresses contractual interchange commitments (i.e., "paper barriers"), car supply, heavy axle loads, routing alternatives, and other matters of concern to the railroads. AAR indicates: that it has worked extensively with the regional and shortline railroads to implement the RIA; that, recently, an Implementation Group was established to facilitate communication among those affected by the RIA and to promote a common interpretation and understanding of the RIA; and that, in addition, a special mediation review process (in which AAR and ASLRRA act as facilitators between the parties) was established for shortline railroads that believe they have been adversely affected by an action of a Class I railroad in a manner that is inconsistent with the terms of the RIA. And, AAR adds, it has also been active in looking for a solution to the problem of infrastructure disparity between Class I railroads and some Class II and Class III railroads (AAR notes, in particular, that the Class I railroads have supported legislation to provide federal funds to the regional and shortline railroads for upgrading their trackage to handle 286,000 pound cars).

[75] AAR insists that we should not adopt in our new merger rules the conditions set out in the "Bill of Rights" advocated by ASLRRA. Most of these conditions, AAR explains, do not deal with rail mergers or the effects of rail mergers, and are therefore not an appropriate subject of consideration in this proceeding. And, AAR adds, the Board should not insert itself into on-going AAR/ASLRRA negotiations by giving consideration in this proceeding to issues unrelated to the effects of future mergers.

Alliances and joint ventures. AAR insists that there is no basis for new rules or increased scrutiny regarding alliances and joint ventures. AAR explains: that joint operating and marketing agreements can permit carriers to offer more efficient service; that joint purchasing agreements can reduce costs; that, in any event, these transactions are subject to the same antitrust laws that apply to similar transactions in other industries; and that, by imposing new regulatory oversight on these transactions, we would discourage railroads from entering into them and would deny shippers the benefits they offer. And, AAR adds, the governing statute does not give the Board authority to review and approve transactions that do not involve the acquisition of "control" or the "pooling" of transportation or earnings.

Application of new merger rules to non-merging railroads. AAR insists that the governing statute would not allow us to apply our new merger rules to non-merging railroads. The statute, AAR explains, give us the authority to impose conditions governing the transaction; it does not, AAR argues, give us the authority to impose conditions on the operations of other, non-merging railroads.

Acquisition premium. AAR contends that our merger rules should not address the treatment of any "acquisition premium" associated with future mergers. AAR explains that, to the extent a proposed transaction raises financial issues that bear upon the public interest, those issues should be examined on a case-by-case basis.

Commuter interests. AAR agrees that the interests of commuter agencies should be addressed by merger applicants and that the Board should be available to address those interests during the oversight period in appropriate circumstances. AAR insists, however, that special treatment of commuter agencies is not justified. AAR contends, in particular, that we should not provide expanded access for commuter lines to the freight rail network of merging carriers (AAR explains that this would amount to an unconstitutional taking of freight rail property and, in any event, would, because wholly unrelated to the effects of future mergers, be outside the scope of this proceeding). AAR further contends that we should not require merging railroads to make specific improvements in the railroad infrastructure for the benefit of commuter railroads (AAR explains that such action would be inconsistent with many contractual arrangements between freight railroads and commuter agencies and would unfairly penalize shippers as well as freight carriers).

Oversight issues. (1) AAR contends that, under our oversight authority, we should not impose penalties in the event that predicted merger benefits do not materialize. AAR explains: that it is in the interest of the merging parties themselves to achieve projected efficiencies and cost savings; that merging parties are penalized in the marketplace if they are unable to achieve these efficiencies and savings; and that arbitrary penalties would only add to the financial burden of a railroad that was unable to achieve anticipated efficiencies and savings. (2) AAR contends that we should not establish specific and inflexible reporting requirements during the oversight period. The Board, AAR believes, should impose reporting requirements on a case-by-case basis; and, AAR adds, by focusing on data that is relevant to specific mergers, the Board will be able to carry out its oversight responsibilities most effectively and without creating unnecessary and costly reporting burdens on the merging parties.

Environment and safety. AAR, which favors negotiated resolution of environmental issues to the widest extent possible, agrees that we should encourage negotiated agreements to resolve environmental and safety issues. AAR insists, however, that there is no credible basis on which the Board can meaningfully catalogue community rights and responsibilities, nor is there any reason why the Board should endeavor to spell out the rights of one set of parties to these negotiations. AAR also contends that we should clarify that we will only consider environmental and safety issues that arise from the proposed merger and that we will not address preexisting conditions or reasonably foreseeable uses of railroad facilities. AAR further contends that there should be limits on our authority to revisit environmental issues in the oversight process and to impose new conditions where circumstances turn out differently from what the parties projected; we should recognize, AAR insists, that railroad traffic patterns are dynamic, and we should make clear that we will not impose new conditions in response to post-merger changes where those changes are consistent with natural fluctuations in railroad market conditions.

Environment and safety: technical matter. AAR contends that we should modify the NPR § 1180.1(f)(1) reference to negotiated agreements with "groups of neighborhood communities" because (AAR claims) it is doubtful that such groups can legally enter into agreements. AAR insists that we should instead encourage negotiated agreements with recognized governmental or public entities.

Environment and safety: DOT/AAR Highway-Rail Crossing Inventory. AAR insists that we should not require merger applicants to provide up-to-date data to the DOT/AAR Highway-Rail Crossing Inventory for crossings in the merged system. AAR explains: that the Inventory, administered by FRA, was set up over 25 years ago as a source for data, most of which is highway traffic-oriented, on rail crossings; that the bulk of the data is derived not from railroads but from state highway agencies; and that, if any changes to the Inventory are appropriate, particularly any changes that would turn what is now a voluntary data collection program into a mandatory one in terms of rail input, such changes should be made only after an FRA rulemaking or similar proceeding that addresses a specific set of proposals.

National Railway Labor Conference. The National Railway Labor Conference (NRLC)[76] objects to a number of things stated in the NPR.

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[76] NRLC, an unincorporated association of 54 railroads (including all of the Class I
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NPR § 1180.1(e), third sentence. The third sentence of NPR § 1180.1(e) states that "the Board respects the sanctity of collective bargaining agreements and will look with extreme disfavor on overrides of collective bargaining agreements except to the very limited extent necessary to carry out an approved transaction." NRLC notes that 49 U.S.C. 11321(a) provides that a carrier "is exempt from the antitrust laws and from all other law . . . as necessary to let [the carrier] carry out" an approved transaction. NRLC insists that, although Congress can change the "self-executing" statutory necessity standard, the Board has no power to modify that standard or to create presumptions against its application.[77] NRLC therefore contends that we should either delete the third sentence entirely (which, NRLC advises, would leave it to 49 U.S.C. 11321(a) to state the necessity standard), or, if we decide to include the necessity standard in the regulation, do so in the even-handed words of the statute itself (which, NRLC advises, provides that CBAs are not affected by the approval of a merger except "as necessary . . . to carry out" the authorized transaction). NRLC insists that the third sentence: (1) reflects an unfortunate choice of words that could serve only to confuse and mislead arbitrators and others in the future application of the Board's settled standards;[78] and (2) is at odds with the purpose of the proposed new Consolidation Procedures generally, which NPR § 1180.1(a) indicates is "to ensure balanced and sustainable competition in the railroad industry" and improved railroad service through consolidations that yield "substantial and demonstrable public benefits that cannot otherwise be achieved."[79]

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[76](...continued)
railroads), filed its pleadings (its initial comments, reply comments, and rebuttal comments) on behalf of: all of its member railroads (except Canadian National's U.S. affiliates); and the National Carriers' Conference Committee (NCCC, which represents railroads in national multi-employer collective bargaining).

[77] NRLC contends that, because Congress (by reenacting 49 U.S.C. 11321(a)) ratified the ICC's interpretation of that provision, the Board is not now free to read a new and more restrictive meaning into that provision.

[78] NRLC fears that the NPR § 1180.1(e) statement that the Board looks with "disfavor" (indeed, "extreme disfavor") on CBA overrides except to the "limited extent" (indeed, the "very limited extent") necessary to carry out an approved transaction could be misconstrued by arbitrators as changing the existing necessity standard or the settled understanding that override of CBAs is needed in certain respects in virtually all consolidations.

[79] NRLC insists, in essence: that enhancing competition and improving service will require operational changes; that such changes will necessarily give rise to issues as to the selection and assignment of forces, such as adjustment of seniority, scope and work jurisdiction rules, and the assignment of employees in a consolidated operation to work under a single CBA;
(continued...)

NPR § 1180.1(e), fourth sentence. The fourth sentence of NPR § 1180.1(e) states that the Board "will review negotiated agreements to assure fair and equitable treatment of all affected employees." NRLC is concerned that the inclusion of this language in the NPR suggests that the Board is proposing to review voluntarily negotiated implementing agreements, something (NRLC notes) that the Board has never done and that no one has asked it to do. NRLC assumes that the Board did not intend to make such a suggestion, which (NRLC claims) would serve only to frustrate the Board's goal of encouraging voluntary agreements.

NPR § 1180.1(e) commentary: negotiations. Our NPR § 1180.1(e) commentary "urge[s] the major railroads and their unions to negotiate broad-based agreements about issues of contention in this area and to report back to us with their results as soon as possible."[80] NRLC advises that, although the unions (other than UTU) have suspended their participation in such negotiations, NRLC hopes that the negotiations will be restarted and that consensus will be reached based on the UTU/NRLC agreement.[81] The railroads, NRLC promises, will keep the Board advised. NRLC further contends, however, that it does not help negotiations very much for the Board to suggest that it views "overrides" with "extreme disfavor" and that it believes that such "overrides" are justified to only a "very limited extent." And, NRLC adds, we should not state that we will adopt a rule barring CBA overrides unless the railroads and their unions can, by a date certain, resolve this matter in negotiations. Such a statement, NRLC explains, would constitute a repudiation of the UTU/NRLC agreement and would leave the other unions with no reason at all to enter into any agreement (and, NRLC adds, a rule eliminating the power to modify contracts when necessary to implement mergers would be flatly contrary to § 11321(a)).

NPR § 1180.1(e) commentary: relocation and other rules. Our NPR § 1180.1(e) commentary further states that "we have proposals before us, which we are seriously considering, for new rules to govern contentious issues, such as the need for employees to relocate in order to retain their jobs."[82] (1) NRLC indicates that it assumes that, if we decide to propose additional rules, we will do so by further Notice of Proposed Rulemaking in accordance with the Administrative Procedure Act. (2) NRLC also indicates that, because we have not yet proposed

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and that such issues will not be resolved satisfactorily without CBA overrides (because, without such overrides, carriers will be relegated to the "almost interminable" procedures of the Railway Labor Act to attempt to secure changes necessary to implement authorized transactions, with the threat of strikes at the end of the process).

[80] See NPR, slip op. at 17, last full paragraph.

[81] See NPR, slip op. at 17.

[82] See NPR, slip op. at 17, last full paragraph.

any rule regarding relocation of employees, NRLC will not speculate as to what rule we might propose in an appropriate proceeding under the Administrative Procedure Act. (3) NRLC insists, however, that RLD's 30-mile relocation proposal[83] is at odds with the objectives of the proposed new Consolidation Procedures. NRLC further insists that RLD's 30-mile relocation proposal would make a change in New York Dock that has no justification whatever under 49 U.S.C. 11326(a). NRLC explains: that, in the Washington Job Protection Agreement of 1936 (WJPA), the unions agreed that employees could be required to relocate in consolidations; that all standard labor protective conditions imposed by the ICC and the Board, including New York Dock, have recognized that employees may be required to relocate (i.e., may be required to accept relocation as a predicate to eligibility for protective benefits); that, in all the recodifications of the predecessors of § 11326(a), Congress has never cast doubt on this long-held understanding; that, as a practical matter, mergers in all major industries, not just the railroad industry, require long-distance relocation of employees; that, also as a practical matter, transcontinental relocations are not unusual; and that the only difference in this regard between rail employees and employees in other industries is that, under New York Dock, rail employees receive 6 years of guaranteed compensation, in addition to generous relocation benefits, including moving expenses, wages for up to 3 days while they move, reimbursement for losses on the sale of homes or unexpired leases, and moving expenses to return if they are furloughed within 3 years of relocation. The most generous merger protection arrangements in other industries, NRLC argues, do not afford comparable benefits to employees.

Other matters. (1) NRLC insists that, in light of the language and history of §§ 11321(a) and 11326(a), we do not have the authority to end CBA overrides. NRLC further insists that adoption of any proposal that would end CBA overrides would thwart implementation of mergers approved by the Board and would defeat their public transportation benefits. And, NRLC adds, the argument that CBA modifications are never necessary in end-to-end mergers is simply wrong.

(2) NRLC insists that the WJPA does not provide a satisfactory procedure by which carriers could obtain CBA modifications. NRLC explains that, although the WJPA (like New York Dock) requires that an implementing agreement be reached (either through negotiation or arbitration) before a consolidation can be implemented, the WJPA (unlike New York Dock) does not provide deadlines for completion of the negotiation and arbitration procedures. The delay inherent in WJPA procedures, NRLC further explains, would have much the same result as subjecting implementation of consolidations to the RLA. And, NRLC adds, successful invocation by the unions of the WJPA's withdrawal provision (which provides that any party can withdraw on a year's notice to the other parties) would leave implementation of mergers subject to the virtually interminable RLA procedures.

[83] See NPR, slip op. at 181.

(3) NRLC insists that there is no "long-debated" dispute over the necessity standard under §§ 11321(a) and 11326(a) that cries out for Board resolution. The fact of the matter, NRLC claims, is that the issue of what constitutes "necessity" for modifying a CBA under §§ 11321(a) or 11326(a) has been resolved by a series of decisions of the District of Columbia Circuit holding that a modification is "necessary" if it will permit implementation of a consolidation-related transaction that will yield a transportation benefit to the public. Under this standard, NRLC explains, modifications are permitted only to realize public transportation benefits that "would not be available if the CBA were left in place, not merely to transfer wealth from employees to their employer." NRLC further contends that we should not create a new "necessity standard" jurisprudence distinguishing "burdens" and "obstacles," because (NRLC claims) the distinction between "burdens" and "obstacles" is not supported by any decision and is, in any event, unintelligible (NRLC explains that both burdens and obstacles are impediments to implementation of a transaction).

(4) NRLC insists that we have not heretofore "arbitrarily and capriciously" maintained two different necessity standards, a more strict standard for CBAs and a less strict standard for all other types of rights. There has been, NRLC argues, only one standard, and that is the statutory standard of § 11321(a).

(5) NRLC insists that we should not limit modifications of CBAs by permitting them only in the context of "the immediate transaction under consideration," i.e., the initial consummation of a merger. That proposal, NRLC explains, runs afoul of the rule that the word "transaction," as used in §§ 11321(a) and 11326(a), embraces two categories of transactions (i.e., both the principal transaction approved by the Board and also any subsequent transactions that are directly related to and grow out of, or flow from, that principal transaction). There has never been, NRLC argues, a deadline on making merger-related operational changes or on modifications of CBAs necessary to accomplish those changes. And, NRLC adds, major rail mergers cannot be implemented all at once, and to try to force carriers to foresee and accomplish all consolidation of operations in one fell swoop at the outset of a merger could have serious service implications.

Burlington Northern and Santa Fe. The Burlington Northern and Santa Fe Railway Company (BNSF) contends that both public policy and a clear Congressional mandate require that the Board continue to favor and approve efficiency-producing mergers. Mergers, BNSF explains: can help the rail industry expand capacity through the more efficient use of existing capital assets; can enable railroads to reduce their costs; can encourage new investment and enable enhanced services to be offered to shippers; and can, by expanding the scope of networks, help railroads meet a greater range of shippers' transportation needs, thereby attracting new business and improving the rail industry's overall competitive position in the national transportation market. And, BNSF adds, the ability to pursue mergers, when warranted, can reassure investors about the future of an industry that today is not earning its cost of capital.

Reregulation. BNSF contends that we should reject proposals that seek the extensive reregulation of the rail industry. BNSF explains that, because the rail industry (which, BNSF notes, still has not achieved revenue adequacy) is a capital-intensive network industry that depends upon "differential pricing," any proposal that would eliminate differential pricing in the rail industry and drive down future rail rates (including expansive gateway regulation, post-merger rate caps, elimination of paper and steel barriers with shortline and regional carriers, competitive access, reciprocal switching and trackage rights, and revised bottleneck rules) would depress the earnings capacity of the rail industry, a result (BNSF adds) that, because it would lead in turn to reduced investment or even disinvestment in the rail industry, would threaten service quality.[84]

Expeditious handling of merger proceedings. It is vital, BNSF contends, that merger proceedings be handled expeditiously, within periods consistent with the requirements of the economy and capital markets. BNSF contends, in particular, that, given the financial realities of today's economy, given the additional detailed information that the NPR would require to be part of any application, given the express requirement that many procedural and case management issues be handled during the pre-filing period, and given the end-to-end nature of the mergers likely to be proposed in the future, the "almost" 2-year merger review process proposed in the NPR would be much too long. BNSF further contends that any final rule adopted by the Board should significantly accelerate the merger review process, by reducing to a maximum of 1 year (which would include the pre-filing period and a 6-month period for any required evidentiary proceedings) the deadline for Board action on a merger application.

Regulatory delay causes harm. BNSF contends that the merger review time frame proposed in the NPR would create significant harm for the rail industry and shippers. (1) BNSF argues that, although there is no reason to delay the benefits of a "good" merger for shippers, extended procedural schedules at best defer those benefits and at worst can lead to the complete loss of those benefits because good mergers are either not proposed or are undone by the delay and uncertainty of the review process. (2) BNSF argues that, during the period when a merger is pending before the Board, the applicants and other parties are placed in a regulatory limbo, unsure how to plan for the future or how to respond to other opportunities. (3) BNSF argues that capital markets cannot tolerate uncertainty or delay. The mere threat of an extended regulatory proceeding, BNSF warns, would cause capital to seek other investment opportunities and place downward pressure on railroad stocks. And, BNSF adds, in the rail industry, capital markets already see a merger review process that takes much longer than the merger review process in other industries. (4) BNSF argues that, given the "time value" of money, the length of the review

[84] BNSF indicates that, in the wake of the merger moratorium, it had to reconsider many of the capital projects it had planned for its system.

process can, by delaying the realization of merger benefits, turn a "good" merger into a "bad" merger or lead railroads to choose not to pursue good mergers.

Evidentiary procedures. (1) BNSF contends that FERC was able to improve its merger processing time significantly when it narrowed the scope of its merger review and defined more precisely for applicants what issues must be addressed in any application. BNSF further contends that FERC has also been able to process most mergers without the need to supplement the initial filings of the parties with third-party discovery, depositions, or other evidentiary proceedings. The Board, BNSF insists, should do the same. (2) BNSF contends that the mere size of a merger should not dictate the time it takes to analyze the merger. BNSF adds: that large mergers that do not raise difficult competitive issues often are handled by DOJ/FTC and other agencies in only a few months; and that many agencies are able to process mergers without significant evidentiary proceedings, relying instead on paper hearings without discovery. The Board, BNSF insists, should adopt this approach, so that rail mergers that do not raise competitive or other complicated issues can be handled on an expedited basis.

BNSF's proposed procedural schedule. BNSF contends that, for Class I mergers, we should adopt a procedural schedule that would result in final Board action on merger applications within 270 days of the filing of a complete merger application, or approximately 1 year from the date that the pre-filing notification is submitted to the Board. BNSF insists that the schedule it has proposed: is closer to the timetables for final review in other industries with which the rail sector competes for capital;[85] and is consistent with schedules that the ICC stated are ample to ensure full review of a merger application. BNSF also insists that we should reject any proposed requirements that would delay the timely filing of a merger application because of mandated consultations with interested parties.

Environmental matters. BNSF insists that a review period of 1 year for Class I mergers would accommodate the environmental review required under the National Environmental Policy Act (NEPA) and the Board's existing environmental regulations. BNSF explains that the Board, in cooperation with the applicants, could initiate many of the steps involved in the NEPA process as soon as applicants filed the pre-filing notification, instead of waiting for the filing of the application. BNSF indicates that, under the procedural schedule it has proposed, the Final EIS would be issued 205 days after the application was filed, making it available to the Board 5 days in advance of oral argument and 15 days before the voting conference. And, BNSF adds, the environmental schedule contemplated by BNSF is not significantly shorter than those adopted by the Board in recent rail merger proceedings and would clearly meet the key time periods

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[85] BNSF advises that mergers of major companies in other industries, including regulated industries, routinely are reviewed by other government agencies in a matter of months.

established under the Council on Environmental Quality NEPA requirements for conducting an EIS.

Case-by-case approach. BNSF contends that we should not adopt detailed regulatory prescriptions for all the issues that will be raised in future merger cases. Rather, BNSF argues, these issues (including "fact-specific" issues such as the treatment of 3-to-2 shippers and the "one lump" theory) should be addressed under the case-by-case approach, based on the facts of any specific merger proposal.

The NPR's presumptions. BNSF contends that the presumptions on which the NPR is premised (the presumption that future rail mergers will not produce significant public benefits, the presumption that future rail mergers will produce generalized competitive harms, and the presumption that future rail mergers will cause transitional service harms) are wrong.

The presumption that future rail mergers will not produce significant public benefits. BNSF contends that there is no basis for the presumption that future rail mergers will not produce significant public benefits. BNSF argues that, although this presumption rests on the premise that the problem of excess capacity and the need to rationalize the rail industry have been resolved, the reality of the matter is that the rail industry continues to face four significant and interrelated problems: the need to add capacity; the need to become more efficient in its operations; the need to improve service to shippers; and the need to earn a return that is adequate to attract the capital necessary to address the first 3 needs. BNSF further contends that mergers can play a crucial role in solving these problems, but only (BNSF adds) if artificial regulatory barriers to good mergers are not erected.

(1) BNSF contends that the most efficient and timely way to increase capacity is to better utilize existing assets. BNSF further contends that a merger can expand capacity at the least possible cost, because a merged railroad (which will be able to make decisions based upon the requirements of its entire network) will have a better ability to manage its assets to maximize capacity than two railroads acting separately or through an alliance or joint venture.

(2) BNSF contends that a merged railroad can be more efficient in its operations. A merged railroad, BNSF explains: can combine many functions, such as information technology and accounting; can achieve purchasing efficiencies that require a centralized approach to asset management; and can reduce the inputs required to achieve a given level of output, thereby producing public and private benefits.

(3) BNSF contends that the single-line service made possible by a merger can offer shippers more reliable service, while enabling railroads to craft new services that can attract traffic from competitors and other transportation modes.

(4) BNSF contends that a regulatory policy that continues to favor mergers will enable railroads to attract capital by reassuring investors that railroads will be free to pursue their preferred business strategies, as long as they will not eliminate competition for 2-to-1 shippers or threaten shippers with service problems. BNSF insists that industries that depend upon capital investment in long-lived assets require the assurance that regulators will not restrict their ability to respond to market requirements unless, and then only to the extent, necessary to prevent identifiable and cognizable harms to the public interest.

(5) BNSF contends that, in any event, any "paradigm shift" in the pro-merger policy reflected in the Board's current regulations must come from Congress; the Board, BNSF insists, does not have the statutory authority to adopt rules that would preclude or discourage mergers, or that would incorporate a presumption that mergers are contrary to the public interest. BNSF contends: that only Congress can reverse the pro-merger policy of the governing statute, which (BNSF believes) clearly favors mergers that increase efficiency; that, however, the rules proposed in the NPR would undermine Congress's ICCTA decision to maintain the then-existing pro-merger policy; that, furthermore, the rules proposed in the NPR are inconsistent with Congress's expressed intent that the ICCTA continue and advance a policy of deregulation of the railroad industry; and that, even if the proposed rules did not incorporate an overt anti-merger bias but rather only adopted a neutral stance toward mergers and increased the regulation of mergers, the rules would be inconsistent with the Board's statutory authority. BNSF further contends that, even if Congress had been silent on the issue of whether mergers could be precluded altogether by the Board, the Board would not have the authority to promulgate the "anti-merger" rules proposed in the NPR (BNSF explains that, because railroad merger policy is of fundamental importance both to national transportation policy and to the economy generally, it would be completely implausible to assume that Congress intended to delegate to the agency, *sub silentio*, the authority to promulgate rules forbidding private restructuring initiatives).

The presumption that future rail mergers will produce generalized competitive harms. BNSF contends that there is no basis for the presumption that future rail mergers will produce generalized competitive harms. BNSF argues that the Board's current policies already require that a merger plan preserve competitive options for 2-to-1 shippers as well as 2-to-1 shortlines and regionals, and also build-in and build-out opportunities and transload options. BNSF further argues: that it is not clear how product and geographic competition would be adversely affected by the end-to-end mergers that are likely to be proposed in the future, particularly given the open gateway and "contract exception" proposals contained in the NPR; and that, in any event, there is no reason why the Board could not consider, as it has in the past, whether product and geographic competition would be reduced, under the facts of an actual merger, in specific markets, and, if so, what specific remedies would be required to offset any identified harms.

The presumption that future rail mergers will cause transitional service harms. BNSF contends that there is no basis for the presumption that future rail mergers will cause transitional service harms. (1) BNSF argues that the "unique" problems of the UP/SP and Conrail transactions are not likely to recur in a future end-to-end merger. BNSF explains that the UP/SP transaction involved the acquisition of a railroad that had under-invested for years, and that the Conrail transaction involved the division of the assets of an existing railroad. (2) BNSF argues that the detailed SAPs and post-merger monitoring proposed by the NPR will ensure that merging railroads engage in a more detailed analysis of potential service problems and that interested parties have the ability to probe those plans. BNSF adds that it has proposed that merger applicants negotiate meaningful service guarantees with their shippers, and provide evidence that their post-merger plans will generate the capital to support the infrastructure improvements necessary for the benefits of the proposed merger to be realized. BNSF claims that these two proposals, if adopted, would further lessen the likelihood of future major service disruptions. (3) BNSF argues that merged railroads will have every incentive to maintain service quality and to learn from the problems of the past. BNSF explains that UP, CSX, and NS paid a very high price, in lost revenues, damages, and credibility with their shippers, for their service problems. (4) BNSF argues that offsetting potential and transitory service harms with concrete and permanent competitive conditions does not appropriately match problems with remedies. BNSF insists, rather, that any remedies should provide shippers with alternate access during the period in which the merged railroad is experiencing merger-related service problems.

<u>Imposing a substantially heavier burden on future rail mergers</u>. BNSF contends that imposing a substantially heavier burden, including the requirement of unrelated competitive enhancements, on future rail mergers would be bad policy and bad law. The Board, BNSF argues, should limit its review to imposing specific conditions designed to offset or remedy specific merger-related harms.

(1) BNSF contends that there is no basis for requiring merging railroads to offer unrelated "competitive enhancements" that could deter future mergers that would serve the public interest. BNSF insists that rail mergers can be structured to mitigate identified competitive harms, and that there is no reason to believe that future mergers will reduce competition in ways that cannot be identified or mitigated. BNSF further insists that the available evidence indicates that, in past mergers, Board-imposed and/or privately negotiated trackage, haulage, and other conditions to preserve competition have been effective.

(2) BNSF contends that, although it has supported the concept of raising the bar for mergers in the specific areas that have been identified as problems in recent mergers (including transitional service problems and the problems that might be created by transcontinental mergers, such as open gateways), that process should not become a means to alter the statutory basis of determining the public interest or a vehicle to reject the benefits of good mergers. There is, BNSF insists, a fundamental difference between raising the bar, as BNSF has proposed, and creating potentially insurmountable barriers, as (BNSF claims) the NPR proposes.

(3) BNSF contends that it is not appropriate to require that rail mergers enhance competition. BNSF argues that, if a merger would maintain effective intramodal competition for those shippers who now have it and would offer significant public benefits, it would be a mistake to deny the public and the railroads the benefits of the merger. That policy, BNSF warns, would harm shippers and adversely affect the ability of railroads to attract the capital necessary to invest in infrastructure.

(4) BNSF contends that the proposal to require applicants to incorporate proposals for enhanced competition is a bad idea. (a) BNSF argues that, if the Board is convinced that some major change in its regulatory policy (e.g., an equal access requirement) would yield significant public benefits, the efficacy of that policy change will depend primarily on its scope. It would make little sense and do little good, BNSF insists, to impose the new policy selectively on railroads that propose to merge. (b) BNSF argues that adopting a policy of approving mergers only if the applicants agree to adopt a major change in their methods of operation that they consider highly undesirable is much more likely to discourage railroads from proposing socially beneficial mergers than to produce a legal regime in which many railroads agree to the change as a condition on approval of a merger. (c) BNSF argues that the proposed policy would require the Board to determine what level of enhancements are necessary to offset possible harms and then allocate those enhancements to shippers who are not, by definition, directly affected by the potential harm. BNSF insists that the unfairness inherent in providing benefits to one class of shippers rather than another is a key reason why remedies should be designed to offset specified harms to specific groups. (d) BNSF argues that, if some shippers would suffer cognizable competitive harms as a result of a proposed merger, relief should be crafted to address those specific harms. The pursuit of broader remedies, BNSF insists, would be unfair to the harmed shippers and would raise very significant questions about the future regulatory structure of the rail industry. (e) BNSF argues that no agency should consider adopting a major change in its regulatory policy (e.g., an equal access rule) without considering carefully and in detail all of the implications and effects of adopting the new policy. And that, BNSF insists, cannot be done as an add-on to a merger review proceeding; rather, BNSF adds, it requires a separate rulemaking in which the agency addresses with care the scores of important issues that are raised by such a proposed policy change.

(5) BNSF contends that the NPR would create barriers to future mergers by allowing the Board to decide whether the claimed benefits of any merger could be achieved through means short of merger, such as alliances and marketing arrangements, that no party has actually proposed. BNSF argues that there are sound economic reasons to believe that mergers will be more efficient in the long run than joint ventures. BNSF further argues that, in any event, proper market incentives exist for management to choose, in each particular instance, the more efficient alternative as between mergers or joint ventures; and, BNSF adds, there is no reason to believe that the Board would make better decisions by second-guessing management.

(6) BNSF contends that the NPR would create barriers to future mergers by adopting rules that are unacceptably vague. BNSF explains: that it would be impossible for merger applicants to propose offsets to harms that cannot be precisely identified or quantified; and that neither the Board nor interested parties would have any meaningful guidelines for identifying the type or extent of enhancements required to offset harms that the parties may be unable to identify or assess. And, BNSF adds, because the rules proposed in the NPR are so vague as to render merger review virtually standardless, such rules, if promulgated, would constitute an unconstitutional delegation of legislative authority, particularly since railroad mergers and merger policy affect the entire economy.

(7) BNSF contends that the rules proposed in the NPR would encourage abuse of the regulatory process by interested parties. BNSF explains: that a competing railroad could propose enhancements in its competitive position (or encourage shippers, shortlines, or communities to propose such enhancements) to offset the hypothetical problems of its competitors' proposed merger; that shippers could seek new options to offset presumed losses of geographic competition that do not even affect them; and that, because the Board would have no reasoned basis for weighing these requests, the regulatory process would be held hostage by parties who would be encouraged to use any merger proceeding as an opportunity for regulatory blackmail. Our rules, BNSF insists, should not encourage interested parties to seek "rents" by demanding non-merger-related benefits, based on a claim that these benefits would compensate for the unidentified and unquantified harms caused by the merger.

(8) BNSF argues that the rules proposed in the NPR would place the Board in the unprecedented and unjustified position of picking winners and losers in the general economy by deciding which shippers or sectors of the economy will be the beneficiaries of any enhanced competition conditions. This, BNSF insists, is not a role that the Board should fill.

<u>Downstream and crossover effects</u>. (1) BNSF contends that, because merger applicants ought to address concrete (but only concrete) downstream and crossover effects of a proposed merger, merger applicants should be required: (i) to demonstrate that they will not create crossover effects by exporting service problems to other railroads; and (ii) to assess any new competitive problems with their merger that would be created by any subsequent merger that is filed with the Securities and Exchange Commission (SEC) by the time the first round of intervenor comments is due under the procedural schedule. (2) BNSF contends that the NPR's concern with downstream effects runs directly contrary to the presumption that future mergers will not produce competitive and other public benefits. A "responsive" merger, BNSF explains, would be "necessary" only if the first merger creates new competitive pressures. (3) BNSF contends that, if a pending merger would produce public benefits, the Board should not reject or impose conditions on the merger simply because a potential responsive merger might be harmful to the public interest. Rather, BNSF insists, the Board should reject or condition the responsive merger if it is actually filed. (4) BNSF contends that injecting downstream and crossover issues,

without appropriate limits, into the merger review process would inevitably result in an abuse and prolongation of the regulatory process. Opposing parties, BNSF explains, would have an incentive to posit responses and problems simply to delay, complicate, and defeat a pending merger proposal. (5) BNSF contends that, although the NPR can be read to suggest that the Board has "preferred outcomes" in any further consolidation of the rail industry, experience teaches that the selection of merger partners is best left to the forces of the market, subject to the protection of competition. (6) BNSF contends that, although the NPR can be read to suggest that the Board favors a "competitive balance" in which railroads compete at the margins but are guaranteed a basic market share, the reforms of the 4R and Staggers Acts were explicitly intended to end the days when regulators allocated markets. (7) BNSF contends that, if the Board has views on the appropriate regulatory structure of the industry (e.g., open access issues), those views should, to the extent allowed by statute, be addressed through a rulemaking of general applicability.

Post-merger oversight; future conditions; projected benefits. BNSF contends that merger applicants should not be subject to the future imposition of conditions to their mergers or required to guarantee the specific projected benefits of a merger. BNSF insists, rather, that the Board should limit its post-merger oversight to a review of: whether the conditions imposed to maintain shippers' competitive options have worked; whether service assurance plans have been followed and updated to maintain service integrity for shippers, shortline and regional carriers, and ports; and whether temporary remedies are required to alleviate any temporary merger-related service problems that may have developed.

(1) BNSF contends that merger applicants and other parties require assurances that Board action with respect to any merger will be final, except as necessary to remedy any transitional service problems or any competitive conditions that prove to be inadequate. BNSF further contends that, although the use of the Board's post-merger conditioning power to remedy these narrow categories of merger-related problems could be appropriate in some circumstances (because it would be crafted to preserve the service and competitive results promised by the merger applicants and approved by the Board), the use of the Board's post-merger conditioning power to impose new conditions on a merger in response to "unforeseen circumstances" or subsequent mergers would not be appropriate. BNSF explains that the "unforseen circumstances" test is so broad that a merged railroad would always be subject to the risk that the Board would impose conditions that would not have been acceptable as an original precondition to the merger. BNSF further explains that, if a subsequent merger takes place, any problems created by the second merger should be remedied only through conditions imposed on that merger, without requiring a previously merged railroad to contribute to the resolution of service or competitive problems that were created by the second merger.

(2) BNSF contends that a requirement that merger applicants propose how they would be held accountable for the benefits and service improvements they claim would be overly broad,

because (BNSF explains) such a requirement would mix areas where continued Board oversight is necessary and appropriate (i.e., competitive conditions and transitional service problems) with areas where continued Board oversight would be harmful and contrary to sound public policy (i.e., anything beyond competitive conditions and transitional service problems). BNSF further contends that, although it is in the applicants' best interest to do all they can to make the service improvements and implement the efficiencies of the transaction as seamlessly as possible, the applicants cannot be held responsible for unforeseen developments in their shippers' businesses, in the competitive dynamics of the industry, or in the economy as a whole that may adversely affect their projections. And, BNSF adds, the proposed "accountability" standard could have the result of discouraging the merged railroad from rethinking its plans in light of changing circumstances; the proposed review, BNSF explains, would encourage railroads to take unwise actions solely to reach regulatory benchmarks.

Alliances and joint ventures. BNSF contends that railroads choose among alliances, other forms of voluntary cooperation, and mergers based upon their assessment of which form will produce the greatest benefits. BNSF further contends that, because railroads recognize the extensive time and effort that mergers require, railroads that nevertheless choose mergers over alliances and other types of voluntary coordination agreements do so because mergers are more likely to achieve the efficiencies the railroads need (a merged entity, BNSF explains, will be better positioned to respond to future problems because of its ability to make decisions that reflect the balancing of the requirements of the entire system, rather than that part of the system served by each railroad in an alliance). And, BNSF insists, the Board should not dictate the structure of future business relationships; sound economic and regulatory policy, BNSF explains, requires that the Board defer to the decisions by capital markets on the best way to structure business enterprises, unless those decisions would result in identifiable harms that cannot be mitigated.[86]

Service assurance plans. (1) BNSF agrees that merger applicants should be required to file SAPs that address the risks of service problems and implementation. BNSF insists, however, that the filing and testing of a SAP should negate any presumption that a merger will produce transitional service problems that must be weighed against the merger as part of the public interest balancing.

(2) BNSF contends that, although the adequacy of the SAPs and any proposals to provide shippers with remedies in the event that service deteriorates for merger-related reasons should be

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[86] BNSF insists that we should reject requests that we review all alliances and joint ventures. BNSF explains that the Board lacks authority to review or condition alliances or joint ventures that do not involve "control." BNSF further explains that alliances and joint ventures are subject to the antitrust laws.

part of the Board's public interest determination, the Board should not dictate, in its rules, the nature of the remedies and/or procedures (including mandatory arbitration at the election of the shipper) to be followed in the "unlikely" event there are significant merger-related service problems in the future. BNSF maintains, rather, that the standards of performance, the avenues for relief, and the methods for resolving disputes should be determined in each merger proceeding on a case-by-case basis, taking into consideration (in each instance) the overall commercial relationship between the parties. And, BNSF adds, the Board should not decide, as a rule of universal applicability, that "compensatory damages" are always appropriate or necessary.

(3) BNSF agrees that the Board should conduct extensive post-approval operational monitoring to help ensure that service levels after a merger are reasonable and adequate. BNSF adds that the merging carriers should propose the relevant datapoints to be monitored, the specific metrics to be provided to the Board and others, and the processes to be used to conduct the post-approval operational monitoring.

(4) BNSF insists that merged carriers should not be responsible for "any" deterioration in service, without regard to whether such service problems are merger-related. Post-merger service, BNSF explains, may not achieve pre-merger benchmarks for a variety of reasons that have nothing to do with the implementation of the merger. It is, BNSF therefore argues, essential that any program of service assurances or guarantees distinguish carefully between merger-related and non-merger-related problems.

(5) It is also essential, BNSF contends, that any service assurance program not interfere with upgrades to the rail infrastructure. BNSF explains: that, if railroads are to meet the competitive challenges posed by other modes of transportation and to provide the improved services shippers want, they will need continually to add or improve infrastructure; that this can include upgrading rails, inserting ties, surfacing and leveling track, installing improved signal systems, expanding yard capacity, building new mainlines and sidings, and other actions; and that any of these actions may require short-term disruptions in service in order to achieve long-term benefits.

Open gateways. BNSF agrees that merger applicants should be required to demonstrate how access to markets and viable service offerings through major open gateways would be maintained operationally and financially. BNSF insists, however, that this requirement should apply only to points directly affected by the merger; there is, BNSF argues, no merger-related policy basis for extending this requirement to gateways not affected by a merger; and, BNSF warns, if railroads are required to keep all gateways open, the ability of railroads to improve service for rail shippers by selecting the most efficient routings and focusing volume onto through trains that pass through, rather than operate to, interchanges would be hampered. BNSF also argues: that the final rules should contain a general standard calling for existing major gateways to be maintained as open on an operational and economic basis; that, however, the

Board should not attempt to define by regulation how it will approach the many factual patterns that this general standard may raise in future merger proceedings; and that the final rules should also recognize that an open gateway requirement will need the full operational cooperation of merging and non-merging carriers, including Class II and Class III carriers (non-merging carriers, BNSF explains, could close gateways economically or operationally even if the merging carriers preferred to keep those gateways open).

2-to-1 situations; build-in/build-out situations; transload options. BNSF agrees that merger applicants should be required to preserve: (a) service options for 2-to-1 shippers; and (b) build-in/build-out and transload opportunities of shippers.

Bottleneck "contract exception" rights. BNSF agrees that merger applicants should be required to preserve a shipper's bottleneck "contract exception" rights, even if the merged carrier will be able to provide single-line service to that shipper.

Transnational transactions. As respects the proposal that, in cases involving Canadian or Mexican railroads, merger applicants be required to file a full-system competitive analysis and operating plan, BNSF indicates that it does not oppose reasonable requirements in this area, particularly as they relate to NAFTA traffic and influences on each country's international trade abilities and commitments, issues of safety requiring involvement or cooperation with the FRA, issues of conflicting economic regulation in Canada and/or Mexico as they affect the operation of the free market in the United States, or issues relating to national defense. BNSF insists, however, that we should not presume transnational transactions to be contrary to the public interest and should not discriminate against them. It would not be appropriate, BNSF adds, for the Board to attempt to forestall the traffic shifts that might result from shippers' responses to the creation of a rail network that is more efficient and has a broader geographic scope.

Labor issues. (1) BNSF agrees that merger applicants should be required to file additional employee impact information, including cross-border data for transnational mergers. (2) BNSF contends that, because Congress has defined when "cramdown" conditions are to be used and the scope of such conditions, any change in this area should come from Congress. (3) BNSF indicates that it supports direct negotiations between unions and the merger candidates as the best mechanism for resolving labor issues. And, BNSF adds, if such negotiations are to succeed, the Board should not involve itself in reviewing or approving voluntary labor implementation agreements.

Market data in support of a merger application. (1) As respects proposals that would require merger applicants to file expanded market data (including detailed market share data), BNSF indicates that, although it would not oppose reasonable requirements in this area, the requirements should reflect what is practical from a data standpoint and should recognize intermodal competition and the Board's precedents on the types of competitive effects that need to be remedied. BNSF explains that, because of the unique operating characteristics of the rail industry, traditional market share analysis is not appropriate in that industry, where a large number of shippers have always been sole-served and where many markets are subject to competition but served by a single carrier due to long-term contracts. Our merger review, BNSF insists, should therefore look to the loss of existing competitive alternatives, not to changes in market shares. (2) BNSF asks that we reject any implication that we will use market data to ensure that a merger does not affect the market shares of other railroads. BNSF explains that, because the competition created by mergers is good for the general public and shippers, no railroad should be insulated from the changes in market shares that such competition brings.

Upstream effects. BNSF contends that it is appropriate for the Board to take into account "upstream effects" (i.e., the effects on conditions imposed on a prior merger when that merged railroad is itself an applicant in a subsequent merger), provided (BNSF adds) that the emphasis remains on protecting the competitive interests of shippers and not the competitive position of railroads. BNSF indicates, by way of example, that, if a condition was imposed to protect a 2-to-1 shipper in a prior merger involving one of the merger applicants, it would be appropriate to review whether the condition would remain viable after the new merger. BNSF insists, however, that it would be contrary to statute and bad policy for the Board to remedy the problems associated with a proposed merger by imposing conditions (including the reopening of old conditions) on parties not involved in the proposed merger.

Technical changes. BNSF indicates that it agrees with the various technical revisions proposed in the NPR.

Post-merger moratorium. BNSF contends that a post-merger moratorium (i.e., a moratorium following each future Class I merger) would place restrictions on the rail industry and its ability to service its customers and would prevent or defer subsequent mergers that would produce public benefits. And, BNSF adds, any such moratorium would be contrary to the statutory provisions governing the Board's review process.

Class II and Class III railroads. BNSF insists that the "broad themes" of ASLRRA's "Bill of Rights" are not merger-related and are, therefore, beyond the scope of this proceeding. BNSF agrees, however, that shortlines and regional carriers are entitled to service assurances against service-related and competitive harms arising from a proposed merger.

Ports. BNSF contends that, although merger applications should address the service implications for ports, merger applicants should not be required to guarantee that there will be no adverse effects on ports. Traffic patterns, BNSF explains, will change over time based on the services offered by ports and railroads, export and import patterns, and the preferences of shippers.

Commuter lines. BNSF agrees that merger applications should address the effects on existing commuter services. BNSF notes, however, that efforts to work with commuter lines may affect other parties, because (BNSF explains) competing requests for one type of service may affect the merged railroad's ability to provide other types of service.

Acquisition premium. BNSF insists that the issues respecting the "acquisition premium" have been resolved in past proceedings, and that there is no basis for reopening these issues in this proceeding. BNSF adds, however, that it agrees that we should review in merger proceedings whether the merged carrier would have the financial ability (including the ability to service merger-related debt) to carry out its service integration and infrastructure plans.

Transcontinental mergers. BNSF insists that there is no reason to open an additional proceeding to consider issues that might be involved in transcontinental mergers.

Canadian National. CN[87] agrees that we should "raise the bar" to assure that future mergers are consistent with the public interest. CN contends, however, that our merger rules should: avoid unnecessary or open-ended regulation; continue to facilitate private initiative; further the public interest in trade and investment flows as envisaged by Congress when it approved NAFTA; and avoid advantaging one group of railroads over another. CN also contends that we can reasonably require merger applicants: to satisfy new requirements for detailed market analyses (subject to the availability of data); to present a detailed "route level review" showing how operational changes will translate into benefits for shippers; to provide a Service Assurance Plan; to provide a Safety Integration Plan; to provide more analysis of geographic and product competition; to provide more analysis of the post-merger competitive position of Class II and III railroads; and to show, through "full system" plans, that activities in foreign countries will not have adverse operating impacts in the United States.[88] CN further contends, however, that we should neither depart from the fundamental deregulatory tenets of the Staggers Act nor impair the predictability that is essential to the continued evolution through private initiatives of efficient structures for North American railroads. CN insists, in particular, that it would not be reasonable to require merger applicants: to "enhance" competition through conditions; to anticipate downstream transactions and evaluate them under the public interest standard; to anticipate whether the Board would deny approval of a voting trust under a public

[87] Affiliated entities Canadian National Railway Company, Grand Trunk Western Railroad Incorporated, and Illinois Central Railroad Company are referred to collectively as Canadian National or CN.

[88] CN also indicates that it would support a rule that would preserve the "contract exception" for separate bottleneck rates for shippers that might otherwise lose the exception through the creation of new single-line routes as a result of merger.

interest test even if the trust properly insulates from unauthorized control; to impose additional requirements for the prima facie case of applicants in transnational mergers;[89] or to increase complexity and reduce the likelihood of settlements so that merger proceedings will inevitably require the maximum statutory period.[90]

Enhanced competition. (1) CN contends that a requirement that merger applicants propose conditions not simply to preserve but also to enhance competition would confer extraordinary discretion on the Board to require regulatory restructuring and would generate corresponding uncertainty for parties attempting to evaluate possible mergers. CN argues: that conditions would no longer be logically bounded by the nature and extent of the competitive harm the merger would cause; that, because enhancements would be neither direct nor proportional, there would be no gauge for determining how much enhancement would be enough; that there would be no apparent way for the Board to compare harms and benefits; and that merger applicants would be unable to make reasonable assessments of these matters in advance. The nature and magnitude of the uncertainties, CN warns, can only interfere with the efficient functioning of the market for control. And, CN adds, the open-ended nature of the assessment required by the Board's proposal, with no meaningful standards to constrain the Board's exercise of discretion, could raise a serious issue of unconstitutional delegation.

(2) CN contends that the assumptions "embedded" in the proposal to require conditions to enhance competition may be stated as follows: (a) any merger between two Class I railroads will always entail irremediable reductions in competition and a risk of significant service disruptions; and (b) the combined negative values of these two effects will always outweigh the combined positive values of the increased efficiencies, improved service, and increased competition arising from the merger itself. CN insists, however, that these assumptions are not supportable. CN explains: that parties enter into mergers in order to increase efficiency and improve service, and those results in turn increase competition against other railroads and other modes; that quantified direct public benefits found by the Board in recent major mergers (largely productive

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[89] CN indicates that it assumes that the Board would consider a future merger between CN (which controls two Class I railroads) and another Class I railroad to be "transnational."

[90] (1) The pleading filed January 30, 2001 by CN (i.e., the "motion" to strike pages 48 through 66 of CSX's rebuttal comments, or, in the alternative, the "petition" for leave to file surrebuttal) is denied insofar as CN seeks to strike portions of CSX's rebuttal comments and is granted insofar as CN seeks leave to file surrebuttal comments of its own. The surrebuttal comments filed by CN (which run from the middle of page 4 to the end of page 14 of the motion/petition pleading) are accepted for filing and made part of the record. (2) The pleading filed February 15, 2001 by CN (i.e., the "notice" of supplemental authority) is accepted for filing and made part of the record.

efficiencies) have been in the hundreds of millions of dollars, and even these do not capture the unquantified direct public benefits such as service improvements and increases in competition; and that, therefore, there is no basis for finding that the direct public benefits of every future major merger will never outweigh any unremediable reductions in competition and unavoidable significant service risks, even assuming *arguendo* that every future merger will present such reductions and risks. And, CN adds, there is simply no basis for a general finding that every future merger between Class I railroads will cause reductions in competition that cannot be directly and proportionately remedied.

(3) CN contends that the "enhancement" requirement rests on an insupportable regulatory finding that precludes case-by-case examination of competitive and market realities. CN further contends that the result (which, CN insists, would be detrimental to all rail constituencies) would be to impose costs on transactions through "enhancement" conditions that are not in fact necessary to make the transaction consistent with the public interest. CN therefore concludes that we should not require enhancement through conditions, separate from the enhanced competition that flows from the increased efficiency and service improvements that result from the merger itself. CN suggests, however, that we could allow enhancement through conditions as an option for applicants in the unlikely event that there are identified competitive harms that are not directly and proportionately remediable. And, CN adds, it would not object if the new merger rules were to provide that competition-enhancing conditions will be examined on a case-by-case basis if and when merger applicants present them.

(4) CN contends that the proposed enhancement requirement would be contrary to the evolution of antitrust law over the past two decades. CN explains: that the assumptions underlying the enhancement requirement constitute a "per se" rule that future Class I mergers are inconsistent with the public interest in the absence of conditions to enhance competition; that the evolution of antitrust law, however, has been away from per se rules to rule-of-reason analysis, in which the particular facts are examined in detail; and that courts and antitrust enforcers have shifted away from per se rules in order to avoid displacing market decisions with legal constraints where a full understanding of the facts would reveal that such displacement is unnecessary to preserve competition and may instead foreclose procompetitive activities. It would not be appropriate, CN argues, to take an approach to the competition aspect of rail mergers that is fundamentally in the opposite direction from that of antitrust enforcement. And, CN adds, adoption of a per se rule would be particularly inappropriate for the Board, which (CN notes) has an expertise and institutional capacity to examine industry facts that courts lack, and which (CN further notes) has been explicitly directed by Congress to minimize federal regulatory controls under a deregulatory statute.

<u>3-to-2 issues</u>. CN indicates that it has no objection to a requirement that merger applicants list all 3-to-2 points. CN contends, however, that we should make clear that the listing

of 3-to-2 points does not carry with it any basic change in the Board's approach to 3-to-2 reductions.

Downstream transactions. (1) CN contends that the proper response to the likelihood of future mergers and a possible transcontinental duopoly is careful scrutiny of actual transactions, not abstract and hypothetical speculation. CN argues that, under the "downstream transactions" proposal: the Board would require applicants to speculate as to responsive mergers and then, building speculation on speculation, "measure" their own benefits in light of the hypothetical future mergers and evaluate the need for further conditions and the desirability of the resultant industry structure; and the Board would then impose its own "industrial policy" by accepting or rejecting the projected industry structure, thereby displacing the market and picking winners and losers in the abstract. CN insists that this *de facto* effect of the "downstream transactions" proposal would echo the central planning role for the ICC that Congress rejected in the Transportation Act of 1940.

(2) CN contends that the pitfalls in the proposal to examine downstream transactions are confirmed by the history of similar notions under the antitrust laws. No court, CN insists, has found a merger otherwise lawful to be unlawful in light of anticipated anticompetitive effects of future mergers, or has found a merger otherwise unlawful to be lawful in light of anticipated benefits of future mergers; such matters, CN claims, are simply not addressed. The DOJ/FTC Merger Guidelines, CN argues, make no mention at all of downstream transactions, merger trends, eventual industry structure, or the like, except insofar as they take account of the prospects of future entry. CN insists that antitrust enforcement does not ignore increasing concentration in particular industries but, rather, recognizes such a trend by applying the standard analyses with special care in such industries to ensure that significant reductions in competition from each merger under review are identified and remedied. Antitrust enforcement, CN claims, does not attempt to predict who is likely to merge with whom, or what the hypothetical benefits and harms of such predicted mergers would be in relation to the benefits or harms of the pending merger.

(3) CN suggests certain action that it claims could reasonably be taken with respect to downstream transactions. (a) CN contends that, if we believe that we need to become more cognizant of issues likely to arise in connection with transcontinental mergers, we should conduct a seminar focused on issues that relate to transcontinental mergers as distinct from other types of mergers. CN adds that we could invite parties to provide information or identify ways of analyzing the kinds of efficiencies that a transcontinental railroad could bring, the existing or potential demand for transcontinental rail services, the bearing of globalization and international trade, ways of identifying relevant markets for competition analysis, the significance of the vigorous competition in two-railroad markets that exists today, the framework for analyzing possible effects on incentives or ability to exercise market power, labor issues, issues of managerial control and customer responsiveness, the significance of new information

technologies, and the likelihood and consequences of failure of one of two systems. (b) As respects the one-case-at-a-time rule, CN contends that we should either: (i) leave the existing rule in place but broaden the class of persons entitled to petition for its waiver; or (ii) repeal the rule and leave to case-by-case determinations the extent to which, if at all, parties should have the opportunity, or merger applicants should be required in the first instance, to address announced downstream transactions.

Voting trusts. (1) CN contends that we should not apply the "public interest" standard to voting trusts; the public interest standard, CN argues, should be applied only to the merits of the merger transaction at the conclusion of the merger proceeding. CN argues that the proposal to apply to voting trusts a public interest test in addition to a "no-control" test would move the Board into uncharted territory (it is not clear, CN suggests, what the elements of the public interest would be apart from whether the voting trust sufficiently insulates from control). CN further argues that the voting trust proposal could involve the Board in second-guessing the applicants' allocation between them of regulatory risk during the pendency of the merger proceeding. This, CN warns, would be a very deep and unnecessary incursion into private initiatives and market outcomes, and could directly and without justification affect the valuation (the price, the stock exchange-ratios, the assumption of debt) agreed to by the applicants.

(2) CN contends that, in the context of a merger proceeding, we have the authority to apply the public interest standard to decide whether a transaction that confers control is in the public interest. CN further contends that, because a voting trust is designed to avoid control (not to achieve it), the use of a voting trust meeting the Board's guidelines has the effect of placing that transaction outside the Board's public interest jurisdiction.

(3) CN contends that the proposal to require applicants to submit voting trusts for Board approval (rather than leaving that choice to applicants as is now the case) would impose regulation in place of the market by not allowing applicants to determine if they prefer to assume the regulatory risk of unauthorized control during the pendency of their merger proceeding before the Board. CN warns that, even under the familiar no-control standard, the proposed requirement for prior approval could be a substantial regulatory impediment in circumstances where managements agree to move quickly to secure shareholder approval and to consummate, using a voting trust. And, CN adds, a prior approval requirement could also impede hostile takeovers initiated through tender offers, which (CN explains) typically require use of a voting trust. CN also warns that a prior approval requirement (and, even more so, a prior approval requirement in combination with a public interest test) could advantage non-railroad acquirers not subject to the Board's control jurisdiction.

(4) CN contends that we can properly aid applicants and further the purposes of our statute with respect to avoiding unauthorized control by standing ready to evaluate voting trusts under the control criteria, if applicants request us to do so. CN further contends that we should

allow applicants to decide whether to assume the regulatory risk of unauthorized control, and should not require applicants to obtain prior approval before employing a voting trust. CN adds that, if applicants do choose to seek our approval, it would be reasonable to provide opportunity for comments and reply comments.

Transnational transactions: the NAFTA framework. (1) CN argues: that NAFTA, "the guiding economic framework" for trade and investment for the NAFTA "Parties" (the U.S., Canada, and Mexico), was designed to create an economic environment in which an investor's nationality plays no role in domestic regulatory decisions; that, in particular, NAFTA provides for the phase out of restrictions on cross-border land transportation services among the three countries in order to create equal opportunities in the North American international land transportation market; that, furthermore, NAFTA requires the United States to accord to Canadian and Mexican investors treatment no less favorable than that it accords, in "like circumstances," to U.S. investors with respect to the establishment, acquisition, expansion, management, conduct, operation, and sale or disposition of investments; and that there is no basis to presume that domestic railroads and wholly privatized publicly traded foreign railroads[91] are not in "like circumstances" with respect to their willingness to cooperate with the FRA, their freedom from political controls that would subvert their profit-maximizing incentives, their lack of ownership restrictions of a type damaging to the public interest, and their willingness to continue to meet defense needs. CN contends that a regulatory agency, if it is to act consistently with the public interest as defined by Congress through NAFTA, bears a high burden if it chooses to discriminate against NAFTA applicants (e.g., by presuming that transnational mergers are contrary to the public interest). CN further contends that this burden is not met here; the special requirements that the NPR would impose on transnational mergers, CN insists, would by themselves prejudice interests that Congress has embedded in the public interest through its approval of NAFTA, and are otherwise unreasonable. And, CN adds, these inappropriate requirements cannot be "saved" by the Board's NPR § 1180.1(k)(2) promise to "consult with relevant officials as appropriate" to ensure that its actions in merger cases conform to NAFTA and other international agreements.

(2) CN rejects a number of arguments respecting the applicability of NAFTA. (a) CN rejects the argument that NAFTA's investor protections extend only to shareholders. NAFTA, CN contends, clearly bars measures that discriminate between different NAFTA companies (and not just different NAFTA shareholders of a single company) based on the companies' places of incorporation. (b) CN rejects the argument that our merger review is not subject to NAFTA because such merger review is either a "standard," a "technical regulation," or a "conformity assessment procedure" (as those terms are used in the NAFTA context). Our merger review, CN

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[91] Canadian National Railway Company is a wholly privatized and publicly traded corporation.

insists, is neither a standard, a technical regulation, nor a conformity assessment procedure. And, CN adds, NAFTA's guarantee of non-discriminatory national treatment would apply even if our merger review were a standard, a technical regulation, or a conformity assessment procedure. (c) CN rejects the argument that we must place the burden of coming forward on Canadian carriers because only Canadian carriers are positioned to bring forward information concerning Canadian rail regulation. Canadian rail regulation, CN explains, is not some kind of hidden law; rather, CN notes, information concerning Canadian rail regulation is public and is readily available to all participants in a merger proceeding.

<u>Transnational transactions: safety</u>. (1) CN contends that there is no reasonable basis for the NPR § 1180.11(a) requirement that transnational merger applicants "explain how cooperation with the Federal Railroad Administration will be maintained without regard to the national origins of merger applicants." CN further contends that this requirement, which (CN believes) would require foreign applicants to profess their good faith simply because they are foreign, is contrary to NAFTA and is arbitrary. CN explains: that Congress approved NAFTA on the implicit assumption that Canadian and Mexican corporations with operations in the U.S. would not, as a general matter, be less willing than domestic corporations to abide by U.S. laws and cooperate with regulatory agencies as appropriate; and that, without any adequate basis, NPR § 1180.11(a) presumes otherwise with respect to cooperation with FRA. CN further explains: that the public interest in harmonizing safety requirements across NAFTA borders is addressed in mechanisms established in NAFTA itself; that, under NAFTA, the NAFTA countries have established a Committee on Standards-Related Measures; that this Committee, in turn, has established a Land Transportation Standards Committee to oversee commitments on safety standardization; that, in addition, a Rail Operations working group has been established; and that these institutions provide a mechanism for encouraging safety and other standards in the operation of railroads across borders, as an ongoing effort not limited to transnational mergers. CN insists that any regulatory agency must discharge a high burden of necessity to presume that this NAFTA mechanism, adopted by Congress as in the public interest, is insufficient to deal with specifically transnational issues in rail safety.

(2) CN contends that the NAFTA assumption that Canadian and Mexican corporations with operations in the U.S. will generally adhere to U.S. laws is reinforced with respect to rail safety by experience and common sense. There already are, CN explains, substantial railroads in the U.S. that are foreign-owned; and, CN adds, the incentives (moral, legal, economic, and contractual) of foreign railroads operating in the U.S. are no different from those of U.S. railroads with respect to safety (each, CN insists, has strong reasons to operate safely, and to cooperate with FRA in order to do so).

(3) CN contends that, even if there were issues of cooperation or performance attributable to foreign ownership that could not reasonably be left to the NAFTA transnational safety

mechanisms, such issues would not be specific to mergers, and the merger rules would therefore not be the place to address them.

(4) CN contends that, if some particular feature of a transnational merger raised particular safety concerns (e.g., if some such feature called into question FRA's ability to enforce its regulations), the merger applicants would no doubt present evidence themselves as part of the application. CN further contends that, if the merger applicants failed to address an element of a transaction that raised particular safety concerns, the issues would no doubt be raised by the numerous parties in a merger proceeding that would have every incentive to pursue such issues.

Transnational transactions: national or provincial goals. (1) CN contends that there is no reasonable basis for the NPR § 1180.11(b) requirement that transnational merger applicants "assess the likelihood that commercial decisions made by foreign railroads could be based on national or provincial rather than broader economic considerations, and be detrimental to the interests of the United States." CN argues: that this is not a reasonable proposal as applied to wholly privatized and publicly traded companies in an era of globalization whose hallmark is multinational corporations successfully pursuing their economic interests across borders without regard to their places of incorporation; that there would have to be something very peculiar about wholly privatized and publicly traded freight railroads to legitimate an across-the-board concern that they are instruments of national or provincial political agendas that displace normal economic incentives; that, however, there is no evidence of such peculiarity; and that both the public policy of the United States and the behavior of the capital markets are to the contrary.

(2) CN contends that NPR § 1180.11(b) would require foreign applicants to explain in their prima facie case why Congress's general assumption that NAFTA investment would increase the economic welfare of the U.S. is accurate as to them. There is, CN insists, no basis for this reversal of Congressional policy, and nothing that would satisfy the high burden on an agency to justify discrimination against NAFTA applicants. The Board, CN adds, can stand ready to entertain credible evidence that the Congressional policy is inapplicable as to a particular applicant, but, as with the other proposals relating exclusively to transnational mergers, it should not impose nationality-based requirements for the prima facie case of NAFTA applicants.

(3) CN acknowledges that the Canada Business Corporations Act (CBCA), under which CN is incorporated, requires that a majority of CN's directors be resident Canadians. CN contends, however, that NAFTA explicitly reserved this CBCA provision for all sectors. CN further contends that, as a practical matter, there is no evidence that the nationality of board members affects firm performance or decisions. And, CN adds, the CBCA (like U.S. corporate laws) imposes a fiduciary duty on directors to manage the company in the best interests of the corporation.

Transnational transactions: ownership restrictions. (1) CN contends that the NPR § 1180.1(k)(1) requirement that transnational merger applicants "address how any ownership restrictions imposed by foreign governments should affect our public interest assessment" would require a new element in a foreign applicant's prima facie case. CN further contends that NPR § 1180.1(k)(1) embraces a presumption that ownership restrictions imposed by a foreign government (even ownership restrictions that are nationality-blind, i.e., that apply without regard to nationality) are contrary to the public interest. The NPR § 1180.1(k)(1) requirement is of concern to CN because, as CN advises, the CN Commercialisation Act contains a nationality-blind ownership restriction that limits the ownership of CN voting stock by any one person or association of persons to 15%.

(2) CN contends that ownership restrictions are not unique to foreign railroads; major U.S. railroads, CN advises, have them too. CN explains that ownership restrictions, which come in several forms and which are imposed in a variety of ways, typically come into play when someone, acting alone or in concert with others, seeks to acquire more than a set percentage (typically within the 10%-to-20% range) of a railroad's outstanding capital stock. CN further explains that ownership restrictions, whatever the source, tend to have a common objective (to protect against corporate raiders and hostile takeovers) and a common goal (to ensure that the terms and conditions of acquisitions, when they do occur, will be reached through arm's-length negotiation by the parties).

(3) CN indicates that some ownership restrictions are imposed through shareholder rights plans known as "poison pills" that are adopted by the railroad's board of directors. CN advises: that CSX has a plan that would be triggered by a tender offer for the acquisition of 10% of CSX's common stock, and that would entitle shareholders (other than the would-be acquirer) to purchase preferred stock at a specified exercise price, or, under certain circumstances, to obtain additional shares of common stock; that NS has a plan that would be triggered by a tender offer for the acquisition of 15% or more of NS's common stock, and that would entitle shareholders (other than the acquiring person or group) to purchase NS shares at a 50% discount; and that, with respect to both CSX and NS, the effect of the plan would be to make the proposed acquisition uneconomic.

(4) CN indicates that other ownership restrictions arise under statutory provisions that inhibit or handicap large stock acquisitions where the acquirer is seeking control of the company. CN advises that CSX and NS are also protected by provisions of the Virginia Stock Corporation Act that require super-majorities of each group of shareholders entitled to vote, in order to approve a merger. CN further advises that BNSF, while allowing a takeover by simple majority, has availed itself of a Delaware statute that allows its board of directors to exclude the voting rights of a would-be acquirer in a shareholder vote on the acquirer's merger proposal. Each of these arrangements, CN suggests, amounts to an ownership restriction.

(5) CN contends that, from the perspective of NAFTA, foreign and domestic applicants are in "like circumstances" with respect to ownership restrictions; either such restrictions presumptively raise concerns under the public interest standard, CN insists, or they do not. CN argues that it is not foreignness but the nature of the restrictions that does or does not presumptively require explanation; to tie the requirement of explanation to foreignness, CN claims, is arbitrary, and would impose without sufficient reason an additional element of a prima facie case for foreign applicants that should be borne by both foreign and domestic applicants or by neither. There is, CN believes, no reasonable basis for imposing a requirement on foreign applicants but not domestic ones with respect to ownership restrictions.

(6) CN contends, in fact, that, with respect to both domestic applicants and foreign applicants, these types of provisions raise no issues under the public interest standard and provide no basis for an additional requirement in the prima facie case. The ICCTA itself, CN notes,[92] allows states to require super-majorities for control transactions, which means (CN contends) that Congress did not consider special restrictions relating to acquisitions to be inconsistent with the public interest; and, CN adds, for the Board now to presume otherwise would be to interpose regulation deeply into matters of corporate structure and governance, for no apparent or sufficient purpose. CN further contends that an acquisition by a corporate entity that could not itself be acquired is not presumptively contrary to the public interest.

(7) CN advises that, as a practical matter, where parties are willing to go forward with a proposed merger, ownership restrictions will not preclude them from doing so. And this, CN contends, is as true of the 15% statutory ownership restriction applicable to CN as it is of the more conventional ownership restrictions applicable to other railroads. CN notes, in this regard, that the BNSF/CN transaction that was proposed in 1999 (hereinafter referred to as the 1999 BNSF/CN transaction) utilized a Delaware holding company and a stapled stock structure that (CN claims) would have been consistent with the Canadian law barring the acquisition of more than 15% of CN's stock by a single person acting alone or with associated persons.

<u>Transnational transactions: national defense</u>. CN indicates that it does not object to NPR § 1180.1(l), which would require all applicants, domestic or foreign, to discuss and assess the national defense ramifications of their proposed merger. CN notes, however, that NPR § 1180.11(c), which applies only in the case of transnational mergers, also requires applicants to discuss national defense ramifications. CN claims that, if this separate requirement has any additional meaning, it presumably would require something more than is required of domestic applicants in order to establish a prima facie case. CN contends that an additional requirement for unspecified defense elements in a foreign applicant's prima facie case would be unreasonable. Congress, CN argues, obviously did not presume when it adopted NAFTA that

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[92] CN cites 49 U.S.C. 11321(a).

free trade in the provision of land transportation and investments in land transportation would be generally inconsistent with the public interest in national defense. Indeed, CN continues, Congress assumed the opposite, with the safeguard of the NAFTA provision that allows signatories to limit free trade to protect national security. CN contends: that a U.S. agency should impose defense-related requirements that discriminate against NAFTA applicants only when demonstrably necessary; and that any such demonstration should come in the first instance from the Department of Defense. CN further contends that applicants in transnational mergers cannot reasonably be expected to identify defense concerns that are not suggested by experience[93] and that DOD has not previously raised.[94]

Procedural schedule. CN contends that "major merger" applicants should ordinarily be able to obtain a Board decision within a year after filing their notice of intent.

Rolling moratorium. CN contends that a "rolling moratorium" (i.e., a moratorium on additional future major mergers that would run for a set period after any particular future major merger) would represent a severe distortion of the market for control that could not possibly be justified. Any such moratorium, CN warns, could produce a rush of major merger proposals designed to get through the regulatory door before it closes for a multi-year period.

Service assurance plans: technical matter. NPR § 1180.10(c) requires merger applicants to discuss on-time performance for principal classification yards and major terminals. CN suggests that, because on-time performance is not a standard category for such facilities, we may wish to clarify what this is intended to mean.

Canadian Pacific. CP[95] agrees that it is appropriate to update our merger regulations to take account of fundamental changes in the structure of the North American rail industry and the business environment in which railroads and their customers operate. CP adds, however, that the

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[93] Foreign ownership of U.S. railroads, CN claims, has always been uneventful from a defense point of view.

[94] CN also suggests that, in the unlikely event that a transnational merger posed a sensitive defense issue, DOD might prefer to have a choice of (a) bringing the matter to the President under the law that gives the President the power to suspend any foreign acquisition when national security could be threatened or impaired, rather than (b) being required to litigate before the Board.

[95] Affiliated entities Canadian Pacific Railway Company, Soo Line Railroad Company, Delaware and Hudson Railway Company, Inc., and St. Lawrence and Hudson Railway Company Limited are referred to collectively as Canadian Pacific or CP.

proposed regulations relating to the Board's analysis of competition issues and the "downstream" impacts of future consolidations contain elements that are of significant concern to CP.

<u>Service issues</u>. CP agrees that we should: weigh service quality more heavily in estimating the benefits of a proposed merger; carefully scrutinize the potential for transitional service disruptions in evaluating possible merger harm; and require applicants to submit detailed Service Assurance Plans, develop contingency plans for merger-related service disruptions, establish problem resolution teams made up of interested stakeholders, and submit to Board oversight of the implementation process. These new requirements, CP claims, are absolutely necessary; experience with recent rail mergers, CP explains, suggests that the most significant issues raised by future consolidation proposals are likely to be about service quality and reliability.

(1) *NPR § 1180.10(a) and (c): technical matter.* CP notes that NPR § 1180.10(a) contemplates analyses of anticipated service improvements based upon benchmarks "for the year immediately preceding the filing date of the application." CP further notes that NPR § 1180.10(c) calls for benchmark analyses of dwell time and on-time performance for principal yards and terminals based upon information "for one year prior to the transaction." CP asks that these proposals be clarified. CP explains: that it is not clear whether the NPR § 1180.10(a) "year" refers to the calendar year preceding the year in which the application is filed or the 12-month period immediately preceding the filing date of the application; that, however, either such "year" could present a problem (because statistics for the full calendar year preceding the filing date might not be available if an application were filed in the early months of the year, and because it is doubtful that statistics for the full 12 months immediately preceding the filing date would ever be readily available; and that, as respects NPR § 1180.10(c), it is not clear how applicants would fix the date of "the transaction" for purposes of determining the "year prior to the transaction." CP therefore asks that we modify the language of NPR § 1180.10(a) and (c) to provide for the use of benchmark statistics "for the most recent twelve-month period for which data is available."

(2) *NPR § 1180.10(i): technical matter.* CP notes that NPR § 1180.10(i) would require applicants to develop contingency plans to deal with potential post-merger service failures. CP further notes, however, that NPR § 1180.10(i) indicates neither when such plans would be put into effect nor who would make such a determination. CP contends that, although it would be appropriate for the Board to assure that merging carriers have effective contingency plans in place prior to consummating their transaction, and although it would also be appropriate for the Board to oversee generally the implementation of approved mergers, regulatory micromanagement of the implementation process (including determination of when to invoke contingency plans) would not be appropriate. CP therefore asks that we clarify that, although the Board will review applicants' contingency plans to assure that those plans deal effectively with

potential service disruptions, the Board will not interject itself in the day-to-day process of implementing applicants' operating plan (including contingency plans).

(3) CP insists that we should reject calls to impose on applicants a variety of sanctions for post-merger service failures (e.g., mandatory arbitration, new Board-administered complaint procedures, and indemnification of shippers and shortlines for costs incurred as a result of merger-related service problems). CP contends that such penalties: would be unprecedented; would deprive the merged carrier of revenue required to restore service; could threaten the viability of a carrier already experiencing financial losses from the diversion of traffic to other carriers; and would divert the attention of the carrier's management from the critical task of addressing its service problems. CP further contends that additional STB-sponsored remedies are not necessary to protect the public from post-merger service failures; carriers and shippers, CP explains, can already, if so inclined, include service guarantees and penalties in their transportation contracts.

Public benefits. CP agrees: that we should scrutinize claimed merger benefits more carefully to ensure that they are well-documented and reasonable; that we should accord increased weight to benefits stemming from enhanced competition and improved service, and less weight to carrier efficiency benefits; and that, in order to discourage applicants from exaggerating the benefits of their transaction, applicants should be required to suggest additional measures that might be taken if the anticipated public benefits identified by applicants fail to materialize in a timely manner. CP asks, however, that we clarify in two respects our proposed regulations relating to public benefits.

(1) *NPR § 1180.6(b)(11): technical matter.* CP is concerned that, although the NPR does not explicitly incorporate new STB-sponsored remedies for post-merger service disruptions, shippers and shortlines might construe the reference to "additional measures" in NPR § 1180.6(b)(11) as an invitation to seek conditions mandating such procedures in individual cases. CP therefore asks that we clarify that NPR § 1180.6(b)(11) is intended to encourage applicants to offer service guarantees or remedial procedures on a voluntary basis, but is not an indication that the Board itself will impose such remedies.

(2) *NPR § 1180.6(b)(11): another technical matter.* CP contends: that operating plans and capital spending proposals set forth in consolidation applications are based upon foreseeable circumstances at the time the application is filed; that changes in customer demand, unanticipated capital needs, and competitive responses by other carriers might dictate that the merged carrier modify or postpone operating changes or investments identified as "public benefits" in the application, or pursue different (but perhaps equally beneficial) actions in the years immediately following the merger; that, for these reasons, a regulation that required merging carriers to adhere strictly to every element of their operating plan, or to implement their merger in precisely the manner described in the application, would not promote the public interest; and that, therefore,

the "additional measures" contemplated by NPR § 1180.6(b)(11) should be invoked only where the merger, as implemented, fails to deliver substantial public benefits. CP therefore asks that we clarify that NPR § 1180.6(b)(11) is not intended to impede the ability of merging carriers to react appropriately to changing business conditions.

Competition issues. (1) CP agrees that we should fashion a merger policy that will ensure balanced and sustainable competition in the railroad industry. CP contends, however, that a rule that requires applicants in all cases to restructure the pre-merger competitive balance, without regard to whether the evidence demonstrates that such restructuring is needed to address any actual harm to the public, is unwarranted. CP further contends: that 49 U.S.C. 11324 mandates that the Board protect the public from adverse competitive consequences of rail mergers, but does not require that all mergers affirmatively increase the level of rail-to-rail competition; that the policy articulated in the NPR represents a major departure from the Board's (and the ICC's) longstanding interpretation of the merger statute; that the blanket assumption that all future consolidations will reduce product and geographic competition and generate transitional service failures would appear to be inconsistent with administrative law governing agency presumptions (CP explains that inclusion of these presumptions in the merger regulations is difficult to reconcile with the requirement that the Board's determinations in adjudicatory proceedings be based on substantial evidence in the record); and that the determination whether, and to what degree, a future consolidation would generate adverse effects of the type hypothesized in the proposed General Policy Statement must be made on a case-by-case basis. And, CP adds, the NPR's concern with product and geographic competition stands in stark contrast to the Board's recent decision to discontinue consideration of product and geographic competition in the market dominance phase of rate cases.

(2) CP contends that the assumption that future mergers will "enhance" competition only if the choices of shippers are supplemented through structural changes (such as trackage rights or shared terminal access) ignores the fact that mergers can promote competition in many ways. CP explains that, to the extent a merger improves operational efficiency or strengthens applicants financially (particularly where the transaction would provide a solution to a weaker carrier's financial problems), consolidation can enhance the competitive capabilities of the rail system. And, CP adds, because the draft regulations afford little guidance regarding how much competitive enhancement would be "enough" to overcome the negative presumptions embodied in the rules, the resulting uncertainty could lead the industry to forgo transactions that would otherwise produce significant public benefits without harming competition.

(3) CP insists: that future merger cases should be decided on the basis of record evidence, not unsupported assumptions; that we should adhere to our longstanding preference for achieving public interest objectives through private industry initiatives rather than extensive regulation; and that it is illogical to require conditions that permanently restructure the competitive balance as a means of offsetting temporary post-merger service failures. And, CP

adds, the introduction of new operations by additional rail carriers on applicants' lines (particularly in terminal areas) during the implementation period would, if anything, increase the risk of congestion and service problems.

(4) CP therefore contends that we should delete the presumptions that future mergers are likely to result in anticompetitive effects and service disruptions, as well as the requirement that applicants must include provisions for enhanced competition in all cases. CP also contends that, in place of these provisions, we can include language indicating that we will consider carefully, on a case-by-case basis, the impact of future consolidations on product and geographic competition, and the likelihood that service may be disrupted during the implementation stage of the transaction. CP further contends that we could also include language providing that, if the record shows that a particular merger would have adverse impacts that were not directly mitigated by conditions or offset by other demonstrable public benefits, voluntary measures by applicants to supplement the competitive choices of shippers would provide a means to satisfy the public interest balancing test.

(5) CP further contends that we should clarify NPR § 1180.1(c)(2)(ii), which provides that, in future merger proceedings, the Board "will consider whether projected shifts in traffic patterns could undermine the ability of the various network links (including Class II and Class III rail carriers and ports) to sustain essential services." CP explains: that the reference to ports suggests that, in future cases, we may assume that diversion of traffic from a U.S. port to a foreign port in connection with a cross-border rail merger is contrary to the public interest; that, however, such an assumption would be contrary to the principles of NAFTA, which (CP advises) is intended to facilitate trade among the United States, Canada, and Mexico; that, consistent with NAFTA, our decisions should promote the development of an efficient continent-wide transportation system; that, to the extent diversion of traffic from a U.S. port to a Canadian port (or vice versa) results from more efficient single-system services offered by a transnational rail carrier, such diversion should be viewed as consistent with NAFTA and with the overall public interest; and that, by contrast, government action prohibiting such diversions would be contrary to the free trade principles articulated in NAFTA. CP therefore asks that we clarify that we will not exercise our authority over rail mergers in a manner that favors U.S. ports over their Canadian counterparts, but rather will evaluate the impact of port diversions on a case-by-case basis and in a manner that takes into account the guiding principles of NAFTA.

(6) CP contends that NPR § 1180.7 (market analyses) would impose an unrealistic evidentiary burden on the parties to future consolidation cases. It is simply not realistic, CP insists, to expect applicants to predict with any degree of certainty the post-merger market shares of both other rail carriers and other modes. CP therefore asks that we reconsider whether it is worthwhile to require applicants to engage in such guesswork.

(7) *NPR § 1180.7: technical matter.* CP contends that the ability of applicants to produce the types of market studies contemplated by NPR § 1180.7 may also be limited by issues of data availability. CP explains: that reliable and consistent data in the format contemplated in the NPR may not be readily available, particularly for non-rail modes; that, with respect to cross-border traffic, data limitations exist with respect to both rail and non-rail shipments; that, although CP and CN submit data for inclusion in the Board's Waybill Sample, the growing number of provincial carriers in Canada do not; and that, furthermore, the motor carrier data compiled by Statistics Canada are based upon a survey of major carriers, and does not include information regarding shipments handled by smaller carriers or private fleets. CP therefore contends that, in order to take account of these (and other) potential shortcomings in available data, NPR § 1180.7 should be revised to require that market impact analyses provide the contemplated types of information "to the extent that it is available."

Downstream impacts. (1) CP indicates that it generally supports the Board's plan to assess the "downstream" implications of future rail mergers. CP insists, however, that, in the absence of an actual responsive merger proposal (and an STB application filed by the parties to that transaction), any attempt by applicants in the first proceeding to develop the detailed quantitative evidence contemplated by NPR § 1180.6(b)(12)(ii) and (iii) would be fraught with speculation and the potential for error. CP explains that, in order to comply with these provisions, applicants would have to predict not only which carriers might merge in response to their transaction, but also when such transaction(s) would be proposed, approved, consummated, and implemented. CP further explains that, even if applicants could accurately predict the timing of those events, they would lack detailed information (at the time they filed their application) regarding critical elements of the responsive merger, including the precise structure of the transaction, the operating plans and marketing strategies of the merging carriers, any new services and facilities investments that might be proposed as part of the responsive application, what competitive or other conditions might be proposed by (or imposed upon) the follow-on merger applicants, and the likely reaction of shippers to the service offerings of the hypothetical merged carrier. CP insists that any evidence regarding these matters would necessarily be speculative. And, CP warns, a Board decision based on such evidence would be vulnerable to legal attack as supported only by speculation, rather than substantial evidence.

(2) CP further contends that NPR § 1180.6(b)(12)(ii) and (iii) would have a number of undesirable practical effects on the conduct of future consolidation cases. CP explains: that, in order to obtain the information required by those provisions, merger applicants would seek discovery of other Class I carriers' internal studies or Board of Directors presentations regarding possible merger partners or the potential benefits of various consolidation transactions; that railroad CEOs would be pressed in depositions to divulge information regarding their discussions with other carriers concerning merger or other joint strategic ventures; that exposing a non-applicant carrier's ongoing business deliberations to discovery by its competitors would have a serious chilling effect on the ability of carriers to pursue strategic initiatives on a

confidential basis; and that premature disclosure of merger negotiations during the STB discovery process could also raise difficult issues under the securities laws. And, CP adds, even if such discovery were not permitted, a requirement that applicants quantify the impacts of hypothetical future mergers, and that other parties respond to such speculative evidence, would unduly complicate and prolong future consolidation cases.

(3) CP therefore asks that NPR § 1180.6(b)(12)(iii) be deleted. CP insists that the burden associated with any attempt to "fine tune" applicants' benefits calculations to account for the effects of hypothetical transactions, and the highly speculative nature of the resulting evidence, outweigh the probative value of such an exercise.

(4) CP also asks that NPR § 1180.6(b)(12)(ii) be modified to require only that applicants explain whether any conditions proposed by them or imposed by the Board would likely require modification if a follow-on merger were to come to pass. CP adds, however: that the public would be best served if the Board deferred decision concerning such modifications until the actual facts relating to responsive consolidation proposals are known; and that applicants and other parties should not be required to fashion "springing" conditions to be imposed on account of unannounced future consolidations. The Board, CP insists, can utilize the second merger proceeding, and its oversight of the first consolidation, to address these issues.

Transnational transactions. (1) CP notes that NPR § 1180.1(k)(2) indicates that the Board, in deciding transnational merger cases, will cooperate with Canadian and/or Mexican government agencies that are charged with reviewing the transaction, and will consult with "relevant officials" to assure that the Board's determinations are in harmony with NAFTA. CP asks that we include relevant officials of both the United States and Canada in any consultations involving a U.S.-Canada rail merger, so that the perspectives of both nations on NAFTA-related issues are taken into account.

(2) CP indicates that it supports the NPR § 1180.1(k)(1) requirement that applicants in future transnational merger cases submit "full system" operating plans and competitive analyses reflecting operations both within and outside the United States.

(3) CP contends, however, that NPR § 1180.1(k)(1) contains certain nationality-based requirements that, by imposing unique evidentiary burdens on "foreign" applicants, would violate NAFTA. CP explains: that NAFTA prohibits discrimination between U.S. and Canadian parties in connection with corporate control and investment transactions; that, in particular, NAFTA requires the United States to accord Canadian investors treatment no less favorable than it accords, in like circumstances, to its own investors with respect to the establishment, acquisition, expansion, management, conduct, operation, and sale or other disposition of investments; and that, furthermore, NAFTA prohibits the U.S. from imposing discriminatory performance requirements relating to Canadian acquisition or operation of investments in the

U.S., and requires the U.S. to accord Canadian service providers, including transportation providers, treatment no less favorable than it accords to its own service providers. NAFTA, CP argues, allows U.S. government agencies to impose application requirements and standards on Canadian and Mexican applicants only to the extent that such requirements and standards apply to U.S. applicants as well.

(4) CP cites two NPR § 1180.1(k)(1) requirements that (it believes) impose unique evidentiary burdens on "foreign" applicants and that should therefore be deleted. (i) *The requirement that non-U.S. applicants explain how cooperation with the FRA will be maintained without regard to the national origins of merger applicants.* CP insists that, although it would be entirely appropriate for the Board to ensure that merger applicants will comply with all applicable FRA safety regulations in operating lines located within the United States, it would be discriminatory for the Board's merger regulations to require only "foreign" applicants (and not their U.S. counterparts) to make such a showing in their application. And, CP adds, it would be improper for the Board to require non-U.S. applicants to take any action that is not required of U.S. railroads under U.S. laws or regulations, or to refrain from taking any action that is not prohibited by such laws or regulations. (ii) *The requirement that, when an application would result in foreign control of a Class I railroad, applicants must assess the likelihood that commercial decisions made by foreign railroads could be based on national or provincial rather than broader economic considerations and be detrimental to the interests of the United States rail network.* CP insists that this requirement, not imposed on U.S. Class I applicants, is precisely the sort of discrimination against Canadian firms that NAFTA proscribes. CP argues: that, like their U.S. counterparts, the Canadian Class I carriers are private corporations owned and controlled by their shareholders, not by any governmental entity; that their managements have the same fiduciary obligation as U.S. railroad managements to promote the interests of the company's stockholders; that it is no more logical to suggest that CP's management might make decisions regarding matters such as the siting of new facilities, the allocation of equipment during periods of peak demand, or rate levels in a manner that placed the wishes of Canadian or provincial governments above CP's own economic interests than it would be to assume that a carrier such as BNSF would favor the interests of Texas (BNSF's home state) over its own commercial interests in making the same decisions; and that, if either CP or CN were to acquire control of any one of the major U.S. Class I railroads, the great majority of the resulting system's lines would be located in the United States and not in Canada, which means (CP claims) that, as a practical matter, it would be even less conceivable that the Canadian firm would act in a manner detrimental to the interests of the United States rail network.

(5) CP indicates that, because its stock is not subject to any ownership restriction imposed by a foreign government, it takes no position with respect to the NPR § 1180.1(k)(1) requirement that foreign applicants address how any such ownership restrictions should affect the Board's public interest assessment.

Labor issues. (1) CP notes that NPR § 1180.1(e) states that the Board will review negotiated agreements to assure fair and equitable treatment of all affected employees. CP contends that this proposal to review negotiated labor agreements to assure "fairness" is inappropriate. This procedure, CP explains, would create a risk that individual employees, or groups of employees, might challenge the terms of agreements negotiated by their unions in an effort to persuade the STB to "sweeten" those deals, or to "match" the terms of agreements entered into by applicants (or by different carriers and labor organizations) in other merger cases. Such a result, CP warns, would create a disincentive for carriers to enter into voluntary agreements with employees.

(2) CP notes that NPR § 1180.6(b)(9) would require that the Employee Impact Exhibit include effects on applicant carrier employees located outside the United States. See NPR, slip op. at 30. CP warns that, although it is reasonable for the STB to seek "full system" labor impact information for purposes of understanding the overall effects of a cross-border transaction, the filing of such data could motivate non-U.S. employees to petition the STB for compensation or other relief to mitigate harms they might experience as a result of the merger. CP therefore asks that we clarify that this informational requirement is not intended to signal an assertion of jurisdiction by the Board over the extraterritorial labor impacts of future transnational mergers, and that potential impacts of such transactions on Canadian (or Mexican) employees remain the sole province of Canadian (or Mexican) law.

Post-merger "cooling off" period. CP warns that a rule that would require a "cooling off" period of at least 3 years between major consolidation transactions would place enormous pressure on the remaining carriers to reach agreement with a merger partner within weeks of the announcement of an initial Class I merger, in order to avoid being "left behind" by their competitors. CP also warns that the alternative (a 3-year moratorium on pursuing a responsive merger) would confer an unacceptable marketplace advantage on the parties to the initial merger.

Alliances and joint ventures. CP contends that we should reject calls to regulate voluntary carrier initiatives short of merger. Our jurisdiction, CP explains, is limited to transactions that involve the merger or control of 2 carriers (49 U.S.C. 11323-25) or the pooling of traffic, services or revenues (49 U.S.C. 11322); and, CP adds, marketing alliances and similar cooperative arrangements that do not involve "control" or "pooling" are simply not subject to prior approval under the ICCTA. CP further contends that any concern that anticompetitive agreements among unaffiliated railroads might escape scrutiny would be misplaced. Absent STB authorization under the control or pooling statutes, CP explains, alliance agreements do not obtain exemption from the antitrust laws pursuant to 49 U.S.C. 11321.

Open gateways. CP contends that we should require only that the "major" east-west and north-south gateways be preserved in connection with any future Class I consolidation. A requirement that applicants keep open any and all interchange points over which traffic moved prior to the merger, CP warns, would impair the ability of the merged system to realize economies of density and to take advantage of more efficient post-merger routings.

Disclosure of settlement agreements. CP contends that we should reject calls that future applicants be required to disclose the terms of all settlement agreements that they reach in connection with the transaction, whether or not such agreements otherwise require STB approval. The forced disclosure of the terms of all settlement agreements, CP warns, would make it impossible for applicants and their customers to resolve merger-related issues in private, and would thereby create a strong disincentive to settlement. CP adds, however, that, if the settlement agreement itself raises significant public interest questions, we should, on a case-by-case basis, require disclosure of settlement terms as appropriate.

Classification of carriers. CP contends that we should not limit the definition of "major" transactions to those consolidations involving only the largest Class I carriers. The revised merger regulations, CP argues, should apply equally to all Class I carriers.

CSX. CSX[96] has commented on a number of the issues raised by the NPR.

Focus on competition. CSX believes that the NPR correctly focuses the "public interest" standard for Class I rail mergers on competition; competitive considerations, CSX agrees, must play an important role in Board determination of any further proposed consolidation; and, CSX adds, our merger regulations should promote only those mergers that are likely to produce service-enhancing efficiencies to the benefit of shippers and the nation's transportation system overall. CSX agrees, in particular, that the policy that favors the approval of Class I rail mergers based on elimination of redundant facilities should be replaced by a policy that seeks to ensure balanced and sustainable competition.

Alliances and joint ventures. CSX agrees that certain procompetitive efficiency benefits of the sort that can be achieved through mergers may be achievable through joint marketing arrangements, interline partnerships, and other alliances between transportation providers. Alternatives of this type, CSX notes, would not result in a permanent restructuring of the rail industry nor engender service disruptions that have the potential to reduce the procompetitive benefits of rail mergers, and thus (CSX adds), if subject to the Board's jurisdiction, should be made subject to exemption or an expedited process of review.

Downstream effects; NPR § 1180.1(i). CSX agrees that, because the next Class I merger may necessitate a response by the other major railroads, that merger will have to be considered in

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[96] Affiliated entities CSX Corporation and CSX Transportation, Inc. are referred to collectively as CSX.

light of its reasonably likely downstream effects, which (CSX insists) will include the potential benefits and harms of the applicants' merger in light of foreseeable subsequent mergers and other reactions. CSX adds, however, that we should make plain that we will administer NPR § 1180.1(i) in a way consistent with keeping unannounced transactions and explorations confidential.

Reregulation via merger conditions. CSX contends that, consistent with the Staggers Act, the new merger regulations must reject reregulation of the rail industry through "forced access" or other intervention by the Board, and must continue to allow shippers, consumers, and the rail industry to enjoy the benefits of market-based competition. CSX insists that broad forced access relief, including forced switching or trackage rights, and/or abandonment of the one lump theory or the Bottleneck rule, would cripple the rail industry and destroy the benefits of deregulation brought about by the Staggers Act. Reregulation through use of conditioning powers, CSX adds, would go beyond "public interest" balancing and would be in direct contravention of governing legislation. CSX further contends: that merger conditions that would require forced access might produce some of the very same anticompetitive conditions that were sought to be corrected by the Staggers Act; that, for example, to the extent forced access conditions were placed only upon the applicants, and granted only to some shippers and not others, they likely would result in an uneven, artificial, and inefficient competitive landscape; and that such a result not only could potentially undermine smooth merger integration, but would create disincentives to invest in rail infrastructure or to pursue service-enhancing merger opportunities in the first place. And, CSX adds, imposing forced access in the context of an ongoing integration plan's execution would complicate substantially the applicants' ability to predict and manage an already complicated process.

Open gateways. CSX warns that broad "open gateway" requirements are the core of the failed DT&I conditions, which (CSX insists) were replete with anticompetitive effects and inefficiencies. CSX warns, in particular, that an unbounded open gateways requirement, like other forced access proposals, would undermine network operations, adversely affect long-haul train densities, and reduce railroad incentives to invest in capital infrastructure. CSX contends that, to minimize the adverse impacts of the NPR's open gateways proposal, we should require applicants to preserve only "major" gateways, i.e., the well-established East-West transcontinental gateways and similar well-established North-South gateways. CSX further contends that the movements to be kept open should be specific as to duration, commodity, route, origin, and termination of substantial movements that afforded both originating and terminating carriers a long haul and were heavily used during the period prior to the filing of the Notice of Intent. And, CSX adds, any open gateways provision must avoid the "equalization of rates" and "commercial closing" doctrines that were the most virulently anticompetitive features of the DT&I conditions.

Transnational mergers: in general. CSX contends that consideration of a major transnational merger proposal would raise novel jurisdictional, national interest, and national defense issues. CSX therefore agrees that transnational merger applicants should be required to inform the Board where a merger will result in foreign control; commercial decisions exercised post-merger, CSX explains, could be based on foreign economic interests or on regulations that may differ from U.S. rail policy goals as established in the Staggers Act. CSX also agrees that transnational merger applicants should be required to discuss how safety concerns will be addressed in cooperation with the FRA, that full-system analyses are necessary in order to evaluate rail systems that act as networks, and that the Board should be permitted to consider the effect of a transnational merger on the mobilization of the U.S. military. And, CSX adds, issues involving foreign law, such as the ability of the transaction presented to the Board to be altered by the act of a foreign sovereign, will have to be understood and factored into the merger analysis.

Transnational mergers: NAFTA issues. (1) CSX contends that the Board, in order to inform itself about facts, laws, and policies that are important to an accurate and comprehensive understanding of major transnational transactions, is justified in requiring non-U.S.-based applicants: to explain how they will be able to cooperate fully with the FRA; to assess the likelihood that foreign provincial or national government policies, rather than strictly commercial concerns, could affect business decisions in a manner detrimental to U.S. transportation interests; to discuss the potential that foreign government-imposed ownership restrictions might be factors relevant to the Board's assessment of whether the consolidation was in the public interest; and to assess the U.S. national defense ramifications of the proposed merger. These requirements, CSX insists, are entirely consistent with NAFTA, which (CSX claims) gives the Board broad powers to undertake precisely these inquiries.[97]

(2) CSX insists that neither CN nor CP has a NAFTA basis for any objection concerning "discrimination" among "investments" or "investors." CSX explains that, because most of CN's and CP's stockholders are U.S. citizens, both sets of "investors" in CN and CP (i.e., U.S. stockholders and Canadian stockholders) would be treated alike by the Board, regardless of what our regulations required with respect to the applications that CN or CP might file. CSX further contends, in essence, that our proposed regulations would not violate NAFTA's nondiscrimination provisions even if such provisions applied to CN and CP themselves. NAFTA's nondiscrimination provisions, CSX explains, bar the imposition of laws and regulations designed to skew the terms of competition in favor of domestic service providers, but

[97] CSX also claims (though without any elaboration) that, just as the NAFTA arrangements do not displace the Board's concerns and its role in dealing with the issues that will be raised by a transnational merger, the WTO arrangements similarly do not displace the Board's concerns and its role. See CSX's initial comments at 19.

do not bar legitimate regulatory distinctions between domestic service providers and foreign service providers. And, CSX adds, common sense indicates that foreign-based rail companies, with substantial operational and management control as well as substantial equipment located in a foreign country, are simply not in "like circumstances" with U.S.-based rail companies whose operations, management, and equipment are all located exclusively within the United States.

(3) CSX contends that NAFTA gives the Board broad powers to regulate in the public interest, including the power to subject non-U.S. service providers to extra burdens where this is important to achieving the Board's legitimate objectives. The Board, CSX notes, is charged with protecting the reliability, soundness, and competitiveness of U.S. rail service, as well as the interests of U.S. freight rail service "consumers" (i.e., shippers and receivers of freight). Our proposed regulations, CSX insists, reflect our evaluation of the "level of protection" we want to provide to minimize the risks of any damage to those objectives. And, CSX adds, we have full authority to assess the risks about which CN and CP do not want to provide information, and we also have full authority to protect against those risks. CSX further contends: that, under NAFTA, each NAFTA Party has the power to adopt "standards-related" measures, including measures relating to safety and the protection of human life[98] and consumers,[99] as well as measures to ensure enforcement or implementation; that this standards-setting right includes the right to prohibit the provision of a service by an existing or proposed service provider of another Party if the service fails to comply with the applicable standards measures governing that service, or if a would-be service provider fails to complete the Party's "approval procedures"; that national regulatory bodies are allowed to exercise independent judgment concerning what "level of protection" they want to achieve; and that, in fact, each NAFTA government has the power to determine unilaterally the "level of protection" it wants to provide in establishing regulations or standards designed to achieve its legitimate objectives of safety or the protection of human life or consumers.

(4) CSX contends that the Board's obligations to try to avoid serious discrimination against foreign service providers apply only where the services provided by the domestic and foreign providers are functionally equivalent in all material respects. CSX insists, however, that foreign rail service providers wishing to make a major change in the structure of the U.S. rail

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[98] CSX insists that the issue concerning cooperation with the FRA relates to safety and to the protection of human life.

[99] CSX insists that the requested discussion as to the likelihood that foreign provincial or national governmental policy will trump U.S. rail policy clearly is related to the protection of "consumers" (i.e., shippers and receivers of freight). CSX further insists that the requirement of information concerning government-imposed ownership restrictions (and the expansion thereof to the Board of Directors' nationality proposed by CSX) has a similar objective.

system do not qualify as providing services "under the same conditions" as U.S.-based railroads, and their services do not "pose the same level of risk" as U.S.-based railroads, if for no other reason than the fact that they will be subject to the regulations of two countries, not just those of one. And, CSX adds, it is evident that the inquiries required by our proposed regulations are not unduly burdensome and are directly relevant to achieving our legitimate objectives of assuring a safe, reliable, and competitive rail system.

(5) CSX argues that certain of our proposed regulations also appear to qualify, under NAFTA, as "approval procedures" (i.e., mandatory administrative procedures for granting permission for a service to be produced, marketed, or used for a stated purpose or under stated conditions). NAFTA, CSX contends, allows "approval procedures" to be applied as strictly as necessary to give the relevant agency confidence that a service conforms with an applicable technical regulation or standard, taking into account the risk that nonconformity would create. CSX further contends that, given the undeniable fact that in a transnational merger one of the merger elements would be subject to both U.S. and foreign government regulations, policies, and practices, it is entirely reasonable that we ask precisely the questions CN and CP are objecting to in deciding whether to approve the services that would be offered. The Board, CSX insists, can and should ensure that its "approval procedures" are strict enough to give it adequate confidence that the risks to rail safety, reliability, consumer protection, and other important public values are kept at an acceptably low level.

(6) CSX contends that there is no basis for asserting "discrimination" under NAFTA regarding the proposed requirement that foreign merger applicants discuss the potential national defense ramifications of their merger applications. CSX explains that, because NAFTA allows the U.S. to take any actions it considers necessary to protect its essential security interests, the Board has a right to make any inquiries it considers necessary to protect the U.S. national defense. CSX further contends that, in any event, there is no formal difference whatsoever, in this regard, in the burdens imposed on CN or CP and those imposed on U.S. applicants, because (CSX argues) NPR § 1180.11(c) (which requires transnational merger applicants to discuss and assess the national defense ramifications of the proposed merger) is "surplusage" to NPR § 1180.1(l) (which requires all merger applicants to discuss and assess the national defense ramifications of the proposed merger).

(7) *Discrimination against Canada-based carriers: technical matter.* CSX suggests that, although there is (in CSX's view) no merit in the argument that the regulations proposed in the NPR discriminate against Canada-based carriers, we might prefer to avoid the argument altogether by making NPR §§ 1180.1(k) and 1180.11 applicable to all major transactions. The fact of the matter, CSX asserts, is that it is not only the two largest Canada-based railroads that have system operations both in the United States and in foreign countries; a number of U.S.-based railroads, CSX explains, also have system operations both in the United States and in foreign countries. The transborder issues addressed by NPR §§ 1180.1(k) and 1180.11, CSX

advises, would be present to some extent, albeit a lesser extent, in cases involving only those U.S.-based railroads (one of which is CSX) that operate both in the United States and in a foreign country. See CSX's reply (filed February 20, 2001) to CN's motion/petition pleading filed January 30, 2001.

Transnational mergers: technical matters. (1) *Ownership restrictions: technical matter.* NPR § 1180.1(k)(1) requires transnational merger applicants to address how "any ownership restrictions imposed by foreign governments" should affect our public interest assessment. CSX insists that this provision, as presently worded, is too narrow, and should therefore be revised to require transnational merger applicants to address how "any ownership, directorship or similar nationality or residence restrictions imposed by foreign governments or otherwise provided for in connection with the transaction" should affect our public interest assessment. CSX, citing certain restrictions that were involved in the 1999 BNSF/CN transaction, explains that not all ownership, directorship, or similar nationality or residence restrictions are imposed by foreign governments; some such restrictions, CSX notes, may be imposed, for reasons of their own, by the parties to the transaction. And such restrictions, CSX suggests, may not be unique to the now-abandoned 1999 BNSF/CN transaction.

(2a) *Service assurance plans: technical matter.* CSX assumes that, because a breakdown in any node of a system may cause breakdowns elsewhere, the required SAPs must be presented on a system-wide basis. CSX claims, however, that the transnational implications of this assumption are not explicitly addressed in NPR § 1180.10. CSX therefore suggests that it might be best to include, in our "service assurance plans" regulation, an explicit statement that, in connection with a transnational merger, the SAP must include reference to matters outside the United States.

(2b) *Full system analyses: technical matter.* CSX contends that, because our public interest determination will have to be based on the public interest of the United States, the regulations should make it plain that, although full system analyses may be required, the transborder materials contained in such analyses will have to be sufficiently separated from the domestic materials contained in such analyses.

(2c) *Consistency in references: technical matter.* CSX notes that, whereas NPR § 1180.1(a) identifies a broad transportation infrastructure that embraces "the nation's highways, waterways, ports, and airports," NPR § 1180.1(k) makes reference to the possibility of actions that might be detrimental to the interest of "the United States rail network." CSX contends that we should adopt a consistent reference to the transportation interests of the United States. CSX contends, in particular, that NPR § 1180.1(k) should be revised to reference "the United States transportation network."

(3) *Definition of applicant: technical matter.* CSX notes that the NPR § 1180.3(a) definition of "applicant" provides that "applicant" "does not include a wholly owned direct or indirect subsidiary of an applicant if that subsidiary is not a rail carrier." CSX contends that this exclusion, although it has been routinely granted under the existing rules on petitions for waiver in the case of purely domestic transactions, has some shortcomings when applied to transnational cases. CSX, citing certain details of the arrangements made in connection with the 1999 BNSF/CN transaction, explains that downstream holding companies can be used as the vehicle for foreign control (at the stockholder or director levels) of a U.S.-based railroad. CSX therefore argues that, unless the Board is convinced that its powers over downstream holding companies that do not become "applicants" are sufficient to deal with a situation in which such a company is used as the vehicle for foreign control of a U.S.-based railroad, there should be an exception in the rule for downstream holding companies that: (i) are subject to or the source of ownership, directorship, or similar restrictions related to nationality or residence; and (ii) are to control directly or indirectly one or more rail carriers operating within the United States.

<u>Standards of competition analysis</u>. CSX contends that broadly accepted standards of competition analysis recognize that procompetitive effects of a merger should be balanced against anticompetitive effects without presumptions pro or con. Any mergers that emerge from the marketplace, CSX argues, should rise or fall on their own merits.

(1) CSX contends that a presumption that future mergers are likely to result in unremediable competitive harm would be inconsistent with the analytical frameworks employed by virtually all other federal agencies empowered by Congress to protect and regulate competition. Other federal agencies, CSX insists, do not create an up-front presumption that mergers either harm or benefit competition; instead, CSX adds, they simply set forth an objective methodology for analyzing each proposed merger on a case-by-case basis, once the necessary facts have been collected. CSX argues that the policies adhered to by other federal agencies (CSX cites, in particular, DOJ, FTC, FERC, FCC, and DOT) regarding both mergers and less integrative alliances benefit both applicants and their customers, because (CSX explains), by using more objective standards, likelihoods (both good and bad) are more easily analyzed and quantified, thereby enhancing the predictability of the merger review process.

(2) CSX adds that another reason we should not presume that further consolidation will cause unremediable competitive harm is that future consolidation among Class I carriers is likely, in whole or in large part, to involve end-to-end combinations of carriers that generally do not compete against one another. CSX explains that end-to-end combinations, as compared to combinations of head-to-head competitors, hold greater promise of producing certain types of public benefits, such as new single-line service alternatives with longer hauls, more reliable service, and reduced interchange and terminal delays. And, CSX claims, end-to-end combinations rarely result in a diminution of competition.

(3) CSX warns that a presumption against further consolidation, even that which is largely or entirely end-to-end in nature, would have foreseeable and practical detrimental effects. Third parties, CSX explains, would be encouraged to propose the imposition of self-serving conditions that are not needed to remedy potential transaction-related competitive harms.

(4) CSX contends that, whereas efficiencies arising from mergers should be treated as enhancements to competition and weighed against any potential harm to competition, the NPR can be read to suggest that increased carrier efficiency will not be regarded as a form of "enhanced competition" even though it permits the carrier to compete more strongly against other rail carriers or against other modes. CSX argues that a conception of "enhanced competition" that fails to recognize increased rail carrier efficiency as a competitive benefit would be inconsistent with the analytical frameworks employed by other federal agencies (CSX again cites DOJ, FTC, FERC, FCC, and DOT) responsible for protecting competition. CSX insists that, although the NPR suggests that the proposals contemplated by the Board as enhancing competition might more accurately be described as proposals that benefit competitors, the consistent treatment of efficiencies as competitive enhancements by DOJ, FTC, FERC, FCC, and DOT strongly suggests that the Board should not limit "enhanced competition" to benefits to competitors.

(5) CSX contends that merger applicants should be permitted to make proposals for "enhanced competition" that rely primarily, even exclusively, on increased carrier efficiency as demonstrating procompetitiveness and indeed offsetting potential harms. CSX further contends that we should recognize, explicitly, that proposals for "enhanced competition" properly may include all types of merger-related efficiencies, including enhancements to current service offerings (e.g., end-to-end long-haul services) as well as cost savings from the elimination of redundancy. And, CSX adds, although cost savings from the elimination of redundant capacity generally may be expected to be smaller in future mergers than they have been in past mergers, any savings that do materialize still would benefit shippers by decreasing the cost of service on a per-unit basis, which (CSX claims) would provide powerful incentives to lower rates, increase output, and profit-maximize at the same time.

<u>Competitive enhancements: cause-and-effect standard</u>. CSX contends that, because competitive enhancements that do not directly address competitive harms caused by the merger are unwarranted, the proposed rules should be modified or clarified to the extent that they could require benefits to competitors that do not address merger-specific harms.

(1) CSX contends that, in past merger cases, the well-established principle that merger conditions are imposed to cure only transaction-related problems and not preexisting problems has allowed the Board to summarily deny requests for the correction of preexisting problems; the Board, CSX adds, has not had to weigh the good that would be done to a shipper or shortline in one state against the good that would be done to a shipper or shortline in another state if only one

or the other's preexisting problem were solved by the Board's conditioning power. CSX further contends, however, that the NPR can be read to do away with this established method of examination and adjudication; its language, CSX explains, seems to say that possible congestion that might occur in Pennsylvania may be expiated by an increase in the number of rail carriers serving particular shippers in Minnesota, or that a reduction of intramodal competition in Kansas may be counterbalanced by a reduction in switching charges in Oregon, even though the transaction otherwise has no effect whatsoever on Minnesota or Oregon. CSX warns that such an approach would sound the death knell of the "preexisting problems" doctrine, which heretofore has demanded a relationship of cause-and-effect involving the transaction; it would be, CSX notes, a rare shipper or shortline that would not have some perceived problem that it could ask the Board to cure. And, CSX further warns: the Board would be placed in the position of picking "winners" and "losers" in a process that has little to do with the merger itself; although prioritization among the requests would have to be effected, there would be no guidelines for this, because the existing guidelines are that preexisting situations are not dealt with at all; merger proceedings would necessarily become larger, busier, more populous, and more complex than they have heretofore been; and the absence of established litigation-tested standards would be felt immediately in the area of judicial review (CSX explains that, if the Board ordered any "freestanding" benefits, i.e., benefits unrelated to specific merger harms, parties that had not received such benefits would argue that they were as entitled to such benefits as the parties that had received them). CSX therefore concludes that we should maintain the "preexisting problem" principle and, in addition, adopt a "cause and effect" standard that requires a close relationship between the principal adverse effects of a transaction and the ameliorating benefits relied upon (i.e., a standard that deals with implementation problems by trying to avoid them and directly remediating and untangling them, that deals with specific competitive problems caused by the transaction by remediating them, etc.).

(2) CSX contends that the use of merger conditions to reregulate the industry is outside the Board's conditioning authority; the Board's conditioning powers, CSX insists, do not empower the Board to alter market-framed ownership interests that are not implicated by a proposed merger. And, CSX adds, because the NPR contemplates that a "fix" need bear no relation to the likely harm, it will be difficult to quantify the degree of fix in one market necessary to counterbalance the degree of harm in another.

(3) CSX contends that NPR § 1180.1(c) (which indicates that the Board, when evaluating the public interest, will consider whether the benefits claimed by applicants could be realized by means other than the proposed merger) contemplates that claimed benefits must be "merger-specific" (i.e., NPR § 1180.1(c) contemplates that, where a Class I merger's efficiencies are not larger than those that could be achieved by less restrictive means, those benefits will not be credited to the proposed merger). CSX argues, however, that requiring "enhancements to competition" that are unrelated to the merger is inconsistent with the requirement that benefits be merger-specific. CSX insists that, just as benefits should be merger-specific, conditions designed

to address harms should also be merger-specific, i.e., should be directed at remedying specific competitive or other harms that are threatened by the merger.

(4) CSX contends that, if "competitive enhancements" are understood to include the removal of "paper barriers" and/or "steel barriers," requiring "competitive enhancements" unrelated to merger-caused harms will discourage the creation of future shortlines and will harm shippers. Shippers will be harmed, CSX explains, because the lifting of preexisting paper and/or steel barriers will have an adverse impact on the economics of rail networks, will dilute revenues realized by Class I railroads, and ultimately will affect decisions on how to deal with branch lines; and all of these matters, CSX claims, are potentially likely to affect shippers adversely. CSX suggests that the Board, rather than undoing contracts as a sort of merger tax, should merely ensure that contractual restrictions are not expanded by mergers.

(5) CSX warns that the sweeping imposition of access conditions not limited to those necessary to remediate identified competitive concerns will significantly adversely affect the achievement of the consolidated system's network and will complicate integration planning. It would be, CSX claims, irresponsible to burden the planning process and, more vitally, the real-life integration itself with additional operators providing a general "enhancement" to competition unrelated to merger harm. CSX insists that the forced introduction of operations by others and the disruptions that it can cause should be a remedy reserved for specific competitive problems.

<u>Service assurance planning</u>. (1) CSX contends that, to allow interested parties the opportunity to provide the Board (and the applicants) with the kind of meaningful input needed to ensure an efficient merger implementation process, applicants should be required to address operations integration, coordination of passenger operations, yard and terminal activities, infrastructure improvements, information technology systems, customer service, labor, training, contingency plans, and timetables. CSX also contends that, by focusing operations integration information on route-level movements rather than shipper-by-shipper movements, the Board has achieved the proper balance that will allow shippers to address concerns while keeping the focus not on insular particularized debates but on the needs of broader groups of the shipping public.

(2) CSX further contends that service assurance planning is most effectively done through a flexible and "iterative" process, i.e., a process designed to lay out the initial plan first, and then "iterations" of it based on choices made in response to third-party comments, market conditions, and other factors that influence railroad choices in a competitive world. Transition planning, CSX explains, is a management process and not simply a regulatory report; the best transitions, CSX insists, will evolve considerably; and it is therefore, CSX argues, critically important that applicants be permitted to adjust their plans as integration unfolds. CSX adds that, as integration unfolds, market and other conditions will change, which means that applicants' competitors (including Class I, II, and III rail carriers, as well as trucking companies and other intermodal elements) can be expected to react competitively to applicants' operating plan. CSX insists that

predicting and quantifying all of these factors in advance so that they are fully anticipated during the Board's years of oversight is simply not realistic. And, CSX adds, even if all of these factors could be predicted and quantified in advance, there will always be some aspects of an integration plan that simply do not work out and that must, therefore, be changed.

(3) CSX, citing particular circumstances that developed in the wake of the Conrail transaction, indicates that, in each of these instances, it was free to make much-needed changes to its operating plan without regulatory process. CSX notes, however, that, although formal Board approval was not sought, the Board's Operational Monitoring team was kept fully advised, first of the difficulties that were being encountered, then of the changes planned, and finally of the success of the changes to the plan. CSX further notes that shippers were kept informed of these changes through the Conrail Transaction Council, which (CSX adds) permitted them to plan and adjust to the changes. The public interest, CSX argues, was protected by ensuring that the railroaders responsible for running the railroad had the freedom to solve the problem, unencumbered by a regulatory process, while the authorities responsible for monitoring were kept fully informed at all times.

(4) CSX notes that, aside from unanticipated difficulties and changing operational conditions, there is yet another reason why an integration plan cannot be finalized in advance: it is simply not possible, CSX explains, to predict all merger benefits (including efficiencies) fully at the outset. CSX adds: that, as these benefits present themselves, applicants may well be faced with the prospect that modification of the plans outlined in their SAP will incur the dissatisfaction of a small element of shippers; that, however, a "snapshot" approach coupled with an overview process of a nature that would tend to freeze planning would undermine the realization of newly discovered procompetitive benefits; and that, if the system is unduly rigid, applicants likely would be reluctant to act out of concern that the oversight rules might impose penalties on such procompetitive choices. Real-world history, CSX contends, shows that mid-course corrections in plans often benefit many shippers while doing little or no harm to others.

(5) CSX contends that the Board should continue in the future the approach it has used in the past, i.e., the Board should not impose the terms of an applicant's operating plan as a condition nor otherwise require strict adherence to it. CSX notes that, because of this approach, CSX was able to make the changes to its operations and infrastructure projects that were needed to work through, on a real-time basis, the service difficulties it encountered in the Conrail integration. CSX adds that, because of the approach the Board has heretofore taken, CSX was and is able to react, adjust, and improve (in the Conrail integration context) without seeking permission from the Board and without having to debate its managerial decisions in a forensic encounter with third parties that might prefer to litigate every change, either to pursue benefits to themselves or to seek leverage in negotiation of unrelated issues.

Claims arising out of service disruptions. CSX contends that, although the Board should require thorough integration planning, the Board should neither permit itself to be turned into a claims tribunal, nor create new bodies for adjudicating service-related claims, nor impose pecuniary sanctions upon carriers for merger-related service disruptions. Our role, CSX insists, should be one of prevention and not of sanction; we should, CSX argues, impose rigorous planning requirements to ensure that operational integration issues are formally addressed, and should closely monitor the operational progress of the integration; but, CSX insists, we should not impose monetary or other sanctions on the merged railroad in a misguided attempt to "motivate" that carrier to make the integration process go smoothly. And, CSX adds, the approach it advocates will not leave the shipping community without remedies. CSX explains that: there are established legal standards for service-related claims; the judiciary and private agreements provide numerous established forums for such claims; and the marketplace (including rail transportation contracts and the insurance marketplace) offers opportunities for private negotiations and risk allocation even before any difficulties arise.

Procedural schedule. CSX contends that, because the regulations proposed in the NPR (by making use of presumptions of anticompetitive effects, service integration failures, and the like, and by requiring counterbalancing "competitive enhancements") increase the uncertainties associated with regulatory review of Class I rail mergers, the period for the Board's review of such mergers should be shortened.

(1) CSX contends that, with a shorter review period, applicants and other interested parties (including shippers, labor, and other railroads) would achieve closure and certainty at an earlier date. A merger review process, CSX explains, is costly in many ways, particularly to the seller: skilled employee attention is diverted to the drafting and prosecution of the application; the applicants lose employees who self-select to find positions elsewhere; shippers can view the uncertainty of the process negatively and choose other shipping options, both rail and other modes; and efficiencies and other benefits are not realized as quickly, the longer the process is dragged out. CSX further explains that, if the final regulations have the effect of introducing more difficulty to the merger process through additional plans, more commentary, broadened issues, abandonment of the "existing problem" rule, or otherwise, the level of uncertainty associated with the process will increase and the costs of the process will be accentuated. CSX insists that, because those costs fall inordinately on the shoulders of the applicants, one or both of the applicants could become, during the pendency of the review, a less effective competitor. And, CSX adds, if the process results in a denial of the application, it is even more important that the process be swift; that way, CSX explains, the applicants will have a better chance of regaining their competitive footing or, better yet, not losing it in the first place.

(2) CSX contends that integration planning is better if it is not dragged out, so that changing market conditions over time can affect it as little as possible. CSX argues: that the regulations proposed in the NPR would promote uncertainty by making merger approval more

lengthy and complex; that this, in turn, will make even more difficult the efficient integration of merging carriers; that such a result is particularly inappropriate given that any future merger likely will be end-to-end and will therefore involve fewer significant competitive issues; and that, in fact, the major issues such a merger is likely to raise will focus on the ability of the carriers to accomplish an expeditious and efficient integration. The process itself, CSX insists, should not be one of the significant impediments to successful integration.

Labor issues. (1) *Negotiations.* CSX approves "our continued emphasis on negotiation, without direct Board involvement, between the unions and railroad management to resolve merger implementation issues." NPR, slip op. at 17. CSX adds: that it supports early consultation and negotiation as the preferred method for reaching the implementing agreements required by the Board's employee protective conditions; that, in fact, CSX, along with the other major railroads, has negotiated, through the National Railway Labor Conference, an agreement with the United Transportation Union concerning the future utilization of the Board's authority to modify CBAs in major transactions;[100] that, furthermore, CSX and the other major railroads are also attempting to negotiate similar agreements with the remaining rail unions; and that, although the remaining unions have suspended their participation in these negotiations, CSX continues to believe that these negotiations should be restarted and that a consensus can be reached based upon the UTU/NRLC agreement.

(2) *CBA overrides.* CSX insists, however, that there is no basis for, and that we should therefore delete, the following language in NPR § 1180.1(e): "[T]he Board respects the sanctity of collective bargaining agreements and will look with extreme disfavor on overrides of collective bargaining agreements except to the very limited extent necessary to carry out an approved transaction." CSX argues that the ICC and the Board, reflecting the statutory mandate of 49 U.S.C. 11321(a), have consistently recognized that CBA modifications are necessary in virtually all railroad consolidations, because preservation of the CBA status quo would effectively thwart full implementation of such consolidations;[101] rail operations, facilities, and employees, CSX explains, simply cannot be combined unless scope, seniority, and other CBA provisions are modified. CSX insists that, although it prefers negotiations, the fact of the matter is that, sometimes, negotiations do not produce an agreement. CSX further insists that, in such circumstances, the Board's arbitration procedure and Board review must be available to ensure that labor disputes do not frustrate an approved transaction that will benefit the public. There is therefore, CSX argues, no justification for the Board now to "strongly disfavor" CBA modifications. And, CSX warns, the proposed statement will encourage unions to oppose even

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[100] The reference is to the UTU/NRLC agreement.

[101] CSX cites Carmen II and Carmen III, which (CSX adds) have removed any basis for a perception that the New York Dock procedures favor carriers over labor.

necessary CBA modifications, which (CSX believes) will make it less likely, rather than more, that voluntary implementing agreements will be reached.

(3) *Relocation.* With respect to the relocation issue, CSX contends that no change in the current labor protection conditions is warranted. It is not unusual, CSX notes, for employees (in the railroad and other industries and in government as well) to have to relocate as a result of mergers and consolidations or to voluntarily relocate through the exercise of their seniority. And, CSX warns, allowing railroad employees to refuse to relocate, when jobs are available, would adversely affect the railroad's ability to provide service and would impose unnecessary costs. CSX explains that the railroad would lose experienced employees, and, at the same time the railroad is paying those employees protection, it would have to hire, train, and pay new employees to fill the positions that the experienced employees refused.

(4) *Test period averages.* CSX contends that a requirement that carriers automatically provide employees their test period averages would be yet another unjustified modification of the New York Dock conditions. CSX further contends that, as with the request to modify the relocation requirement, there is no basis in this proceeding to consider this change, because (CSX claims) there has been no notice that the Board is considering such a change. Nothing in either the NPR or in NPR § 1180.1(e), CSX explains, addresses the issue of test period averages.

Voting trusts. CSX opposes NPR § 1180.4(b)(4)(iv), which concerns the use of voting trusts in transactions involving two or more Class I railroads. CSX believes that our proposal is not needed, would unfairly disadvantage rail combination transactions in the marketplace, would increase litigation, and would place the Board in the awkward position of making "public interest" determinations on the basis essentially of the names of the parties involved in a proposed transaction.

(1) CSX contends: that, nowadays, corporate merger and acquisition (M&A) techniques operate rapidly through tender offers made with deadlines of generally 20 business days (approximately a calendar month) or with stockholder votes taken within a few months of the announcement of a transaction; that these timetables are simply inconsistent with the Board's usual processing times in major merger transactions, and, in fact, would be inconsistent even with expedited timetables, such as 180- or 270-day periods between the filing of the application and the closing of the evidentiary record; and that, given this background, and to put as far as possible regulated railroad M&A transactions on a level playing field with other market transactions (including unregulated acquisitions of rail carriers), Part 1013 of our regulations provides standards for an independent voting trust into which the stock of one of the rail carriers or entities controlling a rail carrier may be deposited, so that the financial aspects of the transaction may be effected (subject to divestiture) in advance of the Board's determination of the "public interest" requirements necessary for approval of a major transaction within its jurisdiction. CSX adds: that, although 49 CFR 1013.3(a) provides that a carrier choosing to

utilize a voting trust "may" submit a copy to the Board's staff for review, it is probably fair to say that, at least in transactions of any size, a submission to the Board's staff is universally made; that, as indicated in 49 CFR 1013.3(a), the review of the voting trust is not by the Board as such but by the Board's staff, which gives "an informal, nonbinding opinion as to whether the voting trust effectively insulates the settlor from any violation of Board policy against unauthorized acquisition of control of a regulated carrier"; that the submissions requesting these opinions and the opinions themselves are public documents, and are available to the public; and that our staff's informal requests for modifications, and the form of agreements that have been the subject of informal clearances by our staff, are often used by practitioners as models in determining the appropriate clauses to be contained in new voting trust agreements.

(2) CSX further contends: that, following the issuance of the staff opinion, a party believing that a particular voting trust does not adequately insulate the corporation whose stock is in trust from unlawful control may take the matter to the Board, and, if the Board disagrees, may take the matter to court; that, however, the only issue presented in such a court review is the effectiveness of the voting trust agreement to provide the necessary insulation; and that, because the Board is viewed by the courts as having expertise in such matters, and also because practitioners generally follow model agreements that have received our staff's prior clearance, the subject has become uncontroversial.

(3) CSX insists that, in practice, the existing voting trust procedure has worked well and has permitted the financial aspects of regulated transactions to proceed at paces similar to those of unregulated transactions. CSX notes, in particular, that it is not simply addressing an equalization of the financial aspects of a takeover of a major rail carrier with the financial aspects of a takeover of (say) a major chocolate manufacturer; what is really being addressed, CSX explains, is the equalization of the financial aspects of a takeover of a major rail carrier by a party already controlling a rail carrier with the financial aspects of a takeover of a major rail carrier by a party outside the rail industry. The latter transaction, CSX observes, can be effected without a voting trust and indeed without any processes of the Board whatsoever. It is, CSX insists, only fair to put these two transactions on an equal footing insofar as the financial mechanisms used to achieve them are concerned. And the present rules, CSX argues, achieve that as much as the governing statute permits.

(4) CSX warns that NPR § 1180.4(b)(4)(iv) would effect two changes in the present system: (i) it would replace the informal action of the Board's staff with formal action by the Board itself; and (ii) it would add to the one standard heretofore applied ("insulation from premature control") a second standard ("consistency with the public interest").

(5) CSX warns that replacing the informal action of the Board's staff with formal action by the Board itself might have a compromising effect. CSX explains: that issues concerning control are sometimes brought forward by parties in the light of restrictive covenants contained

in the transaction documents, which are not available to the Board and the public when the voting trust agreement is submitted for review but which become available to the Board and the public several months later, when the application itself is filed; that such issues can require the Board to explore the interface between the restrictive covenants in the transaction documents and the provisions of the voting trust agreement; and that earlier involvement of the Board in the review of the voting trust agreement would seem to create a basis for challengers to suggest prejudgment by the Board.

(6) CSX's main concern, however, concerns the addition of a "consistency with the public interest" standard. CSX contends, in essence, that "consistency with the public interest" cannot really be determined in the absence of a formal merger application. CSX argues that, as a practical matter, the "public interest" in the voting trust context cannot touch the merits of the transaction, because (CSX explains) all that will be before the Board will be the Notice of Intent, a proposed timetable, a draft protective order, and the proposed voting trust agreement itself, and an assertion by the proposed applicants as to why the voting trust is consistent with the public interest. Those materials, CSX argues, would be enough for the Board to conclude that the form of the voting trust agreement provided on its face insulation from unlawful control, but would not be enough for the Board to make a "public interest" determination, even a narrow one. CSX warns, however, that parties opposed to the transaction may attempt to broaden the issues to include in the definition of "public interest" the ultimate consistency of the transaction with the public interest; their argument, CSX advises, will be that if at the end of the line the Board is likely to turn down the transaction, the process of sterilizing the target carrier in a voting trust and then going through the laborious process of divestiture would best be avoided by rejecting the voting trust. CSX adds that, if we adopt the NPR § 1180.4(b)(4)(iv) "public interest" standard, we will have to define the factors that constitute the public interest at this early stage of the case, and we will then have to apply our definition of those factors, in a possibly controversial and litigious environment, to the skeletal case before us. And that, CSX believes, is likely to result in appellate litigation, without the moorings of the case law that has been decided under the existing arrangements.

(7) CSX warns that there is a considerable potential that NPR § 1180.4(b)(4)(iv) will do mischief. It will, CSX explains, increase the handicap of parties within the industry, in comparison to parties outside the industry, in effecting M&A transactions with major rail carriers. And, CSX insists, with many rail stocks currently at low valuations, now is certainly not the time to impose such a handicap.

(8) CSX adds that, even under the existing regulatory structure, we can act to protect the public interest if a transaction within our jurisdiction is proposed which would clearly involve substantial financial risks and in which the consideration is to be delivered, through the use of a voting trust, prior to our review of the merits. CSX advises that, in a situation of this sort, we have the power to suspend the effectiveness of the voting trust rules as to a proposed transaction

and to require applicants to make an appropriate preliminary showing as to financial matters. And, CSX adds, in order to reserve our authority to suspend the voting trust provisions on the basis of concerns such as financial soundness, we may wish to include, in our rules, an express provision for a power of suspension.

Passenger issues. CSX agrees that impacts to passenger rail services should be considered by the Board in its evaluation of the public interest, and that passenger rail agencies should be consulted throughout the merger application process (commencing prior to filing the application and extending through the oversight period). CSX indicates, however, that it disagrees with proposals that suggest that the cost of approval of a merger application is the grant to passenger rail agencies of substantial new rights that they do not now have under any federal statute or under their contracts with the freight railroads. And, CSX contends: in order to avoid confusion, we should separate our analysis of the passenger network from our analysis of the freight network; and, except perhaps with respect to Amtrak, there should be no general presumption that the preservation of passenger rail services takes precedence over freight rail services or other public interest considerations. CSX further contends that we should neither require the freight railroads, as a condition of a merger, to fund the infrastructure improvements required by passenger rail service, nor require the freight railroads to grant access rights for additional passenger services not agreed to by the freight railroads; such matters, CSX insists, are properly determined by private contractual negotiation.

Kansas City Southern. The Kansas City Southern Railway Company (KCS) agrees that, in light of the changes that have occurred in the past 20 years, the focus of the new merger regulations should be on the preservation of competitive rail options, including the enhancement of such competition when necessary to preserve competitive rail alternatives available to shippers.

NPR § 1180.0: scope of merger regulations. KCS contends that our "major merger" rules should not apply to all mergers involving 2 or more Class I railroads. KCS contends, rather, that the "major merger" rules should apply only: (i) to all mergers involving 2 or more of the 6 largest Class I railroads (UP, BNSF, CSX, NS, CN, and CP); and (ii) to "hostile" mergers involving 1 or more of the 6 largest Class I railroads, on the one hand, and, on the other hand, a "smaller" Class I railroad (which KCS would define as a Class I railroad with under $1 billion in annual revenues). KCS further contends that the "significant" merger rules should apply to a non-hostile merger involving 1 or more of the 6 largest Class I railroads, on the one hand, and, on the other hand, a smaller Class I railroad. KCS explains that the merger of a consenting smaller Class I railroad with a larger Class I railroad does not have the competitive impact found in a merger of the nation's largest railroads, and thus does not justify treatment as a "major" transaction. And, KCS adds, the Board's recent proposal to require consolidated financial reporting by commonly controlled railroads, which (KCS claims) would greatly increase the number of potential mergers involving 2 or more Class I railroads, provides yet another reason to reduce the merger of consenting smaller and larger Class I railroads to "significant" status.

NPR § 1180.1(a): general policy statement. KCS, which agrees that we should refocus our merger policy on the enhancement of rail capacity and competition as remedies to combat the anticompetitive effects of past and future mergers, has a number of concerns regarding the NPR § 1180.1(a) general policy statement. (1) KCS is concerned that the policy statement is not sufficiently specific. The policy statement, KCS argues, should leave no doubt that the preservation of rail-to-rail competition is the single most important factor examined by the Board in weighing the merits of a proposed rail consolidation. Assessments of the public benefits to be bestowed by a rail merger, KCS explains, necessarily hinge on the degree to which competitive options to shippers will be preserved by proposed combinations. (2) KCS is also concerned that a focus on "balanced" competition may in fact serve to reduce competition. There is, KCS explains, a danger that if the Board, in its calculus of public benefits, gives too much weight to the creation of competitors of equal size, the Board will force the consolidation of the industry down to 2 North American Class I railroads, all under the guise of approving a merger because doing so is required to counterbalance the effects of a previously approved merger. Indeed, KCS adds, the evidence in this proceeding does not support the notion that a "balanced" 2-carrier rail network would be in the public interest. (3) KCS is further concerned by what it calls the "generality" of the policy statement. KCS explains: that the policy statement discusses "a broader transportation infrastructure that also embraces the nation's highways, waterways, ports, and airports"; that, however, considerations relevant to this broader infrastructure may cause the Board to be distracted by issues of intermodal competition, either as an alternative to or as a substitute for intramodal rail competition; and that this distraction could cause the Board to overlook its proper focus, which (KCS insists) should be on remediating the adverse effects resulting from any reduction in intramodal rail competition. KCS warns that focusing rail merger decisionmaking on competition with other modes is a distraction the Board cannot afford when the number of remaining Class I railroads is so small and the stakes at risk when any of them merge are so great.

NPR § 1180.1(b): consolidation criteria. KCS agrees that the revised regulation, citing effective competition first, but also listing safety, service, environmental concern, and labor issues, provides the proper balance for the current rail merger environment.

NPR § 1180.1(c): public interest considerations. (1) KCS supports the emphasis on preserving competition but believes that the requirements with respect to enhancing competition are unnecessarily broad; our merger regulations, KCS advises, should not be used to fundamentally restructure the rail industry beyond what is necessary to remediate anticompetitive effects flowing from a merger. KCS contends: that our chief guiding principle in any future merger proceeding should be to preserve the level of pre-merger rail service options available to shippers; that, to this end, we should give increased consideration to the harmful competitive effects caused by any reduction (e.g., 5-to-4, 4-to-3, or 3-to-2) in the number of rail competitors serving a particular market; that, however, we should not expand the public interest consideration beyond preserving the competitive rail options that already exist; and that, in particular, applicants should not be required either to manufacture non-remedial competition outside of ameliorating competitive harms or to propose measures designed to enhance rail-to-rail competition that are not related to a particular adverse consequence of a proposed merger. And, KCS warns, the proposed mandate for enhanced, manufactured, non-remedial competitive options could have the negative impact of discouraging any future mergers, even mergers that improved service, provided efficiency gains, and preserved all current rail-to-rail competition.

(2) KCS agrees that we should consider whether any of the claimed merger benefits could be realized by means other than the proposed transaction. The Board, KCS believes, should continue to support private-sector agreements, such as joint marketing agreements and interline partnerships, that (KCS maintains) often produce merger-like benefits without the commensurate potential harms to the public sometimes generated by mergers.

NPR § 1180.1(c)(1): potential benefits. KCS agrees that applicants should be required to carefully calculate the net public benefits that any proposed merger will generate. KCS also agrees that applicants should be required to propose additional measures that the Board could take if the professed public benefits did not materialize in a timely fashion. KCS adds that, to assist the Board in this determination, applicants should be required to provide, in their oversight reports, a complete analysis of the results that the transaction is actually achieving compared to the benefits that applicants predicted.

NPR § 1180.1(c)(2): potential harm. KCS contends that, in order to enable a full evaluation of the potential harm that a proposed transaction may cause, applicants should be required: to disclose and justify, in light of the changing competitive circumstances created by the transaction, the paper and steel barrier impediments that prevent shortline and regional railroads from interchanging and competing for traffic; and to disclose any facility, station, or terminal that was closed to reciprocal switching by any of the applicants within 24 months prior to the filing of the notice of intent.

NPR § 1180.1(d): conditions. (1) KCS contends that, because the conditioning power should be used to address only those harms arising from merger transactions, we should resist the urgings of parties seeking to use the merger process to implement wider notions of competitive access or expanded competition. KCS insists that, because such a broader use of the conditioning power would directly impact not only the merging carriers but the rail industry as a whole, such matters should be left to Congress. (2) KCS contends that we should state explicitly that we will use our conditioning authority to remedy harms to competition resulting from previous mergers involving the current merger applicants. There is, KCS insists, no reason that we cannot make future mergers conditional on the imposition of conditions designed to remedy past reductions in competition. (3) KCS contends that we should not refer to the use of conditions to "offset" merger-related harms; the appropriate word, KCS argues, is not "offset" but "remediate." KCS explains that conditions that "offset" a merger-related harm might be unrelated to the harm (though not unrelated to a merger), whereas conditions that "remediate" a harm are designed to cure undesirable effects. (4) KCS contends that, whereas the proposed regulation states that we will carefully consider conditions "proposed by applicants," the final regulation should state that we will carefully consider conditions "proposed by all parties." KCS insists that conditions proposed by parties other than applicants should be reviewed under the same standards, and be given the same consideration, as conditions proposed by applicants. Conditions proposed by parties other than applicants, KCS advises, are no more "self-serving" than those proposed by applicants.

NPR § 1180.1(f): environment and safety. KCS asks that we clarify that, if an agreement respecting environmental and safety matters cannot be reached, we will be available to resolve any disputes under existing law and precedent. KCS also asks that we clarify that we will consider only environmental and safety issues that arise from the proposed merger, and will not address preexisting issues and conditions that are not directly related to the proposed transaction.

NPR § 1180.1(g): oversight. (1) KCS contends that we should clarify that parties experiencing merger-related issues do not have to await the quarterly (or annual) public comment period to direct the Board's attention to such issues. (2) KCS contends that applicants should be required to include, in their oversight reports, a matrix that compares the projections contained in the merger application with the actual results. KCS explains that, although it may not be appropriate in every instance to hold merging parties to their pre-merger projections, it is appropriate to allow interested parties to determine where the merged parties have fallen short of expectations, and to allow the newly-merged railroad to explain the discrepancy. (3) KCS contends that we should clarify that any oversight proceedings that are still open on the date of enactment of the new regulations will be subject to the Board's policy directives to enhance and preserve competition. KCS explains that, because past mergers have established that it is inappropriate to limit relief to situations of 2-to-1 competitive reductions, we should exercise our full authority in existing oversight proceedings to fully redress previously unremediated reductions of competition.

NPR § 1180.1(h): service assurance and operational monitoring. (1) KCS contends that, although SAPs and contingency plans should be required aspects of merger applications, the proposed regulation contemplates a great deal of specific information that merger applicants may not be able to provide. KCS further contends that, because it is difficult to envision how any party will be able to predict future events with the kind of accuracy implied in the proposed regulation, the information requirements contemplated in the proposed regulation should be made more realistic. (2) KCS supports the establishment of problem resolution teams and procedures to address problems that may arise in the process of merger implementation. And, KCS adds, mandatory Service Councils will be in the best interests of the industry.

NPR § 1180.1(i): cumulative impacts and crossover effects. (1) KCS contends that our proposal concerning cumulative impacts and crossover effects, which (KCS claims) would require applicants to anticipate and plan responses to the almost infinite variety of possible competitive responses to their merger, would place an unmanageable burden on applicants.

(2) KCS contends that it would be far more fruitful to require "downstream" applicants to propose conditions to enhance and preserve the benefits generated by "upstream" mergers, particularly those mergers in which they themselves have been involved. KCS explains: that, except for KCS and CP, all of the existing Class I railroads have been involved in large-scale mergers in the last 5 years; that these mergers were in turn the product of mergers involving many smaller railroads; that, in approving all of these mergers, the ICC and the Board have focused on the imposition of conditions to preserve the public interest; and that KCS's suggested focus on "upstream effects" is really nothing more than a desire to see the Board recognize the successes and failures wrought by these many prior mergers, and to assure that conditions imposed on any future mergers further the public interest through the preservation and enhancement of competition that resulted from the imposition of a condition in a prior merger. KCS contends, in particular, that our consideration of cumulative impacts and crossover effects (which KCS refers to as "upstream," "current," and "downstream" effects) should include modification of conditions imposed in previous mergers: (a) if necessary to remedy crossover and cumulative anticompetitive effects; and (b) if the Board has jurisdiction over the party upon whom the modified condition is imposed, either because that party is a party to the merger under consideration or because that party is subject to the Board's oversight jurisdiction.

(3) KCS contends that, in order to provide the Board with the "whole picture," the last sentence of NPR § 1180.1(i) should be revised to read: "Applicants will be expected to list all conditions imposed in any prior mergers they have undertaken, and to discuss whether those conditions need to be modified to preserve and enhance competition." KCS adds that, by requiring applicants to direct their efforts to preserve and enhance competition towards prior mergers, we can appropriately limit competitive enhancements to areas where prior merger approval has not maximized the public interest.

NPR § 1180.4(b)(4)(iii): statement of waybill availability. KCS advises that, although it supports reciprocal waybill availability, it also assumes that the Board will be amenable to consider waiver petitions from non-applicant carriers in appropriate circumstances.

NPR § 1180.6: supporting information. KCS contends that applicants should be required to disclose and discuss the impact of related negotiated agreements. KCS explains: that, in many recent mergers, the applicants have entered into agreements to quell concerns over potential adverse impacts on competition, safety, and the environment; that, however, the positive benefits that can be achieved through negotiated agreements have sometimes been blurred, or not fully realized, because applicants have not been required to submit these agreements to the Board; and that, therefore, the Board has been left without a complete record of all of the impacts of the proposed transaction.

NPR § 1180.6(b)(10): conditions to mitigate and offset merger harms. (1) KCS contends that, in order to "preserve" competition (e.g., competition in a particular market or corridor), it may be necessary to impose conditions that "enhance" competition (e.g., by adding rail carriers to that market or corridor, if new carriers are necessary to preserve the competition previously provided by applicants). KCS further contends, however, that any such "enhancement" must be related to the anticompetitive effects of a merger. We should make absolutely clear, KCS insists, that we will not impose competition-enhancing conditions unless they are needed to address a merger's competitive harms. (2) KCS contends that NPR § 1180.6(b)(10), as drafted, is unnecessarily vague; it should be revised, KCS suggests, to make clear that the form of competition of paramount interest to the Board in a rail merger proceeding is rail-to-rail competition. (3) KCS contends that applicants should be required to explain, among other things, how they will preserve the benefits conferred on shippers in prior mergers. Applicants, KCS believes, should not be allowed to disavow prior merger benefits based on the exigencies of their next merger.

NPR § 1180.6(b)(12): downstream merger applications. KCS contends that the "downstream merger applications" regulation would require unmanageable speculation about the structure of possible future mergers and unproductive conjecture about what steps might be needed to address circumstances arising from a variety of possible future merger scenarios. Applicants' time, KCS insists, would be more productively spent addressing the cumulative effects of the proposed merger on benefits derived from previous mergers, and suggesting ways to ameliorate those effects. And, KCS adds, the public interest would best be served through the preservation and enhancement of competition recognized in past mergers, whether that competition was achieved through voluntary agreements or by conditions imposed by the ICC or the Board.

NPR § 1180.7: market analyses. (1) KCS advises that it supports the changes proposed to this section, particularly with respect to the use of market share data. KCS explains that, whereas in many past mergers the debate over market impacts was handicapped by the absence of a common methodology, the changes proposed for this section will help to eliminate this "apples to oranges" problem. KCS further explains that we cannot adequately preserve competition merely by counting the number of competitors present in a market or corridor; KCS insists that the level of the competition provided, as approximated by the relative market share of the operating rail competitors, must be assessed before any conclusion can be drawn regarding the sufficiency of the competition remaining after a merger. And, KCS adds (with reference to the 3-to-2 issue), the national rail transportation market is too complex in its interline relationships and varied market coverage to allow for the simple proposition that 2 competing railroads are sufficient in all instances.

(2) KCS claims that the NPR § 1180.7(b)(2) requirement compelling disclosure of all 2-to-1 and 3-to-2 points would be more effective if it took into account shippers who had access to 2 or more carriers (1 or more via reciprocal switch) but were reduced to 1 carrier through the cancellation of reciprocal rights just prior to the announcement of the merger. KCS adds that requiring the disclosure of such cancellations that occurred within 24 months prior to the announcement of a merger will discourage the incentive to use this competition-reducing technique.

(3) KCS asks that we clarify that the NPR § 1180.7(b)(6) requirement compelling an "explicit delineation of the projected impacts of the transaction on the ability of various network links (including Class II and Class III rail carriers and ports) to participate in the competitive process and to sustain essential services" includes a disclosure of and justification for all existing paper and steel barriers currently impacting operation of those links. KCS explains that the impact of a merger on smaller carriers cannot be accurately assessed if all of the relevant restrictions on that carrier's operations are not fully disclosed. And, KCS adds, disclosure of all paper and steel barriers will assist the Board in determining the competition-enhancing conditions it might need to prescribe in order to ensure that the transaction furthers the public interest.

(4) KCS contends that, in order to ascertain whether conditions imposed in prior mergers continue to operate in the public interest, NPR § 1180.7 should be modified to require applicants to disclose and discuss the competitive impact of all conditions imposed on them, or any of their predecessors, in prior mergers. This information, KCS argues, will allow the Board to determine whether conditions need to be imposed to assure that prior conditions operate in accord with our revised view of the public interest.

<u>NPR § 1180.10: service assurance plan</u>. KCS agrees that SAPs should provide the necessary blueprints for integration, and should afford shippers and connecting carriers (including shortlines) an enhanced opportunity to assess the immediate impacts of the proposed merger on their service and operations. KCS adds, however, that although applicants, in actually implementing the merger, should not be allowed to entirely disregard the SAP they submitted during the merger approval process, that plan cannot realistically be treated as an immutable mandate that must be carried out even in the face of changed circumstances. Even the most carefully crafted SAP, KCS explains, will not accurately anticipate all of the factors (many of which are beyond the railroad's control) that impact daily rail service. KCS therefore asks that we clarify that the SAP is designed as background to a specified level of rail service and operations, and that, while railroads will not be held to comply with all of the services

contemplated in the plan, they will be required to provide the overall level of service envisioned for the integration period.

Norfolk Southern. NS[102] agrees that the regulations proposed in the NPR represent, for the most part, a productive step forward. NS insists, however, that, in several important respects, the proposed regulations would impose requirements that would deter otherwise beneficial rail merger proposals and undermine the fundamental public interest in promoting a sound, healthy, and competitive rail system.

General principles. NS contends that our rail merger review process: (1) should seek to promote the development and maintenance of a sound rail transportation system capable of providing safe, efficient, and reliable transportation services that satisfy the needs of the shipping public, and reasonable rate levels that generate adequate revenues necessary to sustain the system in the long term; (2) should, as in other areas of rail regulation, rely to the greatest extent possible on the marketplace and private initiative rather than on government regulation to promote a sound rail transportation system; (3) should recognize that competition is valued because, and to the extent that, it promotes the provision of safe, efficient, and reliable rail transportation services at reasonable, self-sustaining rates; (4) should promote, not undermine, the efficiencies of the national rail network, including the exploitation of available economies of scale, scope, and density; (5) should avoid the imposition of regulatory conditions or requirements that would undermine economic incentives for efficient investment in rail infrastructure and equipment; and (6) should carefully assess the probable effects of a proposed rail consolidation while not impairing the ability of carriers to respond to changing market and business conditions. And, NS adds: (7) our merger regulations should identify the broad public interest factors that will be given consideration in the rail merger review process and define general evidentiary and procedural requirements for rail merger proceedings, while preserving flexibility in how these policies and rules will be weighed and applied in individual cases.

Provisions for enhanced competition. (1) NS contends that, since 1940, national policy toward rail mergers has been guided by 2 fundamental principles: the principle that rail merger proposals should originate in the private sector, and should not be drafted by government regulators; and the principle that, although rail merger proposals should be subject to intensive "public interest" review, this review should be confined to direct transaction-related impacts of particular rail merger proposals, rather than pre-existing or unrelated market conditions. These guiding principles, NS argues, have been mutually reinforcing, by which NS means that restricting regulatory review of proposed rail mergers to direct, transaction-related effects has served to prevent the merger review process from backsliding into the pre-1940 system of

[102] Affiliated entities Norfolk Southern Corporation and Norfolk Southern Railway Company are referred to collectively as Norfolk Southern or NS.

centralized industrial planning that proved to be unworkable. NS adds that, under the approach that has been followed since 1940, competition has always been a central consideration in rail merger review, but this review has been focused (as, NS claims, it is under the antitrust laws) on assessing direct transaction-related impacts and ameliorating only the adverse effects of a particular proposed transaction on competition, rather than using the merger review process as a vehicle for remedying perceived competitive problems or restructuring market conditions unrelated to a proposed transaction.

(2) NS is concerned that the NPR's emphasis on "enhanced competition" signals a potentially profound reversal of the post-1940 principles of railroad merger review. NS indicates that it would not object if "enhanced competition" were understood to mean only that a proposed major rail merger, in order to obtain regulatory approval, must enhance the overall competitiveness of the transportation system and the competitive vitality of particular rail systems within the relevant transportation markets in which they compete. NS notes, however, that the NPR seems to contemplate a different concept of "enhanced competition." NS is particularly concerned that the "enhanced competition" contemplated by the NPR may be intended to mean that railroads proposing a major rail consolidation must, as a condition to approval of their combination, propose or accept measures to increase the number of railroads able to serve particular shippers or facilities, such as through trackage rights, open switching in terminal areas, joint use, or other devices that increase direct rail-to-rail competition.

(3) NS contends that requiring every railroad proposing a major rail consolidation, regardless of circumstances, to propose or accept regulatory measures to manufacture an artificial form of additional direct rail-to-rail competition as a precondition to approval of a proposed combination would be a serious mistake. NS argues: that there is no sound basis for presuming that all future major rail consolidations will produce significant public harms or that the kind of manufactured rail-to-rail competition the Board seems to have in mind would actually (or invariably) produce offsetting public benefits; that, in any event, there is no nexus between the presumption of merger-related harms and the presumed benefits of measures to inject additional rail-to-rail competition; and that, more generally, the vagueness of the Board's requirement only invites endless demands, unconstrained by principled standards, for the kind of "open access everywhere" that the Board has already found to be beyond its statutory authority to impose on the railroad industry. NS insists that, although we should encourage rail consolidations that include provisions increasing competition (including rail-to-rail competition), any such proposals: should come from the private sector; should be judged on a case-by-case basis on their individual merits; and should not be imposed under standards that are so vague and open-ended that they may deter otherwise beneficial rail combinations from even being proposed.

(4) NS contends that, at a minimum, we should clarify whether a plan for "enhanced competition" might satisfy the requirements contemplated in the NPR without providing for

increased rail-to-rail competition. A merger, NS argues, can enhance existing competition both by enhancing competition between railroads and also by enhancing competition between railroads and other transportation modes.

Presumptions about the effects of future rail mergers. There is, NS insists, no adequate factual predicate for the apparent presumptions that "enhanced competition" is necessary because future major rail mergers will generate no significant public benefits, will result in irremediable competitive harm, and will cause significant transitional service problems. Such presumptions, NS argues, are unjustified, and may discourage the proposal of beneficial rail combinations and, in the process, freeze the future structure of the rail industry without regard to changing market conditions.

(1) *The presumption that future rail mergers will not yield significant efficiencies and other public benefits.* NS contends: that market forces are pushing firms in all major industries toward greater consolidation; that, in particular, the business operations of the railroads' major customers and competitors (including trucks) are, with each passing day, increasingly national if not global in scope; that shippers increasingly demand, and trucking firms, express carriers (such as UPS and FedEx), intermodal marketing companies, and even ocean carriers increasingly can offer, one-stop shipping and logistics services unconstrained by artificial geographical limitations in the size and scope of their networks; that, to match the scale and scope of their customers and competitors, railroads may well be driven to expand the scale and scope of their operations, and to exploit the economies of scale, scope, and density that continue to exist in the rail system; and that we should not immobilize the railroad industry (and it alone) from reacting to changing market conditions through a presumption that the interests of rail customers would be served by requiring them to continue dealing with 2 or more railroads in order to move their cargo by rail across the United States. NS further contends that, because future major rail mergers are likely to have efficiency-enhancing end-to-end effects (including the extension of single-line service and associated elimination of costly and service-delaying interchanges, creation of shorter and more efficient rail routes and other network improvements, development of new markets for shippers, and cost reductions through elimination of administrative and overhead costs), any presumption that future major rail mergers will not generate merger-related public benefits or that such merger-related public benefits will not be substantial would be unfounded. And, NS adds, because nothing in the history of prior rail consolidation transactions or in the circumstances of current market conditions supports the notion that future rail consolidations will not generate significant net public benefits, the imposition of competition-enhancing conditions cannot be justified on the theory that (absent such conditions) future rail mergers will not be in the public interest.

(2) *The presumption that future rail mergers will produce anticompetitive effects that cannot effectively be remedied through conditions.* NS contends that the presumption that future major rail consolidations will inevitably produce adverse competitive effects that cannot

practicably be mitigated through conditions is unsupported. NS argues: that, because future rail mergers are likely to be largely end-to-end in nature, few if any shippers will face a loss of the competitive benefits that accrue from having another carrier nearby; that, because the requirement of 2-to-1 competitive fixes (such as trackage rights or some other arrangement that would preserve an affected shipper's rail alternatives) are now clearly established, few if any shippers will face a loss of geographic competition; and that, even if a particular rail consolidation proposal would in certain locations reduce pre-existing competition that could not be effectively preserved through conditions, such competitive reductions could, in a particular transaction, be more than offset by transaction-related competitive benefits. NS further argues: that presumptions have no place in assessing the competitive effects of possible future major rail consolidations; that, rather, each proposal should be judged on its own merits based on evidence assessing the particular market conditions in which the proposal arises and in which its effects would be felt; and that, if the proposed consolidation would reduce shippers' effective competitive options, the applicant carriers should be expected to propose measures to remedy these adverse effects, and the efficacy of those proposals should be weighed by the Board as one (admittedly important) factor in assessing the overall balance of public benefits and public harms attributable to the transaction. And, NS adds, requiring all rail consolidation applicants to propose or accept artificial measures to create additional rail-to-rail competition as a way of offsetting presumed competitive harms that may or may not exist simply does not make any sense.

(3) *The presumption that future rail mergers will produce transitional service problems.* NS contends that, although we should carefully assess and, with appropriately tailored conditions, seek to mitigate any temporary service disruptions likely to be associated with an approved major rail consolidation, we should neither presume that all future transactions will give rise to significant service disruptions nor impose inflexible requirements for permanent restructuring of rail competition as the cost for presumed service problems that may never occur. (a) NS contends that there is neither any reason to presume that future transactions will always give rise to service disruptions nor any basis to make any intelligible judgments about the nature or extent of any service disruptions that may occur. NS argues, in particular, that, because future major rail consolidation transactions will likely involve end-to-end mergers of relatively healthy systems with adequate rail infrastructure (and because merging railroads will likely take, in the future, even more careful steps to ensure effective merger implementation than they have taken in the past), such transactions are unlikely to give rise to merger-related service disruptions of the size and scope of the problems experienced in connection with the UP/SP and Conrail transactions. (b) NS contends that, even if future major rail consolidations could be expected to give rise to serious transitional service disruptions, there is no rational connection between those potential service problems and the competition-enhancing conditions the Board would impose as a means of offsetting them. It is illogical, NS argues, to require railroads to make structural changes in competition as a supposed means of remedying potential disruptions in service. And there is, NS insists, no logical or evidentiary nexus between the temporary transitional service

disruptions we are presuming and the apparently permanent restructuring of market conditions we seem to be requiring. (c) NS contends that, although we appear to be presuming that measures to inject an artificial form of increased rail-to-rail competition where market conditions have not produced it (such as through mandatory trackage rights or joint use arrangements, terminal switching, etc.) will necessarily and invariably yield public benefits, the fact of the matter is that regulatory forced access measures designed to increase the number of rail carriers serving particular shippers or facilities may just as easily exacerbate as relieve merger-related service problems.

<u>Enhanced competition: absence of principled standards</u>. NS contends that the proposed requirement of measures to increase rail-to-rail competition is so open-ended and so vaguely defined as to provide virtually no meaningful guidance to rail carriers contemplating a proposed rail merger or to other interested parties (and the Board itself) in determining the nature and scope of the "enhanced competition" that will be required to satisfy the new merger approval standards. NS further contends that, because the requirement of "enhanced competition" would be detached from the amelioration of any direct, merger-related reductions in competition, there would be no principled way to decide which shippers should get "enhanced competition" and which should not. NS insists that the absence of any articulated standards in the proposed rules requiring measures for "enhanced competition" means that future rail consolidation transactions, if they are proposed at all, are likely to become embroiled in merger-review proceedings in which shipper interests demand a host of coercive conditions designed to increase the number of railroads serving particular shipper facilities, regardless of whether the solely served nature of such facilities is affected by the proposed combination. And, NS adds, the lack of any standards for when "enhanced" rail-to-rail competition should and should not be imposed by regulatory order makes it highly probable that every future major rail consolidation proceeding will be consumed with endless demands for broad "open access everywhere" conditions. NS therefore concludes that we should not adopt the proposed requirement of "enhanced competition" but, rather, should continue to follow the long-settled practice of granting competitive remedies in rail merger cases only to address, and ameliorate, direct transaction-related losses of competition in affected markets.

<u>Enhanced competition: a case-by-case approach</u>. (1) NS contends that we should welcome, and indeed affirmatively encourage, proposals by rail merger applicants to increase direct rail-to-rail competition as part of their proposed transaction, at least when such measures can be justified within the overall structure and anticipated effects of the proposed transaction. NS further contends that we should give such proposals by applicants significant weight in the overall public interest calculus. NS insists, however, that such measures to increase rail-to-rail competition should be considered on a case-by-case basis and should not be mandated in every case regardless of circumstances, and that they should be proposed by the applicants and not imposed by regulatory order. A case-by-case approach, NS argues, makes more sense than the Board's proposed approach because proposed rail consolidations will differ in their effects (both

beneficial and harmful) and will arise in economic circumstances that cannot be predicted now; and, NS adds, whether, and to what extent, a particular measure to enhance rail-to-rail competition as part of a proposed combination would tip the public interest scales in favor of approval will differ in every case.

(2) NS contends that it would be most appropriate to place on the merger applicants the initiative for formulating possible measures to increase direct rail-to-rail competition. NS explains that the applicant carriers (and their shareholders) must ultimately bear both the financial consequences of the rail combination they propose and the risk of regulatory disapproval. NS further explains that the applicants are in the best position, in formulating rail consolidation proposals, to balance the overall anticipated benefits and costs of the proposed transaction (both private and public) and to assess in particular the benefits and costs of particular procompetitive measures that might be proposed as part of the transaction. And, NS adds, the Board's governing statute directs it to rely on private initiative in the formulation of rail merger proposals.

Assessment of public benefits. NS agrees that the size and significance of, and the potential risks associated with, the type of major rail consolidations likely to be proposed in the future make it appropriate to require merger applicants to make a more convincing showing of merger-related public benefits and to subject those benefits claims to closer scrutiny than has been customary in the past. NS insists, however, that more intense scrutiny of a proposed transaction's projected public benefits and other effects cannot change the essential character of the merger impact analysis, which (NS advises) unavoidably entails at best only informed predictions about the effects of a proposed transaction based on existing conditions and historical data. Nothing, NS adds, can change the fact that estimates of merger-related public benefits are only estimates, whose realization in practice are dependent on a host of business and economic conditions that often cannot be anticipated and that typically are not even incorporated in merger impact analysis. NS suggests, however, that, based on these considerations, it would be appropriate to make 3 "relatively modest, but important," changes in our proposed merger policies and rules dealing with merger benefits analysis.

(1) *Increased emphasis on service improvements.* NS notes that the first sentence of NPR § 1180.1(a) now reads: "To meet the needs of the public and the national defense, the Surface Transportation Board seeks to ensure balanced and sustainable competition in the railroad industry." NS insists, however, that this sentence should be revised to emphasize the promotion of safe, reliable, and efficient rail transportation service as a fundamental policy goal. NS contends, in particular, that this sentence should be revised to indicate that we seek to ensure not only "balanced and sustainable competition" but also "safe, reliable and efficient services that meet the transportation needs of the shipping public." NS explains that a singular focus on competition is too narrow, because competition is valued not for its own sake but only because, and to the extent that, it spurs railroads and other carriers to provide safe, reliable, and efficient

transportation service, meeting the needs of the shipping public, at reasonable, self-sustaining rates.

(2) *Assessing benefits achievable by means short of merger.* NS notes that the last two sentences of the opening paragraph of NPR § 1180.1(c) now read: "When evaluating the public interest, the Board will also consider whether the benefits claimed by applicants could be realized by means other than the proposed consolidation. The Board believes that other private sector initiatives, such as joint marketing agreements and interline partnerships, can produce many of the efficiencies of a merger while risking less potential harm to the public." (a) NS does not object to the first quoted sentence, which (it notes) articulates the "least restrictive alternatives" principle that has long been found in the last sentence of the existing version of 49 CFR 1180.1(c). (b) NS insists, however, that the second quoted sentence should be stricken, even though NS adds that it agrees that means short of merger "can produce many of the efficiencies of a merger while risking less potential harm to the public." NS argues that, because alliances and other inter-carrier agreements are difficult to negotiate and even more difficult to implement and sustain in practice, the question whether a particular claimed merger benefit could have been achieved through alliance or other inter-carrier agreement should be decided on the basis of specific evidence, and not on the basis of a presumption. And, NS adds, the second quoted sentence conveys the impression that the Board has prejudged the issue and has already concluded that many of the public benefits likely to be offered in support of a proposed rail consolidation could be achieved by inter-carrier agreements short of merger.

(3) *Appropriate measures if projected public benefits are not realized.* NS notes that NPR §§ 1180.1(c)(1) and 1180.6(b)(11) would require applicants to suggest "additional measures" that the Board might take if the anticipated public benefits identified by applicants fail to materialize in a timely manner. NS further notes that NPR § 1180.1(g) would require applicants to submit during the oversight process evidence that the merger benefit projections accepted by the Board are being realized in a timely fashion. NS argues that the proposal to hold open the possibility of vague, after-the-fact post-approval sanctions for failure to achieve public benefits estimates is unrealistic, and does not take into account the inherent nature of merger impact analysis. NS explains: that the merger impact analyses that are contained in a rail consolidation application, including estimates of merger-related public benefits, necessarily reflect estimates or predictive judgments about a proposed transaction based on currently available information; that, in most respects, merger impact analyses are based on traffic studies and an operating plan that are predicated on traffic data for a prior, "base" year; and that these static "before and after" analyses seek to factor out the effects of other economic conditions that affect railroad operations and financial performance as a means of isolating the effects of the proposed transaction itself. NS further explains: that the actual implementation of a proposed railroad consolidation never occurs during the base year, but, rather, occurs at some subsequent point in time, when the volume, mix, and routing of freight traffic may be decidedly different than they were in the base year; and that railroad operations and performance are deeply affected

by a host of real-world economic conditions that vary over time and that are not (and cannot be) reflected in the static analyses presented in rail merger applications. NS argues: that it is unrealistic to impose on applicants an absolute requirement that they achieve perfection in realizing the claimed merger benefits; that requiring applicants to submit to after-the-fact Board-imposed conditions simply because projected merger benefits were not realized to the extent or within the time originally predicted would be unfair and counterproductive; and that the most we can properly require of applicants is that they not "unreasonably" fail to implement the transaction or to fulfill any of their specific commitments. NS therefore contends: that the "additional measures" requirements of NPR §§ 1180.1(c)(1), 1180.1(g), and 1180.6(b)(11) should be deleted; and that the merger regulations should be revised to provide that, during the oversight process, the Board will monitor applicants' progress in achieving projected merger-related public benefits and, "should the anticipated public benefits fail to materialize in a timely manner, will reserve authority to remedy any unreasonable failure by applicants to implement the approved transaction or to fulfill any of the specific commitments made by applicants during the approval process."

Service assurance plans and merger implementation. NS supports our "service assurance plan" proposals, which (NS contends) may significantly improve the merger review and merger implementation process, especially as it relates to impacts on rail service. NS adds that it "understands" that the proposed rules requiring the submission and review of SAPs, and establishing a process for operational and service monitoring of approved rail consolidations, are focused on the merger implementation process and the preservation of adequate service during that period.

(1) *Service assurance plans: technical matter.* NS contends that, because operating and traffic data for the calendar year immediately preceding the filing date of the application may often be unavailable in the case of merger applications filed early in a calendar year, NPR § 1180.10(a) should be revised to require benchmark data for "the most recent 12-month period for which accurate and reliable data are available at the time the notice required by § 1180.4(b)(1) is filed."

(2) NS contends that, if a SAP is to have any value in safeguarding rail service during the actual implementation of a rail merger and in assisting all interested parties in ensuring successful merger implementation, the plan must be treated as an evolving, organic document which is continually revised and updated as traffic and market conditions change, merger implementation proceeds, and unanticipated developments or problems arise. Care must be taken, NS insists, to ensure that SAPs do not become regulatory straitjackets on sound railroad operations, and that railroads have freedom to respond immediately to emerging service problems with necessary changes in operations, regardless of the plans described in their formal written submissions to the Board.

Oversight. (1) NS contends that, because NPR § 1180.1(g) makes explicit reference to our authority to impose additional, post-approval merger conditions, this regulation should also make explicit reference to our authority to modify or remove previously imposed merger conditions if, based on subsequent events or circumstances, the original conditions no longer serve the public interest.

(2) NS is concerned that NPR § 1180.1(g), which refers to the Board's retention of jurisdiction "to impose any additional conditions it determines are necessary to remedy or offset unforeseen adverse consequences of the underlying transaction," might be construed too broadly to give the Board a virtual roving commission to use the oversight process to restructure the approved (and consummated) rail consolidation transaction for reasons related less to the actual effects of the approved transaction than to subsequent changes in market conditions or structure. NS warns that constitutional due process issues (i.e., issues of fundamental fairness and adequate notice to merger applicants) would be raised if our post-approval conditioning authority were construed to give us *carte blanche* authority to alter the fundamental terms of an approved consolidation or to impose new conditions not reasonably related to the original impacts of the transaction. NS therefore recommends that we state in our oversight rule that we "will not use the oversight process to impose new conditions that would have the purpose or effect of restructuring the original approved transaction to address post-approval changes in market structure or competitive conditions unrelated to the original transaction."

Cumulative impacts and crossover effects. NS indicates that it generally supports NPR §§ 1180.1(i) and 1180.6(b)(12). The Board, NS contends, should consider the downstream, cumulative, and crossover impacts of a proposed major rail consolidation, including potential rail combinations that may be proposed in response to a particular consolidation transaction. NS is concerned, however, by the NPR §§ 1180.1(i) and 1180.6(b)(12)(iii) provision that would require merger applicants, in calculating the likely public benefits that their proposed consolidation would generate, to measure these benefits in light of anticipated downstream mergers. NS warns that it would be prohibitively burdensome to require merger applicants to prepare alternative merger impact analyses (replete with separate operating plans, traffic studies, SAPs, pro forma financial statements, etc.) for every potential combination of hypothetical downstream rail consolidation transactions. Preparing such detailed studies for the proposed transaction alone, NS advises, is a massive undertaking. And, NS adds, because of the inherent speculation involved in analyzing purely hypothetical downstream transactions, such an exercise would be unlikely to yield information helpful to the Board's merger review. NS therefore recommends that we clarify that NPR §§ 1180.1(i) and 1180.6(b)(12)(iii) do not require this level of detail and precision in applicants' assessment of downstream effects.

Transnational issues. NS insists that, because the case-by-case approach to merger review is sufficiently broad to accommodate the consideration of foreign control and other transnational issues that may be raised in particular cases, changes in the existing rules to address such matters are unnecessary. NS adds, however, that it does not oppose the rules the Board has proposed to deal with these matters.

Environment and safety. (1) NS, citing its experience with the Conrail transaction, insists that the time has come to reexamine our environmental impact review procedures in major rail consolidation cases. (a) NS contends that the environmental review process as currently structured has become far too costly and burdensome. NS adds that at least part of the cause involves the Board's practice of relying on third-party consultants whose work is directed by the Board's staff but whose costs are borne by merger applicants. NS explains that, because the applicants have little control over the nature and scope of the work undertaken by the retained consultants or the costs of their work, there is little incentive to constrain costs or to weigh the costs of a particular set of environmental analyses with the anticipated benefits of such analyses to the overall decisionmaking process. (b) NS contends that the environmental review process as currently structured lacks predictability. There has been, NS explains, far too much variability in the methodologies and analyses employed by the third-party consultants. (c) NS contends that the environmental review process as currently structured has increasingly become detached from the assessment of direct, merger-related changes in rail operations and service. NS argues that the process has increasingly become fixated on identifying and remedying environmental conditions that do not trace their origin to the direct effects of the proposed rail consolidation, or that are affected by changes in traffic volumes and traffic patterns that have less to do with the proposed transaction than with ongoing fluctuations in traffic volumes and other changes in market conditions. NS further argues that the process seems to demand not that adverse environmental impacts in certain discrete areas be weighed against other merger-related environmental benefits (and other non-environmental public benefits) in the overall approval process, but that every discrete adverse effect be remedied in its own right. (d) NS contends that the environmental review process as currently structured lacks necessary finality.

(2) NS makes several proposals. (i) NS contends that we should make clear that, in assessing the environmental effects of a proposed rail consolidation, we will follow the same balancing approach that we employ in assessing other effects of a proposed transaction, and that we will confine our environmental impact analysis to direct, merger-related impacts (both beneficial and adverse), rather than normal changes in business and market conditions unrelated to the immediate and direct effects of the proposed consolidation. (ii) NS notes that NPR § 1180.1(f)(1) includes a provision encouraging merger applicants to enter into negotiated agreements with state and local agencies and individual communities to resolve issues over potential adverse effects of a proposed rail consolidation on a particular locality. NS contends that this regulation should be revised by adding that "in the absence of such voluntarily negotiated agreements, the Board will determine whether any unresolved issues regarding the effects of a proposed consolidation on the environment or safety should be addressed in the proceeding and, if so, the Board will independently resolve such issues." NS insists that we should not penalize applicants if they are unable to negotiate agreements that satisfy localities

and resolve environmental impact concerns over a proposed rail consolidation. (iii) NS contends that we should undertake a reexamination of our environmental review process in rail consolidation proceedings, and, in particular, should reconsider our extensive use of applicant-funded outside consultants in the environmental review process. And, NS adds, we should, at a minimum, consider measures to reduce the costs of the environmental review process to more reasonable levels.

Employee protection. (1) NS notes that we have said that we are "seriously considering" proposals for "new rules to govern contentious issues, such as the need for employees to relocate in order to retain their jobs." NPR, slip op. at 17. NS insists, however, that, because our standard protective conditions already provide the most generous benefits in American industry, enhancements are not warranted. NS adds that it assumes that, if we decide to proceed with additional rulemaking, we will do so in accordance with the Administrative Procedure Act, and will permit interested parties an appropriate opportunity to comment on the specific rules proposed.

(2) NS warns that NPR § 1180.1(e), which refers to "the sanctity" of CBAs and which indicates that we "will look with extreme disfavor" on CBA overrides "except to the very limited extent necessary to carry out an approved transaction," may be misinterpreted (by arbitrators and parties) as announcing a new standard for modification of CBAs. NS suggests that, to avoid unnecessary confusion and conflict, this language, if it is not removed, should be reworded in terms of the familiar "necessity" standard.

(3) NS warns that NPR § 1180.1(e), which provides that we "will review negotiated agreements to assure fair and equitable treatment of all affected employees," may be taken to mean that we intend to review *implementing agreements* voluntarily negotiated under Article I, § 4 of the New York Dock or other standard protective conditions. NS insists, however, that there would be no justification for the Board's routinely reviewing New York Dock implementing agreements that (NS advises) are necessarily the products of mutual accommodation and compromise and are acceptable to both carriers and unions. NS therefore urges us to clarify that we are not proposing to review voluntarily negotiated New York Dock *implementing agreements* but, rather, are simply proposing to reaffirm our existing practice of reviewing voluntarily negotiated *protective arrangements* that are intended by the parties to apply in place of New York Dock.

Production of traffic tapes: technical matter. NS contends that NPR § 1180.4(b)(4)(iii) should be revised to make clear that the traffic tapes that applicants are required to make available to other parties shall include traffic data for the same year that applicants select as their "base year" for merger impact analysis.

Market impact analyses: technical matter. NS is concerned that at least some of the types of data that NPR § 1180.7(b) would require applicants to submit may be unavailable in current or reliable form or may have deficiencies that make them less than wholly reliable in producing the kind of market share and other statistics required by the proposed rules. NS indicates: that currently available traffic data for non-rail freight movements is uneven and subject to a number of deficiencies, particularly when sought at the level of movement-specific detail for which traffic data for rail freight movements are available; that data limitations also persist for traffic movements outside the U.S.; and that, even with respect to the data that do exist, inconsistencies in the manner in which such data are organized might well prevent the compilation of the kind of detailed market share statistics the proposed rules would appear to require. NS therefore suggests that NPR § 1180.7(b) should be revised to make clear that the duty of rail merger applicants to develop and submit the required information is limited "to the extent reliable data exist."

Gateways. NS contends that we should examine gateway preservation issues on a case-by-case basis, but should not adopt rigid rules mandating that every gateway be kept open.

Procedural schedule. NS maintains that the merger review process should be conducted on a 1-year schedule.

Union Pacific. UP[103] has significant concerns about a number of components of the rules proposed in the NPR.

Downstream effects. UP contends that, although the downstream effects of future major rail mergers should be considered, parties cannot realistically evaluate the effects of specific downstream Class I mergers because (UP insists) there are too many possible permutations. UP therefore argues that, as respects downstream effects, we should require applicants to evaluate the impact of a major Class I merger on the assumption that it is part of an "end game" resulting in only 2 major North American railroads. UP adds that, if we approve such a merger, we should condition the merger to protect the public interest in that final industry structure.

(1) *Specific transactions.* UP contends that the Board's call for predictions of specific transactions creates a high likelihood that applicants will make inaccurate guesses and that both the applicants' and the Board's merger analyses will miss the mark; predicting how half a dozen large railroads will respond to a future merger proposal, UP explains, calls for excessive speculation; and, UP adds, requiring applicants to calculate the financial benefits of these predications adds only an illusion of concreteness to the guesswork. UP further contends: that

[103] Affiliated entities Union Pacific Corporation and Union Pacific Railroad Company are referred to collectively as Union Pacific or UP.

the Board's proposed rules demand unrealistic precision, while allowing applicants to avoid addressing the important public policy questions presented by a major rail merger; that, by allowing applicants to identify only downstream transactions that are "likely," the proposed rules leave applicants free to deny that any downstream merger is sufficiently likely to deserve study; and that, even though the evidence in this rulemaking already establishes that the next Class I merger is likely to trigger an "end game" that results in only 2 transcontinental railroads, the Board's proceeding might not address the impact of that end game on the public interest.

(2) *Springing conditions*. UP contends that we cannot remedy the effects of downstream mergers by designing conditions that will "spring" into effect when a downstream merger occurs. UP explains: that our final decision regarding any merger must specify all conditions applicable to that merger; that we cannot impose new substantive obligations on parties that choose to consummate a merger in light of the specific conditions imposed in the final decision approving that merger; that, in particular, we cannot impose post-merger conditions on consummated transactions unless we have provided, in the final decision approving the merger, sufficient notice of those conditions; and that it therefore follows, as a practical matter, that we will not be able to specify, in the final decision approving a merger, the conditions that will "spring" into effect when a downstream merger occurs, because (UP argues) we will not be able to predict accurately which specific downstream mergers are most likely to follow a proposed merger, nor (UP further argues) will we be able to predict accurately how those downstream mergers will be designed and what settlements the applicants will propose.

<u>Retroactivity; oversight</u>. (1) UP contends that the Administrative Procedure Act and fundamental principles of due process limit the Board's authority to apply new rules or new conditions retroactively. It is, UP insists, settled law that the Board cannot impose new regulations and new conditions on consummated mergers, just as the Board cannot apply its proposed merger rules to mergers consummated before the rules are adopted. UP concedes, however, that we may conduct oversight proceedings to ensure that the conditions imposed in the final decision approving a merger achieve their goals; and UP further concedes that we may modify such conditions as necessary to ensure their effectiveness. (2) UP contends that we should reject calls to extend the duration of the oversight phase beyond the current 5-year period, unless parties demonstrate that an extension is required in a particular case. UP explains: that service problems following recent mergers have been resolved in less than 5 years; and that the effectiveness of competitive conditions can be evaluated within 2 to 3 years.

<u>Maintaining safe operations</u>. UP contends that the NPR § 1180.1(f)(2) requirement that applicants "submit evidence about potentially blocked grade crossings as a result of merger-related traffic increases" reflects the wrong approach; instead of seeking evidence on blocked crossings, UP insists, we should require applicants to plan adequate capacity to handle merger-related traffic increases without creating new blocked crossings. UP further contends that, in any event, this NPR § 1180.1(f)(2) requirement will not generate useful evidence; no

merger applicant, UP explains, will plan to create congestion and to block crossings. UP therefore asks that we withdraw this NPR § 1180.1(f)(2) requirement.

Safeguarding rail service. (1) *Service data.* UP contends that, to support our monitoring efforts, we should require applicants to be able to show whether service has improved or deteriorated; monitoring, UP explains, requires consistent data. UP further contends that requiring merging carriers to develop and retain data on pre-consolidation service levels would be of considerable value to the Board and affected parties in evaluating service following a consolidation.

(2) *Bilateral agreements as a mechanism for addressing service failures.* UP contends that pressing applicants to use bilateral agreements as a mechanism for addressing service failures will gives shippers undue leverage in negotiating such agreements. UP insists that we should create a level playing field for negotiations; applicants, UP explains, should be encouraged to negotiate agreements, but failure to do so should not be prejudicial.

(3) *Bilateral agreements: disclosure.* UP contends that we should adopt a rule requiring disclosure (subject to appropriate confidentiality protections) of all commitments made by merger applicants in connection with a pending merger application, if the non-applicant party submits comments on the merger or if the agreement affects merger implementation. The Board and merger proceeding participants, UP explains, need to know if the applicants have made commitments that might burden applicants' post-merger operations, disadvantage connecting railroads, alter competitive balances, or deter applicants from taking procompetitive actions.

(4) *Financial claims.* UP contends that, if merger applicants reach service agreements with a shipper, we should assume that those agreements address all of the shipper's financial claims associated with potential service failures; the Board, UP insists, should not provide a separate regime of remedies that may conflict with or undermine the parties' agreements. UP further contends, however, that we should provide a base level of financial protection for shippers who do not negotiate service agreements.

(5) *Costs of service failures.* UP disputes the argument that we should protect service by excluding the costs of service failures from variable costs in rate reasonableness cases. UP argues that, because it would be difficult if not impossible to separate such costs from normal operating costs, any affected rate case would be greatly prolonged. UP further argues that, in any event, railroads have far greater incentives to avoid service failures than a recalculation of revenue-to-variable-cost ratios in rate cases.

Promoting and enhancing competition. (1) *Enhanced competition.* UP contends that, although we should remedy every substantial competitive harm,[104] we went too far in requiring competition-enhancing concessions that do not address specific anticompetitive effects of a proposed merger; our proposals, UP warns, will cause merger proceedings to become battlegrounds over open-ended restructuring of the rail industry unrelated to the effects of the proposed transaction. UP further contends that, although we should give merger applicants credit for all proposals that enhance competition, we should not impose new competition on a merger. And, UP adds, if competitive harms that cannot be addressed are not offset by sufficient public benefits, we should reject the merger.

(2) *Open gateways.* UP indicates that, although it agrees with the thrust of our "open gateways" proposal, it believes that our proposal does not provide sufficient guidance to potential applicants about what constitutes an "effective plan" for preserving established routes. UP contends that concerns about lack of specificity in the gateway rule are best addressed by requiring combining carriers to make available at a shipper's request separately challengeable "bottleneck" rates between exclusively served facilities on their system and the predominant pre-merger gateway for each type of traffic at those facilities; this requirement, UP argues, would give carriers flexibility to adjust their rates to reflect the relative efficiencies of alternative gateways and new single-line service created by their merger, subject only to rate reasonableness constraints. UP further contends that we should reject more expansive proposals to preserve or expand gateways.

(3) *Divestitures and trackage rights.* UP rejects the argument that we should preserve competition by ordering divestitures rather than trackage rights. UP explains: that, in a parallel merger, divestitures would preserve separate ownership of parallel lines, albeit by destroying efficiencies such as directional running; and that, in an end-to-end merger, divestitures would destroy single-line service and eliminate the economic rationale for the merger. The Board, UP insists, should retain its preference for trackage rights.

(4) *Intermodal competition.* UP insists that, although the economics of the intermodal transportation business are driving a wave of consolidation among marketing companies, future mergers pose no risk to competition in intermodal transportation.

3-to-2 issues. (1) UP contends that, in reviewing 3-to-2 situations, we should maintain the case-by-case approach, and should continue to examine each situation on its facts, without applying a presumption one way or the other; and, UP adds, if the evidence in a particular case

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[104] UP agrees that any party, and not merely the applicant carriers, may propose conditions to preserve competition. Proposed conditions from third parties, UP argues, deserve the same treatment as proposed conditions from the applicants themselves.

demonstrates that the railroad competing with a merged carrier would be unable to provide effective competition, we should introduce an effective third competitor. UP warns, however, that the NPR § 1180.1(c)(2)(i) statement that "[i]ntramodal competition is reduced when two carriers serving the same origins and destinations merge" could be misinterpreted as establishing a hard-and-fast rule that every reduction in the number of serving carriers will be deemed anticompetitive. UP argues that the industry's experience and Board precedent establish that this is not true; 2 rail competitors, UP explains, can continue to provide vibrant competition. UP therefore asks that we clarify that competition "may be" reduced in these circumstances, not that it always "is" reduced.

Merger-related public interest benefits. (1) UP is concerned that the rules proposed in the NPR will require applicants to guarantee that every projected benefit is realized. UP contends that, although merger applicants should not exaggerate the benefits of their proposed transaction and should be required to undertake reasonable efforts to carry out their transaction in a manner that achieves the benefits they projected, the Board should not inflexibly require a merged carrier to carry out every element of its plans; undue rigidity in the oversight process, UP argues, would prevent railroads from serving the public interest. UP explains: that, because the transportation environment is dynamic, merging railroads need the flexibility to adapt to changing conditions while implementing their transaction; that changing economic conditions, such as a severe recession or the failure of new traffic to materialize as expected, might render proposed merger benefits economically unjustified; and that a merged entity obtains complete knowledge of its system only with experience. UP insists that, although we should test benefit claims for reasonableness and should ensure that benefits are merger-related, we can rely on competitive forces and the railroads' strong incentives to maximize profits to compel the railroads to implement their merger effectively.

(2) UP contends that, rather than imposing further conditions if projected benefits are not achieved in a timely fashion, we should acknowledge that applicants will fulfill their obligations if they act reasonably to adapt their merger plans to changing conditions. UP contends, in particular, that we should add the following at the end of NPR § 1180.1(g): "The Board recognizes, however, that applicants require the flexibility to adapt to changing circumstances and that it is inevitable that their merger will not be implemented in precisely the manner anticipated in the application. Applicants therefore satisfy their obligation by demonstrating that they acted reasonably in light of changing circumstances."

(3) *Merger-specific benefits.* UP contends that, because cooperation is much more feasible today than it was in the past (because there are fewer Class I railroads today), future major transactions should be disfavored unless there are substantial and demonstrable public benefits to the transaction that cannot otherwise be achieved. UP further contends that, in order to determine whether identified benefits are merger-specific, we should require applicants to

explain why the benefits they propose cannot be achieved through alliances, joint ventures, or other inter-railroad arrangements.

(4) *Merger harms.* UP contends that we should ensure that we consider all harms resulting from a merger. UP contends, in particular, that we should broaden NPR § 1180.1(c)(2) to include not only losses of competition, harm to essential services, and transitional service problems but also all other potential costs of the merger (e.g., losses of efficiency and long-term damage to service).

<u>Cross-border issues</u>. UP contends that we should fully explore the implications of cross-border transactions; the Board and interested parties, UP explains, need to understand both the systemwide operations of a cross-border railroad and also the competitive effects on U.S. transportation of activities wholly or partly in another country. UP further contends that NPR § 1180.1(k)'s informational requirements will allow the Board to hold foreign applicants to the same standards as domestic applicants, in conformity with the policy objectives of NAFTA. And, UP adds, applicants in cross-border mergers should be required to demonstrate that major gateways on the merged system will remain open, even if those gateways are wholly within another country.

<u>Passenger service issues</u>. (1) *Capacity issues.* UP contends: that capacity on the freight railroads is a highly valuable but scarce resource; that every additional passenger train occupies scarce freight capacity; that if public policies, including the Board's merger rules, divert freight capacity to passenger service without replacing that capacity, rail freight service will be strangled and freight will move in other ways; and that, because most freight diverted from rail will move by truck, proposals to slow the growth of highway traffic by running passenger trains could put more trucks on the highways. The Board, UP argues, should abide by a guiding principle in designing its merger rules and in all other proceedings involving rail passenger service: if the Board imposes additional passenger operations on freight rail lines, it should require passenger rail operators to replace the freight capacity lost to passenger train service, in addition to paying all operating costs their trains impose. UP claims, however, that, because each new increment of freight capacity generally costs more than the last, even the compensation proposed by UP will not adequately reimburse the freight railroads for the costs they incur when they lose capacity to passenger trains.

(2) *Prior consultation.* UP agrees that we should require merger applicants to meet with passengers operators before completing service assurance plans. Prior consultation, UP explains, should help applicants develop operating plans that accommodate existing passenger operations and will provide an opportunity to develop contingency plans for potential implementation problems.

(3) *The public interest standard.* UP agrees that we should consider a merger's effects on existing rail passenger service. UP explains: that, if a merger will facilitate better passenger service, that improvement should be counted as a public benefit; and that, if the merger will reduce the quality of rail passenger service, that harm should be weighed in the balance against the merger. UP insists, however, that we must be very cautious in conditioning mergers for passenger service.

(4) *Respecting commuter service contracts.* UP contends that we should respect, and not interfere with, the market-based service contracts negotiated by commuter operators and freight railroads for the shared use of track; such contracts, UP explains, define the rights and obligations of the parties, and usually provide performance guarantees and penalties for delayed trains; and, UP adds, these contracts provide the commuter operators with the level of service for which they negotiated. UP further contends that, if we ever do reopen commuter service contracts, we should consider whether the contracts provide adequate protection for freight service and, if not, require commuter operators to bear appropriate costs.

(5) *The "essential services" standard.* UP recommends that we either withdraw our NPR § 1180.1(c)(2)(ii) proposal to treat passenger services as "essential services" or carefully consider how that term will be applied to passenger services. UP contends that, although commuter services probably are "essential services" in congested cities, and although it is unlikely that any future end-to-end merger will threaten essential passenger service, the proposed rule might be applied in inappropriate ways. UP further contends that the Board should not use the "essential services" rubric: to make itself a court of first resort for every dispute between merged carriers and passenger operators; to add conflicting or inconsistent remedies to those in passenger service contracts; and/or to require merged railroads to subsidize passenger services. UP, which insists that future mergers probably will never pose a threat to an essential passenger service that the Board should remedy, asks that we clarify that we will not use the "essential service" label to create a new STB remedy for minor impacts on passenger service (e.g., 7 minutes of delay to a commuter train).

(6) *Requests to divert freight capacity for commuter service.* UP urges the rejection of APTA's requests that the Board allow commuter operators to claim rail freight capacity for commuter use. UP contends: that mergers do not aggravate the access challenges confronting passenger rail systems; that, because freight railroads rarely if ever compete for commuter rail service, mergers do not cause "competitive harm" to commuter rail projects; and that reserving a private railroad's property rights (i.e., its capacity) for future passenger service without compensation would be unconstitutional. UP further contends that giving commuter operators veto power over new freight service on lines commuter operators own could impair new freight service.

(7) *Passenger-related oversight.* UP contends that, although we should help identify constructive solutions to passenger service problems caused by merger implementation, we should not provide financial remedies if such difficulties arise. Commuter service contracts, UP explains, already provide negotiated remedies for inadequate performance; and, UP adds, additional remedies imposed by the Board would conflict with contractual remedies and might unravel the compromises the parties reached.

(8) *Labor protection for transit employees.* UP insists that NPR § 1180.1(e) should not be amended to provide labor protection for passenger and commuter rail employees affected by Class I mergers. UP explains that employees of non-applicant carriers are not entitled to labor protection; and, UP further explains, because many commuter railroads are "street, suburban, or interurban electric railways not operated as part of the general system of rail transportation," 49 U.S.C. 10102(5), they are not "rail carriers" subject to Board jurisdiction and therefore (UP insists) they are not covered by the labor protections of 49 U.S.C. 11326(a).

Procedural schedule. UP contends that, for the next major Class I merger, a 15-month procedural schedule would be reasonable. A 15-month proceeding, UP explains, would permit the Board to apply its new rules, consider downstream effects, and review much more detailed service and market evidence. And, UP adds, 6 to 9 months would not be sufficient to determine the future structure of the North American rail system.

Classification of carriers. (1) UP contends that, whether or not we decide to consolidate affiliated carriers for purposes of financial reporting, we should, for purposes of applying the merger rules, combine affiliated carriers only to the extent they integrate their services to shippers. (2) UP contends that KCS should be treated as a Class I carrier, unless it can show by petition that a particular transaction does not have national significance. (3) UP contends that NPR § 1180.1(d), which UP reads as requiring Class I merger applicants to provide special consideration to Class II and Class III railroads, should be revised to restrict this special consideration to Class III carriers. Special treatment, UP argues, should be reserved for shortlines; there is, UP insists, no reason to grant special concessions to regional railroads such as Wisconsin Central.

Technical matters. (1) *Definition of "major" transaction: technical matter.* UP contends that, to avoid any confusion that may arise from our recent notice of rulemaking for consolidated financial reporting,[105] 49 CFR 1180.2(a) should be amended to read: "A *major* transaction is a control or merger involving two or more Class I railroads. For purposes of this section, commonly controlled railroads will be considered a Class I railroad if the affiliated,

[105] Consolidated Railroad Reporting, STB Ex Parte No. 634 (STB served Sept. 25, 2000).

contiguous carriers earn revenues in excess of $250 million and offer integrated service to shippers."

(2) *Service assurance plan: technical matter.* UP contends that, although applicants should be required to explain to the shipping community how they will implement their proposed transaction and how they plan to avoid transitional service problems, the NPR § 1180.10(b) concept of fulfilling passenger service performance agreements is not meaningful; many such agreements, UP explains, contain sliding scales of compensation based on multiple levels of performance. UP therefore recommends that we revise the language of this provision to require applicants to "describe definitively any effects of their proposed merger on those services [i.e., Amtrak or commuter services that are operated over the lines of the applicant carriers]."