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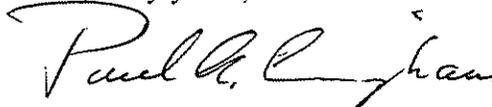
The Honorable Anne K. Quinlan, Esq.
Acting Secretary
Surface Transportation Board
Office of the Secretary
395 E Street, S.W.
Washington, DC 20423-0001

**Re: *Canadian National Railway Company and Grand Trunk Corporation –
Control – EJ&E West Company (STB Finance Docket No. 35087)***

Dear Ms. Quinlan:

Enclosed for filing in the above-referenced docket is the Applicant's Public Response to Comments, Requests for Conditions, and Other Opposition and Rebuttal in Support of the Application. We are also submitting a confidential version with the confidential information unredacted.

Very truly yours,



Paul A. Cunningham
Counsel for Canadian National Railway Company
and Grand Trunk Corporation

Enclosure

cc: All parties of record

BEFORE THE
SURFACE TRANSPORTATION BOARD

STB Finance Docket No. 35087

CANADIAN NATIONAL RAILWAY COMPANY
AND GRAND TRUNK CORPORATION
– CONTROL –
EJ&E WEST COMPANY

APPLICANT'S RESPONSE TO COMMENTS,
REQUESTS FOR CONDITIONS, AND OTHER OPPOSITION
REBUTTAL IN SUPPORT OF THE APPLICATION

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March 13, 2008

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**BEFORE THE
SURFACE TRANSPORTATION BOARD**

STB Finance Docket No. 35087

CANADIAN NATIONAL RAILWAY CORPORATION
AND GRAND TRUNK CORPORATION
– CONTROL –
EJ&E WEST COMPANY

**APPLICANTS' RESPONSE TO COMMENTS, REQUESTS FOR
CONDITIONS, AND OTHER OPPOSITION
AND REBUTTAL IN SUPPORT OF THE APPLICATION**

Canadian National Railway Company and Grand Trunk Corporation (together “CN” or “Applicants”) respectfully submit this response and rebuttal, supported by the reply verified statements of Joseph Chavarria, James H. Danzl, David M. Gevaudan, Robert T. Holmstrom and Paul E. Ladue, David Lowe, Gerald P. Radloff, Gordon T. Trafton II, and Christopher A. Velluro, Ph.D.

INTRODUCTION

The Board is required to approve any transaction not involving two Class I railroads unless the Board finds both that:

- (1) as a result of the transaction, there is likely to be substantial lessening of competition, creation of a monopoly, or restraint of trade in freight surface transportation in any region of the United States; and
- (2) the anticompetitive effects of the transaction outweigh the public interest in meeting significant transportation needs.

49 U.S.C. § 11324(d).

Under this standard, the “Board’s primary focus is on the anticipated competitive effects,” and it must approve the transaction “unless there will be adverse competitive

effects that are both ‘likely’ and ‘substantial.’” *Canadian Nat’l Ry. – Control – Duluth, Missabe, & Iron Range Ry.*, STB Finance Docket No. 34424, slip op. at 13 (STB served Apr. 9, 2004) (“*CN/GLT*”). Even if there are such “likely” and “substantial” anticompetitive effects, the Board cannot disapprove the transaction “unless the anticompetitive impacts outweigh the benefits and cannot be mitigated through conditions (which the Board has broad authority to impose under 49 U.S.C. 11324(c)).” *Id.* at 13-14. Even then, the Board generally limits itself to conditions that are “feasible” and would ameliorate “significant” competitive harm. *Id.* at 14. The Board is also careful to distinguish harms caused by the merger from pre-existing disadvantages that other railroads, shippers, or communities may have been experiencing that are not “merger-related” (*i.e.*, pre-existing disadvantages that will neither be caused nor exacerbated by the merger). *Id.*

Because conditions generally tend to reduce the benefits of a consolidation, the Board has long maintained a policy of refraining from burdening mergers with conditions unless they are necessary either to ameliorate the anti-competitive impact of a merger or to protect essential services. *See Lamoille Valley R.R. v. ICC*, 711 F.2d 295, 302 & n.8 (D.C. Cir. 1983).

The Board will only impose a condition where: (1) a transaction threatens harm to the public interest, such as a significant reduction in competition, (2) the condition would ameliorate or eliminate the harm, (3) it is operationally feasible, and (4) it would result in greater benefit to the public than detriment to the transaction. *Union Pac. Corp. – Control – Mo. Pac. Corp.*, 366 I.C.C. 462, 562-65 (1982); *see also Wisc. Cent. Transp. Corp. – Continuance in Control – Fox Valley & W. Ltd.*, 9 I.C.C.2d 233, 239 (1992).

The burden is on the protesting parties to prove a condition is necessary. In its decision announcing the procedural schedule, the Board required that a party seeking “either the denial of the application or the imposition of conditions upon any approval thereof, on the theory that approval (or approval without conditions) would harm competition and/or their ability to provide essential services . . . must present substantial evidence in support of their positions.” Decision No. 2 at 13, *citing Lamoille Valley*, 711 F.2d 295.

On October 30, 2007, Applicants filed CN-2, a Railroad Control Application (the “Application”). They sought authority under 49 U.S.C. §§ 11323-25 and the Board’s Railroad Consolidation Procedures, 49 C.F.R. Part 1180, for authorization for Applicants to acquire control of EJ&E West Company (“EJ&EW”). Applicants established that their proposed control transaction (the “Transaction”) should be classified as “minor” under the Board’s rules, *see* Decision No. 2 at 9, because Applicants established that “any anticompetitive effects of the transaction will clearly be outweighed by the transaction’s anticipated contribution to the public interest in meeting significant transportation needs.” *Id.* at 2.

The Application contained substantial evidence on both the absence of any anticompetitive effects and on the many transportation benefits expected as a result of the Transaction. The Application contained evidence that there would be no “2-to-1” or “3-to-2” shippers, no vertical foreclosure, no reduction in effective geographic competition, and no increase in market power. The Application also included statements from a number of shippers who would benefit from the Transaction, and many similar statements of support have been filed since the Application was submitted. The

Application thus firmly established that the Transaction merited approval under 49 U.S.C. § 11324(d).

In Decision No. 2, the Board adopted a procedural schedule that provided for submission of “comments, protests, requests for conditions, and any other evidence and argument in opposition to the application” by January 28, 2008, and for Applicants to file their responses to comments, protests, requested conditions and other opposition by March 13, 2008. The Board received a total of 31 comments: 25 in opposition, and 6 either in support or neutral. In addition, the Board has so far received statements from 87 shippers, elected officials, business groups, or individual citizens in support of the Application.

Applicants hereby reply to those opposition comments, and request that the Board approve the Application without further proceedings (including briefs or oral argument) related to the competition aspects of the Application and without any conditions other than the standard *New York Dock* labor protective conditions.¹

DISCUSSION

The Board’s decision classifying the Transaction as “minor” was tantamount to a preliminary determination that the Transaction “clearly” satisfied these approval standards. *See* Decision No. 2 at 10; *see also Railroad Consolidation Procedures: Definition of, and Requirements Applicable to, “Significant” Transactions*, 9 I.C.C.2d 1198, 1199 (1993). None of the commenters has given the Board any reason to question that determination, as no party has presented any evidence, let alone the “substantial evidence” required by *Lamoille Valley*, that tends to show there will be a “substantial

¹ *See New York Dock Ry. – Control – Brooklyn E. Dist. Term.*, 360 I.C.C. 60, *aff’d sub nom. New York Dock Ry. v. United States*, 609 F.2d 83 (2d Cir. 1979).

lessening” of competition. And, even if such effects had been shown, no party has provided any evidence that those effects could outweigh the Transaction’s contribution to the public interest in meeting significant transportation needs. There likewise has been no showing that the Board would have to impose any conditions in order for the Application to meet the approval criteria of 49 U.S.C. § 11324(d).

In part I, Applicants reiterate the substantial pro-competitive benefits of the Transaction, and demonstrate that shippers overwhelmingly support the Application. In part II, Applicants respond to individual comments and requests for condition.

I. THE TRANSACTION HAS RECEIVED SUBSTANTIAL SUPPORT

A. Shippers

While the Application has been actively opposed, almost exclusively on environmental grounds, by a vocal group of special interests, it also is supported by a broad spectrum of shippers, business groups, communities, and government officials because of its substantial transportation benefits.

Of the 87 support statements filed in this proceeding, 38 have been from shippers, many of whom use EJ&E, including five with operations in Wisconsin. Shippers thoroughly understand that efficient and reliable rail service is a driving force behind the nation’s economy and ability to compete on an international stage. Especially given the current economic uncertainty, many shippers welcome the improvements to CN’s system, which should lead to more reliable and cost effective transportation. Shippers on CN’s system are expected to benefit from reduced transit times, and shippers throughout North America would benefit from reduced congestion on other lines in Chicago.

UPS, which has previously testified before the Board about the need for increased rail capacity, expects the Transaction to “alleviate bottlenecks and reduce traffic density in the critical Chicago rail crossroads,” directly benefiting UPS movements on CN. Other shippers expect similar results: Central States Enterprises expects to improve the turn times of its private cars, ERCO Worldwide expects to benefit from increased asset utilization with decreased transit times, and Major-Prime Plastics, Inc. expects to benefit from shortened and more predictable shipping times.

Shippers also recognize the pro-competitive effects of the Transaction. Consumers Energy Company, a utility providing natural gas and electricity to two thirds of Michigan’s population, expects that the acquisition will make CN more competitive and efficient, leading to lower costs. Ford Motor Company believes the Transaction will also make CN more competitive for shipments through Chicago. BASF, a major chemical shipper, has expressed “growing concern over the competitive environment in rail transportation,” but supports this Transaction because of its “value and sense.”

Shippers along EJ&E also support the Application because it would have a positive impact on their local economies. Seeler Industries, located in Joliet, has written that the Transaction would “provide significant benefits to the Joliet business district.” Ozinga Brothers, a Mokena supplier of concrete, expects the efficient, fast, and reliable rail service that would result from the Transaction would help to grow its business. A&R Transport, located in East Morris, supports the Transaction because its customers would benefit from the increased capacities and efficiencies of CN.

Benefits from the Transaction are not just limited to companies with operations in the Chicago area. Badger Mining Company, whose primary mine in Wisconsin is served

by CN, believes the Transaction will create the kind of efficient service and effective competition that is necessary to compete in today's marketplace. Business groups from Wisconsin echo that sentiment, and Wisconsin Manufacturers & Commerce has written that "access to a reliable and affordable freight rail network is an absolute necessity" for jobs, the economy, and the citizens of Wisconsin. The Governor of Michigan, both of its U.S. Senators, and a member of its congressional delegation all recognize how important increased capacity in Chicago is for shippers in Michigan, and all have written in support of the Transaction.

Some shippers also recognize that the Transaction will have benefits that are not related to competition. Ace Ethanol – the first large scale ethanol plant in Wisconsin – recognizes that rail is safer, does not damage public roads, and reduces highway congestion, and believes that, with the growing need to move food and energy, changes are needed to maintain the quality of rail service in North America. Prairie Material Sales, which would also benefit from the ability to reach new suppliers, supports the acquisition for safety reasons and to reduce reliance on truck traffic, which in turn can ease highway congestion.

Additionally, the National Industrial Transportation League ("NITL") filed a letter with the Board recommending the Board approve the Transaction. NITL believes the Transaction would have "significant transportation benefits" by allowing CN to bypass "one of the worst rail chokepoints in the nation." According to NITL, the Transaction would help reduce congestion in Chicago, and would benefit not just CN's customers, but rail shippers in general.

In contrast to the 5 shippers who have stated their opposition to the Transaction, the overwhelming majority of shippers who have submitted comments are in support of the Transaction.

B. Freight Railroads

Additionally, five freight railroads, including two Class Is, have written in support of the Transaction. Canadian Pacific believes the Transaction is in the public interest, and Norfolk Southern believes it will both serve the interests of the national rail system and aid in reducing congestion in the Chicago region. Indiana Harbor Belt Railroad and the Chicago SouthShore and South Bend Railroad, both with operations in Chicago, have also written in support of the Transaction. The Adrian & Blissfield Railroad, a short line that connects with CN, supports the Transaction because it believes the increased competition would lead to service improvements and lower freight rates.

C. Government Officials

Elected officials at all levels of government have written in support of the Transaction. As mentioned above, the Governor and both U.S. Senators from Michigan have written in support. United States Representative Jesse Jackson Jr. wrote in support of the Application, noting that the proposed Transaction would improve rail service, reduce congestion, and have no adverse effects on competition. Illinois State Senator Susan Garrett echoed Rep. Jackson Jr.'s comments about the positive effects of the Transaction, and added that it would especially benefit her constituents because it would drastically reduce the number of CN trains in her district and create capacity for expanded Metra service.

Local government officials have also written in support of the Transaction. The Town of South Holland, Illinois, noted that in addition to the reduced congestion it would experience, the Transaction would create a more efficient transportation system for the entire region, including the motoring public. The Village of Crete, Illinois, which currently has 40-50 trains a day passing through its borders, favored CN's effort to reduce rail congestion using private money. Finally, Richard Daley, Mayor of Chicago, wrote in support of the Transaction because it would improve rail service and not have any adverse effects on competition.

II. RESPONSE TO OPPOSING COMMENTS

A. SHIPPERS

Out of all of the shippers who are EJ&E's customers, only four filed comments opposing the Application. Applicants hereby respond to those four shippers, plus one, Wisconsin Public Service Commission ("WPSC"), that is not a current EJ&E customer.

1. American Chemical Service

American Chemical Service, Inc. ("ACS"), is exclusively served by EJ&E, and would continue to receive rail service from a single railroad after the Transaction. ACS is therefore a 1-to-1 shipper that would not have its competitive options limited as a result of the Transaction.²

ACS, however, has in effect claimed that it is a 2-to-1 shipper, because it says that the Transaction would close off its option to build a rail line out to obtain competitive rail

² Dearden, a witness for both ACS and Aux Sable, makes extended arguments about the quality of service allegedly offered by CN and WC. Those arguments are unrelated to the statutory criteria governing this proceeding. These arguments are addressed below, in section II.A.7.

service from CN. Opposition Statement and Request for Conditions [of ACS] at 4 (“ACS Comments”). That, option, however, is not a realistic one and thus cannot have been constraining EJ&E’s price and service offerings.

In response to discovery requests served by CN, ACS was unable to point to a single instance in which it raised or discussed the possibility of a build-out to either EJ&E or CN.³ Nor is CN aware of any communications by ACS raising or discussing such a possibility, or any internal discussions by CN of the possibility of a build-in or build-out to capture any of ACS’s freight business. Radloff V.S. at 3-4. ACS further admits that it has no “studies, analyses, [or] plans relating to a potential build-out.”⁴ In fact, the most concrete evidence of the feasibility of a build-out that ACS can point to appears to be that “the route of the former EJ&E (C&O)-CN interchange track is distinctly visible.”⁵

³ Responses and Objections [of ACS] to Applicants’ First Set of Interrogatories and Documents Requests, Responses to Interrogatory Nos. 1, 2 (“ACS Disc. Responses”) (attached hereto as Exhibit 1); *id.*, Responses to Document Requests Nos. 1, 2, 3. ACS conceded that there were no communications between it and either EJ&E or CN on the possibility of a build-out during “the past two years.” In response to CN’s inquiries regarding communications ACS may have had with EJ&E or CN regarding the possibility of a build-out “during the two most recent years in which any such communication was made,” and to its requests for related documents, ACS purported to find the term “the two most recent years in which such communications were made” to be “vague and ambiguous.” In fact, it is neither vague nor ambiguous, and the Board may reasonably infer from ACS’s silence that if ACS knew of any such communication, it would have cited it, regardless of when it took place.

⁴ ACS Disc. Responses, Response to Document Request No. 4.

⁵ ACS Disc. Responses, Response to Interrogatory Nos. 1, 2; *id.*, Response to Document Request Nos. 1, 2, 3, 4; *accord*, ACS Comments, Verified Statement of David Tarpo, at 2.

Notwithstanding the visibility of the former interchange track, David Lowe, Chief Regional Engineer for CN's Southern Region, has determined that ACS has underestimated the difficulties of building and operating a build-out track to the CN line. According to the agreement attached as Appendix DT-1 to the verified statement of ACS witness David Tarpo, EJ&E owns the track that extends from EJ&E's main line, just west of the crossing between the CN and EJ&E lines, to the east across Broad Street, then across the former CSXT right-of-way to the end of EJ&E's property, at the point marked "C" on the map. When the former interchange track was present, that track and ACS's own industry track formed a wye that joined EJ&E's track at point "C," as indicated on the map.

That map makes it clear that the right-of-way of the former interchange track is aligned in the wrong direction for ACS to be able to use any track reinstalled there to give CN competitive access to the ACS facility. A CN train moving on CN's line would have to proceed onto the reinstalled track, then past point "C" onto EJ&E's property; upon clearing the wye, the train would have to reverse directions and back onto ACS's industry track.⁶ It is unrealistic for ACS to assume that EJ&E would consent to the use of its track for the purpose of allowing competition from CN to discipline its own price and service offerings.⁷

⁶ Similarly, a train moving from ACS's plant would have to back up from the ACS industry track, moving past point "C" onto EJ&E's track, then reverse direction and move forward past point "C" again onto the reinstalled track, and thence onto CN's line heading southeast.

⁷ Indeed, section "SIXTH" of the agreement attached as Appendix DT-1 to Mr. Tarpo's statement provides that "[n]o other railway company shall be permitted to use Track [defined to include even ACS's own industry track south of point "C"] without consent of [EJ&E]." ACS could escape this prohibition by exercising its right to terminate the

Any build-out track, to be usable, would therefore have to be constructed elsewhere than on the right-of-way of the former interchange track. CN's Mr. Lowe has determined that this could be done by building across property to the west of the ACS plant, connecting to the CN line heading in a northwesterly direction, as indicated on the attachment to his verified statement. This could be done by installing a turnout on the CN line and another turnout on the ACS industry track, and constructing approximately 1,575 feet of new track connecting the turnouts. Lowe Reply V.S. at 4. The turnout on the CN track, however, would be located within the limits of the Griffith interlocker, which would require increased signal costs. Mr. Lowe's examination of the limited plant layout information provided in the ACS Comments that a turnout would need to be added in the ACS plant to allow CN locomotives to run-around cars in order to switch them at the plant. In addition, it appears that the new track would have impacts on wetlands on the site, requiring mitigation.⁸ *Id.* In addition, according to Mr. Lowe, providing service to ACS by using the new build-out track would be difficult from an operational standpoint. An eastbound CN train serving the ACS facility would have to stop between Main Street and Kennedy Avenue (to the west of the CN-EJ&E crossing), assuming the train was short enough to fit, then cut off the ACS cars and move them across Broad

agreement, pursuant to section "SEVENTH" thereof, but in that event section "SEVENTH" gives EJ&E the right to remove its track leading up to point "C," thus making the reverse described above physically impossible.

⁸ The presence of wetlands is confirmed by an Environmental Protection Agency report regarding the ACS facility (which was listed as a Superfund site in 1984), stating that "[w]etlands border the site to the west of the ACS facility and north of the rail spur [i.e., the ACS industry track]." U.S. Environmental Protection Agency, Second Five-Year Review Report, American Chemical Service, Inc. Superfund Site, Griffith, Lake County, IN at 5 (Apr. 2006), available at <http://www.epa.gov/superfund/sites/fiveyear/f0605002.pdf>.

Street and onto the new build-out connection; a westbound CN train would have to stop between Colfax Street and Reder Road, then cut off the ACS cars, move them forward across Colfax Street and past the turnout to the new build-out connection, then back up through the turnout onto the build-out track. Either move could increase traffic delays in the area by requiring additional blockage of the road crossings at Broad or Colfax Street. Lowe Reply V.S. at 4-5.

Mr. Lowe estimates that the cost of the build-out would be approximately \$540,000 for the portion of the construction on CN property (including signaling), and approximately \$1.2 million for ACS's portion (including embankment work, drainage, utilities, and wetland mitigation and permitting, but not including the cost of any necessary land acquisition). Environmental complications aside, ACS provides no reason to believe that this expenditure by ACS would be justified by the rate savings ACS could expect as a result of competition from CN, nor does it provide any reason to believe that CN would regard its expenditure justified by the revenue it could expect to gain from providing service to ACS.

An examination of ACS's own description of the rail traffic moving to and from its facility suggests that the gains from a build-out are unlikely to justify its cost. According to Mr. Tarpo, only 167 carloads of traffic moved by rail to or from ACS in 2007. Tarpo V.S. at 3. All of this traffic moved to or from points served by BNSF, KCS, NS, or UP; none of it moved to or from CN-served points. Radloff Reply V.S. at 3-4. Thus, any ACS traffic that CN might gain from competition with EJ&E would have to be interchanged; of the 2007 traffic, 80 carloads (originating on UP at Taft, LA) would be interchanged at Salem, IL, 6 carloads (terminating on KCS at Verona, MS) would be

interchanged at Jackson, MS, 10 carloads (terminating on either BNSF or KCS at Tupelo, MS) would be interchanged at Memphis or at Jackson, and the rest would be interchanged at Chicago. Radloff Reply V.S. at 3-4. Thus, for 71 carloads, CN could expect no more revenue than what it would earn on the short haul to or from Chicago, and any reductions in ACS's rail rates resulting from CN competition for this traffic would therefore be minimal. CN might have a greater proportion of the division of revenue on the remaining 80 cars from Salem, or the 16 cars to Memphis or Jackson; nevertheless, because the volume of traffic at issue is so low, it is unlikely that CN could offer rates so much lower than EJ&E's rates (even given CN's low operating ratio, which is the lowest of any Class I railroad) ACS would have an incentive to invest the significant resources that Mr. Lowe has indicated would be needed for a build-out.⁹ Radloff Reply V.S. at 3-4.

But even if a build-out were a plausible option for ACS, such that the Transaction would result in a reduction in potential competition, the Board's precedents do not support ACS's proposed remedy for that reduction. ACS requests that approval of the Transaction be conditioned on a grant of trackage rights between ACS's facility and an interchange point with NS at Griffith or Hartsdale, IN. ACS Comments at 4. The trackage rights condition ACS seeks would give ACS access to a second railroad, without having to expend the resources necessary to build out to a second carrier. It would therefore not preserve ACS's existing competitive options, but would give it an unmerited windfall. (And to the extent that the trackage rights were granted to BNSF,

⁹ Even if CN competition were able to reduce the total rail rate by as much as \$200 a car, it would take more than 35 years to recoup an investment of \$1.2 million, without regard for the time value of money.

CP, NS, or UP, they would give ACS single-line service, for at least part of its traffic, that it does not enjoy today, providing a further windfall.)

If a remedy for potential loss of competition were warranted (and it is not), the appropriate remedy would be to give NS or an alternate carrier trackage rights to a point on CN's existing line, with the right to construct track from that point to the ACS facility, or for ACS to construct track from its facility to that point. This would be consistent with the Board's practice in other control proceedings where the transaction was held to be eliminating a credible build-in or build-out opportunity.¹⁰

2. ArcelorMittal

In its Comments and Requests for Conditions (ARCM-2), ArcelorMittal professes a myriad of concerns regarding service to its facilities at Indiana Harbor and Gary, IN, and requests that the Board impose conditions of approval of the Transaction aimed at ensuring that the status quo it now enjoys is not altered. ArcelorMittal calls for (1) trackage rights giving a third carrier (*i.e.*, other than CN or Gary Railway) access to ArcelorMittal's Gary Plate facility, (2) a grant of trackage rights to South Chicago & Indiana Harbor Railroad ("SCIH," an ArcelorMittal subsidiary) to operate over EJ&E trackage linking certain ArcelorMittal facilities, and (3) a broad status quo condition requiring CN to freeze every "rate, other service price or practice offered by EJ&E at any of the Chicago-area ArcelorMittal facilities" for a period of five years following consummation of the CN/EJ&EW Transaction.

¹⁰ *E.g.*, *CSX Corp. – Control & Operating Leases/Agreements – Conrail Inc.*, 3 S.T.B. 196, 320 (1998) (Joseph Smith & Sons); *Union Pac. Corp. – Control & Merger – S. Pac. Rail Corp.*, 1 S.T.B. 233, 469 (Entergy), 473 (Dow Chemical) (1996); *Burlington N. Inc. – Control & Merger – Atchison, T. & S.F. Ry.*, 10 I.C.C.2d 661, 744-45 (Oklahoma Gas and Electric), 781 (Phillips Petroleum Company) (1995).

ArcelorMittal fundamentally misunderstands the role of the Board in this proceeding. Contrary to ArcelorMittal's apparent opinion, it is not the Board's function to manage the details of the relationships between railroads and their shippers, or to ensure that no control transaction goes forward that might alter such details to the dissatisfaction of shippers without regulatory conditions that would preserve the shipper's status quo. That approach, which was once taken, and which stifled carrier initiative and ability to respond to changing circumstances, was decisively rejected by Congress when it enacted the Railroad Revitalization and Regulatory Reform Act of 1976 (the "4R Act") and the Staggers Rail Act of 1980. In those landmark statutes, Congress decided instead that railroads should be left generally free to run their businesses, and that shippers would be served better by competition than by regulatory dictate, except in those instances where market power prevents the benefits of competition from being realized.

Accordingly, the Board has made it clear that, "[b]ecause conditions generally tend to reduce the benefits of a consolidation, they will be imposed only where certain criteria are met." *Canadian Nat'l Ry. – Control – Ill. Cent. Corp.*, 4 S.T.B. 122, 141 (1999) ("*CN/IC*"). As the Board explained, "[t]he principal harms for which conditions are appropriate are a significant loss of competition or the loss by another rail carrier of the ability to provide essential services," although it also imposes conditions "as appropriate to carry out our obligations under various environmental statutes, and to carry out our statutory obligations to protect the interests of affected employees." *Id.* at 141 & n.70. ArcelorMittal does not allege that its requested conditions are necessary to remedy any significant loss of competition. Nor can it, as its facilities at East Chicago and Gary will continue to be served by the same number of railroads as before. (ArcelorMittal

cites no authority that would suggest that CN's alleged "lack of interest in or focus on local rail customers such as ArcelorMittal," ARCM-2 at 4, could constitute a "significant loss of competition" justifying exercise of the Board's conditioning authority.) And it is obvious that the requested conditions do not address the potential loss of essential services provided by another railroad or impacts on the environment or rail employees. And even if the Board has the authority to impose conditions addressing concerns other than competition, essential services, environmental impacts, and labor protection in order to ameliorate or eliminate "effects harmful to the public interest," 4 S.T.B. at 141, ArcelorMittal provides no evidence that the conditions it requests are necessary to protect the public interest (as opposed to ArcelorMittal's private interest).

Even if there were a legal basis for ArcelorMittal's request, there would be no factual basis.¹¹ As EJ&E's James H. Danzl explains, Gary Railway will have every incentive and ability to provide good service to ArcelorMittal after the Transaction. Gary Railway will be better able to focus on ArcelorMittal's needs when ArcelorMittal is one of only six shippers than it does now, as EJ&E, when ArcelorMittal is one of "dozens of shippers." And like any railroad with high fixed costs, Gary Railway will have an incentive to provide service that will maximize its revenue stream and enable it to cover those fixed costs. There is thus no factual basis for granting a third carrier access to serve the Gary Plate mill, as requested by ArcelorMittal.

¹¹ ArcelorMittal argues that the failure of CN's Application to provide "any relevant information regarding local operations in and around ArcelorMittal's various Chicago-area facilities," ARCM-2 at 4, is a cause for concern, and a basis for imposing conditions. But CN's Application fully complied with the Board's rules, which call for the inclusion of information generally relevant to the standards governing approval of the Transaction, not for the information ArcelorMittal would like regarding local service. ArcelorMittal's concern that Gary Railway will provide inadequate service to its Gary Plate mill is unfounded.

Moreover, there is no basis in economic theory for ArcelorMittal's requests. As noted by, "EJ&E is today owned by U.S. Steel, and after the Transaction the portion of the former EJ&E that constitutes the Gary Railway will still be owned by U.S. Steel. ArcelorMittal gives no reason to believe that U.S. Steel's incentives concerning rail service to shippers on the Gary should be different, and adverse to such shippers, in comparison with what they are today." Velturo Reply V.S. at 9. Nor does ArcelorMittal appear to have given any consideration to the constraining impact that source-based competition imparts on delivered product pricing and the fact that there appears to be "no potential for anti-competitive pricing/service quality effects for the products and origins at issue in the ArcelorMittal filings." *Id.*

ArcelorMittal's request that the Board condition approval of the Transaction on a grant of trackage rights to SCIH that would permit that railroad to provide service between the Indiana Harbor East Plant, Indiana Harbor West Plant, and the ArcelorMittal galvanizing facility, is an unjustified attempt to exploit this regulatory proceeding to address a pre-existing condition that has no nexus to this Transaction. As Mr. Danzl explains, before the Transaction was announced, ArcelorMittal had repeatedly requested such trackage rights, and repeatedly been rejected. ArcelorMittal provides no evidence that the trackage rights are necessary to remedy some harm it would incur from the Transaction, and cannot even pretend that they would preserve the status quo that ArcelorMittal now enjoys. The Board should reject that request.

Finally, ArcelorMittal's request for a broad 5-year status quo condition to protect current rates, services, and practices must likewise be rejected. Beyond the fact that ArcelorMittal has demonstrated no anticompetitive basis for such an extraordinary

remedy, there is simply no factual basis for that assertion. ArcelorMittal's request appears based on its concerns that CN, as a large carrier, will not afford it the same degree of attention and service that it has become accustomed with EJ&E. CN has a well-proven and well-regarded record for service excellence, and ArcelorMittal has no reason to doubt that it will receive such service from CN. As we have indicated to ArcelorMittal, we are committed to working with the company now and after consummation of the transaction, should it be approved, to provide a smooth transition and provide it the level of service it requires.

3. Aux Sable & Equistar's Notice of Adoption

Self-styled "Protestants" Aux Sable and Equistar have belatedly and without citation of any authority filed a very unusual, if not unprecedented, Notice of Adoption of Evidence and Argument and of Common Position, consisting of five pages of argumentation and an exhibit.

These parties filed notices of intent to participate on November 19, 2007, and January 28, 2008, and their relevant establishments are only some six miles apart. They have known of each other's involvement for months. Yet, they made their "adoption" filing more than a month after filing their respective comments – only eight business days before the deadline for Applicants' Replies to Comments – citing no authority and offering no explanation or excuse for their prejudicially late and unauthorized action.¹²

¹² The "Notice" suggests that Applicants may have tried to hide the "large concentration of rail traffic" on the East Morris Lead Track and the Illinois River Line (offshoots from the basic EJ&J "arc") because a map distributed by someone other than CN at an environmental scoping session conducted by SEA omitted those segments (Notice p. 3). However, the focus of those sessions was on other parts of the EJ&E system expecting traffic changes, and the Application itself contained a map showing the areas and EJ&E lines Protestants suggest someone was trying to hide (CN-2 at 515).

Adoption of other parties' arguments may sound efficient and administratively desirable, but can involve complications and disruption because of differences in relevant facts and evidence. Parties' taking such action unilaterally and belatedly, as here, is unacceptable and should not be rewarded or encouraged. The Board should strike or disregard the Notice.

To the extent that the Notice is not stricken or disregarded, Applicants request that the Board regard any arguments made below in reply to comments of either Equistar or Aux Sable be deemed, to the extent relevant, to be made in reply to the other's comments.

4. Aux Sable

Aux Sable Liquid Products, LP ("Aux Sable") claims to be "deeply concerned that CN's new plan for local EJ[&]E service would involve a harmful reduction in local rail service" at its Channahon, Illinois plant. Aux Sable's Opposition Statement and Request for Conditions at 5 ("Aux Sable Comment"). It therefore requests two conditions that would require the Board to force CN to agree to a litany of specific service requirements,¹³ including the continued lease of 5,000 feet of trackage at East Joliet Yard. Aux Sable also states that CN "may cause EJ[&]E pricing and rail service to influence all traffic to CN's connecting route" and requests the Board require CN to "assess rates and charges that will ensure economic and non-discriminatory access to all rail carriers who connect with CN" (Aux Sable Comment at 8-9).

¹³ Aux Sable's requested condition would require the Board to impose, and presumably monitor, such minor service aspects as the number of daily switches available, car storage and supply issues, and the time of day that CN would have to provide service.

Aux Sable has provided no legal or factual basis upon which the Board could impose these requested conditions. Aux Sable cannot and does not allege there would be a reduction in competition, much less the “substantial lessening of competition” that is the standard for disapproving the Application or providing mitigation to permit the Application to be approved. It does not even attempt to submit any evidence, much less the “substantial evidence” required in support of its conditions. There is simply no support for the proposition that Aux Sable will lose a competitive option or that competition will otherwise be harmed as a result of the Transaction.¹⁴

Aux Sable states that it must “have a long-term commitment from CN that it will cause EJ[&]E to continue to provide frequent and reliable rail service going forward” (Aux Sable Comment at 6). Aux Sable’s apparent concern is that CN will be less inclined to compete for Aux Sable’s business than EJ&E has been. Thus, Aux Sable’s position is that the Board may impose conditions on a “minor” transaction based on nothing more than a commenter’s concern that the acquiring carrier may provide a less generous offering of services than the acquired carrier has, but it cites no precedent for this radical expansion of the Board’s conditioning power.

Aux Sable offers no evidence for why CN would be disinclined to compete for traffic where there is an opportunity for CN to profit from that traffic. Moreover, Aux Sable proffers no evidence why it is unable to bargain directly with CN for the level of service that it requires as it has bargained with EJ&E in the past. As the Board has previously held, “[n]egotiation of transportation contracts involves a great deal of give-

¹⁴ Additionally, the only evidence Aux Sable submits to support its argument that post-transaction service levels may decrease are one-sided hearsay reports of service issues reportedly faced by still other shippers in Wisconsin at unspecified times after CN acquired WC. As discussed above, the Board should give these statements no weight.

and-take, and the Board is reluctant to use its § 11324(c) conditioning power to force upon a railroad a contract term.” *CN/GLT*, Decision No. 7 at 18. Additionally, post-transaction, Aux Sable will not be without remedies – it will still have what it negotiated for with EJ&E (*i.e.*, whatever remedies its contract with EJ&E provides).

Common control of CN and EJ&E will not lead to competitive harm under the Board’s traditional approach to such matters because CN/EJ&E’s post-merger market power with respect to Aux Sable will be no greater than EJ&E’s pre-merger market power. CN will thus have no incentive not currently possessed by EJ&E to decrease service levels or otherwise act in a manner inconsistent with Aux Sable’s interests.

Because Aux Sable has presented no legal, economic, or factual basis for support of its conditions, they should be denied.

5. Equistar

Equistar Chemicals, LP (“Equistar”), a subsidiary of Lyondell Chemical Company (“Lyondell”) is concerned about what it calls the “disturbing ramifications for its East Morris, Illinois plant that would be posed” if the Transaction were to be approved. Equistar’s Motion for Leave to File a Petition to Deny, or in the Alternative, Request Conditions at 1-2 (“Equistar Motion”). That plant is served by both EJ&E and CSXT but, Equistar claims CSXT “does not pose viable competition to EJ&E, in that CSXT is unable to furnish the necessary storage to support the East Morris plant’s needs.” Equistar’s Petition to Deny, or in the Alternative, Request Conditions at 2 (“Equistar Comment”). Equistar’s other concern, which it at times appears to conflate with its first concern, (*id.* at 3-4), is that it has “serious reservations” that the Transaction will eliminate what it sees to be a “neutral” connection provided by EJ&E to various

other carriers (*id.* at 2). As a remedy for its concerns, Equistar asks the Board to either deny the Application or “impose conditions providing for the granting of trackage rights and storage-in-transit rights consistent with those currently offered by EJ&E sufficient to protect the ability of Equistar to receive benefits equivalent to neutral connection at its East Morris plant” (*id.* at 4).

Equistar, however, has provided no legal or factual foundation for denying the Application or imposing conditions upon its approval. Equistar cannot and does not allege there will be a reduction in competition, much less the “substantial lessening” that is required by statute as a grounds for denying the Transaction or imposing mitigating conditions. Absent such an allegation, much less any showing to that effect, Equistar has no basis to expect any relief.

The Board could take two approaches to assessing Equistar’s concerns. Either would lead to the conclusion that Equistar has no valid concerns, and certainly no concerns that are remediable under ICCTA. The first approach would accept at face value Equistar’s claim, which Applicants believe is untenable, that it is served only by EJ&E and that CSXT provides no actual or potential competition for EJ&E. As we note below, Equistar has provided no serious support for this proposition. And we note here that, if the proposition were true, it would mean that Lyondell acquired Equistar knowing that the Morris Plant was solely served by EJ&E. Based on that assumption, the Board would be required to deny Equistar’s request for relief because Equistar has shown no change in the competitive status quo would result from this Transaction. Instead, CN would fill EJ&E’s shoes as the exclusively serving carrier and would acquire EJ&E’s capacity to store cars and its right, subject to any contractual obligations, to refuse that

service at any time. From the perspective of sound competition analysis, Equistar would face exactly the same competitive picture as it faces today. Vellturo Reply V.S. at 5-7.

Approaching Equistar’s concern from the more plausible premise – that CSXT is a viable competitor – leads to the same result: there would be no change in the competitive status quo as a result of the Transaction. We explore this approach further below.

By its own admission, Equistar is physically served by two carriers, EJ&E and CSXT, and Equistar makes no claim that this arrangement will change after the Transaction. Equistar prefers EJ&E’s service solely because Equistar values the storage service that EJ&E provides (but is not legally required to provide), and which it believes CSXT cannot or will not provide on terms satisfactory to Equistar. Equistar offers no other plausible reason why it does not view CSXT to be a viable competitor for EJ&E now or in the future.¹⁵ Instead, Equistar has intervened in this proceeding, not because it has any demonstrable basis for fearing loss of competition but because it fears that CN will be less inclined than EJ&E has been to provide storage on terms equally favorable to Equistar.¹⁶

¹⁵ Equistar does assert that CSXT is a less effective competitor because part of its competing route is via trackage rights (Equistar Comment at 3). But Equistar makes no showing why trackage rights (which are among the conditions it requests) would make CSXT not competitive with EJ&E or CN.

¹⁶ Equistar’s vague allusions to a loss of competition – that it “anticipates” and has “serious reservations” that CN will eliminate neutral connections in order to maximize CN’s line haul opportunities – are supported by no facts and no economic logic. As discussed in more detail in the Verified Statement of Christopher A. Vellturo, (“Vellturo Reply V.S.”) these concerns have no basis in well established economic theory. That theory has been adopted and repeatedly applied by the Board, and endorsed by federal appellate courts. Vellturo Reply V.S. at 3-4.

In other words, Equistar's ultimate concern is that CN will be less inclined to pursue Equistar's business in competition with CSXT than EJ&E has been. Thus, in the end, Equistar's request for denial of the Transaction or the imposition of conditions is based solely on its view that the Board may refuse to approve a "minor" transaction, or impose conditions for such a transaction, on the grounds that a shipper suspects that the acquiring carrier in the transaction *may*, in competition with another carrier, offer less generous ancillary services (in this case, the storage of loaded cars) than the acquired carrier.

Equistar has offered no evidence that CN is not inclined to compete for traffic where there is an opportunity for CN to make money from that traffic, or that the Transaction would somehow alter its ability to secure such competition. And there is no reason why CN would not be as aggressive in competition for Equistar's traffic as it is for any other traffic. *Velluro Reply V.S.* at 5-7. If the highest and best use of EJ&E's facilities is to store cars for Equistar, then CN will have every incentive to allow Equistar to store its cars. On the other hand, if CN and Equistar cannot come to an agreement regarding the storage of cars, there is no evidence (as opposed to the assertion without factual support by Equistar's witness) that Equistar does not have other options available, such as acquiring its own storage facility, leasing property in another rail yard, or contracting with CSXT to provide the same service. Indeed, there is every reasonable expectation that it does.

However, whether or not CN will be as effective a competitor against CSXT for Equistar's business is something that will be determined only when CN steps into

EJ&E's shoes. What is important is that Equistar has competitive options today and will have those same options tomorrow.

Given that fact, it is no wonder that Equistar offers no basis for its extraordinary proposition that, in the absence of a reduction in competition resulting from the Transaction, there is a legal basis for action by the Board to **guarantee competition in the form and on the same terms and price as those preferred by Equistar**. There is no such authority, and on that basis, and for the reasons outlined above, Equistar's request should be denied.

6. Wisconsin Public Service Corporation

Wisconsin Public Service Corporation ("WPSC") operates two coal-burning power plants in Wisconsin. The Weston Generating Station, near Wausau, WI, receives rail service from CN and CP; Pulliam Generating Station, at Green Bay, WI, is exclusively served by CN. WPSC receives coal at both plants from CN, under the terms of a contract that went into effect January 1, 2008. After implementation of the Transaction, Weston would continue to receive service from two railroads, and would thus be a "2-to-2" shipper, while Pulliam would continue to be exclusively served by CN, and would thus be a "1-to-1" shipper. The proposed Transaction would therefore have no impact on competition for rail service to WPSC's plants.

Nevertheless, WPSC has requested that the Board condition any approval of the Transaction on conditions that would require detailed monitoring and reporting of CN's service on the EJ&E Western Subdivision and that would turn CN's statements about its expectations regarding improvements to service into service guarantees enforceable by the Board. WPSC cites vague "service problems" on CN's lines north of Leithton, over

which CN moves coal under its current contract, as ground for imposition of conditions to ensure the quality of service provided to WPSC. WPS-4, Verified Statement of David J. Wanner at 9 (“Wanner V.S.”). WPSC states that it “remains very concerned that the Transaction may produce traffic flow congestion problems on those lines,” citing as ground for concern the fact that “CN’s Application does not contain traffic change information concerning those lines.” *Id.* In fact, the Application *does* contain such information, and it shows that any impacts of the Transaction on those lines would be minimal.¹⁷ WPSC does not explain the nature or extent of the “service problems” on CN’s lines, so the Board should not regard WPSC’s vague assertions as a basis for any relief.¹⁸

WPSC also suggests that the increases in traffic that CN projects on the EJ&E Western Subdivision “could” adversely affect BNSF’s transportation of coal traffic for WPSC over that line (pursuant to trackage rights granted by EJ&E), although it provides no evidence that such delays would occur.¹⁹ WPSC’s request for conditions to remedy

¹⁷ Attachment A.1 to the Operating Plan (CN-1 at 246) indicates that a maximum of 1,488 tons per day (a number that corresponds with less than 50 carloads a year) would be added to CN’s line between Leithton and Ranier as a result of the Transaction.

¹⁸ CN’s account manager for WPSC, Joseph Chavarria, opines that whatever service problems CN may have had on its Wisconsin lines are probably the effect of the challenges of providing rail service in Wisconsin under sub-zero conditions during the winter. Verified Statement of Joseph Chavarria at 2. (“Chavarria Reply V.S.”). CN works diligently to meet those challenges, which in any event will be unaffected by the CN/EJ&EW Transaction. *Id.*

¹⁹ It is noteworthy that while WPSC points to the absence of “evidence that [CN’s Operating Plan for the EJ&EW lines] was tested via standard industry modeling (*e.g.*, the Railroad Traffic Controller Model (‘RTC’) to determine whether the plan is realistic, or that the inputs were verified.” WPS-4 at 20. Neither the statute nor the Board’s rules require such evidence, nor do they require “that any such model [be] utilized by CN in testing its Operating Plan.” *Id.* Indeed, the Board’s requirements for the operating plan

deterioration of service that merely might occur is unjustified as a matter of law and is unsupported by the facts.

a. WPSC Misstates the Standard Governing the Board’s Review of the Transaction

WPSC attempts to establish the predicate for its request for service-oriented conditions by citing 49 U.S.C. § 11324(c) to argue that the Board must determine whether a proposed control transaction “is in the public interest” (WPS-4 at 6). WPSC ignores the fact that, for transactions (such as this one) not involving the merger or control of more than one Class I railroad, the Board’s public interest inquiry is a very limited one. Under the standard applicable to this case, the Board must approve the Transaction unless it finds both (1) that the Transaction would likely cause “substantial lessening of competition, creation of a monopoly, or restraint of trade in freight surface transportation in any region of the United States” and (2) that “the anticompetitive effects of the transaction [would] outweigh the public interest in meeting significant transportation needs.” 49 U.S.C. § 11324(d).

WPSC’s reference to a “public interest” standard, without providing the wider context of that standard, is an oversimplification that amounts to a misstatement of the applicable law. For minor transactions (such as this one) or significant transactions, the only “public interest” standard applicable is that set forth in the second part of 49 U.S.C. § 11324(d). As the Board’s predecessor has said, “[w]e consider the public interest

submitted for a minor transaction call for considerably less information than for a major or significant transaction, *see* 49 C.F.R. § 1180.8(c), and Applicants’ Operating Plan more than satisfied those requirements. If WPSC had any evidence from RTC or any other standard industry model that Applicants’ Operating Plan was inadequate, they were free to submit it. Having failed to do so, they cannot now legitimately shift the burden of proof back to Applicants.

factors [of 49 U.S.C. § 11324(d)(2)] only if we find significant anticompetitive effects” would result from the transaction. *Canadian Pac. Ltd. – Control – Davenport, R.I. & N.W. Ry.*, Finance Docket No. 32579, (served Feb. 10, 1995) (citations omitted). WPSC has not suggested – nor could it credibly suggest – that the Transaction would have any significant anticompetitive effects upon it. That should be the end of the analysis.

WPSC misleadingly cites 49 C.F.R. § 1180.1(h), providing “guidance as to the importance of service performance assurances,” as stating that “the quality of service is of vital importance,” and as “requiring applicant to demonstrate that post-transaction service levels are ‘reasonable and adequate.’” WPS-4 at 8. In a footnote, WPSC acknowledges that these provisions actually apply only to the merger or control of at least two Class I railroads, but argues that they nonetheless “provide important guidance to the present transaction, especially given the poor service implementation track record of recent mergers.” WPS-4 at 8 n.5. But the only examples of that “track record” cited by WPSC are from mergers of Class I railroads. See WPS-4 at 9 (quoting STB Brief at 4, 20-11 (footnotes omitted), *W. Coal Traffic League v. STB*, 216 F.3d 1168 (D.C. Cir. 2000) (No. 00-1115)).²⁰ Section 1180.1(h) has no bearing on this proceeding.

Perhaps because it recognizes that the Board’s review of this Transaction must primarily focus on the impact of the Transaction on competition, WPSC asserts that “the

²⁰ The STB brief quoted by WPSC referred to “[t]he well-publicized service crisis that developed shortly after approval of the UP/SP merger,” “[t]he subsequent service problems following the Conrail division,” and “[t]he problems with the BN/SF merger.” (It also stated that “even the CN/IC merger [another control transaction involving two Class I railroads] ... has not left all shippers satisfied,” without, however, indicating that any shipper dissatisfaction was well-founded.) That “track record” was already in place in 2001 when the Board adopted 49 C.F.R. § 1180.1(h), yet the Board gave no indication that it intended that section to “provide important guidance” in its review of minor and significant transactions.

possibility of service deterioration resulting from a merger transaction has been considered a form of ‘competitive harm.’” WPS-4 at 6. WPSC, however, fails to support that assertion. While WPSC correctly cites the Board’s decision in *UP/SP* as stating that “merger-related competitive harm results when the merging parties gain sufficient market power profitably to raise rates and/or reduce service,” WPS-4 at 6 (quoting *Union Pac. Corp. – Control & Merger – S. Pac. Rail Corp.*, 1 S.T.B. 233, 430 n.191 (1996) (“*UP/SP*”), *aff’d sub nom. W. Coal Traffic League v. STB*, 169 F.3d 775 (D.C. Cir. 1999)), that statement hardly means that *any* deterioration of service, regardless of its cause, constitutes competitive harm. The Board’s statement means that a deterioration in service may be a consequence of harm to competition, not that it constitutes such harm itself.

b. WPSC Misstates the Scope of the Board’s Conditioning Authority

WPSC quotes the Board’s decision in *CN/IC* that “[t]he principal harms for which conditions are appropriate are a significant loss of competition or the loss by another rail carrier of the ability to provide essential services.” *Canadian Nat’l Ry. – Control – Ill. Cent. Corp.*, 4 S.T.B. 122, 140 (1999) (“*CN/IC*”). While WPSC does not argue that conditions are warranted to remedy “a significant loss of competition,” it makes an “essential services” argument, ignoring the fact that the relevant “essential services,” according to the Board’s precedents, and the very language quoted by WPSC, are services provided by “another rail carrier” than the applicant.²¹ WPSC further obfuscates

²¹ Thus, for example, the Board imposed conditions on the acquisition of Conrail by CSX and NS for the benefit of Wheeling & Lake Erie Railway Company (“W&LE”), “to prevent further erosion of W&LE’s financial viability due to [diversions of W&LE traffic resulting from] this transaction.” *CSX Corp. – Control & Operating Leases/Agreements – Conrail Inc.*, 3 S.T.B. 196, 310 (1998) (“*Conrail*”).

the applicable law by citing several instances in the *UP/SP* and *Conrail* proceedings in which the Board imposed conditions addressing service issues, without acknowledging that those issues were all related to loss of competition as a result of the proposed Transaction.²²

c. WPSC Improperly Seeks to Transform CN' Expectations Regarding Post-Transaction Service Improvements into Enforceable Service Guarantees

Among the conditions WPSC requests is that the Board “hold CN to its representations made in the Application that customers (including trackage rights customers such as WPSC) will receive faster and more reliable service post-transaction.”

In the *UP/SP* decision, the Board explained more fully its use of its conditioning power to preserve essential services:

In assessing the effects of a rail merger, we must evaluate whether *opposing railroads* will be financially and competitively able to withstand the projected loss of traffic to the consolidated system. In assessing the probable impacts and determining whether to impose conditions, however, our concern is the preservation of essential services, not the survival of particular carriers. It is not our duty to ensure preconsolidation levels of traffic or the survival of competitors; we are concerned only with the preservation of the essential services they provide. An essential service, for this purpose, is a service for which there is a sufficient public need, but for which adequate alternative transportation is not available. 49 CFR 1180.1(c)(2)(ii).

Union Pac. Corp. – Control & Merger – S. Pac. Rail Corp., 1 S.T.B. 233, 366 (1996) (“*UP/SP*”). Needless to say, this does not describe the kinds of conditions that WPSC is seeking to characterize as ones for the sake of “essential services.”

²² The condition in *UP/SP* permitting Texas Utilities Electric Company traffic to take advantage of BNSF’s directional running of trains on *UP/SP* lines (*UP/SP*, 1 S.T.B. at 471 (cited in *WPS-4* at 7)) was awarded to insure that the BNSF service provided pursuant to the applicants’ settlement agreements with BNSF and Chemical Manufacturers Association would adequately substitute for competition by SP that would be lost as a result of the transaction. Similarly, other conditions imposed in *UP/SP* “to ensure that the merger does not result in service degradation for Central Corridor coal (and other) movements” were directly intended to remedy the loss of competition between UP and SP for traffic over the Central Corridor, and to ensure that trackage rights granted to BNSF would permit that railroad to compete effectively with *UP/SP*.

WPS-4 at 22. While the Board has held applicants in control proceedings to some or all of their representations on the record, it has not “held” them to statements about their expectations regarding service following the Transaction. Thus, although the Board held the applicants in *Conrail* to “all of the representations they made during the course of this proceeding,” 3 S.T.B. at 387 (cited in WPS-4 at 22), there was no suggestion that the well-publicized service problems that immediately followed the “Day One” division of Conrail were a violation of the applicants’ representations that the division would “result in improved transit times, greater reliability of on-time delivery, increased safety, and other service and efficiency gains.” See 3 S.T.B. at 231. Indeed, the Board made clear that even representations regarding plans for their own use of existing facilities would not be regarded as irrevocable commitments, and that changes in conditions would justify deviations from those plans.²³ WPSC’s “representations” condition is therefore unwarranted.

d. WPSC’s Claims Regarding CN Service Do Not Justify Imposition of Conditions

In any event, WPSC does not need the operational monitoring and guarantee conditions it seeks in order to protect its interests. CN’s service to WPSC’s Weston and Pulliam plants is governed by its contract with WPSC, which was the product of arm’s-length bargaining between the parties and which went into effect at the beginning of this year. Chavarria Reply V.S. at 1. Under that contract, CN is guaranteed [REDACTED]. In that case, two-thirds of WPSC coal traffic now moving over the EJ&E line would use

²³ *CSX Corp. – Control & Operating Leases/Agreements – Conrail Inc.*, STB Finance Docket No. 33388, Decision No. 198 (STB served Sept. 19, 2001) (declining to require NS to keep its Hollidaysburg Car Shops open, notwithstanding NS’s statements regarding its plans to use those shops after acquiring them).

a different route, rendering WPSC's service concerns moot to that extent.

[REDACTED]. Those options are ones which the market now makes available to WPSC. For the Board to impose the requested conditions would be amount to use of the Board's regulatory power to provide WPSC with additional options that it did not seek or was unable to obtain through bargaining with CN. The Board should not let its regulatory authority be used in such a manner, and should deny WPSC's requests.

7. Response to Concerns Raised by Consult to American Chemical Service and Aux Sable

As noted in the Application, CN is committed to customer service (CN-2 at 17, 76). It continues to win awards from shippers for its service (Radloff Reply V.S. at 1). Recently CN again won the Vendor of the Year award from Evergreen Shipping Agency (*id.*).

Nevertheless, consultants speaking in support of two shippers, refer to one-sided hearsay reports of service issues reportedly faced by still other shippers in Wisconsin at unspecified times after CN acquired WC (Aux Sable Comments, Dearden Verified Statement at 17-19;²⁴ American Chemical Service Comments, Dearden/Bradshaw Verified Statement at 4-6, 7-8).²⁵ The Board should not give weight to such reports based on no more than the conclusory hearsay.

²⁴ The shipper consultant witnesses correctly acknowledge that shippers on WC had a remedy readily available to protect their service, through CN's agreement with NITL, which was referred to in the Board's decision (*Canadian Nat. Ry. Co. – Control – Wisc. Cent. Ltd.*, Finance Docket No 34000, Decision No. 10, (served Sept. 7, 2001)). See Dearden V.S. at 7. Despite the extensive scrutiny given to CN's actions (alleged or actual) in Wisconsin after the CN/WC transaction, there has been no reference to any determinations that CN's actions breached any of its legal obligations under the NITL agreements or were otherwise improper.

²⁵ Shipper witness Bradshaw, a top executive at WC before it was acquired by CN, may be understood as having an understandable bias in favor of the way WC ran the railroad

Applicants note, however, that the actions of CN, and the experience of shippers in Wisconsin following the CN/WC merger, were the subject of a public hearing inquiry by the Wisconsin Public Service Commission and the Wisconsin Department of Agriculture, Trade and Consumer Protection in 2006 regarding rail service and rates. CN voluntarily submitted in those proceedings a statement addressing the issues. *See* Statement of James Foote, CN's Executive Vice President of Sales and Marketing, dated October 11, 2006 (attachment to Radloff Reply V.S.).

The shipper witnesses here overlook CN's response. In that response Mr. Foote discussed CN's business model, the capital-intensive nature of rail operations, and the problems with re-regulation. He explained that, after acquiring WC, CN came to learn that some of WC's operating practices were not sustainable over the long run (*id.* at 2). He also explained why service had to be adjusted on some branch lines, and some rates had to be raised (*id.*).

In these 2006 hearings on rail transportation issues, the Wisconsin Public Service Corporation made a presentation discussing some of the specific actions railroads were taking to further improve service. It included CN, and noted that CN was:

- Adding crews in Wisconsin
- Tracking trains more closely
- Working with WPS to install air compressor at Pulliam to perform air testing
- Addressing power issues with origin railroad

when he was there, but his testimony has no bearing on CN's current practices concerning customers in Wisconsin or elsewhere.

- Adding a wye in Junction City, WI at a cost of approximately \$2 million.²⁶

Comments of the Wisconsin Department of Agriculture, Trade and Consumer Protection (Wisconsin DATCP), which along with the Wisconsin Public Service Commission had conducted the hearings, provided a top 10 list of complaints from shippers. Among those included were that “car ordering procedure was streamlined” and “[e]verything is done on-line” (Wisconsin DATCP comments at 3). The fact that such modernizing, efficiency-enhancing changes may have been made does not mean that the Board should not have approved the CN/WC transaction nor that it should not approve the CN/EJ&E Transaction. CN’s actions after the WC acquisition were in no way anticompetitive or otherwise contrary to the public interest, and provide no basis for disapproving the Transaction.

Sensibly looking forward rather than backwards, the Transportation and Logistics Research Center of the University of Wisconsin-Superior conducted a study, *Evaluation of Shipper Requirements and Rail Service for Northern Wisconsin and the Upper Peninsula of Michigan* (Aug. 1, 2006),²⁷ which made a number of recommendations applicable to all shippers and carriers (pp. 6-7):

1. Improve communications of long and short term plans for carriers and shippers
2. Rail carriers need to expand their outreach to seek customer input
3. Expand available tools to support supply chain management

²⁶ Wisconsin Public Service Corporation, *Rail Transportation Issues*, Sept. 28, 2006, at 10.

²⁷ Available at <http://www2.uwsuper.edu/TRANS/Research%20Center/Rail%20Study%20Project/NW-UP-Rail%20Report-Final.pdf>.

4. Support the interaction of shippers and rail carriers with regional communities
5. Formally recognize the external costs of transportation
6. Explore the feasibility of adding transload centers
7. Consider Shortline or Regional Railroad Operator Options
8. Promote economic development by enhancing information about rail options.

The report did not find that CN's actions concerning its acquisition of WC were in any way anticompetitive. Indeed, the report noted that CN was "active and supportive in the study process and is committed to serving the region with an economically sustainable model" (*id.* at 6).²⁸

B. FREIGHT RAILROADS

1. CSXT

Of the many freight carriers that own lines in the Chicago area (including BNSF, UP, NS, CP, IHB, CSSB, BRC), CSXT stands alone in opposing or seeking conditions with respect to CN's proposed Transaction. One might expect, therefore, that CSXT is raising some specific and unique competitive or operational problem. But it does not. CSXT merely asserts in the most general way, through a two-page letter, with no supporting testimony or evidence (save a single attached one page e-mail), that unspecified operational concerns warrant a condition freezing in place the major Chicago interchanges (including locations, practices, terms, and conditions) between CSXT and

²⁸ The report also noted the assistance of present or former CN officials, including the head of CN's entire Chicago-based Southern (U.S.) Division, Gordon Trafton (*id.* at 4).

CN and between CSXT and EJ&E, absent CSXT's approval of a change.²⁹ For the reasons discussed below, its request should be denied.

CSXT's request fails first and foremost because CSXT never shows through any evidence that the Transaction would harm competition or its ability to provide essential services. 49 U.S.C. § 11324(d); Decision No. 2 at 13. Its letter simply asserts that "increased traffic in the Chicago, IL area resulting from this proposed Transaction without mitigation will cause operations problems for CSXT's operations in the Chicago area." CSXT at 1. It never explains what "increased traffic" it is referring to, or where or how the harm it alleges would occur. Moreover, the entire premise of the argument is contrary to CN's voluminous evidence showing that the purpose and effect of its proposed acquisition will be to reduce rail congestion in the Chicago area. CSXT has not even attempted to rebut none of that evidence.

Rather than make any serious effort to demonstrate that the proposed Transaction will harm competition or otherwise harm the public interest, CSXT's letter tries to convince the Board that CN has, in effect, already agreed to the conditions CSXT seeks. (Of course, if that were true, then CSXT would not need to seek conditions.) CSXT makes two disingenuous arguments; each lacks merit.

It asserts first that CN's commitment to "keep all gateways affected by the Transaction open on commercially reasonable terms" (CN-2 at 24) is tantamount to an agreement to freeze in place all of CN and EJ&E's interchange locations and related practices, terms, and conditions. CSXT at 2. This argument, however, is specious. It is apparent from the Application itself that CN's "gateway" commitment does not entail

²⁹ It is unclear if CSXT intends also to bind itself to existing interchange arrangements absent CN and EJ&E permission for a change.

freezing interchanges in place. After all, the Application contains both the aforementioned “gateway” commitment and descriptions of various proposed changes to interchange locations.

The fact is that a “gateway” is a much broader concept than an “interchange” location or point. Chicago is often referred to as a gateway, for example, even though it is home to a large number of interchange points. Likewise, no one would refer to CN’s Barr Yard (which is an interchange point) as a gateway. CN’s “gateway” commitment here is not about freezing in place specific interchange points. As suggested by the language of the commitment itself (“requiring commercially reasonable terms”), it is about protecting shippers’ commercial options, particularly from vertical foreclosure. *See* CN/WC-2, Vol. 1 at 14 n.13. By contrast, railroads within the Board’s jurisdiction are already required by law to provide reasonable interchange facilities (49 U.S.C. §10742), so there is no need for a special commitment to provide that protection.

CN made similar “gateway” commitments in CN/WC and CN/GLT, and KCS made such a commitment in seeking approval for its acquisition of TexMex.³⁰ CN and, to CN’s knowledge, KCS and the Board, have not interpreted those commitments to preclude changes to interchange points. Doing so would threaten to reduce the potential public efficiency gains of the Transaction.

CSXT’s second argument is that CN in an e-mail to CSXT agreed to freeze all of its Chicago interchange points with CSXT (subject to CSXT’s approval of changes). Leaving aside the fact that this e-mail exchange in no way constituted a binding

³⁰ CN/WC, 5 S.T.B. 890, 897; CN/GLT, Decision No. 7 at 12 (served Apr. 9, 2004); *Kansas City S. – Control – Gateway E. Ry.*, Finance Docket No. 34324, Decision No. 12 at 13 (served Nov. 23, 2004).

agreement, Mr. Novak only noted in that e-mail that CN “has no present plan to modify” its interchanges, and that it was nonetheless agreeable to notifying and consulting with CSXT before making any such changes.

Contrary to CSXT’s assertion that CN agreed to freeze its gateways, as discussed by Mr. Trafton in his verified statement, CN’s consistent position throughout its discussions with CSXT was that it would not sacrifice its right to make reasonable unilateral changes to its interchange arrangements for receipt of traffic, even if had no present plans to make any such changes unilaterally. Trafton Reply V.S. at 3. This would allow CN to retain its ability to take advantage of new opportunities for efficiency, should they arise. The Board and courts have consistently upheld this right of a receiving carrier to specify a reasonable location for interchange. *See Norfolk S. Ry. – Petition For Declaratory Order – Interchange With Reading Blue Mt. & N. R.R.*, STB Docket No. 42078 (served April 29, 2003), and cases cited therein (“*Declaratory Order*”); *Burlington N. R.R. v. United States*, 731 F.2d 33, 40 (D.C. Cir. 1984) (carrier may choose between reasonable interchange options). Indeed, recognizing how important this right is for receiving carriers, the Board has stated that it is reluctant to intervene in such matters (*Declaratory Order* at 3), and it has squarely placed the burden on the challenging party to demonstrate that a choice of interchange is unreasonable (*Declaratory Order* at 4). Nonetheless, if CN were ever to select an unreasonable, problematic interchange location, CSXT could challenge it before the Board.

CSXT has not met the legal standards for the imposition of conditions. Neither has it shown that CN has agreed to the imposition of the conditions it seeks. Freezing

CN's and EJ&E's interchanges with CSX in the Chicago area would only disserve the public interest.

2. Wisconsin & Southern

WSOR requests conditions that would require CN to sell to WSOR its line from Leighton (MP 37.9) to Forest Park, Illinois (MP 11.0), and to grant or assign to WSOR a series of trackage rights in order to create a new "back door" route and "safety valve" providing access for WSOR to enter Chicago. WSOR at 4; WSOR, Gardner V.S. at 9-10. WSOR does not seek these extreme conditions to address any claimed competitive harms caused by CN's proposed Transaction itself. To the contrary, the only impact that WSOR alleges due to CN's proposed Transaction is that WSOR will gain traffic.³¹ The foundation for WSOR's request for condition is instead its claim that it will suffer congestion from the combined effects of traffic it will gain from CN's Wisconsin lines and the possibility that CP, as a result of CP's proposed acquisition of DM&E, may begin to run additional coal trains via its "C&M Line" into Chicago, over which WSOR has recently acquired trackage rights. Its arguments fail on both legal and factual grounds.

As discussed in the Introduction to this response, the standards applicable to this proceeding – and to WSOR's claims – are clear and well established. Under 49 U.S.C. § 11324(d), the Board is required to approve any transaction not involving two Class I railroads unless the Board finds both that:

- (1) as a result of the transaction, there is likely to be substantial lessening of competition, creation of a monopoly, or restraint of trade in freight surface transportation in any region of the United States; and

³¹ As discussed below, WSOR's argument, which rests on unsupported assertions and defies logic, is that Wisconsin shippers will move their traffic *en masse* from CN's Wisconsin lines to WSOR's lines as a result of a reduction in local service by CN due to the proposed transaction (WSOR at 7-8).

- (2) the anticompetitive effects of the transaction outweigh the public interest in meeting significant transportation needs.

Therefore, the focus of the Board's inquiry with respect to requests for conditions is necessarily on any anticipated adverse competitive effects due to the Transaction.

Further, as noted by the Board in Decision No. 2, any parties seeking to sustain an argument "on the theory that approval (or approval without conditions) would harm competition and/or their ability to provide essential services" must "present substantial evidence in support of their positions." Decision No. 2 at 13.

Even if one were to accept WSOR's tortured factual assertions (which CN does not), its request for conditions would have to be denied for failing to meet the most basic applicable standard for a grant of conditions – a party must show that the proposed transaction would cause it competitive harm. As noted above, WSOR claims that the direct effect of the CN's proposed acquisition would be to drive additional shippers to WSOR's lines. Such a gain in traffic is the very antithesis of competitive harm.

WSOR's labeling of the remedies it seeks as a "congestion" condition or as a condition seeking to protect "essential services" lends no strength to its arguments. WSOR has not shown that its "congestion" concerns are in any way related to a competitive harm.

Seeking to elide this difficulty, WSOR cites a single decision involving a grant of trackage rights due to "congestion," STB Service Order No. 1518, *Joint Petition for Service Order* (served Oct. 31, 1997) ("*Service Order*") WSOR at 9 n.5. But that decision does not support its argument. That decision did not involve the imposition of conditions based on allegations of potential future congestion as part of a transaction. It

involved a grant of rights to TexMex pursuant to the Board's authority under 49 U.S.C. § 11123. That grant was made only after the Board found, based on an in-depth investigation that included a 12-hour hearing and testimony of 60 witnesses, that a transportation emergency existed in the western United States. *Service Order* at 1.

If anything, this case demonstrates the high hurdles under ICCTA to the Board's use of its statutory authority to grant rights for the relief of congestion. The Board is not authorized to act against congestion until after that congestion "exists," and only then if it creates an emergency situation of "such magnitude as to have substantial adverse effects." *See* 49 U.S.C. § 11123(a). By contrast, WSOR's allegations of potential congestion related to the Transaction are all highly speculative and about events that might occur far in the future.

Moreover, the fact that an independent remedy for serious congestion conditions already exists under 49 U.S.C. § 11123(a) shows that it is unnecessary and would be imprudent to grant WSOR's request for an anticipatory congestion condition.

The only other decision cited by WSOR in an effort to support its argument is *CSX Corp. – Control & Operating Leases/Agreements – Conrail Inc.*, 3 S.T.B. 196 (1998) ("*Conrail*"). But that decision contains a finding directly at odds with WSOR's request. As noted by WSOR itself, the Board in that case denied as contrary to the public interest a request for a condition premised on alleviating congestion in the Chicago area. WSOR at 10 n.6 (citing *Conrail* at 376). WSOR's effort to distinguish that decision, that "[t]imes and circumstances have changed," never explains what those changes are or why that should compel a different result.

WSOR further cites *Conrail* concerning relief to Wheeling & Lake Erie Railroad (“W&LE”), apparently in an effort to support an argument (devoid of evidence) that increased rail congestion could threaten essential services that WSOR provides to local Wisconsin customers. WSOR at 9-10. Leaving aside the question of whether a threat to essential services can ever entirely relieve a party of the need to show anticompetitive harms in a minor transaction,³² the Board’s decision to grant relief to W&LE in *Conrail* provides no precedent for WSOR’s claim here. The Board’s grant of rights to W&LE was to prevent it from failing entirely due to the significant losses it would suffer as a direct result of the proposed Transaction. *Conrail* at 309-11. WSOR’s sole witness, Mr. Gardner, never claims that WSOR’s continued existence is threatened, and he never even mentions essential services, and WSOR has offered no other evidence at all that its claims of potential congestion could possibly result in its failure as a firm, and has identified no shippers who would suffer a loss of essential services.

Even if WSOR’s factual assertions regarding the effects of CN’s proposed Transaction were sufficient to sustain its request for conditions (which, as shown above, they are not), those assertions would have to be rejected as unsupported by substantial evidence. In an effort to show some nexus between its request for conditions and the

³² The *Conrail* proceeding involved the consolidation of more than one Class I carrier under the standards of 49 U.S.C. §11324(b). Those standards are broader than the standards under 49 U.S.C. § 11324(b), which are tightly focused on competition. Given the narrower more focused standards applicable in this proceeding, CN does not believe the preservation of essential services with no independent showing of competitive harm can form the basis for a grant of conditions in this transaction. Even with respect to W&LE in *Conrail*, the Board indicated that “[m]uch of the loss” that would be suffered by W&LE appeared to be due to competition from more efficient routings, which seemed to imply even there that some of the loss was due to potential anticompetitive effects of the transaction.

proposed Transaction, WSOR strings together a remarkable set of assertions. It argues that the proposed Transaction will cause a significant increase in overhead traffic on CN's lines in Wisconsin and a diminution in local service; that as a consequence of this, shippers on CN's lines will be dissatisfied with CN's service; that these shippers can and will begin to transload their traffic to WC's Wisconsin line in large numbers, and that this will contribute substantially to congestion conditions on its lines into Chicago. WSOR, Gardner V.S. at 7-8. These arguments are unsupported and implausible in almost all of their particulars.

Most fundamentally, there is no basis for WSOR's claim that substantial volumes of additional traffic will move over CN's Wisconsin lines as a result of the proposed Transaction. WSOR offers no traffic study or analysis of any kind to substantiate its claim. It simply attributes anticipated increases in volumes of traffic from Prince Rupert to the proposed Transaction. CN has consistently made clear, however, that although its proposed acquisition would allow CN to handle Prince Rupert traffic through Chicago with greater reliability and reduced transit times, the volumes of such traffic will not change as a result of this Transaction. Had WSOR checked CN's document depository, which contains the workpapers for Mr. Stuebner's traffic study, which was included with the Application (CN-2 at 191-198), it would have seen that the projected increases in traffic over CN's Wisconsin lines were very small (fewer than 50 cars per year),³³ reflecting the fact that the traffic gains found were all in the nature of extended hauls, and very little traffic to or from Canada is originated or terminated on EJ&E.

³³ See Applicants' document depository at CN/EJEW 4 HC 100003, Diversions and New CN-EJEW Revenues.xls.

Also unsupported are WSOR's assumptions that CN's local Wisconsin rail service will somehow deteriorate in the future, as a result of the proposed Transaction to the detriment of Wisconsin shippers. The proposed Transaction does not even involve the acquisition of any lines in the state of Wisconsin, and WSOR fails to establish any connection between the proposed Transaction and its assertion that CN will provide diminished service to local Wisconsin shippers. WSOR discusses changes in Wisconsin service that came after CN's acquisition of WC. As explained by Mr. Radloff, however, while CN went through a period of necessary adjustment for its Wisconsin service following its acquisition of the Wisconsin Central, that acquisition has now been complete for many years and CN has established stable service patterns. Radloff Reply V.S. at 2. Like other shippers with traffic to, from, or through Chicago, Wisconsin shippers stand to benefit from CN's proposed Transaction.

Perhaps the best evidence of the likely impact of the proposed Transaction on future rail service in the State of Wisconsin can be gauged by the reaction of shippers themselves. If WSOR were correct that Wisconsin shippers would suffer harm as a result of the proposed Transaction, then one would expect significant opposition among those shippers. That has not been the case. Only one Wisconsin shipper has opposed the Transaction on the transportation merits (Wisconsin Public Service), while substantial numbers of Wisconsin shippers and business associations have filed in support.³⁴

³⁴ See statements and letters of support of Ace Ethanol; Aracruz Celulose USA, Inc.; Badger Mining Corporation; ERCO Worldwide; Fond du Lac Area Chamber of Commerce; Metropolitan Milwaukee Association of Commerce; Oshkosh Chamber of Commerce; Prairie Material Sales, Inc.; The Development Association; Transportation Development Association of Wisconsin; and Wisconsin Manufacturers & Commerce.

The last element necessary for WSOR to tie its congestion concerns to the proposed Transaction is one of the least plausible. Even if WSOR could show that a large number of local CN shippers in Wisconsin would be harmed by the Transaction, it would still need to show that an appreciable number of those shippers could and would choose to leave CN rail service and transload their goods to WSOR rail service. But WSOR has provided no information to support its claim. *See* WSOR, Gardner V.S. at 8. In fact, given the logistics and economics of transloading, the general high quality of CN's service (*see* Radloff Reply V.S. at 1), CN's superior route from Wisconsin to Chicago (as evidenced by the fact that WSOR is seeking an alternative route for itself over CN), and the fact that the Transaction will improve CN's service for the Chicago gateway, there is no basis to conclude that new transloading to WSOR from shippers now served by CN could ever be a substantial source of congestion on that railroad.

For all of these reasons, Mr. Gardner's self-serving speculation is no substitute for the substantial evidence required to establish that WSOR's requested conditions are necessary to prevent the proposed Transaction from causing WSOR competitive harm. WSOR's claims therefore must be denied.

WSOR's efforts to save its request based on added claims that congestion may be caused by CP's proposed acquisition of DM&E are equally unavailing.³⁵ First, its

³⁵ In fact, WSOR's arguments in CP/DM&E are inconsistent with and substantially undermine WSOR's arguments here. In the present proceeding, WSOR argues that CP's C&M Line "will become flooded with coal trains" from the PRB (WSOR, Gardner V.S. at 6), but that assertion is directly contradicted by WSOR's statement in CP/DM&E that "WSOR is going to accept CPR at its word that no PRB coal traffic will move into Chicago over the C&M Line without further studies and approvals," CP/DM&E, WSOR-1 at 13. Similarly, WSOR's claim that it requires the relief sought in this proceeding is undermined by the fact that WSOR makes a separate and different claim for relief in CP/DM&E for the same claimed congestion issue. It characterizes its two different

argument fails to address the fundamental flaw in its claim that the congestion of concern is not caused by any alleged competitive harm. Second, no basis exists to consider jointly the competitive impacts of CN/EJ&E and CP/DM&E. These proceedings involve separate transactions, they are being considered by the Board on separate procedural paths, and they have potential impacts that must be considered separately in each proceeding.³⁶ WSOR's arguments that the Board can and should consider the supposed "downstream" or cumulative effects of CP's proposed Transaction in the present proceeding confuse the present minor transaction with a transaction involving two or more Class I carriers.

Unlike the broad statutory standards applicable to mergers of multiple Class I carriers (49 U.S.C. 11323(b)) the much narrower statutory standards applicable to approval of narrow transactions such as this (49 U.S.C. 11323 (d)) do not provide the flexibility to permit a broad inquiry into cumulative effects. The Board's regulations are also clear that consideration of "cumulative impacts and crossover effects" is appropriate only in control and merger proceedings involving two or more Class I carriers. *See* 49 C.F.R. § 1180.1(i) (applicable only to merger or control of at least two Class I railroads). Moreover, the reasoning behind that policy – which is related to concerns that "there are so few remaining Class I carriers" – is not applicable to a minor transaction that by definition does involve more than one Class I carrier. WSOR makes no convincing

requests for relief identically, each as providing "an obvious and easy solution WSOR's potential congestion dilemma." WSOR, Gardner V.S. at 8; CP/DM&E, WSOR-1 at 14.

³⁶ Had WSOR wished to assert that these two separate proceedings must be considered together, it should have petitioned the Board long ago to establish a procedural schedule providing for that.

argument that the Board can or should ignore the statutory criteria, its own regulations, and well established policies.

Even if the Board were authorized and inclined to consider cumulative effects in reviewing a minor transaction, this would not be an instance in which it should do so. As discussed above, WSOR has failed to show that CN's proposed Transaction would have any competitively harmful impact on WSOR. Taking into account cumulative effects, however, implies cumulating impacts that are harmful to competition. A classic example is considering two major acquisitions together, because each would contribute to concentration in the industry, and together their combined effects could cause even greater impacts. Here, by contrast, WSOR's claim is that it will gain traffic from the CN Transaction. Accordingly, there is no harmful effect due to this Transaction that can be "cumulated" or otherwise combined.

Stripped to its core, WSOR's efforts to challenge CN's proposed Transaction (through cumulation with its claims against CP/DM&E, or otherwise) has nothing to do with legitimate concerns about competitive impacts from CN's proposed acquisition, and everything to do with WSOR's misuse of the Board's approval process to try to acquire from CN lines and trackage rights it might not otherwise be able to acquire, so that WSOR can try to cobble together a more favorable new route for itself into Chicago.³⁷ Having failed to establish any nexus between CN's proposed Transaction and competitive harm to itself, however, WSOR's request for extensive and intrusive conditions should be denied.

³⁷ WSOR, Gardner V.S. at 8 ("Fortunately, CN's absorption of the 'J' presents an obvious and easy solution to WSOR's potential congestion dilemma.").

C. GOVERNMENT AUTHORITIES AND OFFICIALS (INCLUDING AMTRAK AND METRA)

The CN/EJ&E Transaction and this proceeding involve a confluence of several strains of industrial history. Chicago is and for more than a century has been the rail center of the country. It became the crossroad for rail lines moving property and people in all directions. The very existence of the rail network that developed became a reason why industry and people came to Chicago. Although the trains may have been shorter, the railroads were more numerous, and their lines crisscrossed the area with little overriding planning or regulation. The Chicago area boomed over the decades, in part due to the existence of its vast, sprawling rail network. Steel mills and other manufacturing establishments were built and grew.

Predecessors of the present EJ&E started operating in the late 19th century. Pieces were added until around the turn of the century what is essentially the present EJ&E emerged, creating an arc running from Waukegan to Gary. Its lines were crossed or joined by lines of a score or more railroads. The villages and towns that had grown up around EJ&E and through which it passed were still relatively small. Most of the commercial and residential development that now exists in the areas through which EJ&E runs had not occurred.

In 1901 U.S. Steel bought EJ&E, in part to serve the needs of its mills. For a long period the company had steel mills at both ends of the present EJ&E in Waukegan and Gary, as well as Joliet and South Chicago. EJ&E also served other shippers and receivers who were not affiliated with U.S. Steel. As a result, in the past the volume of traffic on EJ&E was significantly greater than it now handles.

Chicago Planners and Plans

As congestion grew in the Chicago region, so did studies of the problem, and proposals by transportation planners. Over 60 years ago observers bemoaned “The Railway Terminal Problem of Central Chicago.”³⁸ Most plans were evidently not pursued very substantially, if at all, for a variety of reasons, not least of which were lack of sufficient private interest or initiative, political consensus, or public funding.

After CN acquired IC in 1999 the Chicago Planning Group addressed bottlenecks and efforts to achieve a fluid Chicago terminal.³⁹ In 2002 the Chicago-area Business Leaders for Transportation issued *Critical Cargo: A Regional Freight Action Agenda*, prompting the question, “The Chicago plan: relief at last?”⁴⁰

The *Critical Cargo* report addressed the growing gridlock in the city’s freight and transportation infrastructure, and provided recommendations for relief. The first and most important recommendation was to “establish a joint-use freight corridor, after investigating the now-underutilized southern arc of Elgin, Joliet and Eastern Railway.”⁴¹ This strategy would have upgraded EJ&E for both freight and commuter uses. EJ&E “could be transformed into a triple-track joint line that is grade separated, features

³⁸ Harold M. Mayer, 21 *Economic Geography* 62 (Jan. 1945).

³⁹ *Chicago Project Background*, available at http://transportation.northwestern.edu/programs/sandhouse/sources/create/Sandhouse_Ga ng_Wacker11-09-04.pdf.

⁴⁰ *Railway Age* (July 2003), available at <http://www.encyclopedia.com/doc/1G1-107044394.html>.

⁴¹ Business Leaders for Transportation, *Critical Cargo: A Regional Freight Action Agenda* (April 2002) at 2.

improved connections to the six main lines it crosses, and would be suitable for both freight and commuter traffic.”⁴²

The “first phase” of a Metra study found no major problems – other than the need for a \$1.3 billion upgrade – to using all or a portion of EJ&E’s line for commuter rail. If the results of the second phase of the study were favorable, federal money could be sought for the project, which was said to have community and political support.⁴³ EJ&E was said to be open to all suggestions and discussions on how to better utilize its railroad line.

A more recent such plan currently being pursued to a limited extent is Project CREATE (*see* CN-2 at 204 n.3). Some parts of the railroad network now in place in Chicago have been targeted as candidates for removal so that the substantial areas they occupy could be put to better uses. A good example is the St. Charles Air Line in downtown Chicago. All such proposals have been plagued by problems of funding and coordination of the diverse political entities and other interests involved.

The Chicago Area Transportation Study has continued to publish studies.⁴⁴

Last year, IRTA, CTA, METRA and PACE issued a report on *Moving Beyond Congestion: 2007 – The Year of Decision Regional Transportation Strategic Plan*.⁴⁵

⁴² Bill Stephens, *Report urges railroad cooperation for Chicago blueprint*, *Trains* (May 3, 2002), available at <http://www.metroplanning.org/press/mpcnews.asp?objectID=1061>.

⁴³ Julian Wolinsky, *Windy City ramp-up*, *Railway Age* (June 2001), available at <http://www.railwayage.com/jun01/windycity.html>.

⁴⁴ *E.g.*, *Working Paper 06-01, Intermodal Volumes III: Serial Measuring, Tracking & Anticipating Levels of Activity for Northeast Illinois* (April 2006). Available at <http://www.catsmpo.org/workingpapers/06-01.pdf>.

⁴⁵ http://movingbeyondcongestion.org/downloads/MBC_FINAL_REPORT.pdf.

Recently an article evidently written before announcement of the CN/EJ&E Transaction called for a new transcontinental railroad bypassing Chicago altogether.⁴⁶

In September 2007 a final report prepared for the American Association of Railroads was published on *National Rail Freight Infrastructure Capacity and Investment Study*, concluding that a total investment of \$148 billion would be required to meet DOT's projected demand for rail freight transportation in 2035 (p. 8-1).

The present Transaction is not the result of any planners' reports, but rather a response to the competitive marketplace. U.S. Steel concluded that it no longer had strategic or other reasons to continue its involvement and investment in most of one of the few remaining pieces of railroad it still owns.

Thus, as part of a continuing review of its operations, U.S. Steel concluded that EJ&E as it now stands is a "non-core" asset for that company which it should seek to sell (Ganetta V.S. ¶ 6; App at 331, 334).⁴⁷ For decades U.S. Steel had no longer had steel operations in Waukegan, at the other end of the EJ&E arc from its continuing operations in Gary, and it has disposed of most of its other railroad operations.

CN saw purchase of the part of EJ&E being offered as a rare opportunity to address in a significant way the rail congestion problem in the Chicago area. Much of CN's traffic not originating or terminating in Chicago but required to pass through it – a

⁴⁶ Keith J. Bucklew, *The Heartland Fast-Freight Rail System*, Transportation J. (Fall 2007) (the author, who is Director, Freight Mobility, for the Indiana Department of Transportation, concludes that even if Project CREATE is successful, "Chicago will continue to be a rail bottleneck").

⁴⁷ U.S. Steel had previously reduced its financial stake in EJ&E by including it as part of a transaction in 1988 in which U.S. Steel sold parts of its interests in EJ&E and several other small railroads it controlled to its Transtar subsidiary, and sold a 51% interest in Transtar to an independent investor (CN-2 at 332). After Transtar had sold some of its small railroads in 2004, U.S. Steel reacquired its controlling interest in EJ&E (CN-2 at 333).

trip that can take as long as a day – could bypass the City in two hours. Removal of such through traffic from the core of the Chicago area would permit trains that still had to travel to or from Chicago for origination, interchange or delivery of freight to do so more efficiently. The desires of the City of Chicago and others to remove freight traffic from the St. Charles Air Line (also a goal of Project CREATE) could be accomplished to a significant degree.

While U.S. Steel’s decision was of course presumably based on its own private interests, rather than undertaken as a pro bono publico effort to solve the seemingly endless transportation crisis in and around Chicago, its sale of most of EJ&E to CN can make a material positive contribution to that end. But it must be borne in mind that CN’s investment, like U.S. Steel’s disinvestment, has primarily private economic motivations, and should not be looked upon as, or reshaped into, a vehicle for achieving what are fundamentally collateral public goals, which should properly be publicly financed.

1. Amtrak⁴⁸

Amtrak has filed comments in opposition to the Application because it was concerned that the Transaction would adversely impact its passenger service between Chicago and other cities. Currently, Amtrak trains traveling between Chicago and cities in downstate Illinois (such as Carbondale, Champaign and Mattoon) and points further south (such as New Orleans), access Union Station over a portion of CN’s track known as the St. Charles Airline route (“Air Line route”). Amtrak’s access to that line is available through a 1995 Agreement with CN that runs through January 31, 2010.

⁴⁸ This section also responds to comments by the Cities of Carbondale, Champaign, and Mattoon, and the Illinois Department of Transportation. Those parties’ comments and requests for conditions are related solely to the ability of Amtrak to access Chicago’s Union Station.

In the Application, CN stated that the proposed transaction would enable CN to move its traffic off the Air Line route. CN was careful to state, however, that it was not proposing to abandon the Air Line route, that before the line could ever be formally abandoned Amtrak trains would need to be re-routed, and that it would work with Amtrak to try to accommodate its interests. CN-2 at 222.

Amtrak asks the Board to condition its approval of the proposed transaction on requiring CN to preserve the Air Line route for Amtrak's use, at its current operating standards, at no additional cost to Amtrak or the State of Illinois until such time as the Grand Crossing route⁴⁹ is completed and in operation. Several other parties⁵⁰ expressed concern that the proposed transaction would harm Amtrak's existing service, and therefore opposed the transaction or sought conditions.⁵¹

Notwithstanding the fact that the conditions sought are unrelated to anticipated competitive impacts of the Transaction, and therefore fall outside the Board's authority to condition the Transaction, CN has now agreed to the conditions sought by Amtrak. It has committed to allowing Amtrak to remain on the SCAL indefinitely, until the Grand Crossing routing or another alternative acceptable to it is available, at costs to be capped at their current level (adjusted only for inflation pursuant to the formula contained in the

⁴⁹ The restoration of the Grand Crossing connection between CN and NS would allow Amtrak to reach Union Station over NS's line, and was one of the projects proposed by CREATE.

⁵⁰ This includes the National Railroad Passenger Association, the Cities of Champaign, Carbondale, and Mattoon, and the Illinois Department of Transportation.

⁵¹ A number of other parties filed comments with the Board's SEA requesting that the impact on Amtrak be included in the scope of study for the EIS that is being prepared in this proceeding.

current agreement between Amtrak and CN) and at the level of operating utility that Amtrak currently enjoys. *See* Letter of E. Hunter Harrison to Senator Richard Durbin, Feb. 14, 2008 (Exhibit 3); Letter of E. Hunter Harrison to Alex Kummant, Mar. 10, 2008 (Exhibit 4).

This commitment goes well beyond CN's statutory responsibilities toward Amtrak, and constitutes a significant annual subsidy of Amtrak by CN. Congress has carefully defined the relationship between Amtrak and freight railroads – and that relationship does not require freight carriers ultimately to retain lines they do not need solely for Amtrak's benefit or to subsidize Amtrak's operations. As the STB has consistently recognized and enforced, carriers are permitted to charge Amtrak the full incremental cost for using their rail lines – those costs that carriers would avoid but for Amtrak's operations.⁵²

CN's commitment to Amtrak therefore goes well beyond the requirements of the law. CN is effectively subsidizing Amtrak by agreeing to forego (1) the proceeds and benefits of a sale of the Air Line route for as long as Amtrak wishes to remain on the line; (2) the statutory compensation to which it would be entitled for maintaining the Air Line route, which would otherwise rise sharply with CN's withdrawal from the line.

CN's generous offer to allow Amtrak to maintain its existing service at no additional cost not only fulfills the conditions sought by Amtrak, it also should resolve

⁵² *See* Section 402, Rail Passenger Services Act, Pub L. No. 91-518, 49 U.S.C. 24308(a)(2); *see also, e.g., National R.R. Passenger Corp. -- Applic. -- 49 U.S.C. 24308(a)*, 3 S.T.B. 143, 145 (1998) (*Amtrak Express*); *National R.R. Passenger Corp.-- Applic -- 49 U.S.C. 24308(a)*, 3 S.T.B. 157, 168 n.24 (1998) (*Amtrak/Guilford*).

any and all issues concerning impacts of the proposed transaction on Amtrak service.⁵³

Nonetheless, because some parties have argued that CN should also be required to help fund a new Grand Crossing connection for Amtrak's use or have suggested that the proposed transaction would undermine CREATE, CN wishes to address those further issues.

There is no basis for calls that CN fund a portion of a new Grand Crossing connection. As explained in the joint verified statement of Robert T. Holmstrom and Paul E. Ladue, CN has never committed itself or been responsible for making a financial contribution to a connection at Grand Crossing or any other facilities that would enable Amtrak to re-route its passenger service. Neither did CN make any such commitment as part of the CREATE Project.

As further explained by Messrs. Holmstrom and Ladue, far from harming the CREATE project, CN's investment of \$400 million in the lines of the EJ&E, plus the additional costs of mitigation, will significantly advance CREATE objectives. It would help reduce rail congestion in the Chicago region and allow CN to relocate its freight operations from the Air Line route, which has long been a goal of the City of Chicago. It would also accomplish these goals more quickly and with less disruption than the construction of the full Central Corridor route.

In sum, CN's commitments concerning Amtrak and the Air Line make it unnecessary for the Board to impose any conditions relating to Amtrak.

⁵³ Including those filed by the City of Carbondale, the City of Champaign, the City of Mattoon, and the Illinois Department of Transportation.

2. Metra

CN recognizes the importance of Metra's commuter operations and has been and remains committed to working cooperatively with Metra to reasonably address and accommodate its concerns. The primary focus of the Board's review, however, is on the anticipated competitive effects of the Transaction, and the Board must approve this Transaction unless there will be adverse competitive effects that are both likely and substantial. Even if there are likely and substantial anticompetitive effects, the Board cannot disapprove the Transaction unless the anticompetitive impacts outweigh the benefits and cannot be mitigated through conditions. If feasible, the Board will impose conditions to ameliorate significant competitive harm that is caused by a merger. Adverse impacts unrelated to competition may be addressed through the Board's environmental review process.

Metra has not raised any issues related to the anticipated competitive effects of the Transaction, and none of its requested conditions are necessary to ameliorate an anticompetitive impact. Moreover, even if the standard for rejecting or imposing conditions on the Transaction were significantly broader than it is, Metra has not shown that its conditions are reasonable or would benefit the public interest.

Metra provides no services over EJ&E's lines. Nonetheless, and without providing any evidence or citing a single precedent, Metra asserts that it is somehow entitled to the imposition of far-reaching conditions that would severely, inefficiently, and unnecessarily restrict freight operations over the EJ&E line so that Metra will no longer have to work with the EJ&E to accommodate its existing and especially its

possible future services. As discussed in this section, Metra's requested conditions should be denied.

Metra's requests for conditions fall into three categories. First, it asks for trackage rights over a 35-mile stretch of EJ&E's Western Subdivision (between Mileposts 7.5 and 42.5) "in order to implement Metra's STAR Line." Metra at 7 (Condition #1). It also asks as part of this condition that EJ&E be required "to work cooperatively to consider future grants of trackage rights" in the event Metra tries to develop a STAR Line East Segment or a STAR Line North Segment. *Id.* at 7-8. Second, Metra seeks a condition requiring CN "to work cooperatively" with it on the establishment of a new Southeast Service, and requiring, if that service is ever established, that CN "respect the integrity of the schedule" and "grant commuter trains priority over the Chicago Heights interlocking." *Id.* at 10 (Condition #2). Finally, Metra seeks several conditions relating to Metra's existing and potential new future services over UP's "Geneva Subdivision" (Metra's "Union Pacific West" commuter line), which crosses the EJ&E Line at the West Chicago Interlocking, and over UP's "Harvard Subdivision" (Metra's "Union Pacific North" commuter line), which crosses the EJ&E Line at the Barrington Interlocking.

Some of Metra's conditions ask that CN be required to cooperate with Metra or discuss various options by which the interests of both freight and passenger service may be accommodated. As discussed in the verified statement of Mr. Trafton ("Trafton Reply V.S."), CN strongly supports such a cooperative approach and has pursued just such an approach in its dealings and discussions with Metra. CN objects, however, to Metra's efforts to use the Board's approval process not to remedy any impacts of the proposed

Transaction that would harm the public interest, but as a means of trying to address pre-existing issues and promote the interests of passenger service without regard to the impacts on freight service, and of trying to obtain concessions and revisions to existing agreements that it has been unable to obtain through the normal process of commercial negotiation.

a. Metra's requested condition concerning a possible future STAR Line Service

Metra's first requested condition, regarding possible future passenger service over EJ&E's current trackage, is unrelated to the competitive effects of the Transaction, and would be contrary to the public interest.

Metra's proposal to introduce a so-called STAR Line Service has been on the drawing board for at least ten years, and its future remains highly uncertain. Through this ambitious project, Metra hopes to use the EJ&E railroad corridor to connect various suburbs and the lines over which its existing service is operated from those suburbs into Chicago. EJ&E and CN have both been supportive of the project. Nonetheless, for reasons having nothing to do with the freight railroads, the future of the project remains highly uncertain.

The STAR Line is only in its early planning phases. Metra has for years been in the process of preparing an Alternatives Analysis for the Federal Transit Administration that would attempt to show that the project, which in its entirety is expected to cost over \$1 billion, is feasible and would be cost effective as compared to other transportation options. If approved by FTA, which is by no means certain, the project would then receive only enough Federal funding to allow preliminary engineering to begin. The project would also have to be subjected to an environmental review, and a final design

plan would have to be created. Once all these preliminary steps are complete, FTA would “conduct[] a rigorous review of the project before approving its entry into the next stage of project development.” Metra’s Response to Interrogatory 2(f). At present, the project has not been shown to be feasible or cost effective, is in its earliest conceptual phases of engineering, and lacks funding at every level – Federal, State, and local.

Indeed, the lack of State funding for the project could alone be enough to defeat it. As reported on February 15, 2008 in the Chicago Tribune, the STAR Line “won’t become a reality unless the [Illinois] General Assembly comes up with a new capital program this year.” Richard Wronski, *Metra: Suburban Rail Depends on State Funds; Legislature Must Match Federal Aid to Secure New STAR Line, Official Says*, Chi. Tribune, Feb. 15, 2008, at 3. Mr. Pagano, Metra’s Executive Director is quoted in that same article saying, “If there is no capital coming out of Springfield, there is no STAR Line.” *Id.* In short, the STAR Line is far from becoming a reality. Thus, Metra cannot and does not state that the project is a reality; it can only claim that the project is “on the way to becoming a reality.” Metra at 3.

Despite this high degree of uncertainty, EJ&E has been willing to work with Metra to create a framework for discussing possible plans to use some portion of its railroad corridor for the STAR Line project. In an explicitly non-binding Letter of Understanding dated May 26, 2006 (“LOU”) (attached as Exhibit 5), and expiring no later than December 31, 2008, the parties set forth their understanding concerning such discussions. The parties expressed their intention – if the Alternatives Analysis should show that the STAR Line is the locally preferred alternative – to begin negotiations concerning a possible agreement for use of aspects of the EJ&E corridor. LOU at 1.

With respect to any such agreement, the LOU states that the parties intend “it will not, to any significant degree, have an adverse effect on the value of the EJ&E and/or the ability of the EJ&E to provide rail service to current and future shippers served by the EJ&E.” *Id.* at 1. The LOU also recognizes the need for a capacity and safety analysis before an agreement can be negotiated. Thus, Metra has established a framework for a cooperative working relationship with EJ&E on the STAR Line project, but it has no binding open-ended commitment from EJ&E regarding use of the EJ&E corridor for the potential STAR Line project. Moreover, Metra has understood for almost two years that EJ&E would not agree to any use of its corridor for passenger service that might compromise the use or value of that corridor for existing and future freight services.

In its discussions with Metra following the announcement of CN’s Application, CN has made clear that it is willing to cooperate with Metra concerning the STAR Line project and to step into EJ&E’s shoes with respect to the project at the appropriate time. Trafton Reply V.S. at 1-2. This includes CN’s agreement to explore with Metra both the use of EJ&E’s right-of-way and the possible use of track facilities. Trafton Reply V.S. at 1-2. As recognized in the LOU, if the project receives approval to move forward so that it can begin to be better defined, there will be a need for a capacity and safety analysis to help both parties determine whether it makes more sense from a cost, capacity, and safety perspective to run service on a new dedicated line constructed largely or entirely within EJ&E’s right of way, or to run service on a joint line based on improvements to EJ&E’s existing track infrastructure.

Against this background, it can be seen that Metra’s requested condition – which asks for an immediate grant of trackage rights over EJ&E for its possible future STAR

Line service – should be denied. Metra’s request is an unwarranted attempt to use the Board’s powers to address a pre-existing issue rather than any harmful effect the Transaction would have on the public interest. The request would not protect Metra’s rights from transaction-related harm, but would go far beyond anything to which Metra is even arguably entitled.

Metra’s request should also be denied because it is unnecessary, premature, and contrary to the public interest. It would attempt blindly to leap over the complex and critical questions of whether and how passenger service might be introduced on the EJ&E corridor so as to be safe, and cost-effective, and avoid interfering with present and future freight operations. CN has shown the same level of commitment and cooperation Metra has had from EJ&E and that Metra has found sufficient to continue pursuing its project. Metra has never had trackage rights over EJ&E for its potential future service, or a commitment that EJ&E would grant it such trackage rights. Indeed, Metra has never been in a position to enter into serious negotiations concerning such rights because the service it hopes to place on that line is undefined and still far from becoming a reality. Its request for trackage rights is thus simply an effort to gain through the improper use of the Board’s approval process concessions and a preemption for other uses for EJ&E’s valuable capacity that it has been unable to obtain through the normal process of commercial negotiations. The Board has repeatedly rejected such requests by commuter rail authorities in the past as not in the public interest, and we respectfully submit it is appropriate to do so again here. *See, e.g., Conrail*, 3 S.T.B. at 297-98 (rejecting conditions from passenger rail lines that were not related to the effects of the Transaction

and sought “material changes to, or extensions of, existing contracts, or to compel new contractual commitments or property sales”).

Given the uncertain and speculative nature of the STAR Line service, as well as its extreme intrusiveness, rejecting Metra’s request is particularly appropriate in this case. As the Board has recognized, requests concerning the operation of passenger service on freight carriers implicates complex issues of a type that are best left to the development and negotiation by the freight railroads and passenger services themselves. Thus, the Board has made clear it is reluctant to use its conditioning power to compel resolution to the difficult issues that arise in such matters. *Id.* at 298. It is better to allow the parties “to work out intricate details concerning rail operations, capital expenditures, and compensation.” *Id.* In this case, it would be next to impossible, and a poor use of the Board’s and the parties’ resources, to attempt to deal with these important issues where the passenger service in question does even exist and is not yet defined. These issues are simply not ripe for either the Board or the parties to address (in a legally binding manner).⁵⁴

Finally, Metra’s request for trackage rights should be denied because it would cause serious and immediate harm to future freight operations over the EJ&E line, with little or no countervailing benefit for other freight service or passenger rail service. Long term capital and operational planning for the EJ&E line, and long term commercial relationships between CN and shippers would all be greatly and immediately hampered if the Board were to introduce the uncertainty of forced passenger service over a major portion of the EJ&E lines without even knowing the exact nature of those services, the

⁵⁴ Reference to these critical issues is noticeably absent from Metra’s comments.

time they might begin, or whether they will even begin at all. CN would face uncertainty in planning its capital program. Neither could it reliably determine the capacity of its own line or the likely impacts it would face on its freight service. Shippers would not know what level of service they could expect from CN over the long term. For a railroad such as CN whose objective is the delivery of premium service to customers premised on precision-based operations that run as close to schedule as possible, the uncertainties that would be introduced by a possible major trackage rights tenant with undefined rights and operations would fundamentally undermine the value of this Transaction.

This is particularly so because, as shown above, there is no basis for concluding that the proposed Transaction would have any harmful impact on Metra's ability to negotiate a reasonable commercial agreement that would permit the introduction of its STAR Line service using the EJ&E corridor. Although the proposed Transaction would result in additional traffic on the EJ&E line, that is a right of ownership that was never ceded to Metra. The proposed Transaction would not impair Metra's rights. But the sweeping trackage rights Metra has sought over the EJ&E lines – which might or might not ever turn out to be needed depending upon whether Metra's STAR Line service ever comes to fruition – would cause serious and immediate harm to the future of freight service over the EJ&E line and in the Chicago region generally.

b. Metra's requested condition concerning a possible new Southeast Service

Metra's second requested condition, regarding possible future "Southeast Service" is unrelated to the competitive effects of the Transaction, and would likewise be contrary to the public interest.

Metra provides no justification or even explanation for its second condition request (found at the bottom of page 10 of its comments), which involves a new so-called Southeast Service that it evidently hopes to introduce between Chicago and Crete, Illinois, crossing the EJ&E line at Chicago Heights. Metra describes this new possible service only in two brief sentences at page 3 of its comments, and then never mentions it again until it appears in the text of its actual proposed condition. The request itself, which is not as benign as it appears, asks that CN be required to “agree to work cooperatively with Metra on the establishment of a commuter train schedule to accommodate the proposed New Start service known as the Southeast Service,” and that once “such schedule is established,” CN be required “to respect” its “integrity” and “grant commuter trains priority over the Chicago Heights interlocking.” Metra at 10. Given the unexplained and uncertain time frame for implementation of this possible future service, Metra’s request is at best premature. More fundamentally, because Metra has made no showing whatsoever that its requested condition is necessary to address a harm to be caused by the proposed Transaction, its request should be denied.

Although further discussion of this condition should not be necessary, CN wishes to make a further point in order to ensure that the Board is aware of the reasons why this requested condition is inappropriate and would be intrusive and contrary to the public interest. If CN acquires control of the relevant EJ&E lines, it is willing to discuss with Metra the potential establishment of a Southeast Service, just as it has discussed other Metra service initiatives in the past. Moreover, if a Southeast Service is established, CN would expect to accord that service priority over the Chicago Heights interlocking. CN’s proposed acquisition creates no need, and no justification for Metra’s attempt to insert a

Board condition into this process of ordinary commercial negotiation. Metra makes no claim to having even initiated discussions of this service with EJ&E, and if it chose to do so, it would be in the same position of having to negotiate a commercially reasonable agreement with EJ&E as it would be with CN.

Moreover, as phrased, the condition sought by EJ&E could be interpreted to go well beyond a basic requirement that CN agree to discuss the potential initiation of the Southeast Service. Metra might claim that its proposed condition compels CN to agree to a specific schedule for the Southeast Service, and once that schedule is established, CN is compelled to modify or limit its own freight schedule in deference to that commuter rail schedule. CN does not object to working with Metra on an even footing toward schedules that accommodate both their needs, but it would be an unwarranted and unfair intrusion into ordinary commercial negotiations for CN to be compelled to enter into an agreement with Metra that may not be in CN's interests or in the interests of its shippers, nor in the public interest. No condition regarding Metra's possible introduction of a Southeast Service is warranted, and no such condition should be granted.

c. Metra's requested conditions relating to UP North Service and UP West Service

Metra's third requested condition, regarding passenger service through the Barrington and West Chicago Interlockings is also unrelated to the competitive effects of the Transaction, and contrary to the public interest.

Metra seeks as its third major condition (Condition #3) a transfer in the control of the West Chicago and Barrington Interlockings from EJ&E to Metra (or to UP). In the alternative, it seeks imposition of strict curfews on freight traffic over the EJ&E lines through both of these interlockings (Condition #4), mandatory instructions to EJ&E

dispatchers to give priority to and avoid undue interference with Metra's commuter trains (Condition #5), and mandatory instructions to EJ&E dispatchers "to take due account of Union Pacific freight traffic in protecting Metra commuter trains" (Condition #6). The final condition sought by Metra would impose on CN/EJ&E biannual reporting requirements with respect to these prior conditions (Condition #7).

All of these conditions are predicated on Metra's concerns that increased traffic on the EJ&E lines as a result of the proposed Transaction might lead to inadequate available capacity at the Barrington Interlocking and at the West Chicago Interlocking to accommodate existing trains and potential future trains for Metra's UP North Service and UP West Service, respectively. Metra at 4-6 & 11. As discussed below, while we recognize, understand, and share Metra's desire to protect important commuter operations, its request for conditions is baseless. Moreover, the conditions sought by Metra would not improve congestion; they would instead reduce the efficiency of all operations through these interlockings and artificially reduce the capacity of both the EJ&E and UP lines.

Metra proffers no evidence at all to support its congestion premise – no expert testimony and no systematic analysis of any kind. Instead, it merely cites Applicants' projections of increased numbers of trains on the EJ&E line and increased lengths as if it is self-evident that these trains will overload the Barrington and West Chicago interlockings. But that is simply not the case.

Rather than rely on supposition, CN has analyzed the capacity of its line, including these interlocker locations, and, as discussed by Mr. Trafton in his verified

statement (at page 2), it has determined that there is exists adequate capacity for Metra's trains.

Metra's focus on the increased number and length of trains on the EJ&E line is misleading. There is a fundamental difference between incremental traffic over a jointly used line and over a line that is merely crossed at grade. In this case, EJ&E's additional and longer trains will not be running over and sharing UP's lines; EJ&E's trains merely cross the same diamonds as the UP lines.

As an illustration to help one understand why CN's and Metra's potential added traffic is not likely to pose a problem at either of these interlockers,⁵⁵ one can determine from CN's Operating Plan the number of trains per day and their typical lengths and speeds that the post-Transaction traffic will on average physically occupy the West Chicago Interlocking for less than 90 minutes per day, and will on average physically occupy the Barrington Interlocking for just over 40 minutes per day.⁵⁶ Indeed, even one

⁵⁵ CN's own judgments and analyses of line capacity and these crossings were, of course, much more sophisticated than this simple calculation, which is simply meant to illustrate how unsupported are Metra's claims of potential capacity constraints based on the projected number and length of trains over EJ&E's lines.

⁵⁶ Consider that each crossing is available for a total of 24 hours per day. CN's total traffic over the Barrington Interlocking is projected to increase to 20.3 trains per day (up from 5.3 today). *See* Letter from Paul A. Cunningham (CN Counsel) to Victoria J. Rutson (Chief, Section of Environmental Analysis, Surface Transportation Board), at Exhibit C: CN-EJE Grade Crossing Analysis.xls (March 12, 2008); see also CN-2 at 247. The typical length of these trains will be about 6,829 feet, and their typical speed would be about 39 miles per hour. One need only determine the total train length per day (20.3 trains/day x 6,829 feet/train = 138,628.7 feet/day) and divide that by typical train speed (39 miles/hour x 5,280 feet/mile), and the result is .67 hours per day. Thus, simple math indicates that traffic will on average occupy the diamond at Barrington for about .67 hours per day - just over 40 minutes for the entire 24 hour period. Similarly, CN traffic over the West Chicago diamond is projected to increase to 31.6 trains per day (up from 10.7 today). *Id.* Typical train length here will be 6,494 feet, with typical speeds of 26 miles per hour. By the same arithmetic as above, the West Chicago diamond will only be

were to assume that every one of CN's post-Transaction trains will be 10,000 feet in length, that traffic would still occupy the West Chicago Interlocking for fewer than 139 minutes per day and the Barrington Interlocking for only 59 minutes per day. It is perhaps for this reason that Metra has not proffered any expert testimony or evidence concerning supposed congestion – there is no case to be made.⁵⁷

As a result, Metra's related request for conditions (Conditions #3-7) are not necessary to address a harm caused by the proposed Transaction and should be denied. Beyond that fact, however, it should also be understood that Metra's requested conditions would not accomplish anything productive, and would harm operations over UP's and EJ&E's lines.

Metra's primary request (Condition #3) is that control over the Barrington and West Chicago interlockings be turned over to it. Metra at 11. This is an extraordinarily intrusive and counterproductive request. EJ&E has operated the West Chicago and Barrington interlockings under agreements with UP that have been in place for almost 90 years, and for over 110 years, respectively. These agreements do not allow EJ&E to prefer its own freight traffic to that of UP or passenger services. To the contrary, similar

occupied for just under 90 minutes per day. (Total train length per day (31.6 trains/day x 6,494 feet/train) divided by typical train speed (26 miles/hour x 5,280 feet/mile), resulting in 1.49 hours per day.)

⁵⁷ Notably absent in the record is any indication that UP supports Metra's requests. If Metra's proposed conditions were necessary and productive, one would expect UP to be the first to support Metra or seek conditions of its own. After all, if Metra's claims were correct then UP's freight service and its operation of Metra's commuter services would be threatened. Also, Metra's conditions are designed to favor operations over UP's lines. That UP has not supported Metra's position, however, is additional confirmation that the added traffic on the EJ&E line is a non-issue and that the Metra's proposed conditions are not necessary.

provisions in each agreement provide that passenger service of each carrier has priority, and that UP's freight traffic has priority over EJ&E's. *See* Exhibit 6 (excerpts from the governing interlocking agreements). Far from showing that EJ&E has done a poor or unfair job of operating these interlockings, Metra's comments are laudatory.

EJ&E controls the Interlockings at West Chicago and Barrington. EJ&E and the Union Pacific Railroad have a history of decades of safe and efficient operation through those Interlockings under EJ&E control. EJ&E has been vigilant to make sure there is minimal freight train interference with Metra commuter trains at those locations.

Metra at 5.

There is no reason to believe that Metra could or would operate these interlockings more efficiently or effectively than EJ&E. To the contrary, Metra is not even a party to these long-standing agreements between UP and EJ&E, and Metra does not even operate either line that traverses these interlockings. Inserting a new party to control an interlocking where that party does not operate either crossing line is virtually unheard of. *Trafton Reply V.S.* at 3. It would result in the highly inefficient need for an extra handoff between dispatchers for every passenger and freight train. It would also create new risks and coordination issues to avoid inconsistent dispatching decisions between the freight dispatchers of both railroads and the Metra dispatcher. All of this promises to make dispatching of these lines *less efficient* and *more risky* than the present dispatching by EJ&E that all parties agree has worked well for many years.⁵⁸

⁵⁸ CN strongly disagrees with Metra's claim that the EJ&E line would somehow benefit from Metra assuming control of these two interlockings because Metra controls the interlocker where its Rock Island District service crosses EJ&E. For the reasons discussed above, CN believes it is far more efficient for the carrier that owns and otherwise dispatches a line also to dispatch and operate the interlockers on that line. Instead, the one interlocker that Metra notes it does control is on a line that Metra owns

As an alternative to control of the West Chicago and Barrington interlockings, Metra argues for freight curfews over these interlockings extending for approximately six hours a day (Condition #4). Metra at 11. Again, leaving aside the total absence of any justification for such a condition, CN strongly opposes that condition on the ground that its primary effect would be to interfere unnecessarily with freight operations and to reduce the effective capacity of both the EJ&E and UP lines. EJ&E is not presently bound in any way to provide a curfew for Metra's traffic. It has observed a curfew in the past – much shorter in duration than the one requested by Metra – because there are only limited opportunities to run freight trains between passenger trains during the morning and evening rush hours and because EJ&E's relatively light present traffic has not required it. CN, however, is very experienced in running freight trains during small windows between passenger trains without causing any interference with passenger service.⁵⁹ CN's review of Metra's curfew proposal has revealed that there would be significant windows of time (e.g., 24 minutes) between Metra trains during which CN could readily run a freight train (which, under ordinary operating conditions, can clear a diamond in 2-4 minutes or less). By contrast, Metra has made no showing that blanket curfews are necessary. Its proposal would needlessly preclude the efficient use of the EJ&E lines, and particularly so by imposing similar curfews at two points on the EJ&E, which together would add complication and result in even a greater capacity constraint.

and dispatches. If Metra really believes that efficiency improvements will result from common control of the interlockers on EJ&E, then it should offer to allow EJ&E to control the Metra interlocker for its Rock Island District service.

⁵⁹ For example, at Junction De l'Est diamond (St Laurant and Deux-Montagnes Sub) in Montreal, CN operates 10,000 foot trains over the diamond between AMT commuter trains that are spaced 10 to 15 minutes apart, without impacting AMT's service performance.

Metra's other requested conditions are equally unnecessary or counterproductive. Its requests (Condition #5) that EJ&E be required to accord priority to the passenger services operated by UP is unnecessary as priority is already provided for under the existing interlocking agreements. *See* Exhibit 6. Likewise, its request (Condition #6) that EJ&E "take due account" of UP's freight traffic is unnecessary as UP's traffic is also accorded priority over EJ&E's freight traffic under both interlocking agreements. (Metra was apparently unaware of these facts, and is not a party to these agreements.)

Finally, because none of the foregoing conditions have been shown to be required in the public interest, there is no need for Metra's final request (Condition #7) which would require formal reports on the effects of those conditions.

3. Gary Airport

a. Introduction and summary

Gary/Chicago International Airport Authority ("GCIAA" or "the Airport") opposes the Transaction, or seeks conditions on its approval, based on asserted effects of the Transaction on its ongoing negotiations with EJ&E concerning the Airport's plans concerning its runways. In doing so the Airport appears to be using the Board's authority to approve the Transaction in order to gain leverage in negotiations predating the Transaction and to exert pressure on CN, and thus EJ&E, to agree to terms the Airport has proposed in those negotiations, which were already difficult and protracted before the Transaction.

The Airport's proposal is not nearly so agreed upon as it suggests to the Board, and is fraught with significant potential safety issues that understandably have given pause to both EJ&E and now CN. Contrary to the Airport's suggestion, EJ&E had not

agreed to those terms prior to its Stock Purchase Agreement with CN. Those terms could significantly impair EJ&E's ability to provide rail service on the line. They also significantly reduce the value of the Transaction to CN.

The Airport has suggested EJ&E could relocate to a CSXT right-of-way, but they do not assert that either CSXT or EJ&E has agreed to such a relocation, or that such relocation would involve the fee ownership that EJ&E would require.

The Airport's comments state that "the primary issue is safety" (Airport Comment at 2, 3) referring to train traffic on the embankment. But the Airport's own proposals for moving the rail lines to run at grade themselves raise obvious safety issues that the Airport's comments do not ever acknowledge.

Imposition of the Airport's conditions would be an unwarranted use of the Board's conditioning power. For factual support of Applicants' position see the Verified Statements of CN's David Lowe and EJ&E's David Gevaudan.

The Airport's inability thus far to reach agreement with EJ&E has little or nothing to do with this Transaction. Neither that inability, nor any other facts or argument in the Airport's comments, provides any basis for relief in this proceeding. In fact, the Airport does not clearly assert any claim for relief from the Board.

Instead, the Airport asserts its pre-existing preference to relocate the EJ&E rail line adjoining the Airport's property, and argues that "[t]o allow this merger to be completed without addressing the GCIAA's legitimate safety concerns leaves a substantial risk to the public that could be avoided," and it calls for "resolution of the

safety issues that will be caused by substantially increased train traffic.” Airport Comments at 3.⁶⁰

This may mean that the Airport wishes approval of the Transaction to be conditioned on measures “addressing,” or on “resolution of,” those alleged safety issues. However, the Airport provides no guidance to the Board on how to determine what would constitute a satisfactory resolution of those issues, or measures satisfactorily addressing them, or any legal basis for the Board to address them.

Nevertheless, Applicants will explain why nothing in the Airport’s comments or the law would justify imposition of any conditions, much less disapproval of the Transaction.

- b. The “safety issues” the Airport raises are pre-existing problems, not effects of the Transaction, and are not proper grounds for disapproval of the Transaction or imposition of conditions on its approval

The railroad was built around the beginning of the 20th century. The embankment on which the EJ&E line now runs was created in its current location in 1908.

The Airport was built nearly half a century later, with its operations using airspace over EJ&E’s line. Although, according to the Federal Aviation Administration (“FAA”), it had identified relocation of the EJ&E rail line as needed as early as the 1970s (after extension of Runway 12-30),⁶¹ the Airport had taken no concrete action until more recently. In the meantime, subsequent to the construction of the Airport and its runways,

⁶⁰ Page citations to the Airport’s comments are to the unnumbered pages in order.

⁶¹ Federal Aviation Administration, Department of Transportation, Draft Environmental Impact Statement for Master Plan Development Including Runway Safety Area Enhancement/Extension of Runway 12-30, and Other Improvements, Gary/Chicago International Airport, Gary, Indiana at 2-7 (Apr. 2004) (“Airport DEIS”).

the FAA established mandatory safety standards with which the Airport's principal runway, Runway 12-30, does not comply, as the Airport concedes.⁶²

In addition, the Airport has determined that it needs a runway longer than Runway 12-30's 7,000 feet in order to accommodate the passenger and aircraft activity it plans to handle at the Airport.⁶³ The Airport has also concluded that relocation of the EJ&E line is the best way to achieve its objectives.⁶⁴ During the time that Gary Airport and EJ&E have been negotiating over the Airport's rail relocation proposal, in December 2001 FAA issued a notice of intent to prepare an EIS evaluating environmental impacts of alternative relocation proposals, which it issued in October 2004.

EJ&E, however, is under no legal or other obligation to move its lines and disrupt its operations simply because the Airport now finds that the design of the runway it built next to EJ&E's rail line is no longer adequate for the Airport's own current and planned operations. Nonetheless, EJ&E has been willing to negotiate with the Airport about relocating EJ&E's rail line, in order to find a solution that would accommodate the Airport's plans without unduly prejudicing EJ&E.

⁶² In 2004, the FAA's Draft Environmental Impact Statement regarding its runway extension plans described those FAA standards as the agency's "recent national mandate for runway safety areas." Airport DEIS at 2-2.

⁶³ Great Lakes Region, Federal Aviation Administration, Department of Transportation, Record of Decision for Proposed Master Plan Development Including Runway Safety Area Enhancement/Extension of Runway 12-30, and Other Improvements at Gary/Chicago International Airport, Gary, Indiana at 4-4 (Mar. 2005), *available at* http://www.faa.gov/airports_airtraffic/airports/environmental/records_decision/media/rod_gary.pdf.

⁶⁴ One alternative would be to shorten the runway, perhaps to its length before it was extended in the 1970s, but that alternative would not permit use of the airport by corporate operators and air service operators who have been using it. Airport DEIS at 3-9.

EJ&E has no legal or other duty to contribute to the Airport's achievement of its goals. EJ&E's position has been that the Airport must compensate the railroad for any economic loss it would incur in agreeing to accommodate the Airport, and that EJ&E's longstanding concerns about the Airport's proposed design for relocation of its lines must be adequately addressed.

Contrary to the Airport's suggestion that the relocation considered in the EIS "was designed with the review and general approval by the EJ&E," the Airport had reached no agreement with EJ&E regarding terms of the relocation. Nor did EJ&E ever approve any of the specific alternatives examined in FAA's EIS. Moreover, the relocation proposal that was identified in FAA's EIS as the preferred alternative would also affect the lines of CSXT and NS. The Airport's responses to Applicants' discovery admit that it has reached no final agreement with EJ&E or with CSXT or NS about relocating any portion of their rail lines to accommodate the runway expansion (Admissions Nos. 4-6).

If the Airport has been unsuccessful thus far in reaching agreement with EJ&E, CSXT and NS about track relocation, such failure has nothing to do with the CN/EJ&E Transaction.

The Airport claims that "an adverse effect on safety" will result from what it characterizes as the "substantial increase in rail traffic" on the EJ&E line resulting from the Transaction (Airport Comments at 3). However, this ignores the fact that the current runway configuration fails to meet FAA safety standards, regardless of the volume of rail traffic on the EJ&E line. Any limitations on Airport operations would be the result of

that physical configuration, and would be unchanged by any increases in traffic resulting from the Transaction.

EJ&E and CN are also properly concerned about the safety aspects of the Airport's plans and their impact on the operation of the railroad, whose employees' safety may be implicated by the Airport's proposed changes. The Airport does not appear to be as sensitive to such legitimate safety concerns of EJ&E and CN.

EJ&E has continued to work toward an agreement with the Airport, and CN is cooperating with EJ&E and the Airport on those efforts. However, neither the Transaction nor CN's involvement is impeding reaching agreement on the terms of relocation or making any such agreement less likely. The Airport provides no evidence that the prospect of the Transaction has made it more difficult to reach agreement with EJ&E. Nor has the Airport provided any evidence that CN would be less likely than EJ&E's present management to accept the Airport's currently proposed terms. The Airport does not deny that CN is cooperating with EJ&E in its negotiations with the Airport.

c. The absence of agreements with EJ&E and the other railroads is not the only obstacle facing the Airport

It would be inaccurate for the Airport to suggest that an agreement with EJ&E is the only thing standing in the way of achieving its objectives for development of a third Chicago passenger airport.

In conclusion, it is the Airport, not EJ&E or CN, that is seeking to alter the status quo, by taking advantage of the fortuitous occasion for exercise of federal regulatory power to further its own strategic plans over those of the railroads. The Board should not permit its authority to be misused in this manner.

4. Illinois Dept. of Transportation

The Illinois Department of Transportation's ("IDOT") comment relates solely to Amtrak's ability to access Union Station over the SCAL. For the reasons discussed *supra*, at section II.C.1, IDOT's request should be denied.

5. Wisconsin Dept. of Transportation

While the Wisconsin Department of Transportation "recognizes the efforts of [CN] to relieve the rail congestion on its rail lines in the Chicago area" (WisDOT Comments at 1), it nonetheless requests a number of conditions. However, because it submits no evidence indicating its conditions are warranted, and they are unrelated to any anticipated competitive impacts of the Transaction, WisDOT has no legal basis for its requested conditions, and they should be denied.

WisDOT's request that "CN be required to define 'commercially reasonable terms' in a manner that will allow an objective determination of compliance with their assertion" (WisDOT Comments at 3) is unnecessary. CN has made the same representations in the CN/IC, CN/WC, and CN/GLT proceedings, and the Board imposed conditions holding CN to that representation. No evidence has been presented, here or in those proceedings, that that condition was inadequate. Further, any shipper that believed CN was failing to honor its commitment could seek to have the Board enforce its condition, and the Board could determine whether CN's terms were, in fact, "commercially reasonable."

The conditions WisDOT requests regarding blockages of businesses and individuals is unwarranted, as the Board's conditioning power in control transactions is not used to address pre-existing conditions, especially where, as here, the condition exists

on a line that will be unaffected by the Transaction. WisDOT's condition regarding increased rail traffic in Wisconsin is unwarranted because CN does not project any increased rail traffic on CN's lines through Wisconsin as a result of the Transaction. Any increases in traffic from Port of Prince Rupert Container Terminal, cited by WisDOT (at 1-2), will occur regardless of whether CN acquires EJ&EW. Without a demonstrated nexus between the Transaction and the impacts WisDOT seeks to mitigate, conditions addressing those impacts are not warranted in the context of this proceeding.

Finally, the condition WisDOT requests regarding speeds of trains through Wisconsin is unwarranted because WisDOT has not shown, and CN does not anticipate, that the Transaction would lead to any increases in speed of CN trains moving across Wisconsin. (CN expects that the Transaction would make it possible to cut transit times between the north side and the south side of Chicago, but that would not affect train speeds in Wisconsin.) Without a demonstrated nexus between the Transaction and the impacts WisDOT seeks to mitigate, the conditions WisDOT seeks to address those impacts are not warranted.

6. Wisconsin Dept. of Agriculture, Trade, and Consumer Protection

The Wisconsin Department of Agriculture, Trade, and Consumer Protection ("DATCP") submitted comments discussing the potential impact from the Transaction on service levels in Wisconsin. It did not oppose the Application or seek conditions, other than for a request that CN be "held to a very high standard and commit[] to preserving access and service." DATCP Comments at 6. Its allegations regarding anticipated service levels in Wisconsin are unsupported by the factual record, and its vague request is beyond the Board's conditioning power.

DATCP provides no evidence that, or even a plausible argument how, this Transaction would adversely affect shippers in Wisconsin. Even if the Transaction, contrary to CN's expectations, failed to improve the transportation through Chicago of freight originating in or destined to Wisconsin, the impact on Wisconsin shippers would be neutral at worst. To the extent that CN's lines in Chicago are subject to "heavily concentrated mainline long-distance traffic," (DATCP Comments at 5), the Transaction would not alter that fact. Growth in intermodal traffic from Port of Prince Rupert (cited in DATCP Comments at 5) is not dependent on the Transaction – that traffic can be expected to move over CN's Wisconsin lines (and in particular the WC line between Duluth-Superior and Chicago) regardless of whether CN acquires EJ&EW.

DATCP also asserts that "[t]he history of [rail] mergers appears to have resulted in negative consequences for Wisconsin businesses" and that CN/WC control transaction "does not appear to have resulted in the level of service that was assured." Even if this were true, it would be irrelevant to this case, and the evidence DATCP submits in support of this point appears to be nothing more than unverified summaries of unspecified shippers in response to an unspecified hearing. Nevertheless, CN has submitted evidence that responds to DATCP's concerns regarding service in Wisconsin. *See supra* at part II.A and Radloff Reply V.S.

DATCP asks "that any approval [be] conditioned to clearly ensure CN is held to a very high standard and commits to preserving access and service to those who may be affected by transport on these lines, whether directly or indirectly." DATCP Comments at 6. This request is too vague to serve as a basis for any relief by the Board. DATCP does not explain what is meant by a "very high standard," how the Board could determine

whether such a standard had or had not been met, or how the Board would enforce the condition if it were able to determine that the standard had not been met. The request also goes beyond the Board’s conditioning power because it is unrelated to the anticipated competitive impacts of the Transaction.

7. Local communities raising environmental concerns

None of the eight local governments that have commented in this proceeding raise issues related to the anticipated competitive impacts of the Transaction, and all raise issues that are properly considered by the Board’s environmental review process. Moreover, no local government presents any “substantial evidence,” as required by Decision No. 2, in support of their requested conditions. Because they have no legal or evidentiary basis, these conditions should be denied.

a. The Village of Frankfort and Will County

The Village of Frankfort and Will County have submitted substantially similar⁶⁵ comments about the necessity for the Board to consider the impact of the Transaction on non-rail traffic. Both pleadings begin with irrelevant background discussions regarding potential environmental impacts of the Transaction. Both pleadings argue the Board must consider the impact of the Transaction on non-rail transportation, and both pleadings seriously misread and misinterpret the statutory provision governing Board review of minor transactions.

Will County flatly states that it “is not addressing any anticompetitive effects of the proposed transaction.” WILL-5 at 5. For that reason alone, its request for condition should be denied. Then, without citing any relevant authority, Will County argues that the Board must consider detrimental environmental impacts when considering “the public

⁶⁵ Indeed, it appears as if substantial sections of both pleadings are identical.

interest in meeting significant transportation needs.” This argument is also completely unavailing because under the relevant statutory scheme, without an initial finding of substantial anticompetitive effects, the Board does not need to even consider “the public interest in meeting significant transportation needs.”

The rest of Will County’s arguments relate to environmental matters, which have been disposed of by the Board in Decision No. 8. Because Will County has failed to raise any potential anticompetitive effects, much less substantial ones, its request should be denied.

Unlike Will County, the Village of Frankfort at least purports to raise an anticompetitive effect. However, the best the Village can do is assert that the Board cannot determine whether the Transaction will be anticompetitive “without knowing the full extent and sources of the projected traffic over the EJ&E.” FRKF-4 at 7, n.4. Frankfort also provides no argument, much less any authority, for its assertion that the amount of traffic CN intends to route over the EJ&E is somehow related to the competitive effects of the Transaction. Frankfort further argues that Applicants’ “refusal to provide their projections about future rail traffic warrants an adverse inference,” FRKF-4 at 7, but fails to state how or why Applicants’ projections are inadequate for the competition assessment to be made here.

Frankfort also states that Applicants “have a duty to give the Board – and the public – a full picture of the net effect the proposed transaction will have upon non-rail” transportation. FRKF-4 at 7. Frankfort cites to no authority for the source of this duty and could not do so, because the information Frankfort seeks is unrelated to the competitive impacts of the Transaction and is being developed independently by SEA.

Frankfort, as well as the Board, and Applicants, will have a full picture of the net environmental effect of the Transaction once the EIS process has been completed.

Because Frankfort has failed to raise any serious threat of anticompetitive harm, its request to deny the application should be denied.

b. Cities in Southern Illinois

Three cities from southern Illinois⁶⁶ have all raised the same concern: that Amtrak service from downstate locations to the city of Chicago will be negatively affected by the Transaction. They have no legal basis for opposition, as their concern is unrelated to competitive effects, they have not proffered substantial evidence that Amtrak service will be negatively affected, and their concern is moot, as CN has agreed to allow Amtrak to use its current route into Chicago indefinitely, and at no increased cost. For the reasons discussed *supra* at section II.C.1, their requests should be denied.

c. Other Local Governments

Three local governments⁶⁷ filed comments exclusively raising environmental concerns. As the Board made clear in Decision No. 8, the environmental review process is separate and distinct from the competitive analysis of the Transaction. As the local governments raise no issue related to the competitive impacts of the Transaction, and have no evidence to support their request for environmental mitigation, their requested conditions should be denied.

⁶⁶ The Cities of Carbondale, Champaign, and Mattoon.

⁶⁷ The Towns of Griffith and Mokena, and the City of West Chicago.

D. UNIONS

This Transaction raises no extraordinary issues regarding the interests of carrier employees, and those issues that may arise can be readily handled through ongoing discussions and under the Board's standard *New York Dock* labor protective conditions process, which CN and EJ&E agree apply here.

As is evident from the Application, and as the Board concluded in Decision No.2, the proposed Transaction is "minor." CN contemplates limited operational changes and only modest workforce reductions anticipated to occur through attrition (CN-2 at 226-29, 248).

Moreover, CN has acknowledged that implementation of the labor aspects of the proposed Transaction will be governed by the applicable labor protection and procedural provisions of the Board's *New York Dock* negotiations process.⁶⁸ As labor commenters are aware, CN's practice in prior control transactions has been to try to achieve necessary work organization changes through voluntary, mutually acceptable agreements. CN has no reason to anticipate that this Transaction will be any different.

As often happens with such proceedings, the negotiations between the railroads and the arguably affected labor organizations will continue while the proceeding is pending, resulting in mutually agreed resolutions that do not require the Board to resolve some of the questions that may appear to be presented at the outset. Applicants anticipate that will be the case here.

Under the *New York Dock* process those changes needed for achieving the efficiencies of a transaction are to be worked out through negotiations and, if necessary,

⁶⁸ *New York Dock – Control – Brooklyn E. Dist. Term.*, 360 I.C.C. 60, *aff'd sub nom. New York Dock Ry. v. United States*, 609 F.2d 83 (2d Cir. 1979).

by arbitration, subject to review by the Board. Therefore it is premature to know or assume the outcomes. Applicants are confident that the issues and disputes that may arise can be resolved ultimately either by continued negotiations between the parties or, if needed, arbitration under the *New York Dock* process that all parties, both railroads and unions, agree governs here. Applicants will advise the Board if, during the period following this Reply, there are significant developments bearing on the questions raised by the unions' comments.

The three rail labor commenters do not dispute that CN's commitment to implementing Transaction-related changes through the *New York Dock* voluntary agreement process has worked well in the past. None of the labor commenters asks the Board to go beyond the standard *New York Dock* protections with respect to employees of Applicants or of EJ&E. To the extent that labor commenters voice "concerns" regarding the proposed Transaction, they appear to be quite hypothetical, providing no basis for the Board to depart from its established procedures in connection with this Transaction.

BLET and IBEW raise certain questions about the Labor Impact Exhibit contained in the Operating Plan in the Application. CN is consulting informally with counsel for the unions to provide answers to the questions raised in their comments.

In this regard, Applicants have described in the Operating Plan the limited changes they now foresee to be necessary to implement the Transaction. Applicants fully intend to implement the Transaction in the manner in which it is described in the Operating Plan, Safety Integration Plan, and other related documents. However, Applicants have also expressly recognized that the need for additional changes to achieve efficiencies made possible by this Transaction may become apparent only after they have

had an opportunity to gain experience with implementation (CN-2 at 229). The statute and the Board's *New York Dock* precedent provide for modification of labor agreements where necessary to realize the efficiencies of a control transaction, and they establish a fair process for reaching agreement on how to accomplish those modifications.

1. Brotherhood of Locomotive Engineers and Trainmen

The Brotherhood of Locomotive Engineers and Trainmen, a Division of the Rail Conference, International Brotherhood of Teamsters ("BLET"), opposes the Transaction and the related grants of trackage rights between EJ&EW, after its acquisition by CN, and other CN subsidiaries that are the subject of the notices of exemption in STB Finance Docket No. 35087 (Sub-Nos. 2 through 7).⁶⁹ BLET asserts that "the Application and the accompanying exemptions should be denied" (BLET Comments at 9). In the alternative, BLET requests "that the *New York Dock* conditions apply to the entire unified transaction and the protections be modified to address the issues identified" in BLET's Comments (*id.*).

Insofar as BLET calls on the Board to "den[y]" the exemptions in Sub-Nos. 2 through 7, BLET's request comes far too late. The exemptions governing those exemptions took effect, under 49 C.F.R. § 1180.4(g)(1), 30 days after the notices of exemption were filed, or on November 29, 2007. Accordingly, the only course open to BLET at this point would be to petition for revocation, but to do so, BLET must show that it has met the criteria of 49 U.S.C. § 10502(d) (*i.e.*, that formal regulation of the proposed trackage rights under 49 U.S.C. § 10101-11908 was necessary to carry out the

⁶⁹ See CN-2 at 351-512.

Rail Transportation Policy of 49 U.S.C. § 10101). 49 C.F.R. § 1121.4(f). Nothing in BLET's comments meets or even addresses those criteria.

Further, in calling for the Board to deny the Application, BLET provides neither evidence nor argument on the only criteria under which the Board, under 49 U.S.C. § 11324(d), may disapprove it.

BLET requests that “the entire unified transaction”⁷⁰ be subject to *New York Dock* labor protective conditions. This request is illogical. BLET says that “[d]ue to the nature of the transaction and the limited materials submitted by CNR, there is a strong inference that CNR has control over the joint operations [of CN’s IC, CCP, WC, and EJ&EW subsidiaries] that will take place,” and argues that, in consequence, *New York Dock* protections should apply. BLET Comments at 4. But CN has never denied that it would exercise common control of those wholly-owned subsidiaries. That, after all, is a reason why it filed the Application. Moreover, to the extent that any EJ&E employees will be adversely affected by CN’s control of EJ&EW in common with its other subsidiaries, those employees would already be protected by *New York Dock* (CN-2 at 27).⁷¹

⁷⁰ By the BLET presumably means the control Transaction that is the subject of the primary Application, together with the trackage rights that are the subject of the exemptions in Sub-Nos. 2 through 7 – and presumably the spin-off of EJ&EW by EJ&E that is the subject of the exemption in Sub-No. 1

⁷¹ CN’s projections of the impacts of that control on employees’ jobs (as opposed, *e.g.*, to possible effects on work rules) are set forth in section 11.0, Appendix A, and Attachment B to the Operating Plan. CN-2 at 226-29, 230-35, 248 (as corrected by CN-14). BLET complains that “[n]o data have been provided showing the labor impact on CCP, GTW, IC, or WC workers as a result of the transaction” (BLET Comments at 6). The short answer is that if no such data were provided in section 11.0, Appendix A, or Attachment B, no such impacts were projected. If, however, any such workers were to be adversely impacted they would be entitled to the same *New York Dock* protection as affected EJ&E workers.

BLET implies that there is something improper about a grant of trackage rights by one rail carrier to its wholly-owned affiliate in order to improve the efficiency of rail operations, and that the standard *Norfolk & Western* labor protective conditions⁷² are inadequate to such a transaction between railroads already operated under common control. But such transactions are common, and *Norfolk & Western* conditions are routinely imposed on them. See, e.g., *Norfolk & W. Ry. – Trackage Rights Exemption – Norfolk S. Ry.*, STB Finance Docket No. 32961 (STB served June 6, 1996); *Norfolk S. Ry. – Trackage Rights Exemption – Norfolk & W. Ry.*, STB Finance Docket No. 32661 (STB served Feb. 21, 1996); *Mo. Pac. R.R. – Trackage Rights Exemption – Union Pac. R.R.*, STB Finance Docket No. 32965 (STB served June 10, 1996); *Mo. Pac. R.R. – Trackage Rights Exemption – Union Pac. R.R.*, STB Finance Docket No. 32656 (STB served May 17, 1996).⁷³

BLET argues the Transaction should be disapproved because of CN's intention to "plac[e] the required train and engine service personnel who work under the WC, EJ&EW, and GTW agreements under a single carrier's agreements in order to facilitate

⁷² See *Norfolk & W. Ry. – Trackage Rights – Burlington N. Inc.*, 354 I.C.C. 605 (1978), modified sub nom. *Mendocino Coast Ry. – Lease & Operate – Cal. W. R.R.*, 360 I.C.C. 653 (1980).

⁷³ In STB Finance Docket Nos. 32656 and 32661 the United Transportation Union had petitioned for revocations of exemptions, arguing that the trackage rights granted in those cases were shams, intended to abrogate collective bargaining agreements. It did not suggest, however that any labor protective conditions other than *Norfolk & Western* were appropriate. (In any event, the Board rejected UTU's arguments, noting in one case that there was nothing inappropriate about the notice of exemption, because "[d]espite their close affiliation, these carriers could not have begun the involved trackage rights arrangement absent our approval or exemption under 49 U.S.C. 11343(a)(6) [now § 11323(a)(6)] or 49 U.S.C. 10505(a) [now § 10502(a)], respectively." *Norfolk S. Ry. – Trackage Rights Exemption – Norfolk & W. Ry.*, STB Finance Docket No. 32661, (STB served Feb. 21, 1996). That is exactly the situation with regard to CN's plan to allow its existing subsidiaries to re-route some of their traffic onto the EJ&EW line after it acquires that property.)

the flow of traffic in and through Chicago.” BLET Comments at 5 (quoting CN-1 at 231). According to BLET, “[i]t is unclear, and . . . contrary to current law, for CNR to suggest that it will attempt to essentially impose a single collective bargaining agreement over its entire U.S. operations under the guise of the ‘efficiencies’ flowing from the routing options in Chicago.” *Id.* at 6. But BLET’s contentions are raised prematurely and in the wrong forum. CN will be unable to bring all Chicago-area train and engine employees under a single collective bargaining agreement except through *New York Dock* procedures. If the unions representing CN’s employees refuse to agree to an implementing agreement that provides for such a consolidation, the only way CN would be able to achieve it would be through arbitration under *New York Dock*, subject to the Board’s review. See *CSX Corp. – Control – Conrail Inc.*, 3 S.T.B. 196, 328-30 (1998).

And, if BLET is correct in its view that such a consolidation is “contrary to current law,” then even arbitration would not, absent a change in “current law,” be sufficient to bring about such a consolidation. If, as BLET maintains, CN’s plans to bring train and engine employees under a common collective bargaining agreement “are totally unnecessary for the proposed operations,” BLET Comments at 7, then CN will have difficulty achieving that result through the *New York Dock* process.

So, even if BLET were right to be concerned about “circumvent[ion of] the obligations of the bargaining agreements, lessen[ing of] the seniority rights of employees, and forc[ing] one contract upon all the employees,” *id.*, denial of the Application would

be an unnecessary and excessive way to prevent those outcomes, given that BLET's members are amply protected by *New York Dock*.⁷⁴

BLET professes to be concerned that CN proposes to give trackage rights to GTW and WC over the entire length of EJ&EW's main line, while EJ&EW would have no corresponding rights over GTW or WC. BLET Comments at 7. Apparently, "[t]he EJ&E locomotive engineers fear that this disparity in the allocation of trackage rights will cause the remaining EJ&E or Gary Railway locomotive engineers to be confined to yard work." *Id.* This fear is unfounded. The trackage rights agreements attached as Exhibit 2 to each of the notices of exemption, as well as the draft notices attached as Exhibit 3 to the notices of exemption for the trackage rights granted to CCP, GTW, IC, and WC, all make clear that the trackage rights in question are overhead rights only, and do not give the grantee any right to provide local service.⁷⁵ CN-2 at 361-62, 378, 389-91, 406, 417-18, 434, 445-47, 462, 473-74, 498-99.

BLET suggests that the fact that the union has several grievance and arbitration proceedings pending regarding its EJ&E members "raise[s] a number of questions, in light of the fact that the EJ&E employees will be split among several railroads." BLET Comments at 8. In the first place, EJ&E employees will not be "split among several

⁷⁴ CN's wish to bring train and engine employees under a common collective bargaining agreement would be no reason to impose *New York Dock*, rather than *Norfolk & Western*, conditions on the ancillary trackage rights transactions. CN has no intention of using the trackage rights as the means for bringing those employees under a common agreement, and if it attempted to do so, BLET's members' rights would be just as secure in an arbitration of an implementing agreement under *Norfolk & Western* as it would in one under *New York Dock*.

⁷⁵ CN would note that if it had any intention of limiting EJ&E engineers to yard work, it would hardly have needed 120 train and engine employees now working for EJ&E to be transferred to CN, as Attachment B to the Operating Plan projects (CN-1 at 248).

railroads.” Some will remain with EJ&E, which will be renamed the Gary Railway.

Some will be transferred to EJ&EW, which will become a CN subsidiary. And some will have their positions abolished, as shown in Attachment B to the Operating Plan.

Furthermore, the questions raised by BLET⁷⁶ are not ones that require denial of the Application or imposition of special labor protective conditions. BLET provides no basis for its claim that “[t]he *New York Dock* conditions provide neither answers nor remedies for these questions” (BLET Comments at 8). Nor does it demonstrate that, even if *New York Dock* is inapplicable, the necessary answers and remedies cannot be obtained under existing collective bargaining agreements. Certainly BLET has demonstrated no reason that the Board should depart from its standard practice of imposing *New York Dock* conditions on the control Transaction, and *Norfolk & Western* conditions on the related trackage rights.

BLET opposes approval absent a condition applying *New York Dock* conditions to the entire transaction, including the trackage rights exemptions. BLET argues that *New York Dock* protections should apply to the trackage rights exemptions because of the nature of the Transaction and because CN can exercise control over its subsidiaries. BLET’s comments asserted that the Application and related filings did not provide sufficient information to address BLET’s concerns. BLET also objected to CN’s position that the information BLET needs should be sought through the usual process of

⁷⁶ “Which rail carrier will be responsible for processing the matters to a conclusion? Which carrier will be responsible to pay any claim sustained? What are the rights of a currently discharged employee who is subsequently restored to service to work on one of the involved carriers?” BLET Comments at 8. Applicants’ initial response is that responsibility for such claim liability is addressed in the Stock Purchase Agreement (CN-2 at 251-307). EJ&E (prior to closing) or Gary Railway (post-closing) would be responsible for handling claims by employees of EJ&E. The implementing agreements will also likely bear on some such claims.

negotiating and implementing agreements rather than through formal discovery before the Board.⁷⁷

BLET had not yet identified how it fears CN may seek to alter the current labor relations landscape (BLET at 6). BLET also asserted that it would be contrary to current law for CN to suggest that it will attempt to impose a single collective bargaining agreement over engineers in all its subsidiaries in its entire U.S. operations (*id.*). In particular, EJ&E engineers expressed concern that the disparity in the allocation of trackage rights agreements will cause the remaining EJ&E engineers to be confined to yard work (*id.* at 7).

BLET also referred to disposition of pending claims under the Stock Purchase Agreement and the possibility of EJ&E employees being split among three unions (*id.* at 8).

CN will continue to meet to discuss open issues with BLET and the other organizations, just, as we understand, EJ&E is also pursuing follow-up discussions of open issues.

Citing no basis, BLET speculates that one of the “major motivations” behind the Transaction may be “to transfer employees without negotiations with their labor representative[s] or to modify collective bargaining agreement provisions favorable to labor or to avoid provisions favorable to employees on one of the subsidiary carriers” (*id.* at 4). The suggestion that CN would engage in what has become a controversial, costly transaction for that purpose is implausible on its face.

⁷⁷ BLET refers to issues concerning CN’s discovery objections and responses, but it filed no motion to compel, and the deadline for doing so had passed before BLET filed its comments.

BLET likens this case to the Board's recent decision in *Mich. Cent. Ry., LLC – Acquisition and Operation Exemption – Lines of Norfolk S. Ry.*, STB Finance Docket No. 35063 (STB served Dec. 10, 2007) (“*Watco*”), where the Board denied a petition for exemption concerning a transaction in which Norfolk Southern would not acquire anything from anyone else but would contribute certain of its rail lines, trackage rights and other assets to Michigan Central. NS had reached agreements with some of the affected unions. Others opposed, calling the transaction a “sham” (Slip Op. at 4). The Board concluded that NS had retained too much control to allow application of § 10901. *Watco* has no bearing on this case.

2. IBEW et al.

IBEW said it was not in a position to support or oppose the Application based on the information it had when it filed its comments.⁷⁸ Nor has it given any reason for not doing so. However, information IBEW needs can be sought through the usual discussions process.

IBEW asked the Board to assure that the collective bargaining agreements remain intact (IBEW Comment at 4), but it has not identified any reason to believe they would not. IBEW also asked the Board to assure that Applicants will succeed to EJ&E's contractual obligations vis-à-vis pending claims (*id.*). Again, however, such liability for CN would be contractual in nature, and IBEW has shown no reason for the Board to override or disregard the provisions for such liability made by the parties.

⁷⁸ IBEW asked the Board to require Applicants to produce the information requested in IBEW's discovery (IBEW Comment at 4), but IBEW did not file a motion to compel, timely or otherwise, nor a motion to extend its deadline for doing so.

IBEW also asked that employees receive full *New York Dock* protections (IBEW Comment at 4). As noted, Applicants agree that the usual *New York Dock* conditions should apply (CN-2 at 27).

3. Jay L. Schollmeyer (UTU/GO-386)

Mr. Schollmeyer is General Chairman appearing on behalf of United Transportation Union-General Committee of Adjustment GO-386, speaking for UTU employees on the lines of BNSF in the vicinity of Vancouver, Washington. This is not a filing by the UTU International union, which is not opposing the Transaction.

Mr. Schollmeyer opposes the Transaction or, in the alternative, seeks protective conditions for employees of other railroads operating in the Chicago terminal area, as well as terminal areas in Tacoma, WA, and other U.S. ports. In particular, Schollmeyer argues that the Transaction would adversely affect persons employed by BNSF in Tacoma because of the diversion of traffic from U.S. Pacific ports such as Tacoma to Prince Rupert in British Columbia and would diminish competition. Schollmeyer asserts that employees of other railroads in the Chicago terminal would be negatively affected in unspecified ways. Schollmeyer's rationale is based on an asserted "terminal" joint-employee exception to the Board's usual position not to impose protection for employees of non-applicant carriers.

Schollmeyer provides no support for his apparent contentions that employees of BNSF across the country at Pacific Coast ports are encompassed by a "terminal"

exception, which is at odds with long-standing case law that *New York Dock* labor protection benefits are not available to employees of non-applicant carriers.⁷⁹

⁷⁹ *Canadian Nat'l Ry. – Control – Ill. Cent. Corp.*, 4 S.T.B. 122, STB Finance Docket No. 33556 (STB served May 21, 1999) ((i) rejecting TCU's argument that KCS employees receive *New York Dock* protection as part of CN's acquisition of control over IC because KCS was party to a marketing alliance program with CN and IC and, therefore, allegedly was properly a party to the control transaction; and (ii) rejecting UTU's argument to extend protection to BNSF employees because of the competitive adverse affects of the transaction on BNSF employees). *See also Crounse Corp. v. ICC*, 781 F.2d 1176, 1192-93 (6th Cir. 1986) (rejecting UTU argument based on plain statutory language that employees "affected by the transaction" and entitled to labor protection must include the employees of non-applicant carriers); *Lamoille Valley R.R. v. ICC*, 711 F.2d 295, 323-24 (D.C. Cir. 1983) (rejecting argument by competitor railroad that its employees were entitled to labor protection as a result of a proposed merger); *Florida E. Coast Ry. v. U.S.*, 259 F.Supp. 993 (D. Fl. 1966) (rejecting argument by RLEA that "the words 'employees of the carrier or carriers by railroad affected' ... requires the Commission to protect not only the employees of the merging roads but also the employees of their competitors who may be affected"); *CSX Corp. – Control and Operating Agreements – Conrail Inc.*, 3 S.T.B. 196, STB Finance Docket No. 33388 (STB served July 23, 1998) (citing general rule in denying UTU's request for labor protection for D&H employees because NS would be operating over former Conrail lines in which D&H has trackage rights and because D&H interchanges with both NS and CSX); *Chicago SouthShore & S. Bend R.R. – Operation Exemption – Ill. Int'l Port Dist.*, STB Finance Docket No. 32425 (STB served April 15, 1998) (denying labor protection to employees of carrier that provided non-exclusive switching and maintenance work at port property, which carrier objected to port's proposed operating agreement with another carrier giving the other carrier the right to operate on all port trackage for the purposes of increasing competition); *Chicago SouthShore & S. Bend R.R. – Trackage Rights – N&W Ry.*, ICC Finance Docket No. 32392 (March 4, 1994) (denying protective benefits to employees of competitor carrier servicing port, which competitor objected to trackage rights agreement that gave applicant carrier rights to trackage leading to the gate of the port).

Respectfully submitted,



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