

SURFACE TRANSPORTATION BOARD

STB Finance Docket No. 33388 (Sub-No. 91)

CSX CORPORATION AND CSX TRANSPORTATION, INC.,
NORFOLK SOUTHERN CORPORATION AND
NORFOLK SOUTHERN RAILWAY COMPANY
— CONTROL AND OPERATING LEASES/AGREEMENTS —
CONRAIL INC. AND CONSOLIDATED RAIL CORPORATION

[GENERAL OVERSIGHT]

Decision No. 5¹

Decided: February 1, 2001

In this first annual round of the Conrail general oversight proceeding,² we find that CSX and NS have substantially resolved their transitional service problems, and that the conditions we imposed are working as intended. No problems related to increased market power have been demonstrated. CSX and NS have made significant progress in implementing various environmental conditions and settlement agreements, although negotiations to resolve various environmental issues continue.

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¹ The decision served in this proceeding on January 29, 2001, was Decision No. 4.

² Abbreviations used in this decision are listed in Appendix A. Short case citation forms used in this decision can be found in Appendix B.

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BACKGROUND

Conrail Proceeding. In a decision served July 23, 1998,³ we approved, subject to various conditions (including a 5-year general oversight condition), the acquisition of control of Conrail and the division of its assets. We established general oversight for 5 years to assess applicants' progress with implementation of the Conrail transaction and the workings of the various conditions we had imposed. We retained jurisdiction to impose additional conditions or take other action as necessary to address unforeseen harms that otherwise could result from the transaction. Specifically, we noted that oversight would ensure adherence by CSX and NS to the various representations they made on the record during the course of the proceeding. It would also permit us to examine impacts on shortline railroads and on the Chicago switching district;⁴ to review the effect of the acquisition premium on the rate reasonableness jurisdictional threshold and on revenue adequacy determinations; and to monitor transaction-related impacts on Amtrak passenger operations and regional rail passenger operations. See, generally, Conrail Dec. No. 89, slip op. at 20-21 (item 38), 160-61, 173-74 (ordering paragraph 1). We also indicated that we would continue to monitor environmental mitigating conditions. Id. at 161.

On February 9, 2000,⁵ we instituted this general oversight proceeding and required CSX and NS to file progress reports by June 1, 2000, respecting the Conrail transaction; we directed

³ CSX Corporation and CSX Transportation, Inc., Norfolk Southern Corporation and Norfolk Southern Railway Company — Control and Operating Leases/Agreements — Conrail Inc. and Consolidated Rail Corporation, STB Finance Docket No. 33388, Decision No. 89 (STB served July 23, 1998) (Conrail Dec. No. 89). In that decision, we approved, subject to conditions: (1) the acquisition of control of Conrail Inc. and Consolidated Rail Corporation (collectively, Conrail or CR) by (a) CSX Corporation and CSX Transportation, Inc. (collectively, CSX) and (b) Norfolk Southern Corporation and Norfolk Southern Railway Company (collectively, NS); and (2) the division of the assets of Conrail by and between CSX and NS. The acquisition of control of Conrail by CSX and NS took place on August 22, 1998 (referred to as the Control Date). The division of the assets of Conrail by and between CSX and NS took place on June 1, 1999 (generally referred to as Day One, the Closing Date, or the Split Date).

⁴ Beyond this oversight proceeding, the Board continues to work with the Association of American Railroads and its Chicago Planning Group on improving the overall operations of the Chicago terminal.

⁵ CSX Corporation and CSX Transportation, Inc., Norfolk Southern Corporation and Norfolk Southern Railway Company — Control and Operating Leases/Agreements — Conrail Inc. and Consolidated Rail Corporation (General Oversight), STB Finance Docket No. 33388 (Sub-No. 91), Decision No. 1 (STB served Feb. 9, 2000, and published in the Federal Register on Feb. 14, 2000, at 65 FR 7414) (General Oversight Dec. No. 1).

interested persons to file comments by July 14, 2000; and we indicated that replies could be filed by August 3, 2000.

We have considered issues raised in the following pleadings:⁶ the CSX-1 progress report filed by CSX; the NS-1 progress report filed by NS; the undesignated comments jointly filed by the Cities of East Chicago, Hammond, Gary, and Whiting, Indiana (referred to collectively as the Four City Consortium or FCC); the undesignated comments filed by the Maryland Department of Transportation (MDOT); the undesignated comments filed by the Transit Riders League of Metropolitan Baltimore (TRLMB); the NYS-2 comments filed by the State of New York (New York), acting by and through the New York State Department of Transportation (NYDOT); the STW-1 comments filed by the Southern Tier West Regional Planning and Development Board (STWRB); the undesignated comments filed by the New York City Economic Development Corporation (NYCEDC);⁷ the NY/NJ-2 comments filed by the Port Authority of New York and New Jersey (PANYNJ); the ORDC-1 comments jointly filed by the Ohio Rail Development Commission (ORDC), the Attorney General for the State of Ohio (OAG), the Public Utilities Commission of Ohio (PUCO), and the Ohio Emergency Management Agency (OEMA);⁸ the undesignated comments filed by the City of Cleveland, Ohio; the SAN-1 comments filed by the City of Sandusky, Ohio; the undesignated comments filed by United States Representative Dennis J. Kucinich of Ohio; the undesignated comments filed by

⁶ Of the pleadings filed in the first annual round of the Conrail general oversight proceeding: the CSX-1 and NS-1 progress reports were filed June 1, 2000; comments were filed on or about July 14, 2000; replies were filed on August 3, 2000; and the various “post-reply” pleadings (i.e., the pleadings filed after August 3, 2000) were filed on the dates indicated in the text.

In Decision No. 3, CSX Corporation and CSX Transportation, Inc., Norfolk Southern Corporation and Norfolk Southern Railway Company — Control and Operating Leases/Agreements — Conrail Inc. and Consolidated Rail Corporation (General Oversight), STB Finance Docket No. 33388 (Sub-No. 91), Decision No. 3 (STB served Nov. 30, 2000) (General Oversight Dec. No. 3), we addressed matters raised in the pleadings filed by Indianapolis Power & Light Company (IP&L) (undesignated comments filed on or about July 14, 2000; undesignated supplemental submissions filed on July 27, 2000, and on August 14, 2000) and Indiana Southern Railroad, Inc. (ISRR) (undesignated comments filed on or about July 14, 2000), and the IP&L/ISRR-related aspects of the pleadings filed by CSX (CSX-1 progress report; CSX-2 reply; and CSX-3 pleading) and NS (NS-1 progress report; NS-2 reply; and undesignated letter filed August 23, 2000).

⁷ NYCEDC’s motion to extend, for 5 days, the time for filing its comments is granted.

⁸ ORDC, OAG, PUCO, and OEMA are referred to collectively as Ohio.

the Transportation Committee Chairmen of the Pennsylvania House of Representatives;⁹ the undesignated comments filed by Growth Resources of Wellsboro Foundation, Inc. (GROW); the DOT-1 comments filed by the United States Department of Transportation (DOT); the ACC-2 comments filed by the American Chemistry Council (ACC); the AESE-2 comments filed by AES Eastern Energy (AESE); the undesignated comments filed by E. I. DuPont de Nemours and Company (DuPont); the ISGR-2 comments filed by ISG Resources, Inc. (ISG); the NLS-2 comments filed by National Lime and Stone Company (NL&S); the RWCS-1 comments filed by Resources Warehousing & Consolidation Services, Inc. (RWCS); the WYANDOT-1 comments filed by Wyandot Dolomite, Inc. (Wyandot); the comments (designated BPRR-2 and RSR-2) jointly filed by Buffalo & Pittsburgh Railroad, Inc. (B&P) and Rochester & Southern Railroad, Inc. (R&S); the undesignated comments jointly filed by Canadian Pacific Railway Company (CPR), Delaware and Hudson Railway Company, Inc. (D&H), Soo Line Railroad Company (Soo), and St. Lawrence & Hudson Railway Company Limited (St.L&H);¹⁰ the HRRC-15 comments filed by Housatonic Railroad Company, Inc. (HRRC); the undesignated comments filed by Illinois Central Railroad Company (IC); the undesignated comments filed by Livonia, Avon & Lakeville Railroad Corporation (LAL); the LIRC-3 comments filed by the Louisville & Indiana Railroad Company (LIRC); the MNCR-1 comments filed by Metro-North Commuter Railroad Company (MNCR); the undesignated comments filed by the National Railroad Passenger Corporation (Amtrak);¹¹ the NYCH-1 comments jointly filed by the New York Regional Rail Corporation (NYRR) and its wholly owned New York Cross Harbor Railroad (NYCH) subsidiary; the undesignated comments jointly filed by North Shore Railroad Company (NSHR), Juniata Valley Railroad Company (JVRR), Nittany & Bald Eagle Railroad Company (NBER), Lycoming Valley Railroad Company (LVRR), Shamokin Valley Railroad Company (SVRR), and Union County Industrial Railroad Company (UCIR);¹² the undesignated comments filed by the Susquehanna Economic Development Agency-Council of Governments Joint Rail Authority (SEDACOG JRA); the RBMN-2 comments filed by the Reading Blue Mountain & Northern Railroad Company (RBMN); the undesignated comments filed by the Wheeling & Lake Erie Railway Company (W&LE); the undesignated comments jointly filed by Wisconsin Central Ltd. (WCL), Fox Valley & Western Ltd. (FV&W), Sault Ste. Marie Bridge Company

⁹ Chairman Richard A. Geist and Minority Chair Joseph W. Battisto are the Chairmen of the Transportation Committee of the Pennsylvania House of Representatives.

¹⁰ CPR, Soo, D&H, and St.L&H are referred to collectively as Canadian Pacific or CP.

¹¹ Amtrak's request that its late-filed comments be accepted is granted.

¹² NSHR, JVRR, NBER, LVRR, SVRR, and UCIR are referred to collectively as the North Shore Affiliates.

(SSMB), and Wisconsin Chicago Link Ltd. (WCLL);¹³ the CSX-2 reply filed by CSX; the NS-2 reply filed by NS; the DOT-2 reply filed by DOT; the RBMN-3 reply filed by RBMN; the undesignated letter jointly filed August 11, 2000, by CSX and NS;¹⁴ the RBMN-5 “rebuttal” filed August 14, 2000, by RBMN;¹⁵ the “rebuttal” (designated BPRR-4 and RSR-4) jointly filed August 16, 2000, by B&P and R&S;¹⁶ the NS-3 pleading filed August 22, 2000, by NS;¹⁷ the CSX-3 pleading filed August 23, 2000, by CSX;¹⁸ the NS-4 pleading filed August 29, 2000;¹⁹ and the undesignated letter filed August 29, 2000, by ORDC, OAG, PUCO, and OEMA. The matters discussed in these pleadings are summarized in Appendix C (the CSX and NS progress reports), Appendix D (local, state, and regional interests, and DOT), Appendix E (shipper and related interests), and Appendix F (railroads and related interests).

¹³ WCL, FV&W, SSMB, and WCLL are referred to collectively as Wisconsin Central System or WCS.

¹⁴ The CSX/NS letter filed August 11th is responsive to the DOT-2 pleading.

¹⁵ In order to decide, on a complete and fully adequate record, the issues raised by RBMN, the RBMN-4 motion (also filed August 14, 2000) that we accept the RBMN-5 pleading for filing is granted.

¹⁶ In order to decide, on a complete and fully adequate record, the issues raised by B&P and R&S, we are granting the jointly filed motion (designated BPRR-3 and RSR-3, and filed August 16, 2000) that we accept the BPRR-4/RSR-4 pleading for filing.

¹⁷ The NS-3 pleading is responsive to the RBMN-4 and -5 pleadings. NS’ request that we strike the RBMN-5 pleading is denied; its alternative request that we accept for filing the portions of the NS-3 pleading that are responsive to the RBMN-5 pleading is granted.

¹⁸ The CSX-3 pleading is responsive to the RBMN-4 pleading and the BPRR-3/RSR-3 pleading.

¹⁹ The NS-4 pleading is responsive to the BPRR-3/RSR-3 pleading and the BPRR-4/RSR-4 pleading. NS’ request that we strike the BPRR-4/RSR-4 pleading is denied; its alternative request that we accept for filing the portions of the NS-4 pleading that are responsive to the BPRR-4/RSR-4 pleading is granted.

Buffalo Rate Study Proceeding. In a decision served December 15, 1999,²⁰ we instituted a proceeding to examine linehaul and switching rates for rail movements into and out of the Buffalo, NY area. In a decision served July 7, 2000,²¹ we addressed the pleadings filed in the initial (6-month) phase of the Buffalo Rate Study proceeding. In a decision served today,²² we have addressed the pleadings filed in the first annual phase of the Buffalo Rate Study proceeding.

Buffalo Area Infrastructure Proceeding. In a decision served June 9, 2000,²³ we instituted a proceeding to examine railroad infrastructure issues related to the Buffalo, NY area. In a decision served today,²⁴ we have addressed the pleadings filed in the Buffalo Area Infrastructure proceeding.

DISCUSSION AND CONCLUSIONS

OVERVIEW. The comments submitted in this first round of oversight, along with the Board's own operational monitoring, demonstrate that CSX and NS have substantially resolved

²⁰ CSX Corporation and CSX Transportation, Inc., Norfolk Southern Corporation and Norfolk Southern Railway Company — Control and Operating Leases/Agreements — Conrail Inc. and Consolidated Rail Corporation (Buffalo Rate Study), STB Finance Docket No. 33388 (Sub-No. 90), Decision No. 1 (STB served Dec. 15, 1999, and published in the Federal Register on Dec. 20, 1999, at 64 FR 71188) (Buffalo Rate Study Dec. No. 1).

²¹ CSX Corporation and CSX Transportation, Inc., Norfolk Southern Corporation and Norfolk Southern Railway Company — Control and Operating Leases/Agreements — Conrail Inc. and Consolidated Rail Corporation (Buffalo Rate Study), STB Finance Docket No. 33388 (Sub-No. 90), Decision No. 4 (STB served July 7, 2000) (Buffalo Rate Study Dec. No. 4).

²² CSX Corporation and CSX Transportation, Inc., Norfolk Southern Corporation and Norfolk Southern Railway Company — Control and Operating Leases/Agreements — Conrail Inc. and Consolidated Rail Corporation (Buffalo Rate Study), STB Finance Docket No. 33388 (Sub-No. 90), Decision No. 6 (STB served Feb. 2, 2001) (Buffalo Rate Study Dec. No. 6).

²³ CSX Corporation and CSX Transportation, Inc., Norfolk Southern Corporation and Norfolk Southern Railway Company — Control and Operating Leases/Agreements — Conrail Inc. and Consolidated Rail Corporation (Buffalo Area Infrastructure), STB Finance Docket No. 33388 (Sub-No. 93) (STB served June 9, 2000).

²⁴ CSX Corporation and CSX Transportation, Inc., Norfolk Southern Corporation and Norfolk Southern Railway Company — Control and Operating Leases/Agreements — Conrail Inc. and Consolidated Rail Corporation (Buffalo Area Infrastructure), STB Finance Docket No. 33388 (Sub-No. 93) (STB served Feb. 2, 2001).

their transitional operational and service problems and that the carriers are in the process of successfully integrating from an operational perspective their respective portions of Conrail. We received 35 comments responding to applicants' first oversight reports. The commenting parties include shippers, railroads, passenger authorities and interests, industrial and regional development organizations, and federal, state, and local interests.

Several comments compliment the progress of NS and CSX in implementing the transaction thus far. Although expressing some prospective concerns about the transaction, DuPont and ACC applaud its safe implementation, and WCS, Congressman Dennis Kucinich, and NYCH comment favorably on the current state of implementation. Similarly, DOT, in its initial comments, describes NS' and CSX's overall safety record since the June 1, 1999 Split Date as "excellent."²⁵ With respect to rail rates, ACC indicates that the division of Conrail and the resulting new rail-to-rail competition have resulted in reduced rates for a number of its members. Applicants' reports indicate that labor relations issues involved in the transaction have been resolved between the railroads and their unions in a mutually satisfactory manner, and no comments taking exception to this position have been filed by any labor organization or other labor interests. Although some parties complain generally about service problems encountered after the Split Date, most also note that service generally has improved significantly in recent months.

Eleven parties raise environmental issues in their comments. Some of these commenters are generally satisfied with our environmental mitigation. But others raise concerns about the impacts of CSX and NS train operations on local communities and complain that the carriers have failed to implement fully certain environmental conditions imposed by the Board and voluntary agreements entered into with communities to address localized environmental issues. While certain of the environmental concerns raised are potentially significant, the oversight record clearly indicates that CSX and NS are actively working with the affected communities to resolve outstanding environmental issues and that the railroads are completing the actions needed to implement our environmental conditions and the voluntary agreements, even though implementation has not always occurred as quickly as some communities had hoped. Under these circumstances, reopening this proceeding to impose supplemental environmental mitigation is unwarranted at this point. We will, however, continue to carefully monitor the situation and intervene in the future should it become appropriate to do so.

²⁵ DOT notes in its reply comments that, although CSX and NS initially experienced congestion and delays as they absorbed their respective portions of Conrail, implementation has since improved. DOT emphasizes that transitional problems at most would require transitional remedies. DOT-2 at 2.

Several parties filing comments have done so merely to advise us of problems or circumstances as they perceive them, not to ask us to modify any conditions or impose new ones. Many of these parties have indicated that they will try to work out solutions to their problems with CSX and NS, but that they may return to the Board for specific relief if their efforts are unsuccessful.

As indicated in General Oversight Dec. No. 1, as well as in previous oversight proceedings, the purpose of this proceeding is to determine whether the conditions we imposed in our decision approving the transaction are being complied with and are serving their intended purpose of addressing harms that otherwise would have resulted from the Conrail transaction. General Oversight Dec. No. 1, slip op. at 2. Our primary focus is on remedying competitive harms. As we made clear in General Oversight Dec. No. 1, operational and service issues generally will continue to be handled through operational monitoring by our Office of Compliance and Enforcement (OCE).²⁶ We will focus here mostly on those service issues that relate directly to the conditions we have imposed.

Oversight proceedings, however, should not be used as a forum to relitigate issues resolved in the decision approving the transaction. As we previously stated, “[i]t is not the purpose of [an] oversight proceeding to give the parties an opportunity to relitigate our merger decision, and in the absence of a competitive problem, it would not be appropriate for us to reopen the merger and impose additional conditions.”²⁷ An oversight proceeding is not an indefinite extension of the time prescribed by the initial procedural schedule for seeking conditions.

ANALYTICAL REVIEW OF ISSUES RAISED BY COMMENTING PARTIES.

A number of issues have been raised in the comments that were filed in the first annual round of the Conrail general oversight proceeding by (1) shippers and shipper-related interests, (2) railroads and railroad-related interests, and (3) state and local interests.²⁸ These issues are

²⁶ Should problems with operations or service persist beyond a reasonable implementation period and be so widespread as to adversely affect the rail system, they will be taken up in oversight. This situation, however, does not now exist.

²⁷ See Union Pacific Corporation, Union Pacific Railroad Company, and Missouri Pacific Railroad Company—Control and Merger—Southern Pacific Rail Corporation, Southern Pacific Transportation Company, St. Louis Southwestern Railway Company, SPCSL Corp., and The Denver and Rio Grande Western Railroad Company [Oversight], STB Finance Docket No. 32760 (Sub-No. 21), Decision No. 10 (STB served Oct. 27, 1997), slip op. at 14.

²⁸ Those commenting parties (Illinois Central Railroad Company; Livonia, Avon
(continued...))

raised in the context of requests for further Board action. We will address these matters using those commenter groupings.

SHIPPERS and SHIPPER-RELATED INTERESTS

American Chemistry Council. ACC notes that, while the Conrail Transaction Council (CTC) has been useful, it could be more helpful if it were to address claims issues. While the members of the CTC may certainly agree to include claims issues as part of their discussion agenda, it would be inappropriate for us to attempt to impose such a requirement on the privately negotiated CTC. Moreover, apparently based on the considerably improved service being provided by CSX and NS, CTC has decided that the Council will meet on an as needed basis instead of the regularly scheduled meetings.

ACC also argues that, while the performance measures that we have required in this case are a substantial improvement over those required with respect to previous mergers, corridor-specific transit times should be provided by the railroads. We have consistently rejected the imposition of requirements that railroads provide commercially sensitive transit times. Every shipper is fully aware of its own transit times, and could, if it wanted, provide that information to the ACC or any other trade association.²⁹

ACC further complains that we have not established benchmarks based on the applicants' pre-merger operations. Historically, our reluctance to require such reporting has been based largely on the fact that pre-consolidation operations will likely be different from post-consolidation operations. Pre-merger benchmarks here would describe operations tailored to respond to the service needs of shippers within the old Conrail system. Post-merger operations are conducted over a divided system that is not uniformly comparable to the pre-merger system. Thus, benchmarks would not provide meaningful measurements here.³⁰

²⁸(...continued)

& Lakeville Railroad Corporation; Louisville & Indiana Railroad Company; the National Railroad Passenger Corporation; New York Regional Rail Corporation and New York Cross Harbor Railroad; and the Wisconsin Central System) whose comments were in the nature of informational filings will not be addressed in this section.

²⁹ In that regard, we understand that certain shipper organizations are exploring the compilation of transit time data from their respective memberships, and that certain railroads are making available on their web sites origin/destination or Business Economic Area transit time information for certain commodity sectors.

³⁰ Arguments relating to transit times and benchmarks have also been made in the
(continued...)

AES Eastern Energy. AES is the successor in interest to New York State Electric & Gas Corporation, which reached a private settlement agreement with the applicants. We imposed no conditions addressing its interests. AES now raises concerns about (1) a rate increase imposed by CSX with regard to a movement of limestone to its Somerset, NY generating station; and (2) general service problems since implementation of the merger that have increased the cycle time for rail cars that it owns and have degraded the quality of its service.

Regarding its first concern, AES notes that CSX raised its rates on a particular movement of limestone to its Somerset generating plant, which has resulted in AES diverting all of this traffic to motor carriage. Although that issue will be dealt with further in our Buffalo Rate Study proceeding, it does not appear to us that a rate increase that results in the diversion of *all* of the issue traffic can be construed as an exercise of market power, and AES has failed to make such a showing.

With respect to its second concern, most of the issues that AES raises relate to service for unit-train shipments of coal. AES argues that its cycle times for sets of shipper-owned cars have increased, and that both CSX and NS have experienced crew and power shortages. It complains particularly that NS' operations between Ashtabula and Buffalo have been congested, and it believes that the situation could be alleviated by NS' use of the Erie Lackawanna line.

The record here indicates that these issues are transitional ones that have already significantly abated. OCE has not received any recent complaints concerning service to AES. Furthermore, NS notes that its cycle times on AES trains have improved from 14 days immediately after the Split Date to 8-day cycles, and that it is continuing to seek improvement in this performance. NS also notes that it has undertaken an aggressive hiring and training program to alleviate crewing issues. In addition, NS states that the Erie Lackawanna line is not a viable solution for Ashtabula-Buffalo congestion because NS does not own the entire line and because the condition of the track is not good. Given the record indicating NS' responsiveness to these service problems, and the improvements that have resulted, it does not appear that our intervention now in this situation would be necessary or productive.

E. I. DuPont de Nemours and Company. DuPont complains that shippers with service problems are steered towards our informal processes handled by OCE, and thus that these issues

³⁰(...continued)

context of the Board's ongoing proceeding to reexamine our merger policy and rules for major rail consolidations. Nothing stated here is intended to prejudge where we will ultimately be with respect to our final rail merger policy and rules.

are not, but should be, the focus of this oversight proceeding. It also echoes ACC's arguments about transit times and benchmarks.³¹

Our informal process using OCE to facilitate service improvement has proven very effective for the shippers that have used it, and is more efficient and effective for both the public and the government as it places individual customer service issues immediately in the hands of the involved service provider for resolution. Furthermore, our informal process through OCE has now been enhanced to include toll-free telephone, e-mail, and web site access to facilitate complaint resolution. Thus, we see no need at this point for a formal service proceeding, and we continue to believe that private-sector resolution of individual service problems yields the best results.

Growth Resources of Wellsboro Foundation. Growth Resources, a non-profit industrial development agency, owns a 35-mile rail line that connects with NS' Southern Tier line at Gang Mills, NY. Growth Resources' line is operated by the Wellsboro & Corning Railroad Company (W&C). Growth Resources complains of service problems in connection with W&C's interchange with NS at Gang Mills and congestion within the Gang Mills Yard. It requests that we require NS to designate a senior executive to be personally responsible for the resolution of service issues at Gang Mills. Growth Resources also asks that we require it and NS to file quarterly status reports on the operations at Gang Mills.

While the concern expressed by Growth Resources for its continued viability is understandable, its request for additional conditions on NS is unjustified. NS concedes that it has experienced difficulties at Gang Mills, but it indicates that those problems have been resolved and that traffic at the Gang Mills Yard is fluid. If Growth Resources has future service problems, these should be brought to the attention of OCE for handling.

³¹ In this regard, it is important to note that most, if not all, major shippers have access to railroad Car Location Messages (CLMs) and with those are able to construct the specific corridor performance statistics for their traffic. DuPont's own statement indicates that it is able to identify that its "current overall transit times on the former Conrail territory are still on average almost two days longer than prior to the Split Date." DuPont appears able to clearly articulate its performance circumstances compared to former Conrail operations even though no transit time performance data was provided to the CTC. In addition, shippers like DuPont have full access to railroad marketing and customer service representatives who, we believe, would be quick to respond to requests for needed information on their shipments.

National Lime and Stone; Wyandot Dolomite. NL&S and Wyandot ship limestone, aggregate, and similar products between points in Ohio.³² Because some of Conrail's lines in Ohio were obtained by NS, while other lines were obtained by CSX, some movements of these shippers that were previously single-line Conrail movements were, as a result of the Conrail transaction, to become joint-line CSX-NS movements. In ordering paragraph 43 of the merger decision, we required CSX and NS to make arrangements to permit one of them to provide single-line service for movements tendered in unit-trains of 40 or more cars for 5 years. We imposed this condition in response to arguments by these shippers that joint-line service would be more expensive for the carriers to provide, and thus would force the carriers to impose rate increases on their traffic. We found that the impact of loss of single-line service was essentially an unavoidable impact of this transaction, which created close to 6 times as many new single-line movements as it ended, and that it would not be in the public interest to attempt to force CSX and NS to restructure their transaction so as to prevent any loss of single-line service. Thus, we imposed a transitional remedy for the aggregate shippers, providing them 5 years of single-line service for major movements to give them an opportunity to adjust to their new circumstances.

Even though it has been using CSX single-line service made possible to it through our merger condition, NL&S complains about post-merger service and rates on movements between Bucyrus and Wooster, OH. Specifically, NL&S states that it experienced significant delays and service problems in the first year following implementation of the transaction. But it is already well-established, and even NL&S acknowledges, that both CSX and NS had difficulties implementing this merger, and that service problems were experienced throughout the system. NL&S has not shown that its situation is out of the ordinary in this regard. Moreover, NL&S has been receiving single-line service as it requested, and there is no allegation that CSX and NS have not been properly implementing that condition. And there has been little opportunity to test NL&S' claim that loss of single-line service will result in severe harm to it. Thus, NL&S provides no basis for modifying the 5-year term of the condition as it requests.

With respect to rates, NL&S complains about a 5.7% price increase that CSX recently imposed on the movement from Bucyrus to Wooster. It notes that typical rate increases in past years have been 2% or 3% and that CSX did not explain why it was asking for a larger increase. But NL&S overlooks the fact that the rail carriers were recently faced with very large fuel cost increases. Between February 15, 1999, and February 15, 2000, railroads experienced a fuel cost increase of approximately 130%. Moreover, there is no evidence that the recent 5.7% increase made what had previously been only marginally profitable rates unreasonably high.³³ Nor is

³² ORDC supports the arguments of NL&S and Wyandot in this proceeding.

³³ ORDC goes so far as to suggest that this 5.7% rate increase indicates that Ohio
(continued...)

there any indication that this increase resulted from any increase in market power exercised by CSX because of the merger. As these shippers have argued all along, aggregate movements are extremely sensitive to even slight rate changes, which indicates a competitive transportation market. Indeed, because CSX needs to compete with nearby origins served by NS, while only Conrail served this territory before, it is likely that competition has increased.

Wyandot is concerned primarily with a movement between its headquarters at Carey, OH, and Alliance, OH. Wyandot claims that it lost a particular customer, Ohio Stone, at Alliance because that customer frequently requested service in lots of fewer than 40 cars. Under our merger condition, CSX and NS were not required to provide single-line service for such shipments. Wyandot argues that Ohio Stone preferred other suppliers that could allegedly serve Ohio Stone in single-line service.³⁴ CSX responds that Wyandot lost this business “because of a decision of Wyandot’s customer for which neither CSX nor its service was to blame.” Neither Wyandot nor CSX gives us enough particulars to make a definitive determination as to whether this loss of business has any relationship to the merger. But our merger condition was not designed to guarantee that these aggregate shippers losing single-line service would be insulated from all effects of the merger or from changing markets. Rather, our condition was designed to ameliorate those impacts and permit these shippers to adjust their businesses to these new circumstances.

Wyandot asks that we remove the 40-car restriction and require CSX or NS to provide single-line service for all of its shipments. But, as CSX points out, it is not efficient for the carrier to run short trains of aggregates. Indeed, the inefficiencies of such an operation would more than offset any efficiencies to be gained from single-line service, thus undermining the rationale for our condition. Our condition does require that the railroads make pre-blocking arrangements for shipments of at least 10 cars, which we continue to believe is an appropriate remedy. In sum, the aggregate shippers have presented no valid grounds for modifying our condition.

³³(...continued)

shippers are being forced to pay for the “acquisition premium.” ORDC provides no support for this argument.

³⁴ It is important to note that the NITL Agreement, which we imposed as a condition to the transaction, froze the rate on this movement, so any increased cost to the carriers due to the fact that this service is now joint-line instead of single-line could not yet have been passed along to the shipper. Nor is there any indication that these movements are time-sensitive, as these materials are not perishable and are easily stored.

Resources Warehousing & Consolidation Services. RWCS is a freight forwarder located on a shortline railroad in Bergen, NJ. It claims that it has been denied the access to competitive intermodal service by both CSX and NS that it was promised by applicants. RWCS already has the access to both carriers that it was promised, in each instance via an interline arrangement with the shortline, NYS&W. RWCS complains, however, that, although NS now serves RWCS' North Bergen facilities, CSX does not. CSX, however, does stand ready to serve RWCS' North Bergen facilities; the problem here is not with CSX but with RWCS' shippers, which (at least to date) have preferred to tender their traffic to NS. Unless RWCS' shippers switch their traffic from an NS/NYS&W routing to a CSX/NYS&W routing, CSX will not be able to participate in these joint movements, even though CSX service is available. Thus, RWCS has provided no basis for relief.

Acquisition Premium. In their June 1, 2000 progress reports, both CSX and NS addressed our admonition that this oversight process provide parties the opportunity to assess the effect of the "acquisition premium" on the calculation of the rate reasonableness jurisdictional threshold and on revenue adequacy determinations. ORDC is the only other party to raise this issue. See, supra, note 28.

There is no evidence on this record that the "acquisition premium" or any aspect of purchase accounting rules played any role in pricing decisions made by NS or CSX. Rate increases and decreases put into effect by these railroads appear to reflect current market conditions -- including the recent and significant rise in diesel fuel costs -- and not the purchase price of Conrail. Indeed, CSX states that "rate compression from increased rail competition following the division of Conrail reduced CSX's surface transportation revenues by an estimated \$150 million on an annualized basis." CSX-1 at 20.

While we will continue to monitor how the Conrail transaction will affect jurisdictional thresholds for CSX and NS movements and revenue adequacy determinations for those two carriers, it is too early to determine exactly what those effects will be.³⁵ Further, there are no

³⁵ Because of the mid-year implementation of the transaction, the 1999 regulatory costing data submitted by CSX and NS in their respective 1999 R-1 reports would not be representative of the results that would be obtained from a full year of operations by the combined CSX/Conrail and NS/Conrail systems, even if there had not been any changes in costs and revenues from 1998 to 1999. In addition, calculation of the 180%-of-variable-cost jurisdictional threshold using the Uniform Rail Costing System (URCS) must necessarily depend on movement-specific data, and there is no evidence on this record as to how the transaction has affected the calculation of URCS or the jurisdictional threshold for any specific movement.

active rate proceedings at the Board in which the jurisdictional threshold for any CSX or NS movement is implicated.³⁶

RAILROADS and RAILROAD-RELATED INTERESTS

Buffalo & Pittsburgh/Rochester & Southern. B&P and R&S are two small railroads operating in New York and Pennsylvania. Both entered into settlement agreements and agreed to support this transaction. These carriers argue that implementation of the transaction caused congestion on NS lines at Buffalo, and has impeded service between Buffalo and Silver Springs, NY. Accordingly, they ask us to grant R&S trackage rights over NS' line between those points.

The problems cited by B&P and R&S as justification for a grant of Buffalo-Silver Springs trackage rights to R&S are largely transitional, and, to the extent they are not transitional, they are not transaction-related. First of all, the post-Split Date problems that were experienced at Buffalo were transitional in nature; it is undisputed that operations at Buffalo have since improved. In any event, the addition of another carrier to NS' Buffalo-Silver Springs line might well result in new congestion and delay. Furthermore, the record indicates that NS' operations between Buffalo and Silver Springs should be sufficient to handle an additional volume of R&S traffic routed via the Silver Springs interchange. Other difficulties at Silver Springs have resulted not from the transaction, but from increasing volumes of traffic (including the anticipated unit salt trains). That traffic increase may well require (and would have required even if there had not been a Conrail transaction) infrastructure improvements in the Silver Springs interchange, as both R&S (which has sought New York State funding for a Silver Springs project) and NS (which has supported R&S's funding request) have recognized. Thus, there is no basis for the relief requested here.

Canadian Pacific (CPR/Soo/D&H/St.L&H). CP is a transcontinental carrier, operating in both Canada and the United States, that entered into a settlement agreement with applicants. Although CP's comments contain a long list of issues, CP now seeks only: (1) a declaration that Oak Island Yard in the North Jersey Shared Assets Area is a CP/Conrail gateway within the scope of the requirement that major existing gateways must be kept open; and (2) a declaration

³⁶ There is one rate case (No. 42027) docketed at the Board involving coal movements over NS (as successor to Conrail) to a power plant operated by Northern Indiana Public Service Company. The parties have requested that we hold this case in abeyance while they complete settlement negotiations. Also, to the extent that NS, CSX, and Conrail remain as parties to No. 38302S, No. 38376S, and I&S No. 9205 (Spent Nuclear Fuel proceedings), settlement negotiations are ongoing there as well.

that Philadelphia is a CP/Conrail gateway that must be kept open.³⁷ We will deny these two requests for relief.

As a threshold matter, there is no indication that applicants have done anything to close either of these gateways. Thus, it would be premature for us to rule on this issue. Moreover, there is nothing in the record to indicate that either Oak Island Yard or Philadelphia was a “major” gateway for traffic moving between CP (or any CP predecessor) and Conrail before the transaction.³⁸ The Oak Island Yard appears to have been used to interchange only certain intermodal traffic. Although CP would like to use it for additional interchange purposes, this would not make it a major existing gateway. Similarly, CP would like to divert traffic that is now interchanged with NS at Allentown, PA, to a Philadelphia NS/CP interchange. Again, this desire has nothing to do with preserving a major existing gateway; rather, it is an attempt by CP to improve its pre-merger situation.

Housatonic Railroad Company. HRRC is a Class III railroad operating in Massachusetts, Connecticut, and New York. As requested by HRRC, we clarify that the filing of comments in the first annual round of the Conrail general oversight proceeding is not a prerequisite to the later filing of additional comments and/or requests for the imposition of additional conditions or other relief, as appropriate to our oversight function.

Metro-North Commuter Railroad Company. MNCR, which operates commuter service in the New York City metropolitan area, raises several issues in connection with its 1983 contract with Conrail under which the two carriers were to operate over each other’s lines. That contract, known as the Master Trackage Rights Agreement (MTRA), extends until at least December 31, 2002, and that, beyond that date, it may be canceled on 1 year’s notice.

As an initial matter, MNCR questions the assignability of this contract to CSX and NS affiliates NYC and PRR respectively, in light of provisions of the MTRA limiting assignment. MNCR’s concerns with regard to this issue are misplaced, as our Conrail Dec. No. 89, slip op. at

³⁷ See Conrail Dec. No. 89, slip op. at 56: “CSX and NS have agreed to keep open all major interchanges with other carriers as long as they are economically efficient.” See also Conrail Dec. No. 89, slip op. at 251: “Section III(D) of the NITL agreement clarifies that CSX and NS anticipate that all major interchanges with other carriers will be kept open as long as they are economically efficient.”

³⁸ CP has also asked that we retain oversight jurisdiction in the event the parties are unable to reach agreement with respect to the numerous other issues cited in CP’s comments. We are retaining the oversight jurisdiction that we imposed in Conrail Dec. No. 89, and are prepared to address any other relevant issues raised by CP at an appropriate time.

175, clearly resulted in an assignment of all contracts and operating rights of Conrail to CSX and NS notwithstanding any contract language that would purport to limit that assignment.³⁹ This assignment took place by operation of law, and therefore no further written agreement memorializing this transfer is necessary to make it legally binding.

As we noted in Conrail Dec. No. 89, slip op. at 97, we found it appropriate that CSX and NS would step into Conrail's shoes, and we rejected various requests by local passenger railroads including MNCR to "void, extend, or amend in various ways their existing contracts with CSX, NS, and/or Conrail." We continue to believe that the sharing of tracks between the freight railroads and the various commuter railroads requires a delicate balance of competing interests that can best be accomplished by negotiation between the parties.

MNCR now asks that we modify the contracts with CSX and NS that resulted from assignment of Conrail's contracts and rights. MNCR complains that, under the MTRA as now assigned to CSX and NS, NS would risk only the loss of very insignificant operating rights if it were to exercise its cancellation rights. However, the record indicates that NS may not give notice of cancellation until December 31, 2002, and that the contract may not be canceled until 1 year from that date. Moreover, there is no indication that NS intends to exercise those cancellation rights. While MNCR's apparent refusal to pay trackage rights and maintenance fees in the amount of almost \$0.5 million could be an obstacle to the continuation of the contract, we anticipate that, now that the legal status of the assignment has been settled by us in this decision, MNCR will agree to make those payments. In any event, we encourage active negotiations between these parties that would yield in the near future a long-term contract that provides for continued commuter service in this region.⁴⁰ Moreover, we invite reports or updates on the status of negotiations during the next round of general oversight in this proceeding if an agreement has not been reached by then.

North Shore Affiliates and Wheeling and Lake Erie (W&LE). North Shore Affiliates is a group of five Class III railroads located in central Pennsylvania. W&LE is a Class II railroad operating in Ohio, Pennsylvania, West Virginia, and Maryland. Although the comments filed by

³⁹ Certain other parties challenged our use of the 49 U.S.C. 11321 override authority to negate non-assignability clauses of various contracts. We rejected those arguments in Conrail Dec. No. 89. Although one of these parties filed a petition for review relating to this issue, that petition was later dismissed. It is now too late for MNCR to raise this issue anyway.

⁴⁰ MNCR renews its request that we require conveyance to it of the Port Jervis-Suffern line. We rejected this and other similar requests by commuter railroads in Conrail Dec. No. 89, slip op. at 96-97, as unrelated to the transaction. MNCR provides no valid basis for overturning that decision here.

these railroads express certain concerns, none of them has actually made a specific request for relief. Rather, they indicate that they will seek relief only if and when ongoing negotiations fail. The Susquehanna Economic Development Agency-Council of Governments Joint Rail Authority (SEDACOG JRA) has requested relief on behalf of the North Shore Affiliates, while the State of Ohio has requested relief on behalf of W&LE.

We think that, in situations of this sort, the best approach is to treat the railroad party as the real party in interest, and to regard the submission of the state/regional/local government as a statement of support submitted on behalf of the railroad. Taking this approach, we will not grant the relief sought on behalf of these parties, but this is not based on any consideration of the merits. The real parties in interest believe that, in light of ongoing negotiations with the applicant carriers, it is premature to request relief now. We are reluctant to interfere with that process, which could yield a remedy better suited to all parties than we would be able to fashion.

Reading Blue Mountain & Northern Railroad Company. The RBMN is a Class III carrier operating in Eastern Pennsylvania over lines purchased from Conrail in 1996. RBMN raises various arguments related to certain features of the contract under which these properties were purchased from Conrail. These features, known as “blocking provisions,” are designed to ensure that the traffic originated by the new shortline carrier continues to flow over Conrail’s lines whenever it is in Conrail’s interest to do so. Although we declined to eliminate freely negotiated blocking provisions of this sort in Decision No. 89, we did impose a condition to limit the blocking provision for RBMN to those NS destinations that were formerly Conrail destinations.

For the most part, the various “blocking provision” arguments now advanced by RBMN are quite similar to those raised in the Conrail acquisition proceeding, which we considered and rejected in Conrail Dec. No. 89, slip op. at 77 (“[w]e do not believe . . . that it would be appropriate for us to require a wholesale elimination of these freely negotiated contractual terms as part of this proceeding”). Its arguments remain unpersuasive. While RBMN has presented a few new variations on its original “blocking provision” arguments, these arguments are no more persuasive than their predecessors. The core of the new arguments is the claim that NS has repudiated certain Conrail/RBMN “understandings” that provided the justification and rationale for the blocking provisions. These “understandings,” however, were never incorporated into the Lehigh Division Agreement, a written agreement that provides that “the entire understanding of the parties hereto with respect to the transactions contemplated hereby” is set forth in the written agreement.⁴¹

⁴¹ RBMN’s additional argument – that the 49 U.S.C. 11321(a)-based override of the Lehigh Division Agreement’s antiassignment clause is an adverse consequence of the Conrail
(continued...)

RBMN also contends that the “otherwise moves” phrase in the “additional consideration” provision⁴² should not be read literally and that Reading Division traffic that moves via the Lehigh Division should not be subject to the “additional consideration” provision. Although in Conrail Dec. No. 89 we implicitly accorded the “otherwise moves” phrase a literal meaning, that was merely an observation, not a holding. See Conrail Dec. No. 89, slip op. at 224 n.343. We lack the authority to issue a definitive ruling as to the meaning of this contractual language. That would be a matter of contract interpretation that ought to be decided in a court of general jurisdiction.

RBMN further argues that the Conrail transaction has greatly expanded the reach of the Lehigh Division blocking provisions, in particular the effect of the penalties provided for by the “additional consideration” provision. See Conrail Dec. No. 89, slip op. at 77 (“we will preclude existing blocking provisions from being interpreted in such a way that the transaction would expand their reach”). We do not agree with this argument. The geographical reach of the two blocking provisions has not been expanded. Rather, it has been limited to NS locations that were formerly Conrail locations just as we intended in imposing our merger condition. Nevertheless, RBMN claims that there is an implicit understanding in the purchase contract that the level of the payments RBMN must pay for failing to route over Conrail lines was designed to compensate Conrail for its loss of revenue from the movement. RBMN claims that now the payments, at least in some cases, will exceed the revenue lost by NS. But the agreement itself does not tie the additional consideration penalty amounts to the level of Conrail’s net contribution nor does it provide any mechanism for changing those amounts to reflect changes in the level of Conrail’s net contribution. Again, RBMN’s argument is based on an interpretation of its agreement which is not borne out by its written agreement, and we find that insufficient to support the relief it seeks.

RBMN is correct that, as respects traffic originated or terminated by CP, a CP-Scranton-RBMN routing would be less circuitous than the CP-Harrisburg-NS-Reading-RBMN routing that

⁴¹(...continued)

transaction that should be remedied by elimination of the blocking provisions – is not persuasive. We have already remedied the adverse effects the antiassignment clause override might otherwise have had by requiring CSX and NS (here, NS) to enter into arrangements that have the effect of providing that the reach of blocking provisions is not expanded as a result of the Conrail transaction. See Conrail Dec. No. 89, slip op. at 178 (ordering paragraph 39).

⁴² The “additional consideration” provision provides for the payment of specified penalty amounts for any rail traffic handled by RBMN that originates or terminates on or “otherwise moves” over the Lehigh Division and that could commercially be interchanged with NS (as successor to Conrail), provided that such traffic is actually interchanged with another rail carrier.

such traffic must now take because of the blocking provisions. This circuitry, however, is not an adverse consequence of the Conrail transaction. Prior to that transaction, the CP-RBMN routing was subject to the blocking provisions and the CP-NS-RBMN routing did not exist. Now, the CP-RBMN routing remains subject to the blocking provisions and (because of the settlement agreements executed in connection with the Conrail transaction) the CP-NS-RBMN routing is newly available. The Conrail transaction did not make the CP-NS-RBMN routing inefficient; the Conrail transaction, rather, brought this routing into existence. We agree with NS' observations on this point: "Whatever [this routing's] shortcomings may be, there is no public harm or need to impose additional conditions when options have been increased, not decreased, as a result of the Transaction."

ISG Resources. ISG arranges for the movement of fly ash, a material produced by coal-burning electric utility plants and generally used for landfill. As was true with a relatively small number of shippers, ISG's pertinent traffic was subject to the "single-line to joint-line" effect of the Conrail transaction. ISG claims, and NS and CSX appear to agree, that the service difficulties that occurred after the Split Date made a CSX/NS routing temporarily impossible. ISG further claims that it was able to put together a basically satisfactory five-carrier routing that involves neither CSX nor NS. ISG is concerned, however, that this alternative routing will cease to exist on June 1, 2001, the expiration date of the NS-granted waiver of an RBMN blocking provision that would have precluded this routing. ISG therefore asks that we require NS to grant an open-ended waiver of the RBMN blocking provision. Although we are sympathetic to ISG's need for reliable rail service, we do not think that it would be appropriate to order the relief ISG seeks. We believe, rather: that service offerings and rail routings should be determined through the normal give-and-take among carriers and shippers; and that there is no need to make voluntarily arrived at transitional remedies (such as the blocking provision waiver) permanent requirements. Now that the difficulties experienced immediately after the Split Date have been addressed, the service issues presented by ISG should be handled in the normal process. We expect, however, that NS will extend the waiver of the RBMN blocking provision if it continues to be unable to provide satisfactory service itself.

STATE and LOCAL INTERESTS

Non-environmental Matters

Maryland Department of Transportation. Although MDOT notes that many of the items that were included in its 1997 settlement agreements with CSX and NS have not yet been addressed, it expects that these commitments will be implemented as agreed. MDOT understands correctly that we will monitor implementation and other transaction impacts for 5 years, and will order remedial action as appropriate. MDOT, however, is not correct in its assessment that the operating plans filed by CSX and NS were "commitments" to achieve proposed service and infrastructure improvements within 3 years after the implementation date that must be enforced without variation. The plans cited by MDOT (CSX's plan to implement

intermodal service between Baltimore and Detroit, Indianapolis, Cleveland, Columbus, and St. Louis; and NS' plan to develop regular high cube intermodal and domestic double stack train service between the Baltimore area and Chicago and other Midwest areas) are applicants' best projections regarding what traffic they believe they can profitably serve. Those operating plans do not provide a basis in and of themselves for relief at this time.

State of New York; Southern Tier West Regional Planning and Development Board.

NYDOT has raised general concerns about: (1) capacity constraints faced by the newly structured NS and CSX systems; (2) cooperation of these carriers with public transport agencies; and (3) service on the Southern Tier line. With respect to the first set of concerns, we cannot resolve questions respecting the extent and/or terms of public funding for rail infrastructure improvements to alleviate ongoing capacity constraints. Those questions will have to be addressed either in the New York State legislative arena or in negotiations between the railroads and the appropriate State agencies. In this regard, we do see a basis for dealing with NYDOT's main argument that complete public funding of specific facilities or facilities expansion should not be a pre-condition to compliance with mandates legally imposed by the Board on private rail consolidation transactions, as neither CSX nor NS has argued that it has any right to condition its compliance on public funding.

Concerning the second set of concerns, we agree with NYDOT that the impact of CSX's operations over the Hudson Line on passenger train performance, and CSX's willingness to work meaningfully with MNCR to address issues arising from that impact, are within the scope of our oversight jurisdiction. At least to date, however, there is no reason to believe that CSX's freight train operations have impaired MNCR's commuter train operations in a way that warrants our regulatory intervention.

Finally with regard to the Southern Tier, we stand ready to assist NS and New York in implementing their settlement agreement concerning the Southern Tier if that becomes necessary. That agreement was imposed by us as a new condition to approval of the merger. See Conrail Dec. No. 89, slip op. at 176 (ordering paragraph 21), 323-24.

New York City Economic Development Corporation. NYCEDC argues that CSX has failed to fulfill its common carrier obligation to provide rail service to the A&P facility at the Hunts Point Food Distribution Center. CSX has indeed refused to provide rail service to the A&P facility, but has explained its refusal by citing what appears to us to be a legitimate safety concern. CSX states that, to reach the A&P facility, its trains would have to cross, at grade, a busy six-lane divided highway that is used by tractor-trailers, by Metropolitan Transit Authority buses, and by general public motorists. Thus, CSX has adequately explained that, although Food Center Drive is a private road located on private property, the physical risks are exactly

what they would be if it were on a public road. We defer to CSX's judgment⁴³ that the safety measures proposed by NYCEDC (installation of cross-bucks, and use of safety vehicles with flashing lights at the crossing any time a train is moving through it) are inadequate. We would hope, however, that constructive private-sector discussions can continue on this issue.

Port Authority of New York and New Jersey. PANYNJ, which entered into a settlement agreement and supported the Conrail application, is now concerned that the Port District lacks sufficient rail infrastructure for efficient operations by CSX, NS, and Conrail, and that CSX and NS do not currently have sufficient capital to expand and improve those facilities. As PANYNJ suggests, we will continue to monitor the financial health of these carriers and their ability to make infrastructure improvements needed to provide efficient service in the Port District and throughout their service territory. We do not believe, however, that reporting or monitoring is required beyond that which is already taking place.⁴⁴

State of Ohio (ORDC/OAG/PUCO/OEMA). *ASHTA Chemicals.* ASHTA is an Ohio chemical shipper that believes that the routing of its products should be more direct. We previously noted that the substitution of CSX for Conrail would not result in a change in the circuitous routing (via Buffalo) of products shipped by ASHTA to western and southern destinations. See Conrail Dec. No. 89, slip op. at 276-77. Thus, this routing is not a consequence of the Conrail transaction. And, as CSX has indicated, the routing that it is using continues to best meet the overall requirements of CSX's train operations in providing cost-effective service to all of its shippers. We will therefore deny the State of Ohio's ASHTA-related request for relief.⁴⁵

The Port Of Toledo. Through the transaction, NS obtained the right to succeed Conrail and operate over CSX tracks to provide service to the Port of Toledo. Ohio is concerned that NS has not yet exercised these rights. As NS notes, Conrail made only sporadic use of these rights before the transaction. NS states that it will use these facilities when it is reasonable and efficient to do so. Because Ohio has not shown that the situation at Toledo has been impaired by the transaction, we will deny its request for additional carrier access to the port.

⁴³ It is important to note that NYCEDC has not alleged that the safety concern cited by CSX is being used as an excuse for not providing service.

⁴⁴ We are aware that, pursuant to an agreement between PANYNJ and CSX, NS, and Conrail, which the Board imposed as a condition, discussions continue among the parties regarding these matters. We also understand that these discussions have been constructive.

⁴⁵ The record indicates that, as we required, CSX has consulted with ASHTA concerning the routing of ASHTA's hazardous materials shipments. See Conrail Dec. No. 89, slip op. at 177 (ordering paragraph 24).

Transportation Committee Chairmen, Pennsylvania House of Representatives.

We will, as requested by the Committee Chairmen, continue to monitor NS and CSX service and continue to assist affected parties in the resolution of problems arising from the Conrail transaction. We will also continue to monitor the commitments that the railroads made and the conditions that we imposed.

Environmental Matters

Environmental issues were raised by a number of parties: the Four City Consortium (FCC); the Maryland Department of Transportation (MDOT) and the Transit Riders League of Metropolitan Baltimore (TRLMB); the State of New York (by NYDOT) and the Southern Tier West Regional Planning and Development Board (STWRB); the New York City Economic Development Corporation (NYCEDC); the State of Ohio (ORDC/OAG/PUCO/OEMA); the City of Cleveland, OH; the City of Sandusky, OH; U.S. Rep. Dennis J. Kucinich; and the U.S. Department of Transportation (DOT).

Overview of Environmental Concerns. Some of the parties state that they are generally satisfied with the environmental mitigation that has been imposed and implemented. However, as outlined in Appendix D, others raise concerns about the impacts of NS and CSX train operations on local conditions, especially delays at grade crossings resulting in problems including emergency response delay, increased train traffic, and noise and air quality concerns resulting from idling trains.⁴⁶ The parties also contend that the carriers have failed to comply with certain environmental conditions and/or Negotiated Agreements⁴⁷ with affected

⁴⁶ Many of the parties maintain that safety concerns can be resolved only through the construction of a grade-separated crossing.

⁴⁷ As explained in Conrail Dec. No. 89, slip op. at 152-53, during the environmental review process in the Conrail transaction, the railroads negotiated a number of mutually acceptable agreements with local governments and organizations addressing specific local environmental concerns. Negotiated Agreements are generally more effective, and in some cases, more far-reaching than environmental mitigation options we could impose unilaterally. Therefore, our practice is to impose as a condition to our decisions approving railroad consolidations a requirement that the railroad comply with the terms of all Negotiated Agreements developed with states, local communities, and other entities regarding environmental issues. These agreements substitute for specific local and site-specific mitigation for a community that otherwise would be imposed.

To give effect to privately negotiated solutions whenever possible, we explained in
(continued...)

communities and that the train traffic on certain rail line segments exceeds the projections in the CSX and NS operating plans.

Continued Consultation With Affected Communities; Quarterly Environmental Status Reports. In an attempt to reach a mutually acceptable resolution of the parties' outstanding environmental concerns, CSX and NS recently instituted a renewed environmental consultation process, which we applaud. This process is intended to include, among other things, open dialogue, site visits, and meetings with community leaders and the general public.⁴⁸ The CSX process involves consultations with certain communities in Ohio and Indiana, and also with ORDC; the NS process involves consultations with certain communities in Ohio, Indiana, and New York, and also with ORDC. CSX and NS have indicated that they are optimistic that the renewed consultation process will result in a mutually acceptable resolution of many environmental concerns.⁴⁹

Environmental Conditions and Negotiated Agreements. The pleadings submitted in the first annual round of the Conrail general oversight proceeding (including the quarterly environmental status reports) establish that CSX and NS are making good faith efforts to comply with the extensive environmental mitigating conditions we imposed when we approved the Conrail transaction. See Conrail Dec. No. 89, slip op. at 382-423 (Appendix Q) (setting out the 51 environmental conditions). The overall record does not support the argument of some parties that the railroads have failed to comply with the terms of existing Negotiated Agreements or to

⁴⁷(...continued)

Conrail Dec. No. 89 that Negotiated Agreements would remain available as an alternative to the local and site-specific mitigation imposed in that decision. As of December 29, 2000, CSX has negotiated 41 agreements with states, local communities, and other entities. NS has entered into 22. (CSX, at the request of Conrail, also has entered into a Negotiated Agreement involving a shared assets area in Michigan.) We have required compliance with the terms of all of the Negotiated Agreements received since issuance of Conrail Dec. No. 89 by adding the agreements to Environmental Condition No. 51, as an alternative to the local and site-specific mitigation previously imposed in Conrail Dec. No. 89.

⁴⁸ To keep us apprised of their activities, CSX and NS agree to submit quarterly environmental status reports. The first quarterly reports (CSX's "Quarterly Community Status Report" and NS' "Community Outreach Status Report"), which were filed on November 15, 2000, reflect the progress of the consultation process through October 31, 2000. We have considered these reports, which are included in the summaries found in Appendix D. The next quarterly reports, covering the period through January 31, 2001, will be filed in February.

⁴⁹ CSX and NS have advised that the renewed consultation process has already resulted in the resolution of a number of environmental issues.

implement our environmental conditions, even though implementation, at times, has taken longer than some communities would like. In addition, the pleadings show that both CSX and NS are committed to working with the affected communities to reach negotiated solutions to the remaining environmental issues related to the Conrail transaction. CSX and NS each continue to enter into voluntary agreements with communities to address localized environmental concerns.

It is true that total compliance with our environmental mitigating conditions has not yet been achieved. But in certain instances it has not yet been possible to complete anticipated infrastructure improvements⁵⁰ and in other instances it has been necessary, for one reason or another, to extend the deadline for compliance.⁵¹ Given the efforts that CSX and NS have made to complete the actions needed to implement our environmental conditions (including, in Environmental Condition No. 51, the requirement that CSX and NS comply with their Negotiated Agreements), and their ongoing consultations with affected communities to find ways to resolve outstanding environmental issues, there is every reason to expect that total compliance and/or further mutually acceptable negotiated solutions will be achieved in due course. In any event, we will continue our active monitoring to ensure that this happens, and the continued

⁵⁰ See, e.g., Conrail Dec. No. 89, slip op. at 415 (Environmental Condition 42(A) requires relocation of NS traffic onto new tracks in the CSX right-of-way through Erie, PA); NS-1 at 67-68 (NS indicates that “conditions beyond [its] reasonable control” have affected the original schedule for completion of the Erie track relocation project).

⁵¹ See, e.g., Conrail Dec. No. 154, which extended the deadline for compliance with Environmental Condition No. 8(A) of Conrail Dec. No. 89, slip op. at 399 (requiring, among other things, the installation of 4-quadrant gates, or alternative mitigation such as median barriers, at the SR 7 grade crossing in Berryville, VA), because it was determined that this crossing is not conducive to the installation and operation of either such gates or such barriers; Conrail Dec. No. 168, which extended the deadline for compliance with Environmental Condition No. 8(A) of Conrail Dec. No. 89, slip op. at 393-94 (requiring, among other things, the installation of flashing lights at the at-grade crossing of Encks Mill Road in Mechanicsburg, PA), because flashing lights cannot be placed in service until the Pennsylvania Fish & Game Commission and the local electric company complete their access agreement that will allow the installation of a utility pole necessary to provide the AC power required for operation of the warning devices; and Conrail Dec. Nos. 166 and 167, which extended the deadline for compliance with Environmental Condition No. 11 of Conrail Dec. No. 89, slip op. at 401-02 (requiring, with the concurrence of the responsible local governments, the mitigation of train wayside noise at noise-sensitive receptor locations on certain rail line segments) to allow additional time to complete implementation of the condition through additional settlements with communities and an individualized noise mitigation program.

consultation process and the filing of the carriers' quarterly environmental status reports will assist the Board in this regard.

Environmental Representations. The pleadings that have been submitted in the first annual round of the Conrail general oversight proceeding establish that, insofar as adherence has been possible, CSX and NS generally have adhered to the environmental representations they made during the course of the Conrail proceeding. Total adherence has not yet been achieved because (in certain instances) anticipated infrastructure investments have not yet been made and (in other instances) the operational difficulties that followed the Split Date have made it impossible to achieve anticipated operating improvements. These problems, however, appear for the most part to be transitional in nature, and we are confident that total adherence will be achieved in the future.

Environmental Condition 50. Environmental Condition 50 provides that, “[i]f there is a material change in the facts or circumstances upon which the Board relied in imposing specific environmental mitigation conditions in [the decision approving the Conrail transaction], and upon petition by any party who demonstrates such material changes, the Board may review the continuing applicability of its final mitigation, if warranted.” Conrail Dec. No. 89, slip op. at 420. None of the submissions made in the first annual round of the Conrail general oversight proceeding, however, demonstrates the kind of material changes or new circumstances that would warrant additional environmental mitigation at this point. It is true that the circumstances (e.g., the varying levels of train traffic on different line segments) that exist today may not be, in every instance, exactly the circumstances that we anticipated. But given the operational difficulties that followed the Split Date, it is not surprising that things have not yet worked out entirely as projected. As DOT has noted, transitional problems do not require permanent remedies. And, as we have previously indicated, CSX and NS, if they are to retain the “ability to carry out their statutory obligation to provide common carrier service upon reasonable request,” must have the flexibility to adjust the level of train traffic over particular line segments in response to shipper demands and changing market conditions. See Conrail Dec. No. 96, slip op. at 22. In this regard, a number of parties have raised environmental issues that could have been but were not raised during the comprehensive Environmental Impact Statement (EIS) process that was conducted during the Conrail proceeding.⁵² The Conrail general oversight proceeding is not intended as a vehicle for reopening the EIS process to address such issues.

Commenting Parties: The Ohio and Indiana Communities. The various environmental issues raised by the Four City Consortium, the State of Ohio, the City of Cleveland, and the City of Sandusky do not merit relief by us at this point. With respect to the

⁵² For example, the City of Cleveland now raises concerns about impacts to air quality and noise resulting from idling trains but did not address this issue during the EIS process.

FCC, the State of Ohio, and the City of Cleveland, we reiterate: there have been good faith efforts to achieve compliance with the relevant environmental mitigating conditions and Negotiated Agreements; there generally has been substantial adherence to the relevant environmental representations; the record to date does not show that there has been material change in the facts and circumstances upon which we relied in Conrail Dec. No. 89 that would warrant supplemental environmental mitigation at this time; and, in many cases, circumstances beyond the railroads' control have either delayed or contributed to the time needed to implement some of the environmental conditions.⁵³

Moreover, the quarterly environmental status reports and other filings by CSX and NS establish that the railroads are committed to working with community representatives to resolve the outstanding environmental issues raised by FCC, Ohio, Cleveland, and Sandusky regarding such issues as blocked crossings and impacts on traffic delay and safety. And, with regard to the Ohio communities, Ohio's special 10-year \$200 million grade crossing program — which will result in the construction of up to 40 separated grade crossings in Ohio communities statewide — should provide a solution to the most severely affected areas.⁵⁴ For these reasons, we find that there is no need for us to intervene at this time. The quarterly environmental status reports and other pleadings CSX, NS, affected communities, and other interested parties will file for the duration of the Conrail oversight period will allow us to closely monitor the situation and take further action in the future should circumstances warrant.

Commenting Parties: Other Issues. The various other environmental issues raised in the comments do not merit relief. (1) As respects the commuter train issues raised by MDOT and TRLMB, these issues involve post-Split Date transitional matters that should be discussed in consultations with CSX. (2) As respects the City of Dunkirk issues raised by NYDOT and STWRB, NS has implemented its Trespasser Abatement Program and made Operation Lifesaver presentations available to Dunkirk schools and community organizations, and has thereby complied with Environmental Condition 24. The other City of Dunkirk issues (respecting CSX coal dust and NS grade crossings) should be discussed in consultations with CSX and NS.

⁵³ For example, with respect to Environmental Condition No. 21(c), involving FCC, CSX states that it completed the upgrade of the track structure and signal systems between Pine Junction and Barr Yard required by that condition, but that CSX determined that it will also be necessary to construct a third main line around Barr Yard to fully implement Condition No. 21(c). According to CSX, that would require an easement from the Forest Preserve District of Cook County, which has not yet been obtained.

⁵⁴ The program will be funded by the Ohio Department of Transportation, ORDC, the Ohio General Assembly, CSX and NS, the federal government and local governments. CSX and NS have agreed to provide 10% of the funding. (The legally required funding level is 5%.)

(3) As respects the Southern Tier Extension river/landfill issue raised by STWRB, this may well be a matter with potentially serious environmental implications, but it is not “transaction-related.” The out-of-service segment of the Southern Tier Extension (and the erosion problem alleged by STWRB on this segment) has not been in service since 1991. (4) As respects the George Washington Bridge Truck Survey issue raised by NYCEDC, in view of the absence of specifics as to what further information it is that NYCEDC wants, we do not now think that changes in the George Washington Bridge Truck Survey reporting system would be appropriate.⁵⁵ (5) As respects the City of Brooklyn train traffic issue raised by U.S. Rep. Dennis J. Kucinich, CSX has advised that its records indicate that, on the C-069 line segment that runs parallel to Brookpark Road behind the homes on Idlewood Drive in Brooklyn, there have been only very small differences between the actual number of trains and the number that was projected in the CSX operating plan.⁵⁶

City of Olmsted Falls. In a letter dated November 13, 2000, the City of Olmsted Falls advises that, in August 2000, NS notified the City that between 52 and 72 trains per day (an average of 64 trains per day) have been operating over rail line segment N-293d (Berea to Vermilion). In response to this letter, our environmental staff reviewed the monthly train count reports that NS submits to the City of Cleveland and NS’ revised operating plan (which projects 55.1 trains per day operating over this line segment). Based on these materials, the environmental staff determined that, from June through September 2000, an average of 64 trains per day (i.e., an average of almost 9 more trains per day than the 55 trains per day that we anticipated) operated over this rail line segment. NS should address, in its next quarterly environmental status report, whether this level of train traffic is expected to continue.

⁵⁵ CSX and NS are filing the reports that we required in Conrail Dec. No. 89. We expect CSX and NS to continue to serve copies of their George Washington Bridge reports on NYCEDC’s designated representatives.

⁵⁶ See CSX’s first Quarterly Environmental Status Report, which, in its discussion of Brooklyn issues, incorporates by reference the contents of a CSX letter dated November 9, 2000. That letter indicates: that CSX had projected a train count of 44 trains per day; that, as demonstrated by a train count study conducted over three 2-week periods during January/February, July, and September 2000, the actual train count has ranged from 32.7 trains per day to 47.6 trains per day; and that this range reflects the variability in rail operations related to particular days, weeks, and seasons.

THE CONTINUATION OF GENERAL OVERSIGHT. The second annual round⁵⁷ of the Conrail general oversight proceeding will be conducted in mid-2001, in accordance with the schedule indicated in the ordering paragraphs below. We anticipate that, following a review of the reports, comments, and replies filed in 2001, we will issue another decision concerning oversight issues. We reserve the right, however, to alter the filing schedule and/or to modify the reporting requirements, if and to the extent circumstances warrant.

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

It is ordered:

1. Except as otherwise indicated, all requests for relief contained in the pleadings filed by the commenting parties are denied.
2. CSX and NS must file progress reports by June 1, 2001, and must make their 100% traffic waybill tapes available to interested persons by June 15, 2001.
3. Comments of interested parties concerning oversight will be due on July 16, 2001.
4. Replies will be due on August 6, 2001.
5. CSX and NS must continue to file quarterly environmental status reports for the duration of our oversight period.
6. This decision is effective on the date of service.

By the Board, Chairman Morgan, Vice Chairman Clyburn, and Commissioner Burkes.
Vice Chairman Clyburn commented with a separate expression.

Vernon A. Williams
Secretary

⁵⁷ CSX has suggested that we might “wish to consider whether a longer interval between cycles than one year is appropriate.” CSX-2 at 90. At the present time, we think it best that this general oversight proceeding be conducted on an annual basis.

Vice Chairman Clyburn, commenting:

This is only the first annual round of the “general oversight” proceeding. I agree that CSX and NS have substantially resolved their transitional service problems and have made progress in other areas including implementing various environmental conditions and settlement agreements. However, certain operational problems still exist and various environmental and other issues remain unresolved. The Board correctly promotes private negotiations to settle these concerns, but I want to emphasize that the Board will continue to be vigilant in the ensuing rounds of oversight to help ensure that these issues are addressed.

APPENDIX A: ABBREVIATIONS

AA	Ann Arbor Acquisition Corporation d/b/a Ann Arbor Railroad
ACC	American Chemistry Council
ADT	Annual Daily Traffic
AESE	AES Eastern Energy
Amtrak	National Railroad Passenger Corporation
App.	Appendix
ASHTA	ASHTA Chemicals Inc.
Board	Surface Transportation Board
B&OCT	The Baltimore and Ohio Chicago Terminal Railroad Company
B&P	Buffalo & Pittsburgh Railroad, Inc.
CLM	Car Location Message
CL&P	Clarendon & Pittsford
CMA	Chemical Manufacturers Association
CN	Canadian National (CNR, GTW, and IC)
CNJ	Central Railroad of New Jersey
CNR	Canadian National Railway Company
Conrail	Conrail Inc. and Consolidated Rail Corporation
CP	Canadian Pacific (CPR, Soo, D&H, and St.L&H)
CPR	Canadian Pacific Railway Company
CR	Conrail Inc. and Consolidated Rail Corporation
CRC	Consolidated Rail Corporation
CSAO	Conrail Shared Assets Operations
CSX	CSX Corporation and CSX Transportation, Inc.
CSXI	CSX Intermodal, Inc.
CSXT	CSX Transportation, Inc.
CTC	Conrail Transaction Council
CTDOT	Connecticut Department of Transportation
dBA	decibel
Dec.	Decision
DOC	Delaware Otsego Corporation
DOT	United States Department of Transportation
DuPont	E. I. DuPont de Nemours and Company
D&H	Delaware and Hudson Railway Company, Inc.
EB	Entire Board
EIS	Environmental Impact Statement
FCC	Four City Consortium (the Cities of East Chicago, Hammond, Gary, and Whiting, IN)
FR	Federal Register
FRA	Federal Railroad Administration

FV&W	Fox Valley & Western Ltd.
GMRC	Green Mountain Railroad
GROW	Growth Resources of Wellsboro Foundation, Inc.
GTW	Grand Trunk Western Railroad Incorporated
GWI	Genesee and Wyoming Inc.
G&W	Genesee and Wyoming Railroad Company
HRRC	Housatonic Railroad Company, Inc.
IC	Illinois Central Railroad Company
ICC	Interstate Commerce Commission
IHB	Indiana Harbor Belt Railroad Company
IORY	Indiana & Ohio Railway Company
IP&L	Indianapolis Power & Light Company
ISG	ISG Resources, Inc.
ISRR	Indiana Southern Railroad, Inc.
JL	joint-line
JVRR	Juniata Valley Railroad Company
LAL	Livonia, Avon & Lakeville Railroad Corporation
L _{dn}	nighttime noise level
LIRC	Louisville & Indiana Railroad Company
LVRR	Lycoming Valley Railroad Company
MDOT	Maryland Department of Transportation
MNCR	Metro-North Commuter Railroad Company
MTRA	Master Trackage Rights Agreement
NBER	Nittany & Bald Eagle Railroad Company
NECR	New England Central Railroad, Inc.
NITL	National Industrial Transportation League
NITL Agreement	See <u>Conrail Dec. No. 89</u> , slip op. at 248-52
NJDOT	New Jersey Department of Transportation
NJT	NJDOT and NJTC
NJTC	New Jersey Transit Corporation and NJTRO
NJTRO	New Jersey Transit Rail Operations, Inc.
NL&S	National Lime and Stone Company
No.	Number
North Jersey SAA	North Jersey Shared Assets Area
North Shore Affiliates	NSHR, JVRR, NBER, LVRR, SVRR, and UCIR
NS	Norfolk Southern Corporation and Norfolk Southern Railway Company
NSHR	North Shore Railroad Company
NSR	Norfolk Southern Railway Company
NYAR	New York & Atlantic Railway
NYC	New York Central Lines LLC

NYCEDC	New York City Economic Development Corporation
NYCH	New York Cross Harbor Railroad
NYDOT	New York State Department of Transportation
NYMTA	New York Metropolitan Transportation Authority
NYRR	New York Regional Rail Corporation
NYSEG	New York State Electric & Gas Corporation
NYS&W	New York Susquehanna & Western Railroad
OAG	Attorney General for the State of Ohio
OCE	Office of Compliance and Enforcement
OEMA	Ohio Emergency Management Agency
Ohio	ORDC, OAG, PUCO, and OEMA
ORDC	Ohio Rail Development Commission
OTP	on-time performance
PANYNJ	Port Authority of New York and New Jersey
PNBC	Philadelphia Naval Base Center
PRR	Pennsylvania Lines LLC
PUCO	Public Utilities Commission of Ohio
RBMN	Reading Blue Mountain & Northern Railroad Company
RWCS	Resources Warehousing & Consolidation Services, Inc.
R&S	Rochester & Southern Railroad, Inc.
SAA	Shared Assets Area
SEDACOG JRA	Susquehanna Economic Development Agency-Council of Governments Joint Rail Authority
SIRC	Staten Island Railway Corporation
SL	single-line
Soo	Soo Line Railroad Company
South Jersey SAA	South Jersey Shared Assets Area
SP	Southern Pacific (Southern Pacific Transportation Company, St. Louis Southwestern Railway Company, SPCSL Corp., and The Denver and Rio Grande Western Railroad Company)
SSMB	Sault Ste. Marie Bridge Company
St.L&H	St. Lawrence & Hudson Railway Company Limited
STB	Surface Transportation Board
STWRB	Southern Tier West Regional Planning and Development Board
SVRR	Shamokin Valley Railroad Company
TEU	20-foot equivalent unit
TLCPA	Toledo-Lucas County Port Authority
TRLMB	Transit Riders League of Metropolitan Baltimore
UCIR	Union County Industrial Railroad Company
UP	Union Pacific (Union Pacific Railroad Company and Missouri Pacific Railroad Company)

URCS	The Uniform Rail Costing System
WCL	Wisconsin Central Ltd.
WCLL	Wisconsin Chicago Link Ltd.
WCS	Wisconsin Central System (WCL, FV&W, SSMB, and WCLL)
WMI	Waste Management, Inc.
Wyandot	Wyandot Dolomite, Inc.
W&LE	Wheeling & Lake Erie Railway Company

APPENDIX B: “SHORT FORM” CITATIONS

<u>Buffalo Rate Study Dec. No. 1</u>	<u>CSX Corporation and CSX Transportation, Inc., Norfolk Southern Corporation and Norfolk Southern Railway Company — Control and Operating Leases/Agreements — Conrail Inc. and Consolidated Rail Corporation (Buffalo Rate Study)</u> , STB Finance Docket No. 33388 (Sub-No. 90), Decision No. 1 (STB served Dec. 15, 1999, and published in the <u>Federal Register</u> on Dec. 20, 1999, at 64 FR 71188)
<u>Buffalo Rate Study Dec. No. 4</u>	<u>CSX Corporation and CSX Transportation, Inc., Norfolk Southern Corporation and Norfolk Southern Railway Company — Control and Operating Leases/Agreements — Conrail Inc. and Consolidated Rail Corporation (Buffalo Rate Study)</u> , STB Finance Docket No. 33388 (Sub-No. 90), Decision No. 4 (STB served July 7, 2000)
<u>Buffalo Rate Study Dec. No. 6</u>	<u>CSX Corporation and CSX Transportation, Inc., Norfolk Southern Corporation and Norfolk Southern Railway Company — Control and Operating Leases/Agreements — Conrail Inc. and Consolidated Rail Corporation (Buffalo Rate Study)</u> , STB Finance Docket No. 33388 (Sub-No. 90), Decision No. 6 (STB served Feb. 2, 2001)
<u>Conrail Dec. No. 89</u>	<u>CSX Corporation and CSX Transportation, Inc., Norfolk Southern Corporation and Norfolk Southern Railway Company — Control and Operating Leases/Agreements — Conrail Inc. and Consolidated Rail Corporation</u> , STB Finance Docket No. 33388, Decision No. 89 (STB served July 23, 1998)

<u>Conrail Dec. No. 96</u>	<u>CSX Corporation and CSX Transportation, Inc., Norfolk Southern Corporation and Norfolk Southern Railway Company — Control and Operating Leases/Agreements — Conrail Inc. and Consolidated Rail Corporation</u> , STB Finance Docket No. 33388, Decision No. 96 (STB served Oct. 19, 1998)
<u>Conrail Dec. No. 99</u>	<u>CSX Corporation and CSX Transportation, Inc., Norfolk Southern Corporation and Norfolk Southern Railway Company — Control and Operating Leases/Agreements — Conrail Inc. and Consolidated Rail Corporation</u> , STB Finance Docket No. 33388, Decision No. 99 (STB served Oct. 26, 1998)
<u>Conrail Dec. No. 102</u>	<u>CSX Corporation and CSX Transportation, Inc., Norfolk Southern Corporation and Norfolk Southern Railway Company — Control and Operating Leases/Agreements — Conrail Inc. and Consolidated Rail Corporation</u> , STB Finance Docket No. 33388, Decision No. 102 (STB served Nov. 20, 1998)
<u>Conrail Dec. No. 107</u>	<u>CSX Corporation and CSX Transportation, Inc., Norfolk Southern Corporation and Norfolk Southern Railway Company — Control and Operating Leases/Agreements — Conrail Inc. and Consolidated Rail Corporation</u> , STB Finance Docket No. 33388, Decision No. 107 (STB served Dec. 9, 1998)
<u>Conrail Dec. No. 109</u>	<u>CSX Corporation and CSX Transportation, Inc., Norfolk Southern Corporation and Norfolk Southern Railway Company — Control and Operating Leases/Agreements — Conrail Inc. and Consolidated Rail Corporation</u> , STB Finance Docket No. 33388, Decision No. 109 (STB served Dec. 18, 1998)

<u>Conrail Dec. No. 112</u>	<u>CSX Corporation and CSX Transportation, Inc., Norfolk Southern Corporation and Norfolk Southern Railway Company — Control and Operating Leases/Agreements — Conrail Inc. and Consolidated Rail Corporation</u> , STB Finance Docket No. 33388, Decision No. 112 (STB served Jan. 22, 1999)
<u>Conrail Dec. No. 114</u>	<u>CSX Corporation and CSX Transportation, Inc., Norfolk Southern Corporation and Norfolk Southern Railway Company — Control and Operating Leases/Agreements — Conrail Inc. and Consolidated Rail Corporation</u> , STB Finance Docket No. 33388, Decision No. 114 (STB served Feb. 5, 1999)
<u>Conrail Dec. No. 123</u>	<u>CSX Corporation and CSX Transportation, Inc., Norfolk Southern Corporation and Norfolk Southern Railway Company — Control and Operating Leases/Agreements — Conrail Inc. and Consolidated Rail Corporation</u> , STB Finance Docket No. 33388, Decision No. 123 (STB served May 20, 1999)
<u>Conrail Dec. No. 132</u>	<u>CSX Corporation and CSX Transportation, Inc., Norfolk Southern Corporation and Norfolk Southern Railway Company — Control and Operating Leases/Agreements — Conrail Inc. and Consolidated Rail Corporation</u> , STB Finance Docket No. 33388, Decision No. 132 (STB served Sept. 22, 1999)
<u>Conrail Dec. No. 133</u>	<u>CSX Corporation and CSX Transportation, Inc., Norfolk Southern Corporation and Norfolk Southern Railway Company — Control and Operating Leases/Agreements — Conrail Inc. and Consolidated Rail Corporation</u> , STB Finance Docket No. 33388, Decision No. 133 (STB served Nov. 4, 1999)

<u>Conrail Dec. No. 134</u>	<u>CSX Corporation and CSX Transportation, Inc., Norfolk Southern Corporation and Norfolk Southern Railway Company — Control and Operating Leases/Agreements — Conrail Inc. and Consolidated Rail Corporation</u> , STB Finance Docket No. 33388, Decision No. 134 (STB served Nov. 19, 1999)
<u>Conrail Dec. No. 154</u>	<u>CSX Corporation and CSX Transportation, Inc., Norfolk Southern Corporation and Norfolk Southern Railway Company — Control and Operating Leases/Agreements — Conrail Inc. and Consolidated Rail Corporation</u> , STB Finance Docket No. 33388, Decision No. 154 (STB served May 31, 2000)
<u>Conrail Dec. No. 166</u>	<u>CSX Corporation and CSX Transportation, Inc., Norfolk Southern Corporation and Norfolk Southern Railway Company — Control and Operating Leases/Agreements — Conrail Inc. and Consolidated Rail Corporation</u> , STB Finance Docket No. 33388, Decision No. 166 (STB served Aug. 22, 2000)
<u>Conrail Dec. No. 167</u>	<u>CSX Corporation and CSX Transportation, Inc., Norfolk Southern Corporation and Norfolk Southern Railway Company — Control and Operating Leases/Agreements — Conrail Inc. and Consolidated Rail Corporation</u> , STB Finance Docket No. 33388, Decision No. 167 (STB served Aug. 22, 2000)
<u>Conrail Dec. No. 168</u>	<u>CSX Corporation and CSX Transportation, Inc., Norfolk Southern Corporation and Norfolk Southern Railway Company — Control and Operating Leases/Agreements — Conrail Inc. and Consolidated Rail Corporation</u> , STB Finance Docket No. 33388, Decision No. 168 (STB served Aug. 22, 2000)

<u>General Oversight Dec. No. 1</u>	<u>CSX Corporation and CSX Transportation, Inc., Norfolk Southern Corporation and Norfolk Southern Railway Company — Control and Operating Leases/Agreements — Conrail Inc. and Consolidated Rail Corporation (General Oversight)</u> , STB Finance Docket No. 33388 (Sub-No. 91), Decision No. 1 (STB served Feb. 9, 2000, and published in the <u>Federal Register</u> on Feb. 14, 2000, at 65 FR 7414)
<u>General Oversight Dec. No. 3</u>	<u>CSX Corporation and CSX Transportation, Inc., Norfolk Southern Corporation and Norfolk Southern Railway Company — Control and Operating Leases/Agreements — Conrail Inc. and Consolidated Rail Corporation (General Oversight)</u> , STB Finance Docket No. 33388 (Sub-No. 91), Decision No. 3 (STB served Nov. 30, 2000)
<u>UP/SP general oversight proceeding</u>	<u>Union Pacific Corporation, Union Pacific Railroad Company, and Missouri Pacific Railroad Company — Control and Merger — Southern Pacific Rail Corporation, Southern Pacific Transportation Company, St. Louis Southwestern Railway Company, SPCSL Corp., and The Denver and Rio Grande Western Railroad Company</u> , Finance Docket No. 32760 (Sub-No. 21)

APPENDIX C: THE CSX-1 AND NS-1 PROGRESS REPORTS

THE CSX-1 PROGRESS REPORT. CSX insists that, in general, implementation of the Conrail transaction has thus far been successful. CSX concedes, of course, that implementation has not been problem-free, but CSX maintains that these problems,⁵⁸ though “extremely trying” to CSX and its customers, have been the exception and not the rule; and, CSX argues, the problems that remain are being solved, the pertinent indicators are improving, and CSX’s rail operations are now transitioning to a normal status. CSX contends, furthermore, that the problems that have occurred should not obscure the great permanent benefits that will result from the Conrail transaction. The Conrail transaction, CSX explains, brought new competitive rail service to portions of the eastern United States that previously had either no major railroad competition or very little such competition; and, CSX adds, the Conrail transaction also created many new single-line service routes for CSX’s customers, both historic customers and those located on Conrail’s lines.⁵⁹

THE NS-1 PROGRESS REPORT. NS argues that, although it is still too early to assess the full effects of the reintroduction of rail-to-rail competition into major markets in the Northeast for the first time in decades, there can be no doubt but that the shipping community has already benefitted from the vigorous NS vs. CSX competition for traffic that previously had been able to be handled solely by Conrail. NS concedes, however, that, on account of the start-up problems that occurred after the Split Date, the shipping community has not yet enjoyed the full benefits of the enhanced competition made possible by the Conrail transaction. And NS further concedes that, in certain locations (e.g., Buffalo, NY), the reintroduction of competitive rail service has been delayed because the pre-Split Date infrastructure could not accommodate the needs of two carriers. NS maintains, however, that, even at this early date, the new intramodal competition that has already occurred gives a good indication of the ultimate benefits of the Conrail transaction. And, NS adds, since October 1999 three important measures of service (average train speed, total cars on line, and average dwell time) have steadily improved on the NS system.

⁵⁸ CSX claims that many of the initial difficulties experienced in implementation reflected unexpected traffic volumes, car classification problems, and problems with interchanges with other carriers.

⁵⁹ CSX also notes that, in integrating the Conrail assets allocated to CSX, CSX has made enormous capital expenditures (over \$640 million during the period 1997 to June 1, 2000, by CSX’s calculations, *see* CSX-1 at 18). CSX further notes that it intends to continue to invest in cost-justified rail and intermodal infrastructure projects to the extent that capital is available and return on investment is acceptable. And, CSX adds, it has competed aggressively to win traffic opened up to it by the Conrail transaction.

APPENDIX D: LOCAL, STATE, AND REGIONAL INTERESTS, AND DOT

INDIANA CITIES OF EAST CHICAGO, HAMMOND, GARY, & WHITING. The interests of the Indiana cities of East Chicago, Hammond, Gary, and Whiting (referred to collectively as the Four City Consortium or FCC) vis-à-vis the Conrail transaction were addressed in the decision approving that transaction. See Conrail Dec. No. 89, slip op. at 153 n.239, 159, 160 n.256, 176 (ordering paragraphs 17 and 19),⁶⁰ 333-34, 405-06 (Environmental Condition 21). See also Conrail Dec. No. 96, slip op. at 20-24, 26 (ordering paragraph 15), 63-70. See also Conrail Dec. No. 114 (revising Environmental Condition 21).

The Comments Of The Four City Consortium. FCC contends that the Conrail transaction has exacerbated what was, even prior to that transaction, a situation of extreme congestion at rail/highway grade crossings in the densely populated Four Cities region. FCC insists that, with respect to the principal CSX and NS lines in the Four Cities region (CSX's "B&OCT" line between Calumet Park, IL, and Pine Junction, IN, and NS' "Nickel Plate" line between State Line Tower, IN, and Hobart, IN),⁶¹ matters clearly have gotten worse since implementation of the Conrail transaction; the environmental, safety, and socioeconomic impacts of that transaction on the Four Cities region, FCC advises, are greater even than those documented by FCC in the Conrail proceeding. FCC contends, in particular: that, on the B&OCT line, daily train movements have increased by six trains per day, and average train speeds have decreased to 9.0 mph;⁶² that, on the Nickel Plate line, daily train movements have not decreased and may actually have experienced a substantial increase, and average train speeds have been below applicants' projections; and that, because train traffic has increased and train speeds have decreased, there has been (by FCC's calculations) a 234% increase in vehicle delay

⁶⁰ Ordering paragraph 17 requires CSX and NS "[to] comply with the environmental mitigation conditions set forth in Appendix Q." Ordering paragraph 19 requires CSX and NS "[to] adhere to all of the representations they made during the course of this proceeding, whether or not such representations are specifically referenced in this decision."

⁶¹ FCC indicates that these two lines traverse numerous busy rail/highway grade crossings in the Four Cities region. FCC further indicates that it is focusing on these two lines: because these are the lines on which the most critical post-transaction congestion problems are occurring; and because these are the only lines for which CSX and NS have voluntarily provided the post-transaction train movement data (average daily volumes and speeds) that is necessary to a meaningful assessment of rail operations.

⁶² FCC indicates that problems on the B&OCT line are compounded by that line's 10 at-grade rail/rail crossings. FCC adds: that CSX does not control dispatching at any of these crossings; and that, in many instances, either the other railroad's trains have dispatching priority or trains are dispatched on a first come, first served basis.

time, from 220,104 hours to 734,947 hours. FCC further contends that the enormous increase in vehicle delay times has had significant adverse impacts on, among other things: the efficient provision of fire, police, and emergency service; families commuting to/from work and school; the propensity of area motorists to ignore grade crossing protection devices (including, in particular, lowered crossing gates) at significant risk to themselves and their passengers; and the propensity of pedestrians (particularly children) to climb under and through stopped trains. And, FCC adds, over and above the considerable safety, congestion, and transportation system impacts, the enormous increase in vehicle delay times has had substantial negative air quality, noise, and fuel consumption impacts.⁶³

FCC further contends that CSX and NS have failed to comply with many of the representations they made respecting capital investments and operating improvements in the Four Cities region (in particular, improvements regarding numbers of trains and average train speeds). FCC insists that, despite assurances by CSX and NS (assurances, FCC adds, that were relied on both by FCC and by the Board) that post-transaction congestion problems in the Four Cities would get better as a result of certain operational and infrastructure improvements, the situation has actually gotten worse, at least over the B&OCT line and the Nickel Plate line. Current problems, FCC explains, are caused, at least in part, (i) by daily train traffic levels that are higher than those projected by CSX and NS, (ii) by average train speeds that are far below those projected by CSX and NS, and (iii) by the railroads' refusal to reroute any of the increased train traffic away from these corridors and their failure to prevent trains from stopping in positions where they block major at-grade highway crossings.⁶⁴

Request For Relief. FCC contends that, in view of the adverse environmental, safety, and socioeconomic impacts of the Conrail transaction in the Four Cities region, and because the conditions previously imposed to mitigate those adverse impacts have proven inadequate,⁶⁵ we

⁶³ FCC also claims that the post-transaction increase in rail traffic over the rail lines traversing the Four Cities region has had negative impacts on the Cities' respective infrastructure improvement and economic development plans, which (FCC notes) are vital to the economic recovery of the Four Cities region.

⁶⁴ FCC indicates that, in response to the growing congestion problems that have been experienced in the region, and because of the perceived lack of attention paid by the railroads to these problems, the Cities of Hammond and East Chicago have had to enact ordinances prohibiting the railroads from blocking at-grade highway/rail crossings for periods of more than 5 minutes at any one time without allowing vehicles and pedestrians to cross the tracks, except where required for safety or other unusual circumstances.

⁶⁵ FCC concedes that CSX has been making upgrades on the B&OCT line, but insists
(continued...)

should impose additional limited protective conditions that will encourage the Conrail applicants (and, in particular, CSX) to give more serious consideration to the Alternative Routing Plan previously proposed by FCC. See Conrail Dec. No. 89, slip op. at 333-34.⁶⁶

(1) With respect to the B&OCT line, FCC asks that we impose the following requirements. (a) FCC asks that we require CSX to re-route traffic off of the B&OCT line between Calumet Park and Pine Junction in at least sufficient amounts so that no more than 31.7 trains per day on a monthly average basis traverse this line segment. FCC asks that we further provide that, to the extent possible, trains re-routed off of the B&OCT line must move over the Conrail Porter Branch and the grade-separated Indiana Harbor Belt Railroad Company (IHB) line via Ivanhoe and Tolleston. (b) FCC asks that we require CSX, in any month in which CSX expects to operate more than an average of 31.7 trains per day over the B&OCT line between Calumet Park and Pine Junction, (i) to provide as much advance notice as possible to FCC, and (ii) to conduct its train operations in a manner that will mitigate congestion (e.g., non-rush hour operations, no blockage of critical at-grade highway/rail crossings, alternative routings). FCC asks that we further provide that, in any event, CSX shall not be permitted to operate more than 31.7 trains per day over the B&OCT line until mitigation issues are resolved through a mutually acceptable agreement with FCC.

(2) With respect to the Nickel Plate line, FCC asks that we impose the following requirements. (a) FCC asks that we require NS to operate no more than 11.2 trains per day on a monthly average basis over the Nickel Plate line between State Line Tower and Hobart. (b) FCC asks that we also require NS, in any month in which NS desires to operate more than an average of 11.2 trains per day on a monthly average basis on the Nickel Plate line between State Line

⁶⁵(...continued)

that these upgrades may actually make matters worse. FCC explains: that many of these upgrades are designed to accommodate longer trains; that a longer train requires more time for deceleration and acceleration for each stop; that, because frequent stops are required by the numerous rail/rail crossings on the B&OCT line, average operating speeds are unlikely to increase to any significant extent; and that an increase in the length of CSX's trains, without a corresponding increase in train speeds, will only serve to increase the amount of time drivers and pedestrians must wait for trains to pass at a specific highway/rail at-grade crossing.

⁶⁶ FCC contends that, although it has been involved in "productive negotiations" with CSX and NS over railroad congestion issues, negotiations have not yet produced, and may never produce, an agreement that would obviate the need for imposition of additional environmental mitigating conditions by the Board. FCC therefore asks that we impose the additional conditions discussed in the text "should negotiations over a settlement agreement between our cities and the railroads fail prior to the Board's decision in this oversight proceeding."

Tower and Hobart, (i) to provide as much advance notice as possible to FCC, and (ii) to conduct its train operations in a manner that will mitigate congestion (e.g., non-rush hour operations, no blockage of critical at-grade highway/rail crossings, alternative routings). FCC also asks that we provide that, in any event, NS shall not be permitted to operate more than 11.2 trains per day over the Nickel Plate line until mitigation issues are resolved through a mutually acceptable agreement with FCC.

(3) FCC also contends that, to better enable FCC to ascertain the effects of the Conrail transaction on the rail lines that traverse the Four Cities region, we should impose an additional reporting requirement on CSX and NS. The requirement contemplated by FCC would require each of CSX and NS to provide FCC, on at least a quarterly basis during the remaining period of the Board's oversight imposed in Conrail Dec. No. 89 and on at least an annual basis for a period of 5 years thereafter, with reports containing the average number of daily train movements, average train speeds (or elapsed time between segment end points for each train), and average train lengths (or actual length for each train) for each of its owned and/or operated rail line segments in East Chicago, Hammond, Gary, and Whiting, during the period in question.⁶⁷

The CSX-2 Reply and First Quarterly Environmental Status Report. CSX concedes that, following the Split Date, it experienced operational difficulties that, in the Four Cities area, extended into February 2000. CSX insists, however: that the situation in the Four Cities area has greatly improved since March 2000; that CSX has been working diligently in good faith to implement the commitments (including the financial and operational commitments) it made in the October 1998 CSX/FCC settlement agreement; and that, although the actions agreed to in that settlement agreement have not produced the desired results as quickly as FCC had hoped, there is no reason at this time to doubt that these actions will effectively compensate for any increased train traffic through the Four Cities area that results from the Conrail transaction. CSX therefore concludes that no additional conditions are warranted at this time.

Train Caps Are Not Appropriate. CSX insists that the local train caps sought by FCC would be inconsistent with the national transportation policy of promoting freight transportation by rail and with the common carrier obligations of railroads. Such caps, CSX explains, would seriously impede efficient train operations not just locally but throughout an integrated rail network.

⁶⁷ FCC explains that, without the information that would be produced under the additional reporting requirement, FCC cannot generate a complete assessment of CSX's and NS' operations over the rail lines traversing the Four Cities region. CSX and NS, FCC adds, have indicated that, unless they are required to provide this information to FCC, they will not provide it.

Capital Improvements Provide A More Appropriate Solution. CSX contends that the capital improvements now contemplated will provide a more appropriate solution for motor vehicle delay in the Four Cities area. CSX adds: that it has already made excellent progress in its attempts to achieve more centralized control of the rail/rail interlockings on the B&OCT line; that, in particular, several such interlockings have already been modernized through installation of new current technology signals, power crossovers, and/or dispatcher control; that, however, the full benefit of the improvements that have already been made have not yet been experienced, because (CSX explains) a number of other significant projects in the Chicago area are still in progress; and that the completion of the various projects now in progress should have a significant positive impact on CSX's ability to maneuver through the Four Cities.

Action On FCC's Requests Should Be Deferred. CSX asks that we permit it to proceed with its program of capital improvements, and that we defer all requests for the imposition of additional conditions until those capital improvements have been given a chance to produce the expected operational improvements.

FCC's Motor Vehicle Delay Statistics Are Misleading. CSX, which disputes FCC's claim that the present level of motor vehicle delay is worse than it was prior to the Split Date, claims that FCC's motor vehicle delay statistics are, at best, misleading. CSX indicates, among other things, that FCC's statistics do not clearly differentiate between the poor situation through February 2000 and the improved situation since March 2000. CSX insists that, in general, the trend since March 2000 has been positive. And, CSX adds, the trend, as time goes by, will get even better, as the benefits from CSX's various capital improvements are achieved.

Negotiations Will Continue. CSX indicates that it remains hopeful that it will be able to resolve all outstanding issues with FCC regarding motor vehicle traffic delay. CSX insists that it has been working hard to improve operations in the Chicago area, both for its own benefit and for the benefit of the communities through which it operates.⁶⁸ And, CSX adds, Board oversight is the appropriate mechanism to ensure that CSX delivers on its commitments.

The NS-2 Reply and First Quarterly Environmental Status Report. NS contends that we should deny FCC's requests for the imposition of additional conditions. Denial of FCC's requests, NS explains, would allow the existing conditions to be fairly utilized.

⁶⁸ CSX has been, and will continue, meeting with FCC, and notes in its First Quarterly Environmental Status Report that FCC has acknowledged CSX's actions to improve train speeds and fluidity of operations, which have reduced the number of blocked crossing complaints. According to CSX, issues discussed at these meetings include, among other things: (1) proposals to re-route train traffic over the IHB; (2) installation of a train location and monitoring system; and (3) coordination of emergency response officials.

Operating Plans Not Inflexible; Train Caps Not Appropriate. NS, which appears to concede that the average train speeds reported by NS have been below those anticipated in NS' operating plan, insists that we should not treat as "ironclad" the operating plans submitted by the applicants in the Conrail proceeding; to do so, NS warns, would constitute an enormous deviation from previous Board practice and would render unworkable the control application process. NS adds that, "while railroads do their best to predict the amount of post-transaction traffic likely to move over a given line, railroads need flexibility because the amount of traffic that actually moves over a particular line depends upon shipper demand. Indeed, a traffic cap could well interfere with applicants' ability to carry out their statutory obligation to provide common carrier service upon reasonable request. Therefore, neither [the Board] nor the ICC has imposed permanent caps on the number of trains the railroads can operate or specified that existing freight must be transported by a specific route." Conrail Dec. No. 96, slip op. at 22.

Additional Operational Improvements Are Anticipated. NS, which notes that (at the time of filing its NS-2 reply) it had only just completed the first year of operations of the expanded NS system, advises that adjustments will continue to be made as operational improvements are put into place. And, NS adds, the comments submitted by FCC fail to note the significant steps (including, in particular, the installation of power switches at one interchange) that NS has already taken to alleviate congestion in the Four Cities area.

Mitigation Already Imposed Should Be Allowed to Work. NS contends that the mitigation already imposed by the Board should be allowed to work. NS contends, in particular, that the mechanisms already in place that provide for joint meetings among FCC, CSX, NS, and IHB, as well as status reports by CSX and NS, are appropriate to address FCC's issues.

Negotiations Should Continue. NS, which indicates that it is engaged in ongoing discussions with communities in the Four Cities area to resolve concerns about grade crossing blocking, and which further indicates that it is optimistic that mutually agreeable solutions will be found to alleviate these grade crossing issues, contends that we should allow the parties to continue their efforts to seek reasonable solutions that will accommodate both the interests of the Four Cities and the needs of NS for the efficient and safe operation of its rail system. There would be, NS advises, little incentive for NS to continue good-faith negotiations with FCC if FCC were to take the position that all of its demands, no matter how extreme or crippling to rail service and rail safety, must be met in order to come to a "mutually" acceptable resolution.⁶⁹

⁶⁹ NS notes in its First Quarterly Environmental Status Report that it participated with CSX and IHB at the October 19, 2000 joint meeting convened by FCC, where the parties discussed the placement of the train location monitoring system and established a committee to
(continued...)

Additional Reporting Requirement. NS insists that the “onerous” additional reporting requirement sought by FCC demonstrates that FCC’s focus is not restricted to the impacts of the Conrail transaction. NS contends, however, that those impacts mark the limit of the Board’s consideration in this oversight proceeding. And, NS adds, collection of the sort of operating data now sought by FCC would require a substantial expenditure of resources.

MARYLAND DEPARTMENT OF TRANSPORTATION. Because the Governor of Maryland, by letter dated October 2, 1997, indicated that the State of Maryland had entered into agreements with CSX and NS and therefore supported the Conrail application, the Board did not need to address the interests of the State of Maryland vis-à-vis the Conrail transaction in the decision approving that transaction. See, however, Conrail Dec. No. 89, slip op. at 420 (Environmental Condition 51 requires CSX and NS to comply with the terms of their negotiated agreements, dated September 24, 1997, with the State of Maryland).

The Comments Of The Maryland Department Of Transportation. MDOT advises that the implementation of the Conrail transaction has not gone as well as had been hoped.

Adverse Impacts On MARC Passenger Rail Service. MDOT advises that the Conrail transaction has adversely impacted the Maryland commuter rail service known as MARC.⁷⁰ MDOT claims: that, since the Split Date, there has been a serious decline in on-time performance (OTP) on the Camden Line, and, to a lesser degree, on the Brunswick Line; that, after the Split Date, passenger trains were often canceled, or delayed by several hours as freight trains were deployed ahead of scheduled passenger trains; that, although there has been some recent improvement, OTP is still, on average, only in the low 80 percentiles and not yet near the minimally tolerable 90% level; that this adverse impact is not in keeping with the commitments given by CSX both in its operating plan and also in the CSX/Maryland negotiated agreement dated September 24, 1997; and that, even with reductions in service by MARC to help CSX accommodate additional freight traffic, OTP has not achieved pre-transaction levels.

Problems Attributable To CSX. MDOT insists that, although the operating plans filed by CSX and NS clearly stated that the forecasted changes in business would have no impact on passenger rail service in the Washington DC, or Baltimore, MD, areas, and although CSX

⁶⁹(...continued)

oversee installation of the system. Other matters discussed included the capacity of the IHB corridor and possible expansion of the train location monitoring system..

⁷⁰ MARC operates on three lines: the Camden Line (owned by CSX, and referred to by CSX as the Capital Subdivision); the Brunswick Line (owned by CSX, and referred to by CSX as the Metropolitan Subdivision); and the Penn Line (owned by Amtrak).

claimed that adequate capacity was available to accommodate expected growth in freight rail traffic as well as the existing passenger rail traffic, the fact of the matter (as MDOT sees things) is that the Conrail transaction has had an adverse impact on MARC service because (MDOT claims) CSX has not had adequate capacity.⁷¹ MDOT further claims: that MARC service has not increased since CSX's operating plan was filed; that, on the contrary, MARC has reduced its passenger train service on the Camden Line to accommodate additional freight service; that, therefore, the problems that have occurred have not been MARC's fault but CSX's; and that MARC is baffled by CSX's reference (in the CSX-1 report) to MARC trains as "daily conflicts." And, MDOT adds, its review of service issues shows that not all delays were capacity related; many delays, MDOT claims, can be tied to poor dispatching decisions, insufficient space in freight yards and terminals outside the MARC service area, or crew availability.⁷²

New Contract Under Negotiation With CSX. MDOT indicates that it is "now" (at the time its comments were filed in July 2000) in the process of negotiating a new contract with CSX for use of its tracks. MDOT further indicates: that negotiations have gone well; that its goal is to complete negotiations and execute a new multi-year contract "by the end of this summer"; that an effort is being made to make certain concessions and improvements within the framework of the new contract to address many issues; and that, although MDOT is hopeful that these adjustments will help, MDOT believes that it is important that the Board continue to monitor the significant impacts that the Conrail transaction has had on MARC service. MDOT adds: that we should recognize the importance of quality rail service to commuters as well as shippers; that there may come a time when the protection of the public good requires intervening conditions; that the Board has the power to impose conditions when an adverse effect (such as CSX's inability to reliably operate MARC train service) occurs as a result of a Board-approved transaction; and that, if necessary, the Board should not hesitate to exercise its statutory powers for the benefit of the public and consistent with the public interest.

Diversion Of Truck Traffic To Rail. MDOT notes that, although both CSX and NS anticipated that the Conrail transaction would take trucks off the interstates by providing superior rail service alternatives, this does not appear to have been the case to date. MDOT claims that, in fact, severe service problems have resulted in many shippers using more trucks than before to

⁷¹ MDOT adds that, although there has been no issue with NS and MARC service "directly," NS service problems on Amtrak lines have "indirectly" had some impacts on MARC's OTP.

⁷² MDOT also contends that, although the State of Maryland did indeed agree to look at certain capital projects that would have enhanced operations considerably, nothing in Maryland's agreement with CSX predicated the continued operation of the MARC trains in a timely, reliable manner on the completion of those projects.

assure timely delivery of goods. And, MDOT adds, the Port of Baltimore has lost some customers as shippers have looked for other ports with better rail service.

Status Of Other Commitments To The State Of Maryland. MDOT advises that many of the items included in the negotiated agreements dated September 24, 1997,⁷³ have not yet been addressed. MDOT adds: that it is hopeful that work will begin soon and that commitments to the State of Maryland will be implemented as agreed to; that, indeed, it is MDOT's understanding that the operating plans filed by CSX and NS were commitments to achieve proposed service and infrastructure improvements within 3 years after the implementation date; and that it is also MDOT's understanding that the Board will monitor implementation and transaction impacts for 5 years.⁷⁴

The Comments Of Transit Riders League Of Metropolitan Baltimore. TRLMB, which was formed in 1999 to improve public transit through informed citizen action,⁷⁵ asks for our support in resolving service delays along MARC's Camden and Brunswick Lines. TRLMB advises that these delays, which (TRLMB indicates) have victimized thousands of MARC passengers, have been caused, at least in part, by additional CSX freight traffic and by CSX equipment failures. TRLMB claims that, although CSX has cited many causes for the MARC delays (including signal problems, communications problems, bad weather, and commercial power outages), CSX has not acknowledged the most obvious cause of many of the delays: additional CSX freight traffic on the MARC lines. TRLMB insists that the delays caused by

⁷³ See MDOT's comments, Attachment Number 2 (the letter of the Governor of Maryland, dated October 2, 1997; the CSX/Maryland negotiated agreement, dated September 24, 1997; the NS/Maryland negotiated agreement, also dated September 24, 1997).

⁷⁴ As respects CSX, MDOT contends that CSX has not yet moved forward on its commitments to implement intermodal service between Baltimore and Detroit, Indianapolis, Cleveland, Columbus, and St. Louis. As respects NS, MDOT contends that NS has not yet moved forward on its commitments: to improve clearances to enable 20'2" double stack intermodal service along the Northeast Corridor between the Port of Baltimore and Perryville, MD, and Harrisburg, PA; to establish an automobile distribution terminal in the Baltimore area; to set up an expanded and/or improved conventional intermodal facility; to construct a bimodal Triple Crown RoadRailer terminal in the Baltimore area; to improve the track connection at Hagerstown to facilitate the flow of traffic; to establish new scheduled bimodal Triple Crown RoadRailer service via the Northeast Corridor to serve the Baltimore area; and to develop regular high cube intermodal and domestic double stack train service between the Baltimore area and Chicago and other midwest areas.

⁷⁵ TRLMB indicates that it represents more than 600 users of bus, light rail, subway, and MARC service in the Baltimore region.

CSX's poor management of the integration of Conrail's operations into CSX's existing operations has directly (though perhaps not solely) caused many of the late trains experienced by MARC customers. These problems, TRLMB adds, are clearly related to the Conrail transaction; such problems are not, TRLMB explains, simply pre-existing problems that have no connection to that transaction. TRLMB therefore insists that we must take a firm stance against CSX's continued failure to adhere to its promise to provide freight service without adverse impact on commuter service.

Relief Requested. (1) TRLMB contends that, to ensure that MARC trains run on time, we should require CSX to give MARC service priority along CSX lines so that MARC passenger trains will not be delayed by CSX freight trains. And, TRLMB adds, this requirement should remain in effect until such time as CSX and its partner agencies and state and local governments construct a necessary third track along the Camden Line. (2) TRLMB asks that we require CSX: to establish a back-up operations center so that freight and commuter traffic is not delayed when the Jacksonville operations center is unable to operate; to pay \$50,000 to MDOT to be used for the establishment of a restitution fund for riders who incur additional costs for child-care, commuting, lost wages, or leave time, etc., as a result of late trains operated by CSX; and to establish a supervisor on-site at MARC headquarters to assist in dealing with commuter traffic delays, customer complaints, and other operational issues. (3) TRLMB also asks that we hold field hearings along the Camden and Brunswick Lines, and in other parts of the country where commuter service has been affected by CSX's acquisition of lines formerly operated by Conrail. Such hearings, TRLMB contends, would allow us to hear directly from commuters who have been let down by CSX's failure to honor the promises it made during the Conrail proceeding.

The CSX-2 Reply. (1) CSX concedes that there was, after the Split Date, a significant decline in on-time performance (OTP) of MARC trains on the Camden Line and, to a lesser extent, on the Brunswick Line. CSX advises, however, that MARC service has been improving, and achieved 91% overall OTP in July 2000. (2) CSX disputes MDOT's claim that the decline in OTP occurred despite the fact that MARC reduced the frequency of its service since the Split Date. There has been, CSX insists, no decline in the frequency of MARC service since the Split Date. (3) CSX insists that MARC trains do indeed present "daily conflicts" on the Camden Line. CSX explains: that these "conflicts" are the meetings of a northbound MARC train and a southbound MARC train on the Camden Line; that CSX, in its Operating Plan, predicted that capacity would be sufficient (i.e., CSX did not anticipate these conflicts) because CSX assumed that Maryland would follow through on its commitment to construct the "Penn Connection" between Amtrak's Northeast Corridor and Camden Station in Baltimore; and that the Penn Connection, if constructed, will allow MARC trains to operate over the Camden Line in one

direction only.⁷⁶ (4) CSX advises that a number of capital projects, one of which is the Penn Connection, are important issues in the ongoing contract negotiations between CSX and MARC. CSX contends that these negotiations should be permitted to proceed without intervention by the Board. (5) CSX advises that CSX and MARC, as part of their negotiations, are contemplating the establishment of a Joint Corridor Improvement Committee. CSX promises to see to it that the points raised by TRLMB are brought to the attention of that Committee.

The NS-2 Reply. NS indicates that it recognizes the importance, to the State of Maryland and the Port of Baltimore, of the various NS infrastructure and service improvements referenced in the NS/Maryland negotiated agreement dated September 24, 1997. NS adds: that it hopes to implement many of these over the coming years; that, however, service disruptions and the absence of anticipated market developments have undermined the immediate utility of certain infrastructure and service improvements, while demonstrating the need for others; that NS will continue to keep the State apprised of developments in this regard; and that NS will continue to work with the State and the Port to develop new initiatives that make sense in the post-Split Date environment.

STATE OF NEW YORK (NYDOT). The interests of the State of New York vis-à-vis the Conrail transaction were addressed in the decision approving that transaction. See Conrail Dec. No. 89, slip op. at 47 n.70, 79-88, 115-16, 160 n.256, 180 (ordering paragraph 62), 313-19. See also Conrail Dec. No. 96, slip op. at 41.

The Comments Of The State Of New York. NYDOT's comments are focused on three topics: capacity constraints and infrastructure improvements; cooperation with public agencies; and monitoring and maintenance of remedial measures.

Capacity Constraints And Infrastructure Improvements. NYDOT indicates that it is troubled by CSX's "recurrent theme" that, if the East-of-the-Hudson condition⁷⁷ is to work

⁷⁶ CSX indicates that, if the Penn Connection is constructed: during the morning commute, MARC trains "returning" from Union Station in Washington, DC, to Camden Station in Baltimore, MD, will run via the Northeast Corridor rather than the Camden Line; and that, during the evening commute, MARC trains "returning" from Camden Station in Baltimore to Union Station in Washington will run via the Northeast Corridor rather than the Camden Line.

⁷⁷ See Conrail Dec. No. 89, slip op. at 177, ordering paragraph 28: "CSX must attempt to negotiate, with CP, an agreement pursuant to which CSX will grant CP either haulage rights unrestricted as to commodity and geographic scope, or trackage rights unrestricted as to commodity and geographic scope, over the east-of-the-Hudson Conrail line that runs between

(continued...)

effectively, “additional public support” in the form of state funds for infrastructure expansion must be provided. NYDOT adds that it is further troubled by CSX’s “similar position” on the status of rail service and competition in the Buffalo area. NYDOT insists that, although “public support” for rail infrastructure improvements remains a mainstay of New York State transportation policy, the complete public funding of specific facilities or facilities expansion should not be a pre-condition to compliance with mandates legally imposed by the Board on private rail consolidation transactions. And, NYDOT adds, the record suggests that, although there are actions the carriers themselves could take to improve the efficiency of current operations and resolve capacity-related conflicts, these actions have been deferred due to their unwillingness to commit resources to the associated facilities expansions and/or infrastructure upgrades.⁷⁸

NYDOT contends: that New York remains committed to an active partnership with CSX and CP to promote the growth of competitive rail freight service throughout the East-of-the-Hudson region; that, however, the primary responsibility for fulfilling the conditions imposed in the decision approving the Conrail transaction rests with the parties to the transaction that gave rise to those conditions; and that, where this requires investment or other action to remedy capacity constraints or other infrastructure limitations, delay through default to the public sector is not an acceptable resolution. NYDOT insists that, through our actions in this oversight proceeding, we should reaffirm this principle.

Cooperation With Public Agencies. NYDOT argues that we should keep a close eye both on CSX as respects its relationship with Metro-North Commuter Railroad Company (MNCR)

⁷⁷(...continued)

Selkirk (near Albany) and Fresh Pond (in Queens), under terms agreeable to CSX and CP, taking into account the investment that needs to continue to be made to the line.” See also Conrail Dec. No. 89, slip op. at 18 (item 10), 82-83; Conrail Dec. No. 99; Conrail Dec. No. 102; Conrail Dec. No. 109; Conrail Dec. No. 112; Conrail Dec. No. 123; Conrail Dec. No. 132; Conrail Dec. No. 133; Conrail Dec. No. 134.

⁷⁸ NYDOT notes, by way of example, that, although MNCR has agreed to reduce the vertical safety clearance on its portion of the Hudson Line from 6" to 4" (to allow the movement of intermodal “trailers-on-flat cars” once proper detection equipment is in place), a dispute between CSX and CP over which carrier should pay the cost has stalled all progress. NYDOT further notes, again by way of example, that, although CSX and CP apparently agree on the need for a second intermodal track at the Harlem River Yard to allow them to better coordinate their joint use of that yard, progress in this regard has been delayed by their belief that some party other than themselves should pay for this track.

and also on NS as respects its relationship with the Southern Tier West Regional Planning and Development Board (STWRB).

(1) As respects the CSX/MNCR relationship, NYDOT contends: that MNCR, as owner of the segment of the Hudson Line between Poughkeepsie and New York City, must accommodate CSX's freight operations east of the Hudson River as it fulfills its own mandate to manage the provision of daily inter-city passenger and commuter service between points in the Hudson Valley and Manhattan; that reliability of service is critical to MNCR's ability to meet customers' expectations for on-time performance (OTP), and is directly affected by the times and manner in which freight trains traverse the Hudson Line; and that, for these reasons, the OTP of MNCR's trains on the Hudson Line must be regarded as an appropriate issue in this oversight proceeding, even though the Hudson Line is owned and controlled by MNCR (and not by CSX). NYDOT further explains that, although MNCR owns a portion of the Hudson Line, CSX has succeeded to Conrail's position, and, therefore, as a co-operator on the line, CSX must shoulder its share of responsibility for overall service performance, including passenger train performance. And, NYDOT adds, passenger train performance has been adversely affected by various occurrences involving CSX trains that are of a pattern and frequency sufficient to arouse great concern on the part of MNCR.⁷⁹ NYDOT insists that, although MNCR will continue to work with CSX to address problems related to the matter of passenger-freight co-existence on the Hudson Line, the impact of CSX operations over the Hudson Line on passenger train performance, and CSX's willingness to work meaningfully with MNCR to address issues arising from that impact, should remain a matter actively supervised by the Board, with agency intervention available as appropriate within the scope of the Board's oversight jurisdiction.

(2) As respects the NS/STWRB relationship, NYDOT contends: that, under the June 1998 settlement agreement among STWRB, New York, and NS, the public authorities committed to property tax abatements and the discharge of a \$2.1 million obligation owed to New York by Conrail, in consideration of NS' covenants to preserve, improve, and maintain the 145-mile Southern Tier Extension between Corry, PA, and Hornell, NY; that, in the decision approving the Conrail transaction, we required NS to adhere to the terms of the June 1998 STWRB/New York/NS settlement agreement;⁸⁰ that, however, at the present time, only the 50-mile stretch of the Southern Tier Extension between Jamestown, NY, and Olean, NY, remains active and operable; and that NS has indicated that further development of the Southern Tier

⁷⁹ NYDOT notes that, between January and May 2000, MNCR reported 78 separate incidents (including derailments and braking problems) that had an impact on passenger operations and OTP. And, NYDOT adds, over 90% of these incidents involved CSX's line-haul general freight trains moving between Selkirk and Oak Point Yard.

⁸⁰ See Conrail Dec. No. 89, slip op. at 176 (ordering paragraph 21).

Extension and associated traffic opportunities have been delayed by “inadequate infrastructure.” NYDOT further contends: that, in June 2000, the State of New York enacted a law creating a Chautauqua, Cattaraugus, Allegany, and Steuben Southern Tier Extension Railroad Authority; that this State-chartered Authority is empowered to complete implementation of the property tax abatement provisions of the June 1998 settlement agreement; and that, with this legislation in place, the course is clear for all parties to move expeditiously to secure the goals of the settlement agreement (i.e., preservation of the Southern Tier Extension; maintenance and enhancement of local service; and the expansion of service as necessary to meet new customer demand over the entire route). NYDOT therefore asks that we maintain close oversight of the full implementation of the June 1998 STWRB/New York/NS settlement agreement, and as necessary require clarification and supplementation of the record as to the progress toward meeting the goals of that agreement.

Monitoring And Maintenance Of Remedial Measures. NYDOT contends: that Environmental Condition 24 directed NS to take steps to secure the freight right-of-way through the City of Dunkirk, NY, to protect pedestrians and vehicles otherwise at risk from an expected increase in the number of freight trains moving each week over a line with numerous at-grade crossings;⁸¹ that, however, the steps taken by NS have been inadequate to accomplish the purpose intended by Environmental Condition 24; that, in fact, NS has paid little or no attention to the grade crossing problem since its initial implementation of the Trespasser Abatement Program; that, although NS has enhanced its safety electronic control devices at the “at grade” crossings, these electronic controls have been extremely erratic in their operation (signaling train movement when there was none, flailing their arms without reason, etc.); and that there is reason to fear that the inaccurate operation of these electronic controls may lead to a pattern of “disregard” and “disbelief” by pedestrians and motorists. NYDOT further contends that difficulties have also been reported in connection with CSX’s Dunkirk operations, which, though largely confined to elevated tracks, have created an “environmental nuisance” in the form of blowing dust from stored utility coal trains; and, NYDOT adds, Dunkirk City staff have been unable to gain the attention of CSX management to address the matter.

NYDOT contends that where, as in the case of the City of Dunkirk and Environmental Condition 24, continued commitment and attention by the carrier to the public purposes sought to be served is necessary, the Board through its oversight and enforcement measures should act to ensure the carriers’ compliance. NYDOT suggests that, if NS and CSX do not remedy matters in Dunkirk on their own, the Board should issue such orders as are necessary and appropriate to

⁸¹ See Conrail Dec. No. 89, slip op. at 407 (Environmental Condition 24 requires NS to implement its Trespasser Abatement Program to reduce trespassing along the NS right-of-way in the City of Dunkirk, NY, and to make Operation Lifesaver presentations available to Dunkirk schools and community organizations).

direct the carriers to more actively monitor their compliance with Environmental Condition 24 and others like it, and modify or supplement their initial implementing actions as circumstances warrant.

The STW-1 Comments. The comments filed by STWRB⁸² concern the Southern Tier Extension and the City of Dunkirk.

(1) *The Southern Tier Extension.* STWRB advises: that the 145-mile Southern Tier Extension extends between Corry, PA, and Hornell, NY; that, however, only the 50-mile segment between Jamestown, NY, and Olean, NY, is active; that this segment has only two active customers; and that the remaining 95 miles have been out of service since 1991, and have existed, since that time, in what amounts to a de facto abandonment-in-place. STWRB further advises: that the June 1998 settlement agreement provided for property tax abatement by means of a sale/leaseback in which a state-chartered and locally-controlled public sector railroad authority would acquire the line and lease it back to NS for 10 years; that, while the Authority owns the line, NS will receive, in essence, 7 years of tax abatement; and that, at the end of the 10 years, the line will revert to NS. STWRB adds: that the June 1998 agreement was intended to establish a low-cost operating environment that would give NS maximum incentive to operate and maintain the line; that, in return for the tax abatement, NS agreed to specific service and maintenance requirements; and that the agreement also provides the Authority with certain rights in the event NS later proposes to abandon part or all of the line. STWRB further adds, that, now that the Authority is in place, STWRB intends to work with NS to achieve the objectives of the June 1998 agreement: (a) to preserve the Southern Tier Extension intact; (b) to maintain and improve local service; and (c) to work with NS and/or NS' designated operator to re-establish mainline service.

(2) *Current Concerns As Respects The Southern Tier Extension.* STWRB indicates: that, during the past year, industries in New York's Southern Tier have been subjected to serious service disruptions; that, although NS' systemwide measures may now show improvement, transit times and reliability for NS-served industries in the Southern Tier continue to suffer compared to those seen before the Conrail split; and that, because NS' focus has been elsewhere, service to the Southern Tier Extension, a marginal branch in an operationally troubled part of the NS system, has suffered. And, STWRB adds, NS has not begun to make necessary repairs. STWRB explains: that the Southern Tier Extension continues to deteriorate; that pre-existing flood damage has been allowed to significantly worsen; and that river erosion at one location has now completely cut the railroad and threatens to invade an adjacent landfill, which (STWRB

⁸² The interests of the Southern Tier West Regional Planning and Development Board (STWRB) vis-à-vis the Conrail transaction were addressed in the decision approving that transaction. See Conrail Dec. No. 89, slip op. at 176 (ordering paragraph 21), 323-24.

warns) could potentially create an environmental problem. STWRB, which advises that NS attributes its failure to repair the line to the lack (until recently) of a tax abatement and the lack of shipping volume justifying repairs, insists that, in the case of the threatened landfill, environmental safety should be paramount, irrespective of either tax relief and/or traffic. NS, STWRB argues, should take immediate steps to preserve the line against further damage, or promptly move forward with implementation of the sale/leaseback so that the Authority can make repairs. STWRB insists that we should not allow continued neglect to cause irreparable harm to the line and to its economic development value.

(3) *Continued Oversight As Respects The Southern Tier Extension.* STWRB contends that, in view of the service difficulties of the past year and the accelerating deterioration of the Southern Tier Extension, we should retain continuing oversight until the June 1998 settlement agreement is fully implemented. STWRB further contends that NS should state what it intends to do with respect to implementing the June 1998 agreement, and should provide enough information so that the Board and public officials can determine whether NS' position with respect to the future of the Southern Tier Extension fulfills the expectations STWRB had when NS sought the support of local, state, and federal officials and the approval of the Board. STWRB adds: that if, on the one hand, NS is not prepared to move forward in the spirit of the June 1998 agreement that secured STWRB's and NYDOT's support for the Conrail transaction, NS should say so on the record; but that if, on the other hand, NS has a plan to repair and reopen the line, and rebuild business on the line, or alternatively to find another operator that will do so, STWRB is prepared to work with NS.

(4) *City Of Dunkirk Grade Crossings.* STWRB contends: that the increase in the past year of the number of NS trains in Dunkirk poses a safety issue to pedestrian and automobile traffic, and has created an automobile traffic flow problem as automobiles queue at the grade crossings; that there is also the potential for disrupted emergency vehicle service; that an NS proposal to eliminate these grade crossings by truncating the City streets so that they do not cross the rail line poses an even greater traffic and safety problem, and does not address the issue of pedestrian safety; and that, thus far, NS has agreed only to place signage at City grade crossings and to hold crossing safety classes. STWRB asks that we direct NS to investigate and implement a more permanent and comprehensive solution to this problem.

The CSX-2 Reply. (1) CSX insists that it is not responsible for making CP an effective East-of-the-Hudson competitor; fair, ethical, and equitable dealing and respect for obligations is, CSX argues, the criterion of the relationship of trackage rights owner to tenant and of the switching which the owner provides to the recipient of that service. (2) CSX insists that it has not caused a significant adverse impact on MNCR's OTP. CSX explains: that south of Poughkeepsie on lines held by MNCR on a long-term basis, CSX operates one or two freight trains round trip per day in the middle of the night (at times when few, if any, passenger trains operate); that southbound CSX trains pass over a third rail clearance envelope detector before

entering MNCR third rail territory; that, when the detector is tripped, CSX stops the train and either corrects the problem immediately or sets out the car that could damage the power rail; and that the 78 incidents referenced by NYDOT represent nothing more than the dispatcher logs of defect detector alarms, and thus document not incidents of delays to MNCR's trains but, rather, CSX's compliance with a safety measure designed to protect passenger service.

The NS-2 Reply and First Quarterly Environmental Status Report. *The Southern Tier Extension.* NS insists that it will work in good faith to implement the June 1998 STWRB/New York/NS settlement agreement, but adds that, even with the tax relief provided by the agreement (which, NS claims, came nearly 2 years later than promised) insufficient traffic on the line may require other disposition of the line such as a transfer to a shortline or abandonment. Significant investments in the line, NS advises, can only be justified by realistic prospects of traffic, and (NS warns) the lack of such prospects may prevent the ultimate realization of STWRB's objectives. NS adds: that most of the Southern Tier Extension has long been out of service; that the June 1998 settlement agreement does not require NS to maintain the out-of-service portion; and that it would make little sense to put scarce resources into out-of-service lines.

The City of Dunkirk. (1) NS insists that it has fully complied with Environmental Condition 24; it has (NS explains) implemented its Trespasser Abatement Program along the NS right-of-way and has made available to Dunkirk school and community organizations Operation Lifesaver presentations; and (NS adds) it has worked directly with the Dunkirk Chief of Police and the Fire Chief to address trespassing issues, and has provided the Mayor of Dunkirk with a rail crossing safety videotape for broadcast via local public television. (2) NS insists that the mechanical problem causing electronic gate arms to come down upon receipt of a "false" train approach message is not related to the Conrail transaction, and has nothing to do with the Trespasser Abatement Program. NS further insists that, in any event, it has not ignored the problem with the electronic gate signal in Dunkirk; the malfunctioning gate signal, NS advises, has been repaired. (3) NS insists that its proposal to close certain grade crossings along a span with nine at-grade crossings within approximately 1 mile would not impact pedestrian or vehicular traffic or create safety concerns. NS explains: that all at-grade crossings within the city limits of Dunkirk are signalized and many have pedestrian walkways, all of which are also signalized; that NS' proposal would leave the signalized pedestrian walkways intact at the closed grade crossings; that the Dunkirk Chief of Police and Fire Chief have conferred with NS concerning the closure proposal and agree that emergency vehicle service would not be disrupted; and that NS has agreed to a request by the City to install a water line along one side of the road by the closed grade crossings to ensure access by fire-fighting equipment to the City water supply. And, NS adds, the grade crossing proposal concerns an issue that pre-dates the Conrail transaction.

NEW YORK CITY ECONOMIC DEVELOPMENT CORPORATION. The interests of the City of New York vis-à-vis the Conrail transaction were addressed in the decision approving that transaction. See Conrail Dec. No. 89, slip op. at 79-84, 180 (ordering paragraph 62), 312-13, 317-18.

The NYCEDC Comments. NYCEDC contends: that, although CSX has done some work in identifying new service opportunities in the New York City market, many questions remain unanswered about CSX's working relationship with CP, and about CSX's commitment to offer quality service at those locations where there is no meaningful threat of competition from another rail carrier; and that, therefore, we should continue to monitor CSX's actions, and should keep in mind the possibility of expanding CP's rights in the Bronx and Queens to permit it to have direct access to facilities when CSX refuses to provide service on its own or cannot because of delays or congestion elsewhere on its system. NYCEDC suggests that, with heightened scrutiny of CSX's ongoing operations, CSX may be encouraged, as its conduct is brought to light, to fully honor its commitment to improve rail service to the New York City market.

NYCEDC's comments address three particular matters that NYCEDC claims continue to plague the City of New York and its shipping community.

(1) Service To The Hunts Point Food Distribution Center. NYCEDC indicates that the 329-acre Hunts Point Food Distribution Center (Hunts Point, which is located in the South Bronx): was created in 1962 through a joint City-State effort to consolidate New York City's food-related businesses in a single location with access to highway and rail networks; has facilities built to accommodate various vegetable, fruit, and meat distribution industries; contains a network of tracks and also a network of roads that intersect the tracks at various locations; and now serves over 15 million consumers in the New York metropolitan region. And, NYCEDC adds, approximately 80% of the City's produce and 40% of the City's meat are distributed through Hunts Point.

In General. NYCEDC claims that the New York Terminal Produce Cooperative Association (which NYCEDC describes as the primary recipient of rail shipments at Hunts Point) has made numerous complaints about the timing and reliability of CSX's service as compared to Conrail's. NYCEDC contends that, although CSX has stated that it is committed to facilitating current and additional rail shipments to Hunts Point, its actions tell a much different story and are causing potential rail users to turn to alternative modes.

The A&P Facility At Hunts Point. NYCEDC's only detailed grievance as respects Hunts Point concerns CSX's asserted refusal to serve a Hunts Point facility (hereinafter referred to as the A&P facility) that is located at 155 Food Center Drive and that is operated and managed by the Great Atlantic & Pacific Tea Company (A&P). NYCEDC claims: that the A&P facility, which consists of a 45,000 square foot building on 14.8 acres, is used for the manufacture,

processing, and storage of food and food-related products, and the distribution of such items to A&P, Food Emporium, and Freshtown supermarkets and food chain stores; that, prior to the Conrail transaction, Conrail served the A&P facility upon request; that CSX, however, has refused to serve the A&P facility; that CSX, in explaining its refusal, has asserted that a gated crossing is required where its tracks cross Food Center Drive; that CSX has persisted in its assertion even though New York State officials have confirmed that, because Food Center Drive is a private roadway (not a public roadway), New York State law does not require such protection at the Food Center Drive crossing (because in this situation, under New York State law, contractual arrangements between the owner of the private road and the serving rail carrier govern); that CSX, however, has insisted that it will not provide service except on the terms it demands, which include construction of a gated crossing over Food Center Drive by NYCEDC at NYCEDC's sole expense; and that CSX has refused to accept other safety measures proposed by NYCEDC and A&P,⁸³ even though such other measures are more comprehensive than those utilized previously without incident by Conrail.⁸⁴ And, NYCEDC adds, CP's ability to quote rates to/from the A&P facility is no help because CP, which must rely on a reciprocal switch by CSX, cannot physically serve the A&P facility.

Relief Requested. NYCEDC, which insists that CSX's refusal to serve the A&P facility is not reasonable, asks that we require CSX to fulfill its common carrier obligation to provide service to A&P.

(2) Service To Waste Management, Inc., In Harlem River Yard. NYCEDC claims that, because New York City's only landfill (located on Staten Island) will close in 2001, the City must be able to transport solid waste out of the City. NYCEDC further claims: that Waste Management, Inc. (WMI), the City's contractor for exporting solid waste generated in the Bronx, has a transfer facility located in the Harlem River Yard; that this facility, which now handles 1,000 to 1,200 tons of solid waste per day, is permitted by the New York State Department of Environmental Conservation to handle up to 3,000 tons of solid waste per day; and that, because WMI transfers this solid waste to disposal sites in Virginia, WMI must rely on CSX to handle this traffic (NYCEDC explains that CSX can, whereas CP cannot, handle this traffic in a

⁸³ NYCEDC indicates that the safety measures proposed by NYCEDC and A&P (which, NYCEDC notes, would be implemented without cost to CSX) include installation of cross-bucks and use of safety vehicles with flashing lights at the crossing any time a train is moving through it.

⁸⁴ NYCEDC indicates that Conrail served the A&P facility with a three-person crew. NYCEDC further indicates that CSX has not even given the shippers (NYCEDC apparently intends this as a reference to A&P) the option to pay some portion of that additional crew cost; CSX, NYCEDC claims, has simply refused to serve the A&P facility.

single-line move). NYCEDC contends: that, for the 6 months preceding the filing of NYCEDC's comments in July 2000, CSX's service was unreliable at best, with WMI experiencing frequent delays in the pick-up of loaded cars at its facility and the return of empty cars to its facility; and that CSX's sporadic service failures have created serious problems for WMI, and have jeopardized the City's ability to make realistic plans and arrangements for the export and disposal of solid waste. And, NYCEDC adds, CSX's sporadic service failures, which have raised the specter of substantial accumulations of solid waste at the WMI facility, have led community groups in the Bronx to express concern over plans to use rail for waste export.

(3) The George Washington Bridge Truck Survey. NYCEDC, which continues to have concerns that the Conrail transaction may bring substantial increases in truck traffic to the already congested George Washington Bridge, claims that the George Washington Bridge Truck Survey reports we required CSX and NS to file⁸⁵ are seriously inadequate and do not provide the level of information that is required to address the air quality and highway and bridge congestion issues that NYDOT and NYCEDC raised in the Conrail proceeding. NYCEDC explains: that it is not clear that the reports heretofore filed by CSX and NS cover all of the terminals such reports were supposed to cover; that, although NYCEDC has asked the railroads for these reports, NYCEDC has been told that these reports were filed with the government and can be obtained from the Board's staff; that, however, as of March 2000 the Board's staff was not able to locate all of the reports previously filed by CSX and NS; and that the reports NYCEDC has seen do not provide a great deal of useful information (the samples, NYCEDC explains, are limited and appear to show no trends).

Relief Requested. NYCEDC contends that, in order to assist NYCEDC in its attempt to fulfill its role of helping to shape the City's future freight network, and in view of the difficulty of obtaining the required information from the carriers or the Board, we should require CSX and NS: (1) to file useful monthly reports that document trend conditions at all of the CSX, NS, and Shared Assets intermodal yards in northern New Jersey; and (2) to serve a copy of all past and future reports on NYCEDC.

The CSX-2 Reply. CSX, which insists that it is fully honoring its commitment to improve rail service in the New York City market, contends: that, despite CSX's service problems in the Summer and early Fall of 1999, service to the Bronx and Queens has vastly improved, and CSX has experienced a 23% increase in freight business in this market; that, in the

⁸⁵ See Conrail Dec. No. 89, slip op. at 177, ordering paragraph 22: "Applicants must monitor origins, destinations, and routings for the truck traffic at their intermodal terminals in Northern New Jersey and in the Commonwealth of Massachusetts in a manner that will allow us to determine whether the CSX/NS/CR transaction has led to substantially increased truck traffic over the George Washington Bridge. Applicants should report their results on a quarterly basis."

past year, CSX has increased its traffic base with the Hunts Point Food Distribution center by 18%; and that, in the past year, solid waste traffic moved out of the Bronx by rail has increased by 45%. CSX adds that CSX service “East of the Hudson” has greatly increased freight movements over and above that provided by Conrail, with nightly trains each way, many of them in excess of 100 cars, and extra trains some nights.

(1) Service To The A&P Facility. CSX concedes that Food Center Drive is a private road, located on private property; and CSX also concedes that New York State law imposes no requirements whatsoever as to trains crossing private roads on shipper facilities, that being left (CSX adds) to mutual agreement between railroad and shipper. CSX claims, however, that, although Food Center Drive is a private road, it also happens to be a very busy six-lane divided highway that is used both by tractor-trailers dealing with facilities located at Hunts Point and also by tractor-trailers dealing with other businesses in the area, by Metropolitan Transit Authority buses, and by general public motorists. CSX insists that, although Food Center Drive is a private road located on private property, the physical risks involved are exactly what they would be if Food Center Drive were a public road located on public property.

CSX further concedes that, prior to the Conrail transaction, Conrail, using three-person crews, served the A&P facility. CSX further claims, however, that such service was provided a good many years prior to the Conrail transaction; the A&P facility, CSX explains, has not employed rail service since some time in the 1980s when the now-A&P facility was occupied by Daitch Shopwell. Much, CSX adds, has changed since that time: the Hunts Point area of the South Bronx has developed as a major industrial and transportation area, and there has been, accordingly, a significant increase in vehicular traffic in that area. And, CSX notes, there has also been, since the 1980s, an important change in the prevailing national Class I labor arrangements: three-person crews have given way to two-person crews. This is important, CSX explains, because, when service was rendered to Daitch Shopwell, the third crew member was “evidently” used to carry a flag or placard to stop highway traffic at the grade crossing.

CSX insists that, given the conditions that prevail today, CSX’s local management believes that the Food Center Drive crossing should be equipped with a grade crossing warning system for the safety both of railroad employees and of the public, and by way of control of CSX’s potential liability. It is simply not reasonable, CSX argues, to expect a single railroad employee to flag six lanes of traffic to a stop as part of the normal method of operation across a road like Food Center Drive. CSX, which insists that it should not be required to serve the A&P facility until an adequate warning system for the Food Center Drive grade crossing is provided, indicates that it has been discussing this matter, and will continue to discuss this matter, with

NYCEDC and A&P. And, CSX adds, it believes that there are good prospects for the development of a mutually-satisfactory solution.⁸⁶

(2) Service To WMI In Harlem River Yard. CSX claims that WMI ships commercial waste and not municipal waste, and that, for this reason, the WMI movements are not related to the issues raised by the closing of the City's facility at Fresh Kill on Staten Island. CSX further claims: that the WMI traffic involves a joint CSX/NS movement, not a CSX single-line movement;⁸⁷ that, as respects this joint CSX/NS movement, CSX's service has been good at all times; that, although this movement was not without problems, most of these problems reflected a lack of sufficient WMI equipment,⁸⁸ an inability to secure the lids on WMI's containers,⁸⁹ and the absence of a disciplined WMI loading schedule;⁹⁰ and that, as WMI has increased the number of cars in its fleet and reduced the time needed to load and unload these cars, the joint CSX/NS service has improved.⁹¹

(3) The George Washington Bridge Truck Survey. CSX insists that the reports it has filed set forth precisely the information that the Board required and that the Board's staff has informally advised is sufficient. CSX explains: that each CSX report shows, for the CSX intermodal terminals in northern New Jersey acquired as a result of the Conrail transaction

⁸⁶ CSX also adds that the Food Center Drive grade crossing issue will not affect rail service to other Hunts Point facilities; the A&P facility, CSX explains, is located apart from other Hunts Point facilities.

⁸⁷ CSX explains that the CSX/NS interchange occurs in Virginia, and that the delivery to the Virginia landfill is made by NS.

⁸⁸ CSX claims that, initially, WMI had too few railcars to support the level of loadings it planned.

⁸⁹ CSX claims that, due to safety concerns respecting lid securement on WMI's containers, WMI was required to retrofit its fleet to ensure that the lids would not blow off moving trains. CSX adds that, for a period of time in the winter of 1999-2000, this retrofit exacerbated the equipment shortage by taking cars out of the available fleet.

⁹⁰ CSX claims that, initially, WMI simply loaded all available empty cars.

⁹¹ CSX claims that, in February 2000, the cycle time for WMI traffic was 19 days, of which 9.7 days were on CSX (the remaining 9.3 days were either on NS or under WMI control at either end of the movement). CSX further claims that the "current" cycle time is 14 days, of which 8.8 days are on CSX (the remaining 5.2 days are either on NS or under WMI control at either end of the movement).

(North Bergen and Kearny) or operated by CSX in northern New Jersey before and since that transaction (Little Ferry), the number of inbound or outbound trailers handled, the “East of Hudson” origin or destination of each, and the number of trailers using each Hudson River crossing during a 6 day quarterly survey period; that these reports also show the amount of traffic handled at these terminals during each survey period that does not cross the Hudson River (i.e., “West of Hudson” traffic); and that CSX has also submitted quarterly reports showing, for a similar survey period, the extent to which traffic handled at its Massachusetts intermodal terminals (Boston, Worcester, and Springfield) either crosses the George Washington Bridge or uses other routings. CSX contends: that the information it has provided in its reports is sufficient to meet the purpose for which these reports were required;⁹² and that, in the absence of any specifics whatsoever as to what further information NYCEDC wants, changes in the reporting system should not be considered. CSX adds, however, that, as part of its normal consultation processes with NYCEDC, CSX will offer to discuss the reports with NYCEDC.

As respects the availability of the reports, CSX concedes that its representatives may well have advised NYCEDC’s representatives that, if NYCEDC wanted to obtain copies of the CSX reports, such copies would have to be obtained from the Board. CSX explains that, initially, CSX was not certain whether the reports were considered public documents; no provision had been made, CSX notes, for serving or furnishing copies of these reports otherwise than to the Board. CSX adds, however, that once CSX determined that the Board had made these reports available to the public,⁹³ CSX furnished NYCEDC with the two reports CSX had filed covering portions of the year 2000. And, CSX adds, it would be glad to continue to furnish copies of its reports to NYCEDC.

The NS-2 Reply and First Quarterly Environmental Status Report. NS, responding to NYCEDC’s arguments respecting the George Washington Bridge Truck Survey, contends that, in putting together the required reports, it has complied fully with the Board’s approved methodology. NS further contends that NYCEDC has provided no new evidence or argument

⁹² See Conrail Dec. No. 89, slip op. at 82: “[B]ecause of the potential adverse environmental effects that would result from an unexpectedly large merger-related increase in truck traffic through the city and over the George Washington Bridge, we will impose a condition requiring applicants immediately to begin monitoring origins, destinations, and routings for motor carrier traffic at their intermodal terminals in Northern New Jersey and in Massachusetts. The purpose of the study is to permit us to determine the accuracy of our assessment that the transaction will not result in substantially increased truck traffic over the George Washington Bridge.”

⁹³ CSX indicates that it has determined that, as of July 24, 2000, all of its previously filed reports were available in the Board’s public files.

that would justify any change in the frequency or methodology of these reports. NS adds that, although the reports NS has filed are available from the Board, NS will provide NYCEDC with copies of all past and future reports.

PORT AUTHORITY OF NEW YORK AND NEW JERSEY. Because PANYNJ, in a withdrawal notice filed April 10, 1998, indicated that it had entered into a settlement agreement with the Conrail applicants and therefore supported the Conrail application consistent with the terms of that settlement agreement, the interests of PANYNJ vis-à-vis the Conrail transaction were not addressed in the decision approving that transaction. See, however, Conrail Dec. No. 89, slip op. at 53 (a reference to the PANYNJ settlement agreement).

The Comments Of The Port Authority Of New York And New Jersey. PANYNJ, an agency of the States of New York and New Jersey that (among other things) is charged with the protection of the commerce of the New York/New Jersey Port District,⁹⁴ contends that the events of the past year⁹⁵ have demonstrated: that, because Conrail rationalized its facilities within the Port District to accommodate the needs of a single rail system, the Port District does not now have sufficient rail infrastructure to allow for efficient operations of three rail systems (CSX, NS, and the “continuing Conrail”);⁹⁶ and that, because CSX and NS paid an excessive price to acquire Conrail, CSX and NS do not now have sufficient capital to improve and expand the rail infrastructure in the Port District. PANYNJ adds: that, notwithstanding the combined efforts of PANYNJ and the carriers (CSX, NS, and the CSAO),⁹⁷ systematic problems, particularly capital

⁹⁴ PANYNJ indicates that the New York/New Jersey Port District, a more-or-less circle-shaped area that encompasses the portions of New York and New Jersey that lie within a roughly 25-mile radius of the Statue of Liberty, includes virtually all of the North Jersey Shared Assets Area (North Jersey SAA).

⁹⁵ PANYNJ indicates, with respect to its “ExpressRail” on-dock rail facility, that 1999 did not show the same level of traffic increase that had occurred from 1991 through 1998. PANYNJ insists that this “fall off” in traffic volume was due primarily, and probably entirely, to the service problems CSX and NS experienced following the June 1, 1999 Split Date.

⁹⁶ PANYNJ refers to the continuing Conrail as the Conrail Shared Assets Operations (CSAO).

⁹⁷ PANYNJ indicates that PANYNJ, CSX, NS, and the CSAO have worked together to solve immediate operating difficulties within the Port District, and, to the extent problems outside the Port District have affected operations within the Port District, they have sought to address problems outside the Port District as well.

problems,⁹⁸ are preventing those carriers from providing the quality and quantity of rail service that was promised in the Conrail proceeding; that, furthermore, there is considerable doubt that their level of service will improve substantially in the foreseeable future;⁹⁹ and that the inability of CSX and NS to fund the rail improvements and expansions required to handle existing (let alone increased future) traffic volumes has materially affected and will continue to materially affect both the carriers and the region. PANYNJ warns that, as serious as the service problems that CSX and NS suffered during the second half of 1999 were, those problems may have been merely a portent of the problems that will most likely occur if significant rail facility investment is not made in the near future.

Future Arrangements In The North Jersey SAA. PANYNJ, which appears to be concerned that the North Jersey SAA concept may be temporary in nature,¹⁰⁰ contends that any regulatory approval of any “further development” of North Jersey SAA operations must be based upon the ability of the carriers effectively, efficiently, and competitively to serve the highly congested North Jersey SAA.

Relief Requested: Continuing Oversight. PANYNJ contends that we should continue this oversight proceeding, and should require additional interim reports from the carriers as to the

⁹⁸ PANYNJ claims that CSX and NS, which collectively face \$13 billion in long-term debt, are in serious financial difficulty; there appear to be, PANYNJ insists, very few sources from which CSX and NS can seek to secure the revenues necessary to pay off their debt and to make the investments necessary both to maintain their rail systems and also to expand capacity sufficiently to meet the demands of the future.

⁹⁹ PANYNJ explains: that, although the North Jersey SAA now needs roughly \$400 million of infrastructure improvements, there is real doubt that these improvements will be funded, and even greater doubt that they will be funded in the short term; that, therefore, there is reason to believe that the North Jersey SAA will continue to suffer from a lack of sufficient rail infrastructure; and that, furthermore, there is reason to believe that, as traffic increases, the lack of sufficient rail infrastructure will also increase.

¹⁰⁰ PANYNJ cites this passage from the CSX-1 report: “This arrangement [i.e., the three Shared Assets Areas established in connection with the Conrail transaction], involving operations by three carriers in areas which had been rationalized by Conrail over two decades as part of a unitary rail system, posed a difficult operational situation, and one which, given the task involved, worked out as well as might be expected. Over time, further development of operations, to create greater efficiencies without sacrificing the basic principle of access by the two carriers to all shippers within the Shared Assets Areas, may be explored, whether in connection with the corporate restructuring contemplated by Section 8.9 of the Transaction Agreement or otherwise, subject to any necessary regulatory approvals.” CSX-1 at 8-9.

status of their service and financial problems, with two purposes in mind: (1) to monitor the activities of the carriers involved in the Conrail transaction;¹⁰¹ and (2) to prevent any further consolidation, or marketing alliance, that might reduce the competitive benefits to the Port of New York and New Jersey upon which the Conrail transaction was, in substantial part, based.¹⁰²

Relief Requested: North Jersey SAA Capacity Study. PANYNJ contends that, because both CSX and NS have severe capital shortages and because (notwithstanding the nearly heroic efforts of the CSAO) service problems exist and promise to get worse, we should institute a study to determine the capacity of the North Jersey SAA to handle existing and projected traffic volumes within that area. PANYNJ further contends that, to facilitate this capacity study, CSX and NS should be required to supply the following information to the Board and to oversight proceeding participants: (1) a comparison of the rail operational capacity within the North Jersey SAA, and the current and projected traffic volumes that will move through that area during the next 5 years, together with any plans currently in place to meet any increase in volume; and (2) the annual capital investment plans of the carriers within the North Jersey SAA for the next 5 years, and how the required funds will be obtained.¹⁰³

The CSX-2 Reply. CSX contends that, although PANYNJ's desire to address and share information on capacity, infrastructure, and long-range planning is well-founded and prudent, it would be better to employ a different procedure, involving a direction to confer and exchange information through the consultation processes that PANYNJ and the serving rail carriers have already put in place. The Board, CSX therefore insists, should not order the new proceeding suggested by PANYNJ but should instead indicate that the parties should examine capacity and infrastructure issues in their present program of conferences. CSX explains: that knowledge of PANYNJ's port improvement plans¹⁰⁴ and a testing of PANYNJ's projections¹⁰⁵ are necessary to

¹⁰¹ Oversight, PANYNJ insists, must continue until such time as the problems that now exist in the Port District are resolved.

¹⁰² PANYNJ warns that the competitive position of the Port of New York and New Jersey would be jeopardized if one of the carriers now serving New York/New Jersey were to be acquired by or merge with a carrier also serving Halifax on the north and Norfolk on the south.

¹⁰³ PANYNJ insists that, in view of the capital shortages now facing both CSX and NS, investment decisions must be made on a public benefit, as well as a private benefit, basis. Putting investment dollars into those areas where they are most needed should be, PANYNJ believes, a fundamental obligation imposed by the Board in this oversight proceeding.

¹⁰⁴ CSX indicates that, although the Port of New York and New Jersey now has a 45-foot
(continued...)

the railroads in developing their own capital budgets;¹⁰⁶ that the mixture of financing between private funds and public funds would be best discussed in conference; and that Board participation in this process, other than as a part of a very general oversight as to rail competition and operations in the area, might well make forensic a process that should be one of consultation and cooperation.

The NS-2 Reply. NS contends that, although rail service to the Port of New York and New Jersey and the North Jersey SAA is very important, no additional special studies or reporting requirements are warranted; there is, NS insists, no reason to single out one port and one service area for a special study of rail infrastructure capacity and projected needs. NS explains: that NS, CSX, and Conrail have worked, and will continue to work, with PANYNJ to address operational and infrastructure issues;¹⁰⁷ that NS, CSX, and Conrail, and also PANYNJ, are well aware of the capacity status and infrastructure needs in the North Jersey SAA; that NS and CSX have ample incentives without any external prods to maintain the infrastructure in the North Jersey SAA at a level to secure existing freight, to attract new freight, and to keep operations running at optimum efficiency; that, in fact, those incentives have already led NS to commit a huge amount of capital to expanding capacity in the former Conrail service area,¹⁰⁸ and

¹⁰⁴(...continued)
channel, PANYNJ's port improvement plans include the creation of a 50-foot channel.

¹⁰⁵ CSX indicates that, in 1997, PANYNJ reported a container throughput of 2.45 million TEUs (a TEU is a "20-foot equivalent unit"). CSX further indicates that PANYNJ's public projections: for the year 2010, are 4.7 million TEUs with a 45-foot channel and 5.75 million TEUs with a 50-foot channel; for the year 2020, are 7.37 million TEUs with a 45-foot channel and 9.47 million TEUs with a 50-foot channel; and, for the year 2040, are 12.88 million TEUs with a 45-foot channel and 17.02 million TEUs with a 50-foot channel. CSX adds that, although rail activities in the North Jersey SAA are not limited to the transshipment of cargoes handled or to be handled in Atlantic Ocean commerce, a major part of the business of the North Jersey SAA does involve Atlantic Ocean commerce handled intermodally.

¹⁰⁶ CSX insists that the growth rates involved in PANYNJ's public projections, and the disparities depending on the extent that investment is made to maintain a 50-foot channel as opposed to a 45-foot channel, are such as to complicate attempts by the railroads to predict their own capital budgets to accommodate increased business in the North Jersey SAA.

¹⁰⁷ NS notes, in this regard, that service in the North Jersey SAA has improved significantly in recent months.

¹⁰⁸ NS indicates that, although most of the capital projects it has already undertaken (NS
(continued...))

that, although not all of the Conrail applicants' capital programs for the former Conrail territory have been completed, the Northeast already has significantly more rail capacity than it had before the Conrail transaction was approved. And, NS adds, PANYNJ's speculation about the future of the Shared Assets Areas arrangements is not a reason to single out the North Jersey SAA for special attention; because any proposal to change those arrangements in ways not contemplated by the Conrail application and the Conrail "Transaction Agreement"¹⁰⁹ would require Board and public scrutiny prior to implementation, there is (NS insists) no need to speculate now about the potential effects of possible future events.

STATE OF OHIO (ORDC, OAG, PUCO, AND OEMA). The interests of the State of Ohio vis-à-vis the Conrail transaction were addressed in the decision approving that transaction. See, especially, Conrail Dec. No. 89, slip op. at 336-38. See also Conrail Dec. No. 96, slip op. at 16-17, 30, 51, 56.

Ohio's ORDC-1 Comments. Ohio advises that the Conrail transaction has resulted in dramatic changes which are affecting Ohio and its constituents. Ohio adds that, although many of these changes were anticipated, some were not, especially in terms of their magnitude and effect. Ohio asks that we undertake a careful reassessment of the specific issues raised in its comments with a view to requiring appropriate remedial action.

Community Issues: In General. Ohio concedes that some Ohio communities are satisfied with some of the environmental mitigation we imposed in our decision approving the Conrail transaction, particularly as respects hazardous materials response training, software programs, and response plan coordination. Ohio insists, however, although we imposed a number of conditions to address public safety, noise, and traffic congestion problems, these conditions have fallen short of correcting the problems many Ohio communities have faced from the implementation of the Conrail transaction, particularly in the area of grade separations. Ohio advises that many Ohio communities are convinced that the only way to remove the risk of train/vehicle collisions, hazardous materials spills resulting from train/vehicle collisions, loss of life and/or property resulting from safety service response delays, and just the everyday problems of getting to school or work on time is to construct a grade separation. And, Ohio adds, some

¹⁰⁸(...continued)

cites, among other things, its new intermodal facility at Rutherford Yard in Harrisburg, a traffic control project out of Harrisburg, the construction of a double track at CP Capital in Harrisburg, and clearance work on the Pattenburg Tunnel) are not in the North Jersey SAA itself, most of these capital projects benefit operations in the North Jersey SAA.

¹⁰⁹ See Conrail Dec. No. 89, slip op. at 22-23.

Ohio communities are also concerned that the Board may not be aware of some of the particular issues that have arisen during their individual negotiations with the railroads.

Ohio contends that it is prepared to make substantial expenditures of its own to resolve grade crossing problems. Ohio notes, in this regard: that, to help reduce the danger of crashes, deaths, and injuries at at-grade crossings, it has already spent nearly \$13 million on 192 active warning device projects in 10 rail corridors; and that the Governor of Ohio recently announced a new \$200 million Rail Grade Separation Program to help counter the safety and quality of life problems that have resulted from the changing train traffic patterns and increased train traffic of the Conrail transaction. Ohio adds, however, that its \$200 million Rail Grade Separation Program will only accommodate approximately 40 projects from the more than 260 requests for grade separations. Ohio observes that, even if it is determined that some of these requests can be sufficiently addressed with alternative measures, it is likely that the scope of Ohio's grade separation needs will surpass the limits of Ohio's \$200 million Rail Grade Separation Program.

Ohio insists that CSX and NS have a responsibility to pay their fair share for safety improvements that have become necessary because of the Conrail transaction. Ohio acknowledges, in this regard, that, to date, CSX and NS: have contributed nearly \$6 million towards the 192 active warning device projects noted above; and have indicated that they would contribute up to \$10 million each towards the \$200 million Rail Grade Separation Program. Ohio intimates, however, that these contributions, although welcome, are not enough.

Relief Requested. Ohio asks that we direct our environmental staff to reassess the conditions imposed to mitigate the environmental impacts of the Conrail transaction and determine if these conditions sufficiently address the public safety and congestion impacts that are being experienced by Ohio communities. Ohio also recommends that we direct our environmental staff to meet with Ohio to determine appropriate measures, including grade separations, to be implemented to solve the problems that Ohio's communities are now experiencing.

Community Issues: Individual Communities. Ohio has addressed, in some detail, the particular environmental issues faced by a number of Ohio communities.

The City Of Ashtabula. The City of Ashtabula indicates that it needs a grade separation where the NS tracks cross West Avenue. The City indicates that this is a very high priority, because there are (the City advises) no grade separations on the NS line that runs east-west through the City.

The City Of Cleveland. Ohio advises that the City of Cleveland has stated its concerns about the impacts from stopped and idling trains, blocked crossings, pollution, horn noise and train vibrations, and inadequate property maintenance, and its lack of confidence in the method

employed to identify receptors. Ohio indicates that it is particularly supportive of Cleveland's efforts in seeking relief to the remaining concerns of blocked grade crossings and the negative effects on the City's ability to provide adequate safety services to its residents.

The City Of Conneaut. The City of Conneaut indicates that it is interested in obtaining a grade separation at Parrish Road and in obtaining "Quiet Zone" designations.

The City Of Euclid. The City of Euclid, which notes that there was an NS train derailment in a Euclid industrial sector, insists that regular inspection and excellent maintenance of all tracks in Euclid must be performed. The City also requests grade separations at Dille Road and at Chardon Road.

The City Of Fostoria. Ohio indicates that the City of Fostoria has experienced a tremendous increase in train traffic, and that, due to this increased train traffic, certain sections of the City are virtually isolated, 19 hours out of each day, from safety service access. Ohio further indicates that the City has little or no confidence in two of the conditions that were designed to remedy the City's safety service and other transportation access problems. Ohio explains: that, based on weekly tests to determine how quickly CSX can respond to a call, the City now has a low confidence level in Environmental Condition 31(C) (which requires the installation of a direct voice hotline);¹¹⁰ and that, although the City appreciates the intent behind Environmental Condition 31(D) (which requires that, to the extent practicable, trains should be held in areas to minimize trains blocking major crossings in Fostoria), the City believes that this condition, rather than solving the problem, merely moves the problem around.¹¹¹

The City Of Mentor. The City of Mentor contends: that it needs a grade separation at Heisley Road; that it also needs new at-grade crossings at the Plaza Boulevard Extension; and that the railroads should interconnect with the City's traffic signal system.

The City Of North Ridgeville. Ohio indicates that the City of North Ridgeville has advised that negotiations with CSX have not yielded satisfactory results. Ohio adds that the City of North Ridgeville has stated: that no solutions were offered to alleviate the City's safety service access issues; and that a grade separation would offer the best solution to the City's problems.

The City Of Sandusky. Ohio contends: that the relocation of NS' Triple Crown Services RoadRailer facility to the City of Sandusky has caused problems with blocked crossings and

¹¹⁰ See Conrail Dec. No. 89, slip op. at 412.

¹¹¹ See Conrail Dec. No. 89, slip op. at 412.

slow moving trains; that track configuration, level of train traffic, and slower than expected train speeds have caused problems greater than those that were anticipated; and that, on numerous occasions, blocked crossings have obstructed the delivery of emergency services and interfered with vehicular and pedestrian activity. Ohio therefore asks that we reassess the situation at Sandusky and order adequate measures to remedy the serious problems that have arisen.

The County Of Huron. Ohio indicates that the County of Huron (which includes the Village of New London and the Village of Greenwich): is concerned about adequate safety service access in the northern half of the Village of New London and believes that a grade separation is the only solution that would adequately address this problem; and questions the lack of noise mitigation ordered for the Village of Greenwich, which has experienced a substantial increase in train traffic.

The Village Of Oak Harbor. Ohio indicates that the Village of Oak Harbor is concerned about NS' report to the Board regarding the pursuit of a real-time train location monitoring system. Ohio further indicates: that the Village and NS have been working on a mutually beneficial proposal respecting the improvement of an existing underpass; that the Village appreciates NS' cooperation in arriving at this preferred solution; and that the Village asks that we approve this substitution, once the final signature has been obtained on the agreement.

The Village Of Wellington. Ohio indicates that the Village of Wellington has advised that negotiations with CSX have not yet resolved the blocked grade crossing and safety service access problems associated with the rail congestion on the Greenwich— Berea line segment. Ohio adds that it is important that CSX continue to work with the Village of Wellington on the selection, implementation, and funding of solutions to meet the Village's safety needs.

Safety. Ohio advises that it applauds both CSX and NS for their safety records since the Split Date. Ohio adds that it is the dedication that both CSX and NS have for safety that encouraged their partnership with Ohio on the grade crossing corridor programs and their agreement to participate in Ohio's \$200 million Rail Grade Separation Program.

ASHTA Chemicals. Ohio indicates that it has been advised by ASHTA Chemicals Inc. (ASHTA):¹¹² that we assumed that shipments originating in Ashtabula would be transported to destinations south and west via the Willard, OH yard; that, however, because this operation was changed shortly after the Split Date, all shipments originating in Ashtabula are now routed east to Buffalo before being transported to their western destinations; and that this via-Buffalo routing

¹¹² ASHTA's interests vis-à-vis the Conrail transaction were addressed in the decision approving that transaction. See Conrail Dec. No. 89, slip op. at 20 (item 31), 113, 177 (ordering paragraph 24), 276-77.

involves an unnecessary and circuitous movement of ASHTA's freight (which, Ohio notes, is classified as hazardous material). Ohio adds that it has been further advised by ASHTA that, although there is regular communication between ASHTA and CSX, more investigation into alternative routing options needs to be done. Ohio therefore asks that we review our stance on reciprocal switching as it relates to the prevention of circuitous and unnecessary movements of hazardous materials. ASHTA, Ohio believes, is an example of the kinds of movements that would merit a reciprocal switching agreement.

The Acquisition Premium. Ohio, which claims that much concern has been expressed that CSX and NS have imposed substantial increases in rates and other charges (e.g., demurrage charges), asks that we address the "acquisition premium" issue to determine if Ohio rail users have been unfairly compelled to cover the cost of the Conrail transaction. Ohio adds that the best way to determine whether an acquisition premium is being paid, to the detriment of Ohio rail users, would be to compare rate increases and/or decreases experienced by captive rail users vs. the comparable increases and/or decreases experienced by rail users that have viable competitive options.

Aggregates Shippers. Ohio, which supports the requests made by Wyandot Dolomite, Inc. (Wyandot) and National Lime and Stone Company (NL&S), asks that we revisit the problems faced by these aggregates shippers and provide effective relief.

Wheeling & Lake Erie Railway Company. Ohio indicates that it supports the arguments advanced by W&LE. Ohio contends: that W&LE should not be required to incur significant capital improvement costs, in addition to paying trackage rights fees, as a precondition to using its trackage rights between Bellevue and Toledo for more than one train a day; that such a requirement would hamstring W&LE in its efforts to build compensatory traffic through its Toledo interchanges with other railroads; that, although the Bellevue-Toledo line is indeed congested, it is difficult to fathom how a few W&LE trains could be determined to be a cause of this congestion; and that NS should be required to assume the financial obligations for expansion to meet its own capacity requirements, and should not be allowed to use congestion as an excuse to limit W&LE's best resource for recovering traffic losses directly resulting from the Conrail transaction. Ohio suggests that we establish a reasonable minimum number of trains that W&LE should be allowed to run before it can be assessed capital costs; and Ohio further suggests that eight trains a day would be a reasonable minimum number. Ohio further contends that extension of W&LE's Huron Dock lease is important to assure that W&LE can continue to provide a competitive alternative for traffic moving between Lake Erie and W&LE's service territory.

The Port Of Toledo. Ohio indicates that it is very much concerned that the Port of Toledo no longer has competitive rail service options as a result (Ohio claims) of NS' failure to exercise access rights it acquired in the Conrail proceeding. Ohio further indicates that the Toledo-Lucas County Port Authority (TLCPA) refrained from pursuing its concerns on the

understanding that NS would actively supplant service previously available from Conrail. Ohio, which indicates that it now believes that the Port of Toledo would have been better served if TLCPA had requested that another railroad be granted access to the Port to assure continuation of competitive service options, asks that we review the competitive access status at the Port of Toledo to determine if access rights should now be granted to a shortline railroad.

Rail Labor. Ohio indicates that it supports the fair and equitable treatment of Rail Labor adversely impacted by the Conrail transaction; it is, Ohio claims, the common laborer who feels the most pain from merger transactions, either through the loss of a job or through the uprooting of the home and family to move to where the new job will be. Ohio adds that it is also concerned that, within the Hours of Service regulations, CSX and NS are working Rail Labor more and harder than ever to keep up with new demands to move more rail traffic faster. Ohio therefore asks that we encourage CSX and NS to closely examine the efforts recently undertaken by Union Pacific regarding adequate rest for locomotive engineers to see how CSX and NS might apply the lessons learned to their own operations.

The CSX-2 Reply and First Quarterly Environmental Status Report. CSX has addressed a number of the issues raised by Ohio.

Community Issues: In General. CSX, which insists that it has complied with or is in the process of complying with the numerous Environmental Conditions imposed for the benefit of Ohio communities, and which further insists that it has complied with the obligations undertaken in negotiated agreements with state agencies and a number of Ohio communities, contends that we should not conduct a wholesale reassessment of all environmental impacts in the State of Ohio.¹¹³ Ohio, CSX argues, has provided no evidence that the situation in Ohio is materially different from that anticipated when the environmental analysis was conducted and the Environmental Conditions were imposed. As respects grade separations in particular, CSX contends: that CSX and NS have agreed to provide substantial financial and technical support to Ohio's \$200 million Rail Grade Separation Program (which, CSX notes, includes projects on all rail lines in Ohio, and is not limited to lines affected by the Conrail transaction); and that, if grade separations are truly justified in the Ohio communities mentioned by Ohio (because of increased traffic resulting from the Conrail transaction or otherwise), they will surely be included

¹¹³ CSX notes, in its First Quarterly Environmental Status Report, that it continues to meet with state and local interests in Ohio. In October, along with NS, CSX met with ORDC officials, who stated in a follow-up letter dated October 18, 2000, that both railroads have taken "great strides" with respect to ORDC's rail safety concerns. In November, CSX hosted another meeting with ORDC officials.

among the top 40 projects for construction. Ohio, CSX insists, has presented no justification for involvement by the Board in this process.¹¹⁴

Community Issues: Individual Communities. CSX contends that none of the specific local issues raised by Ohio presents a reasoned basis for intervention by the Board.¹¹⁵

The City of Fostoria. CSX insists: that, with one exception, it has already complied with all of the Environmental Conditions that were imposed on CSX for the benefit of the City of Fostoria;¹¹⁶ that the direct voice hotline CSX installed pursuant to Environmental Condition 31(C) is indeed reliable;¹¹⁷ and that the apparent claim that the entire City of Fostoria is inaccessible 19 hours per day because of blocked rail crossings is a gross exaggeration.¹¹⁸

¹¹⁴ CSX adds that it has already made a substantial contribution toward grade separations in Ohio by reconfiguring the connection at Greenwich to utilize the W&LE separated crossing rather than the Conrail at-grade crossing, and by funding a substantial share of a grade separation at Section Line 30 Road in Huron County at the west end of Willard Yard. And, CSX notes, it has, in negotiated agreements, also committed to contribute to the funding of two underpasses in Berea, a grade separation in Brook Park, and a grade separation at Olmsted Falls/Olmsted Township.

¹¹⁵ CSX states that it is prepared to discuss all issues of concern with responsible officials. It reports that it has been in touch with local officials in Greenwich, and that the Director of the Huron County Emergency Management Agency has indicated that there were no pressing problems. It also reports that it has had several discussions with the City of Olmsted Falls regarding the possible establishment of a quiet zone.

¹¹⁶ CSX indicated (in its CSX-2 reply filed in August 2000) that it had not yet put into place the real-time train monitoring system required by Environmental Condition 31(A). See Conrail Dec. No. 89, slip op. at 411. That system, CSX further indicated, was scheduled for the third quarter of 2000.

¹¹⁷ CSX concedes that the hotline has sometimes been answered only after five to seven rings. But that, CSX claims, is not an unreasonably slow response time for the busy F Tower operator.

¹¹⁸ CSX explains: that underpasses provide routes for major thoroughfares under the railroad lines in the City of Fostoria; that these grade separations permit access to most sections of the City even when some at-grade crossings are blocked; and that, as respects the sections (referred to as Iron Triangles) that can be cut off by trains, CSX, which has already made significant track and signaling improvements in the City, will continue its efforts to implement
(continued...)

ASHTA Chemicals. CSX contends: that avoidance of circuitry is frequently not required in order to have a safe movement of chemical and other hazardous cargoes; and that, because many considerations enter into the picture (including the number of handlings received and the lengths of time cars are held in yards), it may be, in any particular instance, that the longer (i.e., the more circuitous) of two routings may produce the safer movement. CSX further contends: that CSX services ASHTA daily with a switch crew; that, during the period when cars were routed directly west toward Willard Yard, the crew separated out ASHTA's eastbound traffic from its westbound traffic and left each for pickup by eastbound and westbound trains; that, however, although CSX's eastbound trains routinely had sufficient capacity to pick up ASHTA's eastbound cars, CSX's westbound trains often did not have sufficient capacity to pick up ASHTA's westbound cars; that some of ASHTA's westbound cars therefore sat for up to several days before they could be moved; that, because this was not a satisfactory arrangement, CSX changed the handling plan to move all of ASHTA's traffic first to Buffalo, there to be divided between eastbound and westbound destinations and assembled into the appropriate trains; and that the end result has been a more consistent transit time. And, CSX adds, although it has the matter under study and does not rule out the possibility of returning to the prior operating plan or some modification thereof, CSX must maintain the day-to-day operating flexibility to conduct its operations safely and efficiently.

The NS-2 Reply and First Quarterly Environmental Status Report. NS has addressed a number of the issues raised by Ohio.

Community Issues: In General. NS indicates: that NS and CSX have spent almost \$6 million for nearly 200 grade crossing flasher and gate projects in accordance with their respective Rail Corridor Safety Agreements negotiated with ORDC and PUCO; and that, in addition, NS and CSX have now each committed to contribute very substantial funds to Ohio's \$200 million Rail Grade Separation Program. NS contends that, given these contributions, no more should be assessed through the oversight proceeding vehicle.

Community Issues: Individual Communities. NS insists that none of the specific local issues raised by Ohio presents a reasoned basis for intervention by the Board.

The City Of Ashtabula. NS advises that the City of Ashtabula will be making a request for funding for a bridge to Ohio's \$200 million Rail Grade Separation Program. NS further notes

¹¹⁸(...continued)

operating procedures that will minimize the blockage of those sections. And, CSX adds, if the City desires more accessibility than that afforded by CSX's capital improvements and the Board's conditions, the City should seek grade separations through Ohio's \$200 million Rail Grade Separation Program.

that, on September 15, 2000, it began operating via new trackage rights on the Bessemer & Lake Erie Railroad Company, which has virtually eliminated blocked crossings in the city.

The City Of Conneaut. NS indicates that FRA has not yet issued final regulations establishing a program for communities to apply for Quiet Zone designations. NS further indicates that it will comply with any applicable provisions when such FRA regulations become effective. NS reports that it has met with the Conneaut City Manager to discuss a proposed settlement agreement to satisfy the city's environmental concerns, including the requirements of Environmental Condition No. 28.

The City Of Euclid. NS, which apparently concedes that there was indeed an NS derailment in a Euclid industrial sector, contends that NS applies inspection and maintenance standards at least as stringent as those required by FRA. NS further contends: that NS' contribution towards funding of the Dille Road grade separation is incorporated in a negotiated agreement between NS and the City of Cleveland; and that a request by the City of Euclid to obtain a grade separation at Chardon Road should be submitted to Ohio's \$200 million Rail Grade Separation Program.

The City Of Fostoria. NS insists: that NS and CSX are complying with Environmental Condition 31(D) by holding trains, to the extent practicable, in areas that minimize blocking of major grade crossings; that, in this regard, NS endeavors to stop its trains when necessary only when they are outside the city limits of Fostoria in order not to block emergency access and city intersections; and that, although compliance with this condition does indeed shift the blockages to areas outside of the city limits (and although NS is prepared to consider appropriate measures that would alleviate this matter), suitable options are limited for areas outside of Fostoria if Fostoria wishes to maintain clear crossings within the City. And, NS adds, once a train has been stopped outside city limits to avoid blocking inside the City, start-up speeds through the City are necessarily slow.

The City Of Mentor. As respects the Heisley Road grade separation, NS contends that it has committed \$800,000 towards this project and will continue to cooperate with the design needs for this project. As respects the Plaza Boulevard Extension site, NS contends that, because any determination of the need for a new at-grade crossing or a grade separation must be made by the Ohio county court system (in the case of at-grade crossings) and by the State of Ohio (in the case of grade separations), the City of Mentor should apply to ORDC and other appropriate Ohio authorities and points to Ohio's \$200 million Rail Grade Separation Program.¹¹⁹ As respects interconnections with the City's traffic signal system, NS contends that, although NS cooperates

¹¹⁹ NS also reports that a formal proposal for construction of a new at-grade crossing at Plaza Boulevard has been filed with the Court of Common Pleas, as required by Ohio law.

with localities regarding such matters, it has not yet received a formal request from the City of Mentor.

The City Of North Ridgeville. NS contends: that, as required by Environmental Condition 35,¹²⁰ NS has consulted with the City of North Ridgeville and submitted a report to the Board on NS' progress in resolving local concerns; that, in particular, NS has met on several occasions with the Mayor of the City of North Ridgeville and other officials to discuss the City's desire to alleviate its grade crossing concerns with the construction of a grade separation at SR 83; that, as a result of those discussions, NS has committed to contribute up to \$600,000 towards a grade separation project at SR 83 (contingent upon full funding being obtained by state and local officials); that, in addition, NS provided a voluntary grant of \$16,000 towards a demonstration project sought by Mayor of the City of North Ridgeville to install highway guardrails along the approaches to two grade crossings in North Ridgeville; and that NS intends to continue to cooperate with North Ridgeville on safety and environmental issues of concern to the community. And, NS adds, it is now the responsibility of the City of North Ridgeville to seek the additional funds required for the SR 83 grade separation project from the \$200 million Rail Grade Separation Program or other public funding sources.

The Village Of Oak Harbor. NS contends: that, under Environmental Condition 36(B),¹²¹ it is required to provide a real-time train location monitoring system in Oak Harbor to monitor approaching trains on four NS rail line segments; that, however, Oak Harbor has indicated its preference for funding assistance by NS towards a project to improve the underpass at Park Street; that ORDC, Oak Harbor, and NS are presently engaged in discussions concerning the funding of this project; that, should a negotiated agreement be reached, NS would have no objection to substituting for the real-time train location monitoring system cost a contribution by NS to the underpass project; but that, if negotiations fail, NS intends to go forward with the installation of the real-time monitoring system as originally planned to fulfill its obligation under Environmental Condition 36(B).

The Acquisition Premium. NS contends that Ohio, which has requested what NS describes as "a burdensome study of no value," is attempting to relitigate a matter that was not previously raised by Ohio but that was previously raised by several other parties. NS further contends that the study proposed by Ohio would not enable the Board to ascertain: whether the so-called "acquisition premium" has had an effect on the jurisdictional threshold and/or revenue

¹²⁰ See Conrail Dec. No. 89, slip op. at 413.

¹²¹ See Conrail Dec. No. 89, slip op. at 414.

adequacy determinations; or even whether an “acquisition premium” is being paid by Ohio shippers.¹²²

The Port Of Toledo. NS, which insists that it has obtained the trackage rights and operating rights previously held by Conrail that provide access to the Toledo Docks facilities,¹²³ claims that Ohio misstates the facts when it claims that, on account of NS’ failure to exercise rights acquired in the Conrail proceeding, the Port of Toledo no longer has competitive rail service options. NS insists that the commercial circumstances covering service to the Toledo Docks have not changed from those that existed prior to the Split Date; and, NS insists, it will use the Toledo Docks facilities when such use is reasonable and efficient. NS adds that, in any event, it should not be forgotten that Conrail’s use of these facilities was sporadic at best.

The ORDC/OAG/PUCO/OEMA Reply. Ohio, in the undesignated letter filed August 29, 2000, by ORDC, OAG, PUCO, and OEMA, insists that the unavailability of a competitive alternative for the Port of Toledo is by no means a trivial matter. And, Ohio adds, representatives of the Board should investigate the absence of competitive service alternatives at the Port of Toledo.

CITY OF CLEVELAND, OHIO. Because the City of Cleveland had entered into settlement agreements with CSX and NS, the City’s interests vis-à-vis the Conrail transaction were not addressed in detail in the decision approving that transaction. See, however, Conrail Dec. No. 89, slip op. at 332, 420-21 (requiring CSX and NS to comply with the terms of the settlement agreements entered into with the City of Cleveland). See also Conrail Dec. No. 89, slip op. at 407-09 (Environmental Condition 26). See also Conrail Dec. No. 96, slip op. at 10, 28-29.

¹²² NS explains that the determination of any given rate is very complex, involving a range of commercial, operational, competitive, and other considerations that vary from customer to customer and from movement to movement. Identifying a trend, NS adds, is one thing, but presuming to discern the causes of that trend is another thing altogether. Ohio’s suggested study, NS insists, would do nothing to isolate the various influences on rates or shed light on whether a purported acquisition premium is causing whatever trend the study might show.

¹²³ NS quotes a joint CSX/NS December 1997 rebuttal submission in which CSX and NS stated: “What the Toledo Interests fail to recognize is that NS will obtain all trackage rights and operating rights currently held by Conrail on CSX that provide access to the Toledo Docks facilities.” CSX/NS-176 at 70, quoted (though not entirely accurately) at NS-2 at 47. Given the context, we understand this to mean that NS has already obtained the “trackage rights and operating rights [previously] held by Conrail on CSX that provide access to the Toledo Docks facilities.”

The Comments Of The City Of Cleveland. The City of Cleveland contends that the Conrail transaction has had a direct, substantial, and detrimental impact on citizens in areas of the City adjoining the CSX and NS rail lines; the quality of life of such citizens, the City claims, has been severely and negatively affected by a greater volume of rail traffic than originally estimated and by the impacts from large numbers of stopped and idled trains.

Volume Of Train Traffic Not Anticipated. The City of Cleveland contends that, following the Split Date, both CSX and NS experienced, on their Cleveland lines, an unexpectedly large volume of train traffic.¹²⁴ The City of Cleveland further contends that this unexpectedly large volume of train traffic generated, and (despite claims by CSX and NS that conditions are improving) has continued to generate, serious negative environmental impacts. The City contends, in essence, that, because post-Split train traffic was greater than anticipated, the environmental impacts (noise, air pollution, etc.) of such train traffic were also greater than anticipated; and these greater-than-anticipated adverse environmental impacts, the City argues, were never properly considered when we approved the Conrail transaction.

Certain Impacts Not Addressed. The City of Cleveland contends that it has experienced problems that the Board's Environmental Impact Statement (EIS) did not address and for which mitigation has not been received.

(1) The City argues that, although we examined increases in wheel noise within areas exposed to a 70 dBA L_{dn} , we did not adequately consider horn noise and vibrations caused by passing trains, even though (the City insists) horn noise and train vibrations have had a tremendous negative impact on the daily lives of citizens in close proximity to CSX and NS tracks.

(2) The City argues that, although we examined impacts (noise, etc.) caused by increased numbers of moving trains, we did not adequately consider the noise generated by idling trains and the noise generated by trains as they stop and start, even though (the City insists) these noises have had a severe detrimental impact in Cleveland.¹²⁵ Nor, the City adds, did we

¹²⁴ The City claims, in particular, that, although traffic on CSX's Short Line was expected to increase to an average of 44 trains per day, post-Split Date traffic on the Short Line has been closer to an average of 56 trains per day.

¹²⁵ The City notes, in this regard: that, on account of the Conrail transaction, a Conrail secondary line became an NS main line; that the increased rail activity on this new main line has included a significant increase in the idling, stopping, and re-starting of trains; but that, because noise mitigation studies for the neighborhoods adjoining this new main line were based upon a
(continued...)

adequately consider the health and safety impacts (e.g., blockage of at-grade crossings) caused by increased numbers of idling or stopped trains.¹²⁶ And, the City claims, we did not adequately consider the impact of emissions from trains that sit and idle for hours, even days.¹²⁷

(3) The City argues that, because (in examining environmental impacts) we placed an emphasis on moving trains, we did not adequately consider the environmental impacts on people residing near intermodal facilities, train yards, sidings, and repair facilities.

Inadequate Property Maintenance. The City of Cleveland claims that it has experienced considerable difficulty in getting CSX to maintain railroad sites by removing debris and vegetation that (the City alleges) is causing potential health concerns.

Compliance By CSX With CSX/Cleveland Settlement Agreement. The City of Cleveland insists that CSX is not currently meeting the commitments CSX made in the settlement agreement entered into on June 4, 1998, by CSX and the City of Cleveland.

(1) The City contends that CSX has not yet complied with the CSX/Cleveland settlement agreement provision (hereinafter referred to as the Lakeshore Line provision) that requires CSX to conduct within 6 months of the Split Date a study to determine the feasibility of operation by CSX of two additional through trains over NS' Lakeshore Line. The City further contends that CSX has not yet delivered a Lakeshore Line report to the City (even though, the City adds, NS has advised that, on May 16, 2000, NS supplied comments to CSX concerning the report).

(2) The City contends, in essence, that it appears that CSX does not intend to comply with the CSX/Cleveland settlement agreement provision (hereinafter referred to as the landscaping provision) that requires CSX to expend \$2.4 million in Cleveland over a 5-year period "for fencing, landscaping or other improvements to limit access to railroad property, and for the cost of installation of landscaping related to noise mitigation measures." The City explains: that, although the landscaping provision requires that \$2.4 million be expended for the cited purposes, CSX appears to have budgeted only \$778,864 for those purposes; that CSX has

¹²⁵(...continued)

projected number of trains passing through this community at a given speed, these studies did not address or propose mitigation for the noise caused by the idling, stopping, and re-starting of trains.

¹²⁶ The City notes, in this regard, that, in recent months, there have been two major incidents where trains blocked crossings for several hours.

¹²⁷ The City claims, in this regard, that the thick, black smoke emitted from idling trains leaves black soot on anything within 100 feet of the train.

not yet explained how it intends to spend the remaining \$1.6+ million called for by the landscaping provision; but that certain CSX statements have led the City to suspect that CSX intends to spend the remaining \$1.6+ million in cleaning up trash and debris at a number of sites owned by CSX. The City is adamant, however, that the entire \$2.4 million required by the landscaping provision must be used for the purposes cited in that provision; none of this money, the City insists, should be used for cleaning up trash and debris.¹²⁸

(3) The City contends, in essence, that it appears that CSX does not intend to comply with the CSX/Cleveland settlement agreement provision (hereinafter referred to as the jobs provision) that requires CSX “[to] endeavor to hire up to 40% of the permanent terminal jobs established during the start up period at its expanded intermodal facility from among qualified residents of Cleveland.” The City explains that CSX has indicated: that CSX projects hiring 50 employees at Collinwood Yard; that, however, only four positions will be “permanent”; and that the remaining positions will be “contract clerical, lift and equipment maintenance positions” and “independent owner-operator truckers.” The City contends that CSX is attempting to avoid its obligations under the jobs provision; that provision, the City insists, requires CSX to hire up to 40% of the permanent jobs from among qualified residents of Cleveland, whether the jobs are CSX managers or contract employees or truckers.

(4) The City contends that CSX is not complying with the CSX/Cleveland settlement agreement provision (hereinafter referred to as the committee provision) respecting participation by CSX in a joint Community Advisory Committee. The City explains that, although the meetings of the advisory committee provide an open forum for discussion between community representatives and the railroad, CSX’s representative to the committee is not always prepared to provide accurate updates concerning CSX activities and is slow to respond to community issues. The City claims that CSX: is not currently meeting its responsibilities under the committee provision; and is not currently working to resolve community issues of concern.

Compliance By NS With NS/Cleveland Settlement Agreement. The City of Cleveland indicates that NS has not yet submitted the Asset Management Plan required by the settlement agreement entered into on May 22, 1998, by NS and the City of Cleveland. The City adds, however, that, because the City’s experience with NS to date has been one of cooperation concerning compliance with NS’ obligations under the NS/Cleveland settlement agreement and with regard to other community concerns, the City will continue to work with NS toward a timely completion of the Asset Management Plan.

¹²⁸ The City adds, in essence, that, although the City wants CSX to clean up trash and debris on CSX’s property, the City wants that cleanup of trash and debris to be in addition to, not in lieu of, the \$2.4 million of landscaping required by the landscaping provision.

Relief Requested. The City of Cleveland asks: (1) that we consider reopening the Conrail proceeding to study the environmental impacts caused by the Conrail transaction, with a particular emphasis upon the mitigation of environmental impacts caused by stopped and idling trains; (2) that we require CSX to develop (a) a meaningful process for addressing complaints about the condition of CSX property, and (b) a minimum maintenance plan for CSX property adjacent to residential neighborhoods;¹²⁹ and (3) that we oversee compliance by CSX with its obligations under the CSX/Cleveland settlement agreement.

The CSX-2 Reply and First Quarterly Environmental Status Report. *Assertion Of Increased Train Traffic.* CSX insists that the City's assertion that CSX has been operating 56 trains per day on the Short Line is simply erroneous; the fact of the matter, CSX claims, is that CSX has not (since the Split Date) exceeded the projection of 44 through trains per day over the Short Line on an average daily basis. CSX therefore concludes that, at this time, we need not consider whether it would be appropriate to order additional environmental mitigation for Cleveland if CSX were to operate 56 or more through trains over the Short Line on an average daily basis.

Request To Reopen The Environmental Review Process. CSX insists that we should not undertake the new environmental review urged by the City of Cleveland.

(1) CSX contends that the CSX/Cleveland settlement agreement precludes Cleveland from invoking the Board's environmental review processes to seek the new environmental review Cleveland now seeks. CSX explains that CSX and the City expressly agreed that the settlement agreement's Community Impacts Fund¹³⁰ and various other commitments¹³¹ would be

¹²⁹ Although one of the iterations of the City's second request refers to "the railroads," the context indicates that, as respects the second request, the only railroad the City has in mind is CSX.

¹³⁰ CSX indicates that it has already paid \$4,280,000 of the \$10,700,000 it pledged to pay for a Community Impacts Fund, with the balance to be paid in annual installments in the next 3 years. CSX further indicates that, under the CSX/Cleveland settlement agreement, the City may use the Community Impacts Fund to mitigate adverse environmental impacts resulting from the Conrail transaction, including but not limited to those in the areas of "noise and vibration, noise mitigation structures and landscaping, emergency response and vehicular delay, hazardous materials transport and response, hazmat responder training and emergency vehicle access, pedestrian and vehicular safety, grade crossing maintenance, and cultural preservation."

¹³¹ CSX indicates, among other things, that CSX committed to make capital improvements estimated to cost \$38,200,000 on the Short Line and at Collinwood Yard,

(continued...)

the “sole mitigation for environmental impacts within the City of Cleveland resulting from this transaction.”

(2) CSX contends that, even apart from the CSX/Cleveland settlement agreement, it is far too late to reopen the scope of the EIS. CSX explains that potential environmental impacts in the areas of horn noise, train vibrations, and air emissions were raised: (a) during the scoping process that was conducted prior to preparation of the Draft EIS; and (b) during the commenting process on the Draft EIS. And, CSX adds, even if the City could show that these impacts were not fully considered by the Board, the City (CSX insists) has not demonstrated the material changes or new circumstances that would justify the preparation of a Supplemental EIS.

(3) CSX contends that, to the extent the City is complaining about environmental impacts from CSX trains operating on the Short Line, the City’s complaints are not justified. CSX explains: that, because there are no grade crossings on the Short Line within Cleveland, the only time a CSX engineer would blow a horn on the Short Line would be to warn a trespasser to clear the tracks; that it is not CSX operating practice to idle trains on the Short Line; and that, as the Board has already found, the vibrations of moving trains do not have significant environmental impacts. CSX further contends that, to the extent the City is complaining about environmental impacts from CSX trains operating on the Lakeshore Line (which, CSX concedes, does have a number of grade crossings), the City (which, CSX notes, sought CSX’s agreement to operate some trains on the Lakeshore Line in order to reduce environmental impacts on the Short Line) “cannot fairly have it both ways.”

Property Maintenance. CSX contends that, when it succeeded to Conrail’s operating rights over the Short Line, CSX inherited years of accumulated trash and debris (cars, appliances, furniture, tires, etc.) illegally dumped by trespassers. CSX further contends: that it has focused its cleanup efforts on those areas requested by the City;¹³² that, however, without a pledge from the City of substantially increased enforcement of its anti-trespassing and anti-littering ordinances (a pledge, CSX notes, that has not been made), CSX’s cleanup efforts will never be fully effective; and that, although CSX will continue to conduct trash and debris removal as it continues with its fencing and landscaping program, the hoped-for result of a more attractive right-of-way can be achieved only through the efforts of all to reduce illegal dumping on the

¹³¹(...continued)

including the installation on the Short Line of continuous welded rail and additional ballast and also including surfacing of the track (which, CSX notes, reduces noise and vibration impacts).

¹³² CSX reports that it has agreed to keep the City advised of progress and future plans for cleaning up specific sites identified by the City.

right-of-way. The City, CSX maintains, has presented no justification for the Board to inject itself into this issue.

Compliance By CSX With CSX/Cleveland Settlement Agreement. CSX insists that, because it has either implemented or is in the process of timely implementing all of the obligations imposed on CSX in Environmental Condition 26 and in the CSX/Cleveland settlement agreement, there is no basis for Board enforcement with respect to any of these matters.

(1) As respects the Lakeshore Line provision, CSX concedes that it has not yet provided the City with the required traffic study. CSX insists, however: that, without additional experience, CSX simply cannot determine whether it would be feasible to operate two additional CSX trains over the Lakeshore Line; that Cleveland has not been prejudiced by the delay;¹³³ and that CSX intends to initiate discussions with Cleveland concerning the timing and methodology of a study to determine whether two additional CSX trains may feasibly be operated over the Lakeshore Line.

(2) As respects the landscaping provision, CSX contends: that this provision contemplates that \$2.4 million will be spent over a 5-year period; that the approximately \$780,000 referenced by the City is money intended to be spent on landscaping measures in the year 2000; and that additional funds will be expended under the landscaping provision in future years. CSX further contends, however, that the City's argument that no part of the \$2.4 million may be used for trash and debris removal is without merit. CSX explains that, because debris (such as cars, appliances, furniture, tires, etc.) must be removed to provide a level and straight run for installation of fencing, the debris removal conducted in advance of installation of fencing is fairly chargeable to the \$2.4 million account. CSX adds, however, that it will continue to consult with the City on this issue.

(3) As respects the jobs provision, CSX contends that, because three of the four "permanent" (managerial) employees at Collinwood Yard are Cleveland residents, CSX has more than fulfilled its hiring target for Cleveland residents of 40% of permanent positions. CSX further contends that, consistent with CSX and industry practice for the intermodal business, the remaining 38 positions at Collinwood Yard are not "permanent" positions but, rather, are contractor employees or independent owner-operator truckers. CSX adds that, although CSX provided the City with the contact information for the primary contractor at Collinwood Yard, the City apparently has not followed up with the contractor. CSX further adds that, although the

¹³³ CSX explains that the two Lakeshore Line trains were intended to be in addition to approximately 44 Short Line trains. CSX further explains that, because CSX is not yet operating 44 Short Line trains, Cleveland has not been prejudiced by the lack of a Lakeshore Line study.

persons presently filling the 38 “non-permanent” positions are not CSX employees, CSX would be willing to work with the City to determine the residency of these persons.

(4) As respects the committee provision, CSX insists that it is in full compliance with that provision and also with Environmental Condition 26(D)(d) (which requires the appointment of a community liaison).¹³⁴ CSX insists that the CSX community liaison to Cleveland has worked diligently to address community concerns; and, CSX claims, if some answers were not immediately provided at meetings, it is because the questions could not reasonably have been anticipated. CSX adds that CSX has made, at the request of the community liaison, voluntary contributions (nearly \$50,000 in 1999) to a number of Cleveland community programs and activities above and beyond the substantial financial investments required by Environmental Condition 26 and by the CSX/Cleveland settlement agreement. CSX further adds that it will continue to consult with the City and community leaders regarding issues of concern.

The NS-2 Reply and First Quarterly Environmental Status Report. *Horn Noise And Train Vibrations.* NS insists that, when we assessed the Conrail transaction’s environmental impacts, we adequately considered horn noise and train vibrations. Such impacts, NS explains, were rightly determined to be either not remediable (horn noise, NS advises, was determined to be not remediable due to safety reasons and on account of federal law requiring train horns to be sounded) or not harmful (train vibrations, NS advises, were determined to be not harmful).

Idling Trains And Stopping/Starting Trains. NS contends: that a “scoping notice” (reflecting the environmental impacts intended to be studied and the assessment criteria intended to be applied) was published in the Federal Register several months before the Draft EIS was issued; that the City of Cleveland submitted detailed comments on the Draft EIS and engaged in extensive negotiations with both NS and CSX to resolve the City’s environmental concerns; that these negotiations explored myriad environmental topics of concern to the City and resulted in negotiated agreements with NS and CSX that established numerous remedial and construction projects to be implemented by the railroads at a cost of tens of millions of dollars, in addition to the payment by NS and CSX of over \$20 million into a community fund established by the City to address the environmental impacts deemed by the City to be important; and that (as respects NS), in exchange for this extensive set of obligations by NS, the City of Cleveland provided its express acknowledgment that all environmental concerns related to NS’ participation in the Conrail transaction had been resolved. NS further contends: that this oversight proceeding is not intended to provide an additional opportunity to enlarge the package of benefits negotiated by the City, nor is it intended to reopen the environmental review process that was initiated more than 3 years ago; and that the City, which is obtaining the substantial benefits of the bargains it made

¹³⁴ See Conrail Dec. No. 89, slip op. at 409.

with NS and CSX and for which it obtained Board approval, cannot both claim those benefit packages worth millions of dollars and now seek further to enhance its position.

Two Recent Blocking Incidents. NS indicates that, as the City of Cleveland claims, there have been, in recent months, two major incidents where trains (NS indicates that these were NS trains) blocked crossings for several hours. NS insists, however, that it was not to blame for these incidents; the blockages occurred, NS explains, on account of acts of vandalism beyond NS' control.

Cloggsville Connection. NS reports that in August 2000 it began to operate trains over the new Cloggsville Connection. In response to City Council concern regarding the installation of fencing along the Cloggsville Connection, NS has provided the City Council with design plans and proposed installation sites for sound barriers, fencing, and landscaping under the Community Impact Fund. NS further reports that it also has met with City Council members to discuss placement and relocation of fencing along the Cloggsville Connection.

CITY OF SANDUSKY, OHIO. The City of Sandusky was an active participant in the Environmental Impact Statement (EIS) process conducted during the Conrail proceeding.

The City Of Sandusky's SAN-1 Comments. The City of Sandusky contends that the environmental mitigation conditions we imposed on the Conrail transaction have proved inadequate to protect Sandusky from serious negative consequences arising directly from that transaction. The City of Sandusky further contends that the inadequacy of the existing conditions reflects the fact that the EIS was premised on incorrect, incomplete, and/or inadequate information.

Two Norfolk Southern Lines. The concerns of the City of Sandusky are focused on two NS lines, a north-south line that runs between Sandusky Docks, OH, and Bellevue, OH, and an east-west line that runs between Vermillion, OH, and Oak Harbor, OH. The north-south line, which was operated by NS prior to the Conrail transaction, crosses Tiffin Avenue (SR 101), Venice Road (SR-6), and Monroe Street. The east-west line, which was formerly operated by Conrail, crosses Huron Street, Olds Street, Tiffin Avenue,¹³⁵ Edgewater Street, Pipe Street, Remington Street, Campbell Street, and Mills Street.

The North-South Line. The City of Sandusky claims: that, prior to the Conrail transaction, the north-south line was used (by NS' calculations) by 1.4 NS trains per day; that, initially, NS projected that, after the Split Date, the north-south line would be used by 5.9 trains per day; that later, after NS had decided to relocate a Triple Crown intermodal facility to a point

¹³⁵ Tiffin Avenue, which runs southwest-northeast, is crossed by both NS lines.

just south of Sandusky, NS projected that, after the Split Date, the north-south line would be used by 12.9 trains per day; and that, as indicated in the EIS, the increase in the NS train count from 1.4 to 12.9 trains per day was expected to increase the total blocked-crossing time from 5.9 minutes per day to 54.2 minutes per day. The City argues, however, that, as respects the north-south line, the EIS was not even remotely accurate in predicting the impact of NS' post-Split Date operations. (1) The City claims that, even though NS conceded that the Annual Daily Traffic (ADT) count for Venice Road was 14,950 vehicles per day, the EIS relied on an ADT for Venice Road of only 4,400 vehicles per day. (2) The City claims that, even if the ADT used by the EIS was correct, its use masks the real-world impact of NS operations on Sandusky. The City explains that, because Sandusky Bay has approximately 5,000,000 visitors in the summer and because the Cedar Point recreational facility has approximately 3,500,000 visitors in the summer, the use of an ADT to measure the impacts of train traffic on Sandusky masks those impacts by pretending that Sandusky's high summer traffic counts do not exist. (3) The City claims that, because coal traffic on the north-south line is seasonal (the docks, the City notes, shut down when lake conditions require), the use of average daily train counts understates the numbers of trains that use the north-south line when the docks are open. (4) The City claims that the EIS erred in assuming that NS trains would cross Sandusky's streets at the maximum speed allowed by the FRA (i.e., 15 mph). The fact of the matter, the City insists, is that these trains frequently stop for 20 to 25 minutes at the Venice Road crossing, and, when they move, typically average approximately 5 mph. (5) The City claims that, although the EIS predicted that total blocked-crossing time would average 54.2 minutes per day, the fact of the matter is that (by the City's calculations) total blocked-crossing time at Venice Road (even without including "gate down and up" time) averages 82 minutes per day. And, the City adds, if weekends and holidays are eliminated, the average rises to 107.2 minutes per day. (6) The City claims that, although the EIS's level of service (LOS) analysis assumed that NS' new Triple Crown trains would be spread evenly throughout the day, the fact of the matter is that such trains are not spread evenly throughout the day. The City indicates that, during one recent period, 93% of these trains passed over Venice Road between the hours of 8:00 a.m. and 9:00 p.m., and 68% of these trains passed over Venice Road between 11:00 a.m. and 6:00 p.m. And, the City adds, because these trains are not spread evenly throughout the day, the adverse impacts of these trains are maximized.

The East-West Line. The City of Sandusky claims: that, prior to the Conrail transaction, the east-west line was used by 52.3 trains per day; that NS projected that, after the Split Date, the east-west line would be used by 40.2 trains per day; and that, in light of this projection, the EIS apparently did not consider the east-west line. The City argues, however, that there are certain errors in this approach. (1) The City claims that the EIS's reflection of the impacts of a new Triple Crown facility just south of Sandusky should not have been limited to the north-south line. The City explains: that Triple Crown trains do not remain on that line; that, rather, such trains move north from the intermodal facility, cross Tiffin Avenue "at a snail's pace" (i.e., at not more than 5 mph), and then either move onto the east-west line (blocking Venice Road) or remain on the parallel east-west siding (which crosses Huron Street, Olds Street, and Mills Street); and that,

therefore, the EIS should have reflected the impact of the Triple Crown trains on the east-west track, the connecting track, and the siding. (2) The City claims that, even assuming that the NS train count estimate for the east-west line was accurate, the EIS should have reflected a reasonable estimate of the train speeds of the new Triple Crown traffic on the east-west line. The City notes, in this respect, that, although NS trains (other than Triple Crown trains) typically take 2.8 minutes to cross Mills Street, NS' Triple Crown trains crossing between the north-south and east-west lines move at no more than 5 mph, and therefore take, on average, 10.4 minutes to cross Mills Street. The City explains that Triple Crown trains moving between the north-south and east-west lines must move "at a snail's pace" both because such trains are either entering or exiting the new intermodal facility and also because the turning radius between the two lines is very "tight." (3) The City claims that the EIS should have reflected the impact on Sandusky, its street traffic, and its pedestrian traffic resulting from the fact that NS intermodal traffic moving to and from its new intermodal facility via the east-west line frequently cannot move between the north-south line and the east-west line without being parked on the NS siding.

Other Traffic Impacts. The City of Sandusky contends that, in addition to the failure to accurately address the above-discussed impacts of the Conrail transaction on highway users in Sandusky, the EIS also did not predict other instances of NS' post-Split Date inability or unwillingness to maintain its equipment located in Sandusky and its trains passing through Sandusky. The City cites, in this respect, numerous instances in which city streets (Tiffin Avenue, Venice Road, and Mills Street in particular) have been blocked, either by a train stopped on a crossing, or by a signal malfunction (i.e., gate arms down when no train is coming), or by a derailment. And, the City insists, these recurring incidents have had a substantial impact on the human environment in addition to the blockages of Sandusky's streets caused by NS trains that actually move. The City explains that street traffic (including emergency service provider traffic) has been delayed, and that business has become more difficult to attract. And, the City warns, it is only a matter of time before a person accustomed to signal malfunctions attempts to drive around the gates and gets killed.

Inadequacy Of NS Equipment. The City of Sandusky contends that the use by NS of equipment known to be inadequate has resulted, in a number of instances, in train blockages. The City explains: that, in view of the "tight" turning radius between the east-west and north-south lines, air lines of standard length will often stretch, and snap, as the train moves between the two lines; that, once an air line has snapped and until the air line can be fixed and the pressure built back up, the train cannot move; and that, although NS has been made aware of the problem, NS has not installed suitable air lines on its trains. What this means, the City insists, is that NS is knowingly operating its equipment in a manner that causes it to break down in Sandusky. And this, the City argues, should be reflected in revised mitigation measures.

Mill School Impacts. The City of Sandusky is particularly troubled by the dangers that result from the proximity of NS' tracks¹³⁶ and Sandusky's Mills School, which is located at 1918 Mills Street (0.34 miles south of the NS siding) and which serves 355 students in grades 5 and 6. The City claims, in particular, that NS trains on the siding frequently block Mills Street without regard to the time of day (i.e., without regard to whether the trains interfere with children walking to or from school). The City further claims that, given that NS trains normally are on the siding for between 9 and 18 minutes, pedestrians have few options. They can wait, frequently in cold weather, an unknown period for the train to clear the intersection; they can walk around the train (the next available crossing is at Camp Street), which adds 0.74 miles to their walk; or they can attempt to climb through the train. And, the City adds, while climbing through trains is an obvious safety risk in any case, NS makes this particularly hazardous because (the City insists) NS does not actually "stop" its trains for extended periods on the siding but rather, to avoid being fined for "stopping" on crossings, "inches" its trains forward. The City, which is aware that some children, if not supervised, are likely to attempt to walk through trains, indicates that it has been forced to hire school crossing guards for the Mills Street location (during the periods immediately before and after school opening and closing times) at a cost of approximately \$32,500 annually. The City adds that, despite requests from the City, NS continues to block Mills Street and has refused to reimburse the City for the cost of the crossing guards.

Additional Health And Safety Impacts. The City of Sandusky, citing numerous instances, contends that its citizens have been placed at risk by the delays caused when emergency service providers (police, fire, and ambulance vehicles) are blocked by NS trains. The City notes that, when the crossings at Venice Road and Tiffin Avenue are both blocked (a frequent occurrence, the City claims), emergency equipment must take a 7.48-mile detour.

West End Development. The City of Sandusky contends that development in its "west end" (i.e., the area lying to the west of the north-south line) has been particularly affected by the Conrail transaction. The City explains that, although the Sandusky Public Schools were scheduled to move their bus garage and bus offices to the new City Service Complex, the school system declined to make the move because of the serious problems that would result from the frequently blocked crossing at Venice Road. The City further explains that, for the same reason, Sandusky's Department of Community Development has had great difficulty marketing the 45-acre business park it created in the west end.

¹³⁶ The City indicates that NS "interferes" with Mills Street in three ways: the east-west line crosses Mills Street; the tracks connecting the east-west and north-south lines cross Mills Street; and the siding crosses Mills Street.

Environmental Justice. The City of Sandusky contends that Sandusky has “Impacted City Status” with 53% of its population in the low to moderate income level and a significant (23%) minority population. The City further contends that fully 26.1% of Sandusky residents near the intersection of the north-south and east-west lines are living below the poverty level. The City insists that this disadvantaged population should not be, but has been, required to bear a disproportionate share of the adverse environmental consequences of the Conrail transaction.

Relief Requested. The City of Sandusky asks that a supplemental environmental analysis be conducted and that additional environmental mitigation conditions be imposed.

The NS-2 Reply and First Quarterly Environmental Status Report. (1) NS contends that a recent realignment of the track that connects the east-west and north-south lines has reduced the sharp turn from a 20 degree curve to a 15 degree curve. This realignment, NS insists, will help prevent future airbrake line failures. (2) NS contends that, to maintain adequate sight-line clearance and to operate manual switches, trains must operate at low speeds along the transfer track leading to the Triple Crown yard. (3) NS contends that, although the City of Sandusky has complained that NS’ traffic projections with respect to the north-south line did not properly take account of increased yard moves, the number of such yard moves has in fact decreased because (NS claims) coal traffic to and from Sandusky Docks has been somewhat lighter over the last year. And, NS adds, yard moves to accommodate coal shipments are related to fluctuations in the coal market, not to the Conrail transaction. (4) NS, noting the City’s numerous allegations concerning vehicular traffic counts, train speeds, crossing times, and blocking durations, contends that the City seems to be more interested in accumulating statistics than in exploring reasonable options for addressing its concerns.¹³⁷ (5) NS apparently concedes that NS trains using what the City refers to as a siding (and what NS refers to as a lead) have interfered with children crossing the street while going to and from the Mills School. NS claims, however, that, to minimize blockage of this crossing, NS has modified its operating practices to hold east-bound trains leaving the Triple Crown facility in the yard until they are clear to move directly onto the main line. And, NS adds, it has not “inched” its trains forward for the purpose of avoiding fines for “stopping” on crossings; NS insists, rather, that, as a safety measure, trains on the track near Mills Street must move forward slowly in order to trip the gates and allow sufficient time for the gates to come down. (6) NS contends that, through a series of written reports providing environmental and other data, it kept the Board’s environmental staff apprised of the status of NS’ decision to locate the new Triple Crown facility in the Sandusky area. NS further contends that the City did not challenge the Board’s conclusions in Conrail Dec. No. 89 with respect to either the assumptions used in the EIS or the conditions imposed upon NS. NS

¹³⁷ NS reports that it has met with City representatives, ORDC, OH-DOT, and a representative of Congressman Gillmor’s office to discuss a joint project involving a grade separation at Venice Road or at the intersection of Venice Road and Tiffin Avenue.

insists that the impacts related to the Triple Crown facility were thoroughly studied, and that further study and imposition of additional conditions would not be warranted. (7) NS indicates that it intends to continue to seek ways to improve its operations in the Sandusky area. And, NS adds, NS hopes that the City will join in a cooperative effort to explore solutions that will benefit both the City and NS.

U.S. REPRESENTATIVE DENNIS J. KUCINICH. Rep. Kucinich was an active participant in the Conrail proceeding. See Conrail Dec. No. 89, slip op. at 340.

Rep. Kucinich's Comments. Rep. Kucinich indicates that, in general, he is pleased with the progress CSX and NS are making in the communities of Ohio's 10th Congressional District. (1) *Bay Village, Rocky River, Lakewood.* Rep. Kucinich advises that NS and the State of Ohio acted quickly to ensure that every grade crossing on the Nickel Plate line in Lakewood and Cleveland would be equipped with gates and lights. Rep. Kucinich further advises that work on the Cloggsville Connection is underway and ahead of schedule. (2) *Olmsted Falls, Olmsted Township.* Rep. Kucinich advises that he is pleased with the efforts CSX and NS have made to ensure that safety is not compromised with increases in freight traffic through Olmsted Falls and Olmsted Township. Rep. Kucinich further advises that he is hopeful that a dispute respecting the location of a proposed grade separation will soon be resolved. (3) *City Of Berea.* Rep. Kucinich advises that, with respect to the two major underpass projects of interest to the City of Berea, cooperative efforts with CSX and NS are continuing. Rep. Kucinich further advises that, although closure has not yet been reached on the form of noise mitigation at areas identified in the Final EIS, discussions with CSX respecting such noise mitigation are continuing. (4) *City Of Brooklyn; Relief Requested.* Rep. Kucinich indicates: that, in the Final EIS, the rail segment (C-069) that runs parallel to Brookpark Road behind the homes on Idlewood Drive in Brooklyn was not predicted to meet the "5 dBA increase" criteria for noise mitigation; that this failure to meet the criteria was premised on the projection that there would be, after the Split Date, 43.8 trains per day on this segment; that, however, there is now reason to believe that more than 43.8 trains per day may be using this segment; and that, if this is true, there may indeed have been the 5 dBA increase required for noise mitigation. Rep. Kucinich therefore asks that the Board and CSX work with his office and the City of Brooklyn to attain an accurate train count and to determine the noise levels along the C-069 segment near the homes on Idlewood Drive, which (Rep. Kucinich advises) will enable the City of Brooklyn to receive any mitigation for which it may be eligible.

The CSX-2 Reply and First Quarterly Environmental Status Report. CSX, responding to Rep. Kucinich's request for relief with respect to the City of Brooklyn, insists that CSX has complied with all environmental conditions imposed on it for the benefit of Brooklyn,

and that Brooklyn has not demonstrated any material change in circumstances that would warrant reexamination by the Board of the environmental conditions the Board imposed.¹³⁸

TRANSPORTATION COMMITTEE CHAIRMEN, PENNSYLVANIA HOUSE.

The Transportation Committee of the Pennsylvania House of Representatives was an active participant in the Conrail proceeding. See Conrail Dec. No. 89, slip op. at 320-21.

The Comments Of The Transportation Committee Chairmen. *In General.* The Chairmen believe that, in general, both NS and CSX have made significant progress in the implementation of the Conrail transaction. The Chairmen add, however: that both NS and CSX have encountered significant problems and are still addressing serious service deficiencies that occurred on account of inadequate planning and unforeseen difficulties; that, in the Commonwealth of Pennsylvania, these service deficiencies have had significant and harmful economic impacts that continue to exist and that have yet to be rectified; that there are still numerous situations throughout the Commonwealth where the failure of NS to adequately prepare operational plans and marshal equipment and personnel has economically damaged citizens and businesses; and that, as a result of these service problems and failures, the final answer on whether the Conrail transaction is in the public interest is still in doubt.

Questions Respecting NS Capital Investments. The Chairmen indicate that they are particularly concerned regarding the absence, from the NS-1 report, of adequate specificity with respect to capital commitments made by NS to the Commonwealth of Pennsylvania. The Chairmen claim that, in the Conrail proceeding, NS committed to undertake the following capital investments in new and improved facilities within the Commonwealth: a Triple Crown terminal at Morristown; improvements to Greenwich Yard; a new automobile unloading facility near Philadelphia; a new intermodal facility at Harrisburg; increased capacity on the Reading—Harrisburg line; improvements at the Hollidaysburg car shop; improvements at the Altoona locomotive repair shops; a new locomotive repair shop in Beaver County; increased capacity at Pitcarin Yard Intermodal Facility at Pittsburgh; establishment of staff regional and divisional operational headquarters in Pittsburgh; upgrading of the Harrisburg—Binghamton line; and relocation of the NS main line in Erie. The Chairmen contend, however, that the NS-1 report addresses only three of these commitments (the new intermodal facility at Harrisburg, increased capacity on the Reading—Harrisburg line, and relocation of the NS main line in Erie)

¹³⁸ CSX reports that in its response to Rep. Kucinich's suggestion that the City of Brooklyn could be entitled to noise mitigation as a result of a recent noise study conducted on behalf of the City, CSX conducted a train count of the number of trains operating over this rail line segment. Because the results of the train count study verified that current train traffic is in line with that projected in CSX's operating plan, CSX states that no additional mitigation for the City of Brooklyn is warranted.

and makes no mention of the others. The Chairmen further contend: that, to date, NS, the City of Philadelphia, and the Commonwealth of Pennsylvania have yet to execute an agreement regarding the development of the Philadelphia Naval Base Center (PNBC) which includes a provision for an intermodal facility at the AmeriPort International Terminal; that, moreover, rather than establishing its regional and divisional operational headquarters in Pittsburgh, NS moved those headquarters to Philadelphia; and that, although NS' construction of a new intermodal facility in Bethlehem is commendable, the Chairmen would like to confirm that this facility is in addition to, and not a substitute for, other capital projects. The Chairmen add that they would be most interested to learn of the current status of the capital projects that NS committed to during the course of the Conrail proceeding but failed to discuss in the NS-1 report.

Questions Respecting NS' Interaction With Shortlines. The Chairmen express concern regarding the impact of NS implementation plans on shortline railroads within the Commonwealth. The Chairmen indicate that they have been advised: that delayed interchange, line congestion, and shortages of NS locomotives and crews continue to disrupt and impede efficient rail service for traffic originated or terminated on shortlines; that, in many cases, it appears that NS gives priority to its own trains, and that traffic leaving its shortline connections is interchanged only if and when crews and locomotives are available; and that, as a consequence, shortlines report serious traffic losses as well as delayed and lost shipments, which (the Chairmen note) have resulted in diversions of rail traffic to truck and the loss of that traffic for both the shortlines and NS. And, the Chairmen add, shortlines have reported that they are not getting timely payments from NS of freight and service revenues, which (the Chairmen note) is causing serious cash flow problems for these carriers. The Chairmen further contend that NS has yet to implement various interchange agreements and access arrangements that would afford Commonwealth shortlines competitive routing alternatives with other Class I carriers. The Chairmen urge NS to promptly implement such agreements and arrangements in order to facilitate efficient and timely interchange service and the establishment of competitive routing alternatives.

Other Questions Respecting NS. The Chairmen contend that, given its operational problems, NS appears to have lost its focus on growing rail business in the Commonwealth. The Chairmen further contend that former Conrail employees have reported low morale due to recent layoffs and NS' "top down" management style, and that vendors that formerly supplied Conrail in Altoona and other areas have reported that they have found it hard to get payments for work completed or supplies purchased during the Conrail transition process. And, the Chairmen add, NS managers have been slow to respond to legislators who have raised these concerns.

The Commonwealth's Budget Commitment. The Chairmen indicate that the Commonwealth of Pennsylvania has included in its most recent capital budget over \$300 million in funds to lay a third track on the NS main line from the Ohio border to Harrisburg. The Chairmen insist that, given this level of Commonwealth investment in the NS system, NS must

honor its commitments to the Commonwealth and must work more diligently to develop effective and cooperative partnerships with state government and with Pennsylvania shippers and railroads.

Questions Respecting CSX Commitments. The Chairmen indicate that the CSX-1 report lists the construction of a new merchandise facility in Philadelphia and a new facility at Greenwich Yard but does not discuss CSX's commitment to \$14 million for double stack clearances in Philadelphia or its commitment to assign car repair work to the Hollidaysburg and Altoona shops. The Chairmen advise that they would appreciate a short description of the implementation of these CSX commitments.

Relief Requested. The Chairmen, who indicate that they believe that continued oversight of the Conrail transaction is necessary and appropriate, ask: that we continue to monitor NS and CSX service parameters; that we continue to assist affected parties in the resolution of arrangements arising as a result of the Conrail transaction; and that we continue to monitor the commitments and protective conditions to which CSX and NS are subject and ensure that these public interest obligations are fulfilled.¹³⁹

The NS-2 Reply. NS, which claims that it has already made significant infrastructure improvements to its transportation network in the Commonwealth of Pennsylvania, insists that it remains fully committed to improving its service and growing its business in the Commonwealth. NS concedes, however, that its post-Split Date operations in the former Conrail territory and emerging traffic flows have required that certain projects be developed ahead of those cited by the Chairmen. NS contends: that it is complying with the commitments included in the October 21, 1997, agreement among the Commonwealth of Pennsylvania, the City of Philadelphia, and NS; that, furthermore, NS has already made commitments exceeding \$15 million for expenditures towards rail-served economic development programs in the Commonwealth; and that, in particular, NS has commenced operations at a new intermodal facility in Bethlehem, is working with the Department of Community and Economic Development to identify suitable projects for up front NS capital expenditures, and anticipates the execution of an agreement with the City of Philadelphia pertaining to the development of the PNBC, which (NS adds) will include provision for an intermodal facility at the AmeriPort International Terminal. NS further contends: that a new NS Mid-Atlantic Regional headquarters has been established in Philadelphia; that new jobs have been created at, among other rail-related locations, the Mid-Atlantic Regional headquarters and the new intermodal facilities in Bethlehem and Rutherford; that additional jobs will be created with the construction of the new intermodal

¹³⁹ The Chairmen note, in this regard, that we have required CSX and NS to adhere to all of the representations they made on the record during the course of the Conrail proceeding. See Conrail Dec. No. 89, slip op. at 17 n.26.

facility planned for the PNBC; that, furthermore, NS has reserved land for the construction of an automobile distribution facility at the PNBC; and that negotiations are on-going between NS and SEPTA to address a track connection at the Zoo interlocking and the extension of SEPTA service on the Harrisburg and NS rail lines. And, NS adds, it has worked steadily with its shortline partners to increase both business and service in an effort to grow business through this important feeder network.

The CSX-2 Reply. (1) *The proposed double-stack clearance in the Philadelphia area.* CSX advises that a detailed engineering analysis of the work that would be required to obtain greater clearances along the Trenton line has indicated that the cost to fully clear this line would be about \$28 million. CSX further advises that, although it remains committed to obtaining increased clearances over this route (which, CSX notes, is part of its overall I-95 rail corridor), the timing and staging of this project are subject to internal marketing initiatives and further discussions with the Commonwealth concerning funding shares. (2) *CSX's commitment to assign locomotive/car repair work to the NS shops at Altoona and Hollidaysburg.* CSX advises that it has honored and will continue to honor its commitment to assign (during the years 2000, 2001, and 2002) overhaul work on locomotives and rail cars (195 locomotives and 1,000 rail cars, spread over the 3-year period) to the historical Conrail facilities in and near Altoona that were allocated to NS.

GROWTH RESOURCES OF WELLSBORO FOUNDATION. Growth Resources of Wellsboro Foundation, Inc. (GROW), a non-profit industrial development agency, owns a 35-mile rail line that runs between Wellsboro, PA, and Gang Mills Yard in Gang Mills, NY (the point of interchange with NS', formerly Conrail's, Southern Tier line). Rail service on the Wellsboro-Gang Mills line is provided by the Wellsboro & Corning Railroad Company (W&C).

The Comments Of Growth Resources Of Wellsboro Foundation. GROW contends: that, since it acquired the line from Conrail in 1992, it has worked with W&C to preserve local rail service; that, prior to the Conrail transaction, rail traffic on the line had been increasing; that, however, post-Split Date service problems have wreaked havoc with the W&C/NS interchange at Gang Mills Yard and with W&C traffic routed via NS; that these service problems have been so severe that GROW's most significant shipper has lost all faith in rail service and now intends to divert as much of its traffic as possible to truck; that, although the NS yard masters at Gang Mills Yard are doing the best they can, they simply do not have enough locomotives or crews to handle the volume of traffic flowing into the yard; that many cars arriving in the yard take a week to get switched to W&C; and that, in addition, the congestion in the yard interferes with access to the Canadian Pacific, which (GROW claims) could provide alternative competing routes free from the congestion and service problems on the NS system. GROW further contends: that the service problems at Gang Mills Yard, and the lack of operational coordination and the administrative delays that seem to characterize so much of NS service today, have reached a point that prospects for retention of existing traffic on the GROW line, let alone future growth of

that traffic, have all but disappeared; and that NS' service failures have impacted the business of the shippers on the GROW line, and their competitive positions in their respective industries. And, GROW adds, there has been a lack of responsiveness on the part of NS to address the problems at Gang Mills Yard.

Relief Requested. GROW asks: that we direct NS to designate a senior executive who will be personally responsible for the resolution of the W&C/NS interchange problems at Gang Mills Yard and who will directly interface with representatives of GROW and W&C in resolving these matters; and that we require NS and GROW to file quarterly joint status reports regarding progress or the lack thereof with respect to NS interchange service at Gang Mills Yard. GROW warns that, unless the NS service problems can be resolved promptly, it is questionable whether viable rail operations can continue to be provided on the GROW line without substantial public subsidies.

The NS-2 Reply. NS concedes that, after the Split Date, Gang Mills Yard experienced some of the same congestion difficulties experienced across the NS system. NS insists, however, that those difficulties are being resolved, and that reports from local NS officials indicate that, due to operational changes on the Southern Tier, Gang Mills Yard is now "fluid." And, NS adds, it will continue to work with W&C and CP with regard to operations at Gang Mills Yard. NS insists, however, that a formal Board process with quarterly reports is not required; there already is, NS explains, an informal consultative process with the Board's Office of Compliance and Enforcement; and, NS adds, if operational difficulties arise in the future, the parties should first attempt to resolve matters via this avenue.

UNITED STATES DEPARTMENT OF TRANSPORTATION. DOT was an active participant in the Conrail proceeding. See Conrail Dec. No. 89, slip op. at 354-57.

The DOT-1 Comments And The DOT-2 Reply. *Safety.* DOT indicates that, although the Federal Railroad Administration (FRA) considers the overall safety records compiled by CSX and NS since the Split Date to be "excellent," FRA has identified several systemic safety shortfalls that occurred during integration that will require additional attention. These shortfalls, DOT advises, concern information technology deficiencies, hazardous materials documentation problems, increased inspection defects, "near misses" between trains, and excessive crew delays; and, DOT adds, FRA has also found that post-Split Date service problems have adversely affected safety. DOT further advises that FRA will continue to monitor and work closely with CSX and NS to ensure the safe implementation of the Conrail transaction.

Transitional Problems, Transitional Remedies. DOT insists that, although CSX and NS have experienced congestion and delays as they have absorbed their respective portions of Conrail, transitional problems call for, at most, transitional remedies. DOT explains that, to the extent the harmful circumstances that have been reported by various parties are manifestations of

short-term difficulties that CSX and NS are now correcting, there is less reason to consider new conditions (although, DOT adds, we should not, by declining to impose new conditions, shield CSX and NS from any liability to shippers or others for the consequences of even their transitional problems). DOT further explains: that, to the extent such harmful circumstances continue, they are more likely to represent longer-term operational changes flowing from the transaction; and that it is entirely appropriate for the Board to consider conditions to protect the environment, affected communities, and others from the adverse impacts of such changes. And, DOT adds, we should continue to encourage negotiated agreements between CSX and NS (as appropriate) and the affected parties.

Shortline Railroads. DOT, which notes that a number of shortlines have registered complaints about poor service from NS and CSX since the Split Date, insists that we should “determine the true temporal dimensions” of the problem. DOT-2 at 3.

Environmental And Community Impact Issues: Higher Traffic Levels And Slower Operating Speeds Than Predicted. A number of communities, DOT notes, have complained of impacts resulting from traffic levels that are higher and operating speeds that are slower than the traffic levels and operating speeds anticipated in the operating plans filed by CSX and NS and in the EIS issued by the Board; and, DOT adds, these communities, citing these “changed” circumstances, have sought the imposition of new or revised conditions tailored to mitigate the “unforeseen harms” that have occurred since the Split Date. DOT indicates that it fully supports this approach. DOT contends, in particular: that, in exercising oversight of the environmental impacts of the Conrail transaction, we should be guided by reality; that, if forecasts of traffic levels, train speeds, or other matters were wrong, then the environmental impacts of such factors should be assessed on the basis of the traffic levels, train speeds, and so forth that have actually resulted (assuming, DOT adds, that such matters are not simply transitional in nature); that, although railroads need operational flexibility to deal with a changing business environment, harmful impacts arising from operational changes made possible or necessary by the transaction should be mitigated whether or not they were identified initially; and that, because these impacts are not prospective but are currently being endured by the citizens of these communities, and also because (at this date) it is likely that the operational changes causing these impacts can be traced to the underlying transaction, we should act expeditiously to investigate the claims of these communities and either impose mitigating conditions or encourage CSX and NS to reach, with the affected communities, agreements that will avoid the need for the imposition of mitigating conditions. DOT further contends, however, that, as a general rule, “post-acquisition traffic levels and other factors should not be limited, say, to those specified in operating plans,” DOT-2 at 5, although DOT also adds that there are circumstances in which such an approach would be at least temporarily appropriate to preserve the status quo while mitigation measures were studied.

Environmental And Community Impact Issues: Negative Impacts Caused By Stopped Trains Blocking Crossings. A number of communities, DOT notes, have complained of negative

impacts caused by parked trains blocking crossings. DOT advises that, although this issue was not addressed in the EIS, the record compiled to date indicates that communities are suffering serious disruption due to parked trains; parked trains, DOT explains, affect traffic, generate additional pollution (including their own, if they are idling), and endanger lives and property by delaying emergency response vehicles. DOT contends that if, as it “presumes,” the problem of blocked crossings results primarily from the overall service and integration problems that have occurred since the Split Date, this problem should disappear as service improves. DOT further contends, however, that, if CSX and NS “are unable to eliminate the problem, and soon,” DOT-2 at 6, we should consider measures to ameliorate the situation.

Oversight Should Be Continued. DOT contends that the still-evolving effects of the Conrail transaction call for continued oversight; too little time has passed, DOT insists, to reach any definitive conclusions concerning all of the lasting consequences of this complicated transaction. DOT further contends that we should examine whether there are long-term adverse impacts that were not originally foreseen or accurately measured.

The CSX/NS Response To The DOT-2 Reply. CSX and NS, in their undesignated letter jointly filed August 11, 2000, insist that the environmental impacts of the Conrail transaction are being addressed through compliance with the environmental conditions imposed in Conrail Dec. No. 89, through implementation of the various negotiated agreements between the railroads and local communities, and through continued consultations by the railroads with local communities. CSX and NS indicate that they are conferring with communities to understand their unique concerns, to inform the communities of the steps the railroads can take to mitigate certain impacts, to explain the railroads’ operational and safety needs, and to develop workable strategies to improve local conditions where practicable. CSX and NS contend that their continuing efforts in this regard underscore that there is no basis for the Board to consider any further mandatory environmental conditions or studies in this case. The Board’s existing environmental review approach, CSX and NS add: allows for a detailed assessment of a proposed transaction based on a wealth of data, and encourages negotiated solutions to local environmental impacts related to a proposed transaction; strikes an appropriate balance between the need to protect against overall adverse environmental impacts and the applicants’ need for finality to make a reasoned judgment as to whether to proceed with the conditioned transaction; and, by recognizing the fundamental role shipper demands play in determining rail traffic, permits rail carriers to react to changing commercial, operational, and economic conditions. The alternative, CSX and NS warn, would open the door to a never-ending review process that would not be consistent with the Board’s existing environmental review approach or with negotiated solutions.

The ORDC/OAG/PUCO/OEMA Reply. The State of Ohio, in the undesignated letter filed August 29, 2000, by ORDC, OAG, PUCO, and OEMA, takes strong exception to the notion that there is no basis for the Board to consider any further environmental conditions or studies in

this proceeding. Ohio insists, to the contrary, that, in view of the substantial transaction-related impacts that have been sustained by many Ohio communities, there is an urgent need for the Board to investigate the adequacy of the previously imposed environmental conditions.

APPENDIX E: SHIPPER AND RELATED INTERESTS

AMERICAN CHEMISTRY COUNCIL. The Chemical Manufacturers Association (CMA), which is now known as the American Chemistry Council (ACC), was an active participant in the Conrail proceeding. See Conrail Dec. No. 89, slip op. at 57-63, 160 n.256, 237-42.

The ACC-2 Comments. *Conrail Transaction Council.* ACC reports that the Conrail Transaction Council (CTC) has provided a useful forum for shipper groups to exchange, with CSX and NS, information respecting the Conrail transaction and post-Split service disruptions. ACC adds, however, that neither CSX nor NS has used the CTC process to provide individual shippers, through their trade associations, with information about each railroad's procedures for addressing freight claims relating to post-Split service disruptions.

Performance Measures. ACC reports that one positive result of the Board's oversight process for the Conrail transaction was the identification of several performance measures that CSX and NS issue on a regular basis. This, ACC advises, is a marked improvement vis-à-vis earlier rail mergers, with respect to which (ACC notes) the public had to rely on anecdotal information about post-transaction service problems. ACC regrets, however, that the outcome of the CTC process was a series of performance measures that are oriented toward railroad operations; the CTC process, ACC indicates, did not result in the adoption of two important performance measures that are of particular interest to rail customers: specific corridor transit times; and pre-Split benchmarks. (1) ACC contends: that system-wide operating data on velocity (by train type) and cars on line (by car type) are no substitute for corridor-specific transit time data; that, although terminal dwell times highlight locations with operational difficulties, shippers want to know how long the entire car cycle (loaded and empty) takes; and that this is particularly important to ACC's members, which own or lease their rail cars and face intense competitive pressure from their own customers for timely and predictable freight deliveries. (2) ACC further contends that, because the CTC process did not establish pre-Split benchmarks of Conrail's performance, we now lack historically comparable data; each carrier, ACC indicates, tends to focus on service vis-à-vis its own post-Split low-point. ACC adds, however, that its members still expect that service will meet, and ultimately exceed, the service that was provided before June 1, 1999.

Competition And Service. ACC advises that many shippers have benefitted from the new competition that was created by the establishment of the three Shared Assets Areas and by the reopening of Conrail's contracts. ACC further advises, however, that many of these shippers have also been among those that have suffered from post-Split service disruptions. ACC reports that, since the Split Date, there have been, to varying degrees, service problems in the Shared Assets Areas and on other former Conrail lines, and even in the Southeast.

Safety. ACC commends the Board, the Federal Railroad Administration (FRA), and especially the railroads for the safe manner in which the Conrail transaction has been implemented. Safety, ACC insists, has not been compromised by the Conrail transaction.

AES EASTERN ENERGY. Because New York State Electric & Gas Corporation (NYSEG, AESE's predecessor in interest), by pleading filed February 23, 1998, indicated that it had settled with the Conrail applicants and therefore supported the Conrail application, NYSEG's interests vis-à-vis the Conrail transaction were not addressed in the decision approving that transaction.

The AESE-2 Comments. *Rate Issue.* AESE reports: that CSX's rates on transportation of limestone from Buffalo, NY, to AESE's Somerset, NY generating station increased, effective June 1, 2000, by 51.5%; and that, on account of this increase, AESE has diverted to truck its Buffalo-Somerset limestone shipments. AESE contends that, because its experience with a huge June 1st rate increase may not be atypical, we should exercise caution in reviewing the carriers' filings in the STB Finance Docket No. 33388 (Sub-No. 90) Buffalo Rate Study proceeding.

Service Issues. AESE insists that both CSX and NS continue to be plagued by persistent operational problems that impede effective and efficient service to customers like AESE. AESE adds that the persistence of these problems more than a year after the Split Date indicates that the carriers either are not making sufficient efforts to, or are simply not able to, resolve these problems. AESE suggests that we should examine the record developed in this docket to discern whether AESE's experiences with CSX and NS are indicative of a more widespread problem that may need systemic correction.

AESE raises three particular service issues: (1) AESE advises: that it receives large volumes of coal in company-owned unit trains; that the cycle times on these trainsets have yet to return to what they were under Conrail's operation; and that, although this is true of both CSX and NS, it is a more pronounced problem with NS. (2) AESE advises that both CSX and NS continue to be plagued by crew and power shortages that impede smooth and timely operations. (3) AESE advises that NS' operations between Ashtabula and Buffalo continue to be slowed by congestion. AESE adds that, although it has suggested to NS that, to avoid this congested section, NS should use the old Erie Lackawanna line, NS has yet to heed this suggestion.

The DOT-2 Reply. DOT contends that, although the rate issue raised by AESE deserves careful attention, that attention should be accorded in the STB Finance Docket No. 33388 (Sub-No. 90) Buffalo Rate Study proceeding.

The CSX-2 Reply. CSX contends that Buffalo rate issues should be confined to the STB Finance Docket No. 33388 (Sub-No. 90) Buffalo Rate Study proceeding.

The NS-2 Reply. NS has responded to the service issues raised by AESE. (1) NS claims that the cycle time on its AESE trains has improved from a 14-day cycle experienced just after the Split Date to 8-day cycles. NS adds that, although this is not yet on par with the 7-day cycle often achieved by Conrail, NS currently is evaluating the best approach for getting the cycle times on these trains down to the pre-Split Date level. (2) NS insists that an aggressive hiring and training process initiated before the Split Date helped to alleviate initial crewing issues. NS further contends that, as a result of smoother system-wide operations, AESE trains are now fully powered from origin to prevent power delays in Buffalo. (3) NS concedes that its operations between Ashtabula and Buffalo continue to be slowed by congestion. NS insists, however, that the Erie Lackawanna line is not a viable alternative both because of general track conditions and also because NS does not own the entire route from Meadville to Buffalo. NS adds that it is working to secure an alternative route that will provide a less congested path for AESE's unit trains.

E. I. DUPONT DE NEMOURS AND COMPANY. DuPont's interests vis-à-vis the Conrail transaction were addressed in the decision approving that transaction. See Conrail Dec. No. 89, slip op. at 55 n.84, 160 n.257, 277.

The DuPont Comments. DuPont notes that, because it has five major manufacturing sites and numerous customer and transfer sites on the former Conrail system, it has a substantial stake in the success or failure of the Conrail transaction.

Safety Issues. DuPont indicates that it is extremely pleased with the safe manner in which merger implementation was executed. DuPont notes that, despite numerous operational and computer problems, and despite more recent track maintenance concerns in other regions, safety performance on the former Conrail territory appears to be excellent. DuPont, which believes that a major factor in this regard was the requirement for thorough Safety Integration Plans, commends CSX and NS, and also the Board, for keeping a strong focus on safety.

Service Issues; Alternative Approach Suggested. DuPont insists that, although both CSX and NS have made some progress in recent months at stabilizing service levels, current overall transit times on the former Conrail territory are still on average almost 2 days longer than prior to the Split Date. DuPont indicates that, given the service situation, it is disappointed that this oversight proceeding does not address service issues. DuPont adds that, although it will provide its specific service issues and supporting data to the Office of Compliance and Enforcement as requested, it would much prefer that service be fully examined in a public proceeding.

Performance Metrics; Request For Relief. DuPont indicates that, although the metrics established as part of the Board's Operational Monitoring process have helped railroad customers follow overall railroad system performance, they continue to exclude such customer-oriented measures as transit times on key corridors and benchmarks of current vs. pre-merger Conrail

performance. Transit and cycle times, DuPont indicates, are particularly critical measures of the effectiveness of customers' supply chains; and, DuPont adds, without such customer-focused metrics it is difficult to assess whether CSX and NS are fulfilling the promises they made in the Conrail application. DuPont, which advises that the associations participating in the Conrail Transaction Council originally requested that the corridor transit time and benchmark metrics be included within the Operational Monitoring measures, asks that we reconsider the exclusion of these metrics.

The NS-2 Reply. NS indicates that it believes that the procedure of working out service-related issues through the Office of Compliance and Enforcement remains the most responsive avenue to resolving such problems.

ISG RESOURCES. ISG, a company that arranges for the movement of fly ash produced by coal-burning electric utility plants to places where fly ash can be used, indicates that one of the utility plants for which it manages fly ash disposition is the AES Thames power plant at Montville, CT. ISG further indicates: that it operates as a subcontractor to CSX in the disposition of fly ash from that plant;¹⁴⁰ that the fly ash produced at that plant is transported to Good Spring, PA, for use as landfill; that, prior to the Conrail transaction, this fly ash was routed NECR¹⁴¹-Conrail-RBMN from Montville to Good Spring;¹⁴² that, however, in connection with the Conrail transaction, the Conrail lines between Palmer and Reading were divided between CSX and NS; and that, on account of this division, the movement of the fly ash from Montville to Good Spring was subject to the "single-line to joint-line" (SL-to-JL) effect of the Conrail transaction. Because ISG was not an active participant in the Conrail proceeding, its SL-to-JL interests vis-à-vis the Conrail transaction were not addressed in the decision approving that transaction.

The ISGR-2 Comments. ISG advises that the Montville-to-Good Spring routing has been adversely impacted by the SL-to-JL effect of the Conrail transaction. ISG contends: that, prior to the Conrail transaction, transit time for the movement was a consistent 6-7 days, both

¹⁴⁰ CSX indicates that, although it does not directly serve the Montville plant, it has a "commercial interest" in the fly ash removal operation at that plant. ISG indicates that CSX holds the principal contract for the movement of the fly ash.

¹⁴¹ The Montville plant is served by New England Central Railroad, Inc. (NECR).

¹⁴² The NECR/Conrail interchange was at Palmer, MA. The Conrail/RBMN interchange was at Reading, PA.

outbound and for the return of empty cars;¹⁴³ that, after the Split Date, CSX and NS proposed to maintain what essentially was the same Conrail routing, with the CSX/NS interchange at Oak Island Yard in Newark, NJ; that the transit time contemplated for this routing was 10-12 days; that, however, the actual transit time turned out to be 20-25 days; that, in an effort to avoid Oak Island Yard, the CSX/NS interchange point was moved to Buffalo; that, however, between the circuitry of this route (over 800 miles) and the operational problems at Selkirk and Buffalo, transit times increased to 30+ days; and that, therefore, ISG was compelled to establish a new NECR-GMRC¹⁴⁴-CL&P¹⁴⁵-CP-RBMN routing,¹⁴⁶ which, although it is more circuitous than the old Conrail routing (approximately 600 miles vs. 500 miles), has managed to achieve a transit time of 8-10 days.¹⁴⁷ ISG notes, however, that this routing, although it does not involve NS, exists at NS' discretion. The problem (although it is not fully explained by ISG) is that this routing, because it requires the use of RBMN's Packerton Junction trackage rights, is subject to one of the two RBMN blocking provisions;¹⁴⁸ and, although NS granted a blocking provision waiver that allowed RBMN to participate in the NECR-GMRC-CL&P-CP-RBMN routing, that waiver expires on June 1, 2001.

¹⁴³ ISG indicates that the pre-transaction Conrail routing was approximately 500 miles.

¹⁴⁴ The Green Mountain Railroad is referred to as GMRC.

¹⁴⁵ The Clarendon and Pittsford is referred to as CL&P.

¹⁴⁶ The NECR/GMRC interchange is at Bellows Falls, VT. The GMRC/CL&P interchange is at Rutland, VT. The CL&P/CP interchange is at Whitehall, NY. The CP/RBMN interchange is at Packerton Junction, PA.

¹⁴⁷ ISG concedes, however, that, from time to time, there has been some slippage, with transit times up to 12 days.

¹⁴⁸ RBMN's Packerton Junction trackage rights, and also the two RBMN blocking provisions (the "additional consideration" provision and the "non-revenue traffic" provision), are addressed in greater detail in our discussion of RBMN's comments. The NECR-GMRC-CL&P-CP-RBMN routing (with the CP/RBMN interchange at Packerton Junction, PA) is subject to the "non-revenue traffic" provision; that same routing would be subject to both the "non-revenue traffic" provision and also the "additional consideration" provision if the CP/RBMN interchange were at Taylor, PA. It should be noted, however, that RBMN has asked (in its second alternative request for relief) that we rule that Reading Division traffic that moves via the Lehigh Division (and the NECR-GMRC-CL&P-CP-RBMN routing involves precisely such traffic) is not subject to the additional consideration provision.

Request For Relief. ISG contends: that service degradation due to the division of Conrail, creating joint-line routing where single-line routes previously were operated, has been far greater than anticipated; that, in particular, in view of the fragile nature of the CSX/NS routing that superseded the Conrail routing, the NECR-GMRC-CL&P-CP-RBMN routing must be preserved; that, although ISG anticipates that CSX and NS will continue to act responsibly,¹⁴⁹ ISG would prefer that we strongly encourage CSX and NS to continue to assure that the needs of the user community are satisfied;¹⁵⁰ and that such cooperative arrangements on the part of CSX and NS would avoid the need for remedial prescription by the Board. ISG therefore asks that we take its interests into account and exercise our oversight authority in a manner conducive to preserving the NECR-GMRC-CL&P-CP-RBMN routing.

The CSX-2 Reply. CSX contends: that, although it would like to participate in the Montville-to-Good Spring fly ash movement, it is willing to continue to exclude itself from the route if necessary to provide quality service to the fly ash operation; that, above all, CSX would not want the routing to cause difficulty in the North Jersey Shared Assets Area where the troublesome hand-off between CSX and NS occurred with respect to this movement in the early months following the division of Conrail's routes; that, because it is important that operations within the shared assets areas be efficient, CSX and NS have restricted even their own activities within those areas, delegating many of them to the continuing Conrail operation; and that CSX would be willing to work with the originating carrier (NECR) and other carriers in developing an efficient route. CSX adds that it hopes that a solution can be found for ISG which will provide an acceptable and consistent cycle time for it without prejudice to what CSX believes to be an important principle, namely, that the basic terms of the creation of shortlines, bargained for among the parties, be respected.

The NS-2 Reply. NS contends: that its cooperation in the reroute of ISG traffic demonstrates NS' good faith in trying to meet the needs of its customers; that, however, alternatives such as the reroute that were provided during the difficulties experienced just after the Split Date need not be made permanent; that service offerings should be determined through the normal give-and-take among commercial entities; and that, now that NS has resolved many

¹⁴⁹ ISG indicates that CSX has acted responsibly by providing additional cars to meet the car fleet requirement imposed by the extended transit times. ISG further indicates that NS has acted responsibly by allowing the creation of the NECR-GMRC-CL&P-CP-RBMN routing.

¹⁵⁰ ISG has in mind that, as respects NS, "continue to act responsibly" means that NS should continue to allow the NECR-GMRC-CL&P-CP-RBMN routing to exist. ISG is apparently concerned that NS may be inclined to insist on an alternative routing that involves NS.

of its implementation problems, the service issues presented by ISG should be addressed in the normal private sector process.

NATIONAL LIME AND STONE COMPANY; WYANDOT DOLOMITE. The interests of NL&S and Wyandot vis-à-vis the Conrail transaction were addressed in the decision approving that transaction. See Conrail Dec. No. 89, slip op. at 109-11, 179 (ordering paragraph 43), 295-96, 299-301. See also Conrail Dec. No. 96, slip op. at 8-9, 25 (ordering paragraph 3), 29-30.¹⁵¹

The NLS-2 Comments. NL&S's comments are focused on the rail service that links its Bucyrus, OH quarry with its Wooster, OH sales yard. In its pleadings filed in the Conrail proceeding, NL&S argued: that NL&S's substantial investments in these two facilities were predicated on NL&S's ability to ship aggregates from Bucyrus to Wooster via Conrail's single-line rail service; that the value of these investments would be severely diminished if NL&S were unable to ship its aggregates from Bucyrus to Wooster via single-line rail service; that, however, in connection with the Conrail transaction, the Bucyrus quarry had been allocated to a territory controlled by CSX whereas the Wooster sales yard had been allocated to a territory controlled by NS; and that, as respects NL&S's Bucyrus-to-Wooster traffic, the "single-line to joint-line" (SL-to-JL) effect¹⁵² of the Conrail transaction would result in increased transportation costs to NL&S, would make rail cars more difficult to source, and would make service slower and less reliable. To ameliorate this SL-to-JL effect, we imposed, for the 5-year period commencing on the Split Date, the Wyandot/NL&S condition.

NL&S now contends: that, in the first year following the Split Date, the quality of service between Bucyrus and Wooster declined significantly; that, although single-line Bucyrus-

¹⁵¹ Ordering paragraph 43, as revised by ordering paragraph 3, is hereinafter referred to as the Wyandot/NL&S condition. That condition reads as follows: "As respects Wyandot and NL&S, CSX and NS: must adhere to their offer to provide single-line service for all existing movements of aggregates, provided they are tendered in unit-trains or blocks of 40 or more cars; and in other circumstances including new movements, for shipments moving at least 75 miles, must arrange run-through operations (for shipments of 60 cars or more) and pre-blocking arrangements (for shipments of 10 to 60 cars). The requirements imposed on CSX and NS under the preceding sentence will expire at the end of the 5-year period commencing on Day One." See Conrail Dec. No. 96, slip op. at 25 (ordering paragraph 3).

¹⁵² "SL-to-JL" effects have sometimes been referred to as "one-to-two" effects. See Conrail Dec. No. 96, slip op. at 29 n.61.

to-Wooster service has been provided by CSX,¹⁵³ that service has been marred by significant delays and service-related problems;¹⁵⁴ and that, in particular, car scheduling problems have severely limited NL&S's ability to make timely deliveries of aggregate to its Wooster yard in the quantities needed. NL&S further contends: that, in the first year following the Split Date, the rate NL&S must pay for Bucyrus-to-Wooster service increased substantially; that, indeed, the 5.7% increase effective June 1, 2000, was the largest increase for this service since NL&S first began this movement on Conrail in 1995; that CSX has offered no explanation for this large increase; and that NL&S can only wonder whether it is being forced to pay CSX's transaction costs associated with the Conrail transaction.

NL&S adds that, given the current status of CSX's service between Bucyrus and Wooster, there is reason for concern that, in the not too distant future, the service quality and rate problems NL&S has already experienced will get worse. NL&S warns, in particular, that, when the Wyandot/NL&S condition expires at the end of 5 years, what is now CSX single-line service will become CSX/NS joint-line service. And this change, NL&S suggests, is not likely to improve anything for the better; joint-line service, NL&S explains, is inherently of lesser quality and can be offered only at higher costs. The termination of single-line service, NL&S claims, will make it impossible for NL&S to continue the essential shipment of its products from Bucyrus to Wooster.

Request For Relief. NL&S asks that we revise the Wyandot/NL&S condition so that this condition will not automatically terminate after 5 years. NL&S asks, in particular, that the Wyandot/NL&S condition remain in effect for at least 5 years, and continue in effect thereafter until such time as CSX and NS obtain permission from the Board to abandon service to NL&S. This is not, NL&S insists, a request for "permanent" relief; it is merely, NL&S explains, a request that the Wyandot/NL&S condition remain in place until CSX and NS demonstrate that abandoning high-volume, single-line service to NL&S is consistent with the public interest.

The WYANDOT-1 Comments. Wyandot, like NL&S, is, in the context of the Conrail transaction, a SL-to-JL shipper. Wyandot produces aggregate and limestone at Carey, OH; it had, prior to the Conrail transaction, access to Conrail single-line service for traffic moving from Carey to Alliance, OH;¹⁵⁵ but, in connection with the Conrail transaction, Carey was allocated to

¹⁵³ NL&S indicates that CSX has provided service between Bucyrus and Wooster using 50-car unit trains.

¹⁵⁴ NL&S indicates that CSX's operational difficulties between Bucyrus and Wooster seem to be part of an overall decline in service on CSX following the Split Date.

¹⁵⁵ Conrail accessed Wyandot's Carey facility via trackage rights over a CSX line.

CSX,¹⁵⁶ whereas Alliance was allocated to NS. To ameliorate this SL-to-JL effect, we imposed, for the 5-year period commencing on the Split Date, the Wyandot/NL&S condition.

Wyandot, in its WYANDOT-1 comments, contends that the Wyandot/NL&S condition has not achieved the desired effect. Wyandot indicates, in particular, that, after the division of Conrail lines was accomplished, Wyandot had only two shipments to East Ohio Stone Co. in Alliance. Wyandot advises that this business, which had accounted for more than 10% of Wyandot's volume for a number of years, is now lost. Wyandot adds that it attributes that loss to the constraints on the Wyandot/NL&S condition¹⁵⁷ and to the ready availability of unrestricted single-line service to Wyandot's competitors. Wyandot, which suggests that the Board appears to be increasingly unable to protect the vital interests of small businesses such as Wyandot as large Class I railroads press to become even larger and fewer in number, insists that, as a practical matter, it is no longer an effective competitor along the Conrail line that was allocated to NS.¹⁵⁸

Request For Relief. Wyandot asks that we restore it to the situation it was in prior to the Conrail transaction by granting the relief Wyandot originally requested. See Conrail Dec. No. 89, slip op. at 300-301. The key condition previously requested by Wyandot would require: that the Conrail trackage rights over CSX's Carey-Upper Sandusky line be assigned to NS; and that NS be allowed to link these trackage rights with the generally overhead trackage rights it received on Conrail's Fort Wayne-Upper Sandusky-Crestline line. See Conrail Dec. No. 89, slip op. at 300 (Wyandot's Condition #1).

The CSX-2 Reply. CSX, which indicates that it will faithfully perform the special services required by the Wyandot/NL&S condition during that condition's 5-year term, urges the denial of the relief sought by NL&S and Wyandot. (1) *NL&S.* CSX contends that NL&S's request for relief is premised on the notion that a transaction is contrary to the public interest if it has any SL-to-JL effects. CSX further contends that the existence of operating difficulties during the first year following the Split Date do not justify an extension of the 5-year Wyandot/NL&S condition. (2) *Wyandot.* CSX contends that Wyandot's Carey-to-Alliance movement has dried

¹⁵⁶ The Conrail trackage rights to Carey were not assigned to NS. See Conrail Dec. No. 89, slip op. at 300 n.496.

¹⁵⁷ The principal "constraint" cited by Wyandot reflects the minimum car requirements of the Wyandot/NL&S condition (existing movements of aggregates when tendered in unit-trains or blocks of 40 or more cars; etc.). Wyandot notes that, prior to the Split Date, it frequently shipped fewer than 40 cars to meet the specific requirements of East Ohio Stone Co.

¹⁵⁸ Wyandot adds that it did not gain access to any new territory as a result of the Conrail transaction.

up because of a decision by Wyandot's customer for which neither CSX nor its service was to blame; CSX (CSX claims) would gladly have continued operation of that service for the period specified in the Wyandot/NL&S condition. CSX further contends: that the running of short trains, particularly of aggregates, is not efficient; that short trains require as much in the way of crews as long trains and proportionately to their length burn more fuel; and that the running of short run-through trains would increase the burden imposed on the carriers by the Wyandot/NL&S condition. And, CSX adds, a 40-car threshold for the entitlement to a special run-through train on a trackage rights basis with a single crew is certainly not unreasonable.

The NS-2 Reply. NS, which indicates that it has not received any request to develop new aggregate moves from the quarries operated by NL&S and Wyandot, urges the denial of the relief sought by NL&S and Wyandot. NS insists that the 5-year term of the Wyandot/NL&S condition provides a sufficient time for NL&S and Wyandot to adjust to the altered business environment brought about by the Conrail transaction.

RESOURCES WAREHOUSING & CONSOLIDATION SERVICES. RWCS's interests vis-à-vis the Conrail transaction were addressed in the decision approving that transaction. See Conrail Dec. No. 89, slip op. at 297-98 (footnotes and citation omitted): "RWCS, a freight forwarder with facilities located on an NYS&W line in North Bergen, NJ, supports the CSX/NS/CR transaction but has requested equal access to CSX and NS rail service from/to its facilities. Applicants have indicated, in rebuttal, that RWCS, which can only be served now by NYS&W and which will only be served post-transaction by NYS&W, will be provided the dual access it seeks. 'It will be able to connect to NS via Passaic Junction off the Southern Tier on the Conrail lines allocated to NS; and to CSX via a connection to be built from North Bergen to Little Ferry.'" See also Conrail Dec. No. 89, slip op. at 123: "We will require applicants to hold to the representations they have made to RWCS."

The RWCS-1 Comments. RWCS claims: that it does not now have access to competitive intermodal service from CSX because CSX refuses to provide such service; that, although CSX service would be feasible, RWCS's repeated requests to CSX to meet to establish mutually satisfactory intermodal service arrangements between Chicago and RWCS's North Bergen facility have been refused; and that RWCS's efforts to obtain service opportunities or commitments for its North Bergen facility have been frustrated by CSX's denial of service.

Request For Relief. RWCS asks that we require CSX to implement its prior representation and take the necessary steps to establish intermodal service to RWCS's North Bergen facility.

The CSX-2 Reply. CSX claims: that RWCS's North Bergen facility is a local station on NYS&W; that, therefore, any direct service (either by CSX or by NS) to that facility must be routed interline either via CSX/NYS&W or via NS/NYS&W, respectively; that, at the present

time, the primary international ocean carrier customer utilizing RWCS's North Bergen facility is Hanjin, which (CSX indicates) utilizes an NS/NYS&W routing for its Chicago/North Jersey traffic; that CSX has met with NYS&W to arrange joint-line intermodal service to RWCS's facility; that CSX has made a service proposal to Hanjin for direct service, via a CSX/NYS&W interline movement, to the RWCS facility; that this proposal, however, was declined, and Hanjin retained its existing NS/NYS&W service route; and that CSX is willing to work with other RWCS customers along with NYS&W to consider future opportunities for direct service to the RWCS facility. CSX adds: that RWCS also has access to intermodal service provided by CSX Intermodal, Inc. (CSXI) with rail transportation by CSXT; and that, insofar as RWCS has container or trailer business and wishes to utilize CSXI's intermodal service, RWCS can easily access any of the CSXI terminals at Little Ferry, North Bergen, and Kearny, all of which (CSX advises) are quite close to RWCS in Northern New Jersey.

APPENDIX F: RAILROADS AND RELATED INTERESTS

BUFFALO & PITTSBURGH AND ROCHESTER & SOUTHERN. Because B&P and R&S, by letter jointly filed October 21, 1997, indicated that they had made arrangements with the Conrail applicants and therefore supported the Conrail application, the interests of B&P and R&S vis-à-vis the Conrail transaction were not addressed in the decision approving that transaction. See, however, Conrail Dec. No. 89, slip op. at 87-88, 228 n.353, 306 n.507, 323 (references to B&P); Conrail Dec. No. 89, slip op. at 19 (item 20), 88-89, 102-03, 180 (ordering paragraph 56), 214-15, 261, 308 (references to R&S).¹⁵⁹

The BPRR-2/RSR-2 Comments. B&P, a Class II railroad, operates over approximately 279 miles of track lying generally between Buffalo, NY, and New Castle, PA. R&S, a Class III railroad, operates over approximately 66 miles of track between Rochester, NY, and Silver Springs, NY. Although the Buffalo-New Castle and Rochester-Silver Springs lines do not connect, R&S connects at Buffalo with B&P (and also with CN, CP, and NS) via a 1992 haulage contract with CP (i.e., CP hauls cars for R&S between Buffalo and Silver Springs). R&S also has actual physical connections: with CP and NS at Silver Springs; with CSX at Rochester; with LAL at CSX's (formerly Conrail's) Genesee Junction Yard in Chili, NY (immediately south of Rochester);¹⁶⁰ and with Genesee and Wyoming Railroad Company (G&W, another GWI subsidiary) at Caledonia, NY (southwest of Rochester).¹⁶¹

B&P and R&S contend that, due to NS congestion at Buffalo and the addition of NS operations to the existing CP and R&S operations at Silver Springs, B&P and R&S, and the industries they serve, have been adversely affected by the Conrail transaction. B&P and R&S contend, in particular: that NS congestion in Buffalo has caused a reduction in CP's haulage service between Buffalo and Silver Springs;¹⁶² that the addition of a third carrier (NS) at

¹⁵⁹ B&P and R&S are subsidiaries of Genesee and Wyoming Inc. (GWI).

¹⁶⁰ See Conrail Dec. No. 89, slip op. at 102-03 (creating the R&S/LAL connection at Genesee Junction Yard).

¹⁶¹ G&W has trackage rights over R&S to interchange: with CP at Silver Springs; and with CSX at Rochester.

¹⁶² B&P and R&S indicate that, both pre-Split Date and post-Split Date, all R&S traffic moving between Buffalo and Silver Springs has moved in haulage trains operated by CP. B&P and R&S contend that CP's post-Split Date haulage service has deteriorated on account of the impediments CP has continually encountered in attempting to gain access to CP's SK Yard (in Buffalo) via NS' congested tracks. The NS tracks in Buffalo, B&P and R&S report, have often
(continued...)

Silver Springs has strained the limited interchange tracks at that location;¹⁶³ that the reduction in service at Silver Springs has adversely affected R&S and its customers, has adversely impacted R&S's ability to interchange traffic at Buffalo (with B&P, CP, CN, and NS), and has adversely affected R&S's ability to compete with CSX and other transportation modes; and that R&S has lost a significant amount of revenue and traffic as a result.¹⁶⁴ B&P and R&S further contend that the reduction in service at Silver Springs has adversely affected the R&S/LAL connection at Genesee Junction Yard that was created in Conrail Dec. No. 89. And, B&P and R&S add, they fear that, in view of an impending substantial increase in traffic originated on R&S and G&W, the bad situation that exists today will soon become a great deal worse.¹⁶⁵

B&P and R&S therefore ask that we impose an additional condition requiring NS to grant R&S overhead trackage rights over approximately 54 miles of NS' Southern Tier Line, between (1) B&P's Buffalo Creek Yard at Buffalo, and (2) Silver Springs. B&P and R&S further ask, in essence, that we require NS to grant R&S the described trackage rights under the terms, including the compensation terms, provided for in the B&P/Conrail trackage rights agreement that governs B&P's overhead trackage rights over Conrail's (now NS') lines between Buffalo, NY, and Carrollton, NY. B&P and R&S contend that the requested Buffalo-Silver Springs

¹⁶²(...continued)

been "plugged" by standing trains.

¹⁶³ Although Conrail operated through Silver Springs, the R&S/Conrail point of interchange was Rochester.

¹⁶⁴ B&P and R&S claim that, on account of the degraded service received by R&S's customers as a result of the Conrail transaction, R&S has sustained a loss of rail revenues of some \$800,000. B&P and R&S add that this reflects a loss of approximately 1,500 carloads during the 12-month period ended May 31, 2000 (which, they claim, represents a 25% volume reduction in the business that R&S handled in the 12 months prior to the Split Date).

¹⁶⁵ B&P and R&S anticipate that, beginning early in 2001, G&W will originate approximately 5,000 new carloads of rock salt per year for movement to NS and CP via Silver Springs. And, B&P and R&S add, a new receiver of feed grains and fertilizers (in blocks of up to 75 cars) is scheduled to open at Caledonia on R&S in the spring of 2001. B&P and R&S insist that, given the current switching arrangements, the interchange tracks at Silver Springs, which (B&P and R&S claim) have very limited capacity and cannot effectively handle the fragmented interchange traffic moving today, certainly will not be able to handle any substantial additional volumes.

trackage rights;¹⁶⁶ would allow the restoration of reliable service between Buffalo and Silver Springs; would allow for the enhanced rail competition in the Rochester area that was anticipated in Conrail Dec. No. 89; would ameliorate the harms the Conrail transaction has caused B&P and R&S, and also their customers; would allow the full realization of the benefits of the R&S/LAL connection at Genesee Junction Yard that was created in Conrail Dec. No. 89;¹⁶⁷ and, by restoring service levels to their pre-transaction levels without imposing any undue burden on NS, would provide a simple and fair remedy to a serious service disruption solely attributable to NS' acquisition of Conrail's assets.

The NS-2 Reply. NS urges the denial of the B&P/R&S trackage rights request. NS concedes that its operations have been marred by service difficulties but nevertheless contends: that the B&P/R&S request is inconsistent with the settlement agreement entered into by GWI on behalf of itself and its subsidiaries;¹⁶⁸ that, in any event, NS' service has improved significantly in recent months; that, furthermore, NS has taken a number of steps to resolve the operational problems respecting the movement of R&S's traffic;¹⁶⁹ and that imposition of the requested condition would create additional operational hardships for all carriers now on the Southern Tier line and in the Buffalo terminal area. NS further contends: that it is not appropriate to impose post-approval conditions on applicants to a rail consolidation merely to address service difficulties encountered by the applicants; that, rather, the only proper basis for imposing post-approval conditions as part of the oversight of a consolidation is to rectify competitive harms caused by the consolidation; that, however, the Conrail transaction has not inflicted

¹⁶⁶ B&P and R&S contemplate that R&S would operate a daily train in each direction that would handle all of the traffic moving between Buffalo and Silver Springs for all carriers. B&P and R&S add that CP has indicated that it would likely be willing to discontinue its haulage train and to accept R&S and LAL traffic at Buffalo.

¹⁶⁷ LAL, which has indicated that it supports R&S's efforts to improve the flow of traffic through Silver Springs, agrees that R&S's proposal "to consolidate all traffic into a regularly scheduled R&S train operating between Buffalo and Rochester via the Southern Tier Line has merit." See BPRR-2/RSR-2, Ex. D.

¹⁶⁸ The reference is to the 1997 settlement agreement reflected in the previously mentioned B&P/R&S letter filed October 21, 1997. NS claims that the relief now sought by B&P and R&S is relief that these parties "specifically agreed in [the] settlement agreement not to seek."

¹⁶⁹ NS indicates: that it recently instituted, in coordination with CP, a new haulage service for R&S traffic between Buffalo and Silver Springs; and that it has endorsed R&S's request for New York State funding to construct certain infrastructure improvements at Silver Springs.

competitive harms on B&P and R&S; and that, as respects R&S traffic, R&S has, by virtue of the R&S/CSX routing via Rochester, a competitive alternative to the R&S/CP routing via Silver Springs.

The BPRR-4/RSR-4 Rebuttal. (1) B&P and R&S contend that the trackage rights condition they seek is not inconsistent with the 1997 NS/GWI “letter agreement” under which GWI agreed “to actively support the Conrail acquisition.” B&P and R&S are adamant that the 1997 agreement does not obligate GWI to remain quiet in the face of acts and omissions by NS that defeat the best efforts of the GWI carriers to provide competitive service.¹⁷⁰

(2) B&P and R&S contend that the relief they seek, and the basis for it, are within the scope of the Conrail general oversight proceeding. B&P and R&S, which reject the notion that “service difficulties” are unrelated to competition, insist that the very essence of their complaint is that, because of NS service deficiencies that have persisted for over a year after the Split Date, B&P and R&S are unable to compete for traffic as effectively as they previously could.

(3) B&P and R&S contend that the new NS Buffalo-Silver Springs train is not an effective remedy for the operating problems at Silver Springs. B&P and R&S explain: that the new service implemented by NS is not haulage service, but is, rather, a local service handling traffic moving between NS and LAL; that this new service is not handling any traffic from/to R&S customers, nor is it handling any of the traffic currently being handled for R&S in CP haulage trains for interchange with B&P and the Canadian carriers in Buffalo; and that this new service will not eliminate any of the problems caused by having three carriers operating at Silver Springs instead of the two that operated there before the Split Date. B&P and R&S add that, in any event, in view of the financial challenges facing NS as a result of the Conrail transaction, there is reason to fear that NS’ efforts to reduce operating costs will result in the early elimination of this service.

(4) B&P and R&S contend that prospective infrastructure changes at Silver Springs will not cure the interchange obstacles at that location. B&P and R&S explain: that there is no room at Silver Springs for additional interchange tracks where R&S connects with the Southern Tier line; that the proposed infrastructure project (the one involving New York State funding) will not address this problem;¹⁷¹ and that, in any event, the sought funds have not yet been allocated, and construction is 2 years away at the earliest.

¹⁷⁰ See BPRR-4/RSR-4, App. A (a copy of the 1997 agreement).

¹⁷¹ B&P and R&S indicate that this project involves the acquisition of property to allow R&S to construct a connection that will allow for a progressive move to/from Buffalo, and allow for the more efficient handling of the unit coal trains currently moving from NS to R&S.

(5) B&P and R&S reject as frivolous the argument that a single CSX outlet for R&S/LAL traffic ought to suffice. B&P and R&S argue: that, prior to the Conrail transaction, R&S's customers had the alternatives of using an R&S/Conrail routing via Rochester or an R&S/CP haulage routing via Silver Springs; that the Conrail transaction was supposed to improve routing alternatives for R&S's customers by introducing an R&S/NS routing via Silver Springs; and that, if (because of service difficulties at Silver Springs) R&S's customers are left with only an R&S/CSX routing via Rochester, they will actually have fewer competitive alternatives post-transaction than they had pre-transaction. And, B&P and R&S add, the service difficulties at Silver Springs have frustrated realization of the very purpose of the condition creating the R&S/LAL connection at Genesee Junction Yard.

(6) B&P and R&S contend that the requested condition would neither benefit R&S economically nor harm NS operationally. B&P and R&S explain: that, because the traffic has heretofore moved between Buffalo and Silver Springs in CP haulage service, the sought trackage rights would not give R&S more of an "economic piece" of the traffic; that, rather, the only change would be that R&S, instead of paying a haulage fee to CP, would bear the cost of handling the traffic; and that this change would not cause the additional operating hardships suggested by NS, but, rather, by eliminating some CP moves in Buffalo, would actually provide operating efficiencies for NS.

The NS-4 Response. (1) NS contends that it is not appropriate to impose conditions on a transaction that do not address competitive harms wrought by the structure of that transaction; and, NS adds, temporary service difficulties, though not to be taken lightly, do not call for the imposition of permanent conditions. NS further contends that B&P and R&S have demonstrated neither a loss in their ability to provide essential services nor a transaction-related loss in their competitive options. The fact of the matter, NS maintains, is that not only has R&S not lost any competitive options, it is actually in a better position as a result of the Conrail transaction (because, NS explains, R&S now has a connection with LAL at Genesee Junction Yard, and also the option of direct interchange with NS at Silver Springs).

(2) NS insists that it is complying with the commitments it made in the 1997 letter agreement. NS explains that, when it completes the relocation of its main line in Erie, PA, it will follow through on its 1997 commitment to use its best efforts to build, in Erie, a connection that will allow for a direct interchange between NS and Allegheny & Eastern Railroad (A&E, another GWI subsidiary). NS further explains that it has already followed through on its 1997 commitment to perform haulage for R&S between Buffalo and Silver Springs; and, NS adds, although NS' Buffalo-Silver Springs service presently consists largely of direct interchange traffic, NS remains willing and able to perform haulage for R&S between Buffalo and Silver Springs should R&S request it.

(3) NS insists that B&P/R&S's complaint respecting the Silver Springs infrastructure is not transaction-related. The capacity of the Silver Springs infrastructure, NS explains, is the same now as it was before the Split Date; and, NS adds, just as three carriers (Conrail, CP, and R&S) previously had access to Silver Springs, three carriers (NS, CP, and R&S) have access to Silver Springs today.

(4) NS insists that the anticipated connection to be constructed at Silver Springs will, in fact, smooth operations at that location, in that it will allow for the more efficient handling both of the unit coal trains currently moving from NS to R&S and also of the unit salt trains anticipated to originate on G&W.

(5) NS warns that the trackage rights sought by R&S will not solve, and indeed will make worse, congestion problems on the Southern Tier line and in the Buffalo terminal.

(6) NS argues that the real motivation for the trackage rights sought by R&S is to establish a direct B&P/R&S link via the Southern Tier line, so as to better position B&P and R&S to seek certain traffic that they anticipate will develop in the future.

CANADIAN PACIFIC (CPR, SOO, D&H, AND ST.L&H). Because CP, by letter filed October 22, 1997, indicated that it had reached a settlement with the Conrail applicants and therefore supported the Conrail application, CP's interests vis-à-vis the Conrail transaction were not addressed in the decision approving that transaction. CP indicates, however, that its interests (in particular, the interests of its D&H subsidiary)¹⁷² were implicated, in one way or another, by five matters¹⁷³ mentioned in that decision: the open gateways commitment,¹⁷⁴ the representations

¹⁷² The D&H network runs from Rouses Point (on the U.S.-Canadian border south of Montreal) south to Albany, NY, then southwest to Binghamton, NY, and then: south to Scranton, PA, Taylor, PA, Sunbury, PA, Harrisburg, PA, Allentown, PA, Philadelphia, PA, Washington, DC, and Newark, NJ; and northwest to Buffalo, NY.

¹⁷³ CP refers to these five matters as "conditions."

¹⁷⁴ See Conrail Dec. No. 89, slip op. at 56: "CSX and NS have agreed to keep open all major interchanges with other carriers as long as they are economically efficient." See also Conrail Dec. No. 89, slip op. at 251: "Section III(D) of the NITL agreement clarifies that CSX and NS anticipate that all major interchanges with other carriers will be kept open as long as they are economically efficient."

condition;¹⁷⁵ the East-of-the-Hudson condition;¹⁷⁶ the Buffalo switching fees condition;¹⁷⁷ and the “Belt Line Principle” assertion.¹⁷⁸

The CP Comments. CP contends that the division of Conrail between CSX and NS has had substantial negative impacts on D&H, and has cost CP millions of dollars in increased operating costs. CP contends, in particular: that the Conrail transaction has resulted in extensive service disruptions on the former Conrail lines now operated by CSX and NS; that the Conrail transaction has also resulted in substantial changes in traffic flows through new gateways; and that, in addition, the settlement agreements negotiated by CP have not yielded the benefits anticipated by the parties.

CP insists that, following the Split Date, CSX and NS afforded inadequate service to D&H traffic. CP does not allege service discrimination by CSX or NS; CP alleges, rather, that it was adversely impacted by their general service failures. (1) *As Respects CSX*. CP indicates that

¹⁷⁵ See Conrail Dec. No. 89, slip op. at 176, ordering paragraph 19: “Applicants must adhere to all of the representations they made during the course of this proceeding, whether or not such representations are specifically referenced in this decision.” See also Conrail Dec. No. 89, slip op. at 17 n.26: “We think it appropriate to note, and to emphasize, that CSX and NS will be required to adhere to all of the representations made on the record during the course of this proceeding, whether or not such representations are specifically referenced in this decision.”

¹⁷⁶ See Conrail Dec. No. 89, slip op. at 177, ordering paragraph 28: “CSX must attempt to negotiate, with CP, an agreement pursuant to which CSX will grant CP either haulage rights unrestricted as to commodity and geographic scope, or trackage rights unrestricted as to commodity and geographic scope, over the east-of-the-Hudson Conrail line that runs between Selkirk (near Albany) and Fresh Pond (in Queens), under terms agreeable to CSX and CP, taking into account the investment that needs to continue to be made to the line.” See also Conrail Dec. No. 89, slip op. at 18 (item 10), 82-83; Conrail Dec. No. 99; Conrail Dec. No. 102; Conrail Dec. No. 109; Conrail Dec. No. 112; Conrail Dec. No. 123; Conrail Dec. No. 132; Conrail Dec. No. 133; Conrail Dec. No. 134.

¹⁷⁷ See Conrail Dec. No. 89, slip op. at 178, ordering paragraph 32: “CSX must adhere to its agreements with CN and CP that provide for lower switching fees in the Buffalo area and increased access to these carriers for cross-border, truck-competitive traffic.” See also Conrail Dec. No. 89, slip op. at 19 (item 18), 86, 88 (item 1).

¹⁷⁸ See Conrail Dec. No. 89, slip op. at 179, ordering paragraph 41: “The Belt Line Principle . . . will continue to have, after implementation of the CSX/NS/CR transaction, the effect, if any, that it presently has. Nothing in this decision should be taken to preempt that principle in any way.” See also Conrail Dec. No. 89, slip op. at 19 (item 27), 105, 220-21.

its most important grievance against CSX concerns intermodal traffic originating out of Port Newark/Port Elizabeth, which (prior to the Split Date) was transported by Conrail up the west side of the Hudson River and interchanged to D&H at Selkirk, NY. CP contends that, shortly after the Split Date, this service “virtually collapsed” due in large part to congestion in Selkirk Yard.¹⁷⁹ (2) *As Respects NS*. CP indicates: that traffic moving between D&H and the North Jersey Shared Assets Area (North Jersey SAA) is interchanged with NS either at Binghamton or at Allentown; that traffic moving between D&H and NS shortlines is interchanged with NS either at Binghamton, at Allentown, or at Harrisburg; and that traffic moving between D&H and the South Jersey Shared Assets Area (South Jersey SAA) is interchanged with NS at Allentown. CP contends that, on account of NS’ post-Split Date service problems, D&H was unable to attract or keep a significant amount of this traffic. CP adds: that, as the result of the NS service failures, CP and NS modified their operations to allow CP to directly serve some NS shortlines; that, in particular, CP was allowed to provide direct service to the SEDACOG Railroad (at Sunbury)¹⁸⁰ and to RBMN at Taylor; that, as NS service began to recover, D&H discovered that what little traffic it had moving to or from the Shared Assets Areas failed to participate in this recovery; and that, in addition, upon returning to its former interchange points at Binghamton, Allentown, and Harrisburg, CP service to/from the NS shortlines declined despite the general improvement of NS operations.

CP argues that, although (as a practical matter) the Conrail transaction cannot be undone, we may be required to impose additional conditions if we wish to meet the policy goals we sought to achieve when we approved that transaction in the first instance. CP therefore asks that we continue our oversight of the various issues described below while CP attempts to negotiate resolutions of these issues with CSX and NS. CP states that, except as indicated below, it does not believe that additional or modified conditions are necessary at this time. CP insists, however, that, if it is unable to reach an acceptable resolution of the issues described below, it may be compelled to petition the Board for relief.¹⁸¹

¹⁷⁹ References to “Selkirk, NY” are intended to refer to “Selkirk Yard” (Selkirk Yard is located near Selkirk, NY; see Conrail Dec. No. 89, slip op. at 317).

¹⁸⁰ The “SEDACOG Railroad” referenced by CP appears to be the five “North Shore Affiliates” (NSHR, NBER, LVRR, SVRR, and UCIR) that have direct connections to NS’ (formerly Conrail’s) Harrisburg-Buffalo line.

¹⁸¹ The tenor of CP’s comments suggests (although this, admittedly, is not entirely clear) that the only items of relief CP actually seeks at the present time are: a statement in the nature of a declaratory order that Oak Island is a CP/Conrail gateway within the scope of the open gateways commitment; and a statement in the nature of a declaratory order that Philadelphia is a CP/Conrail gateway within the scope of the open gateways commitment.

CP/CSX Traffic Between Port Elizabeth/Port Newark, NJ, And Selkirk, NY. CP contends: that this traffic is currently interchanged, at Selkirk, NY, between CSX and CP; that, however, CP intends to negotiate changes in its operating relationship with CSX that would allow this traffic to be interchanged, at Oak Island, NJ,¹⁸² between Conrail and CP;¹⁸³ and that the compensation normally paid by CP to CSX with respect to this traffic (for the CSX movement between Port Elizabeth/Port Newark and Selkirk) should be reduced by an amount equal to the “avoided cost” CSX otherwise would have incurred in transporting this traffic between Port Newark/Port Elizabeth and Selkirk. CP insists: that the contemplated operational change would neither create significant operating problems for CSX¹⁸⁴ nor hamper CSX’s ability to obtain the benefits of the Conrail transaction, but, rather, would result in improved service to the shipping public and would remedy a harm (the loss of traffic in this corridor) that is a direct result of the Conrail transaction; that, furthermore, the contemplated operational change could also create an opportunity for moving increased volumes through this corridor; and that, in addition, the transfer of this traffic from CSX to CP would help relieve CSX congestion on its west-of-the-Hudson line and in Selkirk Yard. CP apparently asks (although this is not entirely clear) that we retain oversight jurisdiction over this issue in the event the parties are unable to reach agreement.

CP adds, however, that, to fully realize the benefits of this contemplated operational change, the interchange between CP and Conrail at Oak Island must be recognized as one of the gateways that must remain open in accordance with Conrail Dec. No. 89. CP, which insists (in essence) that the Oak Island gateway should be regarded as a “major interchange” subject to the open gateways commitment, argues: that, as respects intermodal traffic, the CP/Conrail gateway at Oak Island was first established in 1979 pursuant to an agreement between a D&H predecessor and Conrail; that the 1979 agreement’s interchange requirement (i.e., the requirement that Conrail interchange intermodal traffic with D&H at Oak Island) has never been removed; that,

¹⁸² The “Oak Island” referenced by CP is “Oak Island Yard,” which is located in Newark, NJ, in the North Jersey SAA. See Conrail Dec. No. 89, slip op. at 325 (item 6); CSX-2 at 28. CP contends, in essence, that the traffic now transported by CSX from Port Elizabeth/Port Newark to Selkirk should instead be transported by CP from Oak Island to Selkirk (via Allentown, Scranton, and Binghamton), and then on to Toronto and Montreal.

¹⁸³ CP refers to an anticipated *Conrail/CP* interchange at Oak Island. See CP’s comments at 9. CSX indicates, however, that the post-Split Date Conrail (i.e., the “continuing Conrail”) does not interchange with other railroads; the railroading activities of the continuing Conrail, CSX explains, are limited to acting as agent for CSX and NS. CSX therefore assumes, in essence, that the Oak Island interchange that CP has in mind would be a *CSX/CP* interchange. See CSX-2 at 28 n.18.

¹⁸⁴ CP indicates that, because it operates an intermodal facility at Oak Island Yard, it already has access to that yard.

therefore, this interchange requirement remains in force today; and that it follows that Oak Island is one of the “major interchanges” subject to the open gateways commitment. CP therefore asks that we modify the open gateways commitment by specifically recognizing Oak Island as an interchange within the scope of that commitment (i.e., CP asks, in essence, that we state that Oak Island is, for purposes of the open gateways commitment, a “major [CP/Conrail] interchange” that must be kept “open” as long as it is “economically efficient”).

CP/NS Traffic Between Binghamton/Allentown And The North Jersey SAA. CP contends: that, although NS service has improved, CP remains unable to take advantage of its settlement agreement rights¹⁸⁵ because NS service from Binghamton and Allentown to the North Jersey SAA has been too poor to allow CP to compete effectively; that this is more a function of the way NS service into the North Jersey SAA has been structured, and less a function of any particular failure of NS to provide service; and that, to provide a competitive service sufficient to draw customers from other carriers, CP should be allowed to carry this traffic itself to Oak Island and there interchange with Conrail just as CSX and NS do. CP adds that it is currently discussing with NS this revised operating plan, which (CP insists) would benefit NS because CP is willing to continue to pay the applicable amount due under the existing CP/NS joint-line arrangement less NS’ “avoided costs.” CP asks that we retain oversight jurisdiction over this issue in the event the parties are unable to reach agreement.

CP/NS Traffic Between Allentown And The South Jersey SAA. CP contends: that, under the present arrangement, NS takes this traffic to Philadelphia where it is transferred to Conrail for delivery to customers; that, although NS service has improved, NS’ Allentown-South Jersey SAA service remains inefficient and poor; and that, to improve service and increase revenues for all parties, traffic now interchanged between CP and NS at Allentown should instead be interchanged between CP and Conrail at Philadelphia. CP adds that it is currently discussing with NS this revised operating plan, with respect to which (CP notes) CP is willing to continue to pay NS its normal division from Allentown less its “avoided costs.” CP asks that we retain oversight jurisdiction over this issue in the event the parties are unable to reach agreement.

CP also indicates that, under the 1979 agreement between a D&H predecessor and Conrail, CP has the right to interchange traffic directly with Conrail in Philadelphia. CP therefore asks that we modify the open gateways commitment by specifically recognizing Philadelphia as a gateway within the scope of that commitment (i.e., CP asks, in essence, that we state that Philadelphia is, for purposes of the open gateways commitment, a “major [CP/Conrail] interchange” that must be kept “open” as long as it is “economically efficient”).

¹⁸⁵ The reference is apparently to CP’s settlement agreement with NS.

CP/NS Traffic Between CP And Certain NS Shortlines. CP contends: that the CP/NS settlement agreement allowed CP to gain commercial access to certain shortlines along Conrail lines acquired by NS;¹⁸⁶ that, however, there have been significant service issues regarding traffic interchanged by CP to NS for movement to these shortlines; that, for this traffic, the interchanges at Binghamton, Allentown, and Harrisburg simply do not work; that it would be better for all concerned if CP could interchange traffic with these shortlines either directly or at nearby mutually convenient locations; and that this would improve service for all parties and would relieve NS of its obligation to provide low-margin short-distance switching-type service to these shortlines. CP adds that it is willing to reimburse NS for the lost contribution NS would have received from handling CP traffic from the previous points of interchange (Binghamton, Allentown, and Harrisburg) to these shortlines. CP, which apparently intends to discuss this proposal with NS, apparently asks (although this is not entirely clear) that we retain oversight jurisdiction over this issue in the event the parties are unable to reach agreement.

The Staten Island Railway Line. CP indicates: that the line formerly operated by the Staten Island Railway runs approximately 9 miles from a connection with Conrail's Lehigh Line in Union County, NJ, to Arlington Yard on the northwest corner of Staten Island, NY; that, although the line was once owned by CSX and leased to the Staten Island Railway Corporation (SIRC),¹⁸⁷ the line has been abandoned for several years and ownership thereof has been transferred to NYCEDC (which now owns the New York portion of the line) and to the State of New Jersey (which now owns the New Jersey portion of the line); that, however, in connection with recent demands for reinstatement of rail service, the governors of New York and New Jersey have entered into agreements to reestablish the rail connections needed to bring this line back into operation; that it is anticipated that service will be reinstated within the next 5 years; and that, if and when service is reinstated, CP would like to have an opportunity to be one of the carriers providing service to the Staten Island Railway. CP, which adds that we may have to impose a condition giving CP access to the Staten Island Railway, apparently asks (although this is not entirely clear) that we retain oversight jurisdiction over this issue in the event the parties are unable to reach agreement.¹⁸⁸

¹⁸⁶ CP indicates that, although its trains run by many of the connections to these shortlines, "paper barriers" imposed by Conrail when these shortlines were created make it impossible for CP to interchange directly with these shortlines.

¹⁸⁷ CP indicates that SIRC was owned by the New York Susquehanna & Western Railroad (NYS&W), which itself was owned by the Delaware Otsego Corporation (DOC).

¹⁸⁸ CP is apparently suggesting (although this too is not entirely clear) that CSX and/or NS have certain rights with respect to the Staten Island Railway line, either by virtue of CSX's former ownership interest or by virtue of the CSX/NS relationship with DOC. See Conrail Dec.
(continued...)

East-Of-The-Hudson Issues. CP indicates that, pursuant to agreements negotiated in connection with the East-of-the-Hudson condition, CP can now operate: over CSX lines between Albany, NY, and Poughkeepsie, NY; over MNCR lines between Poughkeepsie, NY, and High Bridge, Bronx County, NY; over the “Oak Point Link” (owned by New York State) between High Bridge and CSX’s Oak Point Yard (also located in Bronx County, NY); and in CSX’s Oak Point Yard. CP further indicates: that it is now transporting, between Albany and Oak Point Yard, 24 cars a day 3 days a week; that it expects this traffic to increase significantly; that CP and CSX are working with MNCR and the State of New York to improve clearances on MNCR’s line between Poughkeepsie and High Bridge (which will allow CP and CSX to initiate intermodal service); and that CP and CSX are in negotiations with MNCR over issues relating to the movement of 286,000 pound cars. CP adds, however: that it is still having difficulties with CSX field personnel; that there continue to be significant issues relating to misrouting and delivery/pick-up of CP cars; that, although CP is not alleging service discrimination, the poor switching service by CSX is making it difficult for CP to win new customers; and (apparently) that, although CP and CSX have agreed that CP can interchange traffic directly with the New York & Atlantic Railway (NYAR)¹⁸⁹ at Fresh Pond, CP has not yet been able to “formalize” the CP/NYAR service that exists today. CP, although confident that it can resolve its East-of-the-Hudson issues with CSX without Board intervention, asks that we retain jurisdiction over and continue to monitor the East-of-the-Hudson situation. Continued Board oversight, CP insists, is necessary to ensure continued cooperation by CSX.

The Buffalo Switching Fees Condition. CP indicates that the Buffalo switching fees condition has been successfully implemented and that CP has no issues with regard to it. CP apparently asks (although this is not entirely clear) that we retain oversight jurisdiction over the Buffalo switching fees condition in the event that any issues arise with respect to it.

The SK Yard-Frontier Yard Interchange Issue. CP indicates: that, prior to the Conrail transaction, CP and Conrail interchanged traffic in Buffalo, NY, between CP’s SK Yard and Conrail’s Frontier Yard (the two yards are located about 2 miles apart); that, by agreement, CP and Conrail took turns transporting this traffic over the Conrail tracks connecting the two yards (during a given 6-month period CP would transport traffic between the two yards; during the next 6-month period Conrail would transport traffic between the two yards; and so on); that, in connection with the Conrail transaction, CSX acquired Frontier Yard, NS acquired the

¹⁸⁸(...continued)

No. 89, slip op. at 123 & n.195, 298 & n.490, 328 n.546 (references to the CSX/NS-DOC relationship).

¹⁸⁹ See Conrail Dec. No. 89, slip op. at 217-18 (discussion of operations conducted by NYAR).

connecting tracks, and CP retained trackage rights over the connecting tracks, but (and this is where the problem arises) CSX did not acquire trackage rights over the connecting tracks; that, since the Split Date, all of the traffic moving between the two yards has been transported by CP and none of this traffic has been transported by CSX; and that, therefore, CSX, although it is the successor to Conrail at Frontier Yard, has not complied, because it has not been able to comply, with its (formerly Conrail's) obligations with respect to the movement of traffic between the two yards. CP further indicates: that the failure to provide CSX with trackage rights over the connecting tracks, which did not become apparent (not to CP, anyway) until after the Split Date, was apparently an oversight on the part of CSX and NS; that this failure, by making it impossible for CSX to honor its obligations with respect to the movement of CP/CSX interchange traffic between the two yards and by effectively imposing upon CP the entire burden of moving this traffic between the two yards, has caused serious service difficulties for CP; and that, either because CSX has chosen not to seek the needed trackage rights or because NS has chosen not to grant the needed trackage rights, the failure to provide CSX with trackage rights over the connecting tracks has not yet been cured. CP adds that, although it is currently attempting to resolve this situation with CSX and NS, it may be necessary (if its efforts do not succeed) to request that we either: (1) require NS to convey the necessary trackage rights to CSX; or (2) require CSX to reimburse CP the costs CP now incurs in providing interchange service to CSX at Frontier Yard for 6 months out of the year. CP therefore apparently asks (although this is not entirely clear) that we retain oversight jurisdiction over the SK Yard/Frontier Yard interchange issue in the event the parties are unable to reach agreement.¹⁹⁰

¹⁹⁰ CP also argues that, in failing to provide CSX with trackage rights over the connecting tracks, CSX and/or NS arguably violated 49 U.S.C. 10742 (which, *inter alia*, requires a rail carrier to “provide reasonable, proper, and equal facilities that are within its power to provide for the interchange of traffic” between itself and another rail carrier). CP adds: “For this reason, to the extent[] necessary, CPR requests that CPR [presumably this is intended to reference the Board] compel CSXT to compensate CPR for this interchange service pursuant to this section should the Board determine that it does not wish to require NS to convey trackage rights to CSXT to enable it to gain access to CPR’s SK Yard.” See CP’s comments at 21 n.12. Although a literal reading of the cited footnote appears to indicate that CP is asking us to issue an order requiring CSX to compensate CP for the SK Yard/Frontier Yard interchange service, the tenor of CP’s other statements respecting the SK Yard/Frontier Yard interchange issue indicates (and we therefore conclude) that CP is not, at this time, asking us to issue any such order. See CP’s comments at 20, lines 8-14: “CPR is currently attempting to resolve this situation with NS and CSXT, however, if these efforts are not successful it may be necessary for CPR to request the Board to impose an additional conditions [sic] requiring NS to convey the necessary trackage rights to CSXT to allow it to come to SK Yard for the purpose of interchanging traffic with CPR. In the alternative, it may be necessary for CPR to ask the Board to require CSXT to reimburse
(continued...)

The Philadelphia Belt Line. CP indicates: that it has access to Philadelphia and is a participant in the Philadelphia Belt Line Agreement; that it has, pursuant to the terms of that agreement, access to shippers who have access to the Philadelphia Belt Line Railroad; and that, thus far, CSX and NS appear to be adhering to the Philadelphia Belt Line principle and have not interfered with any right of access enjoyed by CP under it. CP apparently asks (although this is not entirely clear) that we retain oversight jurisdiction over this matter in the event that any issues arise with respect to it.

The CSX-2 Reply. In General. CSX argues, in essence, that CP's arguments in the general oversight proceeding should be regarded as impermissible attempts to expand on the relief CP received under the settlement agreements it executed during the pendency of the Conrail proceeding.

CP/CSX Traffic Between Port Elizabeth/Port Newark, NJ, And Selkirk, NY. CSX opposes CP's plan to relocate, to Oak Island Yard (in the North Jersey SAA), the CSX/CP interchange now conducted at Selkirk Yard (south of Albany, NY). (1) *The Congestion Issue.* CSX insists that Selkirk is presently working quite well; CSX intimates, in essence, that congestion is not now a problem at Selkirk. And, CSX adds, moving the CSX/CP interchange to Oak Island would create problems at that location. CSX explains: that Oak Island, which is in the North Jersey SAA, is used by the continuing Conrail,¹⁹¹ which, to avoid congestion throughout the North Jersey SAA, carries on certain operations for CSX and NS; that, however, there are capacity constraints at Oak Island and throughout the North Jersey SAA; and that the transfer of the CSX/CP interchange to Oak Island would impact on these capacity constraints. (2) *The Gateway Issue.* CSX contends, in essence, that, for purposes of the open gateways commitment, Oak Island is not and never was a "major [CP/Conrail] interchange" that must be kept "open" as long as it is "economically efficient." CSX explains: that the actual CP/Conrail interchange took place at Selkirk, not at Oak Island;¹⁹² that, therefore, the CP/Conrail interchange at Oak Island was a "paper" gateway only; that, in addition, CP's paper rights to an Oak Island

¹⁹⁰(...continued)

CPR the costs it now incurs in providing interchange service to CSXT at Frontier Yard for six months out the year."

¹⁹¹ Oak Island is also used by CSX and NS.

¹⁹² CSX does not claim that no traffic whatsoever was ever interchanged by CP and Conrail at Oak Island. CSX claims, rather, that no established pattern of interchange as to any commodity or type of service ever developed at Oak Island between CP (or any CP predecessor), on the one hand, and, on the other hand, Conrail.

interchange with Conrail were restricted to “intermodal” movements only,¹⁹³ and that CP had no right to interchange at Oak Island with any carrier other than Conrail.

The Staten Island Railway Line. CSX contends, in essence, that the Staten Island Railway issue is not related to the Conrail transaction; the Staten Island Railway, CSX explains, was not being operated at the time of that transaction. CSX further contends that there is no competitive justification for the relief contemplated by CP; a revived Staten Island Railway, CSX explains, will have two Class I connections (CSX indicates that it is presently contemplated that a revived Staten Island Railway will connect with a Conrail line in the North Jersey SAA, which will provide access to CSX and NS).¹⁹⁴

East-Of-The-Hudson Issues. (1) *In General.* CSX indicates that it believes it has treated CP fairly, and adds that it has its own set of complaints with respect to the day-to-day CSX/CP East-of-the-Hudson relationship. (2) *Access To NYAR At Fresh Pond.* CSX contends: that, pursuant to a CSX/CP agreement executed in July 1999, CP can already conduct trackage rights operations between Oak Point Yard (in the Bronx) and Fresh Pond Yard (in Queens); and that, therefore, CSX cannot understand CP’s claim, see CP’s comments at 18-19, that an “additional condition required by CPR in connection with the East Side of the Hudson would be a modification of the Board’s trackage rights grant expressly authorizing CPR direct access to New York and Atlantic at Fresh Pond Junction.” CSX adds that, because all of the interchange facilities at Fresh Pond that are presently used by CP are proprietary to NYAR, any arrangements necessary for the use of these facilities are a matter between CP and NYAR as long as they have no impact on the CSX/NYAR interchange.

The SK Yard-Frontier Yard Interchange Issue. (1) CSX contends, in essence, that, if CP had an issue with the allocation of Conrail’s assets that was provided for in the Conrail application, CP should have raised that issue in the Conrail proceeding (i.e., in connection with the settlement agreements it entered into with CSX and NS). (2) CSX further contends that, as far as it is aware, the only *written* arrangements concerning the interchange of traffic at Frontier Yard require CP¹⁹⁵ to handle *all* interchange traffic moving between Frontier Yard and SK Yard. CSX insists that it is not aware of any written agreement respecting an alternating 6 months’ interchange pattern; what was involved, CSX suggests, may have been only a local practice.

¹⁹³ CSX notes, however, that these “intermodal” movements embraced “bulk transfer operations” as well as “piggy back.”

¹⁹⁴ CSX warns that the insertion of a third carrier into the North Jersey SAA would fundamentally restructure the Conrail transaction.

¹⁹⁵ The written arrangements were entered into by a CP predecessor.

The NS-2 Reply. In General. NS contends that CP's request for conditions is a blatant breach of its settlement agreements with NS and CSX. Any consideration of such requests, NS warns, would thwart the Board's policy of encouraging the resolution of disputes by negotiated agreement. And, NS adds, we should not impose permanent changes as a remedy for temporary implementation problems.

CP/CSX Traffic Between Port Elizabeth/Port Newark, NJ, And Selkirk, NY. NS agrees that movement of the CP/CSX interchange from Selkirk to Oak Island would have an adverse effect on operations in the North Jersey SAA.

CP/NS Traffic From/To The Two Jersey SAAs. NS objects to CP's proposals: to interchange at Oak Island CP/NS traffic moving between Binghamton/Allentown and the North Jersey SAA; and to interchange at Philadelphia CP/NS traffic moving between Allentown and the South Jersey SAA. As respects these proposals, NS contends: that, to the extent they are based on temporary implementation problems, there is no reason to require a permanent change; that, to the extent they are based on an allegedly "better mousetrap" concept, they are contrary to the CP/NS settlement agreement and lack the required basis of adverse effect on competition (there is no indication, NS insists, that the present situation is worse than the pre-transaction situation); and that, to the extent they are based on CP's desire to create "a competitive service sufficient to draw customers from other carriers," there is no suggestion that the Conrail transaction created a competitive problem. As respects the Oak Island proposal, NS adds that CP's Oak Island interchange rights vis-à-vis Conrail extended to intermodal traffic only.¹⁹⁶

CP/NS Traffic Between CP And Certain NS Shortlines. NS objects to CP's proposal to eliminate NS from the route and allow direct interchange between CP and certain shortlines. (1) NS insists that CP enjoys commercial access to the shortlines only on account of the CP/NS settlement agreement. CP, NS argues, wants the benefit of that agreement but without the obligation that agreement imposed on CP to refrain from seeking conditions. And, NS adds, CP's request would also repudiate the terms of the settlement by which CP and NS specifically agreed to interchanges at Binghamton, Allentown, and Harrisburg. (2) NS insists that CP's request has nothing to do with remedying any asserted anticompetitive effects of the Conrail transaction. (3) NS argues that CP has not even claimed that direct interchange is necessary to protect any "essential services" provided by CP. (4) NS contends that there are valid contractual provisions (over and above the CP/NS settlement agreement) that prohibit direct interchange between CP and the shortlines.

¹⁹⁶ NS has not specifically addressed CP's request that we issue relief in the nature of a declaratory order to the effect that Philadelphia is, for purposes of the open gateways commitment, a "major [CP/Conrail] interchange" that must be kept "open" as long as it is "economically efficient."

The SK Yard-Frontier Yard Interchange Issue. NS insists that, although what the Conrail applicants proposed to do in Buffalo was no secret, CP never raised the SK Yard-Frontier Yard interchange issue in its settlement discussions (at least not in its settlement discussions with NS). NS indicates that, as far as it is aware, there was no formal agreement between CP and Conrail to take turns delivering traffic; there was only, NS claims, an “interline service agreement” setting forth operating standards for train service between Conrail and CP in Buffalo, which (NS contends) was not intended to be a binding legal contract and which (NS further contends) specifically contemplated termination upon any material change in the operations of either carrier.

HOUSATONIC RAILROAD COMPANY. HRRC’s interests vis-à-vis the Conrail transaction were addressed in the decision approving that transaction. See Conrail Dec. No. 89, slip op. at 101, 207-08.

The HRRC-15 Comments. HRRC notes that, although we, in the decision approving the Conrail transaction, retained jurisdiction to impose additional conditions and/or to take other action if and to the extent we determined it was necessary to address harms caused by the Conrail transaction, we did not, in that decision, establish a specific procedural schedule for requesting additional conditions or other relief. HRRC further notes that, in the decision instituting the Conrail general oversight proceeding, we directed interested persons to file, by July 14, 2000, comments respecting the progress of implementation of the Conrail transaction and the workings of the various conditions imposed thereon. HRRC indicates that, although July 14th appears to be the due date for filing comments respecting the progress reports filed by CSX and NS on June 1st, HRRC is not certain: (a) whether July 14th is also the due date for filing requests for the imposition of additional conditions or other relief; and/or (b) whether the filing of comments by July 14th is a prerequisite to the later filing of additional comments and/or requests for the imposition of additional conditions or other relief. HRRC asks: (1) that we clarify these matters; and (2) that, if July 14th was indeed the due date for filing requests for the imposition of additional conditions or other relief, we grant HRRC a 6-month extension, or such other extension as we deem appropriate, to file further comments and requests for additional conditions or other relief.¹⁹⁷

The NS-2 Reply. NS indicates that, based on the decision instituting the Conrail general oversight proceeding and past practice in connection with the UP/SP general oversight proceeding, it expects that oversight will be conducted on an annual basis. NS contends that any deviation from that schedule for individual parties would be unwarranted.

¹⁹⁷ HRRC indicates that, although various issues respecting the CSX/HRRC relationship have arisen, the prospects for private resolution of these issues appear good.

ILLINOIS CENTRAL RAILROAD COMPANY. IC's interests vis-à-vis the Conrail transaction were addressed in the decision approving that transaction. See Conrail Dec. No. 89, slip op. at 101-02, 209-12. See, especially, Conrail Dec. No. 89, slip op. at 178, ordering paragraph 36 ("CSX must attempt to negotiate, with IC, a resolution of the CSX/IC dispute regarding dispatching of the Leewood-Aulon line in Memphis. CSX and IC must advise us, no later than September 21, 1998, of the status of their negotiations.").

The CSX-1 Progress Report. CSX contends that it has "complied" with the Leewood-Aulon condition, and that "[t]he solution that was introduced on a trial basis is still being employed."

The IC Comments. IC insists that CSX's statement respecting the Leewood-Aulon condition is somewhat misleading. IC contends: that CSX and IC are currently engaged in certain trial procedures on the Leewood-Aulon line; that, however, delays continue to occur with unacceptable frequency; that (in IC's view) it seems apparent that something more will be needed; and that, therefore, the current trial procedures cannot be characterized as a "solution" to the problems on the Leewood-Aulon line. IC adds that, although it believes that negotiations and implementation of potential new remedies will continue, it reserves the right to have the Board address these issues if such negotiations are not productive and delays on the Leewood-Aulon line continue.

The CSX-2 Reply. CSX, which claims that IC's comments may be intended to "keep alive" the Leewood-Aulon issue, contends: that the local arrangements now in place on the Leewood-Aulon line have worked well; that, in any event, CSX intends to continue to cooperate with IC at the local level to facilitate efficient operations; and that, furthermore, CSX has offered to cooperate with IC to study whether there might be an "engineering solution" whereby additional track might be constructed at IC's expense to expand the capacity of the Leewood-Aulon line.

LIVONIA, AVON & LAKEVILLE RAILROAD CORPORATION. LAL's interests vis-à-vis the Conrail transaction were addressed in the decision approving that transaction. See Conrail Dec. No. 89, slip op. at 102-03, 214-15. See, especially, Conrail Dec. No. 89, slip op. at 180, ordering paragraph 56 (granting LAL's responsive application "to the extent necessary to permit LAL to operate across Conrail's Genesee Junction Yard to reach a connection with R&S").

The LAL Comments. LAL contends: that, in the course of the Conrail proceeding, CSX made a commitment to rehabilitate Genesee Junction Yard; that, furthermore, the CSX/LAL trackage rights agreement entered into in compliance with Conrail Dec. No. 89 requires CSX to rehabilitate and thereafter maintain the trackage to FRA Class 1 standards; that CSX has made a good faith beginning on its obligations to rehabilitate Genesee Junction Yard

(LAL indicates that CSX has completed a tie replacement program on all the yard tracks and on connecting switches at both ends of the yard); that, however, the rehabilitation project has not yet been completed (LAL indicates that, because CSX has not yet tamped and surfaced the track, there are numerous unsupported joints and down ties); and that, until the rehabilitation project is completed, there remains a threat of broken rails and other safety hazards. LAL indicates that it is hopeful that CSX will promptly complete the rehabilitation project, but wishes to reserve the right to advise the Board if the project is not completed promptly.

The CSX-2 Reply. CSX agrees that the CSX/LAL trackage rights agreement requires that the track to be used by LAL be maintained by CSX “in compliance with FRA Class 1.” CSX insists, however, that its engineering staff reports that the track is being maintained to the standards for FRA Class 1. CSX concludes that no action by the Board is required. CSX adds that, if LAL wishes to have a higher degree of maintenance performed, the CSX/LAL agreement provides that on LAL’s reasonable request CSX shall perform such maintenance at LAL’s expense.

LOUISVILLE & INDIANA RAILROAD COMPANY. Because LIRC, by letter filed October 21, 1997, indicated that it had executed two agreements with CSX and expected to execute a third as well, LIRC’s interests vis-à-vis the Conrail transaction were not addressed in the decision approving that transaction. See, however, Conrail Dec. No. 89, slip op. at 333, item 5a (a reference to LIRC).

The LIRC-3 Comments. LIRC advises: that the third agreement was subsequently executed; that, however, there have been disputes between LIRC and CSX as to the proper implementation of one of the three agreements; and that, in an effort to resolve these disputes, LIRC and CSX recently entered into a letter agreement and expect to enter soon into a definitive settlement agreement. LIRC further advises that it believes that this settlement agreement, when implemented, will resolve all outstanding issues between LIRC and CSX regarding the Conrail transaction.

METRO-NORTH COMMUTER RAILROAD COMPANY. MNCR’s interests vis-à-vis the Conrail transaction were addressed in the decision approving that transaction. See Conrail Dec. No. 89, slip op. at 83 n.130, 96-97, 233-34, 315, 317-18.

The MNCR-1 Comments. MNCR operates trains both east of the Hudson and west of the Hudson. (1) *East of the Hudson.* MNCR operates trains on the Hudson, Harlem, and New Haven Lines, which (collectively) are owned or leased by the New York Metropolitan Transportation Authority (NYMTA, MNCR’s parent agency) and the Connecticut Department of Transportation (CTDOT). The Hudson Line extends between New York City and a point north of Poughkeepsie, NY (a distance of about 75 miles). The Harlem Line extends between New York City and Wassaic, NY (a distance of about 82 miles). The New Haven Line extends

between New York City and New Haven, CT (a distance of about 73 miles), with branches to New Canaan, CT, Danbury, CT, and Waterbury, CT. (2) *West of the Hudson*. MNCR operates trains on the Port Jervis Line, which extends between Port Jervis, NY, and Hoboken, NJ (a distance of about 97.5 miles), and which consists of two segments:¹⁹⁸ a 66.2-mile segment between Port Jervis, NY, and Suffern, NY, which was formerly owned by Conrail and which is now owned by Pennsylvania Lines LLC (PRR, the Conrail subsidiary controlled by NS);¹⁹⁹ and a 31.3-mile segment between Suffern, NY, and Hoboken, NJ, which is owned by NJT.²⁰⁰ See Conrail Dec. No. 89, slip op. at 233. MNCR also has an interest of some sort in the Piermont Branch Line, which branches off of the Port Jervis Line and which extends between Suffern, NY, and Spring Valley, NY (a distance of about 6 miles). The record does not clearly indicate that commuter trains are operated on the Piermont Branch Line; MNCR's "interest" in this line, rather, may simply reflect ownership thereof either by MNCR or by NYMTA.

Assignment Of The Conrail Trackage Rights Agreement. MNCR indicates that, many years prior to the Conrail transaction, the "Metro North Parties" (MNCR, NYMTA, and CTDOT are hereinafter referred to as the Metro North Parties) and Conrail entered into a Master Trackage Rights Agreement (MTRA) that was effective as of January 1, 1983. MNCR indicates that the MTRA: governs (a) Conrail's use of the Hudson Line, the Harlem Line, the New Haven Line, and the Piermont Branch Line, and (b) MNCR's use of the Port Jervis-Suffern segment of the Port Jervis Line; and contains the normal features of any trackage rights agreement, such as risk of liability and the trackage charges per car and locomotive unit mile. MNCR contends, in essence, that the MTRA agreement, which the Metro North Parties negotiated with a single entity (Conrail), reflects the fact that this single entity was indeed a single entity. MNCR further contends, in essence, that, on the Split Date, the premise on which the MTRA had been negotiated ceased to be true; there are now, so to speak, two Conrails, not one (because, with respect to the lines covered by the MTRA, NS has succeeded to Conrail's interests west of the Hudson and CSX has succeeded to Conrail's interests east of the Hudson).

MNCR indicates, in essence, that the supposed division of what had been a unitary MTRA raises four issues (which we shall refer to as the assignability issue, the assignee issue,

¹⁹⁸ MNCR's operations on both segments of the Port Jervis Line are performed, under contract, by New Jersey Transit Rail Operations, Inc. (NJTRO).

¹⁹⁹ The Port Jervis-Suffern segment of the Port Jervis Line is part of NS' (formerly Conrail's) Southern Tier Line.

²⁰⁰ The New Jersey Department of Transportation is referred to as NJDOT. New Jersey Transit Corporation and its NJTRO subsidiary are referred to collectively as NJTC. NJDOT and NJTC are referred to collectively as NJT.

the splitting-of-interests issue, and the textual analysis issue). MNCR has also submitted a request for relief with respect to this matter.

The Assignability Issue. MNCR claims that, although the MTRA by its terms is not assignable without the prior written consent of the Metro North Parties, CSX and NS appear to have taken the view that assignment of the MTRA was effected by operation of law (i.e., by operation of our decision approving the Conrail transaction). MNCR indicates that there are, from its perspective, two problems with this view. (1) MNCR claims that nothing in Conrail Dec. No. 89 expressly deals with this matter. MNCR argues that, because significant contractual rights of the Metro North Parties would be affected by a division of the MTRA, it cannot be that those rights could somehow be abrogated by implication. (2) MNCR contends that there is also an issue whether any contractual rights of the Metro North Parties could validly be abrogated by order of the Board, even if done so expressly.

The Assignee Issue. MNCR indicates that CSX and NS are not actually claiming that the MTRA was assigned to CSX and NS. What CSX and NS are actually claiming, MNCR indicates, is that the MTRA was assigned to two wholly owned Conrail subsidiaries: New York Central Lines LLC (NYC, the Conrail subsidiary controlled by CSX); and Pennsylvania Lines LLC (PRR, the Conrail subsidiary controlled by NS).²⁰¹ MNCR contends that the Metro North Parties have received no information regarding the financial wherewithal of NYC and PRR, and therefore are not able to assess, for example, whether or not these companies (which MNCR suggests may be “shell” companies) would be able to satisfy Conrail’s MTRA obligations to indemnify the Metro North Parties in the event of a serious accident for which indemnification is required under the MTRA. MTRA further contends, in essence, that, if CSX and NS are proposing to assign the MTRA to NYC and PRR, the Metro North Parties might condition their consent to such an assignment on guarantees from CSX and NS.

The Splitting-Of-Interests Issue. MNCR indicates that, although the MTRA is terminable by Conrail upon 1 year’s notice following expiration of the MTRA’s fixed term,²⁰² termination must be on an all-or-nothing basis (i.e., Conrail cannot, without the consent of the Metro North Parties, terminate the MTRA as to some rail lines but not as to others). MNCR contends, in essence, that, as a practical matter, the all-or-nothing nature of the termination provision meant that Conrail could never terminate the MTRA. MNCR further contends, in essence, that, if the MTRA has been assigned to CSX and NS on a rail-line-by-rail-line basis, and if the all-or-nothing aspect of the termination provision now applies separately as to CSX and NS, then what was true with respect to Conrail may not be (indeed, probably is not) true with respect to NS.

²⁰¹ See Conrail Dec. No. 89, slip op. at 24.

²⁰² The MTRA’s current fixed term apparently ends on December 31, 2002.

MNCR explains that, whereas Conrail was not able (as a practical matter) to terminate MNCR's rights with respect to the Port Jervis-Suffern segment of the Port Jervis Line (because Conrail could not afford to terminate its own rights with respect to the Harlem, Hudson, and New Haven Lines), NS may well be able (as a practical matter) to terminate MNCR's rights with respect to the Port Jervis-Suffern segment of the Port Jervis Line (because NS can well afford to terminate its own rights with respect to the Piermont Branch Line).²⁰³ MNCR is adamant that we should not countenance a construction of Conrail Dec. No. 89 that would allow NS to terminate MNCR's rights with respect to the Port Jervis-Suffern segment of the Port Jervis Line.

The Textual Analysis Issue. MNCR indicates that it is impossible to discern the relative rights and obligations of the parties (CSX and NS, on the one side; the Metro North Parties, on the other side) by reading the MTRA. MNCR contends, in essence, that arguments respecting such relative rights and obligations can be made, but that, barring an agreed-upon rewriting of the MTRA, a definitive answer to such arguments will require litigation.

Request For Relief. MNCR, which has submitted a draft assignment agreement that would formally assign Conrail's MTRA interests to CSX/NYC and NS/PRR,²⁰⁴ urges the Board to use "its good office" to require execution of the MNCR draft or a document of similar tenor. The crucial provision of the MNCR draft appears to be its ¶ 3(d), which provides, in essence, that Conrail's right to terminate the MTRA may be exercised by CSX and NS, but, if exercised, must be exercised jointly by CSX/NYC and NS/PRR as if these four entities (CSX, NYC, NS, and PRR) were a single party.²⁰⁵

Conveyance Of The Port Jervis-Suffern Segment Of The Port Jervis Line. As MNCR notes in its comments, the primary focus of its participation in the Conrail proceeding was its request that we impose, vis-à-vis the Port Jervis-Suffern segment of the Port Jervis Line, either a "purchase condition" or an "extension condition." See Conrail Dec. No. 89, slip op. at 233-34. We declined to impose either condition. See Conrail Dec. No. 89, slip op. at 96-97.

MNCR, in its comments, has expressed renewed support for its purchase condition. MNCR indicates: that the principal county served by the Port Jervis Line is projected to be the fastest growing county in the NYMTA district over the next 10 years; that, furthermore, the county is experiencing significant demographic change by becoming more of a residential

²⁰³ MNCR indicates that NS uses the Piermont Branch Line once or twice a week to serve two or three customers.

²⁰⁴ See MNCR-1, Ex. A. The MNCR draft: refers to CSX and NYC as the CSX Parties; and refers to NS and PRR as the NS Parties.

²⁰⁵ See MNCR-1, Ex. A at 5-6.

service area to the New York City job market; that this trend will be accelerated by the completion in 2002 of the Secaucus transfer station, which will provide Port Jervis Line commuters direct rail access to midtown Manhattan;²⁰⁶ that the overall number of passenger trains operated on this line, which increased from 22 per week to 99 per week between 1984 and 1996 and which has since increased to 105 per week, is projected to increase to 203 per week by 2020; and that, although MNCR is acquiring locomotives and coaches to handle the projected additional trains (especially the additional trains that will be needed after the opening of the Secaucus transfer station in 2002), MNCR has been hampered by its inability to make other capital improvements to accommodate the projected additional trains. MNCR further indicates that, although NS has (as NS claims) improved its communications with MNCR and is (as NS claims) “working in partnership” with MNCR to reevaluate future capacity needs on the Southern Tier, NS has not yet resolved the question of traffic volume to be operated via the Southern Tier, and, until that question has been resolved to its satisfaction, apparently will not consider a sale of the Port Jervis-Suffern segment. MNCR fears that several years may pass before NS makes a corporate decision regarding the future of this line. And, MNCR adds, the problems it faces will only get worse with delay; railroad facilities such as signal systems, passing sidings, and additional tracks, MNCR notes, require a long lead time to plan, design, and construct.

Request For Relief. MNCR, which does not believe that NS has seriously considered passenger service-related problems on the Port Jervis Line, urges NS and the Board to re-evaluate the need for conveyance of the Port Jervis-Suffern segment to MNCR. MNCR adds that the large capital investment program it contemplates for the Port Jervis-Suffern segment,²⁰⁷ which program (MNCR indicates) would be made possible by its ownership of that segment, would benefit not only MNCR but also NS, and would take into account future growth of NS freight service.

²⁰⁶ MNCR indicated, in its pleadings filed in the Conrail proceeding, that, because the Port Jervis Line terminates in Hoboken, commuters can now travel between Hoboken and Manhattan only by using the rail lines of the Port Authority Trans Hudson Corporation (PATH). MNCR further indicated, in its pleadings filed in the Conrail proceeding, that, when the Secaucus transfer station currently under construction by NJTRO is completed in 2002, commuters on MNCR’s Port Jervis Line trains will be able to transfer to NJTRO’s Northeast Corridor trains to reach Pennsylvania Station in midtown Manhattan.

²⁰⁷ MNCR advises that, to support long-term passenger service expansion plans through the year 2020, it has developed plans for an additional \$104 million of capital improvements on the Port Jervis Line.

CSX Operations On The Hudson, Harlem, And New Haven Lines. MNCR, which notes that CSX has indicated that “east of the Hudson” rail freight traffic from/to points in and adjacent to New York City has experienced considerable growth during the first quarter of 2000,²⁰⁸ advises that, from the standpoint of transportation policy and environmental considerations, this is highly desirable. MNCR further advises that it stands ready to work with CSX, CP,²⁰⁹ and NYDOT to implement reasonable measures for the enhancement of freight traffic on the Hudson, Harlem, and New Haven Lines.²¹⁰

The NS-2 Reply. NS urges denial of MNCR’s NS-related requests for relief.

Assignment Of The Conrail Trackage Rights Agreement. *The Assignability Issue.*

(1) NS contends that, in our decision approving the Conrail transaction: we *expressly* approved the assignment of the MTRA to, and the division of the MTRA among, CSX and NS; and we *expressly* exempted CSX and NS from compliance with the MTRA provision prohibiting assignment of the MTRA by Conrail without the written consent of the Metro North Parties. NS cites in support of its contentions Conrail Dec. No. 89, slip op. at 175, ordering paragraph 9: “Except as otherwise provided in this decision, CSXT and NSR may conduct, pursuant to 49 U.S.C. 11321, operations over the routes of Conrail as provided for in the application, including those presently operated by CRC under trackage rights or leases (including but not limited to those listed in Appendix L to the application), as fully and to the same extent as CRC itself could, notwithstanding any provision in any law, agreement, order, document, or otherwise, purporting to limit or prohibit CRC’s unilateral assignment of its operating rights to another person or persons, or purporting to affect those rights in the case of a change in control.”²¹¹

(2) NS further contends that, in approving the assignment of the MTRA to and the division of the MTRA among CSX and NS, and in exempting CSX and NS from compliance with the MTRA

²⁰⁸ MNCR indicates that CSX operates over most of the Hudson and New Haven Lines as well as over a 24-mile segment of the Harlem Line.

²⁰⁹ CP’s “east of the Hudson” operations are conducted on the Hudson Line.

²¹⁰ MNCR adds that, although certain problems have arisen because some CSX locomotives and freight cars were not in compliance with MNCR’s clearance requirements (particularly as respects the electric third rail used on much of the Hudson and Harlem Lines), MNCR is aware of CSX’s efforts to bring its equipment into compliance with the clearance envelope and is working with CSX to eliminate the problems.

²¹¹ See also CSX/NS-18 (filed June 23, 1997, in STB Finance Docket No. 33388), Appendix L at 221-22 (this lists at least some, although perhaps not all, of the MNCR lines over which Conrail conducted trackage rights operations).

provision prohibiting assignment of the MTRA by Conrail without the written consent of the Metro North Parties, we were exercising our authority under 49 U.S.C. 11321(a).

The Assignee Issue. NS contends that, pursuant to our decision approving the Conrail transaction: PRR owns and NS operates the Port Jervis-Suffern segment of the Port Jervis Line (i.e., PRR/NS has succeeded Conrail as the owner/freight operator of this segment); NS operates over MNCR's Piermont Branch Line (i.e., NS has succeeded Conrail as the freight operator of this line); and CSX operates over portions of MNCR's Hudson, Harlem, and New Haven Lines (i.e., CSX has succeeded Conrail as the freight operator of these lines).

The Splitting-Of-Interests Issue. NS contends that MNCR's "linkage" argument (i.e., MNCR's argument that it must retain the ability to cancel CSX's use of the Hudson, Harlem, and New Haven Lines if NS cancels MNCR's use of the Southern Tier Line) is untenable. NS argues, in essence, that, because CSX and NS are vigorous competitors with different interests, the rail lines governed by the MTRA can no longer be treated as if they were interrelated.

The Textual Analysis Issue. NS contends that the automatic assignment of Conrail's MTRA rights and obligations to CSX and NS, made pursuant to our decision approving the Conrail transaction, effectively split the MTRA into separate parts, one pertaining to CSX and one pertaining to NS. NS further contends that, reading the MTRA in conjunction with the Conrail "Transaction Agreement"²¹² and with our Conrail Dec. No. 89, it is perfectly clear which rights and obligations belong to which party.

Conclusion. NS contends that the assignment agreement drafted by MNCR is unnecessary (because the assignment has already taken place by operation of law) and unjustified (because the MNCR draft would "link" NS' rights vis-à-vis the west-of-the-Hudson lines with CSX's rights vis-à-vis the east-of-the-Hudson lines). NS further contends that MNCR's "desire for formality" could be satisfied by executing NS' own draft agreement,²¹³ which (NS indicates) would simply acknowledge the effect of our decision approving the Conrail transaction. The most obvious distinction between the two drafts is that NS' draft, unlike MNCR's draft, would split the MTRA termination provision into two entirely separate provisions, one applicable to NS west of the Hudson and one applicable to CSX east of the Hudson.²¹⁴

²¹² See Conrail Dec. No. 89, slip op. at 22-23.

²¹³ See NS-2A, Tab 2 (submitted under seal, although precisely why it was submitted under seal is not entirely clear).

²¹⁴ Although the NS draft was submitted under seal, we have found it necessary and think it appropriate to put this detail into the public record.

MNCR's Refusal To Pay Accrued Trackage Rights Fees. NS claims that, although MNCR continued (after the Split Date) to run its trains over the Port Jervis-Suffern segment of the Port Jervis Line, MNCR has declined to pay NS the fees and charges required under the MTRA. NS further claims that MNCR, when asked to explain this nonpayment, has advised that, absent an assignment of the MTRA, there is "no contractual vehicle" for payment. NS indicates that, as of April 2000, MNCR had accrued outstanding and unpaid trackage rights invoices and maintenance charges in the amount of \$448,593.95.

Suggestion In The Nature Of A Request For Relief. NS suggests that we should advise MNCR that, in view of the "automatic nature" of the assignment of the MTRA, there exists today, indeed there has existed all along, a clear "contractual vehicle" under which MNCR can and must pay NS/PRR the trackage rights fees and maintenance charges required by the MTRA.

Conveyance Of The Port Jervis-Suffern Segment Of The Port Jervis Line. NS contends that there is no justification to revisit MNCR's request for conveyance of the Port Jervis-Suffern segment of the Port Jervis Line. MNCR, NS insists, has presented neither new evidence nor new argument on this matter; the issue, NS therefore concludes, is settled. NS adds that, although it is willing to discuss MNCR's desire to invest in improvements in the Port Jervis-Suffern segment that would increase that segment's passenger capacity, NS cannot yet tell what its own needs for use of that segment will be. NS argues that, because the Port Jervis-Suffern segment represents a significant part of NS' capacity in the New York-New Jersey area, it should not be sold without careful study and some experience.

The CSX-2 Reply. Assignment Of The Conrail Trackage Rights Agreement. CSX agrees with NS that our decision approving the Conrail transaction effectively "split" the MTRA into two parts (one for CSX/NYC, and one for NS/PRR), and that, for this reason, a formal assignment of the MTRA is unnecessary. CSX also agrees with NS that the rights and obligations of CSX/NYC and NS/PRR under the now-split MTRA are separate and distinct. CSX adds that, to satisfy MNCR's desire for formality, it is willing to execute a document, provided that such document simply acknowledges the effect of Conrail Dec. No. 89. CSX indicates that, in an effort to resolve this issue, it will confer with MNCR and NS about the form of such a document.

CSX Operations On The Hudson, Harlem, And New Haven Lines. CSX suggests that, when considering the effect of the Conrail transaction on passenger service in New York, we should take into account that, north of Poughkeepsie, CSX has been dispatching 26 Amtrak Empire Service trains daily, with on-time performance standing at 95.5% (which, CSX claims, exceeds Amtrak's performance on Amtrak's own Northeast Corridor).

The DOT-2 Reply. DOT, which acknowledges that it is not in a position to comment on the specific issues raised by MNCR, contends: that there is a vital public interest in balancing

safe, efficient, and economical commuter rail service with efficient freight operations; that, if MNCR is unable to resolve its differences with NS and CSX, we may have to take a more active role; and that, in any event, we should continue to monitor commuter rail service.

NATIONAL RAILROAD PASSENGER CORPORATION (AMTRAK). In the decision approving the Conrail transaction, we imposed a condition requiring the Conrail applicants to adhere to the terms of the settlement agreements they had entered into with Amtrak. See Conrail Dec. No. 89, slip op. at 53, 95-96, 176 (ordering paragraph 21), 231-32. Other aspects of Amtrak's interests vis-à-vis the Conrail transaction were also considered in the decision approving that transaction. See, especially, Conrail Dec. No. 89, slip op. at 80-81, 84 n.131, 89 n.140, 222. Pursuant to the monitoring conditions imposed in that decision, CSX, NS, and Amtrak have been filing, with our Office of Compliance and Enforcement, joint quarterly reports regarding the on-time performance of Amtrak's trains on CSX and NS lines.

The CSX-1 Progress Report. CSX contends that, with respect to Amtrak, the post-Split Date trend in on-time performance has generally been positive. CSX adds: that, although there have been certain problems on CSX's own pre-Conrail lines, there have been few problems on the Conrail lines acquired by CSX; that CSX and Amtrak work together to address problems as they arise; that CSX managers confer with Amtrak managers each morning (7 days a week) to facilitate Amtrak operations throughout the CSX system; and that CSX and Amtrak participate in a "Partners in Performance" program that brings local CSX and Amtrak management together to address problems on the local level.

The NS-1 Progress Report. NS contends that it is in compliance with the terms of the two settlement agreements it entered into with Amtrak, and has continued its good working relationship with Amtrak regarding Amtrak operations throughout the NS system. NS adds that it has been meeting with Amtrak on a regular basis on matters related to new passenger service and Express service, and that there is a continuing dialogue, including daily conference calls at the local supervisory level, regarding operations over Amtrak's Northeast Corridor.

The Amtrak Comments. Amtrak indicates that it generally agrees with the Amtrak-related statements made in the CSX-1 and NS-1 progress reports. As respects both CSX and NS, Amtrak adds that it has worked, and will continue to work, cooperatively with both railroads to accommodate the changes in and disruptions to their operations on the Amtrak-owned Northeast Corridor between New York and Washington, D.C. As respects CSX alone, Amtrak adds that on-time performance of Amtrak trains operating over lines that CSX owned prior to the Conrail transaction declined significantly after the Split Date.

NEW YORK REGIONAL RAIL AND NEW YORK CROSS HARBOR. The interests of NYRR's wholly owned NYCH subsidiary vis-à-vis the Conrail transaction were

addressed in the decision approving that transaction. See Conrail Dec. No. 89, slip op. at 79, 81, 84, 218-19.

The NYCH-1 Comments. NYCH, in its comments: indicates that it has received good post-Split Date cooperation from both NS and CSX; and discusses its potential for resolving post-Conrail service issues in the New York Metropolitan Area.

(1) NYCH indicates that it has developed a close working relationship with NS and has been fairly successful in increasing its car loads with this aggressive new Class I railroad connection.

(2) NYCH indicates that it has begun to develop a positive working relationship with CSX. NYCH explains: that CSX, unlike NS, still has Conrail's incentive to maximize the Selkirk routing for traffic between New England and Long Island, on the one hand, and, on the other hand, the rest of North America; that NYCH, however, is working to persuade CSX of the benefits of NYCH's direct cross harbor routing; that, in fact, CSX has started routing, via NYCH, New England traffic that CSX handles in conjunction with the Providence and Worcester Railroad Company (P&W); and that, although the P&W/NYCH/CSX routing has to date embraced only modest volumes, NYCH is encouraged by the prospects for business growth and by CSX's positive attitude.

(3) NYCH indicates that, because it is essentially a bridge carrier that can move traffic around congested rail facilities such as Selkirk Yard near Albany and other nearby facilities in New Jersey and eastern Pennsylvania, it has the potential to be of great service to the railroad industry in relieving Class I railroad congestion and service problems in the New York Metropolitan Area. NYCH adds that continued cooperation by NS and CSX along with a statement of support by the Board would go a long way toward making NYCH's promise a reality.

NORTH SHORE AFFILIATES (NSHR/JVRR/NBER/LVRR/SVRR/UCIR). We indicated, in the decision approving the Conrail transaction, that the North Shore Affiliates had asked "that we 'note for the record' the settlement agreement they have entered into with NS." See Conrail Dec. No. 89, slip op. at 219. We further indicated in that decision, with specific reference to the North Shore Affiliates, that we were requiring the Conrail applicants "to adhere to any representations made to parties in this case." See Conrail Dec. No. 89, slip op. at 105.²¹⁵

²¹⁵ See Conrail Dec. No. 89, slip op. at 176, ordering paragraph 19: "Applicants must adhere to all of the representations they made during the course of this proceeding, whether or not such representations are specifically referenced in this decision." See also Conrail Dec. No.

(continued...)

The North Shore Affiliates' Comments. The North Shore Affiliates contend: that NSHR, NBER, LVRR, SVRR, and UCIR²¹⁶ are Class III railroads located in central Pennsylvania with connections to NS' (formerly Conrail's) Harrisburg-Buffalo line between Sunbury, PA, and Lock Haven, PA;²¹⁷ that, in the Conrail proceeding, the North Shore Affiliates advised the Board that they had accepted the terms of an NS letter of June 10, 1997,²¹⁸ and had agreed to support the Conrail transaction; that the North Shore Affiliates had, prior to the Conrail transactions, overhead trackage rights over Conrail's Harrisburg-Buffalo line between Sunbury and Lock Haven;²¹⁹ that these trackage rights, however, were restricted to non-revenue traffic between the North Shore Affiliates, and did not permit the North Shore Affiliates to interchange traffic with CP at Sunbury; that, under the June 10, 1997, settlement agreement with NS, NS offered to remove these restrictions and to allow interchange with CP if the North Shore Affiliates would support the Conrail transaction; that, in particular, the June 10, 1997, settlement agreement stated that NS will "grant the five railroads the option to interchange traffic with [CP] at Sunbury, PA originating or terminating at local points on the CP or at points located on carriers that connect only with CP"; that, when NS took control of Conrail's Pennsylvania lines, NS granted the interchange rights described above to the five affected North Shore Affiliates on a temporary basis by an NS letter dated June 24, 1999, pending execution of a formal trackage

²¹⁵(...continued)

89, slip op. at 17 n.26: "We think it appropriate to note, and to emphasize, that CSX and NS will be required to adhere to all of the representations made on the record during the course of this proceeding, whether or not such representations are specifically referenced in this decision."

²¹⁶ Although the comments filed by the North Shore Affiliates purport to speak on behalf of "all" six affiliates, the tenor of the comments suggests that these comments were actually filed on behalf of five affiliates only (the five are NSHR, NBER, LVRR, SVRR, and UCIR). The sixth affiliate (JVRR) is differently situated; it is the only one of the six that does not have a direct connection to NS' (formerly Conrail's) Harrisburg-Buffalo line. See the map submitted by the North Shore Affiliates with their pleading filed October 21, 1997.

²¹⁷ The connections are at Sunbury, PA (SVRR), Northumberland, PA (NSHR), Milton, PA (UCIR), Linden, PA (LVRR), and Lock Haven, PA (NBER). See the map submitted by the North Shore Affiliates with their pleading filed October 21, 1997. LVRR may also have a second connection at a point located just west of Muncy, PA; the map is not entirely clear.

²¹⁸ The North Shore Affiliates refer to the letter of June 10, 1997, as a settlement agreement.

²¹⁹ It is not entirely clear whether such trackage rights were held (i) by each North Shore railroad that had a direct connection to the Harrisburg-Buffalo line, or (ii) by one such railroad only (the one would apparently have been LVRR).

rights agreement;²²⁰ and that this letter acknowledged that “NS [had] previously agreed to grant the five railroads the option to interchange traffic with the CP via overhead trackage rights between Lock Haven and Sunbury, PA for traffic originating or terminating at local points on the CP or at points located on carriers that connect only with CP.”

The North Shore Affiliates indicate that, since June 24, 1999, their new interchange with CP has allowed the North Shore Affiliates to develop a modest but growing volume of traffic, all of which (the North Shore Affiliates insist) conforms to the restrictions stated in the two NS letters and most of which (the North Shore Affiliates add) is new traffic both to the North Shore Affiliates and also to CP. The North Shore Affiliates insist that they have made a particular effort to assure that the traffic interchanged with CP conformed to the restrictions stated in the two NS letters. The North Shore Affiliates add that, in several instances, they have turned down traffic that was outside the NS definition of “local points” on CP.

The North Shore Affiliates further indicate, however, that, in February 2000, NS submitted to the North Shore Affiliates a proposed formal trackage rights agreement that (the North Shore Affiliates claim) contained certain restrictive provisions. The North Shore Affiliates claim that these provisions: would limit LVRR/CP interchange traffic²²¹ to traffic to/from CP stations in Quebec, and those stations in Ontario approved by NS on a case-by-case basis; would exclude traffic to/from transload and rail-truck transfer facilities; and would impose on the trackage rights a term of 5 years with renewals subject to NS’ approval. The North Shore Affiliates warn that these restrictive provisions, which (they insist) are consistent neither with the 1997 settlement agreement nor with the conditions imposed by the Board on the Conrail transaction, would effectively close the interchange with CP with respect to most of the traffic that has heretofore moved via that interchange, and would also severely limit the traffic that could hereafter move via that interchange.

The North Shore Affiliates indicate that, although they will continue to negotiate with NS, they may be compelled either to enforce their settlement agreement in an administrative proceeding or to avail themselves of what they refer to as the Board’s mediation procedures.

The SEDACOG JRA Comments. The Susquehanna Economic Development Agency—Council of Governments Joint Rail Authority (SEDACOG JRA), which is affiliated with the Susquehanna Economic Development Agency—Council of Governments, is a

²²⁰ The North Shore Affiliates refer to the arrangements provided for in the NS letter dated June 24, 1999, as “interim” arrangements.

²²¹ The reference to LVRR/CP interchange traffic is apparently intended to include all traffic interchanged between the North Shore Affiliates and CP.

Pennsylvania municipal authority formed by seven central Pennsylvania counties (Centre, Clinton, Lycoming, Northumberland, Montour, Columbia, and Union Counties) to acquire, and preserve service on, rail lines slated for abandonment. SEDACOG JRA indicates: that it now owns six rail lines that generate approximately 32,000 car loads of traffic annually;²²² that the preservation and growth of rail service on these lines has been instrumental in the promotion of economic development activities and the expansion of employment in central Pennsylvania; that, during the months after the Split Date, rail service on these lines, all of which connect with NS (formerly Conrail) lines, virtually came to a halt, and several plants were forced to close for several weeks; that, more recently, traffic levels have increased modestly, but there continues to be congestion on NS lines and yards, and unreliable empty car service; and that shipper confidence in rail service has been seriously eroded and will be very difficult to restore.

SEDACOG JRA further indicates that these NS service problems make NS' response to the efforts of the North Shore Affiliates to conclude a trackage rights agreement to implement the 1997 settlement agreement all the more galling. SEDACOG JRA claims that NS has failed to honor the commitments it made to the North Shore Affiliates in the Conrail proceeding, and appears intent on commercially closing the CP interchange at Sunbury. It would seem, SEDACOG JRA adds, that NS intends to deprive SEDACOG JRA's shippers of a competitive alternative route to reach CP local stations and to force these shippers to use NS routes that are congested and/or inefficient.

SEDACOG JRA, which believes that it is vital that the North Shore Affiliates have a direct and unrestricted interchange to the entire CP system, insists that NS must fully implement its 1997 settlement agreement with the North Shore Affiliates. SEDACOG JRA therefore requests that we direct NS to enter into immediate and continuing negotiations with the North Shore Affiliates to conclude a formal trackage rights agreement on terms and conditions consistent with the NS settlement agreement of June 10, 1997, and the NS interim agreement of June 24, 1999. SEDACOG JRA further requests that we monitor the negotiations between the North Shore Affiliates and NS, and that we require the parties to file quarterly joint progress reports.

The NS-2 Reply. NS acknowledges that it is indeed engaged in negotiations with the North Shore Affiliates. (1) *The June 10, 1997, settlement agreement.* NS contends that the 1997 settlement agreement provides that NS will "provid[e] access to CP that does not harm Norfolk Southern." NS further contends that the final agreement(s) arising out of the 1997 settlement agreement must fully incorporate this restriction. (2) *The June 24, 1999, interim agreement.* NS contends that the 1999 interim agreement, which was entered into at the depth of the NS service

²²² The lines owned by SEDACOG JRA are operated by the North Shore Affiliates (NSHR, NBER, LVRR, SVRR, UCIR, and JVRR).

difficulties, provided that the North Shore Affiliates would move traffic to relieve severe congestion on the NS line to Buffalo. NS further contends that the 1999 interim agreement is no longer in effect and is not relevant to the issues at hand.

The DOT-2 Reply. DOT indicates that it lacks knowledge of the details surrounding the 1997 settlement agreement and NS' subsequent conduct with respect thereto. DOT contends, however, that, because the North Shore Affiliates have raised a serious issue respecting NS' compliance with the 1997 settlement agreement, we should investigate.

READING BLUE MOUNTAIN & NORTHERN RAILROAD COMPANY.

RBMN's interests vis-à-vis the Conrail transaction were addressed in the decision approving that transaction. See Conrail Dec. No. 89, slip op. at 19 (item 21), 77, 161, 178 (ordering paragraph 39), 223-25. See also Conrail Dec. No. 96, slip op. at 19-20, 26 (ordering paragraph 14), 58-63.

The RBMN-2 Comments. RBMN's grievance vis-à-vis the Conrail transaction remains focused on the "blocking" provisions that Conrail, with the concurrence of RBMN, imposed on RBMN's Mehoopany, PA-Lehigh, PA "Lehigh Division" when that division was acquired by RBMN in August 1996. There appear to be two such provisions: (1) an "additional consideration" provision, which provides "for the payment to [Conrail], its successors or assigns, of certain specified [penalty] amounts for any rail traffic handled by [RBMN, or its successors or assigns], which originates, terminates or otherwise moves over the [Lehigh Division], and which could commercially be interchanged with [Conrail], its successors or assigns, but is interchanged with another rail carrier";²²³ and (2) a "non-revenue traffic" provision, which restricts RBMN's Packerton Junction trackage rights to non-revenue traffic.²²⁴ We think it appropriate to note that there is a slight difference in terminology as between the single "blocking" provision referenced in Conrail Dec. No. 89 and Conrail Dec. No. 96, on the one hand, and, on the other hand, the two "blocking" provisions referenced in this decision. The "additional consideration" provision was

²²³ See Conrail Dec. No. 89, slip op. at 224. The most important "[o]ther rail carrier" is CP (i.e., D&H) at Taylor Yard in Scranton, PA.

²²⁴ RBMN's two divisions (its Hazleton, PA-Reading, PA "Reading Division" and its Mehoopany, PA-Lehigh, PA "Lehigh Division") are linked by RBMN's Haucks Junction, PA-Packerton Junction, PA trackage rights. These trackage rights run over tracks owned by C&S Railroad Corporation (C&S) and Conrail (now NS). The C&S trackage rights cover most of the distance between Haucks Junction and Packerton Junction. The Conrail trackage rights (here referred to as the Packerton Junction trackage rights) fill a short gap (approximately 500-750 feet in length) in the vicinity of Packerton Junction between the C&S tracks and the Lehigh Division. See Conrail Dec. No. 89, slip op. at 224 & n.341.

the single blocking provision referenced in the prior decisions, *see* Conrail Dec. No. 89, slip op. at 224 (first full paragraph); the “non-revenue traffic” provision appears not to have been referenced in the prior decisions. We think it also appropriate to note, however, that, *if* the “otherwise moves” phrase in the “additional consideration” provision is read literally (as we were reading it in Conrail Dec. No. 89), *then* the only traffic that would be covered by the “non-revenue traffic” provision but would not be covered by the “additional consideration” provision would be revenue traffic originating on the Reading Division and terminating on the Lehigh Division, or vice versa (such traffic presumably would not be subject to the “additional consideration” provision because, presumably, it could not “commercially be interchanged” with Conrail).²²⁵

RBMN concedes, of course, that, when it acquired the Lehigh Division in August 1996, it acquired that division subject to the two blocking provisions. RBMN contends, however, that the Conrail transaction (and, in particular, the acquisition by NS of the Conrail lines that connect to RBMN’s lines) has completely undermined the shared understandings (shared, that is to say, by RBMN and Conrail) that existed in August 1996 and that provided the justification and rationale for the blocking provisions.²²⁶

²²⁵ If the “otherwise moves” phrase in the “additional consideration” provision is read literally, then — except for revenue traffic originating on the Reading Division and terminating on the Lehigh Division, or vice versa — the “non-revenue traffic” provision now referenced by RBMN would not appear to “block” any traffic that would not also be “blocked” by the “additional consideration” provision. *See* Conrail Dec. No. 89, slip op. at 224 n.343 (which is premised, though not explicitly, on a literal reading of the “otherwise moves” phrase in the “additional consideration” provision): “The Reading Division was acquired prior to 1996. There is apparently no Reading Division blocking provision, nor any need for one: prior to RBMN’s acquisition of the Lehigh Division, Conrail was RBMN’s only Class I connection; and, upon RBMN’s acquisition of the Lehigh Division, the Lehigh Division’s blocking provision became applicable to any Reading Division traffic transported via the Lehigh Division.” It should be noted, however, that, as discussed below (under the heading “Second Alternative Request For Relief”), RBMN apparently believes that the “otherwise moves” phrase in the “additional consideration” provision should not be read literally.

²²⁶ Statements explaining these shared understandings were submitted by Andrew M. Muller, Jr. (who is now and was in 1996 Chairman and President of RBMN) and by Wayne A. Michel (who is now an RBMN Executive Vice President, but who was in 1996 the Conrail marketing official responsible for designing and implementing the line sale and shortline programs under which RBMN purchased the Lehigh Division). RBMN insists that it would never have agreed to the two blocking provisions if it had known that they would be enforced by
(continued...)

RBMN contends, in particular, that, when it agreed in 1996 to acquire the “low density” Lehigh Division subject to the two blocking provisions, it understood: that CP’s overhead trackage rights operations on the Scranton-Lehigh portion of the Lehigh Division would generate revenues of approximately \$800,000 per year;²²⁷ that, in the not too distant future, Conrail would sell to RBMN the higher density northern and southern segments of Conrail’s Lehigh Line (the northern segment extends between Waverly, NY, and Mehoopany, PA; the southern segment extends between Lehigh, PA, and Allentown, PA);²²⁸ that Conrail would review RBMN’s “allowances” at least once a year, and would adjust the allowances upward as needed;²²⁹ that Conrail would grant blocking provision waivers as needed;²³⁰ that, in particular, Conrail, if it could not efficiently move certain traffic, would allow RBMN to handle such traffic directly with CP (via Scranton); that RBMN, as a “Conrail EXPRESS” partner,²³¹ would be able to acquire equipment at reduced prices and to have welded rail and ballast trains moved at reduced rates; that Conrail was seriously committed to its Conrail EXPRESS partners, and

²²⁶(...continued)

a Conrail successor that refuses to honor the “understandings” that RBMN concurrently had with Conrail.

²²⁷ RBMN is adamant that, without the anticipated CP trackage rights revenue, it would not have acquired the Lehigh Division on the terms it agreed to in 1996.

²²⁸ RBMN notes that, because the southern segment includes the Packerton Junction tracks, an acquisition of the southern segment would necessarily have eliminated the “non-revenue traffic” provision.

²²⁹ RBMN indicates that it understood that Conrail intended to make RBMN’s allowances approximately equal to Conrail’s on-branch cost savings from avoiding crews, power, fuel, taxes, maintenance of way, and car hire.

²³⁰ RBMN concedes that Conrail granted it no blocking provision waivers, but explains that no such waivers were requested during the very brief period between the sale of the Lehigh Division and the announcement of the CSX/CR “Strategic Merger of Equals” (which thereafter became the CSX/NS/CR transaction). RBMN indicates that, once that announcement was made, Conrail essentially shut down its waiver program.

²³¹ RBMN contends, in essence, that the “Conrail EXPRESS” program, under which RBMN purchased the Lehigh Division, was not just another Class I spinoff program, but was, rather, an entirely new concept that involved treating spinoffs more like franchise “partners.”

intended to work with each such partner to ensure that partner's long-term financial success;²³² and that, because RBMN was a Conrail EXPRESS partner, certain training would be available to RBMN personnel. RBMN adds that, based on its many years of experience dealing with Conrail, it believed that Conrail would deliver on its promises and would be flexible in its dealings with RBMN.²³³

RBMN further contends that NS, as Conrail's successor vis-à-vis RBMN, has "repudiated" the Conrail "promises" upon which RBMN relied when it accepted the two blocking provisions. RBMN contends, in particular: that NS has taken action that has resulted in the diversion, off of RBMN's Lehigh Division, of \$500,000 per year of CP trackage rights traffic;²³⁴ that NS has shown no interest in selling to RBMN the northern and southern segments of the Lehigh Line; that NS has granted few blocking provision waivers, and such waivers as NS has granted have generally been for such short periods of time that RBMN has been unable to secure long-term contracts or engage in long-range planning;²³⁵ that, although NS has never formally canceled the Conrail EXPRESS program or the contracts related thereto, NS is not providing any of the benefits of that program; and that, furthermore, the "partnership" relationship that formerly existed with Conrail does not exist with NS.²³⁶ RBMN further

²³² RBMN notes, among other things, that Conrail had assigned some of its best marketing people to work as shortline account executives.

²³³ RBMN further adds that, although it was concerned about the possible future sale of Conrail, it did not believe that the Board would allow a purchaser to stifle competition from a small railroad. RBMN indicates that it was "stunned" when, in our decision approving the Conrail transaction, we rejected RBMN's requests for relief.

²³⁴ RBMN indicates that NS, in an attempt to gain the direct access to New England that it did not get in the Conrail transaction, agreed: (a) to invest NS funds in the rehabilitation of CP's Harrisburg-Sunbury-Scranton line; and (b) to grant CP trackage rights that allow CP to handle overhead traffic to Philadelphia via Harrisburg and Reading.

²³⁵ RBMN claims that NS has granted blocking provision waivers only when NS has been unable to handle the move.

²³⁶ RBMN indicates, by way of example, that NS has taken a number of unilateral actions in raising rates without telling RBMN that have caused RBMN problems with its customers. RBMN further indicates, again by way of example, that NS unilaterally decided, even before the Split Date, to change the long-standing Conrail policy of providing anthracite coal cars free of car hire, which (RBMN adds) ultimately required RBMN to spend several million dollars to purchase used cars for business that NS will continue to handle in long-haul service. NS, RBMN
(continued...)

contends, in essence, that, were it not for the Conrail transaction, none of this would have happened. Conrail, RBMN explains, had its own routes to New England, and, for this reason, Conrail would never have given CP broader access to Philadelphia in an effort to achieve for Conrail broader access to New England. And Conrail, RBMN explains, intended to treat RBMN as a partner, and was prepared to grant blocking provision waivers if necessary to allow RBMN to access a more efficient alternative routing; whereas NS, RBMN further explains, is not treating RBMN as a partner, and does not even have any formal process for considering blocking provision waiver requests.

Ordering Paragraph 39. RBMN notes that, in the decision approving the Conrail transaction, we stated: “As respects any shortline, such as RBMN, that operates over lines formerly operated over by CSX, NS, or Conrail (or any of their predecessors), and that, in connection with such operations, is subject to a ‘blocking’ provision: CSX and NS, as appropriate, must enter into an arrangement that has the effect of providing that the reach of such blocking provision is not expanded as a result of the CSX/NS/CR transaction.” See Conrail Dec. No. 89, slip op. at 178 (ordering paragraph 39). RBMN insists, however, that, because of the effects of a so-called “Fixed Divisions Agreement” (FDA) entered into between NS and CP, because of the change in the route structures that resulted from the Conrail transaction, and because of NS’ restrictive waiver policy, the Conrail transaction has greatly expanded the effect of the Lehigh Division blocking provisions, in particular the effect of the penalties provided for by the “additional consideration” provision. (a) RBMN explains: that the “additional consideration” provision was intended to protect Conrail against diversion of traffic in situations in which Conrail could participate in a route that was at least as efficient as the competing route; that Conrail recognized, however, that if the additional consideration amounts exceeded Conrail’s profit, then traffic would be forced to Conrail even where more efficient routes were available, and, in that situation, the provisions might not be legally defensible from an antitrust perspective; that, therefore, the additional consideration amounts were set to approximate Conrail’s net contribution (i.e., earnings less costs) from the traffic that was moving over the line at the time of the sale; that, however, there are a number of moves that NS can handle where its net contribution is substantially less than the net contribution that Conrail was earning for the same type of traffic;²³⁷ and that, although a CP-Scranton-RBMN routing would be far more efficient (because less circuitous, and because NS would not be involved) than a CP-Harrisburg-

²³⁶(...continued)

insists, views shortlines not as partners but rather as tools limited to serving those markets that the shortlines already reach.

²³⁷ The moves cited by RBMN appear to reflect the various provisions of the CP/NS settlement agreement, which (RBMN insists) has created an NS incentive to route RBMN-terminated (and CP-originated) traffic via a CP/NS interchange at Harrisburg.

NS-Reading-RBMN routing, the additional consideration provision prevents traffic from using the more efficient route. (b) RBMN adds that the change in the route structures that resulted from the Conrail transaction has greatly expanded the effect of the additional consideration provision. RBMN explains that application of the full additional consideration amount to traffic routed CSX/NS/RBMN that was formerly routed Conrail/RBMN allows NS to receive substantially more than its actual net contribution. And this, RBMN insists, has the effect of precluding RBMN from moving traffic over more efficient routes. (c) RBMN further adds that NS has made clear that it has no intention of using waivers to limit the expansion of the effects of the additional consideration provision.

Relief Sought By RBMN. RBMN, which insists (i) that NS has repudiated the Conrail/RBMN bargain respecting RBMN's acquisition of the Lehigh Division and (ii) that NS has violated the "no expanded reach" rule of ordering paragraph 39, asks that we impose a condition eliminating the two blocking provisions.²³⁸ RBMN argues, in essence, that the only way to restore the Conrail/RBMN bargain respecting RBMN's acquisition of the Lehigh Division, and the only way to prevent the two blocking provisions from having an expanded reach as a result of the Conrail transaction, is to give RBMN access (i.e., "competitive access," see RBMN-2, V.S. Michel at 33) to CP. RBMN adds: that, for Lehigh Division traffic, this requires removal of the additional consideration provision; and that, for Reading Division traffic, this requires removal of the non-revenue traffic provision. RBMN further adds that the sought relief: will not burden NS;²³⁹ will not prevent NS from putting together a competitive package of rates and service to compete for the traffic; will, rather, merely preserve the "balance" that existed prior to the Conrail transaction; and will do no more than enable RBMN to act in the best interests of its customers in seeking efficient and economical transportation alternatives.

First Alternative Request For Relief. RBMN contends that, at the very least, we should rule that, for traffic routed CP-Scranton-RBMN, NS is entitled to receive not (i) the full penalty required by the additional consideration provision, but only (ii) the "profit portion" of NS' \$140 "Fixed Division" for traffic routed CP-Harrisburg-NS-Reading-RBMN. See RBMN-2,

²³⁸ RBMN asks, in particular, that we require: (1) that the Conrail/RBMN Lehigh Division Purchase and Sale Agreement (hereinafter referred to as the Lehigh Division Agreement) dated August 19, 1996, and the related deed, be amended to remove the additional consideration provision imposed on RBMN with respect to traffic interlined with carriers other than Conrail or its successors; and (2) that the Conrail/RBMN trackage rights agreement dated August 19, 1996, covering incidental trackage rights at Packerton Junction, be amended to eliminate the restriction that limits usage to non-revenue traffic.

²³⁹ RBMN explains that it already has, with CP at Scranton, a direct connection, for which no NS facilities are needed.

V.S. Michel at 17 n.18. RBMN explains: that, from RBMN’s perspective, from CP’s perspective, and from a public interest perspective, a CP-Scranton-RBMN routing is obviously more efficient (as respects traffic originated or terminated by CP) than a CP-Harrisburg-NS-Reading-RBMN routing; that NS, which reads the additional consideration provision to apply to traffic routed CP-Scranton-RBMN, has effectively forced such traffic to be routed CP-Harrisburg-NS-Reading-RBMN; that, however, when such traffic is routed CP-Harrisburg-NS-Reading-RBMN, NS receives (so RBMN believes) only a \$140 Fixed Division; that, obviously, the “profit portion” of this \$140 Fixed Division must necessarily be less than \$140;²⁴⁰ and that, therefore, we should rule that, for traffic routed CP-Scranton-RBMN, NS is entitled to receive, under the additional consideration provision, only the “profit portion” of the \$140 Fixed Division (because, even if the traffic is routed CP-Harrisburg-NS-Reading-RBMN, NS’ net earnings will equal, and will certainly not exceed, the “profit portion” of the \$140 Fixed Division).

Second Alternative Request For Relief. RBMN contends, and asks that we confirm, that Reading Division traffic that moves via the Lehigh Division is not subject to the additional consideration provision. See RBMN-2 at 13 n.8; RBMN-2, V.S. Michel at 15 n.13; RBMN-3 at 3 n.4. RBMN, which (in essence) rejects the literal reading we implicitly accorded the additional consideration provision’s “otherwise moves” phrase in Conrail Dec. No. 89, slip op. at 224 n.343, explains: that the “additional consideration” penalty amounts do not reflect Reading Division traffic or Conrail’s contributions from that traffic; that Conrail, in calculating the “additional consideration” penalty amounts, did not analyze Reading Division traffic because Conrail assumed that such traffic was not covered by the “additional consideration” provision; that, rather, Conrail intended that the “non-revenue traffic” provision would suffice to protect Conrail against diversion of Reading Division traffic; and that, therefore, a determination that Reading Division traffic that moves over the Lehigh Division *is* subject to the additional consideration provision would further expand the scope of that provision beyond what was intended.²⁴¹

²⁴⁰ NS’ “Fixed Division” (which RBMN believes to be \$140) is a “gross revenue” amount.

²⁴¹ RBMN indicated, in its pleadings filed in the Conrail proceeding, that it was then in the process of obtaining rights that would allow for the construction of a Packerton Junction connection over property formerly owned by the Central Railroad of New Jersey (CNJ); this contemplated connection, RBMN noted, would enable RBMN to connect its divisions without any Conrail trackage rights. RBMN’s second alternative request for relief, which (taken alone) would seem to leave Reading Division traffic subject to the “non-revenue traffic” provision, may reflect a continued determination to build the CNJ connection contemplated at the time of the Conrail proceeding.

Third Alternative Request For Relief. RBMN contends, and (although this is not entirely clear) may be requesting that we rule, that the two blocking provisions will not be allowed to continue in effect after the point in time at which Conrail (and/or NS, as successor to Conrail) has been fully compensated for the reduced sale price of the Lehigh Division. See RBMN-2, V.S. Michel at 15. RBMN explains that, once Conrail has been fully compensated for the reduced sale price, the continued existence of the blocking provisions will become excessive, and the result will be merely to penalize the shipping public.

The RBMN-3 Reply. RBMN contends that the relief it seeks is consistent with the relief sought by ISG and CP. (1) *ISG Resources.* RBMN explains that the elimination of the blocking provisions will enable ISG's traffic (which originates in Connecticut) to be routed CP/RBMN via Scranton, from which point RBMN will move the traffic to destination (Good Springs, PA, a point on RBMN's Reading Division). RBMN insists, in essence, that, if this traffic is to continue to move past the expiration date (June 1, 2001) of the NS-granted blocking provision waiver, NS must not be allowed to demand that NS be part of the routing. The existing waiver, RBMN adds, cannot be relied upon past its expiration date; NS, RBMN fears, does not intend to extend that waiver. (2) *Canadian Pacific.* RBMN explains that the elimination of the blocking provisions will enable traffic that must now be routed CP-Harrisburg-NS-Reading-RBMN to be routed CP-Scranton-RBMN instead. The CP/NS/RBMN routing via Harrisburg, RBMN notes, is longer, is more circuitous, has an additional interchange, and requires use of NS' main line and one (Harrisburg) and sometimes two (Harrisburg and Allentown) NS yards. Elimination of the two blocking provisions, RBMN adds, would allow shippers the benefit of the more efficient CP-Scranton-RBMN routing, and (RBMN insists) would have little or no adverse economic impact on NS and, indeed, would actually benefit NS operationally (by eliminating short haul traffic from NS' main line and its Harrisburg and Allentown yards).

The NS-2 Reply. NS, which believes that a court (and not the Board) is the correct forum to resolve RBMN's "contract complaint" issues, urges denial of the relief sought by RBMN.

(1) NS contends, in essence, that RBMN is attempting to relitigate, in this general oversight proceeding, issues that we decided adversely to RBMN in the decision approving the Conrail transaction.

(2) NS notes that, although RBMN's "understandings" may indeed have reflected RBMN's own aspirations, the fact of the matter is that none of these understandings were part of the contract entered into by Conrail and RBMN. NS contends that, if RBMN had wanted (and Conrail had been willing to provide) contractual commitments with respect to RBMN's "understandings," RBMN: (a) should have insisted that such understandings be incorporated into written agreements; and (b) should not have signed an agreement that provides (as, NS claims, the Lehigh Division Agreement provides) that the written agreement sets forth "the entire

understanding of the parties.” NS further contends that, when it comes to commitment to shortlines, NS is willing to compare its record to that of any other Class I railroad.

(3) NS suggests that Mr. Michel’s “current perspective” may have been influenced by his current position as an RBMN employee. There was probably a reason, NS suggests, that Mr. Michel, as Conrail’s representative in the 1996 negotiations with RBMN, neglected to put into writing the “understandings” that (Mr. Michel now says) both Conrail and RBMN shared.

(4) NS concedes, in essence, that, because of the Conrail transaction and the CP/NS settlement agreement, RBMN has lost a great deal of the CP trackage rights revenues it expected to receive on account of its acquisition of the Lehigh Division. NS insists, however, that the creation of another routing option that CP has found to be superior to the Lehigh Division trackage rights is not a competitive harm; it is rather, NS insists, another example of the public benefits of the Conrail transaction.

(5) NS, though it concedes (in essence) that the CP-Scranton-RBMN routing is more efficient (as respects traffic originated or terminated by CP) than the CP-Harrisburg-NS-Reading-RBMN routing, notes that the CP/NS/RBMN routing would not have existed at all but for the Conrail transaction. “Whatever its shortcomings may be, there is,” NS insists, “no public harm or need to impose additional conditions when options have been increased, not decreased, as a result of the Transaction.”

(6) NS contends that, if the blocking provisions were eliminated, RBMN and CP, not the shippers they serve, would benefit. NS explains that, if the blocking provisions were eliminated, RBMN and CP would extract the maximum price they could charge for traffic routed via Scranton, and would get more money at the expense of NS (and would not, as a practical matter, cut their shippers in on any of this money).

(7) NS concedes that the blocking provision waivers it has granted have generally been of short duration, but contends that it only makes sense to grant short term waivers when there is a short term problem (such as the implementation difficulties NS experienced following the Split Date).

The RBMN-5 Rebuttal. (1) RBMN, responding to NS’ argument that RBMN’s “contract complaint” issues should be resolved in a judicial forum, insists that the Board has the power to grant the relief requested by RBMN. RBMN explains that it is not asking us to address contractual disputes, but, rather, is asking us to grant relief to address harms that RBMN has suffered on account of the Conrail transaction. RBMN insists that the changes in circumstances that have altered the economic bargain underlying the Lehigh Division Agreement, as well as the

nullification of that agreement's no-assignment provision,²⁴² are adverse consequences of the Conrail transaction that we have sufficient authority to remedy.

(2) RBMN, responding to NS' argument that the Lehigh Division Agreement provides that the written agreement sets forth "the entire understanding of the parties," claims that NS has not quoted enough of the integration clause. That clause, RBMN insists, actually provides that the written agreement sets forth "the entire understanding of the parties hereto *with respect to the transactions contemplated hereby*" (emphasis added). The "transactions contemplated hereby," RBMN explains, included the sale of the Lehigh Division and the Conrail EXPRESS and other commercial relationships relating to operation of that division. Such contemplated transactions, RBMN adds, did not include the division of Conrail's assets between CSX and NS; nor, RBMN goes on, did such contemplated transactions include an assignment of Conrail's rights to NS without RBMN's consent (the Lehigh Division Agreement, RBMN notes, specifically provides that Conrail may not assign its interests thereunder without RBMN's prior written consent). RBMN insists that our approval of the Conrail transaction, combined with our nullification of the Lehigh Division Agreement's no-assignment provision, fundamentally changed the Lehigh Division Agreement contrary to its terms and altered the competitive environment in a manner that could not have been contemplated by RBMN. This is not, RBMN insists, a question of RBMN trying to change the terms of its purchase agreement to pay less than it agreed upon; it is rather, RBMN argues, a question of preventing RBMN from paying too much based on what it is now receiving.

(3) RBMN insists that the diversion of CP's trackage rights traffic off of the Lehigh Division is not a public benefit. The only thing that has changed, RBMN argues, is that, whereas CP previously routed traffic via the Lehigh Division, CP now uses its own line that was improved in part with NS funds, and RBMN is losing trackage rights revenue. RBMN insists that this loss of "bottom line" dollars impacts on its ability to maintain the Lehigh Division and the level of service provided to customers on that division, and thereby adversely affects the public interest.

(4) RBMN concedes that, when it acquired the Lehigh Division, it accepted the risk that the CP trackage rights traffic would decrease. RBMN insists, however, that, when it acquired the Lehigh Division, it never accepted the risk that the CP trackage rights traffic would be diverted, because (RBMN argues) the risk of diversion was a risk created by the Conrail transaction itself (and the Conrail transaction, RBMN notes, was not contemplated by the parties to the Lehigh Division Agreement).

²⁴² See Conrail Dec. No. 96, slip op. at 19-20.

(5) RBMN insists that the relief it has requested is in the public interest. Elimination of the blocking provisions, RBMN explains, will allow it to offer its customers shorter, and therefore more efficient, routes.

(6) RBMN, responding to NS' suggestion that Mr. Michel's "current perspective" may have been influenced by his current position as an RBMN employee, insists that Mr. Michel's views have not been influenced by his change of employment. It is, RBMN claims, the railroad landscape that has changed; and it has changed, RBMN adds, as a result of the Conrail transaction.

The NS-3 Response. (1) NS contends, in essence, that the Lehigh Division Agreement's integration clause, read in its entirety, has exactly the meaning that a clause of that nature would be expected to have: it means, NS claims, that the written contract represents the entire understanding of the parties with respect to the sale by Conrail, and the purchase by RBMN, of the Lehigh Division. The integration clause, NS insists, makes perfectly clear that Conrail and RBMN knew that any "understandings" that were part of the consideration for entering into the Lehigh Division Agreement had to be written into that contract. The Conrail transaction, NS therefore concludes, has not impaired any "benefit" for which RBMN bargained when it entered into the Lehigh Division Agreement.

(2) NS contends that there is no basis in law for the argument that RBMN is entitled to relief simply because the Board overrode the antiassignment clause of the Lehigh Division Agreement without RBMN's consent in furtherance of a transaction RBMN did not contemplate. NS, citing Conrail Dec. No. 96, slip op. at 19-20, further contends that RBMN's antiassignment clause argument is nothing more than a variation on an argument that, 2 years ago, we rejected as late-filed.

(3) NS contends that RBMN, when it neglected to provide in the Lehigh Division Agreement for a guaranteed level of CP trackage rights traffic, necessarily accepted the risk that the CP trackage rights fees it claims to have anticipated would not continue indefinitely. RBMN, NS claims, is sophisticated enough to know that if, in negotiating a contract, it wishes to rely on a guaranteed income stream as consideration for entering into the contract, it needs to write that guarantee into the contract, particularly when the contract by its terms says that it represents the entire understanding of the parties concerning the transaction covered by the contract.

(4) NS contends that the fact that traffic is flowing over the new CP route created pursuant to the CP/NS settlement agreement necessarily represents a determination by CP that the new route is better suited to serving the needs of CP's customers than the previously available route.

(5) NS, citing the well-established rule that conditions are not to be imposed except to remedy a transaction-related harm such as a significant loss of competition or the loss by another rail carrier of the ability to provide essential services, contends that RBMN has not demonstrated that the relief it seeks is justified by a loss in competition or the loss of its ability to provide essential services. NS further contends: that RBMN's access to CP is greater today than it was prior to the Conrail transaction; and that RBMN is hauling more cars today than it hauled prior to the Conrail transaction.

(6) NS insists that it is in full compliance with ordering paragraph 39. The reach of the additional consideration provision, NS explains, has been limited to NS destinations that were formerly Conrail destinations.

(7) NS contends that RBMN's present explanation of how the additional consideration provision has been "expanded" accords to the concept of "expansion" an entirely different meaning than was accorded that concept in ordering paragraph 39. NS explains that, in the Conrail proceeding, RBMN indicated that it feared that the geographic scope of the territory to which the additional consideration provision applied would be expanded as a result of the Conrail transaction because (RBMN noted) the geographic reach of the post-transaction NS/Conrail system would be greater than the geographic reach of the pre-transaction Conrail system, and thus the territory encompassing traffic that could be "commercially interchanged" with NS (as successor to Conrail) would be "expanded." See Conrail Dec. No. 89, slip op. at 224 & n.344. See also Conrail Dec. No. 89, slip op. at 77 ("RBMN is concerned that the blocking provision in its contract will make it prohibitively expensive for it to connect with another carrier to reach all points that could be served by NS, which is taking over the Conrail lines that now connect with RBMN. We will grant the relief RBMN seeks by restricting the blocking provision to destinations on NS that were formerly Conrail destinations."). RBMN, NS further explains, did not raise, and we therefore never had occasion to consider, the argument it now asserts regarding the level of the additional consideration provision and the asserted net contribution levels of NS vis-à-vis Conrail. RBMN, NS therefore concludes, should not now be allowed to raise a new argument that it could have raised, but did not raise, in its filings in the Conrail proceeding.

(8) NS further contends that RBMN's "expansion" argument is, in any event, baseless. The additional consideration amounts in the Lehigh Division Agreement, NS explains, are flat amounts; that contract, NS further explains, does not tie those amounts to the level of Conrail's net contribution, and does not provide any mechanism for changing those amounts to reflect changes in the level of Conrail's net contribution. NS insists that if the additional consideration amounts were supposed to reflect the level of Conrail's net contribution and thus vary with it, the contract would have said so and would have provided for such a mechanism. The fact of the matter, NS further insists, is that the additional consideration provisions of the contract are being applied just as the contract provides.

(9) NS insists that it acted properly in noting the possible employment-related bias of RBMN's Mr. Michel.

WHEELING & LAKE ERIE RAILWAY COMPANY. W&LE's interests vis-à-vis the Conrail transaction were addressed in the decision approving that transaction. See Conrail Dec. No. 89, slip op. at 19 (items 24 and 25), 107-09, 181 (ordering paragraph 68), 226-29. See also Conrail Dec. No. 96, slip op. at 17-18, 26 (ordering paragraph 12), 54-57; Conrail Dec. No. 107.

The W&LE Comments. In the decision approving the Conrail transaction, we ordered the Conrail applicants: (1) to grant W&LE overhead haulage or trackage rights access to Toledo, OH, with connections to Ann Arbor Acquisition Corporation d/b/a Ann Arbor Railroad (AA) and other railroads at Toledo; (2) to extend W&LE's lease at, and trackage rights access to, Huron Dock on Lake Erie; (3) to grant W&LE overhead haulage or trackage rights to Lima, OH, with a connection to Indiana & Ohio Railway Company (IORY) at Lima; and (4) to attempt to negotiate an agreement concerning mutually beneficial arrangements, including allowing W&LE to provide service to aggregates shippers or to serve shippers along CSX's line between Benwood, WV, and Brooklyn Junction, WV. See Conrail Dec. No. 89, slip op. at 181 (ordering paragraph 68). W&LE claims that, although 2 years have passed since we approved the Conrail transaction, the conditions we imposed to assure W&LE's continued viability have yet to be fully or effectively implemented. W&LE further claims that several of these conditions have resulted in no appreciable benefit to W&LE, and that CSX and NS (and particularly NS) have used delay and restrictions to diminish those conditions that have shown potential promise.

Access To Toledo. W&LE contends: that NS waited until 1 week prior to the Split Date to tender to W&LE a first draft of an agreement providing for the operation by W&LE of trains on NS' line between Bellevue, OH, and Toledo, OH, the use by W&LE of tracks at NS' Homestead Yard in Toledo, and the acquisition by W&LE of NS' Maumee River Bridge in Toledo; that, pending the execution of a permanent Bellevue-Toledo trackage rights agreement, NS has allowed W&LE to operate only one train per day each way on the Bellevue-Toledo line, and only (W&LE claims) under a series of "temporary detour rights" agreements each of which has been subject to a 60-day term that has been renewable solely at NS' discretion; that NS has indicated that it is willing to allow W&LE access to Homestead Yard in "emergency" situations only, which (W&LE argues) would mean that W&LE would not have a permanent base for its train operations into and out of Toledo; that NS has refused to allow W&LE to interchange traffic with CSX in Homestead Yard and has also refused to provide W&LE with a route to an alternate Toledo interchange point with CSX; that NS has insisted that W&LE's trackage rights over the Maumee River Bridge (which, W&LE indicates, are necessary to reach the interchange with CN west of the river) must expire within 1 year from the date of agreement unless W&LE assumes all responsibility and liability for that aging pivot bridge; and that NS has also insisted that W&LE will be allowed to operate more than one train per day on the Bellevue-Toledo line

only if W&LE agrees to pay what W&LE claims is an unspecified share of an unspecified major NS upgrading of the Bellevue-Oak Harbor segment of the Bellevue-Toledo line. W&LE further contends that NS' unwillingness to allow unlimited W&LE trackage rights operations on the Bellevue-Toledo line reflects NS' determination to cap the amount of competition W&LE can offer;²⁴³ and W&LE is adamant that the notion that the Bellevue-Toledo line (and, in particular, the Bellevue-Oak Harbor segment thereof) lacks the capacity to accommodate W&LE's train operations has no support in the record.

Extension Of W&LE's Lease Of Huron Dock. W&LE contends that the delay in finalizing the extension of its Huron Dock lease and the continuing uncertainty over the term of that lease (which delay and uncertainty, W&LE suggests, are attributable to NS' refusal to negotiate an extension on terms acceptable to W&LE) have made it difficult for W&LE to market its Huron Dock services. W&LE, which insists that it must have secure and long-term access to Huron Dock, argues that, although its pre-transaction Huron Dock rights and its pre-transaction trackage rights to reach Huron Dock are limited to a single commodity (taconite iron ore), that single commodity has been an extremely important part of W&LE's traffic base; W&LE adds that, because Huron Dock is W&LE's only access to the iron ore traffic moving via Lake Erie, loss of the traffic now handled via Huron Dock would be a serious blow to W&LE and could effectively undo much of the other relief granted W&LE; and W&LE warns that, because Huron Dock is the only dock on Lake Erie to which W&LE has access, the termination of W&LE's access to Huron Dock will mean that W&LE will cease to function as a competitive alternative to CSX and NS for traffic moving between points on Lake Erie and points in W&LE's service territory. W&LE contends, however, that, although NS has access to multiple docks on Lake Erie, NS has indicated that it would like to reclaim the use of most or all of Huron Dock's capacity beginning as early as 2003.

Access To Lima. W&LE advises that CSX has granted W&LE overhead trackage rights between Carey, OH, and Lima, OH, with a connection to IORY at Lima. W&LE further advises, however, that, although it has investigated the prospect for traffic movements via the interchange with IORY at Lima, no traffic opportunities have yet been identified and, therefore, the Carey-Lima trackage rights are currently inactive.

Service To Aggregates Shippers. W&LE advises that W&LE and CSX have not reached any "mutually beneficial arrangements" respecting service to aggregates shippers.

²⁴³ W&LE claims that, since the commencement of its Toledo operations, its through routes with CN via Toledo, in competition with NS' former Conrail routes, have found acceptance in the marketplace. W&LE further claims that, if commercial and competitive considerations were allowed to prevail, the volume of W&LE's traffic via Toledo could exceed one train per day each way sometime in the next 12 months.

Service To Shippers On CSX's Benwood-Brooklyn Junction Line. W&LE advises that W&LE and CSX have not reached any "mutually beneficial arrangements" respecting service to shippers on CSX's Benwood-Brooklyn Junction line.

Relief Not Requested. W&LE indicates that it will continue to seek, with NS, a negotiated resolution of the issues that have arisen respecting access by W&LE to Toledo and Huron Dock. W&LE further indicates, however, that, if it is unable to reach a negotiated resolution of these issues, it will seek to have these issues resolved by the Board. W&LE adds that, although negotiations will continue, continued careful oversight of this process by the Board is essential.

The NS-2 Reply. NS insists that, although NS and W&LE have not yet finalized agreements respecting Toledo and Huron Dock, each condition has been implemented. Traffic, NS explains, has begun to move from CN to W&LE via Toledo, and has continued to move to W&LE via Huron Dock.

Access To Toledo. NS contends: that the Bellevue-Toledo "temporary detour rights" agreements have been temporary because NS and W&LE have not yet concluded a permanent trackage rights agreement; that NS has not provided W&LE with tracks in Homestead Yard because it is not operationally feasible to provide such tracks; that, however, NS has granted W&LE a direct route (via the Maumee River Bridge) to AA's and CN's Toledo yards, where interchange with AA and CN can take place;²⁴⁴ that, W&LE's intimations to the contrary notwithstanding, the Bellevue-Toledo line has significant capacity constraints; that, in fact, NS has spent, since the Split Date, more than \$8 million to enhance capacity on the line sufficient to handle the increased NS traffic; and that the addition of a second carrier (W&LE) to a severely capacity-constrained line must bring with it capacity enhancements to handle the additional traffic. NS adds that it rejects the suggestion (which it attributes to ORDC) that W&LE should not have to contribute to any Bellevue-Toledo capacity improvements until it begins to move 8 trains per day on that line.

Extension Of W&LE's Lease Of Huron Dock. NS insists that any Huron Dock lease extension must begin from the expiration date of the original term of the lease (September 27, 1998). NS adds that it has offered W&LE two different terms of extension: a 5-year exclusive

²⁴⁴ NS does not address W&LE's claim that NS has insisted that W&LE assume full responsibility for the Maumee River Bridge. NS does note, however, that, in the decision approving the Conrail transaction, we authorized NS to discontinue operations over that bridge (there referred to as the Toledo Pivot Bridge). See Conrail Dec. No. 89, slip op. at 47 & n.69, 181 (ordering paragraph 71).

occupancy extension; and a 10-year non-exclusive occupancy extension (which would require W&LE to share the dock with NS on a 60/40 basis).

The CSX-2 Reply. CSX insists that W&LE has been greatly benefitted by the relief it was awarded in Conrail Dec. No. 89; the Bellevue-Toledo trackage rights, CSX explains, have allowed W&LE to create a new CN/W&LE routing via Toledo. CSX also insists that, acting in accordance with ordering paragraph 68, it has identified to W&LE a number of “mutually beneficial arrangements” (CSX cites, in particular, proposed arrangements involving petroleum coke movements from Toledo and Lima to Cressup, WV,²⁴⁵ and calcined petroleum coke movements from Cressup to Massena, NY, each involving W&LE as a bridge carrier, and also various movements of scrap metals from destinations on the former Conrail lines to Canton, OH). And, CSX adds, it intends to continue to explore possible “mutually beneficial arrangements” with W&LE.

WISCONSIN CENTRAL SYSTEM (WCL, FV&W, SSMB, AND WCLL). WCS’s interests vis-à-vis the Conrail transaction were addressed in the decision approving that transaction. See Conrail Dec. No. 89, slip op. at 90-92, 180 (ordering paragraph 58), 229-30. See also Conrail Dec. No. 96, slip op. at 17, 26 (ordering paragraph 11), 51-54.

The Wisconsin Central System Comments. WCS’s comments are focused on rail operations in the Chicago Switching District. WCS notes that, although Chicago is by far WCS’s most important interchange point, WCS (unlike most railroads that operate into the Chicago area) has neither a major yard facility in that area nor an ownership interest in any of the major Chicago switching carriers. WCS further notes that, because it does not have alternative gateways to which its traffic can be diverted, it must rely on the provision of neutral and efficient switching and interchange service by other carriers in the Chicago terminal.

WCS insists that, starting shortly after the Split Date and continuing to February 2000, the Conrail transaction had serious and continuing adverse effects on operations in the Chicago switching district. WCS contends: that congestion in applicants’ yards and, in turn, on various mainlines resulted in significant delays to WCS traffic moving through Chicago; that WCS trains, particularly those destined to CSX’s Barr Yard for interchange, were held out for extended periods of time, often with multiple trains stacking up one behind the other and WCS having to re-crew the trains; that, in 1999, merger implementation problems (in Chicago and also, apparently, elsewhere) cost WCS \$2.5 million as a result of lower revenues and higher operating costs; and that WCS’s customers similarly incurred significant expense and inconvenience as a result of applicants’ problems in implementing the Conrail transaction.

²⁴⁵ The “Cresap, WV” referenced by CSX, see CSX-2 at 57, appears to be “Cressup, WV,” see Conrail Dec. No. 89, slip op. at 227 nn.349-50.

WCS concedes, however, that, by and large, Chicago is currently working well from an operating standpoint; matters have improved, WCS allows, since the early part of 2000. WCS indicates that much of the improvement is the result of new cooperative ventures among the Chicago terminal's various rail carriers, including CSX and NS (who, WCS adds, have made good faith efforts to keep the Chicago switching district fluid). WCS further indicates that it believes that the Board's close monitoring of Chicago-area issues has provided at least some needed incentive for CSX and NS to be responsive and conscientious in their actions. It is, WCS therefore concludes, important that the Board continue its careful oversight in this area.

WCS also concedes that it is unaware of any particular change in the orientation of the Indiana Harbor Belt Railroad Company (IHB) as a neutral intermediate switching carrier. WCS is concerned, however, that, as the integration of Conrail's assets by CSX and NS becomes more refined, and as transactions involving other rail carriers arise, the incentive and opportunity for CSX to utilize IHB for CSX's own purposes may become more pronounced.²⁴⁶ WCS warns that actions justified as operational and efficiency improvements (WCS cites, in particular, the co-location of CSX and IHB dispatchers at Calumet City, which CSX has indicated was done to better coordinate traffic over CSX and IHB lines) can lay the groundwork for co-opting IHB's independence and neutrality at a later date. WCS therefore concludes that it remains vitally important that the Board continue its close monitoring of this situation.

The CSX-2 Reply. CSX insists that it is committed to good faith coordination in Chicago and to the fair treatment of all carriers there.

²⁴⁶ See Conrail Dec. No. 89, slip op. at 208 & n.301, 229 & n.359, 230 & n.362.