STB EX PARTE NO. 582 (SUB-NO. 1)

MAJOR RAIL CONSOLIDATION PROCEDURES

Decided June 7, 2001

AGENCY: Surface Transportation Board, DOT.
ACTION: Final rules.

SUMMARY: The Surface Transportation Board (STB or Board) adopts final regulations governing proposals for major rail consolidations. These new rules substantially increase the burden on applicants to demonstrate that a proposed transaction would be in the public interest, by requiring them, among other things, to demonstrate that the transaction would enhance competition where necessary to offset negative effects of the merger, such as competitive harm or service disruptions.

EFFECTIVE DATE: These rules are effective July 11, 2001.

FOR FURTHER INFORMATION CONTACT: Julia M. Farr, (202) 565-1613. [TDD for the hearing impaired: 1-800-877-8339.]

SUPPLEMENTARY INFORMATION:

TABLE OF CONTENTS

BACKGROUND

In March 2000, we concluded that our regulations governing applications for approval of railroad mergers,[1] at 49 CFR Part 1180, subpart A (49 CFR 1180.0 — 1180.9),[2] were outdated and inadequate to address future major rail merger proposals, given the limited merger-related benefits still obtainable through the elimination of overcapacity in the industry, the significant service disruptions that had been associated with recent rail mergers and the prospect that future major merger proposals would trigger other proposals that, if approved, could result in the consolidation of the Class I railroad industry into only two North American transcontinental railroads.[3] Accordingly, we instituted this 15-month, 3-stage rulemaking proceeding to develop new, more up-to-date, merger regulations.

In the advance notice of proposed rulemaking (ANPR),[4] we sought comments and proposals on a wide range of merger-related issues, including, but not limited to: competitive issues; downstream effects; the important role of smaller railroads in the rail network; service performance; the types of benefits to be considered in the balancing test, and how we should monitor those benefits; how we should view alternatives to mergers; employee issues; and international trade and foreign control issues.[5] We also indicated that we would be making technical updates or corrections to the merger rules, and we invited commenters to offer suggestions for modifying the provisions of 49 CFR Part 1180.

In October 2000, we issued a notice of proposed rulemaking (NPR) proposing a new merger policy statement and rules that would require merger applicants to bear a heavier burden in showing that a major merger proposal is in the public interest.[6] Parties were again invited to submit comments, replies, and rebuttal.

We have received comments and suggestions from a wide range of parties: Class I railroads and related interests (*see* Appendix C); regional and shortline

---

[1] Terms such as "merger," "control," "transaction," and "consolidation" are generally used interchangeably herein.

[2] All references to the *United States Code* (U.S.C.) are to the provisions of Title 49; and all references to the *Code of Federal Regulations* (CFR) are likewise to the provisions of Title 49.

[3] *Public Views on Major Rail Consolidations*, 4 S.T.B. 546 (2000).

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

[5] *Major Rail Consolidation Procedures*, 4 S.T.B. 570 (2000), published at 65 Fed. Reg. 18,021 (2000).

[6] *Major Rail Consolidation Procedures*, 5 S.T.B. 1 (2000) published at 65 Fed. Reg. 58,974 (2000).

railroads and related interests (*see* Appendix D); passenger railroads and related interests (*see* Appendix E); rail labor interests (*see* Appendix F); federal and foreign agencies (*see* Appendix G); regional and local interests (*see* Appendix H); port interests (*see* Appendix I); members of Congress (*see* Appendix J); NITL, CURE, & ARC (*see* Appendix K); coal interests (*see* Appendix L); chemicals, plastics, and related interests (*see* Appendix M); agricultural interests (*see* Appendix N); minerals and related interests (*see* Appendix O); forest products, lumber, and paper interests (*see* Appendix P); Canadian shipper interests (*see* Appendix Q); transportation intermediaries (*see* Appendix R); and miscellaneous parties (*see* Appendix S).

OVERVIEW

These new rules reflect our concerns about what an appropriate rail merger policy should be in light of the declining number of Class I railroads, the elimination of the industry's excess capacity, and the serious transitional service problems that have accompanied recent major rail consolidations. We have received comments from over 100 parties in this proceeding, reflecting the wide-ranging views of railroads, shippers, rail labor, federal and foreign agencies, members of Congress, and others. The detailed summaries of the comments that are attached to this decision reflect the numerous thoughtful statements that we have received. The comments have been very helpful to us in formulating these guidelines covering the content of future applications, public participation in the process, and how we should assess future proposals. We believe that our new merger policy statement and rules provide an appropriate framework for considering future major railroad merger proposals.

Our revised rules reflect a significant change in the way in which we will apply the statutory public interest test to any major rail merger application. Because of the small number of remaining Class I railroads, the fact that rail mergers are no longer needed to address significant excess capacity in the rail industry, and the transitional service problems that have accompanied recent rail mergers, we believe that future merger applicants should bear a heavier burden to show that a major rail combination is consistent with the public interest. Our shift in policy places greater emphasis in the public interest assessment on enhancing competition while ensuring a stable and balanced rail transportation system.

Toward this end, we will require applicants to submit a service assurance plan with their initial application and operating plan. Applicants also will be expected to include measures for preserving competition wherever feasible, including effective plans to keep open major existing gateways and to preserve opportunities to challenge segment rates in bottleneck situations. Our new rules reflect an intention on our part to offset, through conditions for competitive enhancements, those merger-related harms that cannot be directly or effectively mitigated. Such competitive enhancements could include, but would not be limited to, reciprocal switching arrangements, trackage rights, or elimination of "paper barriers" on interchange by shortline carriers. We will also analyze the impact of potential future responsive mergers, and issues related to mergers of U.S. and foreign carriers. And we are codifying our recent practice of formal oversight for a period of not less than 5 years following each merger.

In the NPR, we indicated that we would require applicants in future merger proceedings to present proposals that enhance, not merely preserve, competition, in order to secure our approval. Many parties have asked for greater precision about the scope of competitive enhancements that would be necessary. But shippers and carriers fundamentally disagree on the degree of enhancement that should be expected. The Class I railroads argue that it would be both unlawful and inappropriate for us to require applicants to offer *any* competitive enhancements as part of their merger proposals. In contrast, many shippers and shipper groups want us to require applicants to provide a panoply of specific competitive enhancements, essentially providing relief for all exclusively served shippers of an applicant railroad, in order to obtain approval of a merger proposal.[7]

Neither of these extremes is appropriate. Ultimately, the quantity and quality of competitive enhancements that would be required would depend upon the circumstances of a particular case. This analysis involves factors that are difficult to weigh and offset, such as any merger-related competitive harm for which feasible and effective remedies could not be devised, the amount of post-merger service disruption that would be likely to occur as a result of a particular transaction, and the amount of public benefits that could truly be expected to flow from a particular transaction.[8]

---

[7] Certain shippers and shipper groups further request that we impose this relief on railroads that are not applicants or controlled by applicants. However, we lack the authority to impose such conditions on non-applicants.

[8] Some of the railroads argue that we cannot require railroad applicants to offer permanent competitive improvements to offset the risk of temporary service problems. But our merger balancing test already requires us to balance "apples and oranges." While we have never tried to place a dollar weight on every merger benefit and harm, we would note that any transitional service problems also delay the arrival of prospective efficiency benefits and thus reduce the present value (continued...)

Numerous parties have misconstrued the purpose that would be served by competitive enhancements in the application process. Contrary to the argument of many shippers and shipper groups, our new policy is not predicated on the notion that we need to force future merger applicants to make up for any loss of competition caused by past mergers. These parties argue that, through recent mergers, the rail industry has already become unduly concentrated into the hands of a very small number of Class I carriers, reducing shipper options and increasing railroad market power. But even when there was a larger number of Class I railroads, the U.S. rail industry was already highly "concentrated" as compared to most other industries, in the sense that most shippers were served by a single railroad, and only a small percentage were served by two or more railroads. This structure of the rail industry was created by the marketplace, not by recent mergers or by ICC[9] or STB regulation. Rail investors generally have not believed that the investment in additional rail lines to create two- or three-railroad service to most locations or shippers would prove sufficiently profitable to warrant the investment.

Despite this structure, the returns on investment earned by major railroads have been modest for many years. By 1980, the industry was facing numerous bankruptcies by major carriers. Although mergers and other efficiency-enhancing steps since 1980 have improved that situation, the Class I rail carriers continue to generate very modest returns that are typically below those achieved by the industries they serve. Most Class I railroads have failed to achieve rates of return overall that equal their cost of capital on investment as calculated by the ICC and the Board since 1980. Wall Street rating services such as Moody's Investor Service have reached the same conclusions. *Fortune* magazine has consistently rated returns on assets and on equity for major railroads as worse than the median industry group. As The Burlington Northern and Santa Fe Railway Company (BNSF) notes, in 1999, *Fortune* rated the railroad group as 34th and 37th for return on equity and return on investment, respectively, out of 41 industry groups.

Since 1980 at least, we have consistently imposed merger conditions to preserve two-railroad service where it existed, and we have imposed remedies to preserve competition where the number of carriers serving a shipper has gone

---

[8](...continued)
of these benefits. Moreover, the benefits associated with competitive enhancements arrive with greater assurance and with less delay than do benefits associated with efficiency improvements.

[9] The Interstate Commerce Commission (ICC) is the predecessor agency to the STB.

from three to two in limited circumstances on a case-by-case basis.[10] The overall result, so far, has been that railroads have continued to face effective competition, either from other railroads or other modes, that has forced them to pass on the preponderance of the significant efficiency gains they have achieved (through mergers and other means) to the shippers that they serve.[11]

We have not, however, taken these trends, or competition in general, for granted. We have imposed oversight conditions in recent mergers to ensure that mergers do not reduce competition. The records developed in those proceedings after several rounds of oversight have confirmed our predictions in those cases that the transactions would not result in increased market power.

That being said, the prospect of reducing the already small number of major Class I railroads even further, perhaps to the point where only two major railroads remain in the U.S. and Canada, gives us substantial concern. Through the merger process that has taken place over the last 20 years, the number of overall railroad companies has been reduced dramatically, and the size of the remaining carriers has increased correspondingly. Although our new rules and policy statement do not, as the Class I railroads argue, reflect an anti-merger bias,[12] we do plan to take a more skeptical, "show me" attitude toward claims of merger benefits and toward claims that no transitional service problems would occur. More importantly, we need to look down the road and determine whether approving not just the immediate proposal that may be before us, but others like it, would ultimately result in a rail industry structure that continues to provide at least the existing level of competitive options for shippers, and continues to make

[10] *See, e.g., Union Pacific/Southern Merger (General Oversight)*, 3 S.T.B. 987 (1998) Decision No. 13, at 1000. In this regard, we will not adopt the suggestion of The Kansas City Southern Railway Company (KCS) that we should never permit any reduction in the number of railroads serving a particular shipper, regardless of the circumstances. We will continue to evaluate on a case-by-case basis those situations where a shipper would continue to have more than one carrier available to it.

[11] Our Office of Economics, Environmental Analysis, and Administration (OEEAA) has completed several studies over the past 10 years of railroad rates and these, along with other independent analyses performed by disinterested organizations such as the General Accounting Office, have all shown favorable rate trends. The most recent OEEAA study shows that, since 1984, inflation-adjusted railroad rates have decreased more than 45%. As Norfolk Southern (Norfolk Southern Corporation and Norfolk Southern Railway Company) (NS) observes, substantial rate decreases do not occur in the absence of competition.

[12] Citing proposed § 1180.1, BNSF argues that we have proposed to reverse a statutory policy favoring mergers. That section does not support BNSF's argument.

railroads pass on most of the beneficial results of their merger efficiencies to the shipping public.[13]

Our new policy "welcomes private-sector initiatives that enhance the capabilities and the competitiveness of [the] transportation infrastructure," but it disfavors mergers that reduce competitive options for shippers absent substantial overriding public benefits. Thus, we retain in general the traditional balancing test that has always governed our determination of whether mergers are consistent with the public interest under the governing statute, 49 U.S.C. 11323-24. As explained in more detail below, we have taken a fresh look at the factors that go into our traditional public interest balancing test. But we cannot say in advance of a particular proposal exactly what type and what quantity of competitive enhancements would be appropriate. If a merger proposal is in the public interest, we will approve it; if it is not, we will either deny it or impose sufficient conditions to ensure that it is in the public interest.

The Class I railroads contend that by looking for competitive enhancements we incorrectly assume that no future mergers would result in appreciable public benefits, that all future mergers would result in post-merger transitional service disruptions, and that all mergers would cause irremediable competitive harms. They challenge any notion that, without competitive enhancements, future merger proposals would necessarily result in net public harm.

As explained below, however, we have not proposed, and we are not adopting, any such presumption, nor do we wish to prejudge the merits of any future merger proposals. But in light of the service problems that have arisen in recent mergers, and the scale of the transaction that we would be asked to approve in future major rail merger applications, we believe that offering some new or enhanced rail-to-rail competition or other competitive benefits is likely to be necessary to resolve substantial difficulties so as to tip the balance in favor of the public interest. The amount of new or enhanced competition that would be needed to achieve this result would depend on the potential for and likely extent of service problems risked and the degree to which existing competitive alternatives could not be feasibly and effectively preserved.

In formulating our new merger policy and rules, we have been guided by many of the proposals put forth in the record. The new rules, including the new

---

[13] The Ohio Rail Development Commission (ORDC) claims that we should give less weight in our balancing test to economic efficiencies, because it claims that railroads would have no incentive to pass along any of these cost savings to "captive" shippers. Although this may be a popular notion, it does not reflect what has happened over the last 20 years. For example, although a large percentage of coal shippers would be deemed "captive," rates charged to coal shippers have fallen even more sharply than have rates to other rail shipper groups during this period.

rail merger policy, are set forth in italics below, followed by a narrative discussing the new provisions and any material issues that have arisen or changes that we have made since the NPR. Those existing rules not cited in this document will remain unchanged.

REVISIONS TO § 1180.1 General policy statement for merger or control of at least two Class I railroads.

§ 1180.1(a): General. To meet the needs of the public and the national defense, the Surface Transportation Board (Board) seeks to ensure balanced and sustainable competition in the railroad industry. The Board recognizes that the railroad industry (including Class II and III carriers) is a network of competing and complementary components, which in turn is part of a broader transportation infrastructure that also embraces the nation's highways, waterways, ports, and airports. The Board welcomes private-sector initiatives that enhance the capabilities and the competitiveness of this transportation infrastructure. Although mergers of Class I railroads may advance our nation's economic growth and competitiveness through the provision of more efficient and responsive transportation, the Board does not favor consolidations that reduce the transportation alternatives available to shippers unless there are substantial and demonstrable public benefits to the transaction that cannot otherwise be achieved. Such public benefits include improved service, enhanced competition, and greater economic efficiency. The Board also will look with disfavor on consolidations under which the controlling entity does not assume full responsibility for carrying out the controlled carrier's common carrier obligation to provide adequate service upon reasonable demand.

As explained in the NPR, the prior merger policy statement emphasized assisting railroads in rationalizing the nation's rail system and eliminating excess capacity. In contrast, our new rules recognize that the efficiencies and service improvements likely to be realized from further downsizing of rail route systems are limited. Thus, while the prior policy statement focused on greater economic efficiency and improved service as the most likely and significant public interest benefits, our new policy statement adds enhanced competition as an important public interest benefit. The policy statement also recognizes that, with only a few Class I carriers remaining, a transaction involving two Class I rail carriers would affect the entire transportation system, including highways, waterways, ports, and airports. Any companies resulting from an additional (perhaps final) round of consolidations must be able to compete effectively and deliver necessary services, now and into the future. Finally, as the prior policy provided, any entity seeking control must assume full responsibility for carrying out the controlled carrier's common carrier obligation, and we will exercise our authority to the fullest extent to ensure compliance.

§ 1180.1(b): Consolidation criteria. The Board's consideration of the merger or control of at least two Class I railroads is governed by the public interest criteria prescribed in 49 U.S.C. 11324 and the rail transportation policy set forth in 49 U.S.C. 10101. In determining the public interest, the Board must consider the various goals of effective competition, carrier safety and efficiency, adequate service for shippers, environmental safeguards, and fair working conditions for employees. The Board must ensure that any approved transaction would promote a competitive, efficient, and reliable national rail system.

As noted in the NPR, this portion of our prior policy statement merely recited the statutory criteria. The section we are adopting in its place emphasizes that we must balance various, sometimes conflicting goals in determining the public interest. While we have always used a balancing test, we are changing how we will weigh these goals and are adding new elements to the mix. We are upgrading the importance of competition and recognizing that redundant capacity is no longer a central issue. Claims of improved carrier efficiency will be scrutinized carefully, and we will give greater attention to the potential for transitional service disruptions. Also, we will give greater emphasis to the role of Class II and III carriers and ports in the broader transportation infrastructure.

Size of carriers subject to these rules. KCS asserts that for a merger between a large Class I railroad and a smaller Class I railroad such as itself, less stringent requirements should apply.[14] KCS argues that such mergers would not alter the rail transportation environment to the degree that a merger between two large Class I carriers would.

We agree, as a general matter, that a potential transaction involving KCS and another Class I carrier would not necessarily raise the same concerns and risks as other potential mergers between Class I railroads. As explained in our ANPR, the new merger guidelines were prompted largely by the fact that there are now only 6 large carriers remaining in the North American rail industry[15] and there are significant risks associated with further consolidations between any of those carriers. There are, of course, also four other, smaller Class I carriers, but

[14] KCS also suggests a $1 billion threshold (in annual operating revenues) for treatment as a smaller Class I. This proceeding, however, is not an appropriate place for changing the carrier classifications prescribed in 49 CFR part 1201, General Instructions.

[15] BNSF, Norfolk Southern Railway Company, Union Pacific Railroad Company, CSX Transportation, Inc., Canadian National Railway Company (CN), and Canadian Pacific Railway Company (CP).

three of them are affiliated with one or another of the larger roads.[16] KCS is the only one of the smaller Class I rail carriers that is not affiliated with one of the six large railroads, and, as KCS points out, a potential merger between it and a Class I carrier would not necessarily have the same impact as other major mergers. Of course, we cannot assess in the abstract the effect of every potential merger proposal involving KCS.

Accordingly, for a merger proposal involving KCS and another Class I railroad, we will waive application of the new rules and apply the rules previously in effect unless we are persuaded otherwise. *See* 49 CFR § 1180.0(b).

Alliances and joint ventures do not necessarily require our approval. Some parties argue that we should expand our rail merger review to embrace alliances and joint ventures. However, as we explained in some detail in *Canadian National Railway, et al. — Control — Illinois Central Corporation, et al.*, 4 S.T.B. 122 (1999)(Decision No. 37), at 145-152 (*CN/IC*) , under our statute alliances and joint ventures that fall short of either common control or pooling do not require our approval.

§ 1180.1(c): Public interest considerations. The Board believes that mergers serve the public interest only when substantial and demonstrable gains in important public benefits — such as improved service and safety, enhanced competition, and greater economic efficiency — outweigh any anticompetitive effects, potential service disruptions, or other merger-related harms. Although further consolidation of the few remaining Class I carriers could result in efficiency gains and improved service, the Board believes additional consolidation in the industry is also likely to result in a number of anticompetitive effects, such as loss of geographic competition, that are increasingly difficult to remedy directly or proportionately. Additional consolidations could also result in service disruptions during the system integration period. Accordingly, to assure a balance in favor of the public interest, merger applications should include provisions for enhanced competition, and, where both carriers are financially sound, the Board is prepared to use its conditioning authority as necessary under 49 U.S.C. 11324(c) to preserve and/or enhance competition. In addition, when evaluating the public interest, the Board will consider whether the benefits claimed by applicants could be realized by means other than the proposed consolidation. The Board believes that other private-sector initiatives, such as joint marketing agreements and interline partnerships, can produce many of the efficiencies of a merger while risking less potential harm to the public.

Our new rule specifically recognizes various new factors in our balancing test, clarifies that certain factors may be weighed differently, and calls for

[16] The Grand Trunk Western Railroad Incorporated and the Illinois Central Railroad Company are affiliated with CN, and the Soo Line Railroad Company is affiliated with CP.

applicants to incorporate proposals for enhanced competition to assure a balance in favor of the public interest.

Even with extensive advance planning, implementing large rail mergers may cause substantial service disruptions that delay or outweigh expected efficiency gains that should flow to the public. These potential harms will be considered in our balancing test. Certain efficiency benefits of mergers may take several years to be realized by the carrier, and in some cases somewhat longer to flow through to the shipping public. Gains that can be experienced only over time will be given somewhat less weight, using a current value approach. We will also consider the extent to which various claimed merger benefits can be achieved through cooperative agreements among carriers short of a merger. Given the size of the transactions with which we may be faced, and the dangers involved should these transactions fail, we will scrutinize claimed merger benefits very closely.

As explained in more detail below, it is increasingly difficult to remedy certain competitive harms directly and proportionately. For example, we recognize that shippers who are served by a single rail carrier may benefit from having another carrier nearby. They may benefit through geographic competition, through the possibility of constructing (or proposing to construct) a connection to a second carrier, or by transloading freight by truck to a second rail carrier. Although we have imposed conditions specifically addressing concerns raised by the loss of such competitive constraints in prior mergers, this process would become increasingly difficult were the number of independent major railroads to decrease further in a final round of mergers, and were the nearest alternative rail option to be located farther away.

Because of the increased likelihood of transitional service problems and the difficulty of crafting appropriate conditions to mitigate competitive harm, this rule calls for applicants to provide a plan for enhancing competition. This new competition need not be limited to remedying specific competitive or other harms that are threatened by the merger. Competition can be enhanced in many ways. The focus of such a plan could be placed on enhancing intramodal (rail-to-rail) competition, for example, by the granting of trackage rights, the establishment of shared or joint access areas, the removal of "paper" and "steel" barriers, and other techniques that would enhance railroad-to-railroad competition. Unlike some other types of merger benefits that are more uncertain or may take longer to be achieved and even longer to flow through to the public, competitive gains can be realized immediately. Thus, provisions for competitive enhancement will be given substantial weight as merger benefits and are likely to be extremely important to us in determining whether to approve a particular application.

Responses to railroad arguments about our "presumptions." The railroads argue that we are overly negative in our assessment of the factors that would need to be balanced in addressing any future proposals, and that we have, in effect, created a series of irrebutable presumptions. That is not the design or intent of these rules, even though we believe, based on our experience with recent rail mergers, that our cause for concern is well founded. In any event, future applicants should make their best case on these issues, but they risk disapproval or imposition of conditions that are not of their choosing if their presentation fails to convince us that the application as presented is in the public interest.

1. *Public benefits may be limited.* Our rules do not unalterably presume, as the Class I railroads argue, that no future rail mergers would produce significant public benefits. Rather, we have observed, and the railroads have largely agreed, that merger-related benefits formerly obtainable through the elimination of overcapacity in the industry are unlikely to result from future mergers. We recognize, of course, that there are other benefits that can be achieved through mergers in terms of creating single-line service and other efficiencies that can improve rail service and lower rail costs and thus make merging railroads more competitive and more responsive to their customers.

Moreover, as we have explained, in the past many or most of the benefits of such efficiencies have generally been passed along to shippers in the form of reduced rates or improved service. But there is no guarantee that this would continue to be the case in the future, particularly if the number of large railroads were reduced to two or three.

2. *Some competitive harms are increasingly difficult to remedy.* The railroads dispute our assessment that competitive harms that would be increasingly difficult to remedy would be likely to arise from any additional railroad consolidation. The carriers argue that, because future merger proposals would likely be for end-to-end rather than parallel mergers, there would be little loss of direct competition ("2-to-1 points") and thus extensive trackage rights or other remedies comparable to those ordered in *Union Pacific/Southern Pacific Merger*, 1 S.T.B. 233 (1996) (*UP/SP*), would not be needed. In addition, the carriers assume that any conditions must be direct and proportionate, that is, they may only provide a specific fix to a specific problem. But we believe the carriers underestimate the difficulties we could face in attempting to remedy, in a direct and proportionate manner, losses of both direct and indirect competition.

As we noted in the NPR, shippers that are served by a single rail carrier may nevertheless benefit from the indirect competition that results from having another carrier nearby. In this regard, they may have the possibility of constructing (or proposing to construct) a connection to a second carrier, or of transloading freight by truck to a second carrier. They also may benefit from the opportunity to negotiate a long-term contract before choosing to locate a new plant along either of two carriers' lines or to adjust production levels at plants already located along those lines. A quick glance at a rail map confirms that the eastern and western railroads do not simply meet end-to-end at Chicago and the Mississippi River crossings; there is a fair degree of overlap. This situation seems to exist with regard to many of the connections of large U.S. and Canadian systems as well. Thus, a merger between any two U.S. Class I rail carriers or between major U.S. and Canadian rail carriers would surely threaten certain shippers with a loss of some indirect competition.

In *UP/SP*, our condition requiring BNSF trackage rights remedied the competitive harm that would have arisen from the loss, through the merger, of a nearby carrier, because BNSF was permitted to serve new facilities, as well as handle "build-out" and "transload" traffic. Yet these provisions only worked because the traffic base BNSF started from — movements originating or terminating at 2-to-1 points — was sufficient to generate traffic densities that enabled BNSF to offer a competitive service. With fewer 2-to-1 points likely to arise from any additional rail consolidation, we cannot generalize from BNSF's success and assume that trackage rights could always be structured to remedy future merger-related competitive harms.

Moreover, significant losses in geographic competition could occur even where carriers truly are "end-to-end," because there are many commodities (such as phosphate and soda ash) that have a limited number of sources. Similarly, a merger between BNSF and a Canadian carrier, even if largely end-to-end, could raise potential competitive concerns in western export wheat markets. End-to-end carriers that compete with each other geographically would stand to gain market power if we were to approve their merger without imposing effective conditions, which, as discussed above, could be difficult.

Finally, we are concerned that it might not be possible to remedy losses of direct competition using our traditional trackage rights remedy.[17] First, unlike prior consolidations, shippers or product origination points losing two-railroad competition might not be easily reached and served by other carriers through trackage rights. That is, with a dwindling number of Class I railroads to choose from, there may not be an unaffiliated carrier able to offer an effective replacement service to shippers who would be harmed by a merger.

Second, there might not be a carrier willing to provide replacement competition in a particular merger case. Even in those cases where trackage rights would be the preferred remedy, there must be a carrier both willing and able to provide service. In *UP/SP*, for example, several carriers in addition to BNSF offered to provide competition to UP/SP,[18] but we felt they lacked the necessary infrastructure and resources to replace the competition that would otherwise have been lost through the merger of UP and SP. BNSF, however, was both willing and able.

In short, in any future consolidation cases, we will strive to remedy every competitive harm that would stem from any proposal that we decide to approve. We anticipate, however, that, to gain our approval, it likely would be necessary for applicants to offer to offset a difficult-to-remedy loss of competition with competitive enhancements.

3. *Transitional service disruptions are likely.* The Class I railroads generally contest our view that service disruptions would be a likely result of major mergers involving the remaining Class I railroads. BNSF and other railroads argue that the two mergers that caused the most serious recent service problems were unique and that those situations are unlikely to be repeated. They point out that SP had a deteriorating infrastructure as a result of years of

[17] The Committee to Improve American Coal Transportation (IMPACT) argues that trackage rights are an inherently inferior remedy and that we should express a preference for divestiture rather than trackage rights to solve competitive problems. But our experience so far has been that, where there is a carrier that is ready, willing and able to perform them, trackage rights can provide an effective means of remedying what would otherwise be merger-related competitive harm without the destruction of efficiency benefits that can be associated with divestiture.

[18] Union Pacific Corporation and Union Pacific Railroad Company (UP) and Southern Pacific Rail Corporation, Southern Pacific Transportation Company, St. Louis Southwestern Railway Company, SPCSL Corp., and The Denver and Rio Grande Western Railroad Company (SP) (in combination, UP/SP).

underinvestment and that CSX[19] and NS divided an existing carrier's assets in an unprecedented manner. The Class I railroads argue that future merger proposals would likely be for relatively simple end-to-end combinations that should not raise significant service issues, and that the railroads have strong financial incentives to avoid these merger-implementation service problems in the future.

But despite the railroads' very strong financial incentives to avoid post-merger service disruptions, despite substantial planning by applicants in conjunction with this agency and the Federal Railroad Administration (FRA), and despite carefully phased and delayed implementation, the *CSX/NS/CR*[20] transaction resulted in severe service problems that plagued applicants and their customers for a full year or more. Moreover, post-implementation service problems have not been limited to the *CSX/NS/CR* and *UP/SP* transactions. The *UP/CNW*[21] and *BN/SF*[22] transactions were also accompanied by service disruptions, although they were less severe in magnitude than those in *UP/SP* and *CSX/NS/CR*. Thus, it is natural for the Board to be concerned about future mergers in this connection, and we must anticipate that, because of their inherent complexity and scale, future mergers involving the remaining major carriers entail a risk of significant service disruptions that could be nationwide in scope and would not be easily addressed given that even fewer major carriers than today would be available to assist in resolving the disruptions.

Benefits obtainable by other means. BNSF argues that merger applicants should not have to explain whether claimed merger benefits can be achieved through other means, such as joint ventures or alliances. BNSF argues that it would be irrational for two railroads to propose an end-to-end merger unless they believed that the merger would generate cost savings and service improvements that they could not gain by other means. In considering this argument, it is important to keep in mind that merger transactions are sometimes pursued for

---

[19] CSX Corporation and CSX Transportation, Inc. (CSX).

[20] *CSX Corporation et al. — Control — Conrail Inc. et al.*, 3 S.T.B. 196 (1998) (Decision No. 89) (*CSX/NS/CR*), *aff'd, Erie-Niagara Rail Steering Committee, et al. v. STB*, 247 F.3d 437 (2d Cir. 2001) (*Erie-Niagara*).

[21] *Union Pacific Corporation, Union Pacific Railroad Company and Missouri Pacific Railroad Company — Control — Chicago and North Western Transportation Company and Chicago and North Western Railway Company*, Finance Docket No. 32133 (ICC served Mar. 7, 1995) (*UP/CNW*).

[22] *See Burlington Northern et al. — Merger — Santa Fe Pacific et al.*, 10 I.C.C.2d 661 (1995) (*BN/SF*).

reasons other than just cost savings and service improvements. In addition, we recognize that consolidations may permit applicants to gain substantial benefits that are not otherwise achievable, and that the finality of a consolidation can result in long-term investments that would not otherwise be made. But this does not mean that *all* of the claimed benefits require a merger for their accomplishment, nor does it address shipper concerns that a carrier might seek to gain enhanced market power through a merger, while claiming that this harm would be offset by efficiencies that could actually be achieved by means short of merger. We need to have a full awareness of which of the claimed benefits are obtainable only through a merger so that we can fairly weigh them against potential harms. Accordingly, we believe that it is appropriate for us to require applicants to address the question of whether the particular merger benefits upon which they are relying could be achieved by means short of merger.

Financially unsound applicants. Implicit in our policy is the notion that the standards should be applied less stringently to merger proposals involving financially unsound applicants. A mere failure to achieve revenue adequacy, however, is not our yardstick here. Instead, we are referring to carriers in such poor financial shape that a commitment by a financially sound carrier to invest in maintaining and upgrading deteriorating rail infrastructure is needed and constitutes a significant public benefit in its own right, as was the case in *UP/SP*.

§ 1180.1(c)(1): Potential benefits. By eliminating transaction cost barriers between firms, increasing the productivity of investment, and enabling carriers to lower costs through economies of scale, scope, and density, mergers can generate important public benefits such as improved service, more competition, and greater economic efficiency. A merger can strengthen a carrier's finances and operations. To the extent that a merged carrier continues to operate in a competitive environment, its new efficiencies would be shared with shippers and consumers. Both the public and the consolidated carrier can benefit if the carrier is able to increase its marketing opportunities and provide better service. A merger transaction can also improve existing competition or provide new competitive opportunities, and such enhanced competition will be given substantial weight in our analysis. Applicants shall make a good faith effort to calculate the net public benefits their proposed merger would generate, and the Board will carefully evaluate such evidence. To ensure that applicants have no incentive to exaggerate these projected benefits to the public, the Board expects applicants to propose additional measures that the Board might take if the anticipated public benefits fail to materialize in a timely manner. In this regard, the Board recognizes, however, that applicants require the flexibility to adapt to changing marketplace or other circumstances and that it is inevitable that an approved merger may not necessarily be implemented in precisely the manner anticipated in the application. Applicants will be held accountable, however, if they do not act reasonably in light of changing circumstances to achieve promised merger benefits.

Our new policy emphasizes the public benefits flowing from enhanced competition, while strongly cautioning applicants not to exaggerate their benefit projections. To ensure that applicants are careful in their presentation of public benefits, we will require them to suggest additional measures that we could take if those benefits are not realized in a timely manner. We are mindful that many of the benefits claimed by applicants in recent mergers have been delayed by transitional service problems, frustrating both the Board and the shipping community. We are also mindful that the potential efficiency benefits of future large rail mergers may be more limited than in the past. While we believe that overall post-merger service is improving and the benefits initially promised by past applicants will eventually be achieved, we will take particular care to scrutinize future claims of merger benefits and associated time frames to determine whether the applicants' projections are well-documented and reasonable.

Benefits not realized. Some shippers argue that successful applicant railroads should be held accountable for achieving the public benefits that they project in their merger applications. PPL Utilities and PPL Montana (PPL) argue that applicants too often have over-promised and under-delivered, noting that the applicants in the *CSX/NS/CR* acquisition predicted that they would remove 1 million trucks a year from the highways, but the carriers have failed to meet that goal.

The railroads argue that they should not be held accountable for circumstances that were not reasonably foreseeable at the time of the merger application. UP and NS argue that we should require of applicants only reasonable efforts to carry out an approved transaction in a manner that achieves the benefits projected. The Association of American Railroads (AAR) argues that no other industry is required to provide financial guarantees that good faith estimates of merger benefits would actually be realized.

We believe that applicants should identify additional measures for use in case anticipated public benefits should fail to materialize in a timely manner. We ask for this information not so we can punish carriers for any failures associated with a merger that we approve, but to provide applicants with the proper incentives to identify more cautiously and, if approved, to secure more certainly, the public benefits that they project for their merger proposals. We are acutely aware that, as we approach the "end-game," the price for any failure would be high.

The "additional measures" we are calling for are not designed to indemnify specific interests for all claimed benefits that do not come to fruition. Rather, they are a regulatory mechanism designed both to limit exaggeration and to address problems if and when they might arise. Thus, while these measures should be sufficient to ensure that applicants come to us with reasonable projections of expected public benefits, they should not be so potentially burdensome as to unduly harm a merged carrier. The need for such incentives is particularly important if, as we believe, future merger applications are likely to present closer calls in which any individual claim for a particular merger-related benefit or harm might be dispositive.

In this regard, we believe that the increased emphasis these rules place on service assurance plans should address temporary service problems associated with merger integration, and we already have procedures in place for expedited service relief in the event that service problems prove particularly severe. Further, the proposals to enhance competition that we are requesting of applicants are based in part on the likelihood of transitional service problems. Therefore, we would resort to additional measures when the carriers have failed to meet public benefit expectations, and not simply when those benefits have been temporarily delayed by unforeseen operational problems.

We emphasize that merger impact analyses are not intended to guarantee future results, without any consideration of changing economic conditions and other circumstances beyond the applicants' control. It is not our objective to hold railroads to every detail of an operating plan in implementing an approved transaction, nor would we impose after-the-fact remedies lightly. But applicants would be held responsible for any unreasonable failure to achieve promised benefits. And if things do not work out as planned, either from a competitive or a service standpoint, for whatever reason, the merged carriers should be prepared to try different approaches. Accordingly, we would look with more favor on applications that provide back-up or contingency plans when we weigh projected benefits against harms. Such plans could increase the likelihood, and hence give us greater assurance, that a particular merger proposal would be in the public interest.

§ 1180.1(c)(2): Potential harm. The Board recognizes that consolidation can impose costs as well as benefits. It can reduce competition both directly and indirectly in particular markets, including product markets and geographic markets. Consolidation can also threaten essential services and the reliability of the rail network. In analyzing these impacts we must consider, but are not limited by, the policies embodied in the antitrust laws.

(i) Reduction of competition. Although in specific markets railroads operate in a highly competitive environment with vigorous intermodal competition from motor and water carriers, mergers can deprive shippers of effective options. Intramodal competition can be reduced when two carriers serving the same origins or destinations merge. Competition arising from shippers' build-out, transloading, plant siting, and production shifting choices can be eliminated or reduced when two railroads serving overlapping areas merge. Competition in product and geographic

markets can also be eliminated or reduced by mergers, including end-to-end mergers. Any railroad combination entails a risk that the merged carrier would acquire and exploit increased market power. Applicants shall propose remedies to mitigate and offset competitive harms. Applicants shall also explain how they would at a minimum preserve competitive and market options such as those involving the use of major existing gateways, build-outs or build-ins, and the opportunity to enter into contracts for one segment of a movement as a means of gaining the right separately to pursue rate relief for the remainder of the movement.

(ii) Harm to essential services. The Board must ensure that essential freight, passenger, and commuter rail services are preserved wherever feasible. An existing service is essential if there is sufficient public need for the service and adequate alternative transportation is not available. The Board's focus is on the ability of the nation's transportation infrastructure to continue to provide and support essential services. Mergers should strengthen, not undermine, the ability of the rail network to advance the nation's economic growth and competitiveness, both domestically and internationally. The Board will consider whether projected shifts in traffic patterns could undermine the ability of the various network links (including Class II and Class III rail carriers and ports) to sustain essential services.

(iii) Transitional service problems. Experience shows that significant service problems can arise during the transitional period when merging firms integrate their operations, even after applicants take extraordinary steps to avoid those disruptions. Because service disruptions harm the public, the Board, in its determination of the public interest, will weigh the likelihood of transitional service problems. In addition, under paragraph (h) of this section, the Board will require applicants to provide a detailed service assurance plan. Applicants also should explain how they would cooperate with other carriers in overcoming serious service disruptions on their lines during the transitional period and afterwards.

(iv) Enhanced competition. To offset harms that would not otherwise be mitigated, applicants should explain how the transaction and conditions they propose would enhance competition.

We are highlighting a new category of possible merger harm — transitional service problems — that we will scrutinize carefully. Cooperation and communication between independent railroads is vitally important during emergencies. Applicants should explain how they would cooperate with other carriers in overcoming serious service disruptions on their lines during the transitional period and afterwards. Any further decrease in the number of major independent railroads from which to obtain assistance would make inter-carrier cooperation increasingly important. Moreover, with regard to the "harm to essential services" criterion, we have now broadened our prior focus on the rail network to incorporate the entire transportation infrastructure, and have placed increased emphasis on the role of smaller carriers and ports as vital links in the transportation system.

Preserving major gateways. In the NPR, we proposed that, because most inefficient gateways now either have been closed or move only minimal traffic, major existing gateways should be kept open in future mergers. Preserving existing gateways is broadly supported by The National Industrial Transportation

League (NITL), American Short Line Railroad Association (ASLRRA), United States Department of Agriculture (USDA), and others.[23] We will require applicants to present an effective plan to keep open major existing gateways, and will impose conditions on any transaction that we approve to ensure that result.

Numerous parties, including NITL and American Chemistry Council (ACC), stress that gateways must be kept open not just physically but economically. Although we agree, we will not go so far as to resurrect the long-discredited commercial closing doctrine, under which any rate differential was deemed to close a gateway. As the ICC explained in *Traffic Protective Conditions*, 366 I.C.C. 112 (1982), such a rate equalization policy destroys the ability of the merged carrier to reduce rates to reflect its new efficiencies, inhibits competition, and thereby harms both shippers and carriers. At this juncture, we do not believe it would be appropriate to impose any of the several across-the-board rules that have been suggested by various parties for determining when a gateway would be deemed economically closed. Rather, we believe such issues are best addressed on a case-by-case basis. Various parties may offer different ways to achieve gateway protection, and we should give them flexibility to devise effective means depending on the situation. During the oversight process, if we should find that traffic is not moving as it had in the past through a particular gateway that was to be preserved, we can investigate the reasons for the change and weigh appropriate remedies.

During a merger proceeding, parties may identify gateways other than those initially identified by applicants that these parties believe also require specific protection. We can then determine, if we decide to approve the application, whether conditions are necessary to protect a particular gateway from closure. A similar situation arose in *CN/IC*, Decision No. 37, at 158-159, where we imposed a condition requiring applicants to keep the Chicago gateway open and competitive for North Dakota grain movements.

As NITL has suggested, we might permit closure of an existing gateway under certain circumstances. For example, closure might be appropriate if a gateway is shown to be unnecessary to preserve competitive routing options or

---

[23] NITL contends that the term "major gateway" is confusing and should be replaced by the word "interchange." We believe that NITL's proposed change is too broad and imprecise. In our view, the term "major gateway" best describes where the parties and record in any future major merger proceeding should focus.

if maintenance of a particular gateway is shown to undermine economies of density.[24]

Preserving bottleneck rate relief. We will also impose whatever conditions are necessary to preserve pre-merger opportunities for separately challengeable segment rates to be used in conjunction with contract rates in bottleneck situations.[25] It is well established that the ability to challenge a bottleneck rate can provide shippers with leverage. But we cannot overrule our *Bottleneck Decision* so as to permit separate rate challenges to all segments of through or joint rates, as some parties have requested. It is now well settled that, absent a transportation contract to a junction, our statutory scheme does not permit shippers to challenge segments of joint or through rates. Moreover, these parties have not shown that this relief has the requisite nexus to mergers.

Preserving essential services. UP asserts that we should limit the essential services designation to freight service, while some of the passenger authorities argue that every existing passenger service should be considered an essential service. Although we agree that it may not be possible to preserve every existing passenger service, we will give careful consideration to passenger service issues in our merger analysis.

Some of the passenger authorities have argued that applicants must be strictly held to the representations in their Service Assurance Plans, and that the passenger authorities should receive damages when those plans are not followed. Amtrak and the Class I railroads argue, and we agree, that applicants whose merger proposals have been approved must have some flexibility to alter those plans to meet changed circumstances.

Even though we will impose conditions where appropriate to protect passenger railroads from merger-related harm, we will not impose remedies that are inconsistent with passenger service contracts, and we will not require applicants to subsidize passenger service. As we have noted in prior merger decisions, most contracts with passenger authorities already include incentives and penalties for service performance. There is no reason here to attempt to change the fundamental contractual relationship between freight and passenger

[24] Although NITL would require applicants to show that maintenance of the gateway would be "patently inefficient," we believe this would be an unduly burdensome standard.

[25] *See Central Power & Light Co. v. Southern Pac. Transp. Co.*, 1 S.T.B. 1059 (1996), *clarified*, 2 S.T.B. 235 (1997), *aff'd sub nom. MidAmerican Energy Co. v. STB*, 169 F.3d 1099 (8th Cir. 1999), *cert. denied sub nom. Western Coal Traffic League v. STB*, 528 U.S. 950 (1999); *Union Pac. R.R. v. STB*, 202 F.3d 337 (D.C. Cir. 2000) (*Bottleneck Decision*).

carriers. Adherence to these contractual terms is, in most instances, the best way to resolve the sometimes conflicting needs of these parties.

Shortline and regional railroads and ports. The record indicates that there are now over 500 regional and shortline rail carriers, and that these account for 9% of rail revenues and 16% of rail carloadings. As USDA notes, these smaller carriers are crucial to the grain gathering process. Indeed, they are important in the overall funneling of rail freight to and from the Class I carriers. Because of the vital role of Class II and Class III railroads and ports in creating and maintaining a strong national rail transportation system, their interests are a key component of merger review.

We will therefore require applicants to detail a proposed transaction's projected impact on regional and shortline carriers and ports. Under our new rule, applicants must address the anticipated effects of a proposed merger on regional and shortline railroads, identify any benefits that those smaller railroads and their customers would realize as a result of the proposed transaction, and develop suggested remedies for any anticipated harms to the public interest by virtue of a merger's adverse impacts on regional and shortline railroads and ports.

To monitor the potential adverse impacts of any approved merger on smaller railroads, we will also require applicants to address regional and shortline railroad issues in the post-merger oversight process. After the applicants' annual oversight report is filed, Class II and Class III railroads would be given the opportunity to respond. We would then issue a decision addressing any harms to regional and shortline carriers and, if necessary, imposing further conditions to ameliorate or redress those harms.

We can address and, if necessary, remedy competitive and other problems that Class II and III carriers may experience that stem from an approved rail merger on a case-by-case basis. For example, in *CSX/NS/CR* we imposed a condition to preclude contractual restrictions on shortline access from being expanded as a result of the transaction, and we will continue to impose conditions of that nature where appropriate.

We continue to encourage private-sector solutions to these issues. For example, the 1998 Rail Industry Agreement (RIA) between AAR and ASLRRA addresses certain major areas that concern the regional and shortline railroads. AAR indicates that it has worked extensively with the ASLRRA railroads to implement the RIA and has established a special mediation review process for any shortline railroad that believes it has been harmed by an action of a Class I railroad that is inconsistent with the terms of the RIA. The ASLRRA claims that the RIA is not working as effectively as the small railroads had hoped. ASLRRA asserts that the results have been disappointingly limited and that only a handful of waivers have been granted. While the Board applauds this private sector initiative to deal with competitive issues between large and small railroads, the jury is still out on RIA's success.

Financial issues. Numerous shippers and shipper organizations have voiced concern that our proposed rules did not effectively address a potential merger harm related to "acquisition premiums." This term is used to refer to the difference between the value of a company based upon either the book value or the price of a single share of stock before a tender offer and the price that the buyer actually has to pay to obtain control. If a proposed transaction raises financial issues that relate to the merged carrier's ability to meet its fixed charges, then of course we will examine that issue in determining the public interest, just as we did in *CSX/NS/CR*. 49 U.S.C. 11324(b)(3).

Many commenters have suggested that we should adopt a policy of valuing all properties obtained through a merger based upon the predecessor book values or the stock price of the entity before the merger. We continue to believe, however, that there is no sound economic justification for that approach. Because our reasons for not adopting such an approach have already been set forth in detail in *CSX/NS/CR* and other cases,[26] we need not detail those reasons here.[27] Suffice it to say that we do not believe that railroads have any regulatory incentive to overpay for rail properties. But if it is shown that the applicants in a case would pay so much for a property that their financial viability could be undermined, we would likely deny that application. As explained below, we have modified our approach to voting trusts to ensure that their use would not jeopardize a carrier's financial viability before we have the opportunity to make a full assessment of the financial impact upon the applicants.

Voting trusts. We have added a new rule, in § 1180.4(b)(4)(iv), addressing the use of voting trusts. The Board, like the ICC before it, has permitted the use of voting trusts during the pendency of control applications, so long as the trust would not result in unlawful control. 49 CFR part 1013. To facilitate this process, the Secretary of the Board has issued informal, non-binding, staff letters

---

[26] *See, e.g., Railroad Revenue Adequacy — 1988 Determination*, 6 I.C.C.2d 933 (1990), *aff'd sub nom. Association of Am. R.R. v. ICC*, 978 F.2d 737 (D.C. Cir. 1993).

[27] Moreover, our handling of this issue in *CSX/NS/CR* was recently upheld by the U.S. Court of Appeals for the Second Circuit. *See Erie-Niagara, supra* note 16, 247 F.3d at 442-43.

giving an opinion as to whether use of the voting trust would result in unauthorized control. However, we have decided to provide for a more formal and open process for applicants in major rail consolidations, requiring them to demonstrate in a public filing that their contemplated use of a trust would not result in unlawful control and would be consistent with the public interest. (The rules governing the use of voting trusts in all other control transactions that come before us would remain unchanged.)

CN questions our authority to rule on, or prevent the use of, a voting trust, but that power is inherent in our statutory authority over rail mergers. Under 49 U.S.C. 11323, we have plenary authority over the consolidation, merger, or common control of railroads. We also have a particular obligation under 49 U.S.C. 11324(b)(3) to consider the total fixed charges resulting from a transaction. Thus, we are responsible for ascertaining whether a proposed transaction would undermine the financial integrity of the applicant carriers. If prospective applicants make large tender offers for controlling stock interests in other rail carriers, they risk having to sell these assets at a greatly reduced price if we do not approve the control application or if they choose not to consummate it. Therefore, we believe that, with only a limited number of major railroads remaining, we must take a much more cautious approach to future voting trusts in order to preserve our ability to carry out our statutory responsibilities.

CSX has expressed concern that this new rule, under which a voting trust would only be permitted where we find its use to be in the public interest, would give an enormous advantage to non-railroad entities in an attempted hostile takeover of a railroad system. CSX also argues that, to the extent that our public interest inquiry is based on an assessment of financial fitness, it would require detailed financial and other information that is typically not fully available to the parties at the time they file their notice of intent with the Board, and typically has not been submitted until several months later in their control application.

Although we understand CSX's concerns, we believe that it has become necessary for us to determine that a voting trust would be consistent with the public interest before permitting one to be used. There was no need to undertake a preliminary financial fitness assessment when unsuccessful applicants could largely be expected to be made whole through the divestiture process. But it is precisely the divestiture process that now concerns us. When the ICC denied the application in *SF/SP*,[28] at least two Class I railroads — the Denver and Rio Grand Western Railroad and KCS — were actively involved in bidding for SP when it had to be divested from the voting trust into which its stock had been placed pending the application. In contrast, today there would likely be cases where there would be *no* remaining railroad bidders acceptable to us to buy the shares held in a voting trust if we were to deny a major control transaction or impose conditions that the applicants choose not to accept. Bidding limited to nonrailroad entities poses the risk of serious financial harm to applicants and, more importantly, poses risks to their customers as well. Therefore, to gain approval for the use of a voting trust, applicants would have to demonstrate either that any harm to the public interest associated with the divestiture process would be relatively small or that some countervailing public benefit would be associated with their proposed use of a voting trust that would outweigh this risk.[29] (For example, the pendency of a hostile takeover bid by a non-railroad entity might make the use of a voting trust more appropriate.)

Finally, we agree with CSX that requests to use a voting trust need not be submitted with the prefiling notice, and we have revised the rule accordingly. Nonetheless, prospective applicants are forewarned that use of a voting trust is a privilege, not a right, and that they may not employ a voting trust until we have authorized its use.

Lumber issues. The Lumber Fair Trade Group, representing wholesale distributors of forest products, raises another concern. It argues that, when buying lumber produced in Canada, its members are forced to pay unsubstantiated and overstated freight costs as part of the purchase price. It is concerned that this practice, which it refers to as the "phantom freight" practice, is not subject to the U.S. antitrust laws. Accordingly, it argues that approval of any transaction that would result in foreign control of U.S. property must be conditioned upon a requirement of full and complete retention of records within the jurisdiction of the Board and the U.S. courts. It is unclear exactly to what records it is referring, but regardless of the nationality of the owner, railroads operating in the U.S. remain subject to our full regulatory scrutiny and record-keeping requirements.

---

[28] *Santa Fe Southern Pacific Corp. — Control — SPT Co.*, 2 I.C.C.2d 709 (1986), 3 I.C.C.2d 926 (1987) (*SF/SP*).

[29] This approach is consistent with the view expressed by CSX at oral argument that, while voting trusts can serve some public purpose, they should not be used routinely, but rather should be available only for those rare occasions when their use would be beneficial.

§ 1180.1(d): Conditions. The Board has broad authority under 49 U.S.C. 11324(c) to impose conditions on consolidations, including requiring divestiture of parallel tracks or the granting of trackage rights and access to other facilities. The Board will condition the approval of Class I combinations to mitigate or offset harm to the public interest, and will carefully consider conditions proposed by applicants in this regard. The Board may impose conditions that are operationally feasible and produce net public benefits, but will not impose conditions that undermine or defeat beneficial transactions by creating unreasonable operating, financial, or other problems for the combined carrier. Conditions are generally not appropriate to compensate parties who may be disadvantaged by increased competition. The Board anticipates that mergers of Class I carriers would likely create some anticompetitive effects that would be difficult to mitigate through appropriate conditions, and that transitional service disruptions might temporarily negate any shipper benefits. To offset such potential harms and improve the prospect that their proposal would be found to be in the public interest, applicants should propose conditions that would not simply preserve but also enhance competition. The Board seeks to enhance competition in ways that strengthen and sustain the rail network as a whole (including that portion of the network operated by Class II and III carriers).

Instead of focusing narrowly on harm to competition and essential services, our new rule reflects a willingness to use our conditioning power to mitigate or offset all types of merger-related harms to the public interest. It also reflects the recent statutory clarification that we have the authority to require divestiture of parallel tracks or grant trackage rights or other access rights under terms that ensure that effective competition is maintained. This section focuses on imposing sufficient conditions to ensure that a transaction is truly in the public interest.

Conditions are still primarily remedial. Our primary focus in imposing conditions — including competitive conditions — should and will continue to be remedial. Contrary to arguments raised by numerous shippers and shipper groups, conditions should not be sought to fix competitive and other longstanding problems that have no nexus to the merger at hand. The fact that we are asking merger applicants to offer new competitive benefits as part of their application does not entitle every party to a merger proceeding to claim that such benefits must be granted on its behalf to fix an existing problem or to enhance its pre-merger competitive situation. Rather, the focus of interested parties should continue to be on remedying competitive and other harm that would likely be experienced by that party as a result of the merger proposal under review. Imposing remedial conditions as appropriate will continue to be our top priority where we decide that a proposal might be in the public interest. Given this focus, the fact that we are also asking applicants to offer competitive enhancements — as applicants did in both *UP/SP* and in *CSX/NS/CR* — should not unduly complicate or delay our review of merger proposals as some have argued.

Numerous shippers and shipper groups have questioned our asking applicants to come forward with competitive enhancements tailored to their particular proposal rather than our dictating at the outset a more pervasive and uniform approach. We continue to believe that the method we have proposed is far preferable. First of all, it is consistent with the Board's focus on market-based and private-sector initiatives. Secondly, our more flexible approach encourages innovation and initiatives tailored to a particular transaction. Thirdly, with respect to the more pervasive and uniform approach that has been proposed, we recognize that carriers need to be able to engage in some degree of differential pricing and that opening up every one of their solely served shippers to competition from other rail carriers could dramatically affect not just the merged carrier's bottom line but also the shape of the rail system for the future. And we also recognize that granting shippers direct access to other rail carriers could, at least in some cases, complicate merger implementation by creating additional congestion. For these reasons, we are asking railroad applicants to present a proposal that they believe they can both afford and implement operationally.

Conditions are not appropriate for carriers that are not applicants or controlled by applicants. As previously noted, NITL and others argue that we should use our broad conditioning power to force all successful merger applicants to grant broad competitive concessions. They further argue that we should use our general regulatory authority to create a level playing field by requiring the rest of the rail industry to grant similar concessions. These arguments are misplaced. Our focus here is on ensuring that any mergers that are approved are in the public interest, not on imposing a new scheme of regulation upon the railroad industry through the back door of merger approval.

If applicants in a future rail merger proceeding did not believe that they could prosper with the conditions that we ultimately impose, they would have the option of not proceeding with the approved transaction.[30] Non-applicant railroads would not have a similar option not to proceed. Moreover, imposing such conditions on carriers that are not applicants or controlled by applicants is not within our merger conditioning authority, which gives us only the power to "impose conditions governing the transaction." Thus, the request goes well beyond the scope of this proceeding.

---

[30] As explained above, we are modifying our approach to voting trusts to ensure that applicants preserve that option.

§ 1180.1(e): Employee protection. The Board is required to provide a fair arrangement for the protection of the rail employees of applicants who are affected by a consolidation. The Board supports early notice and consultation between management and the various unions, leading to negotiated implementing agreements, which the Board strongly favors. Otherwise, the Board respects the sanctity of collective bargaining agreements and will look with extreme disfavor on overrides of collective bargaining agreements except to the very limited extent necessary to carry out an approved transaction. The Board will review negotiated agreements to ensure fair and equitable treatment of all affected employees. Absent a negotiated agreement, the Board will provide for protection at the level mandated by law (49 U.S.C. 11326(a)), and if unusual circumstances are shown, more stringent protection will be provided to ensure that employees have a fair and equitable arrangement.

This rule reflects our continued emphasis on negotiation between the unions and railroad management, without direct Board involvement, to resolve merger implementation issues.

Various unions have argued that we should eliminate altogether the power of arbitrators or the Board to override collective bargaining agreements (CBAs) when that is necessary to carry out a consolidation transaction approved by the agency. In contrast, the National Railway Labor Conference (NRLC) argued on behalf of the railroads that our proposed rule already goes too far in that direction by indicating that "we will look with extreme disfavor on overrides of CBAs except to the very limited extent necessary to carry out an approved transaction." However, the parties' pleadings — staking out starkly contrasting positions — have now been largely superseded by an historic settlement agreement signed by most of the Class I railroads and by the unions representing most rail employees.[31]

As we encouraged this outcome, we are extremely pleased that these parties have reached agreement on the highly sensitive issue of CBA overrides. Both sides have gained through this process. The railroads have preserved their ability to implement mergers promptly by reaching agreement on issues such as seniority lists and the scope of work. At the same time, the employees have been permitted to select seniority arrangements and CBAs that they believe are most favorable to them.

---

[31] The railroad parties are NS, CSX, UP, BNSF, CP, and KCS. The unions are Brotherhood of Locomotive Engineers (BLE), Brotherhood of Maintenance of Way Employes (BMWE), International Association of Machinists and Aerospace Workers (IAM), Brotherhood of Railroad Signalmen (BRS), Transportation•Communications International Union (TCIU), the Sheet Metal Workers International Association, and the Transport Workers Union of America. United Transportation Union (UTU) negotiated a separate, similar agreement with the Class I railroads, dated February 11, 2000, that it indicates satisfies its concerns in this area.

To the extent that there is still any live issue, we continue to believe that our proposed rule properly implements our statutory mandate. Our new rules reaffirm that we support negotiated agreements wherever possible, that we respect the sanctity of CBAs, and that we would look with disfavor on overrides. As noted in our landmark *Carmen III* decision,[32] override issues are not to be taken lightly, and the necessity standard is not an invitation for the railroads to make whatever changes in CBAs they find convenient.

Moving. RLD seeks elimination of the requirement of *New York Dock* that employees must fully exercise their seniority to take the highest paying job available — even if that requires a change in residence — in order to be eligible for compensation for reduced wages. RLD argues that this change is necessary because future mergers would likely be transcontinental, presumably requiring employees to move longer distances, and because many employees have working spouses who cannot easily relocate. RLD argues that requiring employees to move has caused hardships that are not fully compensated by *New York Dock.*[33] The railroads counter that, even in the earliest labor protection cases, employees were forced to move a thousand miles or more, which was a great distance at the time.

Under 49 U.S.C. 11326(a), the Board is mandated to require the applicant railroad to provide a minimum level of employee protection before we can authorize a transaction. In the merger area that minimum level comprises the conditions outlined in *New York Dock.* Section 11326(a), however, allows the Board the option of mandating that the applicant provide employee protection above that minimum level. We appreciate, therefore, RLD's concerns and can foresee the broader potential for dislocation and hardship for rail employees as a result of a transcontinental merger. While, at this time, we believe that this and similar matters should continue to be negotiated between the railroads and the various labor organizations,[34] we are available, should it prove necessary, to reopen *New York Dock*, on a limited basis, to address the issue of moving in the future.

---

[32] *CSX Corporation — Control — Chessie System, Inc. et al.*, 3 S.T.B. 701 (1998) (*Arbitration Review*), (*Carmen III*).

[33] The record includes specific stories of named employees, accompanied by statements from those individuals, which provide details of hardships they have had to encounter due to moving requirements.

[34] We are denying RLD's request for employees to be provided with their test period averages (on which benefits would be computed) on demand. We believe that issue should be resolved through negotiation and the collective bargaining process.

§ 1180.1(f): Environment and safety. (1) The National Environmental Policy Act, 42 U.S.C. 4321 et seq. (NEPA), requires the Board to take environmental considerations into account in railroad consolidation cases. To meet its responsibilities under NEPA and related environmental laws, the Board must consider significant potential beneficial and adverse environmental impacts in deciding whether to approve a transaction as proposed, deny the proposal, or approve it with conditions, including appropriate environmental mitigation conditions addressing concerns raised by the parties, including federal, state, and local government entities. The Board's Section of Environmental Analysis (SEA) ensures that the agency meets its responsibilities under NEPA and the implementing regulations at 49 CFR part 1105 by providing the Board with an independent environmental review of merger proposals. In preparing the necessary environmental documentation, SEA focuses on the potential environmental impacts resulting from merger-related changes in activity levels on existing rail lines and rail facilities. The Board generally will mitigate only those impacts that would result directly from an approved transaction, and will not require mitigation for existing conditions and existing railroad operations.

(2) During the environmental review process, railroad applicants have negotiated agreements with affected communities, including groups of communities and other entities such as state and local agencies. The Board encourages voluntary agreements of this nature because they can be extremely helpful and effective in addressing specific local and regional environmental and safety concerns, including the sharing of costs associated with mitigating merger-related environmental impacts. Generally, these privately negotiated solutions between an applicant railroad and some or all of the communities along particular rail corridors or other appropriate entities are more effective, and in some cases more far-reaching, than any environmental mitigation options the Board could impose unilaterally. Therefore, when such agreements are submitted to it, the Board generally will impose these negotiated agreements as conditions to approved mergers, and these agreements generally will substitute for specific local and site-specific environmental mitigation for a community that otherwise would be imposed. Moreover, to encourage and give effect to negotiated solutions whenever possible, the opportunity to negotiate agreements will remain available throughout the oversight process to replace local and site-specific environmental mitigation imposed by the agency. The Board will require compliance with the terms of all negotiated agreements submitted to it during oversight by imposing appropriate environmental conditions to replace the local and site-specific mitigation previously imposed.

(3) Applicants will be required to work with the Federal Railroad Administration, on a case-by-case basis, to formulate Safety Integration Plans (SIPs) to ensure that safe operations are maintained throughout the merger implementation process. As part of the environmental review process, applicants will be required to submit:

(i) a SIP and

(ii) evidence about potentially blocked grade crossings as a result of merger-related traffic increases or operational changes.

We continue to believe that there is no need to amend our environmental rules at 49 CFR part 1105, which are not specific to mergers.[35] Given the importance of addressing merger-related environmental concerns, however, we

[35] As we explained in the NPR, our environmental rules implementing NEPA are broadly designed and can be applied to any rail-related actions that come before us, including rail mergers. They give us the flexibility to respond to all types of issues and concerns raised by the public, and to tailor the environmental documentation and analysis to the particular case.

will add this new final rule outlining our intended approach to the environmental review required by NEPA and related environmental laws for major merger transactions.

Based on the comments,[36] we have added language clarifying that our general practice is to focus on the potential environmental impacts resulting from merger-related changes to lines, facilities, and operations, and not to require mitigation for existing conditions and existing railroad operations. In addition, our final rule codifies current practice by adding language explaining that, to give effect to negotiated solutions wherever possible, we will generally require compliance with the terms of all negotiated agreements submitted to us during our formal oversight period in lieu of the local and site-specific mitigation that they would replace.[37]

Certain commenters[38] suggest that we be available to resolve disputes where the parties are unable to reach negotiated agreements. But that would defeat the purpose of negotiated agreements, which is to arrive at voluntary, mutually satisfactory arrangements between the railroads and the affected parties. Thus, it would be inappropriate for us to intervene formally in the parties' negotiations, or to impose restrictions on the content or extent of the negotiations. If the parties are unable to reach agreement, then we will impose whatever local and site-specific environmental mitigation we find is appropriate in the course of our environmental review process.

Our proposal to require applicants to work with FRA, on a case-by-case basis, to formulate SIPs[39] ensuring that safe operations would be maintained

---

[36] *See* the comments of AAR, KCS, and NS.

[37] Our practice of encouraging negotiated resolution of environmental issues to the widest extent possible met with broad support from commenters representing railroad interests (AAR, CSX, and NS), government interests (ORDC) and community interests (Port of Pascagoula, City of Mankato). AAR, however, suggests deleting the reference to negotiated agreements with "groups of neighborhood communities" in our proposed rule. We agree with AAR that it is doubtful that such groups could or would enter into agreements. Therefore, while railroads may negotiate such agreements with any interested parties, as appropriate, our final rule specifically refers only to "affected communities," "groups of communities," and "other entities such as state or local agencies."

[38] NS, KCS, ORDC, Port of Pascagoula, City of Owatanna, and City of Mankato.

[39] As noted in the NPR, we have instituted a joint rulemaking with FRA in which the two agencies, working together, have proposed regulations to ensure adequate and coordinated consideration of safety integration issues in railroad merger cases. *See Regulations on Safety Integration Plans Governing Railroad Consolidations, Mergers, Acquisitions of Control and Start Up Operations; and Procedures for Surface Transportation Board Consideration of Safety Integration Plans In Cases Involving Railroad Consolidations, Mergers and Acquisitions of*

(continued...)

throughout the merger implementation process received wide public support and no opposition.[40] Accordingly, the language of the proposed rule relating to SIPs is essentially unchanged.

In addition to a SIP, applicants will be required to submit evidence about potentially blocked grade crossings as a result of anticipated merger-related traffic increases. The potential for blocked railroad crossings resulting from increased traffic due to mergers has become an increasing concern to communities. Therefore, for major transactions there is good reason to require applicants to address in their initial environmental information what measures they plan to take to avoid blocking grade crossings due to merger-related changes in operations (including increased yard activity), or merger-related increases in rail traffic. Therefore, we have retained this requirement in our final rules.[41]

BNSF and NS request that the environmental review process in major transactions be completed within 1 year from the date of applicants' prefiling notice. Although it is important to complete our environmental review as expeditiously as possible, it would be inappropriate and perhaps impossible to establish and adhere to uniform time frames for the issuance of the necessary environmental documentation. The complexity and nature of the environmental issues that need to be analyzed in individual cases can vary, and at times significant issues surface during the environmental review process that were not anticipated at the beginning of the process, but nevertheless need to be addressed in completing the environmental analysis that NEPA requires. The 16-month statutory time limit for our consideration of railroad merger proposals — and our consistent practice of issuing our final environmental document prior to the

---

[39](...continued)
Control, STB Ex Parte No. 574, FRA Docket No. SIP-1, Notice No. 1 (Joint Notice of Proposed Rulemaking (STB served Dec. 24, 1998, and published at 63 Fed. Reg. 72,225 (1998)) (*SIPS Rulemaking*). We have already solicited and received comments in that proceeding, and a joint hearing has been held by the two agencies. Until a final decision in the joint rulemaking is issued, we will continue to address these safety integration issues on a case-by-case basis.

[40] *See* the comments of CSX, UP, RLD/AFL-CIO, and CPUC.

[41] This proposal was supported by Mayo Foundation d/b/a Mayo Clinic (Mayo), but UP objected to the potentially burdensome nature of such a requirement. To avoid imposing an undue burden on applicants, we will not specify here the type of information about grade crossings that applicants would have to provide. Rather, the information that is appropriate will depend on the circumstances of the individual case.

Board's voting conference — protect against undue delay in the completion of the environmental review.[42]

Finally, NS expresses concern that our practice of using third-party contractors[43] to assist SEA in preparing environmental documentation prevents applicants from controlling the nature, cost, and scope of the work that will be required to complete the environmental analysis, while requiring them to fully fund the contractor's work. But as we have recently explained,[44] the current process is the most efficient and effective way for us to ensure a thorough, adequate, legally sound, and independent environmental review under NEPA. While we understand NS' concerns about costs, we see no way to set monetary limits at the outset of the NEPA process, because the NEPA analysis at times involves the discovery of unforeseen potential environmental impacts that require more analysis than originally contemplated. SEA's oversight and review of the process ensures that the work progresses as efficiently and cost effectively as possible. Finally, given our limited budget, there is no viable alternative to the use of third-party contractors to ensure a legally sufficient, timely environmental review in complex cases.[45]

---

[42] As BNSF itself recognizes, the environmental review process in recent railroad merger transactions has not been prolonged. In *CSX/NS/CR*, the Final Environmental Impact Statement was completed in slightly less than 11 months from the filing of the application. In *CN/IC*, the Final Environmental Assessment was issued in less than 9 months from the date the application was filed.

[43] Third-party contracting is a voluntary arrangement in which the applicant pays for a contractor to assist SEA in developing environmental analyses necessary for compliance with NEPA and related environmental laws, under SEA's direction, control, and supervision. The government-wide regulations implementing NEPA, promulgated by the Council on Environmental Quality, specifically permit the use of third-party contractors in the preparation of environmental documentation, as do our own environmental regulations. 40 CFR 1506.5(c); 49 CFR 1105.10(d).

[44] *See Policy Statement — Third-Party Contracting — Environmental Documentation*, 5 S.T.B. 467 (2001).

[45] We note that certain commenters (Mayo, Mankato, Owatanna) raise environmental concerns (focusing primarily on rail construction proposals) that are beyond the scope of this proceeding. These commenters also are concerned that we not approve an application by a carrier with an adverse safety record unless we are satisfied that the carrier's safety performance would be raised to acceptable levels. Furthermore, they suggest that we address here (1) the importance of hearings (including on-site hearings) to obtain information about particular proposals and (2) the extent to which communities should be required to bear a share of the cost of environmental mitigation we impose. But these are the types of issues and concerns that can best be raised and addressed on a case-by-case basis in individual proceedings that may come before us.

Finally, certain commenters (CN, CP, BNSF) argue that our proposed rules involving transnational issues discriminate against Canadian and Mexican carriers by requiring only non-domestic railroad applicants to explain how cooperation with FRA would be maintained. This issue (continued...)

§ 1180.1(g): Oversight. As a condition to its approval of any major transaction, the Board will establish a formal oversight process. For at least the first 5 years following approval, applicants will be required to present evidence to the Board, on no less than an annual basis, to show that the merger conditions imposed by the Board are working as intended, that the applicants are adhering to the various representations they made on the record during the course of their merger proceeding, that no unforeseen harms have arisen that would require the Board to alter existing merger conditions or impose new ones, and that the merger benefit projections accepted by the Board are being realized in a timely fashion. Parties will be given the opportunity to comment on applicants' submissions, and applicants will be given the opportunity to reply to the parties' comments. During the oversight period, the Board will retain jurisdiction to impose any additional conditions it determines are necessary to remedy or offset adverse consequences of the underlying transaction.

Our new rule on oversight codifies current practice. We have found a formal annual oversight process to be a useful mechanism for identifying and resolving competitive, environmental, and other problems that can arise following major rail consolidations. As is the case today, parties would retain the opportunity to petition us for immediate relief if they believe that is necessary.

With respect to environmental issues, as part of our oversight in past mergers we have imposed environmental conditions allowing communities or other interested parties to seek redress if there is a material post-merger change in the facts or circumstances upon which we relied in imposing specific environmental conditions. As noted in the NPR, we will continue to impose such conditions where appropriate.

Both railroad and community interests agree that there is a need to monitor merger implementation and, in appropriate situations, to address merger-related environmental harm.[46] AAR, CSX, and NS, however, ask that we clarify that there are limits on our authority to revisit environmental issues in the oversight process and to impose new conditions where circumstances turn out differently from what the parties had projected. The need to take further action is a fact-bound determination that can best be addressed on a case-by-case basis.

---

[45](...continued)
is addressed below in connection with § 1180.1(k).

[46] *See, e.g.*, the comments of AAR, ORDC (environmental issues cannot always be adequately resolved before a merger is implemented), and Owatonna (requesting phased-in consummation of any major rail merger, with each new step to be implemented after previous ones have been successful).

Nevertheless, to provide some general guidance, we note here that, as we have previously recognized, in certain instances it can take longer than originally expected to achieve total compliance with our environmental conditions and that transitional problems generally do not warrant permanent remedies.[47] As we have indicated, it also is impossible to predict with certainty future traffic flows or traffic levels. Therefore, if railroads are to retain the ability to carry out their statutory obligation to provide common carrier service upon reasonable request, they must have the flexibility to adjust the level of train traffic over particular line segments in response to changes in shipper demands and in other market conditions.[48] In addition, a general oversight proceeding is not intended as a vehicle for parties to raise environmental issues that could have been but were not raised during the environmental review process.[49]

§ 1180.1(h): Service assurance and operational monitoring. (1) The quality of service is of vital importance. Accordingly, applicants must file, with their initial application and operating plan, a Service Assurance Plan identifying the precise steps they would take to ensure adequate service and to provide for improved service. This plan must include the specific information set forth at § 1180.10 on how shippers, connecting railroads (including Class II and III carriers), and ports across the new system would be affected and benefitted by the proposed consolidation. As part of this plan, applicants will be required to provide service benchmarks, describe the extent to which they have entered into any arrangements with shippers and shipper groups to compensate for service failures, and establish contingency plans that would be available to mitigate any unanticipated service disruption.

(2) The Board will conduct significant post-approval operational monitoring to help ensure that service levels after a merger are reasonable and adequate.

(3) The Board also will require applicants to establish problem resolution teams and specific procedures for problem resolution to ensure that any unanticipated post-merger problems related to service or any other transportation matters, including claims, are promptly addressed. These teams should include representatives of all appropriate employee categories. Also, the Board envisions the establishment of a Service Council made up of shippers, railroads, passenger service representatives, ports, rail labor, and other interested parties to provide an ongoing forum for the discussion of implementation issues.

(4) Loss and damage claims handling. Shippers or shortlines who have freight claims under 49 CFR part 1005 during merger implementation shall file such claims, in writing or electronically, with the merged carrier. The claimant shall provide supporting documentation regarding the effect on the claimant, and the specific damages (in a determinable amount) incurred. Pursuant to 49 CFR part 1005, the merged carrier shall acknowledge each claim within 30 days and successively number each claim. Within 120 days of carrier receipt of the claim, the merged carrier shall respond to each claim by paying, declining, or offering a compromise settlement. The Board will take notice of these claims and their disposition as a matter of

---

[47] *See CSX/NS/CR Oversight Dec. No. 5*, slip op. at 29-31 (STB served Feb. 2, 2001).

[48] *See CSX/NS/CR*, 3 S.T.B. 764 (1998*), Dec. No. 96*, at 785.

[49] *See id.* at 30.

oversight. During each annual oversight period, the merged carrier shall report on claims received, their type, and their disposition for each quarterly period covered by oversight. While shippers and shortlines may also contract with the applicants for specific remedies with respect to claims, final adjudication of contract issues as well as unresolved claims will remain a matter for the courts.

(5) Service failure claims. Applicants must suggest a protocol for handling claims related to failure to provide reasonable service due to merger implementation problems. Commitments to submit all such claims to arbitration will be favored.

(6) Alternative rail service. Where shippers and connecting railroads require relief from extended periods of inadequate service, the procedures at 49 CFR parts 1146 and 1147 are available for the Board to review the documented service levels and to consider shipper proposals for alternative service relief when other avenues of relief have already been explored with the merged carrier in an effort to restore adequate service.

Given the importance of service to shippers, we are adding these new rules. We recognize that implementation of any merger plan necessarily has an element of uncertainty. We also recognize the importance of addressing these uncertainties, to the maximum extent possible, during the application process. Therefore, applicants' Service Assurance Plan for each major merger proposal should provide certain essential information, such as their plans to deal with any potential adverse service effects during implementation and to accommodate such less-than-optimum operations. Specifically, the plan must include information about proposed operational integration; training; information technology systems; customer service; coordination of freight and passenger operations; management of yard and terminal operations; contingency plans for service disruptions; how changes or increases in traffic levels would be accommodated by the combined system; infrastructure improvement; labor issues; service benchmarking;[50] and respective timetables for completion as appropriate. Moreover, the plan should identify and discuss potential areas of temporary or longer-term service degradation, and appropriate mitigation. To ensure that applicants would appropriately address any arising service problems, the Service Assurance Plan must provide for the establishment of problem resolution teams and describe the specific procedures to be utilized for problem resolution.

Having in place privately negotiated mechanisms for resolving implementation problems is also important. The Service Council format that applicant carriers and shippers have negotiated has proven extremely useful in past mergers, and we support the continuation of those informal processes for all

---

[50] "Benchmarking" refers to specific service levels before the transaction is implemented.

future mergers. These councils should be broadened to include passenger, port, and rail labor interests.

In this regard, applicants are strongly encouraged to make a commitment in the application to submit to arbitration all claims of merger-related service failures, and such a commitment will be a consideration in the Board's review process. A program could be devised, for example, to identify in advance levels of service failure that would be construed as a failure to provide common carrier service and to stipulate a system for compensating shippers that are harmed by such failures. With those standards in place, these disputes could be readily handled by an arbitrator if an affected shipper wishes to utilize such arbitration procedures.

Shippers, Class II and III railroads, and ports have indicated a need for more specific service assurances, which applicants can provide, and in this regard we expect applicants to negotiate in good faith with shippers and connecting carriers to address proposed service levels and appropriate service terms. The extent to which applicants offer an arbitration process for these issues will be important to our assessment of possible need for additional mitigation or offsetting conditions to address the risk of merger-related harm.

Shippers have noted that merging carriers have been slow to respond to claims for loss of or for damage to freight during periods of service disruptions. Thus, we will require that shippers and carriers adhere to our claims processing procedures at 49 CFR part 1005 and that periodically the merged carrier should report on merger-related claims. Even though such claims under the statute are not adjudicated by the Board, these new rules are intended to permit us to evaluate the claims handling performance of the applicant carriers during oversight.

Operational monitoring of previous transactions has proven vital to identifying and correcting operating deficiencies during implementation. The monitoring of key operational metrics has been useful to the Board in assessing the level of transportation services provided following a transaction and to the involved carriers in identifying areas for corrective action. We will continue to require the reporting of key operational data, including, but not necessarily limited to, terminal dwell hours and on-time train originations from major terminals. We will also require systemwide metrics for cars on line and average train velocity by commodity sector.

We agree with many shippers that properly benchmarked performance measures would aid in our assessment of the progress of a transaction after implementation. The corridor performance measurements we are requiring as benchmarks include corridor mileage, elapsed time, and carload volume by traffic type (merchandise, intermodal, automotive, unit coal, unit grain or others that are of significance), for carload traffic moving to and from major origins and destinations. The corridor performance benchmarks must include a sufficient number of representative traffic flows to permit an overall comparison of pre- and post-transaction performance. These measurements are not intended to reveal individual shipper transit times, but instead will show area-to-area averages. This information should prove beneficial to shippers and to the Board in measuring post-transaction performance on major corridors. Operational monitoring data requirements will incorporate at least the same data elements as required for benchmarking.

Should substantial service disruptions occur as the result of a merger's implementation, we are committed to considering alternative service arrangements promptly. Our procedures at 49 CFR parts 1146 and 1147 allow for a temporary substitution of another carrier's service for that of the carrier whose service is disrupted or inadequate. We can address merger-related service disruptions under these rules and will approve workable alternatives where appropriate to mitigate the disruption directly. Based on documented service performance and a reasonable opportunity for the incumbent carrier to improve its service, the Board will consider taking such actions as needed to resolve any merger-related disruption, while minimizing possible adverse impacts on the merged carrier or the substituted carrier.

Finally, we emphasize that our informal complaint-handling process will continue to be available. This process has provided shippers, small railroads, rail passengers, railroad employees, and others with immediate access to our problem resolution resources.

§ 1180.1(i): Cumulative impacts and crossover effects. Because there are so few remaining Class I carriers and the railroad industry constitutes a network of competing and complementary components, the Board cannot evaluate the merits of a major transaction in isolation. The Board must also consider the cumulative impacts and crossover effects likely to occur as rival carriers react to the proposed combination. The Board expects applicants to explain how additional Class I mergers would affect the eventual structure of the industry and the public interest. Applicants should generally discuss the likely impact of such future mergers on the anticipated public benefits of their own merger proposal. Applicants will be expected to discuss whether and how the type or extent of any conditions imposed on their proposed merger would have to be altered, or any new conditions imposed, should we approve any future consolidation(s).

As noted in the NPR, our former rule at § 1180.1(g) stated a firm policy of not assessing the effect of potential or hypothetical combinations or transactions, so as to curb speculation and keep merger proceedings manageable. However, we know from the last round of mergers that another merger involving two very large railroads would not likely be an isolated event, but instead would trigger responsive proposals that, if granted, could well lead to a transcontinental railroad duopoly. Given the relatively small number of remaining Class I carriers, there is now a limited range of responsive proposals that could be triggered by any particular transaction. Because from this point on any proposed major transaction would have a significant effect on the structure of the entire industry, we will consider reasonable arguments about likely future transactions and about the future structure of the industry. Moreover, we will consider arguments that conditions imposed in prior mergers would be impaired and that we should revise them to the extent necessary to prevent that result.

Downstream effects. Although there is general agreement that applicants should address the likely effects of any other merger that is actually proposed in response to a particular transaction, many railroads indicate that it would be extremely speculative for them to forecast the precise actions of their competitors in response to a merger application. AAR and various railroads are concerned that we will expect an unrealistic level of detail in applicants' supporting materials concerning these issues. AAR and other railroad interests recognize that applicants could discuss the possible contours of future mergers and their effects on the market, but that a quantitative analysis of public benefits in light of future transactions would be problematic.

We agree with these concerns, and we will not require applicants to present alternative merger benefit calculations based on specific alternative possible responses that could be filed by various carriers. Rather, our intent is simply to require applicants to initiate a commentary, to which other parties could respond, that would give us the information we need to rule on what could likely be the first step in an end-game situation in which only two or three competing transcontinental carriers would remain in North America. We need to develop a consistent set of principles for analyzing all of the applications that could be brought to us in such a final round of mergers. We can meet our responsibility only if applicants file their preliminary evidence about the evolving structure of the industry that would likely result from their proposal and others like it; if they address the merits of such a structure; if they provide their views on how to deal with potential problems that structure could cause to service, efficiency, and competition; and if other affected parties then come in and express their concerns on a full record.

UP cautions that we should not attempt to reserve unlimited power to impose what it describes as "springing conditions," that is, conditions that would be activated by future mergers. We agree that any post-merger conditions would have to be used sparingly, or else they would undermine the predictability and finality that carriers need to have in order to consummate any merger transaction.

Questions have been raised as to whether we would consolidate any contemporaneous applications, but we need to address that issue on a case-by-case basis and with the benefit of downstream effects discussions more concrete than those that have been presented to date. It is impossible for us to predict at this point how close together any applications might be filed and what logistics would be involved with simultaneously dealing with more than one application.[51]

Upstream effects. As KCS and others have suggested, we might need to use our conditioning power to repair a condition from a previous merger that would be substantially impaired by a new merger that we approve. We have provided such relief in the past, where appropriate and where the party for whose benefit the condition was originally imposed seeks that relief in the new merger proceeding.[52]

We can also consider whether specific previously imposed conditions may no longer be necessary in light of subsequent transactions or subsequent legislation or economic developments, as we did in *Traffic Protective Conditions*, 366 I.C.C. 112 (rate equalization provisions no longer imposed to keep routes open in mergers), *aff'd in relevant part, Detroit, T. & I.R.R. v. United States*, 725 F.2d 47 (6th Cir. 1984). However, we could not simply retroactively apply our new standards to past mergers, as KCS and others have suggested. *See Bowen v. Georgetown University Hospital*, 488 U.S. 204, 208 (1988); *Landgraf v. USI Film Products*, 511 U.S. 244, 269 (1994). Rather, absent some failure of a condition that we imposed, or some specific reservation of jurisdiction through oversight or otherwise, it would generally not be appropriate for us to impose new conditions on our approval of a transaction that has already been consummated.[53]

---

[51] IMPACT has suggested a 36-month cooling-off period between the implementation of one merger and the filing of the next. This suggestion appears to be inconsistent with our statute, which requires us to complete our consideration of rail merger applications within a certain time period.

[52] We are not adopting KCS' proposal to require applicants to list every condition that the ICC or STB has ever imposed on the applicant carriers in the past. Parties that believe a particular condition is still required but would be impaired by a proposed transaction should bring that matter to our attention.

[53] While we have express authority under 49 U.S.C. 11327 to issue supplemental orders in appropriate situations in rail merger cases, that authority must necessarily be used very cautiously and sparingly once the parties to an approved merger no longer have the opportunity to elect not to proceed if they are unwilling to accept all of the conditions that we have placed on our approval of (continued...)

§ 1180.1(j): Inclusion of other carriers. The Board will consider requiring inclusion of another carrier as a condition to approval only where there is no other reasonable alternative for providing essential services, the facilities fit operationally into the new system, and inclusion can be accomplished without endangering the operational or financial success of the new company.

This rule merely carries forward the prior provision at former § 1180.1(e) concerning requests for inclusion. We believe that it is appropriate to continue to view inclusion of non-applicant carriers as a matter of last resort.

§ 1180.1(k): Transnational and other informational issues. (1) All applicants must submit "full system" competitive analyses and operating plans — incorporating any operations in Canada or Mexico — from which we can determine the competitive, service, employee, safety, and environmental impacts of the prospective operations within the United States, and explain how cooperation with the Federal Railroad Administration would be maintained to address potential impacts on operations within the United States of operations or events elsewhere on their systems. All applicants must further provide information concerning any restrictions or preferences under foreign or domestic law and policies that could affect their commercial decisions. Applicants must also address how any ownership restrictions might affect our public interest assessment.

(2) The Board will consult with relevant officials, as appropriate, to ensure that any conditions it imposes on an approved transaction are consistent with the North American Free Trade Agreement and other pertinent international agreements to which the United States is a party. In addition, the Board will cooperate with those Canadian and Mexican agencies charged with approval and oversight of a proposed transnational railroad combination.

As noted in the NPR, future major transnational mergers are likely to raise novel jurisdictional, national interest, and public interest issues. We need to be able to gather information about relevant facts, laws and policies that are important to an accurate and comprehensive understanding of a major transnational merger application. Although NAFTA may forbid us from imposing certain limitations on rail ownership by Canadian or Mexican nationals, it does not preclude us from gathering the information that we need to do our job.

The comments have convinced us, however, that the proposed rule requiring certain information only from Canadian and Mexican railroads was too narrow in scope and also may have unnecessarily risked conflict with NAFTA's prohibitions against disparate national treatment. While the genesis of the proposed rule was the prospect of needing to address issues relating particularly to Canadian applications, we conclude that, in the end, we need similar information from all applicants, foreign or domestic. Thus, in addition to full-system competitive analyses and operating plans (including plans for FRA cooperation) required of applicants with transnational operations, we will require

---

[53](...continued)
their proposal.

all applicants to address any ownership restrictions (by law or corporate initiative), and any pertinent governmental restrictions or preferences.

This requirement is not intended to prompt an applicant's search through every conceivably relevant statute. We are most concerned about laws, policies, and corporate actions that might unduly interfere with the market (including the market for corporate control) or that might create an unlevel playing field. That information is clearly related to our legitimate regulatory objectives, and is intended to treat equally, and not burden or prejudice, any applicant.

§ 1180.1(l): National defense. Rail mergers must not detract from the ability of the United States military to rely on rail transportation to meet the nation's defense needs. Applicants must discuss and assess the national defense ramifications of their proposed merger.

The Military Traffic Management Command Transportation Engineering Agency (MTMCTEA) of the Department of Defense (DOD) is responsible for carrying out DOD's "Railroads for National Defense" Program (RNDP), and supervising DOD's national defense requirements. MTMCTEA indicates that, in cooperation with FRA, it conducts periodic readiness reviews of civil rail lines deemed important to the national defense. MTMCTEA recommends that all applicants be required to address the impact of a merger on: maintenance and traffic levels on the Strategic Rail Corridor Network (STRACNET) and connector lines; priority of DOD freight in the event of war; service, routing and equipment agreements between DOD and the merging carriers; and the potential transfer of ownership to a third party without further regulatory review or approval.[54] Finally, MTMCTEA contends that a significant diversion of rail traffic from U.S. to foreign ports could threaten the economic health of U.S. ports and undermine the national defense. It argues that the likelihood of such a traffic shift should be assessed in our merger review.[55]

Applicants in major mergers must discuss national defense ramifications. As proposed, we will consider issues relating to ports in assessing a merger's potential harm to essential services, *see* § 1180.1(c)(2)(ii). No rule giving priority to DOD traffic during a war or other emergency is required here because there are existing statutory provisions governing these matters. *See* 49 U.S.C. 11124 (on Presidential demand or notice during war or threat of war, railroads must give preference to military traffic); 10 U.S.C. 2644 (President in time of

---

[54] In addition, MTMCTEA supports our proposals for at least 5 years of oversight, post-merger monitoring of rail service and operations, and elimination of the "one case at a time" rule.

[55] ORDC urges us to include MTMCTEA's specific recommendations in our final rules.

war may "take possession and assume control of all or part of any system of transportation").

MTMCTEA asks us to require applicants to describe the degree to which DOD traffic would be routed over foreign lines. But our rules will now require the disclosure of significant changes in traffic flows, *see* §1180.10(a). Significant impacts of a merger on maintenance and traffic levels on STRACNET lines, another concern of MTMCTEA, can also be monitored through the operating plan that must be included in an application. Thus, the application will give DOD access to information about potential impacts on military traffic movements, including information about anticipated shifts of its traffic from domestic to foreign lines, and it can object if it has concerns.[56] Finally, we cannot devise rules concerning the transfer of ownership to persons that are not affiliated with a rail carrier, as MTMCTEA suggests, as such transfers do not require our regulatory approval regardless of the nationality of the seller or purchaser.

§ 1180.1(m): Public participation. To ensure a fully developed record on the effects of a proposed railroad consolidation, the Board encourages public participation from federal, state, and local government departments and agencies; affected shippers, carriers, and rail labor; and other interested parties.

This rule carries forward our prior provision at § 1180.1(h), which encourages public participation in our merger proceedings, except that it will now specifically reference rail labor. Input from federal, state, and local governments; affected shippers, carriers, and rail labor; and other parties continues to be of crucial importance in allowing us to make our public interest determinations.

TECHNICAL and INFORMATIONAL REVISIONS.

We are making a number of technical revisions to our merger regulations. For the most part, these revisions codify current practice and conform our regulations to the waivers and clarifications that we have routinely granted in recent merger proceedings. We also include language, where appropriate, reflecting changes in the supporting informational requirements to carry out the proposed revisions to the merger policy statement at § 1180.1, discussed above.

---

[56] CN notes that the principal current component of U.S.–Canada–U.S. routing (*i.e.*, traffic moving between Michigan and Northeast U.S. via Southern Ontario and Quebec) would not change in the event of a U.S.–Canadian railroad merger. Because successful merger applicants would be required to maintain major gateways, DOD's interests will be further protected. *See* §1180.1(c)(2).

§ 1180.0 Scope and purpose.

§ 1180.0(a): General. The regulations in this subpart set out the information to be filed and the procedures to be followed in control, merger, acquisition, lease, trackage rights, and any other consolidation transaction involving more than one railroad that is initiated under 49 U.S.C. 11323. Section 1180.2 separates these transactions into four types: MAJOR, SIGNIFICANT, MINOR, AND EXEMPT. The informational requirements for these types of transactions differ. Before an application is filed, the designation of type of transaction may be clarified or certain of the information required may be waived upon petition to the Board. This procedure is explained in § 1180.4. The required contents of an application are set out in §§ 1180.6 (general information supporting the transaction), 1180.7 (competitive and market information), 1180.8 (operational information), 1180.9 (financial data), 1180.10 (service assurance plans), and 1180.11 (transnational and other informational requirements). A MAJOR application must contain the information required in §§ 1180.6(a), 1180.6(b), 1180.7(a), 1180.7(b), 1180.8(a), 1180.8(b), 1180.9, 1180.10, and 1180.11. A SIGNIFICANT application must contain the information required in §§ 1180.6(a), 1180.6(c), 1180.7(a), 1180.7(c), and 1180.8(b). A MINOR application must contain the information required in §§ 1180.6(a) and 1180.8(c). Procedures (including time limits, filing requirements, participation requirements, and other matters) are contained in § 1180.4. All applications must comply with the Board's Rules of General Applicability, 49 CFR parts 1100 through 1129, unless otherwise specified. These regulations may be cited as the Railroad Consolidation Procedures.

§ 1180.0(b): Waiver. We will waive application of the regulations contained in this subpart for a consolidation involving The Kansas City Southern Railway Company and another Class I railroad and instead will apply the regulations in this subpart A in effect before July 11, 2001, and contained in the 49 CFR parts 1000 to 1199, edition revised as of October 1, 2000, unless we are shown why such a waiver should not be allowed. Interested parties must file any objections to this waiver within 10 days after the applicants' prefiling notification (see 49 CFR § 1180.4(b)(1)).

We are making conforming changes to subsection (a) to reflect changes in our informational requirements and deleting obsolete references to Index I and Index II. As discussed above, we are also adding a new subsection (b) to waive these new regulations for consolidations between KCS and another Class I railroad and allow for our prior regulations to apply, unless parties persuade us otherwise.

§ 1180.3 Definitions.

*§ 1180.3(a): Applicant. The term APPLICANT means the parties initiating a transaction, but does not include a wholly owned direct or indirect subsidiary of an applicant if that subsidiary is not a rail carrier. Parties who are considered applicants, but for whom the information normally required of an applicant need **NOT** be submitted, are:*

(1) in MINOR trackage rights applications, the transferor and

(2) in responsive applications, a primary applicant.

Under the prior rules, "[t]he parties initiating a transaction" technically included not only the ultimate railroad holding company and its Class I railroad subsidiary (*e.g.*, Union Pacific Corporation and Union Pacific Railroad Company) but also wholly owned shell company subsidiaries (which have often been set up in connection with merger transactions) and wholly owned intermediate holding companies (which have often existed in connection with Class I railroads). Because we typically have found that there is no need to treat either a wholly owned shell company subsidiary or a wholly owned intermediate holding company as an applicant, our waiver decisions in past proceedings reflect a recognition that the prior § 1180.3(a) definition is simply too broad. We are therefore excluding from "applicant" status any non-rail subsidiaries.

§ 1180.3(b): Applicant carriers. The term APPLICANT CARRIERS means: any applicant that is a rail carrier; any rail carrier operating in the United States, Canada, and/or Mexico in which an applicant holds a controlling interest; and all other rail carriers involved in the transaction. Because the service provided by these commonly controlled carriers can be an important competitive aspect of the transactions that we approve, applicant carriers are subject to the full range of our conditioning power. Carriers that are involved in an application only by virtue of an existing trackage rights agreement with applicants are not applicant carriers.

Under our previous definition, the term "all carriers related to the applicant" included not only rail carriers related to applicants and subject to our jurisdiction but also three additional categories of carriers: rail carriers not subject to our jurisdiction; rail carriers subject to our jurisdiction but with respect to which the related applicant does not hold a controlling interest; and non-rail carriers. Our waiver decisions in past proceedings have recognized that this definition is too broad. We are now excluding from "applicant carrier" status: (i) rail carriers with respect to which the related applicant does not hold a controlling interest; and (ii) non-rail carriers.[57] We will not exclude foreign carriers over which we otherwise lack jurisdiction.

We are also clarifying that applicant carriers are subject to the full range of our conditioning power. When we approve a transaction, these carriers also fall under common control with the newly controlled carrier or rail assets, and we must necessarily assess the competitive and other aspects of this arrangement.

§ 1180.4 Procedures.

§ 1180.4(a)(1): General. (1) The original and 25 copies of all documents shall be filed in MAJOR proceedings. The original and 10 copies shall be filed in SIGNIFICANt and MINOR proceedings.

We are revising § 1180.4(a)(1) to reflect our current practice regarding the number of copies required in major merger proceedings. Although prior

---

[57] Although we are excluding these carriers from applicant status, they may need to be identified either in the corporate chart required by § 1180.6(b)(6), or in the statement of direct or indirect intercorporate or financial relationships required by § 1180.6(b)(8).

§ 1180.4(a)(1) called for 20 copies in such proceedings, our most recent decisions have called for 25, because the additional copies have served to facilitate immediate internal distribution of filings for handling by Board personnel whose input is essential to prompt disposition of the many matters raised in connection with major railroad merger proceedings.

Deletion of § 1180.4(a)(4): Service Lists. We are deleting § 1180.4(a)(4), which provides deadlines for the issuance of service lists. While service lists will still have to be issued, as with all matters connected with procedural schedules, this timing question is best handled on a case-by-case basis.

§ 1180.4(b)(4): Prefiling notification. When filing the notice of intent required by paragraph (b)(1) of this section, applicants also must file:

(i) A proposed procedural schedule. In any proceeding involving either a major transaction or a significant transaction, the Board will publish a Federal Register notice soliciting comments on the proposed procedural schedule, and will, after review of any comments filed in response, issue a procedural schedule governing the course of the proceeding.

(ii) A proposed draft protective order. The Board will issue, in each proceeding in which such an order is requested, an appropriate protective order.

(iii) A statement of waybill availability for major transactions. Applicants must indicate, as soon as practicable after the issuance of a protective order, that they will make their 100% traffic tapes available (subject to the terms of the protective order) to any interested party on written request. The applicants may require that, if the requesting party is itself a railroad, applicants will make their 100% traffic tapes available to that party only if it agrees, in its written request, to make its own 100% traffic tapes available to applicants (subject to the terms of the protective order) when it receives access to applicants' tapes.

(iv) Applicants may also propose the use of a voting trust at this stage, or at a later stage, if that becomes necessary. In each proceeding involving a major transaction, applicants contemplating the use of a voting trust must explain how the trust would insulate them from an unlawful control violation and why their proposed use of the trust, in the context of their impending control application, would be consistent with the public interest. Following a brief period of public comment and replies by applicants, the Board will issue a decision determining whether applicants may establish and use the trust.

We are adding these new prefiling requirements to replace the prior rules in § 1180.4(d)(1)-(3), which prescribed a procedural schedule that has not actually been followed for many years. In recent cases, procedural schedules have been established on a case-by-case basis tailored to what is suited to the full and fair development of the record for that particular proposal. Our new rules also establish a new procedure for use of voting trusts and new procedures for obtaining access to confidential railroad traffic tapes.

Procedural schedule. BNSF argues that we need to process merger applications in 12 months or less, including the pre-notice period. Although the statute provides for a 16-month processing period from the time of filing the application, we have endeavored to complete our review process as quickly as possible. We recognize that capital markets are sensitive to uncertainty and delay. Nevertheless, 12 months could be an unduly short period to build a record, allow for full public participation, and complete the necessary environmental documentation for the large, transcontinental mergers that we may be asked to consider.

Thus, we are codifying our present practice for establishing a customized procedural schedule by requiring merger applicants to file a proposed procedural schedule when they file their notice of intent. We anticipate that, in each proceeding involving either a major or significant transaction: the proposed procedural schedule would be published in the *Federal Register*, comments would be solicited, and a final procedural schedule would then be adopted.

Protective order. Merger review proceedings frequently require parties to gain discovery of, or submit evidence about, commercially sensitive information. Some types of information are statutorily protected against disclosure. Accordingly, we have developed a protocol under which particularly sensitive "highly confidential" information will be disclosed only to outside counsel or consultant of a party, and only upon that outside counsel/consultant's signing of a confidentiality agreement. If highly confidential material is submitted in evidence, it is submitted under seal, and is available for inspection only by outside counsel or consultant who have signed confidentiality agreements. This prevents the information from being disclosed to the parties themselves and used for purposes beyond the merger review proceeding.

To codify our present practice for establishing a protective order, we are requiring that applicants include a proposed draft protective order with their notice of intent. But, there is no compelling reason to include a standard protective order in our regulations.

Several parties have suggested that applicants be required to disclose publicly the terms of all settlement agreements related to their merger proposal. We believe that this would undermine our policy of encouraging private settlement agreements. Applicant carriers are much more likely to agree to concessions if confidentiality is preserved. Applicants do, of course, retain the option of making settlements public, to the extent permitted by their agreements and as necessary to secure favorable consideration of their proposed transaction. And the Board will continue to permit such agreements to be submitted confidentially, and will impose them as conditions as appropriate. (See the previous discussion of negotiated agreements in the discussion accompanying the rules dealing with environmental review.)

UTU/GO 386 argues that our merger review process is conducted secretly prior to an application being filed. UTU/GO 386 totally misunderstands the pre-filing stage of the process. The only contact between applicants and agency staff on other than procedural matters takes place with the environmental staff. And the only matters that are discussed with that staff relate to the appropriate environmental review, and how it can be accomplished in a timely manner. Contact between applicants and staff concerning the merits of the transaction is not permitted during the pre-filing period or any other stage of the review process. Similarly, UTU/GO 386's argument that most of the critical evidence in a merger case is filed under seal is simply not true. Most of the evidence is filed in public documents. Only evidence that is truly commercially confidential may be filed under seal, and that evidence is available for inspection by counsel or consultant for interested parties who sign confidentiality agreements. This process has worked well, and we see no reason to change it.

Traffic tapes. We are requiring that applicants contemplating a major transaction make their highly confidential 100% traffic tapes available to outside counsel or consultants for interested parties — subject to an appropriate protective order — as soon as practicable after the filing of the notice of intent. Early access to this critical traffic data would aid interested parties in the preparation of their own submissions but (unlike broad pre-application discovery, which we are not proposing) would not impede the prospective applicants in the preparation of their application. If the party seeking the applicants' 100% traffic tapes is itself a railroad, it must provide applicants' counsel or consultants with reciprocal access to its own 100% traffic tapes, subject to an appropriate protective order.

§ 1180.4(c)(6): Application format. (vi) The information and data required of any applicant may be consolidated with the information and data required of the affiliated applicant carriers.

We are adding to the rule at § 1180.4(c)(6) a new clause (vi) to codify our practice in past waiver decisions of authorizing the filing of consolidated information and data pertaining to each applicant and the rail subsidiaries it controls.

§ 1180.4(d): Responsive applications.

(1) No responsive applications shall be permitted to minor transactions.

(2) An inconsistent application will be classified as a major, significant, or minor transaction as provided in § 1180.2(a) through (c). The fee for an inconsistent application will be the fee for

the type of transaction involved. See 49 CFR 1002.2(f)(38) through (41). The fee for any other type of responsive application is the fee for the particular type of proceeding set forth in 49 CFR 1002.2(f).

(3) Each responsive application filed and accepted for consideration will automatically be consolidated with the primary application for consideration.

As discussed earlier, we are adopting new requirements at § 1180.4(b)(4) replacing prior § 1180.4(d)(1)-(3), which had set forth a procedural schedule for the filing of pleadings by parties other than the primary applicants. That schedule has not actually been followed for many years. Here, we are retaining the non-scheduling portion of the prior rules at § 1180.4(d)(4) with regard to responsive applications.

§ 1180.4(e): Evidentiary proceeding.

§ 1180.4(e)(2). The evidentiary proceeding will be completed:

(i) within 1 year after the primary application is accepted for a ***major*** *transaction;*

(ii) within 180 days for a SIGNIFICANT transaction; and

(iii) within 105 days for a MINOR transaction.

§ 1180.4(e)(3). A final decision on the primary application and on all consolidated cases will be issued:

(i) within 90 days after the conclusion of the evidentiary proceeding for a MAJOR transaction;

(ii) within 90 days for a SIGNIFICANT transaction; and

(iii) within 45 days for a MINOR transaction.

Prior § 1180.4(e)(2) and (3) tracked the pre-1996 statutory time frames contained in the predecessor to what is now 49 U.S.C. 11325. We are revising this provision to track the new statutory timeframes of 49 U.S.C. 11325.

§ 1180.4(f): Waiver or clarification.

§ 1180.4(f)(2) Except as otherwise provided in the procedural schedule adopted by the Board in any particular proceeding, petitions for waiver or clarification must be filed at least 45 days before the application is filed.

Prior § 1180.4(f)(2) provided that, with one specified exception, petitions for waiver or clarification had to be filed at least 45 days before the application is filed. We are revising § 1180.4(f)(2) to conform to new § 1180.4(d).

§ 1180.6 Supporting information.

§ 1180.6(b)(1): Form 10-K (exhibit 6). Submit: the most recent filing with the Securities and Exchange Commission (SEC) under 17 CFR 249.310 made within the year prior to the filing of the application by each applicant or by any entity that is in control of an applicant. These shall not be incorporated by reference, and shall be updated with any Form 10-K subsequently filed with the SEC during the pendency of the proceeding.

Although most Class I railroads are wholly owned subsidiaries of noncarrier holding companies, prior § 1180.6(b)(1) required the submission, in major merger proceedings, of the applicant carriers' most recently filed Form 10-K. We have revised this provision, consistent with our recent waiver decisions, to substitute the Form 10-K of the controlling, noncarrier entity where the applicant carrier does not currently file a Form 10-K with the SEC.

§ 1180.6(b)(2): Form S-4 (exhibit 7). Submit: the most recent filing with the SEC under 17 CFR 239.25 made within the year prior to the filing of the application by each applicant or by any entity that is in control of an applicant. These shall not be incorporated by reference, and shall be updated with any Form S-4 subsequently filed with the SEC during the pendency of the proceeding.

Prior § 1180.6(b)(2) has been revised for two reasons. First, Form S-14, cited in prior § 1180.6(b)(2), has been replaced by Form S-4. Second, although most Class I railroads are wholly owned subsidiaries of noncarrier holding companies, prior § 1180.6(b)(2) required the submission, in major merger proceedings, of the applicant carriers' most recently filed Form S-14. Our revisions are consistent with our recent waiver decisions.

§ 1180.6(b)(3): Change in control (exhibit 8). If an applicant carrier submits an annual report Form R-1, indicate any change in ownership or control of that applicant carrier not indicated in its most recent Form R-1, and provide a list of the principal six officers of that applicant carrier and of any related applicant, and also of their majority-owned rail carrier subsidiaries. If any applicant carrier does not submit an annual report Form R-1, list all officers of that applicant carrier, and identify the person(s) or entity/entities in control of that applicant carrier and all owners of 10% or more of the equity of that applicant carrier.

Prior § 1180.6(b)(3) required major merger applicants to "[i]ndicate any change in ownership, control, or officers not indicated in the most recent annual report Form R-1." There are two problems here: (1) although most Class I railroads have hundreds of officer positions that might fall within the scope of the "change in officers" requirement, the compilation of such a list would be burdensome to applicants and of little, if any, value to us and to the public; and (2) because only Class I railroads now submit Form R-1, it was not clear what was required with respect to Class II and III rail carriers that qualify as applicant carriers. We have therefore revised the rule to be consistent with our recent waiver decisions.

§ 1180.6(b)(4): Annual reports (exhibit 9). Submit: the two most recent annual reports to stockholders by each applicant, or by any entity that is in control of an applicant, made within 2 years of the date of filing of the application. These shall not be incorporated by reference, and

shall be updated with any annual or quarterly report to stockholders issued during the pendency of the proceeding.

Prior § 1180.6(b)(4) required the submission, in major merger proceedings, of the applicant carriers' two most recent annual reports; however, most Class I railroads are wholly owned subsidiaries of noncarrier holding companies and do not make separate annual reports to their stockholders. We have thus revised this provision to be consistent with our recent waiver decisions.

§ 1180.6(b)(6): Corporate chart (exhibit 11). Submit a corporate chart indicating all relationships between applicant carriers and all affiliates and subsidiaries and also companies controlling applicant carriers directly, indirectly or through another entity (with each chart indicating the percentage ownership of every company on the chart by any other company on the chart). For each company: include a statement indicating whether that company is a noncarrier or a carrier; and identify every officer and/or director of that company who is also an officer and/or director of any other company that is part of a different corporate family that includes a rail carrier. Such information may be referenced through notes to the chart.

The "corporate chart" provision must be revised because the prior requirement of a statement indicating all common officers and directors sweeps too broadly; the only disclosure that is really needed in this context concerns individuals who hold officer and/or director positions in more than one corporate family, where the nonapplicant corporate family or families includes a rail carrier. We have thus revised our rule to permit major merger applicants to disregard common officers and/or directors within a single corporate family, and to report only those instances in which two or more companies from different corporate families, each including a rail carrier, share officers and/or directors.

§ 1180.6(b)(8): Intercorporate or financial relationships. Indicate whether there are any direct or indirect intercorporate or financial relationships at the time the application is filed, not disclosed elsewhere in the application, through holding companies, ownership of securities, or otherwise, in which applicants or their affiliates own or control more than 5% of the stock of a non-affiliated carrier, including those relationships in which a group affiliated with applicants owns more than 5% of the stock of such a carrier. Indicate the nature and extent of any such relationships, and, if an applicant owns securities of a carrier subject to 49 U.S.C. Subtitle IV, provide the carrier's name, a description of securities, the par value of each class of securities held, and the applicant's percentage of total ownership. For purposes of this paragraph, "affiliates" has the same meaning as "affiliated companies" in Definition 5 of the Uniform System of Accounts (49 CFR part 1201, subpart A).

Our prior rule required major merger applicants to disclose all intercorporate or financial relationships between applicant carriers and persons affiliated with applicant carriers, on the one hand, and, on the other hand, other carriers or persons affiliated with such other carriers. Recent waiver decisions, however, have established that the only disclosure that is really needed in this context is of "significant" intercorporate or financial relationships, *i.e.*, relationships involving ownership by applicants and/or their affiliates of more than 5% of a non-affiliated carrier's stock, including those relationships in which a group affiliated with applicants owns more than 5% of a non-affiliated carrier's stock. We have revised the rule to conform to the waiver decisions issued in recent proceedings and, in accordance with those decisions, we have changed the focus of this provision from "applicant carriers" to "applicants."

§ 1180.6(b)(9): Employee impact exhibit. The effect of the proposed transaction upon applicant carriers' employees (by class or craft), the geographic points where the impacts would occur, the time frame of the impacts (for at least 3 years after consolidation), and whether any employee protection agreements have been reached. This information (except with respect to employee protection agreements) may be set forth in the following format:

EFFECTS ON APPLICANT CARRIERS' EMPLOYEES

Current Location	*Classification*	*Jobs Transferred to*	*Jobs Abolished*	*Jobs Created*	*Year*

We have created a new § 1180.6(b)(9), applicable only to major transaction applications. For major merger transactions, we have considered three suggested revisions of the prior § 1180.6(a)(2)(v) "employee impact exhibit" requirement.[58] First, we are declining to narrow its scope to the effects of the proposed transaction upon applicant carriers' employees *in the U.S.* Rather, any major transnational merger that may come before us in the future would be such as to require knowledge, on our part, of the effects of the proposed transaction upon all applicant carriers' employees, regardless of whether they are located in Canada, Mexico, or elsewhere. Second, we do not believe it appropriate to amend our rule (as requested by carrier interests) to attempt to specify a single set of classes or crafts of employees to be covered by the required employee impact exhibit because past decisions have not established, in this respect, the necessary uniformity. Third, our rule has been revised to specify the format of

[58] We are making no changes in § 1180.6(a)(2)(v), which continues to apply to major, significant, and minor applications.

the required employee impact exhibit. Past decisions have established, in this respect, the necessary uniformity.[59]

§ 1180.6(b)(10): Conditions to mitigate and offset merger-related harms. Applicants are expected to propose measures to mitigate and offset merger-related harms. These conditions should not simply preserve, but also enhance, competition.

(i) Applicants must explain how they would preserve competitive options for shippers and for Class II and III rail carriers. At a minimum, applicants must explain how they would preserve the use of major existing gateways, the potential for build-outs or build-ins, and the opportunity to enter into contracts for one segment of a movement as a means of gaining the right separately to pursue rate relief for the remainder of the movement.

(ii) Applicants should explain how the transaction and conditions they propose would enhance competition and improve service.

We have added this new rule to implement our new policy at § 1180.1, requiring applicants in major merger transactions to propose conditions preserving shippers' existing competitive options, and suggesting that they propose additional conditions or other means to enhance competition and improve services that would offset anticompetitive effects, transitional service problems, and other merger-related harms.

§ 1180.6(b)(11): Calculating public benefits. Applicants must enumerate and, where possible, quantify the net public benefits their merger would generate (if approved). In making this estimate, applicants should identify the benefits that would arise from service improvements, enhanced competition, cost savings, and other merger-related public interest benefits, and should discuss whether the particular benefits they are relying upon could be achieved short of merger. Applicants must also identify, discuss, and, where possible, quantify the likely negative effects approval would entail, such as losses of competition, potential for service disruption, and other merger-related harms. In addition, applicants must suggest additional measures that the Board might take if it approves the application and the anticipated public benefits identified by applicants fail to materialize in a timely manner.

We have added this new rule for major transactions reflecting our new policy at § 1180.1. Because we must weigh the application's effect on the public interest, it is important that we carefully calculate the net public benefits a merger would generate, and, to do so, the applicants must provide detailed and accurate data. Moreover, as discussed previously, we have created an incentive for carriers not to exaggerate benefits.

---

[59] We note that the "Jobs Transferred To" column will capture, among other things, anticipated cross-border transfers.

§ 1180.6(b)(12): Downstream merger applications. (i) Applicants should anticipate whether additional Class I mergers are likely to be proposed in response to their own proposal and explain how, taken together, these mergers, if approved, could affect the eventual structure of the industry and the public interest.

(ii) Applicants are expected to discuss whether any conditions imposed on an approval of their proposed merger would have to be altered, or any new conditions imposed, if the Board should approve additional future rail mergers.

In adopting this new rule for major transactions, we have discarded the "one case at a time" policy. We expect applicants generally to identify the likely strategic responses of other Class I carriers and anticipate how, taken together, these various proposals would affect the structure of the industry and the public interest.

§ 1180.6(b)(13): Purpose of the proposed transaction. The purpose sought to be accomplished by the proposed transaction, such as improving service, enhancing competition, strengthening the nation's transportation infrastructure, creating operating economies, and ensuring financial viability.

Consistent with the goals of our policy statement, we have revised this rule so that the list of merger-related accomplishments associated with a proposal for a major transaction would stress enhancing competition and strengthening transportation infrastructure, as well as improving service. This provision also looks to applicants for evidence demonstrating their financial viability.

§ 1180.7 Market analyses.

§ 1180.7(a): For MAJOR and SIGNIFICANT transactions, applicants shall submit impact analyses (exhibit 12) describing the impacts of the proposed transaction — both adverse and beneficial — on inter- and intramodal competition with respect to freight surface transportation in the regions affected and on the provision of essential services by applicants and other carriers. An impact analysis should include underlying data, a study of the implications of those data, and a description of the resulting likely effects of the proposed transaction on the transportation alternatives that would be available to the shipping public. Each aspect of the analysis should specifically address significant impacts as they relate to the applicable statutory criteria (49 U.S.C. 11324(b) or (d)), essential services, and competition. Applicants must identify and address relevant markets and issues, and provide additional information as requested by the Board on markets and issues that warrant further study. Applicants (and any other party submitting analyses) must demonstrate both the relevance of the markets and issues analyzed and the validity of their methodology. All underlying assumptions must be clearly stated. Analyses should reflect the consolidated company's marketing plan and existing and potential competitive alternatives (inter- as well as intramodal). They can address: city pairs, interregional movements, movements through a point, or other factors; a particular commodity, group of commodities, or other commodity factor that would be significantly affected by the transaction; or other effects of the transaction (such as on a particular type of service offered).

§ 1180.7(b): For MAJOR transactions, applicants shall submit "full system" impact analyses (incorporating any operations in Canada or Mexico) from which they must demonstrate the

impacts of the transaction — both adverse and beneficial — on competition within regions of the United States and this nation as a whole (including inter- and intramodal competition, product competition, and geographic competition) and the provision of essential services (including freight, passenger, and commuter) by applicants and other network links (including Class II and Class III rail carriers and ports). Applicants' impact analyses must at least provide the following types of information:

(1) The anticipated effects of the transaction on traffic patterns, market concentrations, and/or transportation alternatives available to the shipping public. Consistent with § 1180.6(b)(10), these would incorporate a detailed examination of any competition-enhancing aspects of the transaction and of the specific measures proposed by applicants to preserve existing levels of competition and essential services;

(2) Actual and projected market shares of originated and terminated traffic by railroad for each major point on the combined system. Applicants may define points as individual stations or as larger areas (such as Bureau of Economic Analysis statistical areas or U.S. Department of Agriculture Crop Reporting Districts) as relevant and indicate the extent of switching access and availability of terminal belt railroads. Applicants should list points where the number of serving railroads would drop from two to one and from three to two, respectively, as a result of the proposed transaction (both before and after applying proposed remedies for competitive harm);

(3) Actual and projected market shares of revenues and traffic volumes for major interregional or corridor flows by major commodity group. Origin/destination areas should be defined at relevant levels of aggregation for the commodity group in question. The data should be broken down by mode and (for the railroad portion) by single-line and interline routings (showing gateways used);

(4) For each major commodity group, an analysis of traffic flows indicating patterns of geographic competition or product competition across different railroad systems, showing actual and projected revenues and traffic volumes;

(5) Maps and other graphic displays where helpful in illustrating the analyses in this section;

(6) An explicit delineation of the projected impacts of the transaction on the ability of various network links (including Class II and Class III rail carriers and ports) to participate in the competitive process and to sustain essential services; and

(7) Supporting data for the analyses in this section, such as the basis for projections of changes in traffic patterns, including shipper surveys and econometric or other statistical analyses. If not made part of the application, applicants shall make these data available in a repository for inspection by other parties or otherwise supply these data on request, for example, electronically. Access to confidential information will be subject to protective order. For information drawn from publicly available published sources, detailed citations will suffice.

(8) If necessary, an explanation as to how the lack of reliable and consistent data has limited applicants' ability to satisfy any of the requirements in this paragraph (b).

§ 1180.7(c): For SIGNIFICANT transactions, specific regulations on impact analyses are not provided so that the parties will have the greatest leeway to develop the best evidence on the impacts of each individual transaction. As a general guideline, applicants shall provide supporting data that may (but need not) include: current and projected traffic flows; data underlying sales forecasts or marketing goals; interchange data; market share analysis; and/or shipper surveys. IT IS IMPORTANT TO NOTE THAT THESE TYPES OF STUDIES ARE NEITHER LIMITING NOR ALL-INCLUSIVE. The parties must provide supporting data, but are free to choose the type(s) and format. If not made part of the application, applicants shall make these data available in a repository for inspection by other parties or otherwise supply these data on request, for example,

electronically. Access to confidential information will be subject to protective order. For information drawn from publicly available published sources, detailed citations will suffice.

This section replaces prior § 1180.7, encompassing market analyses in major and significant transactions. For major transactions, we are revising this rule to reflect our concern that applicants' impact analyses should reflect the entire North American rail system. All applicants will be required to provide us with information on their Canadian and Mexican operations and marketing plans so that we can fully determine the effects of the application on competition and the provision of essential services within the United States.

We are setting minimum requirements to replace the discretionary guidelines that have been in use for market analyses in major transactions. These ensure that applicants will supply the types of information that we have found most helpful in assessing harm to competition or to essential services in previous major merger transactions. We are explicitly requiring data on how the proposed transaction would affect geographic competition and product competition, as well as on how the transaction would affect market concentration for major origin and destination points and for major corridors on the applicants' combined system.

Finally, these impact analyses should incorporate a detailed examination of the ways in which the transaction would enhance competition. Applicants must set out the specific measures they propose to preserve existing levels of competition and essential services.

For significant transactions, we are not amending the information requirements or impact analyses.

§ 1180.8 Operational data.

§ 1180.8(a): Applications for MAJOR transactions must include a full-system operating plan — incorporating any prospective operations in Canada and Mexico — from which they must demonstrate how the proposed transaction would affect operations within regions of the United States and on a nationwide basis. As part of the environmental review process, applicants shall submit:

(1) A Safety Integration Plan, prepared in consultation with the Federal Railroad Administration, to ensure that safe operations would be maintained throughout the merger implementation process.

(2) Information on what measures they plan to take to address potentially blocked crossings as a result of merger-related changes in operations or increases in rail traffic.

We have added this new rule setting forth some additional informational requirements on applicants in major transactions. In major transactions, we will require full-system operating plans that document how the application would affect all operations, including those in Canada and Mexico. The Board needs these data to determine how operational changes in foreign nations would likely affect the U.S. rail network. In addition, consistent with our recent practice, we will require applicants to consult with FRA and file a safety integration plan. Also, because blocked railroad crossings have become an increasing concern to communities, applicants will be required to indicate what measures they plan to take to avoid blocking grade crossings that might otherwise result from merger-related changes in operations or increases in rail traffic. The full-system operating plans that we will require of applicants in major transactions must be submitted with the application, and the Safety Integration Plan and information on blocked crossings shall be submitted as part of the environmental review process.

Renumbering prior § 1180.8(a) and (b). As a result of the insertion of new § 1180.8(a), which will be applicable to major transactions, we have renumbered the prior rules at § 1180.8(a) and § 1180.8(b) as new § 1180.8(b) and new § 1180.8(c), respectively. New § 1180.8(b) sets out operational data requirements for major and significant transactions. New § 1180.8(c) sets out operational data requirements for minor transactions.

§ 1180.10 Service assurance plans.

For MAJOR transactions: Applicants must submit a Service Assurance Plan, which, in concert with the operating plan requirements, identifies the precise steps to be taken by applicants to ensure that projected service levels would be attainable and that key elements of the operating plan would improve service. The plan shall describe with reasonable precision how operating plan efficiencies would translate into present and future benefits for the shipping public. The plan must also describe any potential area of service degradation that might result due to operational changes and how instances of degraded service might be mitigated. Like the Operating Plan on which it is based, the Service Assurance Plan must be a full-system plan encompassing:

(a) Integration of operations. Based on the operating plan, and using appropriate benchmarks, applicants must develop a Service Assurance Plan describing how the proposed transaction would result in improved service levels and how and where service might be degraded. This description should be a precise route level review, but not a shipper-by-shipper review. Nonetheless, the plan should be sufficient for individual shippers to evaluate the projected improvements and changes, and respond to the potential areas of service degradation for their customary traffic routings. The plan should inform Class II and III railroads and other connecting railroads of the operational changes or changes in service terms that might affect their operations, including operations involving major gateways.

(b) Coordination of freight and passenger operations. If Amtrak or commuter services are operated over the lines of applicant carriers, applicants must describe definitively how they would continue to facilitate these operations so as to fulfill existing performance agreements for those services. Whether or not the passenger services are operated over lines of applicants or applicants' operations are on the lines of passenger agencies, applicants must establish operating protocols ensuring effective communications with Amtrak and/or regional rail passenger operators to minimize any potential transaction-related negative impacts.

(c) Yard and terminal operations. The operational fluidity of yards and terminals is key to the successful implementation of a transaction and effective service to shippers. Applicants must describe how the operations of principal classification yards and major terminals would be changed or revised and how these revisions would affect service to customers. As part of this analysis, applicants must furnish dwell time benchmarks for each facility described in this paragraph, and estimate what the expected dwell time would be after the revised operations are implemented. Also required will be a discussion of on-time performance for the principal yards and terminals in the same terms as required for dwell time.

(d) Infrastructure improvements. Applicants must identify potential infrastructure impediments (using volume/capacity line and terminal forecasts), formulate solutions to those impediments, and develop time frames for resolution. Applicants must also develop a capital improvement plan (to support the operating plan) for timely funding and completion of the improvements critical to transition of operations. They should also describe improvements related to future growth, and indicate the relationship of the improvements to service delivery.

(e) Information technology systems. Because the accurate and timely integration of applicants' information systems is vitally important to service, applicants must identify the process to be used for systems integration and training of involved personnel. This must include identification of the principal operations-related systems, operating areas affected, implementation schedules, the realtime operations data used to test the systems, and pre-implementation training requirements needed to achieve completion dates. If such systems will not be integrated and on line prior to implementation of the transaction, applicants must describe the interim systems to be used and the adequacy of those systems to ensure service delivery.

(f) Customer service. To achieve and maintain customer confidence in the transaction and to ensure the successful integration and consolidation of existing customer service functions, applicants must identify their plans for the staffing and training of personnel within or supporting the customer service centers. This discussion must include specific information on the planned steps to familiarize customers with any new processes and procedures that they may encounter in using the consolidated systems and/or changes in contact locations, telephone numbers, or communication mode.

(g) Labor. Applicants must furnish a plan for reaching necessary labor implementing agreements. Applicants must also provide evidence that sufficient qualified employees would be available at the proper locations to effect implementation.

(h) Training. Applicants must establish a plan for providing necessary training to employees involved with operations, train and engine service, operating rules, dispatching, payroll and timekeeping, field data entry, safety and hazardous material compliance, and contractor support functions (e.g., crew van service), as well as training for other employees in functions that would be affected by the acquisition.

(i) Contingency plans for merger-related service disruptions. To address potential disruptions of service that could occur, applicants must establish contingency plans. Those plans, based upon available resources and traffic flows and density, must identify potential areas of disruption and the risk of occurrence. Applicants must provide evidence that contingency plans would be in place to promptly restore adequate service levels. Applicants must also provide for the establishment of problem resolution teams and describe the specific procedures to be utilized for problem resolution.

(j) Timetable. Applicants must identify all major functional or system changes/consolidations that would occur and the time line for successful completion.

(k) Benchmarking. Specific benchmarking requirements may vary with the transaction. The minimum for benchmarking will be the 12 monthly periods immediately preceding the filing date of the notice of intent to file the application. Benchmarking is intended to provide an historic

monthly baseline against which actual post-transaction levels of performance can be measured. Benchmarking data should be sufficiently detailed and encompassing to give a meaningful picture of operational performance for the newly merged system. Applicants will report in a matrix structure giving the historic monthly (benchmark) data and provide for the reporting of actual monthly data during the monitoring period. It is important that data reflect uniformly constructed measures of historic and post-transaction operations. Minimum benchmark data include:

(1) Corridor performance benchmarking - Benchmarks will consist of route level performance information including flow data for traffic moving on the applicants' systems. These data will encompass flows to and from major points. A major point could be a Bureau of Economic Analysis (BEA) statistical area, or it can be a railroad-created point based on an operational grouping of stations or interchanges, or it could be another similar construction. It will be necessary for applicants to define traffic points used to establish benchmarks for purposes of monitoring. A sufficient number of corridor flows must be reported so as to fully represent system flows, including interchanges with short lines and other Class I's, and internal traffic of the respective applicants before the transaction. In addition to identifying traffic flows by areas, they also must be identified by commodity sector (for example, merchandise, intermodal, automotive, unit coal, unit grain etc.). Data for each flow must include: traffic volume in carloads (units), miles (area to area), and elapsed time in hours. Only loaded traffic need be included.

(2) Yard and terminal benchmarking -

(i) Terminal dwell. Terminal dwell for major yards will be calculated in hours for cars handled, not including run-through and bypass trains or maintenance of way and bad order cars.

(ii) On time originations by major yard. On time originations are based on the departure of scheduled trains originating at a particular yard.

(3) System benchmarking -

(i) Cars on line.

(ii) Average train velocity, by train type.

(iii) Locomotive fleet size and applicable bad order ratios.

(iv) Passenger train performance for commuter and intercity passenger services.

We are adding this new section to our rules to reflect the new Service Assurance Plan called for under § 1180.1(h) regarding service assurance and operational monitoring.

§ 1180.11 Transnational and other informational requirements.

(a) For applicants whose systems include operations in Canada or Mexico, applicants must explain how cooperation with the Federal Railroad Administration would be maintained to address potential impacts on operations within the United States of operations or events elsewhere on their systems.

(b) All applicants must assess whether any restrictions or preferences under foreign or domestic law or policies could affect their commercial decisions, and discuss any ownership restrictions applicable to them.

We are adding this new section to our rules to allow for our full consideration of an applicant's transnational operations, and for our consideration of any ownership restrictions or pertinent governmental restrictions or preferences applicable to any applicant (foreign or domestic) that may affect our public interest assessment, particularly those that might unduly interfere with the market or that might create an unlevel playing field.

Small entities. The Board certifies that the revisions to our regulations will not have a significant economic impact on a substantial number of small entities within the meaning of the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*). These rules have created additional filing requirements only for Class I applicants, which are very large rail carriers. At the same time we have given increased weight to issues and concerns of smaller railroads and shippers, a change that should benefit these small entities.

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

Board releases available via the Internet. Decisions and notices of the Board, including this decision, are available on the Board's website at "www.stb.dot.gov."

Authority. 49 U.S.C. 721, 11323-11325.

List of Subjects in 49 CFR Part 1180

Administrative practice and procedure, Bankruptcy, Railroads, Reporting and recordkeeping requirements.

CHAIRMAN MORGAN, commenting and dissenting in part:

The rules that we are adopting here are the culmination of a comprehensive process begun some 15 months ago and ending on schedule. As part of this process, we have imposed a moratorium on major rail mergers, conducted a three-stage rulemaking proceeding, held an oral argument, and received and reviewed written comments on a broad array of issues from over 100 parties in this proceeding, representing the wide-ranging views of railroads, rail users, rail labor, governmental agencies, Members of Congress, and other affected parties. We have benefitted greatly from this extensive public participation in formulating our new policy and rules for considering future major railroad merger proposals. The process, I believe, has exemplified good government at work, and we are all particularly indebted to the outstanding Board staff for their important contributions to this process and to this product.

Given the likelihood that the next round of major rail mergers could result in two transcontinental railroad systems, the Board's reexamination of its major rail merger policy has focused on three issues. First, we cannot afford the service and financial problems associated with the last round of rail mergers. Second, the policy must reflect competitive concerns with further consolidation. And finally, because of the risks and finality associated with the next round, the policy must ensure that future mergers add value and provide benefits that clearly outweigh any potential harm. There is little margin for error as we proceed ahead.

The new policy and rules we are adopting here reflect these objectives in several ways. They significantly increase the burden on applicants to demonstrate that a proposed transaction would be in the public interest, requiring applicants to demonstrate that new merger proposals would produce tangible benefits, such as improved service, and enhanced competition wherever that is necessary to offset negative effects of the merger, such as unmitigated competitive harm or service disruptions. In doing so, the new rules strike the proper balance between on the one hand the desire for specificity and on the other hand the need for the requisite flexibility to allow for private-sector initiative and innovation and to permit the Board to address individual merger proposals depending on the circumstances of a particular case. The new rules also require more accountability for benefits that are claimed and a showing that such benefits could not be realized by means other than a merger. And the new rules require more details up front regarding the service that would be provided, as well as contingency planning and problem resolution in the event of service failures. In sum, our action here reflects the lessons learned from the past in a way that allows for the needs of the marketplace of the future, and it ensures that, if further major mergers are pursued, our new policy and rules will permit the Board to properly evaluate whether such proposals are truly in the public interest.

While some may take the position that the new rules do not go far enough, others may view the heavier burden reflected in our new rules as foreclosing "good mergers." It is certainly not my intent to stifle private-sector initiatives and market-based transactions that are in the public interest, and I believe that our final policy and rules appropriately reflect that approach. Whether additional major mergers are pursued depends, in large part, on how customers view more mergers, how the investment community assesses further consolidation in the industry, and the state of the economy. But I do hope our new rules remind railroads that mergers do not have to be the first choice or the only choice when they are considering ways to strengthen and improve their networks, particularly given the great risks associated with further consolidation.

Moreover, it is essential for the railroads to continue to focus on effectively and creatively running, day-to-day, the businesses that they now have, with a view toward more efficient operations, improved service, increased cooperation among themselves, and better customer and employee relations, all of which are necessary for the rail sector to thrive. While mergers have their place, recent events have shown that no major merger takes place in isolation, and that, once a round of mergers begins, it can be all-consuming, distracting, and disruptive, to the detriment of the nation's transportation system, rail shippers, rail employees, and communities across the country. Important progress has been made during the Board-imposed 15-month moratorium in stabilizing the rail network, enhancing service reliability, pursuing alliances and other cooperative arrangements among railroads, and promoting more positive relationships with rail workers, rail users, and others. We must be careful not to undo the important progress that has been made, and we must continue to promote an environment in which that progress can be furthered.

While I have voted to approve the overall package of rules as being in the public interest, I disagree with the special treatment being afforded KCS in the decision being issued today. This historical Class I railroad situated in the Nation's heartland serves a number of important markets and provides significant competitive routes and connections not only for North-South traffic but for East-West traffic as well. Indeed, as the self-styled NAFTA railway with its substantial ownership interest in the Texas Mexican Railway Company and Grupo Transportacion Ferroviaria Mexicana, as well as its control of Gateway Western and its marketing agreement and alliance with CN/IC, KCS is of such strategic importance that any merger between it and another Class I railroad could well trigger the next round of major rail mergers resulting in two transcontinental railroad systems. Giving KCS the opportunity to pursue waiver requests on a case-by-case basis at the time it proposes a specific merger transaction would seem appropriate. But I respectfully disagree with the conclusion reached by my colleagues as reflected in the decision being issued today that we need not worry about a transaction involving KCS and another major carrier, and thus that a blanket waiver from the new rules is presumed to be appropriate in the first instance. I do not believe that it is sound policy to give KCS such special treatment while applying the new rules to the other Class I railroads.

As we move forward, we must make sure that actions taken, whether in the private sector or by government, will result in a stronger rail network capable of meeting the service needs of its customers and continuing to fulfill its important role in our economy well into the future. A continued focus on improved rail service, a merger policy that is reflective of the past and attentive to the future, and an overall regulatory framework that results in the kind of rail network that this Nation wants and needs are all important to that end. Taken as a whole, the policy and rules for major rail mergers that we are adopting meet this objective.

VICE CHAIRMAN CLYBURN, commenting:

While some believe that this decision ends a long process of hearings and rulemaking proceedings culminating in the issuance of these final rules, I believe that the rules are a new beginning in our task of serving the public interest. As I remarked in our landmark decision, STB Ex Parte No. 582, which instituted a 15-month moratorium on mergers, "past rail consolidations have created a new paradigm" in which we must now operate. The quest we have followed throughout this process has been how to properly balance the public interest in this new era in the rail industry.

We have had a lively debate from all segments of the transportation industry. We have heard from freight railroads, large and small, passenger railroads, rail customers of various commodities and their associations, labor interests, economists, federal and foreign government agencies, state and local governments, ports, and Members of Congress. The testimony from each of these sources has indicated that we cannot proceed with the concept of "business as usual." I view these rules as a significant shift from prior merger policy.

I commend the railroads and rail labor for their historic agreement concerning the overrides of collective bargaining agreements. The Board takes notice of this agreement and should adjudicate any relevant matters accordingly. I hope the momentum created by this agreement can lead to a mutually agreeable solution to the moving issue; however, I remind the industry that the Board is prepared to act on this matter. The Board is taking a new step in stating that it is amenable to reviewing its interpretation of the *New York Dock* conditions regarding moving.

Applicants must be aware that it is critical that they fully address any potential service problems and other harms including the mitigation of such problems with proposals that would preserve and/or enhance competition. The Board is directing applicants to ensure that the benefits projected more accurately reflect the benefits realized shortly after consummation. The rail industry consists of many important components of which a viable shortline industry is an essential part. It is my hope that this decision will highlight the crucial symbiotic relationship between all the transportation stakeholders.

COMMISSIONER BURKES, commenting:

The changes to the Board's major railroad consolidation rules and procedures set forth herein correctly shift the focus away from encouraging mergers to encouraging the enhancement of competition. It should be noted that the adopted rules are not significantly different from those first proposed in this proceeding on October 3, 2000. However, there is a noticeable change in the wording in that Class I railroads now will not be specifically "required" to include provisions to enhance competition. For example, the wording in Section 1180.1(c) has been changed from "merger applications *must* include provisions for enhancing competition" to "merger applications *should* include provisions for enhancing competition." (emphasis added) Therefore, enhanced competition is now an encouraged goal rather than a mandated standard.

I am not in favor of a mandated enhanced competition standard, absent a definition of that term in the rules. No where in these new rules is "enhanced competition" defined. The decision (but not the new rules) states that enhanced competition "*could be*" the enhancement of intramodal or rail-to-rail competition, such as the establishment of shared access areas, the granting of trackage rights, the removal of so-called "paper barriers" and other approaches. However, enhanced competition also "could be" the enhancement of intermodal competition or some other type of competition that may not even be related to transportation. If we are to impose an enhanced competition standard, future merger applicants should know what steps they need to take and shippers should know what to expect.

The decision leaves it to the Board's discretion as to what constitutes enhanced competition. In other words, the Board will know enhanced competition when it sees it. These rules certainly do not prohibit the merging of North American railroads into two systems. Under these rules, the Board could approve Transcontinental Merger A because it would enhance intermodal competition and then approve Transcontinental Merger B since it would enhance competition with Transcontinental Merger A. It is my hope that the Board will closely scrutinize future applications and use its conditioning power, if necessary, to preserve and enhance competition in a way that promotes a competitive and healthy railroad system.

There has been a raising of the bar in terms of the details and planning that must be included in future merger applications (*e.g.*, the Service Assurance Plan). Based on the service problems associated with recent mergers, these changes are justified, however, I hope that these added requirements do not unnecessarily lengthen the merger review process or burden other interested parties.

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

APPENDIX

For the reasons set forth in the preamble, Title 49, Subtitle B, Chapter X, Part 1180 of the Code of Federal Regulations is amended as follows:

PART 1180--RAILROAD ACQUISITION, CONTROL, MERGER, CONSOLIDATION PROJECT, TRACKAGE RIGHTS, AND LEASE PROCEDURES

1. The authority citation for part 1180 continues to read as follows:

Authority: 5 U.S.C. 553 and 559; 11 U.S.C. 1172; 49 U.S.C. 721, 10502, 11323-11325.

2. Section 1180.0 is revised to read as follows:

§ 1180.0 Scope and purpose.

(a) *General.* The regulations in this subpart set out the information to be filed and the procedures to be followed in control, merger, acquisition, lease, trackage rights, and any other consolidation transaction involving more than one railroad that is initiated under 49 U.S.C. 11323. Section 1180.2 separates these transactions into four types: *Major, significant, minor*, and *exempt*. The informational requirements for these types of transactions differ. Before an application is filed, the designation of type of transaction may be clarified or certain of the information required may be waived upon petition to the Board. This procedure is explained in § 1180.4. The required contents of an application are set out in §§ 1180.6 (general information supporting the transaction), 1180.7 (competitive and market information), 1180.8 (operational information), 1180.9 (financial data), 1180.10 (service assurance plans), and 1180.11 (transnational and other informational requirements). A *major* application must contain the information required in §§ 1180.6(a), 1180.6(b), 1180.7(a), 1180.7(b), 1180.8(a), 1180.8(b), 1180.9, 1180.10, and 1180.11. A *significant* application must contain the information required in §§ 1180.6(a), 1180.6(c), 1180.7(a), 1180.7(c), and 1180.8(b). A *minor* application must contain the information required in §§ 1180.6(a) and 1180.8(c). Procedures (including time limits, filing requirements, participation requirements, and other matters) are contained in § 1180.4. All applications must comply with the Board's Rules of General Applicability, 49 CFR Parts 1100 through 1129, unless otherwise specified. These regulations may be cited as the Railroad Consolidation Procedures.

(b) *Waiver.* We will waive application of the regulations contained in this subpart for a consolidation involving The Kansas City Southern Railway Company and another Class I railroad and instead will apply the regulations in this subpart A in effect before July 11, 2001, and contained in 49 CFR, Parts 1000 to 1199, edition revised as of October 1, 2000, unless we are shown why such a waiver should not be allowed. Interested parties must file any objections to this waiver within 10 days after the applicants' prefiling notification (*see* 49 CFR § 1180.4(b)(1)).

3. Section 1180.1 is revised to read as follows:

§ *1180.1 General policy statement for merger or control of at least two Class I railroads.*

(a) *General.* To meet the needs of the public and the national defense, the Surface Transportation Board (Board) seeks to ensure balanced and sustainable competition in the railroad industry. The Board recognizes that the railroad industry (including Class II and III carriers) is a network of competing and complementary components, which in turn is part of a broader transportation infrastructure that also embraces the nation's highways, waterways, ports, and airports. The Board welcomes private-sector initiatives that enhance the capabilities and the competitiveness of this transportation infrastructure. Although mergers of Class I railroads may advance our nation's economic growth and competitiveness through the provision of more efficient and responsive transportation, the Board does not favor consolidations that reduce the transportation alternatives available to shippers unless there are substantial and demonstrable public benefits to the transaction that cannot otherwise be achieved. Such public benefits include improved service, enhanced competition, and greater economic efficiency. The Board also will look with disfavor on consolidations under which the controlling entity does not assume full responsibility for carrying out the controlled carrier's common carrier obligation to provide adequate service upon reasonable demand.

(b) *Consolidation criteria.* The Board's consideration of the merger or control of at least two Class I railroads is governed by the public interest criteria prescribed in 49 U.S.C. 11324 and the rail transportation policy set forth in 49 U.S.C. 10101. In determining the public interest, the Board must consider the various goals of effective competition, carrier safety and efficiency, adequate service for shippers, environmental safeguards, and fair working conditions for employees. The Board must ensure that any approved transaction would promote a competitive, efficient, and reliable national rail system.

(c) *Public interest considerations.* The Board believes that mergers serve the public interest only when substantial and demonstrable gains in important public benefits — such as improved service and safety, enhanced competition, and greater economic efficiency — outweigh any anticompetitive effects, potential service disruptions, or other merger-related harms. Although further consolidation of the few remaining Class I carriers could result in efficiency gains and improved service, the Board believes additional consolidation in the industry is also likely to result in a number of anticompetitive effects, such as loss of geographic competition, that are increasingly difficult to remedy directly or proportionately. Additional consolidations could also result in service disruptions during the system integration period. Accordingly, to assure a balance in favor of the public interest, merger applications should include provisions for enhanced competition, and, where both carriers are financially sound, the Board is prepared to use its conditioning authority as necessary under 49 U.S.C. 11324(c) to preserve and/or enhance competition. In addition, when evaluating the public interest, the Board will consider whether the benefits claimed by applicants could be realized by means other than the proposed consolidation. The Board believes that other private-sector initiatives, such as joint marketing agreements and interline partnerships, can produce many of the efficiencies of a merger while risking less potential harm to the public.

(1) *Potential benefits.* By eliminating transaction cost barriers between firms, increasing the productivity of investment, and enabling carriers to lower costs through economies of scale, scope, and density, mergers can generate important public benefits such as improved service, more competition, and greater economic efficiency. A merger can strengthen a carrier's finances and operations. To the extent that a merged carrier continues to operate in a competitive environment, its new efficiencies would be shared with shippers and consumers. Both the public and the consolidated carrier can benefit if the carrier is able to increase its marketing opportunities and provide better service. A merger transaction can also improve existing competition or provide new

competitive opportunities, and such enhanced competition will be given substantial weight in our analysis. Applicants shall make a good faith effort to calculate the net public benefits their proposed merger would generate, and the Board will carefully evaluate such evidence. To ensure that applicants have no incentive to exaggerate these projected benefits to the public, the Board expects applicants to propose additional measures that the Board might take if the anticipated public benefits fail to materialize in a timely manner. In this regard, the Board recognizes, however, that applicants require the flexibility to adapt to changing marketplace or other circumstances and that it is inevitable that an approved merger may not necessarily be implemented in precisely the manner anticipated in the application. Applicants will be held accountable, however, if they do not act reasonably in light of changing circumstances to achieve promised merger benefits.

(2) *Potential harm*. The Board recognizes that consolidation can impose costs as well as benefits. It can reduce competition both directly and indirectly in particular markets, including product markets and geographic markets. Consolidation can also threaten essential services and the reliability of the rail network. In analyzing these impacts we must consider, but are not limited by, the policies embodied in the antitrust laws.

(i) *Reduction of competition*. Although in specific markets railroads operate in a highly competitive environment with vigorous intermodal competition from motor and water carriers, mergers can deprive shippers of effective options. Intramodal competition can be reduced when two carriers serving the same origins or destinations merge. Competition arising from shippers' build-out, transloading, plant siting, and production shifting choices can be eliminated or reduced when two railroads serving overlapping areas merge. Competition in product and geographic markets can also be eliminated or reduced by mergers, including end-to-end mergers. Any railroad combination entails a risk that the merged carrier would acquire and exploit increased market power. Applicants shall propose remedies to mitigate and offset competitive harms. Applicants shall also explain how they would at a minimum preserve competitive and market options such as those involving the use of major existing gateways, build-outs or build-ins, and the opportunity to enter into contracts for one segment of a movement as a means of gaining the right separately to pursue rate relief for the remainder of the movement.

(ii) *Harm to essential services*. The Board must ensure that essential freight, passenger, and commuter rail services are preserved wherever feasible. An existing service is essential if there is sufficient public need for the service and adequate alternative transportation is not available. The Board's focus is on the ability of the nation's transportation infrastructure to continue to provide and support essential services. Mergers should strengthen, not undermine, the ability of the rail network to advance the nation's economic growth and competitiveness, both domestically and internationally. The Board will consider whether projected shifts in traffic patterns could undermine the ability of the various network links (including Class II and Class III rail carriers and ports) to sustain essential services.

(iii) *Transitional service problems*. Experience shows that significant service problems can arise during the transitional period when merging firms integrate their operations, even after applicants take extraordinary steps to avoid those disruptions. Because service disruptions harm the public, the Board, in its determination of the public interest, will weigh the likelihood of transitional service problems. In addition, under paragraph (h) of this section, the Board will require applicants to provide a detailed service assurance plan. Applicants also should explain how they would cooperate with other carriers in overcoming serious service disruptions on their lines during the transitional period and afterwards.

(iv) *Enhanced competition*. To offset harms that would not otherwise be mitigated, applicants should explain how the transaction and conditions they propose would enhance competition.

(d) *Conditions*. The Board has broad authority under 49 U.S.C. 11324(c) to impose conditions on consolidations, including requiring divestiture of parallel tracks or the granting of trackage rights and access to other facilities. The Board will condition the approval of Class I combinations to mitigate or offset harm to the public interest, and will carefully consider conditions proposed by applicants in this regard. The Board may impose conditions that are operationally feasible and produce net public benefits, but will not impose conditions that undermine or defeat beneficial transactions by creating unreasonable operating, financial, or other problems for the combined carrier. Conditions are generally not appropriate to compensate parties who may be disadvantaged by increased competition. The Board anticipates that mergers of Class I carriers would likely create some anticompetitive effects that would be difficult to mitigate through appropriate conditions, and that transitional service disruptions might temporarily negate any shipper benefits. To offset such potential harms and improve the prospect that their proposal would be found to be in the public interest, applicants should propose conditions that would not simply preserve but also enhance competition. The Board seeks to enhance competition in ways that strengthen and sustain the rail network as a whole (including that portion of the network operated by Class II and III carriers).

(e) *Employee protection*. The Board is required to provide a fair arrangement for the protection of the rail employees of applicants who are affected by a consolidation. The Board supports early notice and consultation between management and the various unions, leading to negotiated implementing agreements, which the Board strongly favors. Otherwise, the Board respects the sanctity of collective bargaining agreements and will look with extreme disfavor on overrides of collective bargaining agreements except to the very limited extent necessary to carry out an approved transaction. The Board will review negotiated agreements to ensure fair and equitable treatment of all affected employees. Absent a negotiated agreement, the Board will provide for protection at the level mandated by law (49 U.S.C. 11326(a)), and if unusual circumstances are shown, more stringent protection will be provided to ensure that employees have a fair and equitable arrangement.

(f) *Environment and safety*. (1) The National Environmental Policy Act, 42 U.S.C. 4321 *et seq*. (NEPA), requires the Board to take environmental considerations into account in railroad consolidation cases. To meet its responsibilities under NEPA and related environmental laws, the Board must consider significant potential beneficial and adverse environmental impacts in deciding whether to approve a transaction as proposed, deny the proposal, or approve it with conditions, including appropriate environmental mitigation conditions addressing concerns raised by the parties, including federal, state, and local government entities. The Board's Section of Environmental Analysis (SEA) ensures that the agency meets its responsibilities under NEPA and the implementing regulations at 49 CFR part 1105 by providing the Board with an independent environmental review of merger proposals. In preparing the necessary environmental documentation, SEA focuses on the potential environmental impacts resulting from merger-related changes in activity levels on existing rail lines and rail facilities. The Board generally will mitigate only those impacts that would result directly from an approved transaction, and will not require mitigation for existing conditions and existing railroad operations.

(2) During the environmental review process, railroad applicants have negotiated agreements with affected communities, including groups of communities and other entities such as state and local agencies. The Board encourages voluntary agreements of this nature because they can be extremely helpful and effective in addressing specific local and regional environmental and safety concerns, including the sharing of costs associated with mitigating merger-related environmental impacts. Generally, these privately negotiated solutions between an applicant railroad and some or all of the communities along particular rail corridors or other appropriate entities are more effective, and in some cases more far-reaching, than any environmental mitigation options the Board could impose unilaterally. Therefore, when such agreements are submitted to it, the Board generally will impose these negotiated agreements as conditions to approved mergers, and these agreements

generally will substitute for specific local and site-specific environmental mitigation for a community that otherwise would be imposed. Moreover, to encourage and give effect to negotiated solutions whenever possible, the opportunity to negotiate agreements will remain available throughout the oversight process to replace local and site-specific environmental mitigation imposed by the agency. The Board will require compliance with the terms of all negotiated agreements submitted to it during oversight by imposing appropriate environmental conditions to replace the local and site-specific mitigation previously imposed.

(3) Applicants will be required to work with the Federal Railroad Administration, on a case-by-case basis, to formulate Safety Integration Plans (SIPs) to ensure that safe operations are maintained throughout the merger implementation process. As part of the environmental review process, applicants will be required to submit:

(i) a SIP and

(ii) evidence about potentially blocked grade crossings as a result of merger-related traffic increases or operational changes.

(g) *Oversight.* As a condition to its approval of any major transaction, the Board will establish a formal oversight process. For at least the first 5 years following approval, applicants will be required to present evidence to the Board, on no less than an annual basis, to show that the merger conditions imposed by the Board are working as intended, that the applicants are adhering to the various representations they made on the record during the course of their merger proceeding, that no unforeseen harms have arisen that would require the Board to alter existing merger conditions or impose new ones, and that the merger benefit projections accepted by the Board are being realized in a timely fashion. Parties will be given the opportunity to comment on applicants' submissions, and applicants will be given the opportunity to reply to the parties' comments. During the oversight period, the Board will retain jurisdiction to impose any additional conditions it determines are necessary to remedy or offset adverse consequences of the underlying transaction.

(h) *Service assurance and operational monitoring.* (1) The quality of service is of vital importance. Accordingly, applicants must file, with their initial application and operating plan, a Service Assurance Plan identifying the precise steps they would take to ensure adequate service and to provide for improved service. This plan must include the specific information set forth at § 1180.10 on how shippers, connecting railroads (including Class II and III carriers), and ports across the new system would be affected and benefitted by the proposed consolidation. As part of this plan, applicants will be required to provide service benchmarks, describe the extent to which they have entered into any arrangements with shippers and shipper groups to compensate for service failures, and establish contingency plans that would be available to mitigate any unanticipated service disruption.

(2) The Board will conduct significant post-approval operational monitoring to help ensure that service levels after a merger are reasonable and adequate.

(3) The Board also will require applicants to establish problem resolution teams and specific procedures for problem resolution to ensure that any unanticipated post-merger problems related to service or any other transportation matters, including claims, are promptly addressed. These teams should include representatives of all appropriate employee categories. Also, the Board envisions the establishment of a Service Council made up of shippers, railroads, passenger service representatives, ports, rail labor, and other interested parties to provide an ongoing forum for the discussion of implementation issues.

(4) *Loss and damage claims handling.* Shippers or shortlines who have freight claims under 49 CFR part 1005 during merger implementation shall file such claims, in writing or electronically, with the merged carrier. The claimant shall provide supporting documentation regarding the effect on the claimant, and the specific damages (in a determinable amount) incurred. Pursuant to 49 CFR part 1005, the merged carrier shall acknowledge each claim within 30 days and successively number

each claim. Within 120 days of carrier receipt of the claim, the merged carrier shall respond to each claim by paying, declining, or offering a compromise settlement. The Board will take notice of these claims and their disposition as a matter of oversight. During each annual oversight period, the merged carrier shall report on claims received, their type, and their disposition for each quarterly period covered by oversight. While shippers and shortlines may also contract with the applicants for specific remedies with respect to claims, final adjudication of contract issues as well as unresolved claims will remain a matter for the courts.

(5) *Service failure claims.* Applicants must suggest a protocol for handling claims related to failure to provide reasonable service due to merger implementation problems. Commitments to submit all such claims to arbitration will be favored.

(6) *Alternative rail service.* Where shippers and connecting railroads require relief from extended periods of inadequate service, the procedures at 49 CFR parts 1146 and 1147 are available for the Board to review the documented service levels and to consider shipper proposals for alternative service relief when other avenues of relief have already been explored with the merged carrier in an effort to restore adequate service.

(i) *Cumulative impacts and crossover effects.* Because there are so few remaining Class I carriers and the railroad industry constitutes a network of competing and complementary components, the Board cannot evaluate the merits of a major transaction in isolation. The Board must also consider the cumulative impacts and crossover effects likely to occur as rival carriers react to the proposed combination. The Board expects applicants to explain how additional Class I mergers would affect the eventual structure of the industry and the public interest. Applicants should generally discuss the likely impact of such future mergers on the anticipated public benefits of their own merger proposal. Applicants will be expected to discuss whether and how the type or extent of any conditions imposed on their proposed merger would have to be altered, or any new conditions imposed, should we approve any future consolidation(s).

(j) *Inclusion of other carriers.* The Board will consider requiring inclusion of another carrier as a condition to approval only where there is no other reasonable alternative for providing essential services, the facilities fit operationally into the new system, and inclusion can be accomplished without endangering the operational or financial success of the new company.

(k) *Transnational and other informational issues.* (1) All applicants must submit "full system" competitive analyses and operating plans — incorporating any operations in Canada or Mexico — from which we can determine the competitive, service, employee, safety, and environmental impacts of the prospective operations within the United States, and explain how cooperation with the Federal Railroad Administration would be maintained to address potential impacts on operations within the United States of operations or events elsewhere on their systems. All applicants must further provide information concerning any restrictions or preferences under foreign or domestic law and policies that could affect their commercial decisions. Applicants must also address how any ownership restrictions might affect our public interest assessment.

(2) The Board will consult with relevant officials, as appropriate, to ensure that any conditions it imposes on an approved transaction are consistent with the North American Free Trade Agreement and other pertinent international agreements to which the United States is a party. In addition, the Board will cooperate with those Canadian and Mexican agencies charged with approval and oversight of a proposed transnational railroad combination.

(l) *National defense.* Rail mergers must not detract from the ability of the United States military to rely on rail transportation to meet the nation's defense needs. Applicants must discuss and assess the national defense ramifications of their proposed merger.

(m) *Public participation.* To ensure a fully developed record on the effects of a proposed railroad consolidation, the Board encourages public participation from federal, state, and local government departments and agencies; affected shippers, carriers, and rail labor; and other interested parties.

4. Section 1180.3 is amended by revising paragraphs (a) and (b) to read as follows:

§ 1180.3 Definitions.

(a) *Applicant*. The term *applicant* means the parties initiating a transaction, but does not include a wholly owned direct or indirect subsidiary of an applicant if that subsidiary is not a rail carrier. Parties who are considered applicants, but for whom the information normally required of an applicant need *not* be submitted, are:

(1) in *minor* trackage rights applications, the transferor and

(2) in responsive applications, a primary applicant.

(b) *Applicant carriers*. The term *applicant carriers* means: any applicant that is a rail carrier; any rail carrier operating in the United States, Canada, and/or Mexico in which an applicant holds a controlling interest; and all other rail carriers involved in the transaction. Because the service provided by these commonly controlled carriers can be an important competitive aspect of the transactions that we approve, applicant carriers are subject to the full range of our conditioning power. Carriers that are involved in an application only by virtue of an existing trackage rights agreement with applicants are not applicant carriers.

* * * * *

5. Section 1180.4 is amended by revising paragraph (a)(1) to read as follows, by removing paragraph (a)(4), by adding new paragraphs (b)(4) and (c)(6)(vi) to read as follows, and by revising paragraphs (d), (e)(2), (e)(3), and (f)(2) to read as follows:

§ 1180.4 Procedures.

(a) * * * (1) The original and 25 copies of all documents shall be filed in *major* proceedings. The original and 10 copies shall be filed in *significant* and *minor* proceedings.

* * *

(4) [Removed]

(b) * * *

(4) *Prefiling notification*. When filing the notice of intent required by paragraph (b)(1) of this section, applicants also must file:

(i) *A proposed procedural schedule*. A proposed procedural schedule. In any proceeding involving either a major transaction or a significant transaction, the Board will publish a *Federal Register* notice soliciting comments on the proposed procedural schedule, and will, after review of any comments filed in response, issue a procedural schedule governing the course of the proceeding.

(ii) *A proposed draft protective order*. A proposed draft protective order. The Board will issue, in each proceeding in which such an order is requested, an appropriate protective order.

(iii) *A statement of waybill availability for major transactions*. Applicants must indicate, as soon as practicable after the issuance of a protective order, that they will make their 100% traffic tapes available (subject to the terms of the protective order) to any interested party on written request. The applicants may require that, if the requesting party is itself a railroad, applicants will make their 100% traffic tapes available to that party only if it agrees, in its written request, to make its own 100% traffic tapes available to applicants (subject to the terms of the protective order) when it receives access to applicants' tapes.

(iv) Applicants may also propose the use of a voting trust at this stage, or at a later stage, if that becomes necessary. In each proceeding involving a major transaction, applicants contemplating the use of a voting trust must explain how the trust would insulate them from an unlawful control violation and why their proposed use of the trust, in the context of their impending control application, would be consistent with the public interest. Following a brief period of public comment and replies by applicants, the Board will issue a decision determining whether applicants may establish and use the trust.

(c) * * *

(6) * * *

(vi) The information and data required of any applicant may be consolidated with the information and data required of the affiliated applicant carriers.

(d) *Responsive applications*. (1) No responsive applications shall be permitted to minor transactions.

(2) An inconsistent application will be classified as a major, significant, or minor transaction as provided in § 1180.2(a) through (c). The fee for an inconsistent application will be the fee for the type of transaction involved. *See* 49 CFR 1002.2(f)(38) through (41). The fee for any other type of responsive application is the fee for the particular type of proceeding set forth in 49 CFR 1002.2(f).

(3) Each responsive application filed and accepted for consideration will automatically be consolidated with the primary application for consideration.

(e) * * *

(2) The evidentiary proceeding will be completed:

(i) within 1 year after the primary application is accepted for a *major* transaction;

(ii) within 180 days for a *significant* transaction; and

(iii) within 105 days for a *minor* transaction.

(3) A final decision on the primary application and on all consolidated cases will be issued:

(i) within 90 days after the conclusion of the evidentiary proceeding for a *major* transaction;

(ii) within 90 days for a *significant* transaction; and

(iii) within 45 days for a *minor* transaction.

* * *

(f) * * *

(2) Except as otherwise provided in the procedural schedule adopted by the Board in any particular proceeding, petitions for waiver or clarification must be filed at least 45 days before the application is filed.

* * * * *

6. Section 1180.6 is amended by revising paragraphs (b)(1), (b)(2), (b)(3), (b)(4), (b)(6), and (b)(8) to read as follows, and by adding new paragraphs (b)(9), (b)(10), (b)(11), (b)(12), and (b)(13) to read as follows:

§ *1180.6 Supporting information.*

* * * * *

(b) * * *

(1) *Form 10-K (exhibit 6)*. Submit: the most recent filing with the Securities and Exchange Commission (SEC) under 17 CFR 249.310 made within the year prior to the filing of the application by each applicant or by any entity that is in control of an applicant. These shall not be incorporated by reference, and shall be updated with any Form 10-K subsequently filed with the SEC during the pendency of the proceeding.

(2) *Form S-4 (exhibit 7).* Submit: the most recent filing with the SEC under 17 CFR 239.25 made within the year prior to the filing of the application by each applicant or by any entity that is in control of an applicant. These shall not be incorporated by reference, and shall be updated with any Form S-4 subsequently filed with the SEC during the pendency of the proceeding.

(3) *Change in control (exhibit 8).* If an applicant carrier submits an annual report Form R-1, indicate any change in ownership or control of that applicant carrier not indicated in its most recent Form R-1, and provide a list of the principal six officers of that applicant carrier and of any related applicant, and also of their majority-owned rail carrier subsidiaries. If any applicant carrier does not submit an annual report Form R-1, list all officers of that applicant carrier, and identify the person(s) or entity/entities in control of that applicant carrier and all owners of 10% or more of the equity of that applicant carrier.

(4) *Annual reports (exhibit 9).* Submit: the two most recent annual reports to stockholders by each applicant, or by any entity that is in control of an applicant, made within 2 years of the date of filing of the application. These shall not be incorporated by reference, and shall be updated with any annual or quarterly report to stockholders issued during the pendency of the proceeding.

* * *

(6) *Corporate chart (exhibit 11).* Submit a corporate chart indicating all relationships between applicant carriers and all affiliates and subsidiaries and also companies controlling applicant carriers directly, indirectly or through another entity (with each chart indicating the percentage ownership of every company on the chart by any other company on the chart). For each company: include a statement indicating whether that company is a noncarrier or a carrier; and identify every officer and/or director of that company who is also an officer and/or director of any other company that is part of a different corporate family that includes a rail carrier. Such information may be referenced through notes to the chart.

* * *

(8) *Intercorporate or financial relationships.* Indicate whether there are any direct or indirect intercorporate or financial relationships at the time the application is filed, not disclosed elsewhere in the application, through holding companies, ownership of securities, or otherwise, in which applicants or their affiliates own or control more than 5% of the stock of a non-affiliated carrier, including those relationships in which a group affiliated with applicants owns more than 5% of the stock of such a carrier. Indicate the nature and extent of any such relationships, and, if an applicant owns securities of a carrier subject to 49 U.S.C. Subtitle IV, provide the carrier's name, a description of securities, the par value of each class of securities held, and the applicant's percentage of total ownership. For purposes of this paragraph, "affiliates" has the same meaning as "affiliated companies" in Definition 5 of the Uniform System of Accounts (49 CFR Part 1201, subpart A).

(9) *Employee impact exhibit.* The effect of the proposed transaction upon applicant carriers' employees (by class or craft), the geographic points where the impacts would occur, the time frame of the impacts (for at least 3 years after consolidation), and whether any employee protection agreements have been reached. This information (except with respect to employee protection agreements) may be set forth in the following format:

EFFECTS ON APPLICANT CARRIERS' EMPLOYEES

Current Location	Classification	Jobs Transferred to	Jobs Abolished	Jobs Created	Year

(10) *Conditions to mitigate and offset merger-related harms.* Applicants are expected to propose measures to mitigate and offset merger-related harms. These conditions should not simply preserve, but also enhance, competition.

(i) Applicants must explain how they would preserve competitive options for shippers and for Class II and III rail carriers. At a minimum, applicants must explain how they would preserve the use of major existing gateways, the potential for build-outs or build-ins, and the opportunity to enter into contracts for one segment of a movement as a means of gaining the right separately to pursue rate relief for the remainder of the movement.

(ii) Applicants should explain how the transaction and conditions they propose would enhance competition and improve service.

(11) *Calculating public benefits.* Applicants must enumerate and, where possible, quantify the net public benefits their merger would generate (if approved). In making this estimate, applicants should identify the benefits that would arise from service improvements, enhanced competition, cost savings, and other merger-related public interest benefits, and should discuss whether the particular benefits they are relying upon could be achieved short of merger. Applicants must also identify, discuss, and, where possible, quantify the likely negative effects approval would entail, such as losses of competition, potential for service disruption, and other merger-related harms. In addition, applicants must suggest additional measures that the Board might take if it approves the application and the anticipated public benefits identified by applicants fail to materialize in a timely manner.

(12) *Downstream merger applications.* (i) Applicants should anticipate whether additional Class I mergers are likely to be proposed in response to their own proposal and explain how, taken together, these mergers, if approved, could affect the eventual structure of the industry and the public interest.

(ii) Applicants are expected to discuss whether any conditions imposed on an approval of their proposed merger would have to be altered, or any new conditions imposed, if the Board should approve additional future rail mergers.

(13) *Purpose of the proposed transaction.* The purpose sought to be accomplished by the proposed transaction, such as improving service, enhancing competition, strengthening the nation's transportation infrastructure, creating operating economies, and ensuring financial viability.

*   *   *   *   *

7. Section 1180.7 is revised to read as follows:

§ 1180.7 Market analyses.

(a) For *major* and *significant* transactions, applicants shall submit impact analyses (exhibit 12) describing the impacts of the proposed transaction — both adverse and beneficial — on inter- and intramodal competition with respect to freight surface transportation in the regions affected and on the provision of essential services by applicants and other carriers. An impact analysis should include underlying data, a study of the implications of those data, and a description of the resulting likely effects of the proposed transaction on the transportation alternatives that would be available to the shipping public. Each aspect of the analysis should specifically address significant impacts as they relate to the applicable statutory criteria (49 U.S.C. 11324(b) or (d)), essential services, and competition. Applicants must identify and address relevant markets and issues, and provide additional information as requested by the Board on markets and issues that warrant further study. Applicants (and any other party submitting analyses) must demonstrate both the relevance of the markets and issues analyzed and the validity of their methodology. All underlying assumptions must be clearly stated. Analyses should reflect the consolidated company's marketing plan and existing and potential competitive alternatives (inter- as well as intramodal). They can address: city pairs, interregional movements, movements through a point, or other factors; a particular commodity, group of commodities, or other commodity factor that would be significantly affected by the transaction; or other effects of the transaction (such as on a particular type of service offered).

(b) For *major* transactions, applicants shall submit "full system" impact analyses (incorporating any operations in Canada or Mexico) from which they must demonstrate the impacts of the transaction — both adverse and beneficial — on competition within regions of the United States and this nation as a whole (including inter- and intramodal competition, product competition, and geographic competition) and the provision of essential services (including freight, passenger, and commuter) by applicants and other network links (including Class II and Class III rail carriers and ports). Applicants' impact analyses must at least provide the following types of information:

(1) The anticipated effects of the transaction on traffic patterns, market concentrations, and/or transportation alternatives available to the shipping public. Consistent with § 1180.6(b)(10), these would incorporate a detailed examination of any competition-enhancing aspects of the transaction and of the specific measures proposed by applicants to preserve existing levels of competition and essential services;

(2) Actual and projected market shares of originated and terminated traffic by railroad for each major point on the combined system. Applicants may define points as individual stations or as larger areas (such as Bureau of Economic Analysis statistical areas or U.S. Department of Agriculture Crop Reporting Districts) as relevant and indicate the extent of switching access and availability of terminal belt railroads. Applicants should list points where the number of serving railroads would drop from two to one and from three to two, respectively, as a result of the proposed transaction (both before and after applying proposed remedies for competitive harm);

(3) Actual and projected market shares of revenues and traffic volumes for major interregional or corridor flows by major commodity group. Origin/destination areas should be defined at relevant levels of aggregation for the commodity group in question. The data should be broken down by mode and (for the railroad portion) by single-line and interline routings (showing gateways used);

(4) For each major commodity group, an analysis of traffic flows indicating patterns of geographic competition or product competition across different railroad systems, showing actual and projected revenues and traffic volumes;

(5) Maps and other graphic displays where helpful in illustrating the analyses in this section;

(6) An explicit delineation of the projected impacts of the transaction on the ability of various network links (including Class II and Class III rail carriers and ports) to participate in the competitive process and to sustain essential services; and

(7) Supporting data for the analyses in this section, such as the basis for projections of changes in traffic patterns, including shipper surveys and econometric or other statistical analyses. If not made part of the application, applicants shall make these data available in a repository for inspection by other parties or otherwise supply these data on request, for example, electronically. Access to confidential information will be subject to protective order. For information drawn from publicly available published sources, detailed citations will suffice.

(8) If necessary, an explanation as to how the lack of reliable and consistent data has limited applicants' ability to satisfy any of the requirements in this paragraph (b).

(c) For *significant* transactions, specific regulations on impact analyses are not provided so that the parties will have the greatest leeway to develop the best evidence on the impacts of each individual transaction. As a general guideline, applicants shall provide supporting data that may (but need not) include: current and projected traffic flows; data underlying sales forecasts or marketing goals; interchange data; market share analysis; and/or shipper surveys. *It is important to note that these types of studies are neither limiting nor all- inclusive.* The parties must provide supporting data, but are free to choose the type(s) and format. If not made part of the application, applicants shall make these data available in a repository for inspection by other parties or otherwise supply these data on request, for example, electronically. Access to confidential information will be subject to protective order. For information drawn from publicly available published sources, detailed citations will suffice.

8. Section 1180.8 is amended by redesignating paragraphs (a) and (b) as paragraphs (b) and (c), respectively, and by adding a new paragraph (a) to read as follows:

§ 1180.8 Operational data.

(a) Applications for *major* transactions must include a full-system operating plan — incorporating any prospective operations in Canada and Mexico — from which they must demonstrate how the proposed transaction would affect operations within regions of the United States and on a nationwide basis. As part of the environmental review process, applicants shall submit:

(1) A Safety Integration Plan, prepared in consultation with the Federal Railroad Administration, to ensure that safe operations would be maintained throughout the merger implementation process.

(2) Information on what measures they plan to take to address potentially blocked crossings as a result of merger-related changes in operations or increases in rail traffic.

* * * * *

9. A new § 1180.10 is added to subpart A to read as follows:

§ 1180.10 Service assurance plans.

For *major* transactions: Applicants must submit a Service Assurance Plan, which, in concert with the operating plan requirements, identifies the precise steps to be taken by applicants to ensure that projected service levels would be attainable and that key elements of the operating plan would improve service. The plan shall describe with reasonable precision how operating plan efficiencies would translate into present and future benefits for the shipping public. The plan must also describe any potential area of service degradation that might result due to operational changes and how instances of degraded service might be mitigated. Like the Operating Plan on which it is based, the Service Assurance Plan must be a full-system plan encompassing:

(a) *Integration of operations*. Based on the operating plan, and using appropriate benchmarks, applicants must develop a Service Assurance Plan describing how the proposed transaction would result in improved service levels and how and where service might be degraded. This description should be a precise route level review, but not a shipper-by-shipper review. Nonetheless, the plan should be sufficient for individual shippers to evaluate the projected improvements and changes, and respond to the potential areas of service degradation for their customary traffic routings. The plan should inform Class II and III railroads and other connecting railroads of the operational changes or changes in service terms that might affect their operations, including operations involving major gateways.

(b) *Coordination of freight and passenger operations*. If Amtrak or commuter services are operated over the lines of applicant carriers, applicants must describe definitively how they would continue to facilitate these operations so as to fulfill existing performance agreements for those services. Whether or not the passenger services are operated over lines of applicants or applicants' operations are on the lines of passenger agencies, applicants must establish operating protocols ensuring effective communications with Amtrak and/or regional rail passenger operators to minimize any potential transaction-related negative impacts.

(c) *Yard and terminal operations*. The operational fluidity of yards and terminals is key to the successful implementation of a transaction and effective service to shippers. Applicants must describe how the operations of principal classification yards and major terminals would be changed or revised and how these revisions would affect service to customers. As part of this analysis, applicants must furnish dwell time benchmarks for each facility described in this paragraph, and estimate what the expected dwell time would be after the revised operations are implemented. Also required will be a discussion of on-time performance for the principal yards and terminals in the same terms as required for dwell time.

(d) *Infrastructure improvements.* Applicants must identify potential infrastructure impediments (using volume/capacity line and terminal forecasts), formulate solutions to those impediments, and develop time frames for resolution. Applicants must also develop a capital improvement plan (to support the operating plan) for timely funding and completion of the improvements critical to transition of operations. They should also describe improvements related to future growth, and indicate the relationship of the improvements to service delivery.

(e) *Information technology systems.* Because the accurate and timely integration of applicants' information systems is vitally important to service, applicants must identify the process to be used for systems integration and training of involved personnel. This must include identification of the principal operations-related systems, operating areas affected, implementation schedules, the realtime operations data used to test the systems, and pre-implementation training requirements needed to achieve completion dates. If such systems will not be integrated and on line prior to implementation of the transaction, applicants must describe the interim systems to be used and the adequacy of those systems to ensure service delivery.

(f) *Customer service.* To achieve and maintain customer confidence in the transaction and to ensure the successful integration and consolidation of existing customer service functions, applicants must identify their plans for the staffing and training of personnel within or supporting the customer service centers. This discussion must include specific information on the planned steps to familiarize customers with any new processes and procedures that they may encounter in using the consolidated systems and/or changes in contact locations, telephone numbers, or communication mode.

(g) *Labor.* Applicants must furnish a plan for reaching necessary labor implementing agreements. Applicants must also provide evidence that sufficient qualified employees would be available at the proper locations to effect implementation.

(h) *Training.* Applicants must establish a plan for providing necessary training to employees involved with operations, train and engine service, operating rules, dispatching, payroll and timekeeping, field data entry, safety and hazardous material compliance, and contractor support functions (*e.g.*, crew van service), as well as training for other employees in functions that would be affected by the acquisition.

(i) *Contingency plans for merger-related service disruptions.* To address potential disruptions of service that could occur, applicants must establish contingency plans. Those plans, based upon available resources and traffic flows and density, must identify potential areas of disruption and the risk of occurrence. Applicants must provide evidence that contingency plans would be in place to promptly restore adequate service levels. Applicants must also provide for the establishment of problem resolution teams and describe the specific procedures to be utilized for problem resolution.

(j) *Timetable.* Applicants must identify all major functional or system changes/consolidations that would occur and the time line for successful completion.

(k) *Benchmarking.* Specific benchmarking requirements may vary with the transaction. The minimum for benchmarking will be the 12 monthly periods immediately preceding the filing date of the notice of intent to file the application. Benchmarking is intended to provide an historic monthly baseline against which actual post-transaction levels of performance can be measured. Benchmarking data should be sufficiently detailed and encompassing to give a meaningful picture of operational performance for the newly merged system. Applicants will report in a matrix structure giving the historic monthly (benchmark) data and provide for the reporting of actual monthly data during the monitoring period. It is important that data reflect uniformly constructed measures of historic and post-transaction operations. Minimum benchmark data include:

(1) *Corridor performance benchmarking* Benchmarks will consist of route level performance information including flow data for traffic moving on the applicants' systems. These data will encompass flows to and from major points. A major point could be a Bureau of Economic Analysis (BEA) statistical area, or it can be a railroad-created point based on an operational grouping of stations or interchanges, or it could be another similar construction. It will be necessary for applicants to define traffic points used to establish benchmarks for purposes of monitoring. A sufficient number of corridor flows must be reported so as to fully represent system flows, including interchanges with short lines and other Class I's, and internal traffic of the respective applicants before the transaction. In addition to identifying traffic flows by areas, they also must be identified by commodity sector (for example, merchandise, intermodal, automotive, unit coal, unit grain etc.). Data for each flow must include: traffic volume in carloads (units), miles (area to area), and elapsed time in hours. Only loaded traffic need be included.

(2) *Yard and terminal benchmarking* -

(i) *Terminal dwell.* Terminal dwell for major yards will be calculated in hours for cars handled, not including run-through and bypass trains or maintenance of way and bad order cars.

(ii) *On time originations by major yard.* On time originations by major yard. On time originations are based on the departure of scheduled trains originating at a particular yard.

(3) *System benchmarking* -

(i) Cars on line.

(ii) Average train velocity, by train type.

(iii) Locomotive fleet size and applicable bad order ratios.

(iv) Passenger train performance for commuter and intercity passenger services.

10. A new § 1180.11 is added to subpart A to read as follows:

§ 1180.11 Transnational and other informational requirements.

(a) For applicants whose systems include operations in Canada or Mexico, applicants must explain how cooperation with the Federal Railroad Administration would be maintained to address potential impacts on operations within the United States of operations or events elsewhere on their systems.

(b) All applicants must assess whether any restrictions or preferences under foreign or domestic law or policies could affect their commercial decisions, and discuss any ownership restrictions applicable to them.

APPENDIX A: ABBREVIATIONS

AAR	Association of American Railroads
ACC	American Chemistry Council
ADR	alternative dispute resolution
AFBF	American Farm Bureau Federation
AFL-CIO	American Federation of Labor and Congress of Industrial Organizations
AFRC	American Forest Resource Council
AF&PA	American Forest & Paper Association
AGP	Ag Processing Inc.
ALJ	Administrative Law Judge
Ameren	Ameren Services Company
Amtrak	National Railroad Passenger Corporation

ANPR	advance notice of proposed rulemaking
APA	Administrative Procedure Act
APC	American Plastics Council
APTA	American Public Transportation Association
ARC	Alliance for Rail Competition
ARU	Allied Rail Unions (BRS, IBB, NCFO, SMW, and TWU)
ASLRRA	American Short Line and Regional Railroad Association
ATDD	American Train Dispatchers Department-BLE
ATU	Amalgamated Transit Union
BASF	BASF Corporation
BEA	Bureau of Economic Analysis statistical area
BLE	Brotherhood of Locomotive Engineers
BMWE	Brotherhood of Maintenance of Way Employes
BN	Burlington Northern Inc. and Burlington Northern Railroad Company
BNSF	The Burlington Northern and Santa Fe Railway Company
Board	Surface Transportation Board
BRS	Brotherhood of Railroad Signalmen
Bunge	Bunge Corporation
CBA	collective bargaining agreement
CBCA	Canada Business Corporations Act
CCS	Certain Coal Shippers group
CDA	Canadian Government
CFI	The Canadian Fertilizer Institute
CFR	Code of Federal Regulations
CMA	Chemical Manufacturers Association
CN	Canadian National (Canadian National Railway Company, Grand Trunk Western Railroad Incorporated, and Illinois Central Railroad Company)
CNW	Chicago and North Western Transportation Company and Chicago and North Western Railway Company
COFI	Council of Forest Industries
Conrail	Conrail Inc. and Consolidated Rail Corporation
CP	Canadian Pacific (Canadian Pacific Railway Company, Soo Line Railroad Company, Delaware and Hudson Railway Company, Inc., and St. Lawrence and Hudson Railway Company Limited)
CPPA	Canadian Pulp and Paper Association
CPUC	California Public Utilities Commission
CR	Conrail Inc. and Consolidated Rail Corporation
CRCIC	CrossRoad Carriers Intermodal Co.
CSX	CSX Corporation and CSX Transportation, Inc.
CURE	Consumers United for Rail Equity
DM&E	Dakota, Minnesota & Eastern Railroad Corporation
DOD	U.S. Department of Defense
DOJ	U.S. Department of Justice
DOT	U.S. Department of Transportation
Dow	Dow Chemical Company
DT&I	Detroit, Toledo & Ironton Railroad Company

DuPont	E. I. Du Pont de Nemours and Company
EEI	Edison Electric Institute
EIS	Environmental Impact Statement
Enron	Enron Corporation
EPO	Enterprise Products Operating L.P.
ESHR	Eastern Shore Railroad, Inc.
FERC	Federal Energy Regulatory Commission
FGLK	Finger Lakes Railway Corp.
FMRS	Farmrail System, Inc.
FOA	final offer arbitration
Fed. Reg.	*Federal Register*
FRA	Federal Railroad Administration
FTC	Federal Trade Commission
GHP	Greater Houston Partnership
GRR	Georgetown Railroad Company
HERE	Hotel Employees and Restaurant Employees Union
HRC	Housatonic Railroad Company, Inc.
IAM	International Association of Machinists and Aerospace Workers
IBB	International Brotherhood of Boilermakers, Iron Ship Builders, Blacksmiths, Forgers and Helpers
IBEW	International Brotherhood of Electrical Workers
IC	Illinois Central Railroad Company
ICC	Interstate Commerce Commission
ICCTA	ICC Termination Act of 1995
IMC	intermodal marketing company
IMC Global	IMC Global Inc.
IMPACT	Committee to Improve American Coal Transportation
KCS	The Kansas City Southern Railway Company
LFTG	Lumber Fair Trade Group
MARC	MARC Commuter Train Service
Mayo	Mayo Foundation d/b/a Mayo Clinic
MDDOT	Maryland Department of Transportation
Metra	Commuter Rail Division of the Regional Transportation Authority of Northeast Illinois d/b/a Metra
MIDOT	Michigan Department of Transportation
MKT	Missouri-Kansas-Texas Railroad Company
MMM	Martin Marietta Materials, Inc.
MP	Missouri Pacific Railroad Company
MSE	Mississippi Export Railroad
MTMCTEA	Military Traffic Management Command Transportation Engineering Agency
NAFCA	North America Freight Car Association
NAFTA	North American Free Trade Agreement
NCCC	National Carriers' Conference Committee
NCFO	National Council of Firemen and Oilers/SEIU
NEPA	National Environmental Policy Act
NGFA	National Grain and Feed Association
NITL	National Industrial Transportation League
NJT	New Jersey Transit Corporation

NMA	National Mining Association
NPR	notice of proposed rulemaking
NS	Norfolk Southern (Norfolk Southern Corporation and Norfolk Southern Railway Company)
NRLC	National Railway Labor Conference
NYCEDC	New York City Economic Development Corporation
OEEAA	Office of Economics, Environmental Analysis, and Administration
OKDOT	Oklahoma Department of Transportation
ORDC	Ohio Rail Development Commission
ORDOT	Oregon Department of Transportation
PANYNJ	Port Authority of New York and New Jersey
PHTC	Pennsylvania House Transportation Committee
POCCA	Port of Corpus Christi Authority of Nueces County, TX
POHA	Port of Houston Authority
POPM	Port of Pascagoula, MS (Jackson County Port Authority)
POPO	Port of Portland, OR
POSW	Port of Seattle, WA
PPG	PPG Industries, Inc.
PPL	PPL Generation, LLC and PPL Montana, LLC
P&G	The Procter & Gamble Company
PRB	Powder River Basin
PSA	purchase of service agreement
RCAF	Rail Cost Adjustment Factor
Reagent	Reagent Chemical & Research, Inc.
RIA	the 1998 AAR/ASLRRA "Railroad Industry Agreement"
RLA	Railway Labor Act
RLD	Rail Labor Division of the Transportation Trades Department AFL-CIO
RNDP	Railroads for National Defense Program
ROE	Return on Equity
ROI	Return on Investment
SAP	Service Assurance Plan
SCRRA	Southern California Regional Rail Authority
SCS	Subscribing Coal Shippers group
SEA	Section of Environmental Analysis
SEIU	Service Employees International Union
SF	Santa Fe Pacific Corporation and The Atchison, Topeka and Santa Fe Railway Company
Shell	Shell Oil Company and Shell Chemical Company
SIP	Safety Integration Plan
SMW	Sheet Metal Workers International Association
SP	Southern Pacific Rail Corporation, Southern Pacific Transportation Company, St. Louis Southwestern Railway Company, SPCSL Corp., and The Denver and Rio Grande Western Railroad Company
STB	Surface Transportation Board
STRACNET	Strategic Rail Corridor Network
TCIU	Transportation•Communications International Union

TCS	Texas Crushed Stone Company
Tex Mex	Texas Mexican Railway Company
TFI	The Fertilizer Institute
TIA	Transportation Intermediaries Association
TMI	Twin Modal, Inc.
TPA	test period average
TWU	Transport Workers Union of America
UP	Union Pacific (Union Pacific Corporation and Union Pacific Railroad Company)
URPA	United Rail Passenger Alliance, Inc.
USCPTA	U.S. Clay Producers Traffic Association, Inc.
USDA	U.S. Department of Agriculture
UTU	United Transportation Union
UTU/GO-386	UTU — General Committee of Adjustment (represented by Mr. John D. Fitzgerald, General Chairman for UTU on lines of BNSF)
WB&GC	Wheat, Barley & Grains Commissions group
WCL	Wisconsin Central Ltd.
WCS	Wisconsin Central System (Wisconsin Central Ltd., Fox Valley & Western Ltd., Sault Ste. Marie Bridge Company, Wisconsin Chicago Link Ltd., and Algoma Central Railway, Inc.)
WCSC	Western Canadian Shippers' Coalition
Weyerhaeuser	Weyerhaeuser Company
Williams	Williams Energy Services
WJPA	Washington Job Protection Agreement of 1936
WTO	World Trade Organization

APPENDIX B: "SHORT FORM" CITATIONS

ANPR	*Major Rail Consolidation Procedures*, 4 S.T.B. 570 (2000) published at 65 Fed. Reg. 18,021 (2000)
BN/SF decision	*Burlington Northern et al. — Merger — Santa Fe Pacific et al.*, 10 I.C.C.2d 661 (1995)[6]
BN/SF proceeding	*Burlington Northern Inc. and Burlington Northern Railroad Company — Control and Merger — Santa Fe Pacific Corporation and The Atchison, Topeka and Santa Fe Railway Company*, Finance Docket No. 32549
Bottleneck rules	*Central Power & Light Co. v. Southern Pacific et al.*, 1 S.T.B. 1059 (1996), *clarified*, 2 S.T.B. 235 (1997)

[6] This was the decision in which the ICC approved the BN/SF merger application.

BNSF/CN proceeding	*Canadian National Railway Company, Grand Trunk Western Railroad Incorporated, Illinois Central Railroad Company, Burlington Northern Santa Fe Corporation, and The Burlington Northern and Santa Fe Railway Company — Common Control*, STB Finance Docket No. 33842
Carmen II	*CSX Corp. — Control — Chessie and Seaboard C.L.I.*, 6 I.C.C.2d 715 (1990)
Carmen III	*CSX Corp. — Control — Chessie System, Inc. Et Al. (Arbitration Review),* 3 S.T.B. 701 (1998)
City of Palestine	*City of Palestine v. United States*, 559 F.2d 408 (5th Cir. 1977)
CN/IC decision	*Canadian National, et al. — Control — Illinois Central, et al.*, 4 S.T.B. 122 (1999)[61]
CN/IC proceeding	*Canadian National Railway Company, Grand Trunk Corporation, and Grand Trunk Western Railroad Incorporated — Control — Illinois Central Corporation, Illinois Central Railroad Company, Chicago, Central and Pacific Railroad Company, and Cedar River Railroad Company*, STB Finance Docket No. 33556
CSX/NS/CR decision[62]	*CSX Corp. et al. — Control — Conrail Inc. et al.*, 3 S.T.B. 196 (1998) Decision No. 89[63]
CSX/NS/CR proceeding[64]	*CSX Corporation and CSX Transportation, Inc., Norfolk Southern Corporation and Norfolk Southern Railway Company — Control and Operating Leases/Agreements — Conrail Inc. and Consolidated Rail Corporation*, STB Finance Docket No. 33388
CSX/NS/CR Dec. No. 96 ...	*CSX Corp. et al. — Control — Conrail Inc., et al.*, 3 S.T.B 764 (1998) Decision No. 96
Dispatchers	*Norfolk & Western R. Co. v. Train Dispatchers*, 499 U.S. 117 (1991)
Dispatchers II	*American Train Dispatchers Ass'n v. ICC*, 26 F.3d 1157 (D.C. Cir. 1994)

[61] This was the decision in which the Board approved the CN/IC merger application.

[62] The *CSX/NS/CR* decision is also referred to as the *Conrail* decision.

[63] This was the decision in which the Board approved the CSX/NS/CR application (also referred to as the Conrail application).

[64] The *CSX/NS/CR* proceeding is also referred to as the *Conrail* proceeding.

DT&I conditions	*Detroit, T. & I. R. Co. Control*, 275 I.C.C. 455, 492-93 (1950)
Midtec	*Midtec Paper Corporation v. CNW et al.*, 3 I.C.C.2d 171 (1986)
New York Dock	*New York Dock Ry. — Control — Brooklyn Eastern Dist.*, 360 I.C.C. 60 (1979)
NPR	*Major Rail Consolidation Procedures*, 5 S.T.B. 1 (2000) published at 65 Fed. Reg. 58,974 (2000)
SF/SP decisions	*Santa Fe Southern Pacific Corp. — Control — SPT Co.*, 2 I.C.C.2d 709 (1986), 3 I.C.C.2d 926 (1987)[65]
proceeding	*Santa Fe Southern Pacific Corporation — Control — Southern Pacific Transportation Company*, Finance Docket No. 30400
SIPs rulemaking	*Regulations on Safety Integration Plans Governing Railroad Consolidations, Mergers, Acquisitions of Control, and Start Up Operations; and Procedures for Surface Transportation Board Consideration of Safety Integration Plans in Cases Involving Railroad Consolidations, Mergers, and Acquisitions of Control*, STB Ex Parte No. 574, FRA Docket No. SIP-1, Notice No. 1 (Joint Notice of Proposed Rulemaking (STB served Dec. 24, 1998, and published at 63 Fed. Reg. 72,225 (1998))
UP/CNW decision	*Union Pacific Corporation, Union Pacific Railroad Company and Missouri Pacific Railroad Company — Control — Chicago and North Western Transportation Company and Chicago and North Western Railway Company*, Finance Docket No. 32133, Decision No. 25 (ICC served Mar. 7, 1995)[66]
UP/CNW proceeding	*Union Pacific Corporation, Union Pacific Railroad Company and Missouri Pacific Railroad Company — Control — Chicago and North Western Transportation Company and Chicago and North Western Railway Company*, Finance Docket No. 32133
UP/MKT decision	*Union Pacific Corp. et al. — Cont. — MO-KS-TX Co. et al.*, 4 I.C.C.2d 409 (1988)[67]
UP/MKT proceeding	*Union Pacific Corporation, Union Pacific Railroad Company and Missouri Pacific Railroad Company — Control — Missouri-Kansas-Texas Railroad Company, et al.*, Finance Docket No. 30800

[65] These were the decisions in which the ICC denied the SF/SP merger application.
[66] This was the decision in which the ICC approved the UP/CNW merger application.
[67] This was the decision in which the ICC approved the UP/MKT merger application.

UP/MP/WP decision	*Union Pacific — Control — Missouri Pacific; Western Pacific*, 366 I.C.C. 459 (1982)[68]
UP/MP/WP proceeding	*Union Pacific Corporation, Pacific Rail System, Inc., and Union Pacific Railroad Company — Control — Missouri Pacific Corporation and Missouri Pacific Railroad Company*, Finance Docket No. 30000; *Union Pacific Corporation, Pacific Rail System, Inc., and Union Pacific Railroad Company — Control — The Western Pacific Railroad Company*, Finance Docket No. 30000 (Sub-No. 1)
UP/SP decision	*Union Pacific/Southern Pacific Merger*, 1 S.T.B. 233 (1996)[69]
UP/SP proceeding	*Union Pacific Corporation, Union Pacific Railroad Company, and Missouri Pacific Railroad Company — Control and Merger — Southern Pacific Rail Corporation, Southern Pacific Transportation Company, St. Louis Southwestern Railway Company, SPCSL Corp., and The Denver and Rio Grande Western Railroad Company*, Finance Docket No. 32760
UTU	*United Transp. Union v. STB*, 108 F.3d 1425 (D.C. Cir. 1997)

APPENDIX C: CLASS I RAILROADS AND RELATED INTERESTS

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

---

[68] This was the decision in which the ICC approved the UP/MP/WP merger application.

[69] This was the decision in which the Board approved the UP/SP merger application.

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

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

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

AAR contends that the rules proposed in the NPR: would treat railroads more harshly than any other U.S. industry; would jeopardize the very public interest the Board is charged with protecting; and would complicate and delay merger review proceedings that are already cumbersome. The possibility of Board-imposed non-remedial conditions, AAR argues, would be an invitation for expanded litigation in merger proceedings over conditions having nothing to do with anticompetitive effects of a merger. And, AAR adds, the suggestion that merger applicants will be forced to implement competitive "fixes" that are not designed to remedy specific competitive harms is particularly disturbing. This suggestion, AAR argues, portends a departure both from reliance on market forces and from the logic of "cause and effect" remediation that has guided the Board and its predecessor in prior merger cases. AAR insists that, if the Board were to require merger applicants to make structural changes that the companies would not otherwise implement and that are not intended to remedy specific competitive harms, the Board would be engaged in industrial planning, not in promoting competition.[72]

AAR insists that the three "presumptions" on which the rules proposed in the NPR are based (the presumption of unremediable harm, the presumption that permanent non-remedial competitive conditions will be necessary to offset transitory merger-related service disruptions, and the presumption of no significant merger efficiencies) are unwarranted. Sound administrative decisionmaking, AAR argues, should be based on a careful review of evidence in the record, and presumptions should be used only when a solid factual record has been created that supports the inferred facts without the need for any additional factual development. Such a factual record, AAR insists, does not exist in this proceeding. (1) There is, AAR insists, no tangible evidence in the record of this rulemaking to support a presumption that any anticompetitive effects of future mergers could not be remedied through conditions narrowly tailored to address the particular competitive harm. Merger applicants, AAR argues, should be given the opportunity to prove that any merger-related harms can be remedied or that any unremedied losses will be offset by competitive benefits such as increases in intermodal competition.

---

[71](...continued)
merger.

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

(2) AAR insists that, even if the Board were to conclude that the increased focus on service and operating issues in future merger proceedings will not eliminate the risk of service disruptions, it would be unreasonable to require merger applicants to implement permanent structural changes to address or compensate for possible temporary service disruptions. The duration of service-related remedies, AAR argues, should be linked to the duration of the problems; permanent structural changes, AAR contends, are not appropriate as a remedy for temporary service problems. And, AAR adds, a requirement that merger applicants implement structural changes in rail-to-rail competition would be counterproductive if the mandatory competitive conditions had the effect of compounding service disruptions. (3) AAR insists that, just as we should not presume that efficiency gains would necessarily flow from a future merger, we should also not presume that such gains will not occur. Our rules, AAR argues, should call upon applicants to make convincing demonstrations of any efficiencies that will flow from future combinations. And the Board, AAR adds, should make clear that it will recognize such efficiency gains, including any enhanced intermodal competition that they generate, as public benefits.

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

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

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

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

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

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

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

Cumulative impacts and crossover effects. AAR is concerned that the NPR's treatment of cumulative impacts and crossover effects places too much weight on speculation; merger applicants, AAR explains, cannot realistically be expected to quantify, with precision, the public benefits of a proposed merger in light of anticipated downstream effects (AAR explains that, even if the merger applicants can correctly anticipate which other firms will seek to combine, they cannot know how the proposed combination will be structured, where the downstream merging firms will redirect traffic, what efficiencies the downstream merger will hope to achieve, or any number of other characteristics of the downstream transaction that would be critical to any quantitative analysis). And, AAR adds, the proposal that the merging parties identify new conditions that might be required as the result of future mergers is particularly inappropriate (AAR explains that, given the broad range of variables that would have to be anticipated to propose future conditions related to future mergers, such "springing conditions" proposed by the merger applicants could well be inapplicable or irrelevant to the precise concerns raised by future transactions). AAR insists that it is not sound policy to require merger applicants to propose contingent conditions based on speculation about the future.

---

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

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

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

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

Acquisition premium. AAR contends that our merger rules should not address the treatment of any "acquisition premium" associated with future mergers. AAR explains that, to the extent a

---

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

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

proposed transaction raises financial issues that bear upon the public interest, those issues should be examined on a case-by-case basis.

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

Oversight issues. (1) AAR contends that, under our oversight authority, we should not impose penalties in the event that predicted merger benefits do not materialize. AAR explains: that it is in the interest of the merging parties themselves to achieve projected efficiencies and cost savings; that merging parties are penalized in the marketplace if they are unable to achieve these efficiencies and savings; and that arbitrary penalties would only add to the financial burden of a railroad that was unable to achieve anticipated efficiencies and savings.

(2) AAR contends that we should not establish specific and inflexible reporting requirements during the oversight period. The Board, AAR believes, should impose reporting requirements on a case-by-case basis; and, AAR adds, by focusing on data that is relevant to specific mergers, the Board will be able to carry out its oversight responsibilities most effectively and without creating unnecessary and costly reporting burdens on the merging parties.

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

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

Environment and safety: DOT/AAR Highway-Rail Crossing Inventory. AAR insists that we should not require merger applicants to provide up-to-date data to the DOT/AAR Highway-Rail

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

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

NPR § 1180.1(e), third sentence. The third sentence of NPR § 1180.1(e) states that "the Board respects the sanctity of collective bargaining agreements and will look with extreme disfavor on overrides of collective bargaining agreements except to the very limited extent necessary to carry out an approved transaction." NRLC notes that 49 U.S.C. 11321(a) provides that a carrier "is exempt from the antitrust laws and from all other law * * * as necessary to let [the carrier] carry out" an approved transaction. NRLC insists that, although Congress can change the "self-executing" statutory necessity standard, the Board has no power to modify that standard or to create presumptions against its application.[77] NRLC therefore contends that we should either delete the third sentence entirely (which, NRLC advises, would leave it to 49 U.S.C. 11321(a) to state the necessity standard), or, if we decide to include the necessity standard in the regulation, do so in the even-handed words of the statute itself (which, NRLC advises, provides that CBAs are not affected by the approval of a merger except "as necessary * * * to carry out" the authorized transaction). NRLC insists that the third sentence: (1) reflects an unfortunate choice of words that could serve only to confuse and mislead arbitrators and others in the future application of the Board's settled standards;[78] and

(2) is at odds with the purpose of the proposed new Consolidation Procedures generally, which NPR § 1180.1(a) indicates is "to ensure balanced and sustainable competition in the railroad

---

[76] NRLC, an unincorporated association of 54 railroads (including all of the Class I railroads), filed its pleadings (its initial comments, reply comments, and rebuttal comments) on behalf of: all of its member railroads (except Canadian National's U.S. affiliates); and the National Carriers' Conference Committee (NCCC, which represents railroads in national multi-employer collective bargaining).

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

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

industry" and improved railroad service through consolidations that yield "substantial and demonstrable public benefits that cannot otherwise be achieved."[79]

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

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

NPR § 1180.1(e) commentary: relocation and other rules. Our NPR § 1180.1(e) commentary further states that "we have proposals before us, which we are seriously considering, for new rules to govern contentious issues, such as the need for employees to relocate in order to retain their jobs."[82] (1) NRLC indicates that it assumes that, if we decide to propose additional rules, we will do so by further Notice of Proposed Rulemaking in accordance with the Administrative Procedure Act.

(2) NRLC also indicates that, because we have not yet proposed any rule regarding relocation of employees, NRLC will not speculate as to what rule we might propose in an appropriate proceeding under the Administrative Procedure Act.

---

[79] NRLC insists, in essence: that enhancing competition and improving service will require operational changes; that such changes will necessarily give rise to issues as to the selection and assignment of forces, such as adjustment of seniority, scope and work jurisdiction rules, and the assignment of employees in a consolidated operation to work under a single CBA; and that such issues will not be resolved satisfactorily without CBA overrides (because, without such overrides, carriers will be relegated to the "almost interminable" procedures of the Railway Labor Act to attempt to secure changes necessary to implement authorized transactions, with the threat of strikes at the end of the process).

[80] *See NPR* at 17 first full paragraph.

[81] *See NPR* at 16-17.

[82] *See NPR* at 17 first full paragraph.

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

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

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

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

[83] *See NPR* at 150.

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

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

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

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

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

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

accelerate the merger review process, by reducing to a maximum of 1 year (which would include the pre-filing period and a 6-month period for any required evidentiary proceedings) the deadline for Board action on a merger application.

Regulatory delay causes harm. BNSF contends that the merger review time frame proposed in the NPR would create significant harm for the rail industry and shippers. (1) BNSF argues that, although there is no reason to delay the benefits of a "good" merger for shippers, extended procedural schedules at best defer those benefits and at worst can lead to the complete loss of those benefits because good mergers are either not proposed or are undone by the delay and uncertainty of the review process.

(2) BNSF argues that, during the period when a merger is pending before the Board, the applicants and other parties are placed in a regulatory limbo, unsure how to plan for the future or how to respond to other opportunities.

(3) BNSF argues that capital markets cannot tolerate uncertainty or delay. The mere threat of an extended regulatory proceeding, BNSF warns, would cause capital to seek other investment opportunities and place downward pressure on railroad stocks. And, BNSF adds, in the rail industry, capital markets already see a merger review process that takes much longer than the merger review process in other industries.

(4) BNSF argues that, given the "time value" of money, the length of the review process can, by delaying the realization of merger benefits, turn a "good" merger into a "bad" merger or lead railroads to choose not to pursue good mergers.

Evidentiary procedures. (1) BNSF contends that FERC was able to improve its merger processing time significantly when it narrowed the scope of its merger review and defined more precisely for applicants what issues must be addressed in any application. BNSF further contends that FERC has also been able to process most mergers without the need to supplement the initial filings of the parties with third-party discovery, depositions, or other evidentiary proceedings. The Board, BNSF insists, should do the same.

(2) BNSF contends that the mere size of a merger should not dictate the time it takes to analyze the merger. BNSF adds: that large mergers that do not raise difficult competitive issues often are handled by DOJ/FTC and other agencies in only a few months; and that many agencies are able to process mergers without significant evidentiary proceedings, relying instead on paper hearings without discovery. The Board, BNSF insists, should adopt this approach, so that rail mergers that do not raise competitive or other complicated issues can be handled on an expedited basis.

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

---

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

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

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

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

The presumption that future rail mergers will not produce significant public benefits. BNSF contends that there is no basis for the presumption that future rail mergers will not produce significant public benefits. BNSF argues that, although this presumption rests on the premise that the problem of excess capacity and the need to rationalize the rail industry have been resolved, the reality of the matter is that the rail industry continues to face four significant and interrelated problems: the need to add capacity; the need to become more efficient in its operations; the need to improve service to shippers; and the need to earn a return that is adequate to attract the capital necessary to address the first 3 needs. BNSF further contends that mergers can play a crucial role in solving these problems, but only (BNSF adds) if artificial regulatory barriers to good mergers are not erected. (1) BNSF contends that the most efficient and timely way to increase capacity is to better utilize existing assets. BNSF further contends that a merger can expand capacity at the least possible cost, because a merged railroad (which will be able to make decisions based upon the requirements of its entire network) will have a better ability to manage its assets to maximize capacity than two railroads acting separately or through an alliance or joint venture.

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

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

(4) BNSF contends that a regulatory policy that continues to favor mergers will enable railroads to attract capital by reassuring investors that railroads will be free to pursue their preferred business strategies, as long as they will not eliminate competition for 2-to-1 shippers or threaten shippers with service problems. BNSF insists that industries that depend upon capital investment in long-lived

assets require the assurance that regulators will not restrict their ability to respond to market requirements unless, and then only to the extent, necessary to prevent identifiable and cognizable harms to the public interest.

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

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

The presumption that future rail mergers will cause transitional service harms. BNSF contends that there is no basis for the presumption that future rail mergers will cause transitional service harms. (1) BNSF argues that the "unique" problems of the UP/SP and Conrail transactions are not likely to recur in a future end-to-end merger. BNSF explains that the UP/SP transaction involved the acquisition of a railroad that had under-invested for years, and that the Conrail transaction involved the division of the assets of an existing railroad.

(2) NSF argues that the detailed SAPs and post-merger monitoring proposed by the NPR will ensure that merging railroads engage in a more detailed analysis of potential service problems and that interested parties have the ability to probe those plans. BNSF adds that it has proposed that merger applicants negotiate meaningful service guarantees with their shippers, and provide evidence that their post-merger plans will generate the capital to support the infrastructure improvements necessary for the benefits of the proposed merger to be realized. BNSF claims that these two proposals, if adopted, would further lessen the likelihood of future major service disruptions.

(3) BNSF argues that merged railroads will have every incentive to maintain service quality and to learn from the problems of the past. BNSF explains that UP, CSX, and NS paid a very high price, in lost revenues, damages, and credibility with their shippers, for their service problems.

(4) BNSF argues that offsetting potential and transitory service harms with concrete and permanent competitive conditions does not appropriately match problems with remedies. BNSF insists, rather, that any remedies should provide shippers with alternate access during the period in which the merged railroad is experiencing merger-related service problems.

Imposing a substantially heavier burden on future rail mergers. BNSF contends that imposing a substantially heavier burden, including the requirement of unrelated competitive enhancements, on future rail mergers would be bad policy and bad law. The Board, BNSF argues, should limit its review to imposing specific conditions designed to offset or remedy specific merger-related harms. (1) BNSF contends that there is no basis for requiring merging railroads to offer unrelated "competitive enhancements" that could deter future mergers that would serve the public interest. BNSF insists that rail mergers can be structured to mitigate identified competitive harms, and that there is no reason to believe that future mergers will reduce competition in ways that cannot be identified or mitigated. BNSF further insists that the available evidence indicates that, in past mergers, Board-imposed and/or privately negotiated trackage, haulage, and other conditions to preserve competition have been effective.

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

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

(4) BNSF contends that the proposal to require applicants to incorporate proposals for enhanced competition is a bad idea. (a) BNSF argues that, if the Board is convinced that some major change in its regulatory policy (*e.g.*, an equal access requirement) would yield significant public benefits, the efficacy of that policy change will depend primarily on its scope. It would make little sense and do little good, BNSF insists, to impose the new policy selectively on railroads that propose to merge. (b) BNSF argues that adopting a policy of approving mergers only if the applicants agree to adopt a major change in their methods of operation that they consider highly undesirable is much more likely to discourage railroads from proposing socially beneficial mergers than to produce a legal regime in which many railroads agree to the change as a condition on approval of a merger. (c) BNSF argues that the proposed policy would require the Board to determine what level of enhancements are necessary to offset possible harms and then allocate those enhancements to shippers who are not, by definition, directly affected by the potential harm. BNSF insists that the unfairness inherent in providing benefits to one class of shippers rather than another is a key reason why remedies should be designed to offset specified harms to specific groups. (d) BNSF argues that, if some shippers would suffer cognizable competitive harms as a result of a proposed merger, relief should be crafted to address those specific harms. The pursuit of broader remedies, BNSF insists, would be unfair to the harmed shippers and would raise very significant questions about the future regulatory structure of the rail industry. (e) BNSF argues that no agency should consider adopting

a major change in its regulatory policy (*e.g.*, an equal access rule) without considering carefully and in detail all of the implications and effects of adopting the new policy. And that, BNSF insists, cannot be done as an add-on to a merger review proceeding; rather, BNSF adds, it requires a separate rulemaking in which the agency addresses with care the scores of important issues that are raised by such a proposed policy change.

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

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

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

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

Downstream and crossover effects. (1) BNSF contends that, because merger applicants ought to address concrete (but only concrete) downstream and crossover effects of a proposed merger, merger applicants should be required: (i) to demonstrate that they will not create crossover effects by exporting service problems to other railroads; and (ii) to assess any new competitive problems with their merger that would be created by any subsequent merger that is filed with the Securities and Exchange Commission (SEC) by the time the first round of intervenor comments is due under the procedural schedule.

(2) BNSF contends that the NPR's concern with downstream effects runs directly contrary to the presumption that future mergers will not produce competitive and other public benefits. A "responsive" merger, BNSF explains, would be "necessary" only if the first merger creates new competitive pressures.

(3) BNSF contends that, if a pending merger would produce public benefits, the Board should not reject or impose conditions on the merger simply because a potential responsive merger might be harmful to the public interest. Rather, BNSF insists, the Board should reject or condition the responsive merger if it is actually filed.

(4) BNSF contends that injecting downstream and crossover issues, without appropriate limits, into the merger review process would inevitably result in an abuse and prolongation of the regulatory process. Opposing parties, BNSF explains, would have an incentive to posit responses and problems simply to delay, complicate, and defeat a pending merger proposal.

(5) BNSF contends that, although the NPR can be read to suggest that the Board has "preferred outcomes" in any further consolidation of the rail industry, experience teaches that the selection of merger partners is best left to the forces of the market, subject to the protection of competition.

(6) BNSF contends that, although the NPR can be read to suggest that the Board favors a "competitive balance" in which railroads compete at the margins but are guaranteed a basic market share, the reforms of the 4R and Staggers Acts were explicitly intended to end the days when regulators allocated markets.

(7) BNSF contends that, if the Board has views on the appropriate regulatory structure of the industry (*e.g.*, open access issues), those views should, to the extent allowed by statute, be addressed through a rulemaking of general applicability.

Post-merger oversight; future conditions; projected benefits. BNSF contends that merger applicants should not be subject to the future imposition of conditions to their mergers or required to guarantee the specific projected benefits of a merger. BNSF insists, rather, that the Board should limit its post-merger oversight to a review of: whether the conditions imposed to maintain shippers' competitive options have worked; whether service assurance plans have been followed and updated to maintain service integrity for shippers, shortline and regional carriers, and ports; and whether temporary remedies are required to alleviate any temporary merger-related service problems that may have developed. (1) BNSF contends that merger applicants and other parties require assurances that Board action with respect to any merger will be final, except as necessary to remedy any transitional service problems or any competitive conditions that prove to be inadequate. BNSF further contends that, although the use of the Board's post-merger conditioning power to remedy these narrow categories of merger-related problems could be appropriate in some circumstances (because it would be crafted to preserve the service and competitive results promised by the merger applicants and approved by the Board), the use of the Board's post-merger conditioning power to impose new conditions on a merger in response to "unforeseen circumstances" or subsequent mergers would not be appropriate. BNSF explains that the "unforseen circumstances" test is so broad that a merged railroad would always be subject to the risk that the Board would impose conditions that would not have been acceptable as an original precondition to the merger. BNSF further explains that, if a subsequent merger takes place, any problems created by the second merger should be remedied only through conditions imposed on that merger, without requiring a previously merged railroad to contribute to the resolution of service or competitive problems that were created by the second merger.

(2) BNSF contends that a requirement that merger applicants propose how they would be held accountable for the benefits and service improvements they claim would be overly broad, because (BNSF explains) such a requirement would mix areas where continued Board oversight is necessary and appropriate (*i.e.*, competitive conditions and transitional service problems) with areas where continued Board oversight would be harmful and contrary to sound public policy (*i.e.*, anything beyond competitive conditions and transitional service problems). BNSF further contends that, although it is in the applicants' best interest to do all they can to make the service improvements and implement the efficiencies of the transaction as seamlessly as possible, the applicants cannot be held

responsible for unforeseen developments in their shippers' businesses, in the competitive dynamics of the industry, or in the economy as a whole that may adversely affect their projections. And, BNSF adds, the proposed "accountability" standard could have the result of discouraging the merged railroad from rethinking its plans in light of changing circumstances; the proposed review, BNSF explains, would encourage railroads to take unwise actions solely to reach regulatory benchmarks.

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

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

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

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

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

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

of service assurances or guarantees distinguish carefully between merger-related and non-merger-related problems.

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

Open gateways. BNSF agrees that merger applicants should be required to demonstrate how access to markets and viable service offerings through major open gateways would be maintained operationally and financially. BNSF insists, however, that this requirement should apply only to points directly affected by the merger; there is, BNSF argues, no merger-related policy basis for extending this requirement to gateways not affected by a merger; and, BNSF warns, if railroads are required to keep all gateways open, the ability of railroads to improve service for rail shippers by selecting the most efficient routings and focusing volume onto through trains that pass through, rather than operate to, interchanges would be hampered. BNSF also argues: that the final rules should contain a general standard calling for existing major gateways to be maintained as open on an operational and economic basis; that, however, the Board should not attempt to define by regulation how it will approach the many factual patterns that this general standard may raise in future merger proceedings; and that the final rules should also recognize that an open gateway requirement will need the full operational cooperation of merging and non-merging carriers, including Class II and Class III carriers (non-merging carriers, BNSF explains, could close gateways economically or operationally even if the merging carriers preferred to keep those gateways open).

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

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

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

Labor issues. (1) BNSF agrees that merger applicants should be required to file additional employee impact information, including cross-border data for transnational mergers.

(2) BNSF contends that, because Congress has defined when "cramdown" conditions are to be used and the scope of such conditions, any change in this area should come from Congress.

(3) BNSF indicates that it supports direct negotiations between unions and the merger candidates as the best mechanism for resolving labor issues. And, BNSF adds, if such negotiations are to succeed, the Board should not involve itself in reviewing or approving voluntary labor implementation agreements.

Market data in support of a merger application. (1) As respects proposals that would require merger applicants to file expanded market data (including detailed market share data), BNSF indicates that, although it would not oppose reasonable requirements in this area, the requirements should reflect what is practical from a data standpoint and should recognize intermodal competition and the Board's precedents on the types of competitive effects that need to be remedied. BNSF explains that, because of the unique operating characteristics of the rail industry, traditional market share analysis is not appropriate in that industry, where a large number of shippers have always been sole-served and where many markets are subject to competition but served by a single carrier due to long-term contracts. Our merger review, BNSF insists, should therefore look to the loss of existing competitive alternatives, not to changes in market shares.

(2) BNSF asks that we reject any implication that we will use market data to ensure that a merger does not affect the market shares of other railroads. BNSF explains that, because the competition created by mergers is good for the general public and shippers, no railroad should be insulated from the changes in market shares that such competition brings.

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

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

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

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

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

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

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

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

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

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

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

requirements for the prima facie case of applicants in transnational mergers;[89] or to increase complexity and reduce the likelihood of settlements so that merger proceedings will inevitably require the maximum statutory period.[90]

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

(2) CN contends that the assumptions "embedded" in the proposal to require conditions to enhance competition may be stated as follows: (a) any merger between two Class I railroads will always entail irremediable reductions in competition and a risk of significant service disruptions; and (b) the combined negative values of these two effects will always outweigh the combined positive values of the increased efficiencies, improved service, and increased competition arising from the merger itself. CN insists, however, that these assumptions are not supportable. CN explains: that parties enter into mergers in order to increase efficiency and improve service, and those results in turn increase competition against other railroads and other modes; that quantified direct public benefits found by the Board in recent major mergers (largely productive efficiencies) have been in the hundreds of millions of dollars, and even these do not capture the unquantified direct public benefits such as service improvements and increases in competition; and that, therefore, there is no basis for finding that the direct public benefits of every future major merger will never outweigh any unremediable reductions in competition and unavoidable significant service risks, even assuming *arguendo* that every future merger will present such reductions and risks. And, CN adds, there is simply no basis for a general finding that every future merger between Class I railroads will cause reductions in competition that cannot be directly and proportionately remedied.

(3) CN contends that the "enhancement" requirement rests on an insupportable regulatory finding that precludes case-by-case examination of competitive and market realities. CN further contends that the result (which, CN insists, would be detrimental to all rail constituencies) would be to impose costs on transactions through "enhancement" conditions that are not in fact necessary to

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

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

make the transaction consistent with the public interest. CN therefore concludes that we should not require enhancement through conditions, separate from the enhanced competition that flows from the increased efficiency and service improvements that result from the merger itself. CN suggests, however, that we could allow enhancement through conditions as an option for applicants in the unlikely event that there are identified competitive harms that are not directly and proportionately remediable. And, CN adds, it would not object if the new merger rules were to provide that competition-enhancing conditions will be examined on a case-by-case basis if and when merger applicants present them.

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

3-to-2 issues. CN indicates that it has no objection to a requirement that merger applicants list all 3-to-2 points. CN contends, however, that we should make clear that the listing of 3-to-2 points does not carry with it any basic change in the Board's approach to 3-to-2 reductions.

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

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

to merge with whom, or what the hypothetical benefits and harms of such predicted mergers would be in relation to the benefits or harms of the pending merger.

(3) CN suggests certain action that it claims could reasonably be taken with respect to downstream transactions. (a) CN contends that, if we believe that we need to become more cognizant of issues likely to arise in connection with transcontinental mergers, we should conduct a seminar focused on issues that relate to transcontinental mergers as distinct from other types of mergers. CN adds that we could invite parties to provide information or identify ways of analyzing the kinds of efficiencics that a transcontinental railroad could bring, the existing or potential demand for transcontinental rail services, the bearing of globalization and international trade, ways of identifying relevant markcts for competition analysis, the significance of the vigorous competition in two-railroad markets that exists today, the framework for analyzing possible effects on incentives or ability to exercise market power, labor issues, issues of managerial control and customer responsiveness, the significance of new information technologies, and the likelihood and consequences of failure of one of two systems. (b) As respects the one-case-at-a-time rule, CN contends that we should either: (i) leave the existing rule in placc but broaden the class of persons entitled to petition for its waiver; or (ii) repeal the rule and leave to case-by-case determinations the extent to which, if at all, parties should have the opportunity, or merger applicants should be required in the first instance, to address announced downstream transactions.

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

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

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

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

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

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

(2) CN rejects a number of arguments respecting the applicability of NAFTA. (a) CN rejects the argument that NAFTA's investor protections extend only to shareholders. NAFTA, CN contends, clearly bars measures that discriminate between different NAFTA companies (and not just different NAFTA shareholders of a single company) based on the companies' places of incorporation. (b) CN rejects the argument that our merger review is not subject to NAFTA because such merger review is either a "standard," a "technical regulation," or a "conformity assessment procedure" (as those terms are used in the NAFTA context). Our merger review, CN insists, is neither a standard, a technical regulation, nor a conformity assessment procedure. And, CN adds, NAFTA's guarantee of non-discriminatory national treatment would apply even if our merger review were a standard, a technical regulation, or a conformity assessment procedure. (c) CN rejects the argument that we must place the burden of coming forward on Canadian carriers because only Canadian carriers are positioned to bring forward information concerning Canadian rail regulation. Canadian rail regulation, CN explains, is not some kind of hidden law; rather, CN notes, information concerning Canadian rail regulation is public and is readily available to all participants in a merger proceeding.

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

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

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

(3) CN contends that, even if there were issues of cooperation or performance attributable to foreign ownership that could not reasonably be left to the NAFTA transnational safety mechanisms, such issues would not be specific to mergers, and the merger rules would therefore not be the place to address them.

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

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

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

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

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

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

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

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

in a shareholder vote on the acquirer's merger proposal. Each of these arrangements, CN suggests, amounts to an ownership restriction.

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

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

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

Transnational transactions: national defense. CN indicates that it does not object to NPR § 1180.1(l), which would require all applicants, domestic or foreign, to discuss and assess the national defense ramifications of their proposed merger. CN notes, however, that NPR § 1180.11(c), which applies only in the case of transnational mergers, also requires applicants to discuss national defense ramifications. CN claims that, if this separate requirement has any additional meaning, it presumably would require something more than is required of domestic applicants in order to establish a prima facie case. CN contends that an additional requirement for unspecified defense elements in a foreign applicant's prima facie case would be unreasonable. Congress, CN argues, obviously did not presume when it adopted NAFTA that free trade in the provision of land transportation and investments in land transportation would be generally inconsistent with the public interest in national defense. Indeed, CN continues, Congress assumed the opposite, with the safeguard of the NAFTA provision that allows signatories to limit free trade to protect national security. CN contends: that a U.S. agency should impose defense-related requirements that discriminate against NAFTA applicants only when demonstrably necessary; and that any such demonstration should come in the first instance from the Department of Defense. CN further

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

contends that applicants in transnational mergers cannot reasonably be expected to identify defense concerns that are not suggested by experience[93] and that DOD has not previously raised.[94]

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

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

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

CANADIAN PACIFIC. CP[95] agrees that it is appropriate to update our merger regulations to take account of fundamental changes in the structure of the North American rail industry and the business environment in which railroads and their customers operate. CP adds, however, that the proposed regulations relating to the Board's analysis of competition issues and the "downstream" impacts of future consolidations contain elements that are of significant concern to CP.

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

(1) *NPR § 1180.10(a) and (c): technical matter.* CP notes that NPR § 1180.10(a) contemplates analyses of anticipated service improvements based upon benchmarks "for the year immediately preceding the filing date of the application." CP further notes that NPR § 1180.10(c) calls for benchmark analyses of dwell time and on-time performance for principal yards and terminals based upon information "for one year prior to the transaction." CP asks that these proposals be clarified. CP explains: that it is not clear whether the NPR § 1180.10(a) "year" refers

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

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

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

to the calendar year preceding the year in which the application is filed or the 12-month period immediately preceding the filing date of the application; that, however, either such "year" could present a problem (because statistics for the full calendar year preceding the filing date might not be available if an application were filed in the early months of the year, and because it is doubtful that statistics for the full 12 months immediately preceding the filing date would ever be readily available; and that, as respects NPR § 1180.10(c), it is not clear how applicants would fix the date of "the transaction" for purposes of determining the "year prior to the transaction." CP therefore asks that we modify the language of NPR § 1180.10(a) and (c) to provide for the use of benchmark statistics "for the most recent twelve-month period for which data is available."

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

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

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

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

(2) *NPR § 1180.6(b)(11): another technical matter.* CP contends: that operating plans and capital spending proposals set forth in consolidation applications are based upon foreseeable circumstances at the time the application is filed; that changes in customer demand, unanticipated

capital needs, and competitive responses by other carriers might dictate that the merged carrier modify or postpone operating changes or investments identified as "public benefits" in the application, or pursue different (but perhaps equally beneficial) actions in the years immediately following the merger; that, for these reasons, a regulation that required merging carriers to adhere strictly to every element of their operating plan, or to implement their merger in precisely the manner described in the application, would not promote the public interest; and that, therefore, the "additional measures" contemplated by NPR § 1180.6(b)(11) should be invoked only where the merger, as implemented, fails to deliver substantial public benefits. CP therefore asks that we clarify that NPR § 1180.6(b)(11) is not intended to impede the ability of merging carriers to react appropriately to changing business conditions.

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

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

(3) CP insists: that future merger cases should be decided on the basis of record evidence, not unsupported assumptions; that we should adhere to our longstanding preference for achieving public interest objectives through private industry initiatives rather than extensive regulation; and that it is illogical to require conditions that permanently restructure the competitive balance as a means of offsetting temporary post-merger service failures. And, CP adds, the introduction of new operations by additional rail carriers on applicants' lines (particularly in terminal areas) during the implementation period would, if anything, increase the risk of congestion and service problems.

(4) CP therefore contends that we should delete the presumptions that future mergers are likely to result in anticompetitive effects and service disruptions, as well as the requirement that applicants must include provisions for enhanced competition in all cases. CP also contends that, in place of

these provisions, we can include language indicating that we will consider carefully, on a case-by-case basis, the impact of future consolidations on product and geographic competition, and the likelihood that service may be disrupted during the implementation stage of the transaction. CP further contends that we could also include language providing that, if the record shows that a particular merger would have adverse impacts that were not directly mitigated by conditions or offset by other demonstrable public benefits, voluntary measures by applicants to supplement the competitive choices of shippers would provide a means to satisfy the public interest balancing test.

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

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

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

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

(2) CP further contends that NPR § 1180.6(b)(12)(ii) and (iii) would have a number of undesirable practical effects on the conduct of future consolidation cases. CP explains: that, in order to obtain the information required by those provisions, merger applicants would seek discovery of other Class I carriers' internal studies or Board of Directors presentations regarding possible merger partners or the potential benefits of various consolidation transactions; that railroad CEOs would be pressed in depositions to divulge information regarding their discussions with other carriers concerning merger or other joint strategic ventures; that exposing a non-applicant carrier's ongoing business deliberations to discovery by its competitors would have a serious chilling effect on the ability of carriers to pursue strategic initiatives on a confidential basis; and that premature disclosure of merger negotiations during the STB discovery process could also raise difficult issues under the securities laws. And, CP adds, even if such discovery were not permitted, a requirement that applicants quantify the impacts of hypothetical future mergers, and that other parties respond to such speculative evidence, would unduly complicate and prolong future consolidation cases.

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

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

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

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

(3) CP contends, however, that NPR § 1180.1(k)(1) contains certain nationality-based requirements that, by imposing unique evidentiary burdens on "foreign" applicants, would violate NAFTA. CP explains: that NAFTA prohibits discrimination between U.S. and Canadian parties in connection with corporate control and investment transactions; that, in particular, NAFTA requires the United States to accord Canadian investors treatment no less favorable than it accords, in like

circumstances, to its own investors with respect to the establishment, acquisition, expansion, management, conduct, operation, and sale or other disposition of investments; and that, furthermore, NAFTA prohibits the U.S. from imposing discriminatory performance requirements relating to Canadian acquisition or operation of investments in the U.S., and requires the U.S. to accord Canadian service providers, including transportation providers, treatment no less favorable than it accords to its own service providers. NAFTA, CP argues, allows U.S. government agencies to impose application requirements and standards on Canadian and Mexican applicants only to the extent that such requirements and standards apply to U.S. applicants as well.

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

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

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

(2) CP notes that NPR § 1180.6(b)(9) would require that the Employee Impact Exhibit include effects on applicant carrier employees located outside the United States. *See NPR* at 31. CP warns that, although it is reasonable for the STB to seek "full system" labor impact information for purposes of understanding the overall effects of a cross-border transaction, the filing of such data could motivate non-U.S. employees to petition the STB for compensation or other relief to mitigate harms they might experience as a result of the merger. CP therefore asks that we clarify that this informational requirement is not intended to signal an assertion of jurisdiction by the Board over the extraterritorial labor impacts of future transnational mergers, and that potential impacts of such transactions on Canadian (or Mexican) employees remain the sole province of Canadian (or Mexican) law.

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

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

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

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

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

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

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

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

Downstream effects; NPR § 1180.1(i). CSX agrees that, because the next Class I merger may necessitate a response by the other major railroads, that merger will have to be considered in light of its reasonably likely downstream effects, which (CSX insists) will include the potential benefits and harms of the applicants' merger in light of foreseeable subsequent mergers and other reactions. CSX adds, however, that we should make plain that we will administer NPR § 1180.1(i) in a way consistent with keeping unannounced transactions and explorations confidential.

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

---

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

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

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

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

(2) CSX insists that neither CN nor CP has a NAFTA basis for any objection concerning "discrimination" among "investments" or "investors." CSX explains that, because most of CN's and CP's stockholders are U.S. citizens, both sets of "investors" in CN and CP (*i.e.*, U.S. stockholders and Canadian stockholders) would be treated alike by the Board, regardless of what our regulations

---

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

required with respect to the applications that CN or CP might file. CSX further contends, in essence, that our proposed regulations would not violate NAFTA's nondiscrimination provisions even if such provisions applied to CN and CP themselves. NAFTA's nondiscrimination provisions, CSX explains, bar the imposition of laws and regulations designed to skew the terms of competition in favor of domestic service providers, but do not bar legitimate regulatory distinctions between domestic service providers and foreign service providers. And, CSX adds, common sense indicates that foreign-based rail companies, with substantial operational and management control as well as substantial equipment located in a foreign country, are simply not in "like circumstances" with U.S.-based rail companies whose operations, management, and equipment are all located exclusively within the United States.

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

(4) CSX contends that the Board's obligations to try to avoid serious discrimination against foreign service providers apply only where the services provided by the domestic and foreign providers are functionally equivalent in all material respects. CSX insists, however, that foreign rail service providers wishing to make a major change in the structure of the U.S. rail system do not qualify as providing services "under the same conditions" as U.S.-based railroads, and their services do not "pose the same level of risk" as U.S.-based railroads, if for no other reason than the fact that they will be subject to the regulations of two countries, not just those of one. And, CSX adds, it is evident that the inquiries required by our proposed regulations are not unduly burdensome and are directly relevant to achieving our legitimate objectives of assuring a safe, reliable, and competitive rail system.

---

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

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

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

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

(7) *Discrimination against Canada-based carriers: technical matter.* CSX suggests that, although there is (in CSX's view) no merit in the argument that the regulations proposed in the NPR discriminate against Canada-based carriers, we might prefer to avoid the argument altogether by making NPR §§ 1180.1(k) and 1180.11 applicable to all major transactions. The fact of the matter, CSX asserts, is that it is not only the two largest Canada-based railroads that have system operations both in the United States and in foreign countries; a number of U.S.-based railroads, CSX explains, also have system operations both in the United States and in foreign countries. The transborder issues addressed by NPR §§ 1180.1(k) and 1180.11, CSX advises, would be present to some extent, albeit a lesser extent, in cases involving only those U.S.-based railroads (one of which is CSX) that operate both in the United States and in a foreign country. CSX's reply (filed February 20, 2001) to CN's motion/petition pleading filed January 30, 2001.

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

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

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

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

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

Standards of competition analysis. CSX contends that broadly accepted standards of competition analysis recognize that procompetitive effects of a merger should be balanced against anticompetitive effects without presumptions pro or con. Any mergers that emerge from the marketplace, CSX argues, should rise or fall on their own merits. (1) CSX contends that a presumption that future mergers are likely to result in unremediable competitive harm would be inconsistent with the analytical frameworks employed by virtually all other federal agencies empowered by Congress to protect and regulate competition. Other federal agencies, CSX insists, do not create an up-front presumption that mergers either harm or benefit competition; instead, CSX adds, they simply set forth an objective methodology for analyzing each proposed merger on a case-by-case basis, once the necessary facts have been collected. CSX argues that the policies adhered to by other federal agencies (CSX cites, in particular, DOJ, FTC, FERC, FCC, and DOT) regarding both mergers and less integrative alliances benefit both applicants and their customers, because (CSX explains), by using more objective standards, likelihoods (both good and bad) are more easily analyzed and quantified, thereby enhancing the predictability of the merger review process.

(2) CSX adds that another reason we should not presume that further consolidation will cause unremediable competitive harm is that future consolidation among Class I carriers is likely, in whole or in large part, to involve end-to-end combinations of carriers that generally do not compete against

one another. CSX explains that end-to-end combinations, as compared to combinations of head-to-head competitors, hold greater promise of producing certain types of public benefits, such as new single-line service alternatives with longer hauls, more reliable service, and reduced interchange and terminal delays. And, CSX claims, end-to-end combinations rarely result in a diminution of competition.

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

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

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

Competitive enhancements: cause-and-effect standard. CSX contends that, because competitive enhancements that do not directly address competitive harms caused by the merger are unwarranted, the proposed rules should be modified or clarified to the extent that they could require benefits to competitors that do not address merger-specific harms. (1) CSX contends that, in past merger cases, the well-established principle that merger conditions are imposed to cure only transaction-related problems and not preexisting problems has allowed the Board to summarily deny requests for the correction of preexisting problems; the Board, CSX adds, has not had to weigh the good that would be done to a shipper or shortline in one state against the good that would be done to a shipper or shortline in another state if only one or the other's preexisting problem were solved by the Board's conditioning power. CSX further contends, however, that the NPR can be read to do away with this established method of examination and adjudication; its language, CSX explains, seems to say that possible congestion that might occur in Pennsylvania may be expiated by an increase in the number of rail carriers serving particular shippers in Minnesota, or that a reduction of intramodal competition in Kansas may be counterbalanced by a reduction in switching charges in Oregon, even though the transaction otherwise has no effect whatsoever on Minnesota or Oregon. CSX warns that such an approach would sound the death knell of the "preexisting problems" doctrine, which heretofore has demanded a relationship of cause-and-effect involving the transaction; it would be, CSX notes, a rare shipper or shortline that would not have some perceived problem that it could ask the Board to cure. And, CSX further warns: the Board would be placed in the position of picking "winners" and "losers" in a process that has little to do with the merger itself; although prioritization among the requests would have to be effected, there would be no guidelines for this, because the existing guidelines are that preexisting situations are not dealt with at all; merger proceedings would necessarily become larger, busier, more populous, and more complex than they have heretofore been; and the absence of established litigation-tested standards would be felt immediately in the area of judicial review (CSX explains that, if the Board ordered any "freestanding" benefits, *i.e.*, benefits unrelated to specific merger harms, parties that had not received such benefits would argue that they were as entitled to such benefits as the parties that had received them). CSX therefore concludes that we should maintain the "preexisting problem" principle and, in addition, adopt a "cause and effect" standard that requires a close relationship between the principal adverse effects of a transaction and the ameliorating benefits relied upon (*i.e.*, a standard that deals with implementation problems by trying to avoid them and directly remediating and untangling them, that deals with specific competitive problems caused by the transaction by remediating them, etc.).

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

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

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

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

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

(2) CSX further contends that service assurance planning is most effectively done through a flexible and "iterative" process, *i.e.*, a process designed to lay out the initial plan first, and then "iterations" of it based on choices made in response to third-party comments, market conditions, and other factors that influence railroad choices in a competitive world. Transition planning, CSX explains, is a management process and not simply a regulatory report; the best transitions, CSX insists, will evolve considerably; and it is therefore, CSX argues, critically important that applicants be permitted to adjust their plans as integration unfolds. CSX adds that, as integration unfolds, market and other conditions will change, which means that applicants' competitors (including Class I, II, and III rail carriers, as well as trucking companies and other intermodal elements) can be expected to react competitively to applicants' operating plan. CSX insists that predicting and quantifying all of these factors in advance so that they are fully anticipated during the Board's years of oversight is simply not realistic. And, CSX adds, even if all of these factors could be predicted and quantified in advance, there will always be some aspects of an integration plan that simply do not work out and that must, therefore, be changed.

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

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

(5) CSX contends that the Board should continue in the future the approach it has used in the past, *i.e.*, the Board should not impose the terms of an applicant's operating plan as a condition nor otherwise require strict adherence to it. CSX notes that, because of this approach, CSX was able to make the changes to its operations and infrastructure projects that were needed to work through, on a real-time basis, the service difficulties it encountered in the Conrail integration. CSX adds that,

because of the approach the Board has heretofore taken, CSX was and is able to react, adjust, and improve (in the Conrail integration context) without seeking permission from the Board and without having to debate its managerial decisions in a forensic encounter with third parties that might prefer to litigate every change, either to pursue benefits to themselves or to seek leverage in negotiation of unrelated issues.

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

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

(2) CSX contends that integration planning is better if it is not dragged out, so that changing market conditions over time can affect it as little as possible. CSX argues: that the regulations proposed in the NPR would promote uncertainty by making merger approval more lengthy and complex; that this, in turn, will make even more difficult the efficient integration of merging carriers; that such a result is particularly inappropriate given that any future merger likely will be end-to-end and will therefore involve fewer significant competitive issues; and that, in fact, the major issues such a merger is likely to raise will focus on the ability of the carriers to accomplish an expeditious

and efficient integration. The process itself, CSX insists, should not be one of the significant impediments to successful integration.

Labor issues. (1) *Negotiations*. CSX approves "our continued emphasis on negotiation, without direct Board involvement, between the unions and railroad management to resolve merger implementation issues." *NPR* at 16. CSX adds: that it supports early consultation and negotiation as the preferred method for reaching the implementing agreements required by the Board's employee protective conditions; that, in fact, CSX, along with the other major railroads, has negotiated, through the National Railway Labor Conference, an agreement with the United Transportation Union concerning the future utilization of the Board's authority to modify CBAs in major transactions;[100] that, furthermore, CSX and the other major railroads are also attempting to negotiate similar agreements with the remaining rail unions; and that, although the remaining unions have suspended their participation in these negotiations, CSX continues to believe that these negotiations should be restarted and that a consensus can be reached based upon the UTU/NRLC agreement.

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

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

(4) *Test period averages*. CSX contends that a requirement that carriers automatically provide employees their test period averages would be yet another unjustified modification of the *New York Dock* conditions. CSX further contends that, as with the request to modify the relocation

---

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

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

requirement, there is no basis in this proceeding to consider this change, because (CSX claims) there has been no notice that the Board is considering such a change. Nothing in either the NPR or in NPR § 1180.1(e), CSX explains, addresses the issue of test period averages.

Voting trusts. CSX opposes NPR § 1180.4(b)(4)(iv), which concerns the use of voting trusts in transactions involving two or more Class I railroads. CSX believes that our proposal is not needed, would unfairly disadvantage rail combination transactions in the marketplace, would increase litigation, and would place the Board in the awkward position of making "public interest" determinations on the basis essentially of the names of the parties involved in a proposed transaction. (1) CSX contends: that, nowadays, corporate merger and acquisition (M&A) techniques operate rapidly through tender offers made with deadlines of generally 20 business days (approximately a calendar month) or with stockholder votes taken within a few months of the announcement of a transaction; that these timetables are simply inconsistent with the Board's usual processing times in major merger transactions, and, in fact, would be inconsistent even with expedited timetables, such as 180- or 270-day periods between the filing of the application and the closing of the evidentiary record; and that, given this background, and to put as far as possible regulated railroad M&A transactions on a level playing field with other market transactions (including unregulated acquisitions of rail carriers), Part 1013 of our regulations provides standards for an independent voting trust into which the stock of one of the rail carriers or entities controlling a rail carrier may be deposited, so that the financial aspects of the transaction may be effected (subject to divestiture) in advance of the Board's determination of the "public interest" requirements necessary for approval of a major transaction within its jurisdiction. CSX adds: that, although 49 CFR 1013.3(a) provides that a carrier choosing to utilize a voting trust "may" submit a copy to the Board's staff for review, it is probably fair to say that, at least in transactions of any size, a submission to the Board's staff is universally made; that, as indicated in 49 CFR 1013.3(a), the review of the voting trust is not by the Board as such but by the Board's staff, which gives "an informal, nonbinding opinion as to whether the voting trust effectively insulates the settlor from any violation of Board policy against unauthorized acquisition of control of a regulated carrier;" that the submissions requesting these opinions and the opinions themselves are public documents, and are available to the public; and that our staff's informal requests for modifications, and the form of agreements that have been the subject of informal clearances by our staff, are often used by practitioners as models in determining the appropriate clauses to be contained in new voting trust agreements.

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

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

concerned. And the present rules, CSX argues, achieve that as much as the governing statute permits.

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

(5) CSX warns that replacing the informal action of the Board's staff with formal action by the Board itself might have a compromising effect. CSX explains: that issues concerning control are sometimes brought forward by parties in the light of restrictive covenants contained in the transaction documents, which are not available to the Board and the public when the voting trust agreement is submitted for review but which become available to the Board and the public several months later, when the application itself is filed; that such issues can require the Board to explore the interface between the restrictive covenants in the transaction documents and the provisions of the voting trust agreement; and that earlier involvement of the Board in the review of the voting trust agreement would seem to create a basis for challengers to suggest prejudgment by the Board.

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

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

(8) CSX adds that, even under the existing regulatory structure, we can act to protect the public interest if a transaction within our jurisdiction is proposed which would clearly involve substantial financial risks and in which the consideration is to be delivered, through the use of a voting trust, prior to our review of the merits. CSX advises that, in a situation of this sort, we have the power to suspend the effectiveness of the voting trust rules as to a proposed transaction and to require applicants to make an appropriate preliminary showing as to financial matters. And, CSX adds, in order to reserve our authority to suspend the voting trust provisions on the basis of concerns such as financial soundness, we may wish to include, in our rules, an express provision for a power of suspension.

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

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

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

NPR § 1180.1(a): general policy statement. KCS, which agrees that we should refocus our merger policy on the enhancement of rail capacity and competition as remedies to combat the anticompetitive effects of past and future mergers, has a number of concerns regarding the NPR § 1180.1(a) general policy statement. (1) KCS is concerned that the policy statement is not sufficiently specific. The policy statement, KCS argues, should leave no doubt that the preservation of rail-to-rail competition is the single most important factor examined by the Board in weighing the merits of a proposed rail consolidation. Assessments of the public benefits to be bestowed by a rail merger, KCS explains, necessarily hinge on the degree to which competitive options to shippers will be preserved by proposed combinations.

(2) KCS is also concerned that a focus on "balanced" competition may in fact serve to reduce competition. There is, KCS explains, a danger that if the Board, in its calculus of public benefits, gives too much weight to the creation of competitors of equal size, the Board will force the consolidation of the industry down to 2 North American Class I railroads, all under the guise of

approving a merger because doing so is required to counterbalance the effects of a previously approved merger. Indeed, KCS adds, the evidence in this proceeding does not support the notion that a "balanced" 2-carrier rail network would be in the public interest.

(3) KCS is further concerned by what it calls the "generality" of the policy statement. KCS explains: that the policy statement discusses "a broader transportation infrastructure that also embraces the nation's highways, waterways, ports, and airports;" that, however, considerations relevant to this broader infrastructure may cause the Board to be distracted by issues of intermodal competition, either as an alternative to or as a substitute for intramodal rail competition; and that this distraction could cause the Board to overlook its proper focus, which (KCS insists) should be on remediating the adverse effects resulting from any reduction in intramodal rail competition. KCS warns that focusing rail merger decisionmaking on competition with other modes is a distraction the Board cannot afford when the number of remaining Class I railroads is so small and the stakes at risk when any of them merge are so great.

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

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

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

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

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

NPR § 1180.1(d): conditions. (1) KCS contends that, because the conditioning power should be used to address only those harms arising from merger transactions, we should resist the urgings of parties seeking to use the merger process to implement wider notions of competitive access or expanded competition. KCS insists that, because such a broader use of the conditioning power would directly impact not only the merging carriers but the rail industry as a whole, such matters should be left to Congress.

(2) KCS contends that we should state explicitly that we will use our conditioning authority to remedy harms to competition resulting from previous mergers involving the current merger applicants. There is, KCS insists, no reason that we cannot make future mergers conditional on the imposition of conditions designed to remedy past reductions in competition.

(3) KCS contends that we should not refer to the use of conditions to "offset" merger-related harms; the appropriate word, KCS argues, is not "offset" but "remediate." KCS explains that conditions that "offset" a merger-related harm might be unrelated to the harm (though not unrelated to a merger), whereas conditions that "remediate" a harm are designed to cure undesirable effects.

(4) KCS contends that, whereas the proposed regulation states that we will carefully consider conditions "proposed by applicants," the final regulation should state that we will carefully consider conditions "proposed by all parties." KCS insists that conditions proposed by parties other than applicants should be reviewed under the same standards, and be given the same consideration, as conditions proposed by applicants. Conditions proposed by parties other than applicants, KCS advises, are no more "self-serving" than those proposed by applicants.

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

NPR § 1180.1(g): oversight. (1) KCS contends that we should clarify that parties experiencing merger-related issues do not have to await the quarterly (or annual) public comment period to direct the Board's attention to such issues.

(2) KCS contends that applicants should be required to include, in their oversight reports, a matrix that compares the projections contained in the merger application with the actual results. KCS explains that, although it may not be appropriate in every instance to hold merging parties to their pre-merger projections, it is appropriate to allow interested parties to determine where the merged parties have fallen short of expectations, and to allow the newly-merged railroad to explain the discrepancy.

(3) KCS contends that we should clarify that any oversight proceedings that are still open on the date of enactment of the new regulations will be subject to the Board's policy directives to enhance and preserve competition. KCS explains that, because past mergers have established that it is inappropriate to limit relief to situations of 2-to-1 competitive reductions, we should exercise

our full authority in existing oversight proceedings to fully redress previously unremediated reductions of competition.

NPR § 1180.1(h): service assurance and operational monitoring. (1) KCS contends that, although SAPs and contingency plans should be required aspects of merger applications, the proposed regulation contemplates a great deal of specific information that merger applicants may not be able to provide. KCS further contends that, because it is difficult to envision how any party will be able to predict future events with the kind of accuracy implied in the proposed regulation, the information requirements contemplated in the proposed regulation should be made more realistic.

(2) KCS supports the establishment of problem resolution teams and procedures to address problems that may arise in the process of merger implementation. And, KCS adds, mandatory Service Councils will be in the best interests of the industry.

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

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

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

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

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

NPR § 1180.6(b)(10): conditions to mitigate and offset merger harms. (1) KCS contends that, in order to "preserve" competition (*e.g.*, competition in a particular market or corridor), it may be necessary to impose conditions that "enhance" competition (*e.g.*, by adding rail carriers to that market or corridor, if new carriers are necessary to preserve the competition previously provided by applicants). KCS further contends, however, that any such "enhancement" must be related to the anticompetitive effects of a merger. We should make absolutely clear, KCS insists, that we will not impose competition-enhancing conditions unless they are needed to address a merger's competitive harms.

(2) KCS contends that NPR § 1180.6(b)(10), as drafted, is unnecessarily vague; it should be revised, KCS suggests, to make clear that the form of competition of paramount interest to the Board in a rail merger proceeding is rail-to-rail competition.

(3) KCS contends that applicants should be required to explain, among other things, how they will preserve the benefits conferred on shippers in prior mergers. Applicants, KCS believes, should not be allowed to disavow prior merger benefits based on the exigencies of their next merger.

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

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

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

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

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

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

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

General principles. NS contends that our rail merger review process: (1) should seek to promote the development and maintenance of a sound rail transportation system capable of providing safe, efficient, and reliable transportation services that satisfy the needs of the shipping public, and reasonable rate levels that generate adequate revenues necessary to sustain the system in the long term;

(2) should, as in other areas of rail regulation, rely to the greatest extent possible on the marketplace and private initiative rather than on government regulation to promote a sound rail transportation system;

---

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

(3) should recognize that competition is valued because, and to the extent that, it promotes the provision of safe, efficient, and reliable rail transportation services at reasonable, self-sustaining rates;

(4) should promote, not undermine, the efficiencies of the national rail network, including the exploitation of available economies of scale, scope, and density;

(5) should avoid the imposition of regulatory conditions or requirements that would undermine economic incentives for efficient investment in rail infrastructure and equipment; and

(6) should carefully assess the probable effects of a proposed rail consolidation while not impairing the ability of carriers to respond to changing market and business conditions. And, NS adds:

(7) our merger regulations should identify the broad public interest factors that will be given consideration in the rail merger review process and define general evidentiary and procedural requirements for rail merger proceedings, while preserving flexibility in how these policies and rules will be weighed and applied in individual cases.

Provisions for enhanced competition. (1) NS contends that, since 1940, national policy toward rail mergers has been guided by 2 fundamental principles: the principle that rail merger proposals should originate in the private sector, and should not be drafted by government regulators; and the principle that, although rail merger proposals should be subject to intensive "public interest" review, this review should be confined to direct transaction-related impacts of particular rail merger proposals, rather than pre-existing or unrelated market conditions. These guiding principles, NS argues, have been mutually reinforcing, by which NS means that restricting regulatory review of proposed rail mergers to direct, transaction-related effects has served to prevent the merger review process from backsliding into the pre-1940 system of centralized industrial planning that proved to be unworkable. NS adds that, under the approach that has been followed since 1940, competition has always been a central consideration in rail merger review, but this review has been focused (as, NS claims, it is under the antitrust laws) on assessing direct transaction-related impacts and ameliorating only the adverse effects of a particular proposed transaction on competition, rather than using the merger review process as a vehicle for remedying perceived competitive problems or restructuring market conditions unrelated to a proposed transaction.

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

(3) NS contends that requiring every railroad proposing a major rail consolidation, regardless of circumstances, to propose or accept regulatory measures to manufacture an artificial form of additional direct rail-to-rail competition as a precondition to approval of a proposed combination would be a serious mistake. NS argues: that there is no sound basis for presuming that all future major rail consolidations will produce significant public harms or that the kind of manufactured rail-to-rail competition the Board seems to have in mind would actually (or invariably) produce offsetting public benefits; that, in any event, there is no nexus between the presumption of

merger-related harms and the presumed benefits of measures to inject additional rail-to-rail competition; and that, more generally, the vagueness of the Board's requirement only invites endless demands, unconstrained by principled standards, for the kind of "open access everywhere" that the Board has already found to be beyond its statutory authority to impose on the railroad industry. NS insists that, although we should encourage rail consolidations that include provisions increasing competition (including rail-to-rail competition), any such proposals: should come from the private sector; should be judged on a case-by-case basis on their individual merits; and should not be imposed under standards that are so vague and open-ended that they may deter otherwise beneficial rail combinations from even being proposed.

(4) NS contends that, at a minimum, we should clarify whether a plan for "enhanced competition" might satisfy the requirements contemplated in the NPR without providing for increased rail-to-rail competition. A merger, NS argues, can enhance existing competition both by enhancing competition between railroads and also by enhancing competition between railroads and other transportation modes.

Presumptions about the effects of future rail mergers. There is, NS insists, no adequate factual predicate for the apparent presumptions that "enhanced competition" is necessary because future major rail mergers will generate no significant public benefits, will result in irremediable competitive harm, and will cause significant transitional service problems. Such presumptions, NS argues, are unjustified, and may discourage the proposal of beneficial rail combinations and, in the process, freeze the future structure of the rail industry without regard to changing market conditions. (1) *The presumption that future rail mergers will not yield significant efficiencies and other public benefits.* NS contends: that market forces are pushing firms in all major industries toward greater consolidation; that, in particular, the business operations of the railroads' major customers and competitors (including trucks) are, with each passing day, increasingly national if not global in scope; that shippers increasingly demand, and trucking firms, express carriers (such as UPS and FedEx), intermodal marketing companies, and even ocean carriers increasingly can offer, one-stop shipping and logistics services unconstrained by artificial geographical limitations in the size and scope of their networks; that, to match the scale and scope of their customers and competitors, railroads may well be driven to expand the scale and scope of their operations, and to exploit the economies of scale, scope, and density that continue to exist in the rail system; and that we should not immobilize the railroad industry (and it alone) from reacting to changing market conditions through a presumption that the interests of rail customers would be served by requiring them to continue dealing with 2 or more railroads in order to move their cargo by rail across the United States. NS further contends that, because future major rail mergers are likely to have efficiency-enhancing end-to-end effects (including the extension of single-line service and associated elimination of costly and service-delaying interchanges, creation of shorter and more efficient rail routes and other network improvements, development of new markets for shippers, and cost reductions through elimination of administrative and overhead costs), any presumption that future major rail mergers will not generate merger-related public benefits or that such merger-related public benefits will not be substantial would be unfounded. And, NS adds, because nothing in the history of prior rail consolidation transactions or in the circumstances of current market conditions supports the notion that future rail consolidations will not generate significant net public benefits, the imposition of competition-enhancing conditions cannot be justified on the theory that (absent such conditions) future rail mergers will not be in the public interest.

(2) *The presumption that future rail mergers will produce anticompetitive effects that cannot effectively be remedied through conditions.* NS contends that the presumption that future major rail consolidations will inevitably produce adverse competitive effects that cannot practicably be mitigated through conditions is unsupported. NS argues: that, because future rail mergers are likely

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

(3) *The presumption that future rail mergers will produce transitional service problems.* NS contends that, although we should carefully assess and, with appropriately tailored conditions, seek to mitigate any temporary service disruptions likely to be associated with an approved major rail consolidation, we should neither presume that all future transactions will give rise to significant service disruptions nor impose inflexible requirements for permanent restructuring of rail competition as the cost for presumed service problems that may never occur. (a) NS contends that there is neither any reason to presume that future transactions will always give rise to service disruptions nor any basis to make any intelligible judgments about the nature or extent of any service disruptions that may occur. NS argues, in particular, that, because future major rail consolidation transactions will likely involve end-to-end mergers of relatively healthy systems with adequate rail infrastructure (and because merging railroads will likely take, in the future, even more careful steps to ensure effective merger implementation than they have taken in the past), such transactions are unlikely to give rise to merger-related service disruptions of the size and scope of the problems experienced in connection with the UP/SP and Conrail transactions. (b) NS contends that, even if future major rail consolidations could be expected to give rise to serious transitional service disruptions, there is no rational connection between those potential service problems and the competition-enhancing conditions the Board would impose as a means of offsetting them. It is illogical, NS argues, to require railroads to make structural changes in competition as a supposed means of remedying potential disruptions in service. And there is, NS insists, no logical or evidentiary nexus between the temporary transitional service disruptions we are presuming and the apparently permanent restructuring of market conditions we seem to be requiring. (c) NS contends that, although we appear to be presuming that measures to inject an artificial form of increased rail-to-rail competition where market conditions have not produced it (such as through mandatory trackage rights or joint use arrangements, terminal switching, etc.) will necessarily and invariably yield public benefits, the fact of the matter is that regulatory forced access measures designed to increase the number of rail carriers serving particular shippers or facilities may just as easily exacerbate as relieve merger-related service problems.

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

Enhanced competition: a case-by-case approach. (1) NS contends that we should welcome, and indeed affirmatively encourage, proposals by rail merger applicants to increase direct rail-to-rail competition as part of their proposed transaction, at least when such measures can be justified within the overall structure and anticipated effects of the proposed transaction. NS further contends that we should give such proposals by applicants significant weight in the overall public interest calculus. NS insists, however, that such measures to increase rail-to-rail competition should be considered on a case-by-case basis and should not be mandated in every case regardless of circumstances, and that they should be proposed by the applicants and not imposed by regulatory order. A case-by-case approach, NS argues, makes more sense than the Board's proposed approach because proposed rail consolidations will differ in their effects (both beneficial and harmful) and will arise in economic circumstances that cannot be predicted now; and, NS adds, whether, and to what extent, a particular measure to enhance rail-to-rail competition as part of a proposed combination would tip the public interest scales in favor of approval will differ in every case.

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

Assessment of public benefits. NS agrees that the size and significance of, and the potential risks associated with, the type of major rail consolidations likely to be proposed in the future make it appropriate to require merger applicants to make a more convincing showing of merger-related public benefits and to subject those benefits claims to closer scrutiny than has been customary in the past. NS insists, however, that more intense scrutiny of a proposed transaction's projected public benefits and other effects cannot change the essential character of the merger impact analysis, which (NS advises) unavoidably entails at best only informed predictions about the effects of a proposed transaction based on existing conditions and historical data. Nothing, NS adds, can change the fact that estimates of merger-related public benefits are only estimates, whose realization in practice are dependent on a host of business and economic conditions that often cannot be anticipated and that typically are not even incorporated in merger impact analysis. NS suggests, however, that, based on these considerations, it would be appropriate to make 3 "relatively modest, but important," changes in our proposed merger policies and rules dealing with merger benefits analysis. (1) *Increased emphasis on service improvements.* NS notes that the first sentence of NPR § 1180.1(a) now reads: "To meet the needs of the public and the national defense, the Surface Transportation Board seeks to ensure balanced and sustainable competition in the railroad industry." NS insists, however, that this sentence should be revised to emphasize the promotion of safe, reliable, and efficient rail transportation service as a fundamental policy goal. NS contends, in particular, that this sentence should be revised to indicate that we seek to ensure not only "balanced and sustainable competition" but also "safe, reliable and efficient services that meet the transportation needs of the shipping public." NS explains that a singular focus on competition is too narrow, because competition is valued not for its own sake but only because, and to the extent that, it spurs railroads and other carriers to provide safe, reliable, and efficient transportation service, meeting the needs of the shipping public, at reasonable, self-sustaining rates.

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

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

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

Service assurance plans and merger implementation. NS supports our "service assurance plan" proposals, which (NS contends) may significantly improve the merger review and merger implementation process, especially as it relates to impacts on rail service. NS adds that it "understands" that the proposed rules requiring the submission and review of SAPs, and establishing a process for operational and service monitoring of approved rail consolidations, are focused on the merger implementation process and the preservation of adequate service during that period. (1) *Service assurance plans: technical matter.* NS contends that, because operating and traffic data for the calendar year immediately preceding the filing date of the application may often be unavailable in the case of merger applications filed early in a calendar year, NPR § 1180.10(a) should be revised to require benchmark data for "the most recent 12-month period for which accurate and reliable data are available at the time the notice required by § 1180.4(b)(1) is filed."

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

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

(2) NS is concerned that NPR § 1180.1(g), which refers to the Board's retention of jurisdiction "to impose any additional conditions it determines are necessary to remedy or offset unforeseen adverse consequences of the underlying transaction," might be construed too broadly to give the Board a virtual roving commission to use the oversight process to restructure the approved (and consummated) rail consolidation transaction for reasons related less to the actual effects of the approved transaction than to subsequent changes in market conditions or structure. NS warns that constitutional due process issues (*i.e.*, issues of fundamental fairness and adequate notice to merger applicants) would be raised if our post-approval conditioning authority were construed to give us

carte blanche authority to alter the fundamental terms of an approved consolidation or to impose new conditions not reasonably related to the original impacts of the transaction. NS therefore recommends that we state in our oversight rule that we "will not use the oversight process to impose new conditions that would have the purpose or effect of restructuring the original approved transaction to address post-approval changes in market structure or competitive conditions unrelated to the original transaction."

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

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

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

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

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

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

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

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

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

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

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

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

Downstream effects. UP contends that, although the downstream effects of future major rail mergers should be considered, parties cannot realistically evaluate the effects of specific downstream Class I mergers because (UP insists) there are too many possible permutations. UP therefore argues that, as respects downstream effects, we should require applicants to evaluate the impact of a major Class I merger on the assumption that it is part of an "end game" resulting in only 2 major North American railroads. UP adds that, if we approve such a merger, we should condition the merger to protect the public interest in that final industry structure. (1) *Specific transactions.* UP contends that the Board's call for predictions of specific transactions creates a high likelihood that applicants will make inaccurate guesses and that both the applicants' and the Board's merger analyses will miss the mark; predicting how half a dozen large railroads will respond to a future merger proposal, UP explains, calls for excessive speculation; and, UP adds, requiring applicants to calculate the financial benefits of these predications adds only an illusion of concreteness to the guesswork. UP further contends: that the Board's proposed rules demand unrealistic precision, while allowing applicants to avoid addressing the important public policy questions presented by a major rail merger; that, by allowing applicants to identify only downstream transactions that are "likely," the proposed rules leave applicants free to deny that any downstream merger is sufficiently likely to deserve study; and that, even though the evidence in this rulemaking already establishes that

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

the next Class I merger is likely to trigger an "end game" that results in only 2 transcontinental railroads, the Board's proceeding might not address the impact of that end game on the public interest.

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

Retroactivity; oversight. (1) UP contends that the Administrative Procedure Act and fundamental principles of due process limit the Board's authority to apply new rules or new conditions retroactively. It is, UP insists, settled law that the Board cannot impose new regulations and new conditions on consummated mergers, just as the Board cannot apply its proposed merger rules to mergers consummated before the rules are adopted. UP concedes, however, that we may conduct oversight proceedings to ensure that the conditions imposed in the final decision approving a merger achieve their goals; and UP further concedes that we may modify such conditions as necessary to ensure their effectiveness.

(2) UP contends that we should reject calls to extend the duration of the oversight phase beyond the current 5-year period, unless parties demonstrate that an extension is required in a particular case. UP explains: that service problems following recent mergers have been resolved in less than 5 years; and that the effectiveness of competitive conditions can be evaluated within 2 to 3 years.

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

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

(2) *Bilateral agreements as a mechanism for addressing service failures.* UP contends that pressing applicants to use bilateral agreements as a mechanism for addressing service failures will gives shippers undue leverage in negotiating such agreements. UP insists that we should create a

level playing field for negotiations; applicants, UP explains, should be encouraged to negotiate agreements, but failure to do so should not be prejudicial.

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

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

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

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

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

(3) *Divestitures and trackage rights.* UP rejects the argument that we should preserve competition by ordering divestitures rather than trackage rights. UP explains: that, in a parallel

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

merger, divestitures would preserve separate ownership of parallel lines, albeit by destroying efficiencies such as directional running; and that, in an end-to-end merger, divestitures would destroy single-line service and eliminate the economic rationale for the merger. The Board, UP insists, should retain its preference for trackage rights.

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

3-to-2 issues. (1) UP contends that, in reviewing 3-to-2 situations, we should maintain the case-by-case approach, and should continue to examine each situation on its facts, without applying a presumption one way or the other; and, UP adds, if the evidence in a particular case demonstrates that the railroad competing with a merged carrier would be unable to provide effective competition, we should introduce an effective third competitor. UP warns, however, that the NPR § 1180.1(c)(2)(i) statement that "[i]ntramodal competition is reduced when two carriers serving the same origins and destinations merge" could be misinterpreted as establishing a hard-and-fast rule that every reduction in the number of serving carriers will be deemed anticompetitive. UP argues that the industry's experience and Board precedent establish that this is not true; 2 rail competitors, UP explains, can continue to provide vibrant competition. UP therefore asks that we clarify that competition "may be" reduced in these circumstances, not that it always "is" reduced.

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

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

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

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

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

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

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

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

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

(5) *The "essential services" standard.* UP recommends that we either withdraw our NPR § 1180.1(c)(2)(ii) proposal to treat passenger services as "essential services" or carefully consider how that term will be applied to passenger services. UP contends that, although commuter services probably are "essential services" in congested cities, and although it is unlikely that any future end-to-end merger will threaten essential passenger service, the proposed rule might be applied

in inappropriate ways. UP further contends that the Board should not use the "essential services" rubric: to make itself a court of first resort for every dispute between merged carriers and passenger operators; to add conflicting or inconsistent remedies to those in passenger service contracts; and/or to require merged railroads to subsidize passenger services. UP, which insists that future mergers probably will never pose a threat to an essential passenger service that the Board should remedy, asks that we clarify that we will not use the "essential service" label to create a new STB remedy for minor impacts on passenger service (*e.g.*, 7 minutes of delay to a commuter train).

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

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

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

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

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

Technical matters. (1) *Definition of "major" transaction: technical matter.* UP contends that, to avoid any confusion that may arise from our recent notice of rulemaking for consolidated financial reporting,[105] 49 CFR 1180.2(a) should be amended to read: "A *major* transaction is a control or merger involving two or more Class I railroads. For purposes of this section, commonly controlled railroads will be considered a Class I railroad if the affiliated, contiguous carriers earn revenues in excess of $250 million and offer integrated service to shippers."

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

APPENDIX D: REGIONAL AND SHORTLINE RAILROADS

AMERICAN SHORT LINE AND REGIONAL RAILROAD ASSOCIATION. The American Short Line and Regional Railroad Association (ASLRRA)[106] indicates that, although it applauds the Board for the stated overall objectives of the rules proposed in the NPR, it believes that the proposed rules must be revised if the stated objectives are to be accomplished. The proposed rules, ASLRRA argues, are not specific enough about what will be required of applicants in future Class I mergers; there is, ASLRRA insists, too much leeway left for the applicants, and not enough precision about what will be required; and, ASLRRA adds, the proposed rules do not clearly carry through the Board's intent to increase the burden on applicants to enhance competition and to offset negative impacts of service disruptions and competitive harms. ASLRRA therefore urges that we put "teeth" in the rules by adding specific minimum conditions that will be required. Specific minimum conditions, ASLRRA argues, are necessary to accomplish the Board's stated intent of raising the bar for merger approval, enhancing competition, and safeguarding service.

ASLRRA's "Bill of Rights" conditions. ASLRRA contends that, to address the service and competitive issues of critical concern to small railroads that will arise in any future Class I merger, we should add to our merger rules ASLRRA's "Bill of Rights" conditions. (1) ASLRRA contends that Class II and Class III railroads that connect to the consolidated carrier must have the right to compensation by the consolidated carrier for service failures related to the consolidation.[107] ASLRRA further contends that, when the consolidated carrier cannot provide an acceptable level of service post-transaction, connecting Class II and Class III railroads should be allowed to perform additional services as necessary to provide acceptable service to shippers.

(2) ASLRRA contends that Class II and Class III railroads must have the right to interchange and routing freedom. ASLRRA further contends: that contractual barriers affecting Class II and Class III railroads that connect with the consolidated carrier that prohibit or disadvantage full

---

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

[106] ASLRRA submitted its comments on behalf of its 418 shortline and regional railroad members.

[107] ASLRRA adds, however, that the Board would not need to get into the business of handling freight claims. ASLRRA explains that most claims would not be disputed, and that an expedited process could be put in place to handle those that were.

interchange rights, competitive routes, and/or rates must be immediately removed by the consolidated carrier, and none imposed in the future; that the consolidated carrier must maintain competitive joint rates through existing gateways; that Class II and Class III railroads must be free to interchange with all other carriers in a terminal area without pricing or operational disadvantage; and that any pricing or operational restrictions that disadvantage connecting Class II or Class III railroads must be immediately removed by the consolidated carrier, and none imposed in the future.

(3) ASLRRA contends that Class II and Class III railroads that connect to the consolidated carrier must have the right to competitive and nondiscriminatory rates and pricing. ASLRRA further contends that rates and pricing of the consolidated carrier that do not meet this standard must be promptly corrected by the consolidated carrier upon request by a connecting Class II or Class III railroad.

(4) ASLRRA contends that Class II and Class III railroads that connect to the consolidated carrier must have the right to fair and nondiscriminatory car supply. ASLRRA further contends that car supply issues regarding this standard must be promptly addressed by the consolidated carrier upon request by a connecting Class II or Class III railroad.

(5) ASLRRA contends that the Board should strongly encourage the consolidated carrier to work out any issues regarding these conditions with its connecting Class II and Class III carriers in a mutually agreeable fashion without resorting to the Board for interpretation or enforcement. ASLRRA further contends that, if needed, the Board should put in place an expedited and cost-effective remedy process to be initiated by complaint filed with the Board by a connecting Class II or Class III carrier.

Minimum conditions for future mergers. ASLRRA indicates: that the conditions it contemplates would be minimum conditions; that, although the Board would retain the flexibility to craft appropriate conditions, the burden would be on applicants to make the case as to why something different than the minimum conditions should be imposed; and that, in effect, the rules would establish a rebuttable presumption in favor of the set of minimum conditions. ASLRRA adds that applicants: could agree to accept more than what the minimum conditions require; could propose variations on the minimum conditions tailored to particular or unique circumstances; and/or could argue for imposition of less than the minimum conditions if they can convince the Board that the minimum conditions would be inappropriate for their transaction or would be unduly burdensome.

Regulatory Flexibility Act issues. (1) ASLRRA contends that the approach it advocates would greatly reduce the burden on small railroads. ASLRRA explains that its minimum conditions might meet the needs of many of the affected small railroads, which would mean that the concerns of these railroads would be addressed without the burden and expense of participating as a party of record in a major merger proceeding. And, ASLRRA adds, its minimum conditions would also address the issue of disparity in bargaining power between the merging mega-carriers and their small railroad connections (minimum conditions, ASLRRA explains, would raise the floor from which negotiations begin, making it more likely that private negotiations between the parties could lead to a satisfactory outcome). Minimum conditions, ASLRRA contends, would make the process less burdensome and more user friendly for small railroads.

(2) ASLRRA insists that, without minimum conditions, our merger rules will not effectively address the important issues raised by small railroads. ASLRRA argues: that our proposed merger rules, as presently drafted, will have a significant economic impact on a substantial number of small entities; that requiring hundreds of small railroads that connect with merger applicants to undertake individual negotiations and/or to participate in a major regulatory proceeding would be unnecessarily burdensome and expensive; and that the hundreds of small railroads that will be affected by any

future Class I merger simply do not have the resources to put them on an equal footing with the applicants for negotiating, or for litigating before the Board or the courts.

EASTERN SHORE RAILROAD. Eastern Shore Railroad, Inc. (ESHR) is a Class III shortline that operates a 63-mile line of railroad extending between Pocomoke City, MD, and Cape Charles, VA.[108] (1) ESHR claims that, although the NPR appears to raise the barriers to merger approval, it is unclear whether or to what extent the Board will change existing law on granting protective conditions on competition or essential rail service. The Board, ESHR therefore contends, needs to explain whether it will be easier for adversely affected parties to obtain relief and what types of fact situations will warrant relief.

(2) ESHR contends that the Board should formally recognize that shortline and regional railroads are part of the country's transportation infrastructure and can play an important role as "congestion relievers." ESHR further contends that, because many smaller railroads are fragile financially, the Board should bend over backwards to protect them where there are merger-related impacts such as traffic diversion.

(3) ESHR contends that preservation of competition is not sufficient unless it is the preservation of "effective competition." ESHR further contends that, where the Board grants another carrier rights to use a rail line, it should grant that carrier a common carrier service obligation as well.

(4) ESHR contends that, although the Board seems to place a very heavy reliance on voluntary arrangements to resolve problems between merger applicants and potential protestants, the Board should recognize that parties will only be able to reach meaningful voluntary agreements if the parties have equal bargaining power (which, ESHR notes, shortlines generally lack) or if the Board is likely to use its regulatory power to provide relief if the parties cannot agree.

FARMRAIL SYSTEM. Farmrail System, Inc. (FMRS)[109] contends that future mergers should be subject to conditions similar to those provided for in ASLRRA's "Bill of Rights" and those suggested by FMRS earlier in this proceeding. FMRS argues that, although the broad procompetitive principles announced in the NPR are steps in the right direction, too much has been left to the discretion of the applicants, without any specifics for either judging an application or guiding shortlines as to what they should expect. FMRS insists that, by relying on applicants to propose how competition will be preserved and enhanced, the regulations proposed in the NPR virtually guarantee that shortlines and the shippers they serve on the fringe of the rail network will continue to be ignored in future merger proceedings.

Enhanced competition. FMRS contends that, although we are requiring the application to provide not only for preserving but also for enhancing competition, we have presented nothing specific in this regard. Applicants, FMRS believes, have been left to determine the regions where an accommodation will be offered and the manner in which it will be offered; and, FMRS adds, the minimal opportunities offered shortlines in recent mergers leave little doubt that small carriers will fare no better under this scheme. FMRS insists that our final regulations should provide for

---

[108] ESHR, a quasi-public entity, is indirectly owned by the Accomack/Northampton Transportation District Commission, a political subdivision of the Commonwealth of Virginia.

[109] FMRS is a holding company for two wholly owned Class III railroads (Farmrail Corporation and Grainbelt Corporation) that together operate approximately 354 miles of line in western Oklahoma. FMRS has, in addition to its 100% ownership interests in Farmrail Corporation and Grainbelt Corporation, a partial ownership interest in Finger Lakes Railway Corp. (FGLK).

imposition of conditions to ensure that shortlines and their customers receive due consideration in terms of procompetitive effects. FMRS further insists that the final regulations should establish a "floor" of enhanced competition, with the applicants being free to provide for more if circumstances warrant. (1) *Competitive pricing.* FMRS contends that small railroads need competitive, nondiscriminatory rates determined on the same basis as nearby Class I stations.

(2) *Paper and steel barriers.* (a) FMRS contends that, in any new merger, the applicants should be required to rescind all paper and steel barriers that restrict the ability of shortlines to provide competitive service. (b) FMRS contends that another restrictive practice that should be discouraged is Class I refusal to allow a shortline over which it has ratemaking authority to make (either with another Class I or with a non-contiguous shortline) a rate for business that is either new or that the Class I cannot reasonably handle. FMRS explains that an awkward situation arises under a "competitive block" when the blocked carrier (*e.g.*, another Class I) calls with a new business opportunity or a competitive rate proposal; the carrier taking the initiative, FMRS advises, is disadvantaged whether the shortline simply advises that the traffic is blocked or refers the inquiry to the blocking carrier so it can attempt to be inserted or to remain in the routing. It doesn't take long, FMRS notes, before the growth-promoting marketing calls from the "competing" Class I stop coming. (c) FMRS contends that routing flexibility could also be improved by requiring merging carriers to provide shortlines with haulage or trackage rights to nearby interchanges with other Class I carriers.

Essential services. FMRS contends that the proposed regulations should be revised to indicate that, because shortlines provide "essential services" to the fringes of the rail network, any significant adverse merger-caused traffic shifts[110] will undermine the ability of the shortline to continue to provide that service and will therefore entitle the shortline to relief. FMRS explains that shortlines play a vital role in preserving rail service, particularly in rural agricultural areas where rail alternatives rarely exist. FMRS further explains that, almost by definition, any significant loss of traffic by a shortline will undermine (in the long run, if not immediately) its ability to maintain its lines, to upgrade its infrastructure to handle the next generation of cars, and to provide reliable competitive service. A shortline, FMRS argues, should be entitled to relief even if it cannot demonstrate that a merger will force the shortline out of business immediately.

Service-related losses. (1) FMRS agrees that the requirement of service assurance plans, including contingency plans, is a step in the right direction toward the goal of minimizing post-merger service disruptions. FMRS contends, however, that the requirement that a "problem resolution team" be established to deal with service problems and "related claims" is not sufficient. FMRS further contends that, in such circumstances, applicants should be required not only to provide a team to address the problems but also to make prompt reimbursement to shippers and connecting shortlines for demonstrable service-related losses.

(2) FMRS contends that we should clearly establish that shortlines have claims for lost traffic or additional operating expenses that result from post-merger service-related failures. Shortlines, FMRS explains, cannot provide satisfactory service to their customers when their Class I connections are not performing normally. And, FMRS adds, this is particularly true when there are paper or steel barriers that prevent the shortline from handling the traffic with another carrier.

---

[110] FMRS suggests that we could select a standard such as a 10% loss of traffic, and give parties the opportunity in particular instances to demonstrate that a different level is appropriate.

(3) FMRS insists that, with respect to service assurance failures, shortlines should be given the same rights to relief and compensation as shippers.

FINGER LAKES RAILWAY. Finger Lakes Railway Corp. (FGLK),[111] a Class III railroad, agrees that, instead of imposing a number of new fixed conditions, we should require specific disclosures by applicants of how they will handle different relevant issues. FGLK adds that it is particularly interested in requiring disclosures about how a proposed merger would treat affected shortlines.

Specific references to Class II and Class III carriers. FGLK contends that, although it is evident that our intention is to develop a more inclusive consideration of the concerns of shippers and Class II and Class III carriers in merger applications, this is not specifically stated as such (at least in certain instances) in the regulations proposed in the NPR. FGLK therefore asks that we include in the final regulations specific references to Class II and Class III carriers in each instance where it is appropriate.

Service assurance plans. FGLK argues that, although it agrees that applicants should be required to develop service assurance and contingency plans, it also believes that we should specify that Class II and Class III railroads are entitled to compensation when the applicants' breach of their assurances causes lost traffic or other harms.

Merchandise freight. FGLK contends that applicants should be required to address, in their SAPs, their plans for the coordinated movement of "merchandise freight" (which FGLK refers to as "loose car business"). FGLK explains that it believes that most of the service complaints that have occurred in connection with post-merger service problems have involved merchandise freight services. FGLK adds that we might also wish to address merchandise freight issues in a separate proceeding, which (FGLK argues) would allow shippers, railroads, and other interested parties an opportunity to provide meaningful input on the needs and issues surrounding the handling of merchandise traffic.

HOUSATONIC RAILROAD COMPANY. Housatonic Railroad Company, Inc. (HRC),[112] a Class III railroad operating in Connecticut, Massachusetts, and New York, contends that we should develop policies to ensure a fair, efficient, and non-discriminatory transportation system for Class III railroads and their customers. HRC explains: that, whereas a Class I railroad is both a network service provider and a local service provider, a Class III railroad is primarily a local service provider only; that the Class I-Class III relationship is complicated by the fact that, although the Class I is the Class III's only access to the general transportation network, the Class I is also a competitor of the Class III; and that, although the Class I can engage in significant anticompetitive conduct to the significant disadvantage of the Class III and the customers of the Class III, the Class III must work with the Class I as a partner in the development of transportation business. HRC therefore contends that we should adopt policies designed to ensure that Class I railroads do not use their monopoly power as network service providers to compete unfairly with Class III railroads or to discriminate against them with respect to rates or service.

[111] FMRS and FGLK filed separately.

[112] HRC's request that its late-filed rebuttal comments (filed January 17, 2001) be accepted is granted.

Merger effects upon Class III railroads. HRC contends that the businesses most likely to suffer adverse consequences from a major rail consolidation are the Class III carriers affected by the consolidation. HRC explains that Class III railroads, unlike shippers, cannot alleviate anticompetitive merger consequences by turning to other modes of transportation; Class III railroads, HRC notes, are "captive" to their Class I connections. HRC insists that Class III railroads deserve protection from merger harms resulting from unfair competition caused by monopolistic, anticompetitive behavior of Class I railroads.

Use of monopoly power to harm Class III railroads. (1) HRC contends that, when a Class I is "captive" to a Class I (*i.e.*, when the Class III has no meaningful alternative connection to the railroad network), the connecting Class I has the power to completely control rates, routing, and service enjoyed by the Class III. The Class I, HRC explains, can compete unfairly with the Class III by discriminatory or differential pricing to disadvantage a Class III's local service relative to the Class I's.

(2) HRC contends that the competitive balance can best be achieved by requiring Class I railroads to price network services and local services separately, and by prohibiting the Class I railroads from using their network monopoly to extract monopoly profits. HRC further contends: that Class I railroads should be required to provide wholesale network services to Class III carriers at prices that reflect the marginal cost of providing the service plus a reasonable return to the Class I; that pricing of overhead services between a Class III and another carrier should not be used by the Class I to disadvantage one route compared to another or to attempt to profit from local services provided by the Class III; and that reasonable overhead rates should be provided to all gateways and other Class I interchange points.

(3) HRC insists that, although many of its concerns exist even in the absence of a major rail consolidation, they should nonetheless be addressed in our merger regulations. HRC explains that, because a major rail consolidation strengthens a government-sanctioned monopoly, it is reasonable to require the consolidating carriers, as a cost of obtaining the private benefits of the transaction, to take reasonable measures to enhance rail competition. HRC further explains that, because the monopoly power of the surviving Class I is increased by the merger and because the surviving Class I is often under substantial pressure to increase revenue to pay for the costs of the transaction, many of the anticompetitive circumstances that existed before the transaction are often exacerbated by the transaction.

Proposed separate proceeding. HRC contends that we should institute a separate proceeding to consider whether and under what circumstances it would be appropriate to mandate competitive access, and whether we should require fair and competitive pricing by Class I railroads of network services provided to their connections.

Regulations proposed in the NPR. (1) HRC, which supports our NPR § 1180.1(a) recognition of the important role that Class II and Class III carriers play in the transportation network, indicates that it is hopeful that we will interpret NPR § 1180.1(a) broadly to address the unique role of Class III carriers in connection with major rail consolidations.

(2) HRC contends that we should revise the second sentence of NPR § 1180.1(b) to read as follows: "In determining the public interest, the Board must consider the various goals of enhanced effective competition, carrier safety and efficiency, improved service for shippers, environmental safeguards, fair working conditions for employees, and the impact on the railroad network (including Class II and Class III carriers)."

(3) HRC contends that, in implementing NPR § 1180.1(c), we should focus on the role of Class III carriers in enhancing competition, improving service, and promoting economic efficiency.

(4) HRC contends that NPR § 1180.1(c)(1) should be revised to make clear that the potential public benefits of the merger apply not only to customers of the merging carriers but to the railroad network as a whole, and to give explicit recognition to the important role that Class II and Class III carriers can play in achieving public benefits.

(5) HRC contends that, in applying NPR § 1180.1(c)(2), we should consider potential harm to Class II and Class III carriers caused by major rail consolidations even if such harms do not result in the inability of the carrier to provide essential services.

(6) HRC contends that NPR § 1180.1(d) should be revised to include a requirement that the Board carefully consider conditions proposed by Class II and Class III carriers. HRC further contends that the NPR § 1180.1(d) statement that "[c]onditions are generally not appropriate to compensate parties who may be disadvantaged by increased competition" is unfortunate. HRC explains that, when a post-merger Class I uses its monopoly power as a network provider to a connecting Class III to enable the Class I to compete with the Class III, the resulting "competition" is unfair and tainted, and protective conditions in favor of the smaller carrier are warranted.

Other issues. (1) HRC contends that Class I railroads should not be permitted to use differential pricing for network services provided to Class III railroads.

(2) HRC contends that, although we should not permit the expansion of old paper or steel barriers or the creation of new ones in connection with a consolidation transaction, the commitments made by a Class III in a line sale transaction should be honored following a major rail consolidation.

(3) HRC contends that all Class III carriers should have the right to interchange with any new additional carriers which operate through a junction or physical track connection with the Class III as a result of a consolidation transaction.

(4) HRC contends that, although it does not endorse ASLRRA's "Bill of Rights," that proposal is a useful starting point for identifying the specific issues that we should address.

(5) HRC contends that consolidating Class I carriers should be required to compensate their Class III connections in those cases in which the Class III connections can document existing traffic that was lost because of service deterioration that occurred as a result of the consolidation transaction.

TEXAS MEXICAN RAILWAY COMPANY. Texas Mexican Railway Company (Tex Mex)[113] is a Class II railroad that owns and operates over a 157-mile line between Corpus Christi and Laredo, TX, and that also operates over some 400 miles of trackage rights in Texas from Corpus Christi to Houston and Beaumont. Tex Mex contends that we should not adopt any proposals that would have the effect of placing restrictions on the ownership of interests in railroads operating in the United States based on citizenship or nationality, or that would place special burdens on rail consolidation transactions that involve non-U.S. railroads or parties. Tex Mex argues that, because our jurisdiction is limited to rail transportation in the United States, we have no basis for examining, or requiring evidence about, the effects of a rail transaction outside the borders of the United States.

Transnational issues. (1) Tex Mex contends that it is not clear what is meant by the "full system" competitive analyses and operating plans required by NPR § 1180.1(k)(1). Tex Mex argues that, if this means that a major transaction involving a Canadian railroad would require an

[113] Tex Mex is a wholly owned subsidiary of Mexrail, Inc., which is itself owned 51% by Transportación Maritima Mexicana (a Mexican company) and 49% by Kansas City Southern Industries (the corporate parent of KCS).

analysis of the competitive effects on rail or other transportation in Canada, it is not clear why such analyses would be relevant to the issues before the Board, or how the Board's review of those issues would avoid encroaching on the proper jurisdiction of Canadian agencies.

(2) Tex Mex contends that the information that would be required by NPR § 1180.11(b) and (c) appears to be based on an unwarranted presumption that major transactions involving non-U.S. railroads would have some adverse effect on the commercial or national defense interests of the United States. Tex Mex insists that we should clearly disclaim any such presumption.

Procedural schedule. Tex Mex contends that, because Board proceedings involving major transactions are expensive and burdensome and create great uncertainty throughout the entire transportation community, the presumption should be that evidentiary proceedings in a major transaction proceeding should be completed in 180 days from the filing of the application.

WISCONSIN CENTRAL SYSTEM. WCS,[114] which is concerned that, in drafting the regulations proposed in the NPR, we may have overlooked the interests of small and regional railroads, contends that we must ensure that rules developed with the 6 remaining mega-carriers in mind do not unduly or inadvertently harm other carriers.[115]

Competition enhancements. WCS, which believes that we should require that parties in major mergers identify specific competitive harms arising from a proposed transaction and then identify specific solutions and remedies that address or otherwise relate to the specified harm, is concerned with the proposed "open-ended" requirement that mega-merger applicants submit proposals to create and enhance competition. WCS insists that, if there is to be a new, procompetitive movement within the rail regulatory system, the Board should do it directly, through its own statutory powers, and not by using merger proceedings as a back-door tool to produce such results in a necessarily arbitrary and piecemeal fashion, depending on which carriers happen to first engage in mega-mergers after the new rules take effect. WCS adds that, although it does not endorse the need for such a reorientation of the Board's competition policies, it would prefer that the debate on the subject be open and direct, and that the outcome of the debate (whatever it may be) be equally available to all.

Service/terminals/interchange. WCS indicates that, although it endorses NPR §§ 1180.1(h) and 1180.10, it believes that we should develop and implement these "extremely broad" regulations in as tangible and practical a manner as possible. WCS contends, in particular, that, in order to achieve the effective access to neutral switching and interchange facilities in major terminal areas that (WCS claims) is an absolute prerequisite if the smaller railroads which comprise the feeder system for the national rail industry are to survive and prosper, our regulations should provide that, where a proposed transaction would further concentrate the ownership of any "neutral" terminal carrier in any major transportation hub, the applicants must divest part of their interest in the terminal carrier to other railroads in the area, preferably to other railroads that currently have no ownership interest in the terminal carrier. WCS further contends that, alternatively, we could require the elimination of any existing discrimination against non-owners in the pricing of the terminal carrier's services and the availability of the terminal carrier's facilities.

---

[114] Affiliated entities Wisconsin Central Ltd., Fox Valley & Western Ltd., Sault Ste. Marie Bridge Company, Wisconsin Chicago Link Ltd., and Algoma Central Railway, Inc. are referred to collectively as Wisconsin Central System or WCS.

[115] WCS consists of three Class II railroads, one Class III railroad, and one Canadian railroad.

Cross-border issues. WCS indicates that it is perplexed by the continued focus on international ownership of U.S. rail carriers and the imagined difficulties that such ownership might bring. There has been, WCS contends, no sign to date that further ownership of U.S. railroads by CN or CP would lead to detrimental commercial decisions; and, WCS adds, there has been no indication that we could not adequately deal with any such unlikely behavior through our own statutory powers and clear jurisdiction over any rail carrier operating in the United States, regardless of its ownership. WCS further contends that, although the NPR appears to suggest that "intrusions" into foreign operations and data are necessary to determine the impacts of a transaction in the United States, that has not been true in the past and there is no evidence that it will be true in the future. The nature of the "problem," WCS insists, simply does not warrant the "reach" outside of its jurisdiction that (WCS claims) the Board is attempting here.

Scope of coverage of rules; Class I status. (1) WCS contends that rules designed to govern mergers among the 6 largest Class I railroads do not apply comfortably to transactions between a large Class I and a smaller Class I, and could have serious adverse consequences on the smaller carriers involved in those transactions. WCS explains that application of the new "competition enhancement" policy to smaller Class I railroads with limited geographic reach, little market power, and predominantly short-haul, joint-line, truck-competitive traffic could be devastating to the smaller carrier's traffic base and operations. Transcontinental merger rules, WCS argues, should not apply to regional rail transactions.

(2) WCS indicates that, on November 15, 2000, its Wisconsin Central Ltd. (WCL) component filed with the Board a petition seeking the institution of a rulemaking proceeding to amend the Board's rail classification regulations by raising the Class I revenue threshold from $250 million to $500 million. WCS further indicates that, without favorable action on that petition, WCL could become a Class I carrier as of January 1, 2002. WCS insists that we should act, either in this proceeding or in a separate proceeding, to ensure that our new merger rules apply only to mergers involving 2 or more of the 6 largest Class I railroads.

(3) WCS contends that, in considering the interests of non-merging carriers in a consolidation proceeding, we should recognize that there are crucial distinctions between the remaining Class I mega-carriers and the feeder system of regional and shortline railroads.

Speculative aspects of the proposed regulations. WCS contends that, in a number of instances (WCS cites downstream effects, alternatives to merger, and competitive enhancements), the proposed regulations call for speculative information or analysis that is likely to cause more confusion than clarity. WCS insists that, although we will require a certain degree of flexibility in adjudging the major consolidation proposals that will come before us, our merger regulations also need to provide guidance, *i.e.*, to provide some degree of certainty as to what is expected from applicants and some defined notion of the criteria upon which their applications will be considered. Mergers, WCS argues, should be judged on their own actual merits, and not on how they *could* lead to other, undesirable mergers, or *could* have been structured differently, or *could* lead to presumed, unidentified competitive harms that must be remedied. WCS maintains that these speculative components of the proposed regulations should be minimized to the greatest extent possible.

APPENDIX E: PASSENGER RAILROADS AND RELATED INTERESTS

NATIONAL RAILROAD PASSENGER CORPORATION (AMTRAK). The National Railroad Passenger Corporation (Amtrak), which advises that many of its guests have suffered greatly as a result of the service problems that followed recent rail mergers, agrees that future merger applicants should be required: (a) to submit "service assurance plans" and "impact analyses" that address in detail the impact of their proposed merger on affected rail lines and terminals and on Amtrak service; and (b) to develop detailed capital and contingency plans to remedy "potential infrastructure impediments" and "potential areas of disruption" during merger implementation. Amtrak believes that these requirements will allow us to ensure that, if we approve future mergers, Amtrak trains will receive both the priority over freight trains to which they are entitled by law and the high level of on-time performance that Congress has deemed essential for Amtrak's rail passenger services. Amtrak insists, however, that the regulations we have proposed to govern SAPs fall short of the mark in several critical respects.

Infrastructure analyses and contingency plans. (1) Amtrak contends that the proposed regulations provide no guidance or thresholds for use in determining what level of merger-related impacts triggers the requirements in NPR § 1180.10(d) and (i) for detailed analyses of infrastructure needs and development of contingency plans. The proposed regulations, Amtrak further contends, leave it entirely to the applicants to decide where "potential infrastructure impediments" and "potential areas of disruption" exist. Amtrak warns, however, that, even if we assume that future merger applicants will exercise this unfettered discretion in good faith, recent experience suggests that their predictive powers will leave a great deal to be desired; applicants in recent merger proceedings, Amtrak explains, significantly underestimated the number of locations on their systems where additional rail line and terminal capacity, and contingency plans to address merger implementation service problems, would be required. Amtrak therefore insists that the proposed regulations should be revised to establish objective specifications as to when detailed infrastructure analyses and contingency plans will be required.

(2) Amtrak indicates that there are a number of ways to ensure that applicants will be required to undertake detailed infrastructure studies, and to develop contingency plans, with respect to all rail lines and facilities where their proposed transaction creates the potential for service disruptions. Amtrak suggests that applicants might be required to conduct capacity studies and operational simulations, and to develop infrastructure plans, for all rail lines on which their proposed merger will increase traffic by 4 or more trains a day, or on which capacity problems are already being experienced. Amtrak also suggests that, as with environmental matters, we might retain outside consultants at the applicants' expense to scrutinize their service and infrastructure plans. Amtrak further suggests that we might apply to NPR § 1180.10(d) and (i) the 49 CFR 1105.7 thresholds for merger-related increases in traffic volume and terminal activity that are used to identify merger impacts that require environmental scrutiny in non-attainment areas.

Passenger/freight coordination plans. (1) Amtrak contends that, although NPR § 1180.10(b) requires applicants to "describe definitively" how they will ensure that they "fulfill existing performance agreements" with Amtrak and commuter service operators, applicants are not required to provide, with respect to rail passenger services, either "benchmark" performance data for the period preceding their application or projected performance data for the period following implementation of their merger. Amtrak further contends that NPR § 1180.10(a) and (c), dealing with impacts on shippers and yard and terminal operations, do require that applicants include in their SAPs both benchmark and projected performance data. Amtrak insists that there is no reason for treating passenger operations differently from freight operations with respect to benchmarking and quantitatively measuring performance. Amtrak further insists that, if we do not require applicants to provide specific pre- and projected post-merger performance measurements for rail passenger performance, we will not be able to accurately measure potential benefits of proposed transactions, and we will not be able to hold applicants to their commitments post-merger.

(2) Amtrak contends that, with respect to Amtrak operations, appropriate performance measurements are readily available. Amtrak explains that the total number of minutes that each Amtrak train has been delayed during a month or year by causes within a particular freight railroad's control (*e.g.*, freight train interference, slow orders, or restrictive signals) can readily be derived from the delay reports that are used by Amtrak and the freight railroads to determine the railroads' entitlement to incentive payments. And, Amtrak adds, agreements between freight railroads and commuter authorities typically include quantifiable performance measures.

(3) Amtrak therefore asks that we revise NPR § 1180.10(b) to require applicants to furnish, for each route over which passenger services are operated, mutually agreed-upon performance measurements that quantify railroad-controlled delays to passenger trains for 1 year prior to the transaction, and projected performance figures for the same route after the implementation of the proposed transaction.

Maintenance needed prior to merger implementation. Amtrak contends that the proposed regulations do nothing to ensure that future mergers will not be implemented until key rail lines are in such condition that they will not require major maintenance during merger implementation. This, Amtrak explains, is a matter of some concern, because (Amtrak claims) many of the delays that Amtrak's trains experienced after the implementation of the UP/SP and Conrail transactions were attributable to the implementation of these transactions at a time when key lines on SP and CSX had an immediate need for major maintenance work. And this, Amtrak further explains, resulted in a multitude of slow orders, and an urgent need to take track out of service to catch up on deferred maintenance, at the very same time that merger implementation was placing unprecedented demands upon the UP and CSX systems. Amtrak therefore insists that, at a minimum, NPR § 1180.10 should be revised to require applicants to describe in their SAPs: (i) the steps they will take to address maintenance needs on key lines before they implement their proposed mergers; and (ii) how they will schedule or augment their pre-implementation maintenance-of-way activities so that they will not have to take key lines and tracks out of service for major maintenance during the crush of merger implementation. And, Amtrak adds, applicants should also be required to update this portion of their SAPs prior to the implementation of their merger.

Other issues. (1) Amtrak contends that, in connection with the development of SAPs, we should specifically require applicants to consult with passenger railroads that operate over their lines. Participation by passenger railroads in the SAP process, Amtrak insists, is essential if SAPs are to fulfill their intended purpose of ensuring that future mergers will not harm passenger rail service.

(2) Amtrak contends that allowing railroads to modify the plans set forth in their SAPs, but requiring them to give notice of such modifications: will give applicants the flexibility they need to implement their merger; will enable the Board to ensure that applicants meet the commitments in their SAPs, even if not in precisely the manner that was initially contemplated; and will put other parties on notice of changes in applicants' plans that may affect them or to which they may take exception.

(3) Amtrak contends that, to ensure that the most relevant data are used for benchmarking purposes, applicants should be directed to use data from the most recent 12-month period for which reliable data are available, rather than for the most recent calendar year.

(4) Amtrak notes that several parties have argued that applicants should be required to describe how their proposed transaction will impact passenger rail services operated over lines owned by passenger railroads. Amtrak further notes that APTA has argued that applicants should be required to obtain the approval of the affected passenger railroad before increasing freight traffic over the passenger railroad's lines. Amtrak indicates, however, that such requirements are not necessary with respect to freight railroad operations over Amtrak-owned trackage. Amtrak explains that the

agreements between Amtrak and the freight railroads that operate over Amtrak-owned lines require that any proposed changes in freight operations be submitted to Amtrak for its approval, and provide for arbitration if a freight railroad believes that Amtrak's approval has been unreasonably withheld. And, Amtrak adds, during the course of the Conrail proceeding Amtrak entered into a separate agreement with CSX and NS that established principles applicable to acquisition-related changes in freight operations on Amtrak-owned lines.[116]

(5) Amtrak contends that any rail passenger service supported by governmental funding is an "essential service" that must be preserved.

(6) Amtrak contends that any service guarantees or monetary remedies for merger-related service problems offered to shippers should be made equally available to Amtrak and commuter rail operators. Such parity, Amtrak explains, is essential to ensure that we do not unwittingly create incentives for railroads to disregard their contractual and statutory obligations to give Amtrak trains priority over freight transportation.

(7) Amtrak insists that we have no authority to extend labor protection rights to employees of passenger railroads.

(8) Amtrak advises that, even if the UP/SP merger had not occurred, Amtrak would not be operating passenger trains over the lines identified by URPA.

(9) *NPR § 1180.1(h)(1): technical matter.* Amtrak contends that, to ensure that NPR § 1180.1(h)(1) is consistent with NPR § 1180.10, NPR § 1180.1(h)(1) should be revised to specify that SAPs must detail how shippers, connecting railroads, *and* passenger railroads will be affected and benefitted by the proposed transaction.

AMERICAN PUBLIC TRANSPORTATION ASSOCIATION. The American Public Transportation Association (APTA)[117] contends that we must consider the impact of any future mergers on passenger rail providers. APTA further contends that our consideration of passenger rail impacts should include, in addition to commuter railroads, the impact on rail transit systems that are users or potential users of the tracks and/or right-of-way of the affected freight railroads, in accordance with policies of the FRA.

Overall approach. APTA agrees that we should place on merger applicants a significantly increased burden to demonstrate that the proposed merger would be in the public interest. Recent consolidations, APTA contends, have led to significant transitional service problems, which have harmed the public interest; and, APTA adds, because experience has shown that mergers can disrupt operations in ways never contemplated in merger filings and service contracts (*e.g.*, by the consolidation of dispatching operations in distant centralized dispatch centers), special action needs to be provided for in those circumstances. APTA further contends that further consolidation will likely aggravate the access challenges that passenger rail systems that are in the planning and design stages already face. APTA explains: that there is a shortcoming in the current framework in which new passenger rail projects move forward; that, in particular, there is no process for resolving disagreements that arise when parties cannot agree on terms and conditions for use of a railroad

---

[116] Amtrak notes, however, that it recognizes that commuter railroads may be in a very different situation. Amtrak indicates, in particular, that commuter railroads' agreements with the freight railroads that operate over the commuter railroads' lines may give the commuter railroads less ability than Amtrak has to prevent changes in freight operations that could harm passenger services.

[117] APTA's 1,300+ members include commuter railroads and rail transit systems.

right-of-way; that, although APTA and AAR have discussed the possibility of an industry-wide framework to help facilitate the negotiation of local agreements, APTA and AAR have not been able to negotiate a process for resolving disputes; that, therefore, freight railroads continue to be able to unilaterally deny access to passenger rail agencies, for no reason at all other than not wanting passenger rail operations; and that public agencies so denied have no recourse under the existing framework, because state law-based condemnation authority does not extend to property owned by freight railroads. APTA warns that the ability of rail passenger agencies to obtain the rail access agreements they need to serve the public, which is a very difficult task even under normal circumstances, becomes even more complex with a continually downsizing core system with fewer and larger owners.

Enhancement of competition. APTA, which agrees that further consolidations in the rail industry are likely to result in some competitive harms that are difficult to remedy directly, contends that we should require merger applicants to address separately and specifically the issue of competitive harm to passenger rail projects, both those currently in operation and those which have been under public consideration. APTA further contends that we should explicitly include passenger rail interests in our analysis of the public interest, and that we should use the conditioning power to mitigate and offset competitive harms to passenger rail interests. APTA explains that, because new commuter rail operations are almost always contracted out to existing railroads, APTA's "new start" members need a competitive rail industry with alternative contract operators in order to keep contract costs under control. And, APTA adds, unless there is a healthy measure of competition in the market, further consolidations in the freight industry will likely result in increased trackage rights costs and increased operations contracts costs to public agencies.

Assessment of benefits/harms. (1) APTA, which believes that the Board should assist in ensuring that benefits claimed by merger applicants materialize, indicates that it would support the establishment of a mechanism whereby those affected by a merger could bring their disputes for resolution by the Board in situations where benefits that were claimed by merger participants have not materialized.

(2) APTA, which argues that essential passenger rail services must be preserved, asks that we explain, as respects passenger rail services, precisely how the "essential existing service" concept would work in evaluating harm to the essential services provided by rail passenger agencies. APTA argues that, when commuter rail is built in a region, the choice of that mode is often the outcome of a long, locally-driven planning process in which several issues have been considered, including congestion mitigation, air quality, and cost. APTA further argues that these considerations demonstrate public need and the inadequacy of other local transportation alternatives for a significant portion of the local population.

(3) APTA, which contends that passenger rail properties have often borne the brunt of the harmful effects of past mergers, insists that, in connection with future mergers, passenger rail operators, just like Rail Labor, should not have the harmful effects of mergers "crammed down" upon them.

Downstream effects. APTA insists that our examination of downstream effects must take into account the ongoing redevelopment of American rail passenger service. APTA explains: that, because "new starts" often rely on unused freight rail capacity or right-of-way, mergers that eliminate all unused capacity will stifle the future growth of passenger rail; that, in addition, access negotiations, which are never simple, become more difficult when passenger rail systems must negotiate with what are, in essence, oligopolists; and that, with little competition and no other recourse for getting fair access to rail right-of-way, new passenger rail systems would face an even steeper uphill climb with further consolidation of freight railroads.

Service and oversight. (1) APTA contends that the role of the proposed Service Councils should be enhanced; our regulations, APTA insists, should specifically identify commuter and passenger rail entities as participants on this Council. And, APTA adds, an additional Council might be necessary to give focused attention to commuter and passenger rail issues in a post-merger environment.

(2) APTA contends that we must ensure that attention is given to system-wide impacts, and not just to the new territories affected by the merger. APTA explains that, in the case of the Conrail transaction, passenger service problems were generally in the established portions of the system, not in the newly affected areas.

(3) APTA contends that reporting requirements must be established at the beginning of the process and must be monitored on a continuing basis. APTA further contends that we should commit to oversight of the SAPs for a period of at least 5 years.

(4) APTA contends that, because mergers can impact commuter railroads in instances where freight railroads operate on tracks owned by commuter railroads, a formal approval process should be established in which these commuter railroad owners can agree to projected freight volumes and not be forced to accept increased volumes that occur post-merger.

(5) APTA contends that, whether through a Service Council or directly through the Board, a mechanism needs to be created whereby complaints related to mergers can be received and promptly resolved. APTA insists that, rather than simply requiring reporting and forums for discussion, we should mandate arbitration on deviations from the service assurance plans. APTA explains, by way of example, that if track improvements are needed in order to maintain service levels promised in the SAP, the Board should be empowered to direct the railroad to complete the needed track improvements.

Consideration of impacts on rail passenger service. (1) APTA contends that our focus on the need for service improvement should extend to passenger services as well as freight services.

(2) APTA contends that we should carefully consider the impacts of mergers on existing and future rail passenger services as a key factor in our determination on the merger itself. APTA further contends that any adverse impacts to rail passenger operations should be specifically determined and weighed, as a public policy issue, in the decision as to whether or not to approve any merger. APTA adds that this consideration should be given to both existing passenger rail projects and proposed passenger rail projects, and should be given regardless of whether a passenger rail property owns its railroad right-of-way or operates on freight

(3) APTA contends that, if there are any existing or future rail passenger operations that will be adversely affected by a merger, we should mitigate the impacts of that merger by granting additional access rights in that corridor, by granting rights to prospective new services, or by directing the merging railroads to take other action to remedy the situation.

MARC and SCRRA. Initial comments on behalf of the MARC Commuter Train Service (MARC)[118] and the Southern California Regional Rail Authority (SCRRA)[119] were jointly filed: by the Maryland Mass Transit Administration, on behalf of MARC; and by SCRRA, on behalf of itself. Thereafter: reply comments were separately filed by SCRRA, on behalf of itself; rebuttal comments were separately filed by the Maryland Department of Transportation (MDDOT), on behalf of MARC;[120] and rebuttal comments were separately filed by SCRRA, on behalf of itself.[121]

MARC and SCRRA contend that, notwithstanding the close working relationships MARC and SCRRA had established with the freight railroads with which they share tracks, and notwithstanding the intensively negotiated contractual arrangements MARC and SCRRA had entered into with these freight railroads, the commuter rail services provided by MARC and SCRRA were adversely affected by the service disruptions that occurred in connection with the Conrail and UP/SP transactions, respectively. MARC and SCRRA further contend that their experience with these transactions demonstrates that the measures included in the NPR do not satisfactorily address the issues that commuter rail authorities encounter as a direct result of mergers this Board approves. MARC and SCRRA insist that we should acknowledge the important role that commuter railroads play in the communities they serve, the contribution these public agencies frequently make to the coffers or to the enhanced operations of the railroads with whom they share tracks, and the need to protect this segment of the public from the ravages that the exercise of merger authority can wreak upon the quality and reliability of commuter rail service.

Conditioning authority; oversight. (1) MARC and SCRRA contend that the public interest clearly lies in the preservation of commuter rail service; the presence of commuter rail operations in a community, MARC and SCRRA explain, means that community leaders have made a public policy decision that this service is a valid expenditure of substantial public funds because of the benefits the service will bring to the community. MARC and SCRRA note, however, that, although our broad authority to impose conditions on mergers encompasses the ability to address all harms that can arise as a result of a merger (and therefore allows us to impose conditions intended to preserve commuter rail services in which communities have made a substantial financial and political

---

[118] MARC operates on 3 lines serving the Baltimore, MD, and Washington, DC, metropolitan regions. MARC indicates: that it shares the road with other carriers on all 3 lines; that 2 of its lines are owned by CSX, which operates the MARC service on these 2 lines; that the third line is owned by Amtrak, which operates the MARC service on this line; that Amtrak also operates intercity rail service on 2 of the lines MARC uses; that NS operates freight service on the Northeast Corridor line owned and operated by Amtrak; and that CSX operates freight service on all 3 MARC lines.

[119] SCRRA, a joint powers authority comprised of 5 county member agencies (the Los Angeles County Metropolitan Transportation Authority, the Orange County Transportation Authority, the Riverside County Transportation Commission, the San Bernardino Associated Governments, and the Ventura County Transportation Commission), operates on 5 lines that its member agencies either own outright or have operating rights over. SCRRA indicates that, in almost all instances, SCRRA operations share the road with freight service provided either by BNSF or by UP. SCRRA further indicates that Amtrak also operates intercity rail passenger service on lines SCRRA uses for its Metrolink service.

[120] MDDOT's request that its late-filed rebuttal comments (filed January 17, 2001) be accepted is granted.

[121] SCRRA's request that its late-filed rebuttal comments (filed January 17, 2001) be accepted is granted.

investment), NPR § 1180.1(d) does not explicitly indicate that we will exercise our conditioning authority to preserve such commuter rail services. MARC and SCRRA therefore contend that we should indicate, in NPR § 1180.1(d), that the conditions we will impose to protect the public interest include conditions to ameliorate impacts on commuter rail service, including (but not limited to) conditions that require applicants to make and fund improvements to lines owned by the public agencies and operated over by applicants. MARC and SCRRA further contend that we should be clear that we will exercise our authority to require applicants to make investments in infrastructure when post-merger developments demonstrate that the implementation of a transaction has created congestion or other circumstances that adversely impact the service provided by the commuter authorities.

(2) MARC and SCRRA insist that it is not enough to remind applicants that they should honor their commitments to commuter railroads. MARC and SCRRA explain that, without a specific statement of our willingness to require the applicants to spend money to fix problems created by their merger, their attention is likely to be focused on other issues, particularly issues relating to shippers. Shipper issues, MARC and SCRRA concede, are indeed important; but shippers, MARC and SCRRA insist, are not necessarily more important than the taxpayers who fund and the riders who depend upon commuter service.

(3) MARC and SCRRA argue that the potential for facing a condition that will cause applicants to pay for improvements needed to preserve the integrity of agreed-upon service commitments would have the desired effect of causing applicants to think realistically about their operating plans, and either be certain to plan around the service that exists on their lines or look for low-cost ways to address the issues before they arise. And, MARC and SCRRA insist, we should not allow applicants to hide behind the terms of contracts made at the time the commuter service was planned and service was preparing to begin. MARC and SCRRA explain that the contracts entered into by commuter agencies, and the extensive investments made by such agencies in reliance on such contracts, are entered into and made in a pre-merger environment; the fundamental assumptions underlying such contracts and such investments, MARC and SCRRA note, reflect that pre-merger environment; and the consequences resulting from a future merger, MARC and SCRRA insist, are not foreseeable at the time such contracts are entered into and such investments are made. MARC and SCRRA contend that commuter agencies, having made such investments and having commenced operations in accordance with such contracts, must have the assurance that, to protect the public's investment and preserve the reliability of the service, this Board will impose conditions that go beyond any financial commitments the railroad may have made in the original agreements.

(4) MARC and SCRRA contend that we should acknowledge that our oversight authority extends, and will be used, to protect commuter operations that are occurring on the lines applicants use. MARC and SCRRA contend, in particular, that NPR § 1180.1(g) should specifically indicate that, under our oversight authority, we will impose conditions intended to preserve the public interest in the reliability and integrity of commuter rail service operations. MARC and SCRRA further contend that our authority to impose conditions intended to address unforeseen or unforeseeable merger-caused harms to commuter operators continues "after" the merger has been implemented and "beyond" the oversight period.

Pre-filing planning process; service assurance plans. (1) MARC and SCRRA contend that because applicants, in the development of their SAPs, should be expected to engage all affected parties in a dialogue to assess the impacts of the transaction and to focus on steps that will be required to ensure an efficient transition, NPR § 1180.10(b) should be revised to require applicants to consult with Amtrak and commuter service operators prior to preparing the freight/passenger coordination description that NPR § 1180.10(b) calls for. MARC and SCRRA argue: that fuller participation in the planning process will give public authorities more information upon which to base their understanding of the impacts of the transaction and their discussions with applicants about protection of their public's interests; and that, after the merger goes forward, commuters (like others involved in this process) will be better positioned to understand the differences between what was promised and what is actually occurring, and thus will be in a better position to support requests that the carriers invest in improvements needed to fulfill the promises they made.

(2) *NPR § 1180.10(b): technical matter.* MARC and SCRRA contend that, as respects coordination of freight and passenger operations, SAPs should focus not just on lines owned by applicants and operated over by commuter railroads, but also on lines owned by commuter railroads and operated over by applicants. MARC and SCRRA suggest, in particular, that the first sentence of NPR § 1180.10(b) should be revised to read: "If Amtrak or commuter services are operated over lines used by the applicant carriers to provide freight service, applicants must describe definitively how they will continue to operate these lines to fulfill existing performance agreements for those services."

Test for essential services. (1) MARC and SCRRA note that NPR § 1180.1(c)(2)(ii) provides that an existing service is essential, and therefore the Board must ensure its preservation, if there is "sufficient public need" for the service and "adequate alternative transportation" is not available. MARC and SCRRA take no position on the use of this "essential services" test for freight or intercity passenger service, but they insist that the use of this test for commuter rail service does not work. MARC and SCRRA explain that the very existence of commuter service (and, apparently, the very existence of plans to introduce and/or extend commuter service) represents a determination by the relevant local governments that there is indeed "sufficient public need" for the service and that "adequate alternative transportation" is not available; the relevant local governments, MARC and SCRRA further explain, would not undertake the enormous tasks involving in establishing and/or continuing commuter service (and, apparently, planning for future commuter service) if there were not a "sufficient public need" for the service or if "adequate alternative transportation" were available. MARC and SCRRA therefore insist: that we should use a standard other than "essential services" as the threshold for protecting commuter rail operations; and that we should include in our regulations a presumption that the decision of the local governments to continue investing in commuter service means that there is a "sufficient public need" and that "adequate alternative transportation" is not available in those communities.[122]

(2) MARC and SCRRA insist that, in the context of freight railroad mergers, we should not "second guess" the decisions made by local governments respecting "sufficient public need" and "adequate alternative transportation." MARC and SCRRA argue that, although the ICC and the STB have historically been the arbiters of public need and adequacy of transportation alternatives in the freight transportation business, it has long been the province of local governments to make decisions about satisfying the transit needs of the citizens in their regions. MARC and SCRRA further argue that, although the ICC may have been involved in similar analyses with respect to intercity passenger service many years ago, the creation of Amtrak marked the removal of that jurisdiction from the ICC and the end of the ICC's expertise in assessing the need for intercity rail passenger service.

---

[122] MARC and SCRRA insist that they are not asking us to presume that the preservation of passenger rail service takes precedence over freight rail service or other public interest considerations. MARC and SCRRA insist, rather, that they are only asking us to presume that the services provided by commuter rail operators are "essential" within the meaning of NPR § 1180.1(c)(2)(ii).

(3) MARC and SCRRA note that in many situations (*e.g.*, Chicago, New York/New Jersey, Philadelphia, Boston, and the MARC train service) local governments now operate commuter rail services that were once operated by freight railroads. MARC and SCRRA contend that, because local governments relieved the freight railroads of their commuter service obligations and have continued to invest in the preservation of commuter service, to permit a situation where the local governments' decision to continue that service could be undercut by a conclusion by this Board that the service is not "essential" would introduce a fundamental inequity into the regulatory scheme.

REGIONAL TRANSPORTATION AUTHORITY OF NORTHEAST ILLINOIS (METRA). The Commuter Rail Division of the Regional Transportation Authority of Northeast Illinois d/b/a Metra (Metra), the commuter rail authority serving the Chicago metropolitan area, indicates that the rail mergers of the past 5 years have impacted its operations. Metra, which notes that efficient coordination of its services with those of the freight railroads with which it shares operating corridors, joint facilities, or junctions is absolutely essential if Metra is to provide dependable service to its passengers, contends: that, in evaluating essential services, we should look at the entire transportation infrastructure, not just the rail network; that we should retain jurisdiction during an oversight period in order to impose any additional conditions that are needed to remedy or offset unforeseen adverse consequences of the underlying transaction; and that applicants should be required to include, in their "full system" impact analyses, the specific measures they propose to preserve existing levels of essential services.

Metra contends that, if the level and quality of the commuter and passenger rail services in effect under contract at the time a proposed merger is announced are to be preserved, the regulations proposed in the NPR should be clarified and strengthened in a number of ways. (1) Metra contends that we should explicitly state that commuter and passenger rail services (including commuter and passenger rail services that have been approved and funded, although not actually implemented, at the time of filing of a merger application) are "essential services." Metra argues that, given the significant public expenditure involved in operating and maintaining commuter and passenger rail systems, we should establish a presumption that such systems meet the test for essential services (*i.e.*, a sufficient public need for the service and an unavailability of adequate alternative transportation). Merger applicants, Metra adds, should have an extraordinary burden to demonstrate that their proposed merger should be permitted to disrupt or reduce the reliability of commuter and passenger rail services.

(2) Metra asks that we confirm that our asserted "willingness to use our conditioning power to mitigate or offset all types of threatened merger harms to the public interest," *NPR* at 16, means that harm to commuter rail service can be considered a harm to the public interest.

(3) Metra argues that, in appropriate circumstances, we should use the conditioning power to reopen and override contracts between freight railroads and commuter operators, in order to preserve pre-merger levels and quality of commuter service. Metra explains: that, although some commuter authorities may have included provisions addressing mergers in their trackage rights/use agreements or PSAs, others may not have done so; that, if the parties did address potential merger impacts in their contract, that contract provision should govern their relationship, unless the commuter operator satisfies a heavy burden of demonstrating why the contract provision should not control; but that, if the parties did not address potential merger impacts, it might be appropriate for the Board to open up that contract, to ensure that the commuter service is not displaced or otherwise harmed by the merger.

(4) Metra contends that, in appropriate circumstances, we should order merger applicants to fund capital improvements as a condition to merger approval. Metra argues that, regardless of whether such improvements are specifically aimed at alleviating impacts on commuter and passenger operators, or whether they are intended primarily to benefit freight railroads with corollary benefits

to commuter operators, the funding of such improvements is another potent remedy against merger-related harm. The Board, Metra insists, should not allow contractual commitments regarding funding responsibilities to preclude it from imposing this condition where appropriate.

(5) Metra contends that the NPR § 1180.10(b) freight/passenger coordination requirement should be expanded to require applicants to consider, among other things, problems that might arise at junction points on the commuter operator's system as well as at junction points on lines owned by applicants, and to establish remedial measures to alleviate these problems. Metra also asks that we confirm that the NPR § 1180.10(b) freight/passenger coordination requirement will apply regardless of whether the commuter railroads that might be affected are "connecting" railroads, or even carriers regulated by the Board. Metra adds that, while it takes no position with respect to Amtrak's argument that applicants should not be required to describe the impact of their proposed transaction on passenger rail services where they operate over certain Amtrak lines, Metra believes that applicants should be required to describe the impact of their proposed transaction with respect to lines owned by the commuter authorities themselves.

(6) Metra contends that NPR § 1180.10 should be revised to require applicants to consult with commuter authorities prior to filing a rail merger application. Metra contends, in particular, that, during the period between the filing of the pre-filing notification and the filing of the application, applicants should be required to consult with local commuter rail authorities that operate trains on shared right-of-way or at junctions with a party to the transaction. Metra explains: that the purpose of this consultation would be to review the preliminary results of the traffic analyses and the preliminary operating plan being devised for the terminal area where the commuter authority operates; that, if there are to be system-wide changes (*e.g.*, a reorganization or consolidation of dispatching centers), these too should be reviewed with the commuter authority during this consultation; and that, if changes in the supervisory personnel of the consolidating carriers are possible, the applicants should at this stage agree to prepare and review with commuter authorities a transition plan that ensures that supervisors experienced with specific commuter operations remain in control pending the training and orientation of their replacements.

(7) Metra asks that we confirm that NPR § 1180.6(b)(11) requires applicants to account for how the merger will impact commuter rail operations, and creates incentives for applicants to improve commuter operations on their lines and to promote improved commuter service as a public interest benefit of the transaction.

(8) Metra contends that the Board should be permitted to provide monetary remedies in the event that passenger service problems arise as a result of merger implementation. Metra explains that, while other remedies such as service orders might resolve a problem, the Board should have the option to impose a remedy, including a monetary penalty, that it believes will be most appropriate and effective under the circumstances. Metra indicates, by way of example, that, where carriers have had a record of persistent violations of contractual performance undertakings to commuter authorities, a monetary penalty might be appropriate.

(9) Metra contends that the Board should continue to exercise its existing authority to impose new or revised conditions on consummated mergers where those mergers have not produced anticipated benefits, or where previously imposed conditions have failed to alleviate harm. Metra argues that if it becomes clear (during an oversight proceeding or in another proceeding seeking to reopen a merger) that unexpected obstacles or changed circumstances have arisen that make the impacts of the merger more harmful than anticipated, the Board should be able to intervene and correct the situation. Such action, Metra explains, need not be any more intrusive or burdensome than was the condition originally imposed, but will restore equity to a situation that has become unbalanced in favor of the merged carrier.

NEW JERSEY TRANSIT CORPORATION. New Jersey Transit Corporation (NJ Transit or NJT) commends the Board for recognizing the potential impact of major rail mergers on passenger rail operations and for requiring future merger applicants to describe how they will coordinate post-merger freight operations with passenger rail operations. NJT contends, however, that we should clarify the scope of these protections and impose additional requirements in order to ensure that effective communication and coordination relating to the potential impact on existing and proposed passenger rail service takes place prior to the development of post-merger operating plans.[123]

Definition: technical matter. NJT indicates that it generally uses the term "passenger rail" to describe all types of passenger rail operations which use the general railroad network, including but not limited to intercity passenger rail operations, commuter rail operations, and light rail operations over "shared use" track. NJT contends that we should adopt, for purposes of our merger regulations, a similarly expansive definition of the term "passenger rail."

NPR § 1180.1(a). NJT, which notes that we have recognized that "a transaction involving two Class I rail carriers will affect the entire transportation system, including highways, waterways, ports, and airports," *NPR* at 11, contends that, in NPR § 1180.1(a), we should acknowledge explicitly that such a transaction will also impact passenger rail services and operators.

NPR § 1180.1(b). NJT contends that NPR § 1180.1(b) should repeat the statutory requirement that we consider the effect of a proposed merger on the adequacy of transportation to the public as a whole. NJT further contends that we should clarify that, in determining whether a proposed merger is in the public interest, we will consider the impact on existing and proposed passenger rail service.

Public interest considerations; essential services. (1) NJT contends that our merger rules. should fully take into account the essential services provided by NJT and other passenger railroads across the country. NJT notes, by way of illustration, that, although a future railroad merger might reduce truck transportation in and around Philadelphia or Newark, the net benefit to the public of reduced truck traffic would be offset or eliminated if those trucks were replaced by automobiles driven by former NJT patrons who had grown tired of delayed passenger rail service.

(2) NJT contends: that passenger rail service is an essential service that must be viewed in the context of the entire transportation infrastructure; that, similarly, any evaluation of the benefits of a merger weighed against its potential harms must include an evaluation of the entire transportation infrastructure, including passenger rail service; and that, with a narrower view, it is possible that predicted benefits of improved service, enhanced freight competition, or economic efficiency would not adequately take into account merger-related harms to passenger rail operations and other essential services provided by the transportation infrastructure as a whole. NJT further contends that the impacts of freight and passenger services in shared territory must be looked at simultaneously; a passenger service, NJT insists, should not need to be "fixed" as a result of changed freight operations. NJT therefore insists that the last sentence of NPR § 1180.1(c)(2)(ii) should be revised to read: "The Board will consider whether projected shifts in traffic patterns could undermine the

---

[123] NJT's commuter rail operating subsidiary, New Jersey Transit Rail Operations, Inc., operates 341 route miles (972 track miles) of railroad of which 300 route miles are shared with freight rail carriers.

ability of the various network links (including Class II and Class III rail carriers, passenger rail operators and ports) to sustain essential services."

(3) NJT notes that NPR § 1180.1(c)(2)(ii) states that "[a]n existing service is essential if there is sufficient public need for the service and adequate alternative transportation is not available." NJT argues, however: that, although the Board has exclusive and plenary authority over freight rail transportation and is well positioned to evaluate whether there is sufficient public need for freight service and adequate alternatives for that service, the Board does not regulate commuter rail or rail transit service; that State departments of transportation, other State sovereign entities, and the Federal Transit Administration have the primary role for determining the efficiency of, and public need for, particular commuter rail or rail transit services and the adequacy and availability of alternative passenger transportation; and that, therefore, if a publicly-sponsored passenger rail operation is in service or if a publicly-sponsored passenger rail operator has a commitment with a freight railroad for the commencement of new or extended passenger rail service, the Board should presume that there is sufficient public need for the service, that it is an essential service, and that there are no adequate transportation alternatives. NJT indicates, with particular reference to New Jersey, that the continuation and expansion of NJT's rail passenger services are vital; increased passenger rail ridership, NJT claims, will enable New Jersey to reduce the economic inefficiency and lost human productivity associated with automobile trip delays and the air quality problems caused by excessive numbers of automobile trips.

Service assurance plans. (1) NJT contends that the NPR § 1180.(1)(h)(3) Service Council should include passenger rail operators affected by any proposed merger.

(2) NJT contends that, because NPR § 1180.10(b) could be construed to apply only to freight or passenger operations over lines owned by the applicants themselves, we should explicitly require applicants to describe how they will coordinate post-merger freight operations over lines owned by passenger rail operators.

(3) NJT contends that we should also require applicants to address the potential impacts of post-merger freight operations on future passenger rail operations, particularly where the passenger rail operator has contract rights to expand its service over lines owned by or shared with the applicants. NJT contends that, at a minimum, the applicants should be required to address the specific impacts of the proposed merger on passenger or transit projects that are in the Federal Transit Administration or New Jersey State review process and/or for which monies have been committed.

(4) NJT contends that NPR § 1180.10(e), regarding information technology systems, would work best if we would employ sufficient resources (including outside consultants) to carefully review information submitted by applicants.

(5) NJT contends that SAPs, including the contingency plans for merger-related service disruptions, should also include (but not be limited to) specific information regarding planned locations for temporary storage of trains whose crews have exceeded their hours of service and assurances that such storage will not adversely affect passenger rail service.

(6) NJT contends that we should require applicants to meet and confer with passenger railroads in advance of finalizing their operating plans.

UNITED RAIL PASSENGER ALLIANCE. United Rail Passenger Alliance, Inc. (URPA), contends that past rail carrier consolidations have adversely affected existing as well as prospective intercity, regional, and commuter rail operations, and warns that future rail carrier consolidations may also adversely affect existing as well as prospective intercity, regional, and commuter rail operations. Entire routes and major cities, URPA claims, have been lost to rail passenger service as a result of past consolidations; and more routes and more cities, URPA suggests, may be lost to rail passenger service as a consequence of future consolidations. URPA further contends: that future growth in passenger train frequencies in long-distance markets, and the expansion of passenger service into new markets, could be equally impacted by future transactions; that, unless we require complete review of merger impacts on both current and prospective passenger services in future transactions, it will be impossible for Congress, states, cities, regional multistate agencies, and private businesses interested in rail passenger services, both existing and prospective, to understand and to take appropriate ameliorative actions regarding these transactions; and that, for these reasons, we should incorporate into the proposed regulations a fully-articulated requirement that the parties to a covered transaction provide a complete evaluation of the impacts of the transaction on both existing and prospective commuter, regional, and intercity rail passenger services. URPA insists that failure to require complete evaluation of impacts of rail carrier consolidations on both existing and prospective commuter and regional rail passenger services could have a preclusive impact on their future growth and further development, which (URPA insists) would be hostile to the public interest in fostering growth of popular and effective rail transit alternatives to overcrowded highways.

APPENDIX F: RAIL LABOR INTERESTS

RAIL LABOR DIVISION OF THE TRANSPORTATION TRADES DEPARTMENT AFL-CIO (ATDD, BLE, BMWE, BRS, HERE, IAM, IBB, IBEW, SEIU, SMW, TCIU, and TWU). The Rail Labor Division of the Transportation Trades Department AFL-CIO (RLD)[124] contends that there are serious problems with the current major consolidation regulations that clearly favor consolidation applicants and effectively devalue the concerns and interests of rail workers, communities, and shippers. RLD further contends that, although the regulations proposed in the NPR purport to address these problems, the proposed regulations must be revised to speak more specifically, more clearly, and more directly in a number of areas. RLD contends, in particular, that because (in its view) the ICC and the STB have often given conflicting signals on the assessment of public transportation benefits and the cramdown issue, and because the carriers have successfully exploited ambiguities and mixed messages in those areas, the new regulations should be, as respects those areas, especially clear and detailed, and mandatory rather than advisory.

General policy, consolidation criteria, downstream effects, and assessment of the public interest. (1) RLD contends that, because experience has shown that the public does not necessarily benefit from major rail consolidations, major consolidation applicants should be required to show, by clear and convincing evidence, that the transaction will produce substantial and demonstrable public interest benefits that are likely to be realized, that cannot be achieved through

---

[124] RLD's affiliated organizations are the American Train Dispatchers Department-BLE (ATDD), the Brotherhood of Locomotive Engineers (BLE), the Brotherhood of Maintenance of Way Employes (BMWE), the Brotherhood of Railroad Signalmen (BRS), the Hotel Employees and Restaurant Employees Union (HERE), the International Association of Machinists and Aerospace Workers (IAM), the International Brotherhood of Boilermakers, Iron Ship Builders, Blacksmiths, Forgers and Helpers (IBB), the International Brotherhood of Electrical Workers (IBEW), the Service Employees International Union (SEIU), the Sheet Metal Workers International Association (SMW), the Transportation•Communications International Union (TCIU), and the Transport Workers Union of America (TWU). BRS, IBB, SMW, and TWU also joined in the Allied Rail Unions (ARU) filing; TCIU, IAM, IBEW, and ATDD also filed a separate joint submission; and BRS also filed separately.

other means, and that are likely to outweigh any potential harm to the public interest. RLD further contends that this requirement should apply to all major consolidations and not just to those that arguably might reduce railroad competition and competition from other transportation alternatives; the next major consolidations, RLD explains, will be national in scope and will necessarily affect transportation throughout the country and will reduce the industry to 2 or 3 mega-carriers. And, RLD adds, because past applicants have repeatedly offered the same superficial and unsubstantiated claims that transactions would be in the public interest, future applicants should be required to produce evidence to support their claims based on prior experience, actual operational studies and pilot programs, customer surveys, or some other objective analysis.

(2) RLD, which notes that the proposed regulations refer to "efficiency" and "greater economic efficiency" as potential public interest benefits of a transaction, contends that we should clarify: that "greater economic efficiency" means greater economic efficiency generally for the nation or regions served by the carriers involved, and not greater economic efficiency for the carriers themselves; that the efficiency must come from the transaction itself, and not from an inference that government license for the transaction is license for the applicants to alter their costs of doing business; and that the potential to use "cramdown" to reduce labor costs should not be a factor in determining whether a transaction is in the public interest. RLD explains: that, while we may consider whether a transaction will promote better transportation for shippers and the public at large, neither shippers nor the public have a legitimate interest in having the government reduce labor costs for the carriers; that, however, the carriers have often distorted and exploited the concept of greater economic efficiency by using ICC/STB approvals of transactions as a justification for abrogating CBAs; that, in particular, the carriers have often asserted that, because changes in rates of pay, rules, and working conditions would make the carriers more efficient, the changes were mandated by the general policy favoring greater economic efficiency; and that, although the courts once held that "public transportation benefits" should not be used as a cover to merely transfer wealth from employees to their employer, the carriers have since succeeded in selling the notion that their economic well-being is part of the concept of greater economic efficiency and is thus a part of the larger public interest.

(3) RLD agrees that we should analyze the likely "downstream effects" of a proposed transaction.

(4) RLD indicates that it applauds our recognition that, because forecasts of public benefits in recent transactions have not turned into real public benefits, it is necessary to look with more skepticism on the claims that applicants make. RLD contends, however, that we have understated the problem in asserting that claimed benefits have been "delayed" by transition problems; it is not at all clear, RLD insists, that the claimed benefits will ever be realized. RLD explains that recent improvements on some carriers have effectively restored them to the level of service provided prior to the initiation of the most recent round of consolidations, while on other carriers the "improvements" have seen service change from terrible, to bad, to below pre-transaction standards.

Paper and steel barriers. RLD contends that many "paper" and "steel" barriers are the result of line sales by Class I railroads that Rail Labor argued (at the time of such sales) were not genuine transactions because the sold lines would not really be independent of the selling Class I, but, rather, would simply feed traffic to the seller and would remain effectively a part of the seller's system but with fewer employees working at lower pay rates under inferior terms and conditions of employment. RLD further contends that Rail Labor specifically noted (at the time of such sales) that, in many cases, there were financial inducements and penalties to ensure that the supposedly independent new carriers would necessarily feed traffic only to the selling Class I, and that the new carriers' lower operating costs merely reflected their ability to reduce labor costs by cutting employment and pay and by abrogating standard national CBAs. RLD argues that, although (at the time of such sales) the newly created shortlines and regionals denied Rail Labor's charges, many of them, and many of the shippers who supported them, now acknowledge that they are not truly independent of the selling Class I. RLD therefore submits that, in considering mechanisms for the preservation and enhancement of competition, we should tread warily when considering requests for removal of paper and steel barriers; such relief, RLD believes, should not be given when the complained-of barriers were a part of a line sale deal predicated on the supposed independence of the purchaser.

Safe operations. RLD contends that NPR § 1180.1(c)(2) should be revised to recognize "unsafe operation of rail service" as a "potential result from consolidations which would ill serve the public." The ability of the carrier to operate safely, RLD insists, is not just an issue at the time of integration; it is, rather, a concern in each day of operation. Applicants, RLD argues, should therefore be required: to show that they will have the financial ability to ensure continued safe operations after the transaction is consummated; to produce a "safety inventory" analyzing the condition of tracks, structures, dispatching and signal systems, and locomotives and rolling stock; and to explain plans to maintain and/or upgrade those physical assets.

Cramdown. (1) RLD claims that, although it appreciates our identification of the carriers' use of "cramdown" as a potent source of friction in labor-management relations, NPR § 1180.1(e) will do nothing to reduce labor-management conflict over cramdown because (RLD insists) NPR § 1180.1(e) effects no real change in the status quo. RLD explains: that the status quo permits a carrier to obtain "cramdown" relief by demonstrating to an arbitrator that the change or abrogation of a contract is somehow merger-related and will foster some change in operations that will provide a virtually unquantifiable public transportation benefit; that, oftentimes, the asserted public benefit is merely a reduction in labor costs for the carrier that supposedly will somehow be passed along to the public; that arbitrators have understood our decision in *Carmen III* to mean that the carrier can justify work assignment and employment level changes merely by showing that it could operate more efficiently with the changes than without them; and that we have never found that an arbitrator went too far in saying that a CBA could be modified or abrogated. The carriers, RLD contends, look at the present environment as giving them license to do whatever they want, and they therefore have little incentive to make substantive concessions.

(2) RLD objects to our NPR § 1180.1(e) statement that we are required to provide "adequate" protection to the rail employees of applicants who are affected by a consolidation; the fact of the matter, RLD argues, is that we are required by 49 U.S.C. 11326(a) to provide a "fair arrangement" that is protective of the employees; and RLD insists that we should use the term "fair arrangement" in NPR § 1180.1(e). RLD explains: that, because we cannot by rulemaking amend our governing statute, we cannot adopt a rule that will result in protective conditions that do not provide a "fair arrangement" for employees; and that the use of an alternative word such as "adequate" could lead to confusion among labor and management as to whether we have articulated a new standard as to what constitutes a "fair arrangement."

(3) RLD notes that, although it agrees with our general approach favoring private settlement of management-labor disputes, *NPR* at 17, it views this general approach in a somewhat different manner. The parties, RLD explains, already have a private settlement, the Washington Job Protection Agreement of 1936 (WJPA), that was used successfully from 1936 to 1980 and that, if used now, would once again provide the appropriate means for the selection of forces and the assignment of employees involved in merger-related transactions.

(4) RLD notes that the third sentence of NPR § 1180.1(e) provides that "[t]he Board respects the sanctity of collective bargaining agreements and will look with extreme disfavor on overrides of collective bargaining agreements except to the very limited extent necessary to carry out an approved transaction." RLD insists that this sentence is well within our statutory power, and suggests, in essence, that we should expand on this sentence by narrowing the now prevailing "necessity" and

"approved transaction" standards. (a) *Necessity standard.* RLD contends: that the *Carmen III* necessity standard, which (RLD claims) permits application of the 49 U.S.C. 11321(a) cramdown provision to abrogate or modify CBAs when that action will provide a "public transportation benefit," is a departure from earlier ICC and judicial interpretations; that the *Carmen III* necessity standard is not nearly as stringent as is required by 49 U.S.C. 11321(a); that we have the authority to restate the necessity standard to one more stringent than exists today; and that we should use this authority to adopt a more stringent necessity standard that would not allow wholesale changes in CBAs greater in scope and far removed in time from the actual financial transaction for which approval has been sought and granted under 49 U.S.C. 11323-24.[125] (b) *"Approved transaction" standard.* RLD, which contends that the term "approved transaction" should also be construed narrowly, would apparently limit that term to the actual financial transaction for which approval has been sought and granted under 49 U.S.C. 11323-24. Cramdown, RLD contends, should only be applicable if, without cramdown, the "approved transaction" would be blocked. (c) *The WJPA standard.* RLD contends that we should adopt a "cramdown is dead" policy by determining that, under 49 U.S.C. 11321(a), any override of CBAs beyond those permitted under the WJPA procedures is not "necessary" to carry out the "approved transaction." RLD further contends that, because the WJPA is a negotiated agreement that permits the carrying out of approved transactions, reliance upon the WJPA procedures for the carrying out of such transactions (*i.e.*, for the selection of forces and assignment of employees necessary to carry out such transactions) would make it "unnecessary" to use cramdown to abrogate or modify any CBA involved in a merger.

Transfers/relocations. RLD contends that the *New York Dock* conditions must be modified to reflect the transcontinental nature of any future consolidations, and the inherent hardships worked upon employees forced to relocate or transfer as a result. RLD, which insists that the transcontinental nature of present-day rail consolidations renders the existing protective terms inadequate and their historical justification less than convincing, argues that, to truly constitute "fair arrangements" for the protection of employees, the *New York Dock* conditions must be modified as proposed by RLD in its ANPR comments.

Test period averages. RLD contends: that the TPA provides the means for the employee to help determine whether there has been an adverse effect and to quantify the severity of the adverse effect for a given month; that the TPA also enables the employee to fulfill the obligation to work the highest-rated position available to the employee in the normal exercise of his/her seniority; and that neither the calculation of the TPA, nor the furnishing of the TPA to an employee, constitutes a determination that a transaction-related adverse effect has occurred. RLD further contends that the carriers have resisted providing TPAs in the hope of frustrating employees in their efforts to obtain benefits to which they are entitled (the carriers, RLD explains, say that employees cannot obtain

[125] RLD, which insists that we have applied a more exacting "necessity" standard before "cramming down" changes in contracts other than CBAs, contends that our maintenance of 2 "necessity" standards for 49 U.S.C. 11321(a) is arbitrary and capricious and may raise Fifth Amendment issues because (RLD explains) we are applying a different "necessity" standard based upon the property right at issue. RLD further contends that any claim that CBAs are different because of the provision for compensatory benefits under 49 U.S.C. 11326 would be wrong; the benefits under 49 U.S.C. 11326, RLD explains, are provided to cushion the economic effects of a merger on railroad employees; and such benefits, RLD insists, are not a quid pro quo for the use of the cramdown.

benefits without showing adverse effect, but have refused to provide the employees with readily available data necessary to show loss of earnings until they are found to be adversely affected). RLD, which insists that there are substantial equitable reasons why carriers should be required to provide TPAs[126] and that there are no good reasons for the carriers to refuse to provide them,[127] contends that, to ensure that employees who have been adversely affected by a consolidation receive the benefits to which they are entitled, we should require railroads to provide each employee with his/her TPA, upon the employee's request.

Cross-border issues. RLD contends: that it is possible that foreign applicants might seek, as part of a merger, to transfer parts of their domestic operations (*e.g.*, their train dispatching operations) to locations beyond U.S. borders; that, therefore, foreign applicants should be required to provide assurances of continued FRA supervision of operations that would impact the safety of the domestic rail system; that such a requirement is unnecessary in the case of domestic carriers because, by definition, their operations are fully within U.S. borders and fully subject to FRA supervision; and that, although such differentiation between foreign applicants and domestic applicants may be discrimination, it certainly is not unlawful or improper discrimination. RLD further contends that, in any event, we could satisfy the discrimination concerns expressed by CN and CP by expanding NPR §§ 1180.1(k) and 1180.11 to encompass domestic carriers that, as part of a wholly domestic merger, intend to transfer to another country any part of their operations that would impact safety of domestic operations. And, RLD insists, we should also expand NPR § 1180.1(k) by requiring applicants (foreign as well as domestic, apparently) to "provide assurance that operational control of rail trackage within the United States shall remain within the United States subject to regulation by the government of the United States." RLD, which argues that the U.S. does not permit foreign nationals to control U.S. commercial airspace, insists that the rail system should be accorded the same protection.

Passenger rail issues. RLD contends that we should treat existing passenger rail service as essential to the communities that have such service. RLD further contends that, because passenger rail operations often share track, facilities, and equipment with freight railroads, we should provide that, if passenger rail workers are adversely affected by a consolidation, they should be eligible for employee protections similar to those provided freight rail workers in the same transaction.

ALLIED RAIL UNIONS (BRS, IBB, NCFO, SMW, and TWU). ARU,[128] which indicates that the 5 ARU unions join in and adopt as their own the comments filed by RLD, contends that we should end cramdown because (ARU insists) cramdown can no longer be said to be necessary to the carrying out of any major consolidation. (1) ARU argues that the NPR does not adequately address

---

[126] RLD explains that, without carrier-provided TPAs, an employee must attempt to show loss of earnings based on pay stubs for the preceding 12 months. And, RLD adds, because the loss of earnings is for the test period "time paid for," the employee must calculate, for the preceding 12 months, not only average earnings but also average hours worked.

[127] RLD insists that it would be a relatively simply administrative function for the carriers to calculate TPAs.

[128] The Brotherhood of Railroad Signalmen (BRS), the International Brotherhood of Boilermakers, Iron Ship Builders, Blacksmiths, Forgers and Helpers (IBB), the National Council of Firemen and Oilers/SEIU (NCFO), the Sheet Metal Workers International Association (SMW), and the Transport Workers Union of America (TWU) filed jointly as the Allied Rail Unions (ARU).

the problem of carrier use of Board approvals of transactions to override existing CBAs. ARU insists that, although NPR § 1180.1(e) states that "[t]he Board respects the sanctity of collective bargaining agreements and will look with extreme disfavor on overrides of collective bargaining agreements except to the very limited extent necessary to carry out an approved transaction," this language lacks standards and contains no specific rules that would result in a change in the status quo.

(2) ARU argues that ICC and STB decisions, and arbitration awards that have been sanctioned by the Board, have allowed the use of cramdown as a means of compelling CBA changes, sometimes many years after the primary approved financial transaction had been consummated. ARU claims that the ICC/STB and arbitrators have accepted carrier arguments that they were carrying out transactions and could override CBAs not only when they combined adjoining seniority districts of previously separate carriers, but also when they merged multiple and non-contiguous seniority districts in several states that were previously separate districts within the same pre-merger carrier. ARU insists that: it is one thing for carriers to claim a necessity to change existing CBAs when they are combining work forces at common points or common territories where there will be ongoing mixed assignments with employees who previously worked under different CBAs regularly assigned to the same locations or territories; but that it is an entirely different matter for the carriers to claim that CBAs must be changed in order to create vast seniority districts or work territories or regions under a single CBA where the real change is not in the combination of previously separate workforces with consolidated assignments of work, but rather in the CBA that will govern the employees involved.

(3) ARU argues that, because the carriers have found it undesirable to maintain separate CBAs at separate stand-alone facilities, in separate seniority districts and even in their own separate work regions that do not interact with each other, they have used cramdown to just eliminate CBAs, even when there has been no operational reason to do so. These changes, ARU explains, have been accomplished with the approval of the ICC/STB and its arbitrators because they were supposedly "necessary" to the "carrying out" of the approved transactions (even ones consummated many years earlier). ARU contends that, under current precedent: the "necessity" standard has been transmuted first into "convenience" and then into "desirability;" the "carrying out of the transaction" standard has been transmuted from effecting the approved financial transaction, to implementation of the consolidation made possible by common ownership, to realization of efficiencies and economies of the type contemplated by the applicants; and the "transaction" concept has been transmuted from the approved merger or acquisition of control, to the alleged goals of the transaction. Recent precedent, ARU argues, has sanctioned cramdown whenever it would be advantageous for facilitation of any plan that might be related to the applicants' objectives in consolidating, including simple reductions in their labor costs.

(4) ARU argues that the NPR's statement that we will look with "extreme disfavor" on cramdown "except to the very limited extent necessary to carry out an approved transaction" offers cold comfort to Rail Labor because of the misuse of the word "necessary" and the words "carry out" under prior ICC and STB decisions. ARU insists that, if we truly intend a change in this area, our use of this language is likely to frustrate our purpose.

(5) ARU argues that the reality of the nature of future major consolidations is such that the current regime can no longer be justified as a matter of policy; there can simply be, ARU explains, no necessity for CBA overrides in connection with future Class I consolidations that will be transcontinental in scope. ARU adds: that the fact that 2 railroads will meet in Chicago or Kansas City cannot possibly necessitate overriding the CBAs covering tens of thousands of employees on the east and west coasts; that integration of operations at a connecting point could not possibly require having seniority districts stretching from Pennsylvania to Colorado, combining seniority districts in New England under a CBA applicable in Texas, or placing shops in Kentucky under agreements applicable to shops in California when there will be no interchange of work or

employees between the facilities; and that, while there never was merit to the ICC/STB's purported rationale for CBA overrides, that rationale is facially specious with respect to the transactions that will be covered by the new regulations.

TCIU, IAM, IBEW, and ATDD. TCIU, IAM, IBEW, and ATDD, which have joined in the comments filed by RLD, have also offered supplemental comments of their own. TCIU, IAM, IBEW, and ATDD indicate that, although they are disappointed that the NPR proposes neither to end cramdown entirely nor to adopt the TCIU/IAM/IBEW/ATDD alternative cramdown proposal,[129] they take seriously the Board's encouragement of the parties to attempt to resolve the cramdown issue through private agreements and the Board's specific urging that the parties negotiate resolution of contentious issues such as mandatory employee relocation. TCIU, IAM, IBEW, and ATDD indicate that they will attempt to negotiate a broad-based agreement on these issues and will report back to the Board on their progress.

AMALGAMATED TRANSIT UNION. The Amalgamated Transit Union (ATU) has taken issue with the NPR's treatment of passenger rail issues. (1) ATU contends that, because much of the nation's public transportation industry uses the track or right-of-way of various freight railroads, future mergers have the potential to negatively impact commuter rail operations (ATU notes, in particular, that past mergers have resulted in more distant centralized dispatch centers and the replacement of freight railroad personnel who had been trained to provide commuter services on behalf of commuter authorities through "purchase of service" agreements). ATU therefore insists that we must consider the impacts of mergers on existing and future rail passenger services as a key factor in our decision on the merger itself. And, ATU adds, any potential adverse impacts to rail passenger operations (especially those concerning safety and reliability) should be weighed, as a public policy issue, in the decision as to whether or not to approve any merger.

(2) ATU contends that, as respects commuter rail operations, the "essential service" concept should go beyond the consideration of whether alternative transportation is available, and should consider, rather, the significant long-term planning and financial commitments that local communities across the U.S. have made to include passenger rail service as part of the solution to their mobility challenges. ATU further contends that the standards of sufficient public need and whether or not alternative transportation is available fail to take into consideration the issues of congestion, environmental concerns, and whether or not such alternative transportation is affordable. ATU claims that, once local communities have made the significant commitments required to establish passenger rail service, the existing passenger rail service indeed becomes essential to the economic vitality of the public by serving critical mobility needs and by creating jobs in the community as well as within the commuter rail authorities themselves. ATU therefore insists that our regulations should provide that all existing passenger rail service shall be considered essential in communities that have wisely invested their resources in necessary public transportation infrastructure.

(3) ATU contends that, as the proposed regulations would require the Board to provide adequate protection to freight rail employees affected by a consolidation, they should require similar guarantees for passenger and commuter rail employees who may be affected by a consolidation. ATU further contends that potential adverse impacts on safety should also be addressed prior to any final decision. And, ATU adds, we should maintain a strong oversight role to protect the interests of commuter rail passengers and personnel.

---

[129] *See NPR* at 153.

BROTHERHOOD OF RAILROAD SIGNALMEN. The Brotherhood of Railroad Signalmen (BRS) contends that we should revise our merger regulations in light of the current transportation environment and the prospect of a North American transportation system composed of as few as 2 transcontinental railroads. (1) BRS, which opposes the use of preemption procedures to force labor concessions in approved transactions, argues that preemption of collectively bargained rights was intended only to allow non-labor-related transportation benefits to be realized for the public good and not to allow the forced imposition of work rule concessions on employees only minimally affected by a merger. CBA changes, BRS insists, should be made only through bargaining. And, BRS adds, the wholesale imposition of railroad-preferred work rules exceeds what is intended in the Interstate Commerce Act.

(2) BRS notes that NPR § 1180.1(e) provides that "[t]he Board respects the sanctity of collective bargaining agreements and will look with extreme disfavor on overrides of collective bargaining agreements except to the very limited extent necessary to carry out an approved transaction." BRS concedes that this statement appears to address some employee concerns but insists that there is nevertheless a problem with this statement. The problem, BRS explains, is that similar language has been used by the Board in the past without accomplishing the intended result. BRS insists, in particular, that, although similar language was used in *Carmen III*, a subsequent arbitration involving shop-craft employees resulted in the replacement of entire CBAs with other CBAs even though there was neither any integration of employees nor any other considerations making CBA changes even remotely necessary.

(3) BRS contends that the now-suspended "cramdown" negotiations between employee representatives and the NCCC should be resumed. BRS further contends that these negotiations, if successful, would serve the interests of rail employees and rail carriers alike (BRS explains that successful resolution would serve the interests of rail employees by placing limitations on the use of preemption, and would serve the interests of the rail carriers by providing a workforce subject to less disruption and therefore better capable of dealing with the challenges presented by the merger of large rail carriers with dissimilar work rules). And, BRS adds, to give rail employees the leverage they lack under the current process we should: (a) grant the parties a specified period of time in which to resolve this issue jointly, and indicate that, if there is no joint resolution, we will issue a final rule in this specific area; and (b) indicate to the industry that we are considering a final rule that could prohibit any arbitrator acting under the authority of the STB from overriding, modifying, or abrogating a CBA.

UNITED TRANSPORTATION UNION. (1) United Transportation Union (UTU), which contends that the abrogation of collective bargaining rights by carriers under the guise of merger procedures has been a serious problem for UTU and its members over the past 2 decades, indicates that the recently negotiated solution to this problem (the UTU/NRLC agreement, which UTU refers to as the "Revised Standards") addresses "cramdown" issues to UTU's satisfaction. UTU advises: that the parties reached their agreement to the Revised Standards by bargaining under the Railway Labor Act; that the parties intend that the Revised Standards will be prescribed by statute and will not be conditions imposed and administered by the STB; and that the parties have agreed that the UTU/NRLC agreement is not itself subject to the 49 U.S.C. 11321(a) exemption provision. UTU further advises that, because the UTU/NRLC agreement removes the labor relations issue of post-merger CBA changes from the STB's control, the STB has been freed to administer transportation issues and to get out of the labor relations business. And, UTU adds, it remains steadfast in its belief that negotiations provide the best method for resolving "cramdown" issues.

(2) UTU contends that, although the UTU/NRLC agreement addresses "cramdown" issues, the positions of Rail Labor on other labor issues in major rail consolidations should be given more consideration than they have been accorded in the regulations proposed in the NPR. UTU contends,

in particular, that Rail Labor should be mentioned in NPR § 1180.1(a), (c), and (h). UTU further contends that Rail Labor is a necessary voice on the NPR § 1180.1(h) Service Council.

JOHN D. FITZGERALD. Mr. Fitzgerald, General Chairman for UTU on lines of BNSF, filed for and on behalf of UTU—General Committee of Adjustment (UTU/GO-386). Mr. Fitzgerald's primary concern is with the "Northern Lines" formerly operated by the Great Northern Railway Company, the Spokane, Portland & Seattle Railway Company, and the Northern Pacific Railway Company.

Scope of the proposed regulations. Mr. Fitzgerald contends that the NPR does not correctly set forth the scope of the proposed regulations with respect to the transactions and carriers involved and the extent to which the "regulations" may be considered binding. (1) *Title of the NPR.* Mr. Fitzgerald contends that, although the NPR is titled "Major Rail Consolidation Procedures" and purports to involve only "major" transactions (*i.e.*, transactions involving the control or merger of at least 2 Class I rail carriers), the fact of the matter is that the regulations proposed in the NPR go far beyond "major" consolidation proposals; the NPR, Mr. Fitzgerald explains, extensively revises present regulations applicable to "significant" and "minor" transactions as well as "major" transactions. Mr. Fitzgerald insists that, because the NPR fails to adequately announce important changes for other than major rail consolidations, the NPR has not provided the public and railroad employees due process.

(2) *Policy statement or regulation.* Mr. Fitzgerald notes that the NPR: proposes modifications to our "regulations," *NPR* at 1; proposes new "rules," *NPR* at 1; and indicates that "[t]he centerpiece of our proposed rules is a new merger policy statement," *NPR* at 9. Mr. Fitzgerald contends that the NPR appears to have confused a *rule* or *regulation*, on the one hand, with a *policy statement*, on the other hand. Mr. Fitzgerald explains that a policy statement is not binding (*i.e.*, it can be challenged when applied), and is subject to very limited judicial review. Mr. Fitzgerald insists that any final rules should indicate that the NPR § 1180.1 "general policy statement" is not binding.

The secrecy process. Mr. Fitzgerald contends that the proposed policy statement and regulations do not solve the "secrecy process" that (Mr. Fitzgerald claims) is the heart of the STB's problem. Mr. Fitzgerald, who maintains that the service disruptions that followed recent rail consolidations did not follow older rail consolidations, insists that what has changed over the years has been the nature of the process for inquiring into the merits of a major rail consolidation proposal. Mr. Fitzgerald contends that a closed and secret process for the development of evidence, and its evaluation by the select few, has been substituted for the formerly open procedures that encouraged full participation by the public and examination of the record by many persons. An open and complete record, Mr. Fitzgerald adds, tends to unearth problems, which then may be evaluated and addressed in a timely fashion. (1) *Prefiling procedures.* Mr. Fitzgerald claims that the NPR would continue, and enlarge, the prefiling process whereby carriers and STB staff determine, behind closed doors, the initial evidentiary framework and requirements for the forthcoming application. The real merger decisional process, Mr. Fitzgerald argues, takes place between attorneys for applicants and agency staff. And, Mr. Fitzgerald adds, although there are rules against ex parte communications, these rules come into play only after an application has been accepted and noticed for the taking of evidence. Mr. Fitzgerald also claims that, although STB staff is permitted to be involved in ex parte communications even after the application has been accepted so long as a memorandum is placed in the public docket, there is no requirement that parties to a proceeding be notified that an item has been placed in the public docket, and, in actual practice, agency staff does not provide such notification.

(2) *Hearings.* Mr. Fitzgerald contends: that we did not conduct public hearings in our most recent consolidation proceedings; that the only "hearings" held in our most recent consolidation proceedings were conducted by an ALJ from another agency, were restricted to discovery issues, and were held in Washington, DC; and that most of these "hearings" were closed to the public. Mr. Fitzgerald further contends that, in years gone by, major rail consolidation proposals were the subject of local hearings (to allow input from the public and examination of carrier statements) and the ALJ assisted in the process of developing an adequate record (even if the record ultimately was certified to the agency without an ALJ's initial decision). Mr. Fitzgerald insists that, under the procedures formerly employed, potential problems were discovered and analyzed; and, Mr. Fitzgerald adds, railroad employees frequently appeared at local hearings and contributed to the evidentiary process, particularly with respect to operating matters.

(3) *Secret procedures.* Mr. Fitzgerald contends that, whereas current practice at the STB allows much of the critical evidence adduced after the application is accepted to be placed under seal, this was very rare in railroad consolidation proceedings until recently. Mr. Fitzgerald further contends that, because the secret critical materials, and thus an important part of the proceedings, have a limited audience, the scope of analysis by the public and by all parties is circumscribed.

(4) *Ex parte contacts.* Mr. Fitzgerald claims that it is common knowledge that persons in the transportation industry (including railroad executives, heads of trade organizations, and employee representatives) frequently have private audiences with STB members; and, Mr. Fitzgerald adds, the secrecy process of the STB is not confined to railroad consolidation proceedings, but permeates the agency. Mr. Fitzgerald argues that closed private gatherings should not serve as a substitute for the development of a public record, and for the interaction of views within the transportation industry through an open process. The STB, Mr. Fitzgerald insists, should disavow secrecy, except in a dire emergency.

(5) *Diskette requirements.* Mr. Fitzgerald contends that the requirement that all submissions be accompanied by a diskette compatible with WordPerfect 9.0 precludes participation by large numbers of the public. Mr. Fitzgerald further contends that this "unconscionable" diskette requirement, which (Mr. Fitzgerald notes) is in addition to the availability of all filings by the scanning process, is part of the limited information and secrecy process that (Mr. Fitzgerald insists) will lead to further service disruptions and service inadequacies.

Excess capacity and enhanced competition. Mr. Fitzgerald rejects the notion that, because railroads have now reduced most or all of their "excess capacity" and have greatly improved the efficiency of their operations, future merger applicants should be required to "enhance competition" as an offset to negative impacts from service disruptions and competitive harms. (1) *Excess capacity.* Mr. Fitzgerald contends: that the NPR's "excess capacity" contention is a fabrication; that a mission to reduce "excess capacity" through Class I rail mergers does not exist for the ICC/STB; and that, in any event, the "excess capacity" concept has not been applied by the ICC/STB in the administration of the present policy statement. Mr. Fitzgerald further contends: that the national policy toward railroads is not pro-merger; that, rather, the national policy is toward a limited number of systems; that the present policy statement is not pro-merger and was not designed to have the agency eliminate or reduce excess rail capacity; and that ICC/STB decisions over the last 20 years have not authorized consolidations of Class I carriers based upon any asserted need to reduce capacity. And, Mr. Fitzgerald adds, the existence of "duplicative facilities" does not equate with "excess capacity."

(2) *Enhanced competition.* Mr. Fitzgerald contends that our justification for an "enhanced competition" standard does not come from present or prior law, but comes, rather, from our own recent approval of behemoth consolidations. Mr. Fitzgerald further contends that the "enhanced competition" standard lacks a rational basis for future transactions, because (Mr. Fitzgerald explains)

it extends beyond merely trying to address the curtailment of competition that might result from the transaction. And, Mr. Fitzgerald adds, to promote enhanced competition is to promote inequality among users of carrier services.

Employee matters. Mr. Fitzgerald contends that the right to participate in STB proceedings and to receive protection should not be subverted by twisting the terms "labor" and "employee." (1) *Employee participation.* Mr. Fitzgerald notes that, whereas 49 U.S.C. 11324(b)(4) requires the STB to consider the interests of "rail carrier employees," NPR § 1180.1(m) encourages participation by "rail labor." Mr. Fitzgerald contends that, if our rules are to set forth specific categories of participants, the rules should track the statutory term "employee."

(2) *Employee protection.* Mr. Fitzgerald notes that, whereas 49 U.S.C. 11326 speaks of protective arrangements for "employees," NPR § 1180.1(e) would instead continue, in the caption, the term "labor protection." Mr. Fitzgerald urges that the term "employee protection" be substituted for "labor protection" in the NPR § 1180.1(e) caption. Mr. Fitzgerald explains that the term "employee" would be consistent with the statute, and also with the proposed text of NPR § 1180.1(e). Mr. Fitzgerald further explains: that the confusion between "employee" and "labor" appears to stem from efforts to deprive "management" personnel who may not be "officials" of their statutory right to employee protection; and that the terms "officials" and "employees" over the years have been the dividing lines for "employee protection" under the Interstate Commerce Act, contrary to any inference of "management vs. labor" that might characterize other statutes. And, Mr. Fitzgerald adds, the Board should not promote the disentitlement of so-called "management employees."

Other issues. (1) *NPR § 1180.3(a).* Mr. Fitzgerald opposes the proposed definition of "applicant" because (Mr. Fitzgerald explains) the revision would exclude subsidiaries of an applicant if such entities are noncarriers. Mr. Fitzgerald insists that full disclosure of a rail carrier's noncarrier family members remains justified.

(2) *NPR § 1180.3(b).* Mr. Fitzgerald opposes the proposed definition of "applicant carriers" because (Mr. Fitzgerald insists) full disclosure of all related carriers is required. And, Mr. Fitzgerald adds, the requirement for including carriers should be clarified to mean all carriers, whether or not regulated by the STB, and irrespective of mode.

(3) *NPR § 1180.4(c)(6)(vi).* Mr. Fitzgerald opposes the proposed revision that (Mr. Fitzgerald explains) would allow an applicant to submit consolidated data for itself and all affiliated applicant carriers, in one package. Mr. Fitzgerald contends that this revision, along with other revisions and the policy statement, serve to promote secrecy. And, Mr. Fitzgerald adds, rail employees have a special interest in having data segregated by carrier.

(4) *NPR § 1180.6(b)(6).* Mr. Fitzgerald opposes the proposed revision that (Mr. Fitzgerald explains) would eliminate the present requirement that all common officers and directors be listed, and substitute a listing requirement for only those officers and directors of a different corporate "family." Mr. Fitzgerald argues that this proposal is yet another of the added secrecy features in the STB process.

(5) *NPR § 1180.6(b)(8).* Mr. Fitzgerald opposes the proposed revision that (Mr. Fitzgerald explains) would limit required disclosure of intercorporate or financial relationships to those exceeding 5% of a non-affiliated carrier. Mr. Fitzgerald insists that full disclosure, not greater secrecy, should be the rule.

(6) *NPR § 1180.6(b)(10), (11); NPR § 1180.7.* Mr. Fitzgerald opposes the "enhanced competition" aspects of these proposals.

APPENDIX F-1: SUPPLEMENTAL SUBMISSION REGARDING LABOR

JOINT SUPPLEMENTAL SUBMISSION BY CERTAIN CARRIERS AND LABOR ORGANIZATIONS. (1) In the NPR, the Board urged rail labor and rail management to enter into agreements resolving merger implementation issues. The Board said, in particular, that the language of NPR § 1180.1(e) "reflects our continued emphasis on negotiation, without direct Board involvement, between the unions and railroad management to resolve merger implementation issues. A recent agreement between the United Transportation Union and the major railroads governing their approach to implementing all major rail consolidation transactions, including the handling of existing collective bargaining agreements, indicates that such negotiations can be a win-win situation, with both sides gaining value through an agreement. The Board is aware of other efforts at the highest levels to arrive at similar agreements involving other crafts, and is quite interested in the resolution of those initiatives before issuing our final rail merger policy and rules. We continue to encourage such private-sector agreements, both on an overall basis and in the context of implementing agreements geared to a particular merger." *NPR* at 17.

(2) On April 4, 2001, a joint supplemental submission (styled "Joint Supplemental Submission by Certain Carriers and Labor Organizations Regarding Labor Protection Issues") was filed on behalf of certain Class I railroads (The Burlington Northern and Santa Fe Railway Company, The Kansas City Southern Railway Company, Union Pacific Railroad Company, CSX Transportation, Inc., Norfolk Southern Railway Company, and Canadian Pacific Railway) and certain labor organizations (Brotherhood of Locomotive Engineers, Brotherhood of Railroad Signalmen, Sheet Metal Workers International Association, Carmen Division of Transportation Communications International Union, Brotherhood of Maintenance of Way Employes, International Association of Machinists, Transportation Communications International Union, and Transport Workers Union of America). The joint supplemental submission was submitted to the Board in order to keep the Board informed about the progress of negotiations over labor protection issues, and to report to the Board that the submitting parties have resolved the preemption issue to their mutual satisfaction.

(3) The joint supplemental submission indicates: that the submitting parties have reached an agreement[130] that resolves the preemption issue (the issue as to the modification of CBAs) to the satisfaction of the submitting parties; that, as of April 4, 2001, the railroad parties include all Class I railroads other than the Canadian National affiliates, and the labor parties include all the national rail labor organizations listed above; and that the 2 agreements that have now been entered into on the preemption issue (the agreement now reached by the submitting parties and the agreement previously reached by the United Transportation Union and the carriers) cover approximately 93% of the represented employees of the railroad parties.

(4) The joint supplemental submission further indicates that, with one qualification, the agreement that the submitting parties have reached takes all proposals by the parties off the table with respect to agreement overrides and implementing agreement and selection and assignment of forces issues. The one qualification concerns employee relocation and severance pay issues. The joint supplemental submission indicates that, because the agreement provides that "[i]t is understood that this Agreement does not address proposals pending before the Surface Transportation Board

[130] A copy of the agreement (styled "Revised Standards for Preemption of Collective Bargaining Agreements for Transactions Initiated Pursuant to Section 11323 of the Interstate Commerce Act") is attached to the joint supplemental submission.

regarding employee relocation and severance pay," the parties remain free to address issues regarding that limited subject matter as they see fit.

(5) The agreement that the submitting parties have reached also provides: that the procedures set forth in the agreement will be prescribed by statute and not as a condition imposed and administered by the Surface Transportation Board or any successor agency; that the terms of the agreement when enacted in statutory form will not be subject to the 49 U.S.C. 11321(a) exemption provision; that the parties will agree on appropriate statutory language to that effect; and that, until enactment of such statutory language, the railroad signatories will not assert such exemption authority. The agreement that the submitting parties have reached further provides that, prior to the adoption of the agreement by an Act of Congress, the signatory parties will jointly petition the Surface Transportation Board to enact a regulation providing that the award of an arbitrator under the agreement shall be treated as a final decision of the Board (which, the agreement advises, would make such award subject to review by the United States Court of Appeals for the District of Columbia Circuit under statutory provisions and standards applicable to review of agency adjudications).

(6) The joint supplemental submission also indicates that the agreed-upon joint petition to enact a regulation regarding review of arbitration awards will be submitted "in due course." The joint supplemental submission further indicates that the arbitration review matter requires no action by the Board in this rulemaking proceeding.

APPENDIX G: FEDERAL AND FOREIGN AGENCIES

U.S. DEPARTMENT OF AGRICULTURE. The U.S. Department of Agriculture (USDA) contends that, although we have attempted to address the concerns expressed by shippers, the proposed regulations fall far short of protecting the public interest in the event of future major railroad consolidations. There is, USDA insists, a lack of specificity in the proposed rules and too much reliance on voluntary offers, negotiations, and applicant-proposed penalties.

In general. USDA contends: that there has been, in recent years, a reduction in the rail share of transportation of wheat, corn, and soybeans; that the severe service disruptions associated with recent rail mergers have been a major reason for the recent loss of rail share; that, because rail is the only cost-effective transportation mode for agricultural producers located distant from markets and water transportation, the shift to truck transportation could only have been accomplished at great cost to agricultural producers and rural communities; and that this is particularly true in large areas of the Midwest and Plains States where shippers have little direct access to inland waterway transportation and the distances involved make truck transportation uneconomical. USDA further contends that, to more fully protect the public interest, we should revise our proposed regulations for a number of reasons. (1) USDA contends that the increased concentration of Class I railroads, and the corresponding increase in their market power relative to connecting shortline and regional railroads, threatens the viability of smaller railroads serving rural regions. Shortline and regional railroads, USDA notes, are important to the grain-gathering process.

(2) USDA contends that, to compete effectively in increasingly competitive world markets, U.S. farmers must have access to efficient, reliable, and cost-competitive transportation. USDA further contends that the rates agricultural shippers pay for rail transportation must be at a level that promotes, not penalizes, American competitiveness in world agricultural markets. USDA warns that if, due to inadequate or non-competitive transportation services, farm incomes cannot be expanded through exports of raw and value-added goods, the freedom provided under the Federal Agricultural

Improvement and Reform Act of 1996 (the 1996 Farm Bill) to farmers to plant and compete will have less value.

(3) USDA contends that the loss of rural rail lines will result in greatly increased road maintenance costs for rural areas. USDA explains that increased truck traffic, caused by shipping to locations on Class I railroads and/or the loss of rural rail lines, greatly increases highway maintenance costs because (USDA further explains) many of the roads in rural agricultural regions were not designed for heavy truck traffic. And, USDA adds, since rural regions typically have lower population densities, they are less able to pay for the increased highway maintenance costs or increased road capacities required by increased truck traffic.

(4) USDA contends: that the Staggers Act relies upon the effectiveness of competition, rather than regulation, to discipline the marketplace; that, indeed, in many agricultural production regions, truck and barge transportation provide adequate competition to constrain rail prices; that, however, barge transportation is not available to agricultural producers located in the western portions of the Plains States, and truck transportation is not cost-effective due to the long distances to market; and that, therefore, for agricultural producers located in those regions, there will not be effective competition unless competition, including rail-to-rail competition, is preserved and promoted.

(5) USDA contends that, as the market power of Class I railroads has increased relative to that of shippers and connecting shortline railroads, the potential for the violation of antitrust laws to the detriment of agricultural producers and rural communities has also increased. USDA therefore insists that, in revising our merger rules, we should consider this increased potential for violations of antitrust law and the effects these violations, should they occur, can have upon shippers and smaller connecting railroads.

NPR § 1180.1(b). USDA contends that the last sentence of NPR § 1180.1(b) ("The Board must ensure that any approved transaction will promote a competitive, efficient, and reliable national rail system.") should be changed to read: "The Board must ensure that any approved transaction will promote competition, as well as an efficient and reliable national rail system." USDA explains that the word "competitive" could be interpreted as cost-efficient, rather than requiring the presence of sufficient transportation competition.

NPR § 1180.1(c). USDA applauds the increased emphasis on enhancing competition; competition between rail carriers, USDA explains, is the essential ingredient needed to encourage improved customer service in the railroad industry, to preserve the economic vitality of the railroad industry, and to protect shippers from the abuse of railroad market power. USDA contends, however, that the fifth sentence of NPR § 1180.1(c) should be revised to *require* the Board, where both carriers are financially sound, "to make broad use of the powers available to it * * * to condition its approval to preserve and enhance competition." USDA further contends that, if the conditions proposed by the consolidating carriers fail to fully alleviate the effects of reduced competition, or if the plan proposed by the consolidating carriers fails to remedy specific competitive or other harms that are threatened by the merger, the Board should be *required* to condition the transaction to accomplish the goal of preserving and enhancing competition. And, USDA adds, the words "financially sound" should be defined in specific terms so that the exemption from Board-imposed conditions refers only to railroads in immediate danger of bankruptcy or service discontinuance, and not to railroads that are determined not to be "revenue adequate."

NPR § 1180.1(c)(1). USDA indicates that, although it applauds our intention to more carefully evaluate merger applicants' claims of the net public benefits a merger will generate, it does not believe that any penalties suggested by the applicants will sufficiently protect the public interest, particularly that of shippers and financially vulnerable smaller railroads.

NPR § 1180.1(c)(2)(i). USDA contends that consolidating railroads should be required to preserve competitive options, such as those involving the use of major existing gateways and build-outs or build-ins; it is not enough, USDA argues, to require consolidating railroads to propose remedies to mitigate and offset competitive harms. USDA also contends that we should prohibit carriers from charging shippers higher tariffs to recover the "premiums" paid for the acquired railroad or to take advantage of their increased market power; and, USDA adds, this could be accomplished by capping post-merger tariff rate increases to no more than the increase in the adjusted rail cost adjustment factor for a period of 5 years subsequent to the merger. USDA further contends: that the antitrust statutes should be applied more rigorously to those Class I railroads proposing further consolidations; and that we should be required to seek and consider the opinions of the U.S. Department of Justice and the Federal Trade Commission before approving any further consolidations involving Class I railroads.

NPR § 1180.1(c)(2)(ii). USDA indicates that it is pleased that we have recognized the importance of preserving essential freight, passenger, and commuter services by considering whether projected shifts in traffic patterns could undermine the ability of the various network links (including Class II and Class III rail carriers and ports) to sustain essential services. USDA recommends, however, that in NPR § 1180.1(c)(2)(ii)'s second sentence ("An existing service is essential if there is sufficient public need for the service and adequate alternative transportation is not available.") the words "adequate alternative transportation" should be revised to read "adequate cost-effective alternative transportation."

NPR § 1180.1(c)(2)(iii). USDA contends that our proposal, by placing only an increased weight upon the likelihood of transitional service problems, allows the consolidating carriers to transfer the costs of service disruptions to shippers, affected communities, and other railroads. USDA insists that, if a merger truly makes economic sense, the consolidating railroads should be able to reimburse those harmed by transitional service disruptions. USDA therefore contends that, rather than placing a heavier weight on transitional service harms when balancing the public interest, we should require consolidating railroads to reimburse shippers and other railroads fully for any damages caused by service degradation. And, USDA adds, this reimbursement should be required until the rail service provided each shipper and railroad is equal to that received prior to the consolidation.

NPR § 1180.1(d). USDA contends that, although it is difficult to condition a transaction to offset the harm to the public interest without undermining or defeating the transaction itself, the potential magnitude and probability of public harm caused by future Class I railroad consolidations may be so great as to justify extraordinary caution. USDA therefore argues: that the final merger rules should be phrased so that, in the application of conditions, the Board errs on the side of protecting the public interest; and the final rules should be phrased to make clear that the Board is not limited to conditions suggested by the consolidating railroads.

NPR § 1180.1(h). USDA indicates that it agrees with the Board's emphasis upon contingency plans and post-approval monitoring to help ensure that service levels after a merger are reasonable and adequate. USDA contends that we should include in the text of NPR § 1180.1(h): a statement to the effect that the Board expects applicants to engage in good faith negotiations with shippers and connecting carriers and that the Board, when determining the need for mitigation, will consider the extent to which applicants are successful in such negotiations; and a requirement that the Board monitor negotiations between applicants, on the one hand, and shippers and connecting railroads, on the other hand, to prevent unfair discrimination against smaller shippers and smaller railroads.

NPR § 1180.1(i). USDA indicates that it agrees that we should consider cumulative impacts and crossover effects.

NPR § 1180.1(k). USDA contends that in the last sentence of NPR § 1180.1(k) ("When an application would result in foreign control of a Class I railroad, applicants must assess the likelihood that commercial decisions made by foreign railroads could be based on national or provincial rather than broader economic considerations and be detrimental to the interests of the United States rail network, and applicants must address how any ownership restrictions imposed by foreign governments should affect our public interest assessment.") the words "detrimental to the interests of the United States rail network" should be revised to read "detrimental to the interests of the United States rail network and shippers."

NPR § 1180.10. USDA, which applauds the Board for recognizing the importance of adequate service to shippers and other affected parties, indicates that the comprehensive information required in the service assurance plan addresses numerous issues of concern to shippers. USDA indicates that it particularly appreciates the requirement that applicant railroads furnish dwell time information for 1 year prior to the transaction; the availability of prior benchmarks, USDA explains, is essential for the Board to be able to assess post-merger service levels. USDA recommends, however, that we should also require applicant railroads to provide historical data on the transit times for major origin-destination pairs.

NPR § 1180.11(b). USDA agrees that transnational merger applicants should be required: to assess the likelihood that commercial decisions made by foreign railroads could be based on national or provincial rather than broader economic considerations, and could be detrimental to the interests of the United States; and to discuss any ownership restrictions imposed on them by foreign governments.

Other issues. (1) USDA opposes any decrease in the review period of proposed mergers. USDA explains that rail shippers need the current length of time provided in the merger review period to adequately assess the effect of the proposed merger upon their operations, particularly since the competitive effects of end-to-end mergers are more difficult to quantify than those effects due to parallel mergers. USDA further explains that a shorter review period would not allow the Board to adequately analyze the public benefits and costs of a rail merger.

(2) USDA contends that our final rules should require Board approval of railroad marketing alliances and the remediation of any anticompetitive effects of such alliances.

U.S. DEPARTMENT OF DEFENSE. The U.S. Department of Defense (DOD),[131] which insists that the ability to deploy military forces rapidly by rail must be preserved, indicates that it supports the modifications proposed in the NPR in their entirety.

National defense. DOD contends that, to ensure that rail mergers do not detract from the U.S. military's ability to deploy by rail, merger applicants should be required to assess and discuss the effects mergers will have on national defense. DOD further contends that the following specific

---

[131] DOD's comments were submitted by the Military Traffic Management Command Transportation Engineering Agency (MTMCTEA), which is responsible for the management and execution of DOD's Railroads for National Defense Program.

areas of concern should be addressed by applicants and considered by the Board: the impact of a merger on maintenance of the STRACNET and connector lines under the control of the merging carriers;[132] the impact of the merger on traffic levels over STRACNET lines under the control of the merging carriers; the specific plans for prioritization of DOD freight in the event of war or other contingency; the agreements in place, if any, between DOD and the merging carriers, addressing provisions of rail services to DOD in times of war or other contingency, and the impact a merger would have on those agreements; the plans, procedures, and/or agreements in place to ensure that the routes, locomotives, rolling stock, and other equipment essential to the national defense will be operated and adequately maintained after the merger; the degree to which DOD traffic will be routed, as a result of the merger, over foreign rail lines, and the likelihood of assured access to such rail lines in time of war or other contingency; and, in the event the merged carrier is owned or controlled by a foreign entity, the ability of that entity to sell its ownership or controlling interest to a third party without further regulatory review and approval (DOD is concerned that an acceptable foreign owner might sell its interests to a foreign owner that, for financial, national defense, or other reasons, is not acceptable). And, DOD adds, we should also consider (particularly in the event of a merger that will result in foreign ownership or control of a U.S. carrier) whether the merging carriers have established, or are willing to establish, agreements with DOD designed to ensure that the carriers' rail services and equipment will be available for the movement of DOD equipment and material in time of war or other contingency.

Cumulative impacts and crossover effects. DOD contends that the "one case at a time rule" should be eliminated, both to allow DOD to comment upon possible adverse effects to national defense interests arising from downstream responses by other carriers and also to enable the STB to address the impact a merger will have on other carriers, consumers, shippers, and national defense, and other areas currently beyond the scope of the STB's merger inquiries. DOD further contends that the relevant criteria for analyzing downstream effects include the following: (1) If the merging carriers' management teams were involved in prior mergers, did they accomplish their stated goals in such mergers? If not, how can the merger be conditioned to ensure that goals are met in the present transaction?

(2) Same questions as (1) above for the responding carriers.

(3) Timing and benchmarks for implementation and phasing of the initial and downstream transactions.

Oversight. DOD contends that, given the large size of future mergers and the potential for service problems, 5-year oversight authority is necessary to ensure that the objectives of the merger are accomplished. And, DOD adds, oversight authority will enable the STB to intervene if problems with military deployments occur as a result of a merger.

Service assurance and operational monitoring. DOD contends that, because quality rail service is vital to successful military deployments, the merging carriers' application should establish benchmarks for delivery schedules. DOD further contends that the merging carriers should prioritize the benchmarks (to reflect different levels of on-time performance based upon the price or urgency of the service) and should substantiate how these benchmarks will be met or exceeded as well as the

---

[132] DOD indicates that the Strategic Rail Corridor Network (STRACNET), which consists of some 38,000 miles of main lines and connectors, is the minimum integrated and inter-connected rail corridor network essential to meeting national defense rail transportation needs.

penalties they will accept if the benchmarks are not attained. And, DOD adds, it is very concerned about post-merger abandonments as well as on-time delivery of material.

Transnational issues. DOD indicates that, in addition to its "DOD-unique" concerns relating to foreign ownership or control of a U.S. rail carrier, it also has more general concerns about the effect such ownership or control may have on the maintenance and safety of U.S. rail lines. DOD contends, in this regard, that the requirement that applicants address how ownership restrictions imposed by foreign governments should affect the public service assessment will help DOD determine the effects on rail line maintenance and safety. DOD also contends that the requirement for carriers to explain how cooperation with the FRA will be maintained without regard to the nationality of merger applicants will support a safe rail network in the U.S. DOD further contends that the likelihood of traffic being shifted from U.S. to foreign ports should also be considered when reviewing the application. A significant shift in traffic, DOD explains, could threaten the economic health of U.S. ports and thereby eventually impact the ability to meet national defense needs.

U.S. DEPARTMENT OF TRANSPORTATION. The U.S. Department of Transportation (DOT) indicated, in its remarks at the oral argument held in this proceeding on April 5, 2001, that, because its leadership had "changed significantly" after the filing of DOT's written comments in this proceeding, DOT could neither support nor oppose the positions it had taken in its previously filed written comments, except with respect to the few specific issues on which it was prepared to offer guidance at the oral argument. DOT further indicated, in its oral argument remarks, that, although it was prepared to offer guidance on a few specific issues, circumstances had not allowed its new leadership to accord to a great many other subjects the thorough consideration that such subjects require. (1) *Development of new standards.* DOT indicated, in its oral argument remarks: that it agrees that the changes that have occurred since the Staggers Act, and the uncertainties attending future mega-mergers, fully support the development of new standards by which to judge Class I rail mergers; that such new standards must consider the effects of mergers not only on railroads but also on shippers, communities, the transportation network at large, and other interested parties; and that the moratorium imposed by the Board has provided a useful respite within which to undertake the development of such new standards, free from the influence of specific pending applications. DOT further indicated, in its oral argument remarks, that it intends to participate in major future rail merger proceedings to aid in the specific application of the Board's proposed standards. Such proceedings, DOT advised in its oral argument remarks, will enable DOT to address these issues as they arise in concrete circumstances.

(2) *Cramdown and other labor issues.* DOT indicated, in its oral argument remarks: that, as respects differences between labor and management on merger implementation issues, DOT prefers privately negotiated agreements to government imposed solutions; that, therefore, DOT is pleased that rail management and labor appear to have reasonably reached agreement on a process to resolve the core issues of cramdown; and that the Board should support this agreement by leaving the matter to the parties and abiding by their request that it refrain from reviewing arbitration appeals, and instead permit such appeals to go directly to the courts. DOT further indicated, in its oral argument remarks, that, apart from the cramdown agreement, DOT does not endorse its previously advanced positions on labor issues.

(3) *NAFTA issues.* DOT indicated, in its oral argument remarks, that it strongly supports NAFTA and the continental trading zone that NAFTA envisions. DOT also indicated, in its oral argument remarks, that, although hindrances to the equal opportunity to compete within North America are (as a general matter) suspect and must (as a general matter) be justified, the "unlike circumstances" that exist within the NAFTA countries may offer support for treating some elements of transnational mergers differently than consolidations of wholly U.S.-based railroads.

DOT further indicated, in its oral argument remarks, that, although it had previously urged the Board to require carriers proposing a transnational merger to submit information and explanations with their application that were not required of U.S.-based applicants, it now believes that, with the exception of full-system operating plans (which, DOT advised, have a strong safety component), it would be appropriate to adopt a more neutral course, which (DOT further advised) would be to require applicants in such cases to provide information in response to specific questions raised by a party to the case or by the Board itself. This more neutral course, DOT explained in its oral argument remarks, would avoid a meaningless exercise, and would allow the Board to concentrate on issues that are germane to the application at hand. DOT added, in its oral argument remarks: that DOT does not agree with conclusions of law that the Board's proposals are in violation of NAFTA; that, however, DOT has (except for the full system operating plans) a different policy preference (*i.e.*, DOT would prefer to require transnational merger applicants to provide information in response to specific questions raised by another party or by the Board, and would also prefer that the Board consider such issues on a case-by-case and issue-by-issue basis); and that (except for the full system operating plans) DOT now disagrees with the proposed rules insofar as such proposed rules call for applications involving foreign-based rail mergers to include at the outset additional information and/or explanations about various subject matters.

CANADIAN GOVERNMENT. The Government of Canada (CDA)[133] requests the deletion of NPR § 1180.11 from the Final Rules in its entirety. CDA argues that NPR § 1180.11 is redundant and poses an unfair administrative burden only to transnational applicants and not to domestic ones. Furthermore, because the proposed § 1180.11 takes the form of a preliminary requirement necessary to establish the *prima facie* merits of a merger application, CDA argues that foreign applicants would face both additional and unnecessary risks and burdens in accessing the process of merger review, which would constitute a violation of the national treatment provision of the NAFTA.

NPR § 1180.11(a) – Rail Safety. CDA argues that, given that the proposed regulations require all merger applicants to provide an operating plan and a Safety Integration Plan, it is not evident why proposed § 1180.11(a) is also required. Moreover, while recognizing that safety is a vital concern, CDA states that safety as such is covered by the ongoing relationship between the FRA and the rail operators, be they domestically-owned or foreign-owned. CDA therefore argues that, in light of the provisions already in place which would allow the Board to query transnational applicants with respect to rail safety, proposed § 1180.11(a) is an unnecessary administrative burden.

NPR § 1180.11(b) – Foreign National or Provincial Goals. CDA argues that the proposed rule imposes a hurdle not faced by domestic applicants by requiring transnational applicants not only to provide information about foreign policies, but also to assess the likelihood that foreign policies would have a detrimental bearing on their operations in the United States. CDA states that national and provincial laws and policies in Canada, as in the United States, are public. It also states that Board's merger review process provides parties with ample opportunity to offer arguments and evidence about such laws and policies, and to explore their potential relevance to the commercial behavior of a transnational applicant. Therefore, CDA argues that the proposed § 1180.11(b) constitutes an unnecessary and prejudicial burden.

---

[133] Along with its comments (CDA-2) filed May 16, 2001, CDA simultaneously filed a petition (CDA-1) for leave to file comments out of time. We will accept CDA's late-filed comments.

NPR § 1180.11(b) – Ownership Restrictions. CDA argues that ownership restrictions are not unique to foreign applicants and that such restrictions can be raised and discussed during the Board's merger review process. To require a foreign applicant to discuss them beforehand as in the proposed rule, CDA argues, is both unfair and redundant.

NPR § 1180.11(c) – National Defense. In light of the requirement in proposed § 1180.1(l), which would require all applicants, be they foreign or domestic, to consider national defense issues, CDA argues that proposed § 1180.11(c) is redundant.

APPENDIX H: REGIONAL AND LOCAL INTERESTS

CALIFORNIA PUBLIC UTILITIES COMMISSION. The California Public Utilities Commission (CPUC) contends that we should protect the national rail transportation network through the development and implementation of regulations designed to ensure lower-cost rail transportation rates and to improve service through competition. Mergers, CPUC insists, must be carefully reviewed and structured to avoid increased monopoly or duopoly power. (1) CPUC agrees that merger applicants should be required to include concrete provisions for "enhanced competition" but insists that we should provide a better definition of the term. CPUC contends that a definition that assures lowered rates and/or provides meaningful and quantifiable service benefits will not unduly restrict an applicant's creativity in this area, but is necessary to properly judge whether a proposal will truly enhance competition. CPUC therefore suggests that NPR § 1180.1(c) should be revised to provide that "descriptions of 'enhanced competition' shall require clearly described merger benefits to shippers which demonstrably reduce rates by passing through cost savings from the efficiencies of scale resulting from the merger and/or result in meaningful and quantifiable service improvements."

(2) CPUC contends that an oversight program, to be truly effective, should include a detailed accounting of the applicant's progress in attaining all claimed public benefits made in the merger application as well as measures indicating the level of competition generated by the combination. CPUC further contends: that a simple listing by the applicant showing the status of all the promised service improvements, infrastructure projects, and efforts to enhance competition coupled with an explanation why a particular item is pending would suffice; that statistics showing price and market share fluctuations after the merger indicating how well competition is functioning should also be filed by the applicant in its periodic oversight reports; that the applicant should be subject to civil penalties and/or sanctions if it fails to make sufficient efforts to meet its goals and accomplishments for improved service or enhanced competition; that the Board should be able to impose new conditions on the merger to take advantage of new opportunities to further enhance competition; and that the Board's authority to impose conditions on the merged system should not terminate after the 5-year oversight period but, rather, should extend until the merger has been fully implemented (*i.e.*, when the applicant fulfills all of its representations made in the Service Assurance Plan).

(3) CPUC contends that, because service assurance plans will only be effective to the extent they are thoughtfully developed and implemented: the Board must closely monitor whether the carrier is fulfilling all aspects of its SAP and enhancing competition; applicant should be required to reimburse shippers any additional cost they incur due to a merger-related service breakdown; and, furthermore, the Board should have the authority to impose civil penalties and/or sanctions in the event the Board determines that post-merger service levels have deteriorated to a significant extent, or that the applicant failed to adequately comply with its SAP, or that the SAP was insufficient in addressing issues that the applicant knew or should have known could adversely affect service or safety at the time the SAP was submitted.

(4) CPUC contends that, because mergers involving carriers with operations outside the U.S. present unique challenges to safety (particularly if the carrier maintains its headquarters in a foreign country), applicants should be required: to disclose any functions that may be moved to a foreign country following a merger; to agree that any functions relocated will be conducted in accordance with FRA and other state and federal governmental rail safety requirements; and to discuss and evaluate, in their Safety Integration Plan, the safety impact of foreign rail safety requirements inconsistent with those of the FRA.

(5) CPUC contends that, in future merger proceedings, the new emphasis on enhancing competition will require us to review procompetitive proposals submitted by non-applicant railroads or other interested parties even if such proposals do not address specific merger-related harms or would result in "new" competition. CPUC further contends that we should affirm that we will approve proposals to the merger made by non-applicant railroads and other interested parties consistent with our objective to increase rail competition.

KANSAS DEPARTMENT OF TRANSPORTATION AND CORPORATION COMMISSION. The Kansas Agencies[134] object to the regulations proposed in the NPR as general in nature and short on specifics. Our merger regulations, the Kansas Agencies insist, should provide certainty and predictability. (1) The Kansas Agencies contend that the regulations proposed in the NPR fail to provide solutions for the problems experienced in previous mergers and fail to adequately address the major areas of concern raised in the comments filed in the ANPR stage of this proceeding, and, furthermore, are exceedingly vague and lacking in accountability. The proposed rules, the Kansas Agencies insist, should be specific, easily definable, enforceable, and verifiable.

(2) The Kansas Agencies contend that we should modify the proposed rules by including specific guidelines and conditions that would work to: ensure enhanced competition; do more to protect shippers from merger-related service disruptions; provide regional and shortline railroads with meaningful competitive access through the elimination of "steel" and "paper" barriers; hold merger applicants accountable for promises made in merger applications by imposing distinct performance measures and penalties; maintain open gateways; and address the needs and concerns of captive shippers.

MARYLAND DEPARTMENT OF TRANSPORTATION. The Maryland Department of Transportation (MDDOT) agrees that the regulations proposed in the NPR accomplish the important public objective of requiring applicants in merger proceedings to acknowledge and take more care to address the interests of the elements of the public that will be affected by a transaction they propose. MDDOT insists, however: that applicants should be held responsible for the consequences of their actions; and that we have the authority to impose new conditions on consummated mergers. (1) MDDOT insists that, although the future cannot be foreseen with precision, applicant carriers should nevertheless be held accountable for their projections and responsible for the consequences of their actions. MDDOT contends: that the merger application submitted by applicants provides most of the information that the Board and third parties (including other freight railroads and shippers, and also commuter railroads and their customers) use to begin understanding whether a proposed transaction is consistent with the public interest; that, although each third party has a choice (support the transaction, oppose it and seek conditions, or remain silent), third parties, in making their choices, rely heavily on applicants' projections; and that, therefore, applicants should

[134] The Kansas Department of Transportation and the Kansas Corporation Commission filed jointly as the "Kansas Agencies."

be held to their promises, and should be required to compensate affected parties for the damage they cause. MDDOT further contends that, although it is true that changes in the market totally independent of the merger may trigger service or other problems for third parties, the fact of the matter is that applicants in a rail merger are often the ones who are responsible for the impacts being experienced by the third parties.

(2) MDDOT insists that the Board has, and should continue to exercise, the authority to impose new conditions on consummated mergers. MDDOT contends: that 49 U.S.C. 722(c) provides that, in the event of material error, new evidence, or substantially changed circumstances, the Board may, at any time, reopen a proceeding, or grant rehearing, reargument, or reconsideration of an action of the Board, or change an action of the Board; that 49 CFR 1115.4 similarly provides that, in the event of material error, new evidence, or substantially changed circumstances, a person may, at any time, file a petition to reopen any administratively final action of the Board; that the remedy provided by 49 U.S.C. 722(c) and 49 CFR 1115.4 was established to permit the Board to require carriers to fix problems that their transaction has created; and that, in view of the existence of this remedy, carriers implementing transactions take the risk that the Board will reopen a consummated merger and impose further conditions when a third party is experiencing harm as a result of a transaction.

MICHIGAN DEPARTMENT OF TRANSPORTATION. The Michigan Department of Transportation (MIDOT) contends that we should review each proposed transaction on its own merits, including the resulting service to be offered to shippers, the effects on competition, and the impact to the environment. MIDOT adds that, although it is certainly appropriate to identify changes in service provided to shippers by the combining carriers, MIDOT would be concerned with any "downstream" requirement that an applicant identify how other carriers would subsequently react. To expect applicants to speculate on future reactions by other carriers, MIDOT argues, is unreasonable and inappropriate.

NEW YORK. The State of New York, acting by and through the New York State Department of Transportation (New York), agrees that a "paradigm shift" in the policies underlying the exercise of the Board's authority over rail merger and consolidation proposals is needed.

NPR §§ 1180.1(c)(2) and 1180.1(d). New York contends that, although NPR §§ 1180.1(c)(2) and 1180.1(d) advance the status quo insofar as the promotion of competition is concerned, certain modifications and/or clarifications are needed to bring the actual impact and effect of these rules closer to the acknowledged public policy goal of preserved and enhanced competitive options for shippers and communities. (1) New York, which notes that NPR § 1180.1(c)(2)(i) relies in the first instance on applicants to "propose remedies to mitigate and offset competitive harms," contends that this rule should be revised to affirm that applicants' proposed remedial measures will not carry any presumption of superiority to conditions proposed by other interested parties, particularly shippers and public authorities. New York, which claims that experience teaches that carrier views respecting the effectiveness of a competitive remedy that an applicant has agreed to offer a shipper or region often are not shared by those who are supposed to benefit from that remedy, insists that all proposed remedies should be considered on an equal footing.

(2) New York contends that we should clarify NPR § 1180.1(d) to confirm that carrier parties to future mergers will not be given a license that would allow for the reduction or elimination of competition in one region or market so long as competition is enhanced in another region or market as an offset. New York insists that, where a party or region is threatened with the reduction or elimination of competition, the right to seek redress through appropriate conditions should not be compromised by a carrier's offer to offset that anticompetitive impact by giving new options to shippers somewhere else.

(3) New York contends that we should reconsider our apparent reluctance to adopt a more proactive posture that would encourage the use of our conditioning authority to promote new competition in markets and regions dominated by a single carrier. New York insists that our handling, in connection with our consideration of the Conrail transaction, of the issue of increased rail-to-rail competition east of the Hudson River could serve as an instructive starting point for an expanded procompetitive policy that, while stopping short of a broad program of open access, would serve the public interest in increased competition as an effective counterweight to increased rail industry market concentration.

NPR § 1180.10(b). New York agrees that, in general, NPR § 1180.10(b), which requires applicants to "describe definitively how they will continue to operate [the lines of applicant carriers over which Amtrak or commuter services are operated]," adequately addresses the passenger rail-related issues raised by New York in its ANPR comments. New York contends, however, that we should clarify that the mandatory description requirement will apply with respect to any line over which both passenger and freight rail operations are conducted that is the subject of a proposed merger or consolidation transaction, without regard to whether the freight railroad is the owner of the line. New York indicates that this clarification would mean that, if a major freight railroad operates (or would operate) over a line owned by Amtrak or a public entity such as Metro-North Commuter Railroad Company, the carrier would be required to submit the same definitive description of the steps to be taken to accommodate passenger service that would be required if the passenger authority were the tenant.

NPR §§ 1180.1(h) and 1180.10. (1) New York contends that we should adopt the proposed "Service Assurance Plan" rules in full, with no weakening conditions. New York argues that, in addition to the universal agreement regarding the importance of service quality and efficiency as priority considerations in evaluating any new rail mergers or consolidations, there appears to be basic consensus among virtually all parties that the new merger rules should include meaningful and forceful mandates for the submission of data that will facilitate the design and implementation of before-the-fact controls to avoid post-merger service disruptions.

(2) New York also contends that we should clarify that SAPs will be probative not only for the purpose of before-the-fact assessments of the need for mitigation conditions but also as benchmarks for measuring post-transaction performance during the oversight phase.

(3) New York further contends that, in evaluating SAPs, we should give special attention to the interests of smaller communities and shippers. New York insists that, because rural areas and those served by branch lines face the greatest risk from the de facto resource rationing that typically occurs when post-merger service problems materialize, our final SAP rules should include special safeguards for rail-dependent smaller communities, especially as respects infrastructure, yard and terminal operations, and contingency plans.

NPR §§ 1180.1(c)(2)(ii) and 1180.1(h). New York contends that, although NPR §§ 1180.1(c)(2)(ii) and 1180.1(h) include certain provisions that appear to have been designed to advance the interests of shortline and regional railroads, these provisions do not go far enough. (1) New York contends that we should adopt a rule raising a rebuttable presumption in favor of the removal of Class II and Class III interchange barriers as a condition of approval of any new Class I mergers or acquisitions. The time has come, New York insists, to take a new look at artificial interchange barriers that foreclose competitive options for smaller carriers and their customers; the recent growth in the size and market power of the Class I railroads, New York explains, has narrowed the legitimacy of these "paper barriers" to competitive interchange; and, New York adds, these now-obsolete barriers can no longer be justified as alternative financing vehicles for new carrier line acquisitions. New York further insists that the narrow relief it contemplates would not involve a broad program of open access; such relief, New York explains, would apply only to circumstances where feasible, effective physical interchange capability exists but is precluded by contract terms that cannot be justified on competitive or financing grounds. (2) New York further contends that our final rules should provide that Class II and Class III railroads that connect to the consolidated carrier have the right to compensation by the consolidated carrier for service failures related to the consolidation. New York explains that Class I service delays or equipment shortages during or following implementation of a major merger or consolidation can result in traffic diversions to motor carriage, with direct and disproportionately adverse economic consequences for connecting shortlines and regionals.

NPR § 1180.1(c)(1). New York contends that, although NPR § 1180.1(c)(1) represents a meaningful step toward reform as respects scrutiny of claimed future merger benefits, firm enforcement terms should be added to the proposed rule. The UP/SP and Conrail transactions, New York explains, have demonstrated that there is a need for closer scrutiny of claims by merger applicants that a particular consolidation is justified by cost savings and efficiency gains expected to be realized as a result of the transaction; and, New York insists, the UP/SP and Conrail transactions have further demonstrated that applicants should be required to propose remedial measures to be taken in the event that claimed benefits do not materialize. New York argues, however, that the absence of a specific enforcement provision and deferential reliance on carrier-crafted remedies could blunt the effectiveness of NPR § 1180.1(c)(1) as a deterrent to inflated claims by merger applicants. New York therefore contends that this rule should be modified to include confirmation that the Board will consider and, where appropriate, will impose conditions proffered by parties other than applicant carriers to address the failure of claimed benefits to be realized on a timely basis. And, New York adds, this rule should be further modified to require the imposition of conditions precluding carriers from transferring the economic burdens of merger-related cost overruns to shippers and communities through rate increases or demands for public funding of needed infrastructure improvements.

NORTH DAKOTA. North Dakota,[135] which commends the Board for its efforts in this proceeding, argues that the changed economic and operating environment that has evolved over the past 20 years in the rail industry truly warrants a paradigm shift in how the Board perceives and processes proposed mergers. North Dakota further argues that a similar shift is warranted in rate complaint proceedings and complaints against unreasonable carrier practices related to demurrage rules, volume requirements, reciprocal switching, etc.

Policy statement. North Dakota contends that the proposed policy statement recognizes changes that have taken place in the rail industry and attempts to strike a new balance between the needs of the rail industry and the needs of shippers. North Dakota adds that it hopes that the paradigm shift reflected in the proposed rules will also be reflected in the Board's handling of other matters involving carrier market power.

---

[135] The North Dakota Public Service Commission, the North Dakota Grain Dealers Association, the North Dakota Wheat Commission, and the North Dakota Barley Council filed jointly as "North Dakota."

Potential harm and service disruptions. (1) North Dakota insists that "enhanced competition" must accrue to the benefit of captive shippers; it would be a travesty, North Dakota explains, if the "balancing test" supported a merger because a large number of non-captive shippers were given even more competitive options while a smaller number of already captive shippers received no benefits. The Board, North Dakota insists, must recognize this situation and stand ready to protect those shippers who are most captive. And, North Dakota adds, revenue to variable cost ratios would be a good indicator of captivity.

(2) North Dakota, which notes that the proposed rules call on carriers to suggest remedies to mitigate and offset negative harms, contends that carrier proposals must include agreed-to penalties that will automatically be paid if the carrier fails to perform. North Dakota, which insists that carrier proposals and promises without related penalties would be meaningless and counterproductive, argues that the penalties must be significant and must accrue to the benefit of aggrieved shippers.

(3) North Dakota contends that mergers do not impact shippers simply in the areas of service disruptions and upward pressure on rates. North Dakota explains: that, as railroads have gotten larger, they have gained control of an increasing share of origins and destinations for certain commodities; that this has put them in a position not only to charge higher rates but also to dictate terms and conditions to the shippers and receivers on their lines; that recent mega-mergers have made it possible for railroads to demand shipper operating systems that are perfectly matched to the railroad's operations; that, in particular, the lack of competitive pressure has made it possible for railroads to demand things such as larger shipping volumes and faster loading times; that, however, compliance may carry great costs in terms of capital improvements and increased operating costs; and that, to the extent the railroads can force shippers to consolidate shipments at fewer and fewer origins, related costs may be paid not only by shippers but also by the public sector in the form of increased highway maintenance expenses. North Dakota insists that these shippers already need protection. North Dakota further insists that, if enhanced competition is insufficient to protect shippers from this type of abuse, the Board must stand ready to remedy such abuses.

(4) North Dakota contends that the ability to use interchanges to access markets is another tool that the Board should use to enhance competition, or at least to maintain pre-merger levels of competition, in merger cases. North Dakota further contends that the Board must stand guard to ensure that gateways remain open, both physically and economically (physical possibilities are meaningless, North Dakota explains, if carriers can make an interchange economically impractical). And, North Dakota adds, new gateways should be created whenever possible to enhance competition.

Shortline and regional carriers. North Dakota indicates that the viability of shortline and regional carriers is a major concern; the 3 such carriers that now operate in North Dakota, North Dakota explains, may be threatened by Class I efforts to concentrate originating traffic at a few select points on Class I main lines. North Dakota, which warns that these occurrences impact shippers, local communities, roads, etc., insists that, if private-sector negotiations regarding these matters fail, the Board must be available to settle disputes, both during the merger review process and once the merger has been consummated. And, North Dakota adds, the Board should presume that the shortline or regional carrier is entitled to the protection it seeks unless the Class I can clearly prove otherwise.

Transnational issues. North Dakota is concerned that transnational rail mergers will make North Dakota's seldom-competitive shipping situation even worse; the "free" trade promised by NAFTA, North Dakota explains, has not always been "free" in both directions. North Dakota further explains: that its shippers are already served by one transnational carrier (CP) and must compete with another (CN); that, although significant rate spreads on wheat now exist between North Dakota and Saskatchewan, North Dakota may have little recourse in this regard because (North Dakota explains) it is more a matter of disparity than of the reasonableness of an individual rate; that, furthermore, Canada has a totally different approach to grain marketing than does the U.S., and its rate reasonableness tests on grain are far different than the comparable U.S. tests; and that, when combined with border crossing issues and marketing systems that make it impossible for U.S. farmers to sell their grain to Canadian elevators, rate spreads of several cents per bushel on shipping points that are within a few miles of each other make it impossible for U.S. farmers to compete with their Canadian neighbors to various markets. North Dakota therefore contends that we should act to ensure rate and service parity in geographic regions and industries that span the border and that are served on both sides of the border by a merged carrier. North Dakota contends, in particular, that rules should be put in place to allow aggrieved U.S. shippers to compete effectively with their counterparts on the other side of the border.

Acquisition premiums. North Dakota contends that our merger rules should address acquisition premiums; history, North Dakota explains, indicates not only that carriers are willing to pay huge premiums to acquire their competitors but also that, to the extent competition is reduced, the resulting carrier is in a much better position to charge higher rates to finance the transaction. North Dakota further contends: that the incentive for future mergers should be increased efficiencies; that carriers should not look to captive shippers to finance premium payments; that rates should cover associated operating costs and provide the carrier with a reasonable return on its investment; and that, to the extent the carrier paid more than the reasonable value of the property, it should not be able to recoup those costs via higher rates from its captive shippers. North Dakota therefore suggests that a rule be promulgated to provide that acquisition premiums are to be considered "below the line" expenses in rate cases and in determining revenue adequacy.

Specifics. North Dakota notes that some have suggested that the proposed rules are short on specifics and will, if enacted as drafted, lead to years of extremely costly litigation. North Dakota, which claims that this would benefit the rail industry (because, North Dakota explains, litigation is something that railroads are extremely good at), contends that, whenever possible, we should provide details that will help minimize the need for further interpretive action by the Board or the courts.

OHIO RAIL DEVELOPMENT COMMISSION. The Ohio Rail Development Commission (ORDC) applauds the NPR for its recognition that excess capacity has largely disappeared from Class I railroads and that "enhanced competition" needs to be a major part of the template by which the STB will evaluate whether further major consolidations will be consistent with the public interest.

NPR § 1180.1(c). ORDC contends that the "enhanced competition" requirement should be used as a guiding principle in merger and control proceedings. ORDC further contends: that future mergers must enhance competition through "Reasonable Access" along the lines of the 1998 AAR/ASLRRA "Railroad Industry Agreement" (RIA); that, in this regard, the STB should not rely solely on the applicants to suggest ways to enhance competition but, rather, should also seek suggestions from States, shippers, and small railroads; and that, because the STB's "public interest" conditioning power is by its nature both vague and expansive, the STB, where justified by the public interest, should impose relief that is not strictly "transaction-related." And, ORDC adds, because the enhanced competition it contemplates is primarily intramodal (*i.e.*, rail-to-rail) competition, the final rules should specify "enhanced rail to rail, intramodal competition" rather than merely "enhanced competition" (ORDC explains that, although it appreciates the value of rail-truck and rail-barge competition, the reality of the matter is that, in many instances, there really is no substitute for rail-to-rail competition). ORDC also contends: that we should require applicants to identify the beneficiaries of any new rail-to-rail competition so that it is clear to all whether any "captive shippers" or "captive shortlines" are positively impacted; and that we should require applicants to identify competitive options (including reciprocal switching arrangements, haulage rights arrangements, voluntary marketing agreements, and other market access arrangements) that were canceled during the 24-month period prior to the filing of the notice of intent.

NPR § 1180.1(c)(1). ORDC contends that merging railroads should be required to compare asserted merger-related benefits with key priorities established by States and other public bodies, as well as shippers, trade associations, and ASLRRA. Such a requirement, ORDC explains, would motivate merging railroads to better interact with their constituents and would motivate States and trade groups to make hard choices as to just what their top priorities are.

NPR § 1180.1(c)(2). ORDC, which cites the transitional service problems that occurred in connection with the Conrail transaction, contends that, because even the best laid plans can go astray, we should require merging railroads to pay shippers and small railroads reparations for merger-related service failures; merging railroads, ORDC insists, simply must be held responsible if service problems occur in any future merger. ORDC further contends that, because service agreements negotiated as part of the merger process would go a long way toward ensuring that the proper remunerations would be paid if post-merger service became a problem, we should encourage such self-executing up-front service agreements.

NPR § 1180.1(d). ORDC agrees that any future mega-merger must enhance competition. ORDC contends, however, that, because applicants by their very nature are not well equipped to determine what is most in the public interest (especially in the areas of the environment and economic development), we should, at the very least, require applicants to make good faith efforts to determine what States, rail users, and Class II and III railroads envision as effective ways to enhance competition. And, ORDC adds, we should place on applicants the burden to prove that specific enhancements to competition sought by States, communities, rail users, and small railroads would unduly impact the proposed merger.

NPR § 1180.1(e). ORDC, which agrees that rail labor should be treated fairly and equitably, contends that we should ensure that the safety of rail labor will be in no way compromised by a proposed rail merger.

NPR § 1180.1(f). ORDC, which cites its experiences in connection with the Conrail transaction, insists that a one-on-one negotiation process is not a fair and effective platform on which to base merger policy. ORDC concedes that negotiations between railroads and communities can play an important role in solving environmental issues, but insists that this type of negotiation is intrinsically biased toward the railroads. ORDC explains: that the environmental issues are simply too complex and obtuse for many communities, and even for State agencies, to handle effectively without help; that, because true environmental impacts cannot be known until well after trains start running, environmental issues simply cannot be adequately resolved before the merger is implemented; and that the existing system of formal STB filings and proceedings to determine environmental issues is fundamentally flawed and limits access by small shippers and railroads. ORDC, which believes that ongoing mediation will effectively bring parties to mutually acceptable solutions to most environmental issues without expensive and burdensome filings during consideration of the merits of a merger proposal, contends that we should make clear in the NPR § 1180.1 policy statement that, given the resources by Congress, we will make mediators available to all parties throughout the environmental review process.

NPR § 1180.1(h). ORDC, which supports the proposal for Service Assurance Plans and Service Councils, argues that the additional planning and oversight envisioned by this proposal will make it possible to avoid some of the mistakes of the past. ORDC insists, however, that it does not believe that the new policy statement goes far enough. ORDC explains: that, for all the emphasis on more planning and oversight, the basis of the proposed policy is still good faith negotiations between merging railroads and shippers and between merging railroads and small railroads; that, however, many shippers (especially small or captive shippers) and virtually all small railroads are at a huge disadvantage in this system; that, therefore, to protect the interests of small shippers and small railroads, as well as States and communities, we should adopt a "field mediation system" involving mediation conducted by outside mediators supervised by the STB; and that such mediation should be mandatory and binding for applicant railroads but not for other parties. And, ORDC adds, we should affirm that the principles of the ASLRRA "Bill of Rights" are issues that would be subject to mediation between small railroads and merger applicants.

NPR § 1180.4(b)(4)(iii). ORDC contends that it is a very good idea to require that merging railroads supply 100% data tapes under proper protective orders. ORDC, citing its experience in connection with the Conrail transaction, explains that the 1% data tapes can be sorely lacking in relevance to the proposed transaction.

NPR § 1180.6(b)(9). ORDC contends that better accounting of employee impacts is needed; precipitous cutbacks in front line management, ORDC explains, can be detrimental to rail operations in general, and can result in poor service to rail users and to shortline partners. In addition, ORDC, which believes that the impacts of disruption on families is never fully accounted for in the merger process, applauds the attempt to quantify "Jobs Transferred."

NPR § 1180.6(b)(10)(ii). ORDC contends that the requirement that applicants "explain how the transaction and conditions they propose will enhance competition and improve service" is woefully inadequate. ORDC explains that solely relying on the applicant railroads to provide ways to enhance competition will not adequately take into account relevant priorities and concerns of communities, rail users, rail labor, and small railroads, as well as the environmental and economic development priorities of the States.

NPR § 1180.6(b)(11). ORDC agrees that applicant railroads should be responsible for presenting and quantifying benefits and detriments of the proposed transaction. ORDC insists, however: that we should add much more detail to this procedure; that, in particular, we should require the applicants to specify in detail their measurement systems through which the benefits and detriments were quantified so that we and other parties can assess whether such benefits will actually occur; and that we should specify the categories of benefits and detriments that the applicant railroads need to address. The benefit categories contemplated by ORDC would include but not be limited to: increased capacity in multi-modal shipping corridors; increased capacity for intercity and commuter rail passenger services; better service/reduced rates for intermodal shippers due to improved access to ports and terminals; reduced noise and environmental impacts from reduction of trains on routes; reduced rates for shippers from such efficiencies as decreased car ownership and maintenance costs due to quicker car turn-around or heavier loadings and other such savings; reduced rates for carload shippers from the efficiencies of longer single-line hauls and from improved access to terminals and ports; reduced rates to shippers attributable to enhanced competition; increased viability for connecting railroads due to better access to terminals, gateways, and ports, including the elimination of paper barriers; increased viability for connecting railroads due to better efficiency of the applicant railroad in such areas as faster car turn-around, expanded car supply, and related areas; increased viability for connecting carriers from the efficiencies of longer single-line connecting hauls; and improvements for communities from the reduction of blocked crossings, reduction of noise and pollution, and reduction of hazardous materials moving through towns, and related issues. The detriment categories contemplated by ORDC would include but not be limited to: loss of freight and passenger capacity due to congestion and inadequate infrastructure; increased energy use from running of additional trains; increased blocked crossings due to increased train traffic; increased pollution and noise and other adverse impacts on lines where traffic will increase; increased environmental problems near yards and intermodal terminals where usage will increase; higher rates or reduced quality of service for shippers due to the loss of competitive options; lost business for connecting railroads due to the loss of competitive options and connections; loss of business for shippers due to loss of direct service or competitive options; increased costs for connecting railroads due to merger-related decisions to increase train lengths, increase car weights, reduce crews serving interchange points, and related actions; and constraints on shipper flexibility because of minimum tender limitations.

NPR § 1180.6(b)(12). ORDC agrees that the "one case at a time policy" should be discarded; the next mega-merger, ORDC explains, will set off a chain reaction resulting in 2 major transcontinental railroads in the U.S. and Canada in the short term, with mergers with Mexican railroads likely to follow. ORDC, adds, however, that it will have great difficulty discerning how the downstream process will play out until the follow-up plans are actually announced; until two mega-railroads emerge with certainty, ORDC argues, the permutations of downstream impacts could be overwhelming. ORDC contends that, because the upcoming round of mergers is likely to determine the North American railroad map for the next 100 years, North America would be better off if the Big Six railroads came forward at once with a proposed final map and the STB and its Canadian and Mexican counterparts took as long as was needed to sufficiently analyze the results. And, ORDC adds, the stakes are sufficiently high that provision for thorough evaluation of future ramifications should not be constrained by current time limitations. ORDC further contends that we should commence a separate proceeding to address the shape of the ultimate transcontinental rail duopoly.

Need for mediation/arbitration. ORDC, citing its experience in connection with the Conrail transaction, contends that the Conrail negotiations that it witnessed were difficult because (ORDC explains) railroad officials were in many instances unsympathetic to community and shipper needs, and local and shipper officials often did not comprehend the perspective of the railroad responsible for moving interstate commerce and running an efficient business. ORDC, which notes that the NPR (despite the many new elements it contains) still relies overwhelmingly on negotiated solutions, indicates that future negotiations are no more likely to succeed than past negotiations; without a fundamental change in human nature, ORDC explains, the perspectives of the opposing parties in these negotiations are not likely to encompass the "gray areas" concerning important issues. ORDC therefore requests that we formally incorporate mediation/arbitration (ORDC refers to mediation and arbitration more or less interchangeably) into the merger process. ORDC contends: that mediation would greatly reduce the burdens on communities, shippers, small railroads, rail labor, and States as well as the STB and the applicant railroads in a merger process; that, furthermore, mediation would facilitate mutually acceptable resolutions of issues that would then not have to be dealt with in a formal decision; that, although STB-supplied mediators would be optimal, outside mediators under the direction of the STB would be more cost-effective; and that, in either instance, mediation should be mandatory for the applicant railroads but voluntary (though strongly encouraged) for other parties.

Need for STB Office of Public Counsel. ORDC contends: that, if the STB had a fully staffed Office of Public Counsel that could assist entities that believe they will be adversely impacted by a proposed merger, that Office could be the best resource in directing parties to acceptable compromises; that guidance from STB experts would be invaluable in leading parties to fruitful negotiations or mediation and, when deemed appropriate, in representing the interests of small shippers or communities in the development of an adequate record; and that, although the existing Office of Congressional and Public Services has been of great assistance to ORDC when ORDC has used its services, that Office is simply too small to be a key component of a mega-merger.

Impacts of unregulated joint route agreements. ORDC contends that, because the Class I railroads may find it in their best interests to bypass our new merger procedures and to gain the benefits of mergers without formally merging, we should take a hard look at the "alliance" issue. ORDC explains that alliances, just like mergers, have the potential to create great benefits in capacity and efficiency as well as adverse impacts.

Gateway issues. ORDC contends that, because it would be unfair to the applicants to require them (but not non-applicant railroads) to offer continued access to certain gateways to enhance competition, such non-applicant railroads should also be required to offer continued access to such gateways (provided, ORDC adds, that such non-applicant railroads are not unduly harmed by such a requirement).

National defense. ORDC contends that, because transportation is a critical element of national defense, the new merger rules should fully address national defense issues. ORDC further contends that, because of the end-to-end nature of the next round of transcontinental mergers, the reporting requirements sought by DOD should not be an undue burden upon applicants.

OKLAHOMA DEPARTMENT OF TRANSPORTATION. The Oklahoma Department of Transportation (OKDOT) indicates that, although it generally supports a "paradigm shift" that would place greater emphasis on "enhanced competition" and "improved service," it is concerned that the NPR relies too heavily on applicants to propose solutions. OKDOT contends that, to be effective, our merger regulations must provide more specific guidance both to applicants and to parties affected by the proposed merger.

Measurement of merger benefits. OKDOT contends that applicants, when calculating potential merger benefits, should not be permitted to include economic efficiencies unless they can show that they were operating efficiently before the merger. OKDOT, which notes that one of the benefits applicants often claim is that they will be better able to utilize their equipment, insists that, as carriers get bigger, they do not necessarily use their equipment more efficiently. And, OKDOT adds, it questions why carriers need to grow larger to make more efficient use of their equipment, when it seems they could find more efficient ways to use their equipment now.

Enhanced competition. OKDOT contends that, although the NPR would require applicants to provide for enhanced competition, the NPR does not specify "how" or "where" this is to be done; the "how" and the "where," OKDOT adds, have been left for applicants to propose. This is troubling, OKDOT explains, because in past mergers (OKDOT cites the BN/SF, UP/SP, and Conrail transactions in particular) such enhancement of competition as has occurred has involved deals negotiated by the Class I applicants with other Class I railroads, and not with shortlines. OKDOT, which believes that the new regulations should ensure that shortlines and the rural shippers they serve get their fair share of the enhanced competition that is created as a result of any future merger, insists that, to ensure that some level of enhanced competition will be supplied to the shortline fringes that will otherwise be ignored, the new regulations should require some minimal conditions such as those suggested by ASLRRA's "Bill of Rights."

(1) *Competitive pricing.* OKDOT contends: that, as the Class I railroads have grown ever larger, their pricing has changed to emphasize their longest hauls and to encourage shippers to invest in larger facilities that can handle 100-car unit grain trains; that the Class I railroads have even talked about eliminating the 26-car units common in Oklahoma, even though (OKDOT adds) few if any country elevators can handle even 26-car units, enlargement of these elevator facilities is usually not practicable, and, even if enlargement were practicable, most shortline track infrastructure cannot handle 100-car trains; that shortlines have attempted to deal with these issues by providing multiple switches and co-loading between elevators to put together the size units (either 26 or 54 or 100 cars) that the Class I requires, while at the same time making the better pricing available to their customers; that, even though there is no increased handling cost to the Class I connection (which still receives a unit train bound for a single destination), the Class I railroads (which often have retained pricing authority over their shortline spinoffs) have limited the ability of shortlines to co-load from different stations or to perform multiple switches; and that these Class I pricing decisions have hurt the shippers that are located on Oklahoma's many shortlines. OKDOT insists that smaller shippers should not be priced out of the market just because they are small; rather, OKDOT argues, they should be given the opportunity to compete by receiving fair, competitive pricing. OKDOT therefore contends that our merger regulations should require merging carriers to provide fair, competitive pricing to connecting shortlines and their customers.

(2) *Elimination of barriers.* OKDOT contends: that "paper barriers" that restrict the ability of shortlines to provide competitive service were originally designed to make the sale more attractive to the shortline buyer, while preserving the bulk of the revenue for the Class I seller and eliminating what was often costly branch line service; that, although the deals were premised on the economics, pricing, and service that existed at the time of the sale, all of these factors have since changed; that, in particular, while the Class I railroads have merged and grown larger, the shortlines have been limited to the lines they bought; that, furthermore, while the Class I railroads have focused on longer hauls and larger trains to become more profitable, the shortlines have been able to rely only on traffic growth; and that, because many shortlines have been around for 5 to 10 years, the Class I sellers have already received substantial value as a result of the barriers they imposed. OKDOT therefore insists that, in order to create additional competitive options for shippers located on shortlines and to stimulate both a growth in traffic and improved pricing, any future merger applicants should be required to rescind all paper barriers.

(3) *Opening terminals.* OKDOT indicates that it would support opening terminals by requiring merger applicants to provide switching, at an agreed-upon reasonable fee, to all exclusively served shippers and shortlines located within or adjacent to terminal areas. OKDOT adds that, if such a condition were imposed for the benefit of shortlines, it would have to be further conditioned on the elimination of contractual barriers that would otherwise frustrate use of the switching fee to connect with shippers or other carriers.

Harm to shortlines. OKDOT contends that, in view of the vital role that shortlines play in preserving service (in particular to rural agricultural areas), and given that there are almost never rail alternatives in the areas that shortlines serve, our merger regulations should provide that shortlines provide "essential services" in preserving rail service to the fringes of the rail network. OKDOT further contends that, because any loss of traffic by a shortline will undermine (in the long run, if not immediately) its ability to maintain its lines, to upgrade its infrastructure to handle the next generation of cars, and to provide reliable competitive service, our merger regulations should provide that any significant loss of traffic resulting from traffic shifts caused by a merger will undermine the ability of the shortline to continue to provide service and will therefore entitle the shortline to relief. OKDOT, in an effort to quantify the "significant loss of traffic" concept, suggests that we could create a presumption that, for example, a 10% loss of traffic would entitle a shortline to relief. The presumption contemplated by OKDOT would be rebuttable, and (OKDOT explains) parties would be allowed to demonstrate that a different level of loss would be appropriate in particular instances.

Service-related losses. OKDOT contends that, although the requirement of service assurance plans is a step in the right direction that will hopefully foster the goal of minimizing post-merger service disruptions, such disruptions are still almost certain to occur; no amount of planning, OKDOT explains, can anticipate all problems. OKDOT, which notes that past merger-related service disruptions have resulted in higher costs to shippers and loss of traffic for shortlines when traffic was trucked around them because of "choke points" on the connecting Class I carriers, insists that the requirement that a "problem resolution team" be established to deal with service problems and "related claims" is not sufficient. Rather, OKDOT contends, our regulations should require that, in such circumstances, applicants must provide both a team to address the service disruptions and prompt reimbursement to shippers and shortlines for demonstrable service-related losses. And, OKDOT insists, it is imperative that we clearly establish that shortlines are entitled to reimbursement for lost traffic that results from post-merger service-related failures.

Passenger service. OKDOT contends that, although its concerns relating to passenger traffic have been met in large measure by the proposed regulations, certain problems remain. OKDOT contends, in particular, that the regulations: should make clear that any substantial interference with passenger service will be grounds for protective conditions; should require applicants to address passenger operations that have been proposed at the time of the application; should require applicants to meet with passenger operators as part of the SAP preparation process; and should include arrangements for remedies or damages if the SAP is not fulfilled. And, OKDOT adds, a reference to passenger operators should be added to NPR § 1180.1(h).

OREGON DEPARTMENT OF TRANSPORTATION. The Oregon Department of Transportation (ORDOT), which filed on behalf of the State of Oregon, indicates that it generally supports the regulations proposed in the NPR; the new rules, ORDOT believes, will do a great deal to better balance America's transportation system. ORDOT indicates, however, that, although it generally supports the proposed regulations, it is concerned about the wording of NPR § 1180.1(c)(2)(ii). ORDOT, which notes that Oregon is in the process of rebuilding its passenger rail service, explains: that the term "essential service" is problematic; that, interpreted strictly, very little rail service is actually "essential" (there is, ORDOT insists, very little freight that cannot move by truck); that it is not clear how "public need" and "adequate alternative transportation" are to be defined; and that ORDOT would not like to think that new passenger rail service will not be deemed "essential" until I-5 is in complete gridlock from Eugene to Portland and no air service is available. ORDOT suggests that, without some clear definition of "essential," the caption for NPR § 1180.1(c)(2)(ii) should be changed to "Harm to service opportunities," the third sentence of NPR § 1180.1(c)(2)(ii) should be deleted, and the first 2 sentences of NPR § 1180.1(c)(2)(ii) should be revised to read as follows: "The Board must ensure that freight, passenger, and commuter rail service opportunities are preserved. Existing service and future opportunities should demonstrate public need and an over-all benefit to the transportation system."

PENNSYLVANIA HOUSE TRANSPORTATION COMMITTEE. The Pennsylvania House Transportation Committee (PHTC) indicates that, although it applauds our increased focus on enhancement of competition as an offset to negative impacts resulting from service disruptions and competitive harms caused by merger transactions, it does not believe that the proposed regulations contain effective or adequate remedial measures to address those problems. PHTC contends, in particular, that our merger regulations: should provide for meaningful competitive access for regional and shortline carriers to competing Class I connections; should reject efforts by merged carriers to maintain barriers to competitive interchange; should require the preservation of competitive gateways to connecting carriers; should incorporate ASLRRA's "Bill of Rights" and the comments submitted by PPL and other coal interests; and should adopt expedited measures to allow connecting carriers and shippers to recover financial damages caused by service disruptions and other operational problems resulting from ineffectively implemented transactions.

THE CITY OF MANKATO, MINNESOTA. The City of Mankato, MN (Mankato), which is located 90 miles south of the Twin Cities and 125 miles west of the Mississippi River, has direct access to 2 railroads: DM&E, which operates a former CNW east-west line from Winona (on the west bank of the Mississippi River) through Mankato and westward into South Dakota; and UP, which operates a former CNW north-south line that passes through Mankato on its way from the Twin Cities to Omaha. (1) Mankato's main focus appears to be on the Powder River Basin (PRB) line that DM&E has proposed to build. Mankato indicates: that the PRB line would transform DM&E from a grain hauling regional carrier with a modest traffic base and modest frequency levels (presently 3 trains daily through Mankato) into a virtual coal hauling conveyer belt (expected to handle 37 trains daily through Mankato); that DM&E, which now operates through downtown Mankato by way of trackage rights over the UP line, is considering whether to build a short bypass to the south of Mankato ("the southern bypass"), to construct a new DM&E track on the present UP alignment, or to substantially increase its trackage rights use of the UP line; that, although Mankato would prefer to see DM&E build the southern bypass, DM&E prefers either of the two cheaper "in town" alternatives (*i.e.*, construction of a new DM&E track on the UP alignment or substantially increased use of the UP trackage rights); that, however, Mankato fears that the noise and vibration associated with either "in town" alternative might weaken flood control structures; that, furthermore, Mankato fears that, absent mitigation measures, any "in town" solution would have numerous adverse effects on street and pedestrian traffic, public safety, property values, emergency vehicle access, environmental considerations, and the quality of life generally; and that, to the extent DM&E can implement either "in town" alternative without Board approval (*i.e*, to the extent either such alternative is not within the jurisdiction of the Board), Mankato will not be able to secure mitigation relief from the Board.

(2) Mankato contends that, just as changes in traffic flows and operations associated with new rail construction can have serious environmental and community impacts, changes in traffic flows and operations associated with rail mergers can also have serious environmental and community impacts. Mankato further contends that, although the regulations proposed in the NPR would substantially raise the bar that merger applicants must pass to obtain approval, such regulations would not make it any easier for affected parties to obtain relief from the adverse effects of an approved transaction. Mankato insists that, rather than raising so substantially the standard for future mergers, we should scrutinize future merger proposals more carefully using hearings (including on-site hearings) chaired by objective factfinders. Mankato also insists: that field hearings would give the Board a better sense of the transaction's community impact; and that use of public counsel and/or publicly-funded independent consultants would ensure the proper representation of interests that may lack the financial resources to employ expertise skilled in the intricacies of a very esoteric field of administrative law and economics. Mankato further insists that we should clarify and simplify the standards for adversely affected parties to obtain relief. And, Mankato adds, although it agrees that there should be a greater emphasis on post-consummation

remedies, it also believes that serious attention should be given to a phased-in consummation of any major rail merger, with each new step to be implemented after previous ones have been successful.

(3) Mankato contends that another environmental and social impact issue common to both mergers and rail construction cases involves mitigation efforts and who should pay for those efforts. Mankato notes, in this respect, that, in either class of cases, modest cities such as Mankato are forced to retain expensive and specialized engineering and legal counsel to make their views known at the Board. And, Mankato adds, although it agrees that voluntary arrangements are always preferable to government-mandated solutions, the NPR's reliance on voluntary arrangements overlooks the basic fact that those parties most likely to reach a negotiated solution are those with equal bargaining power.

(4) Mankato is apparently concerned that DM&E's future prospects will be threatened either if the PRB line is not constructed or if UP is involved in another major merger. Mankato notes that, if DM&E were to fail, such rail competition as presently exists in the Mankato market would vanish. Mankato therefore contends that we should scrutinize merger proposals more carefully when financially fragile Class II and III railroads are involved and should lower the standard for granting relief for Class II and III railroads alleging loss of competition and essential rail service. And, Mankato adds, any revision of our merger regulations that would permit us to condition future transactions or reopen past transactions (such as the UP/CNW merger) might possibly provide a basis for relief for Mankato.

(5) Mankato contends that various types of agreements made between merger applicants and other parties (*e.g.*, unregulated traffic routing agreements such as haulage agreements, carrier alliances, marketing agreements, and traffic-related settlement agreements, and also settlement or other agreements involving community impact and environmental issues) should be filed with the Board for its approval and should be available for public review subject to appropriate protection for confidential information. Mankato concedes that, under traditional railroad commerce law, some of these agreements are not normally subject to Board scrutiny. Mankato insists, however, that, where these agreements could drastically affect traffic flows with obvious environmental and community impacts of the sort presented in the DM&E construction case and several recent rail mergers, the Board should act. And, Mankato adds, Board action is especially important in view of recent court rulings preempting state or local safety and environmental regulation. Mankato further contends that the Board should be able to examine agreements imposed or approved in prior transactions that could present serious environmental or community impacts involving traffic flows (Mankato indicates that it believes that the Board could revisit the appropriateness of a provision in an agreement when one party to that agreement is an applicant for a new merger transaction).

(6) Mankato warns that, because many shortlines are so fragile financially that a service problem with their Class I connection that affects their cash flow could well be their death knell, post-merger service disruptions may cause shippers to lose the essential rail service provided by their shortlines. Mankato therefore contends that we should formulate a mechanism, either in this proceeding or in a specific merger proceeding, to allow shortlines affected by traffic loss due to merger-related service breakdowns to recoup lost revenues.

THE CITY OF OWATONNA, MINNESOTA. The City of Owatonna, MN (Owatonna), which is located 70 miles south of the Twin Cities and 70 miles west of the Mississippi River, has direct access to 3 railroads: DM&E, which operates a former CNW east-west line from Winona (on the west bank of the Mississippi River) through Owatonna and westward into South Dakota; I&M, which operates a former CP line through Owatonna; and UP, which operates a former CNW north-south line that passes through Owatonna on its way from Minneapolis to Kansas City. (1) Owatonna's main focus appears to be on the Powder River Basin line that DM&E has proposed to build. Owatonna indicates: that the PRB line would transform DM&E from a grain hauling regional carrier with a modest traffic base and modest frequency levels (presently 3 trains daily through Owatonna) into a virtual coal hauling conveyer belt (expected to handle 37 trains daily through Owatonna, with as many as 10 of these trains turning at Owatonna to move northwards onto I&M); that because UP, which (as successor to CNW) leases to DM&E a small segment of the "DM&E" line through Owatonna, has refused to let DM&E build an "in town" DM&E/I&M connection on UP-owned property,[136] DM&E has proposed to build an "Inner Loop" DM&E/I&M connection on the DM&E-owned portion of the line inside the city limits; that, however, in view of the numerous adverse effects of the "Inner Loop" on street and pedestrian traffic, public safety, property values, emergency vehicle access, environmental considerations, and the quality of life generally, Owatonna prefers an "in town" DM&E/I&M connection on UP-owned property; that, under an agreement reached by Owatonna and DM&E, Owatonna has dropped its "Outer Loop" proposal (which Owatonna apparently prefers to both the "in town" connection and the "Inner Loop" connection) and DM&E has agreed to pursue the "in town" DM&E/I&M connection on UP-owned property; but that, although construction of the "in town" DM&E/I&M connection on UP-owned property would require UP's consent, DM&E has so far been unable to obtain that consent.

(2) Owatonna contends that, just as changes in traffic flows and operations associated with new rail construction can have serious environmental and community impacts, changes in traffic flows and operations associated with rail mergers can also have serious environmental and community impacts. Owatonna further contends that, although the regulations proposed in the NPR would substantially raise the bar that merger applicants must pass to obtain approval, such regulations would not make it any easier for affected parties to obtain relief from the adverse effects of an approved transaction. Owatonna insists that, rather than raising so substantially the standard for future mergers, we should scrutinize future merger proposals more carefully using hearings (including on-site hearings) chaired by objective factfinders. Owatonna also insists: that field hearings would give the Board a better sense of the transaction's community impact; and that use of public counsel and/or publicly-funded independent consultants would ensure the proper representation of interests that may lack the financial resources to employ expertise skilled in the intricacies of a very esoteric field of administrative law and economics. Owatonna further insists that we should clarify and simplify the standards for adversely affected parties to obtain relief. And, Owatonna adds, although it agrees that there should be a greater emphasis on post-consummation remedies, it also believes that serious attention should be given to a phased-in consummation of any major rail merger, with each new step to be implemented after previous ones have been successful.

(3) Owatonna contends that another environmental and social impact issue common to both mergers and rail construction cases involves mitigation efforts and who should pay for those efforts. Owatonna notes, in this respect, that, in either class of cases, modest cities such as Owatonna are forced to retain expensive and specialized engineering and legal counsel to make their views known at the Board. And, Owatonna adds, although it agrees that voluntary arrangements are always preferable to government-mandated solutions, the NPR's reliance on voluntary arrangements overlooks the basic fact that those parties most likely to reach a negotiated solution are those with equal bargaining power.

(4) Owatonna contends that a revision of the merger regulations that would permit the Board to condition future mergers or reopen past transactions by requiring the elimination of anticompetitive practices such as "paper barriers" would be very beneficial to parties such as Owatonna. Owatonna explains: that a "paper barrier" has allowed UP to block the "in town"

---

[136] Owatonna indicates that, although the DM&E and I&M lines presently cross at grade in Owatonna, these lines do not now "connect" in Owatonna.

DM&E/I&M connection favored both by Owatonna and by DM&E; that this "paper barrier," which dates back to the creation of the DM&E and which involves ownership by UP (formerly CNW) of a small portion of the "DM&E" line, was established in order to prevent DM&E from interchanging traffic with CP (I&M's predecessor); and that the elimination of this "paper barrier" would allow DM&E to construct an "in town" DM&E/I&M connection, which would eliminate the need for both the "Inner Loop" favored by DM&E and the "Outer Loop" favored by Owatonna.

(5) Owatonna, which is apparently concerned that the future prospects of DM&E and I&M will be threatened either if the PRB line is not constructed or if UP is involved in another major merger, warns that, if DM&E and/or I&M fail, the level of competition in the Owatonna market would be measurably diminished and the essential rail service now provided by these carriers would be jeopardized. Owatonna, which is also apparently concerned that either DM&E or I&M might be acquired by UP and that we might decide not to mitigate this 3-to-2 reduction in competition, insists that, although the "superficial analysis" that sees no harm in 3-to-2 competitive reductions might be appropriate for some markets, it would not be appropriate for the Owatonna market because (Owatonna explains) both DM&E and I&M are fairly weak carriers. The simple fact of the matter, Owatonna contends, is that the Board should scrutinize merger proposals more carefully than it has in the past when financially fragile Class II and III railroads are involved and should lower the standard for granting relief for Class II and III railroads alleging loss of competition and essential rail service.

(6) Owatonna contends that various types of agreements made between merger applicants and other parties (*e.g.*, unregulated traffic routing agreements such as haulage agreements, carrier alliances, marketing agreements, and traffic-related settlement agreements, and also settlement or other agreements involving community impact and environmental issues) should be filed with the Board for its approval and should be available for public review subject to appropriate protection for confidential information. Owatonna concedes that, under traditional railroad commerce law, some of these agreements are not normally subject to Board scrutiny. Owatonna insists, however, that, where these agreements could drastically affect traffic flows with obvious environmental and community impacts of the sort presented in the DM&E construction case and several recent rail mergers, the Board should act. And, Owatonna adds, Board action is especially important in view of recent court rulings preempting state or local safety and environmental regulation. Owatonna further contends that the Board should be able to examine agreements (*e.g.*, the agreement that created the DM&E "paper barrier" in downtown Owatonna) imposed or approved in prior transactions that could present serious environmental or community impacts involving traffic flows (Owatonna indicates that it believes that the Board could revisit the appropriateness of a provision in an agreement when one party to that agreement is an applicant for a new merger transaction).

(7) Owatonna warns that, because many shortlines are so fragile financially that a service problem with their Class I connection that affects their cash flow could well be their death knell, post-merger service disruptions may cause shippers to lose the essential rail service provided by their shortlines. Owatonna therefore contends that we should formulate a mechanism, either in this proceeding or in a specific merger proceeding, to allow shortlines affected by traffic loss due to merger-related service breakdowns to recoup lost revenues.

THE NEW YORK CITY ECONOMIC DEVELOPMENT CORPORATION. The New York City Economic Development Corporation (NYCEDC), a local development corporation created by the City of New York to promote economic growth and create business opportunities through a variety of financial incentives and assistance programs, contends that, if we use the full range of our authority to guard the public interest by preserving a level competitive playing field and by preventing adverse impacts on safety and the environment, the rules proposed in the NPR have the potential to provide safeguards for the public and private interests that will be at risk as a result of the merger proposals that are sure to come in the future. (1) NYCEDC agrees that our analysis of the competitive impacts of the transaction must look beyond the borders of the U.S. to assess the transaction's transnational impacts. NYCEDC explains: that the rail networks of the U.S., Canada, and Mexico are increasingly integrated; that the implementation of NAFTA has expanded the interest of all of the U.S. railroads in marketing and operating arrangements that move traffic across both the northern and southern borders; that, however, actions of transnational merging carriers may disadvantage certain U.S. interests; that, by way of example, actions of transnational merging carriers that advantage Canadian ports may potentially disadvantage U.S. ports; that, although our merger rules are not designed to protect against the impacts of increased competition, we must nevertheless identify and address impacts that will affect the availability of the national transportation infrastructure for use by U.S. commercial and defense interests; and that, although we cannot regulate transportation that occurs beyond the borders of the U.S., we must assess the impact of actions or strategies beyond those borders on the interests of the public within the U.S. NYCEDC contends, in particular, that our recognition of the need to address "full system" competitive analyses in transactions involving major Canadian or Mexican railroads is both a necessary and an appropriate exercise of our authority.

(2) NYCEDC contends that, as the number of rail transportation alternatives shrinks due to the continuing mergers among rail carriers, it is appropriate and within the Board's authority for the Board to require applicants to propose actions that will enhance competition in the context of a proposed merger. NYCEDC cites, in this regard, the "east of the Hudson" remedy that we imposed on the Conrail transaction. This remedy, NYCEDC argues, is the type of remedy that the proposed new regulations will encourage applicants to craft on their own, working together with interests that, like the public agencies and commercial interests on the "east of the Hudson" corridor, see a problem and a solution that does not unduly disadvantage the applicants.

(3) NYCEDC agrees that we should make the oversight process we have used in recent cases part of our standard operating procedure; no amount of planning and projection, NYCEDC explains, will be able to predict with certainty the fallout from future mergers. NYCEDC insists, however, that, if oversight jurisdiction is to be effective, the Board must use aggressively and affirmatively the NPR § 1180.1(g) authority "to impose any additional conditions it determines are necessary to remedy or offset unforeseen adverse consequences of the underlying transaction." NYCEDC further insists that, if the Board's oversight jurisdiction is to play a meaningful role, the Board will need to put the merging parties to the test of responding fully and accurately to issues, whether related to competition, harms to the environment, or impacts on local commuter operations, raised during the course of the oversight proceeding or in petitions for immediate relief that parties may file. And, NYCEDC adds, it is essential that the Board use its authority to investigate fully any claims for post-merger relief and to respond pro-actively; it is not enough, NYCEDC argues, to leave the merged carrier and the claimant to work out a private solution.

(4) NYCEDC insists that, although the future cannot be foreseen with precision, applicant carriers should nevertheless be held accountable for their projections and responsible for the consequences of their actions. NYCEDC contends: that the merger application submitted by applicants provides most of the information that the Board and third parties (including other freight railroads and shippers, and also commuter railroads and their customers) use to begin understanding whether a proposed transaction is consistent with the public interest; that, although each third party has a choice (support the transaction, oppose it and seek conditions, or remain silent), third parties, in making their choices, rely heavily on applicants' projections; and that, therefore, applicants should be held to their promises, and should be required to compensate affected parties for the damage they cause. NYCEDC further contends that, although it is true that changes in the market totally independent of the merger may trigger service or other problems for third parties, the fact of the

matter is that applicants in a rail merger are often the ones who are responsible for the impacts being experienced by the third parties.

(5) NYCEDC insists that the Board has, and should continue to exercise, the authority to impose new conditions on consummated mergers. NYCEDC contends: that 49 U.S.C. 722(c) provides that, in the event of material error, new evidence, or substantially changed circumstances, the Board may, at any time, reopen a proceeding, or grant rehearing, reargument, or reconsideration of an action of the Board, or change an action of the Board; that 49 CFR 1115.4 similarly provides that, in the event of material error, new evidence, or substantially changed circumstances, a person may, at any time, file a petition to reopen any administratively final action of the Board; that the remedy provided by 49 U.S.C. 722(c) and 49 CFR 1115.4 was established to permit the Board to require carriers to fix problems that their transaction has created; and that, in view of the existence of this remedy, carriers implementing transactions take the risk that the Board will reopen a consummated merger and impose further conditions when a third party is experiencing harm as a result of a transaction.

THE GREATER HOUSTON PARTNERSHIP. The Greater Houston Partnership (GHP)[137] indicates that, although it is pleased that some of its ANPR recommendations were addressed in the NPR, it is disappointed that some of its recommendations were not addressed and that certain that were addressed do not provide sufficient specifics. (1) GHP contends that merging railroads should be required: to maintain existing gateways and existing joint line rate levels at those gateways, subject to an annual indexing administered by the STB; to permit competitive access to all shippers located in major terminal areas by all railroads serving the terminal area; and to permit competitive access to all shippers located within a pre-determined distance of a railroad interchange point. GHP insists that a requirement that existing gateways be kept open will not be effective if the shipper must obtain a transportation contract from the competing railroad simply to continue using a route that was available before the merger. And, GHP adds, our regulations should identify the specific actions merging railroads must take to enhance competition, and should not leave the specifics to be determined by the railroads themselves.

(2) GHP contends that we should impose severe sanctions (including mandated shipper access to another railroad) on railroads whose service failures cause substantial financial harm to their customers. It is not enough, GHP argues, simply to require the merging railroads to prepare a contingency plan for merger-related service disruptions, with no sanctions to be imposed on the merged railroad for failing to provide adequate service. GHP adds that more precise rules are needed in this area, specifying the sanctions the STB will impose on merged railroads whose service severely impacts shippers. And, GHP insists, these rules should be in addition to shippers' existing rights to pursue other legal remedies.

(3) GHP contends that all merging railroads should be required to maintain strict neutrality between ports. The neutrality contemplated by GHP would require that railroads not give routing, service, rate, or promotional preferences to one port over another. And, GHP adds, an effective, neutral forum should be available to adjudicate disputes between ports and railroads over this issue.

[137] GHP's 2,200 members are located in the Houston region.

APPENDIX I: PORT INTERESTS

PORT OF SEATTLE, WA. The Port of Seattle, WA (POSW) endorses, with certain reservations, the changes proposed in the NPR. (1) POSW endorses a reasonable implementation of the "enhanced competition" proposal, because (POSW argues) competitive benefits, including the merging railroads' increased ability to compete with intermodal and motor carriers, should be considered in determining whether a merger is in the public interest. POSW adds, however, that it does not believe that we should require competitive enhancements beyond those needed to offset any harmful effects of the merger.

(2) POSW contends that, to ensure that the rail structure resulting from a final round of industry mergers is acceptable from a competitive standpoint, we should look at the "downstream effects" of future mergers.

(3) POSW endorses the new focus on ensuring smooth merger implementation, which (POSW suggests) will help in avoiding the disruption that has accompanied some recent mergers.

(4) POSW contends that the NPR takes a realistic and reasonable approach to transnational issues by requiring applicant carriers to address a number of unique issues that may arise when a merger has significant transnational elements. POSW suggests, however, that NPR § 1180.1(k)(1) should be revised to require that, where a merger has significant transnational elements, applicants must address, among other things, whether "commercial decisions made by foreign railroads could be based on national or provincial rather than broader economic considerations and be detrimental to the interests of the United States rail network or United States ports."

(5) POSW indicates that it is concerned that the proposed guidelines may not give sufficient weight to the economic efficiency gains that can result from railroad consolidations. POSW adds that, although future mergers may present difficult challenges as respects preserving and enhancing competition, difficulty in meeting those challenges should not be used as a sole reason for denying mergers that will result in substantial economic efficiency gains for the merging carriers.

(6) POSW contends that, because a timely merger implementation process is beneficial for all concerned, we should take a closer look at streamlining timelines to keep the process to a manageable and efficient length.

PORT OF PORTLAND, OR; PORT OF CORPUS CHRISTI AUTHORITY OF NUECES COUNTY, TX. The Port of Portland, OR (POPO) and the Port of Corpus Christi Authority of Nueces County, TX (POCCA)[138] contend that we should adopt the rules as proposed, with special consideration given to avoiding the presumption that all proposed mergers cause harm, avoiding prolonged and lingering procedures, and including the views of and impact on ports in STB decisions that are responsive to market needs and market dynamics. (1) POPO and POCCA insist that they do not believe that there should be a presumption that all proposed mergers will be detrimental. POPO and POCCA argue that, if applicants can satisfy the criteria set forth in the rules as proposed, a merger should be approved as in the public interest.

(2) POPO and POCCA, which agree that the rail industry is part of a broader transportation infrastructure that also embraces the nation's ports, contend that any proposed merger must enhance the capabilities and the competitiveness, and avoid harming any of the essential components, of this broader transportation infrastructure.

(3) POPO and POCCA contend that adoption of standards that require consideration of the impact of a merger on ports: will allow ports to go ahead with long-lead time infrastructure projects;

---

[138] POPO and POCCA filed separately.

will allow the Board to determine the routing, service, rates, and any promotional preferences that the railroads intend to provide each port; and will enable ports and the Board to determine whether the proposed merger will impact positively or negatively the competitiveness of the ports.

(4) POPO and POCCA endorse the NPR § 1180.1(h)(3) "Service Council" concept. POPO and POCCA, which claim that ports have heretofore been excluded from participation in the regular meetings that past rail merger parties have held with shippers, argue that the inclusion of ports in the Service Council will go a long way to provide ports up-to-date information and potential resolution of problems, which (POPO and POCCA add) will allow ports to continue to serve domestic and international customers and to have the opportunity to protect the huge public and private investment they have made in port facilities.

PORT OF HOUSTON AUTHORITY. (1) The Port of Houston Authority (POHA) endorses the NPR § 1180.7(b)(6) requirement that applicants' impact analyses must include an "explicit delineation of the projected impacts of the transaction on the ability of various network links (including Class II and Class III rail carriers and ports) to participate in the competitive process and to sustain essential services."

(2) POHA insists, however, that, in order to provide an ongoing forum for the discussion of implementation issues related to ports, we should require applicants to establish a "Ports Council" that (as contemplated by POHA) would be similar to NPR § 1180.1(h)(3)'s Service Council. POHA, which insists that a Ports Council would be important to assuring effective implementation of the merger in terms of the ability of ports to sustain essential services and to effectively participate in the competitive process, argues that problems related to ports cannot be handled by the Service Council because the nature of ports is different from the experience and expertise that one would expect to find in the shipper community. POHA explains: that ports are not shippers or receivers; that, rather, ports are links in the transportation network, partners with railroads rather than customers of railroads; and that, for this reason, a Council comprised of shippers and railroads would not be attuned to port issues.

(3) POHA indicates that it is pleased that the proposed regulations recognize that enhanced competition is in the public interest.

(4) POHA insists, however, that the most effective method of assuring quality, responsive, and competitive service in a major terminal or port area is through the use of a neutral switching carrier accountable to a board comprised of local shippers and receivers. POHA adds that it does not propose seizing railroads' local service infrastructure without compensation; rather, POHA indicates, it envisions that the railroads will receive fair compensation for any properties included in a neutral switching carrier.

PORT OF PASCAGOULA, MS. The Port of Pascagoula, MS (POPM)[139] contends that, although the NPR is a very positive and welcome document that identifies numerous issues that should concern everyone involved with railroads and rail service, the NPR is nevertheless deficient in a number of respects. POPM contends, in particular, that the NPR does not go far enough in suggesting available remedies to protect the interests of affected parties such as rail-served ports, shippers, communities, shortline and regional railroads, and rail passenger service providers. And, POPM adds, the NPR does not identify changes in Board policies that will enable affected parties to preserve essential rail service and to obtain enhanced competitive rail service (other than through an applicant's self-serving gestures). Our merger regulations, POPM insists, must preserve

[139] POPM's formal name is the Jackson County Port Authority.

competition, must be more specific, must provide closer scrutiny of claimed benefits, and must protect shortline and regional railroad interests. (1) POPM commends the Board on its efforts to persuade applicants to include enhanced competition as part of their merger proposals, the requirement that applicants provide affected parties with greater detail about potential merger impacts, the Board's heightened attention on preventing and resolving service problems, and the abandonment of the "one case at a time" merger analysis in favor of the "downstream" approach.

(2) POPM contends that the public interest merger approval standard should be modified to include impacts on rail-served ports. POPM explains that, for all intents and purposes, the interest of a port is in some respects similar to that of a rail shipper or customer and should be accorded the same level of respect by the Board.

(3) POPM contends that ports are part of the country's national transportation infrastructure and that the term "essential rail service" should reflect the rail service needs of ports. POPM insists that we must recognize the role that smaller ports and the rail lines serving them fulfill as "congestion relievers" for larger facilities. POPM explains that if, as a result of merger-induced traffic diversion, rail lines serving smaller ports are downgraded or abandoned, these ports will be adversely affected and may be forced to close or eliminate facilities with great harm to the public interest.

(4) POPM contends that, because ports compete aggressively for business, the presence or absence of effective rail competition at a port can enhance or erode a port's competitiveness. POPM notes that, although it competes aggressively for business with other Gulf Coast ports, several of these ports (Houston, New Orleans, and Mobile in particular) have more vigorous rail service options and more aggressive rail carrier competition than POPM enjoys. POPM adds: that the quantity and quality of available rail service is one of a series of assets that can give a port a competitive edge over adjacent facilities; that rail carrier actions such as discriminatory pricing, car supply availability, and reciprocal switching practices that have the practical effect of favoring one port over its competitors can have a devastating impact on a port's ability to compete with others for cargo; and that, through pricing and marketing initiatives (including the unwillingness of one carrier to make reasonable joint rates with another carrier on interline traffic), a railroad can literally dry up traffic moving to a port and can use its market power to punish some ports and reward others. The Board, POPM insists, must use its merger approval and conditioning powers in a way that will not permit such abuses to occur.

(5) POPM contends that structural changes in the competitive dynamics of the railroad industry during the past 20 years require a total re-examination of the Board's current policies on competitive access and competition between railroads. POPM explains: that today's rail industry is a vastly different entity than that which existed in the late 1970s and early 1980s; that, in particular, today's industry is far more concentrated than it was when the current regulations were fashioned; that, in fact, many major markets now enjoy service from just 2 railroads, and some markets now enjoy service from just 1 railroad; that the elimination of many railroads and routes has resulted in decreased competition and fewer competitive alternatives; that, in many cases, shippers (and ports too) find "they can't get from here to there" on today's rail system; and that, although tracks permitting traffic to move may exist, the marketing and pricing policies of the owning railroads may render specific "gateways" economically impractical. POPM further contends that, just as today's duopolistic American railroad structure has begun to resemble the 2-carrier Canadian railroad system, the same sort of relief adopted by Canadian authorities (*i.e.*, the regulations that ensure that rail shippers have access to competitive rail service so long as their facilities are within 30 kilometers of a competing long-haul carrier) could prove appropriate for preserving competition for the new American railroad duopoly. And, POPM adds, competition could also be maintained through other arrangements such as neutral terminal switching railroads, shared asset railroads such as that established to assume certain Conrail operations, and the use of shortline railroads to provide neutral switching for Class I railroad connections.

(6) POPM contends that, if we decide not to include in the new merger rules competitive "enhancements" such as restrictions on gateway closings and reciprocal switching access, we should initiate an independent rulemaking proceeding to consider these alternate ways to maintain competitive rail access; and, POPM adds, issues such as rate equalization (or discrimination) between competing ports and bottleneck rates deserve attention, either here or in a new rulemaking. POPM further contends that, if a broad program of open access would indeed require a fundamental shift in policy better left to Congress, the Board should let the public know whether the Board would support or seek legislation in favor of that policy shift.

(7) POPM contends that, when the Board preserves competition or competitive alternatives to mitigate the adverse effects of a merger, the resulting competition will only be meaningful if it is effective competition. POPM explains that, on some past occasions, only the semblance of competition has been preserved when a true competitive service has been replaced by an inferior substitute provided by a weaker carrier or a carrier with an inferior route. POPM, which notes that Pascagoula is served by 2 freight railroads (CSX and MSE),[140] warns that, if CSX were to merge with CN/IC, rail competition at Pascagoula would suffer absent some protective arrangements. POPM is concerned, however, that under what it regards as the Board's no-relief precedent of 2 carriers before (CSX and MSE) and 2 carriers after (CSX+CN/IC and MSE), the Board would not act to preserve effective competition.

(8) POPM indicates that, just as it wants to preserve competitive rail service in Pascagoula, it also wants to preserve essential rail service in Pascagoula. POPM, which notes that MSE provides both alternate north-south rail service to Pascagoula and also an alternative to CSX's congested east-west route, indicates that its concern respecting the preservation of essential rail service arises in the context of Class I service failures that can adversely affect the financial health of connecting shortlines such as MSE. POPM explains: that many shortlines do not have the financial staying power of larger carriers; that, while a larger railroad could survive the financial impact of a disruption, a shortline deprived of revenues from connecting traffic might be forced to curtail service or might even be forced into bankruptcy; that, in the case of Pascagoula, the loss of MSE could terminate essential rail service to those shippers who are solely dependent upon it as well as eliminate the rail competition MSE provides for the Pascagoula market; and that, therefore, the Board needs to formulate a mechanism (either in this proceeding or in a specific merger proceeding) that will allow shortlines affected by traffic loss due to merger-related service breakdowns to recoup lost revenues.

(9) POPM contends that, although voluntary arrangements normally represent a desirable resolution of a dispute, consensual solutions are less likely to occur for parties with unequal bargaining power absent the prospect of regulatory intervention on behalf of the weaker party. POPM therefore argues that the Board should play an active but behind the scenes role to ensure successful private negotiations.

(10) POPM contends that applicants should be required to disclose all stations, facilities, or terminals that were open to reciprocal switching at any time during the 24-month period prior to filing a notice of intent to merge, and that there should be a rebuttable presumption that favors reinstatement of reciprocal switching at a closed location. POPM also contends that the disclosure

---

[140] POPM indicates that Mississippi Export Railroad (MSE), a north-south Class III railroad that is jointly owned by International Paper Company, the Illinois Central Railroad (IC), and several private investors, connects with IC at Evanston and with CSX at Pascagoula. POPM further indicates that, although POPM's facilities are physically located on a CSX spur, POPM enjoys access to MSE via a CSX reciprocal switching tariff.

requirement and the rebuttable presumption should also apply with respect to similar cancellations of other commercial arrangements that provide a semblance of rail competition (including haulage agreements, carrier alliances, voluntary cooperation agreements, and so forth). POPM further contends that applicants should also be required to disclose settlement agreements and "paper" and "steel" barriers subject to appropriate protection for confidentiality.

PORT AUTHORITY OF NEW YORK AND NEW JERSEY. The Port Authority of New York and New Jersey (PANYNJ), which welcomes our recognition of the fact that the rail industry is part of a transportation network that includes the nation's ports, indicates that, in general, the NPR satisfies its concerns. PANYNJ adds, however, that certain "relatively minor adjustments" should be made to further clarify and effectuate our goals.

Transnational issues. (1) PANYNJ contends: that foreign control of a rail carrier operating in the United States may lead to decisions, particularly marketing and routing decisions, being made for other than normal commercial reasons; that, to the extent those decisions may involve the movement of export/import traffic over Atlantic Coast or Pacific Coast ports, such non-commercial reasons may be detrimental to the interests of U.S. ports as well as the U.S. rail network; and that any fair reading of the NPR taken as a whole would support a conclusion that we mean to protect both the U.S. rail network and U.S. ports from such injurious non-commercial considerations. PANYNJ adds, however, that it would prefer that the potential negative impact on United States ports vs. their foreign competitors be specifically recognized as a transnational issue under NPR § 1180.1(k).

(2) PANYNJ disputes CN's argument that there would have to be something very peculiar about wholly privatized and publicly traded freight railroads to legitimate an across-the-board concern that they are instruments of national or provincial political agendas that displace normal economic incentives. PANYNJ explains: that implicit in this argument is the incorrect premise that it would be contrary to the economic interests of a foreign railroad to implement a plan conceived by a foreign government or governmental interest, the purpose of which is to discriminate in favor of foreign interests at the expense of U.S. interests; that, for example, in 1992 a Canadian task force recommended that certain Canadian statutory rate restrictions be amended to permit Canadian railways to charge less than compensatory rates for the movement of import/export containers where the principal objective of such pricing is the maintenance or promotion of increased import/export container traffic through Canadian ports; and that the Canadian task force further recommended that the railroads reducing rates below compensatory levels to attract traffic away from U.S. ports to the Canadian port of Halifax be compensated by various federal and provincial tax reductions and incentives. PANYNJ argues that it would hardly be contrary to the economic interests of CN, whether it was a governmental agent or a fully privatized entity, to take advantage of tax breaks to reduce its rates below a compensatory level, if the costs to it of such reductions were less than the net benefits of the tax breaks. PANYNJ, which advocates adoption of the NPR's transnational transaction provisions, insists that the NPR does not presume that transnational consolidations will involve discriminations against U.S. interests but merely suggests the possibility of such discrimination, and provides U.S. interests (including U.S. ports) with an opportunity to address that possible discrimination.

Railroad financial health. (1) PANYNJ contends that, although the NPR places considerable emphasis on the ability of any surviving carrier interest to meet its common carrier obligations, PANYNJ believes that NPR § 1180.1(c) should specifically state that no merger or consolidation can be found to be in the public interest when the surviving carrier is to be placed in a position of questionable financial health. PANYNJ further contends that we must be able affirmatively to find that the merger or consolidation will not impose such financial burdens upon the surviving carrier as to interfere with its ability to meet its common carrier obligations and to properly maintain its rail infrastructure.

(2) PANYNJ also contends that we must consider the financial impact on any other carriers that may be adversely affected by any proposed merger or consolidation. PANYNJ contends, in particular, that NPR § 1180.1(i) should contain specific language calling upon applicants to anticipate not only the likely downstream affects of their application but also the likely financial health of their consolidated railroad and of the responding carriers as well. PANYNJ insists that we should not approve any merger that would force upon other carriers a Hobson's choice of entering into a financially unsound merger or being crushed by the competitive strength of the merging carriers.

Voting trusts. PANYNJ indicates that NPR § 1180.4(b)(4)(iv) contains a procedure for approving voting trusts at a time and generally in a manner that would meet the goals expressed by PANYNJ in its ANPR comments. PANYNJ contends, however, that, although our proposal imposes a "public interest" test with which to evaluate the voting trust and determine whether it should be approved, meeting such a test at the earliest stage of the proceeding might be difficult or, indeed, impossible. PANYNJ therefore suggests that we should approve voting trusts, under the procedures set forth in the proposed rules, when the carriers establish that the voting trust will properly address the control issue and that the financial aspects of the proposed transaction will not leave the surviving carrier(s) in a situation where it or they will not be able to raise sufficient debt or capital monies to meet the investment needs of the carrier(s). PANYNJ explains that this type of examination would both protect the carriers from being forced to meet an unreasonable burden of proof and also protect the public from further service deterioration based on the inability of the carriers to raise capital funds.

APPENDIX J: MEMBERS OF CONGRESS

U.S. REPRESENTATIVE JERROLD NADLER. Rep. Nadler indicates that, because the proposed rules go a long way toward resolving his objections to the way prior mergers were reviewed, he has only a few suggestions for improvements. (1) Rep. Nadler contends that the inclusion of lines owned by a non-applicant railroad should be allowed, either on application by the applicant carriers, upon the Board's own motion, or upon application by any affected party, including a governmental or civic organization, for good cause shown. Rep. Nadler explains that, because so many shortlines and public track owners hold portions of once major lines, the possibility that some of these assets may need to be incorporated in a Class I for the public good, with or without the current owner's approval, must be part of any consideration of a realignment of the national system.

(2) Rep. Nadler contends that the improvement of system capacity and efficiency should become the major goal of all activity by the Board, not just to maintain or improve competition but to assure that the system can satisfy the needs of the public anywhere those needs exist or should exist. It is time, Rep. Nadler argues, for the public to become involved in determining what capital improvements may be required to achieve public goals, such as the removal of truck traffic from highways, particularly congested highways.

(3) Rep. Nadler contends that, if grade separation or grade crossing improvements are required to accommodate a road or highway that did not exist when the railway was built, the financial burden of creating any needed improvement should not be imposed on the railroad. Rep. Nadler adds that the applicants' responsibility in the application should be to identify crossings where a problem may or will be created, and to suggest a correction.

(4) Rep. Nadler contends that applicants should be relieved of the burden of making any capital improvements on rail assets (main lines, yards, and terminals) that would subject the railroad to increased real estate or other local or state taxes.

(5) Rep. Nadler contends that, in addition to Board review of an application, DOD should review such applications for their impact upon the nation's ability to supply its armed forces in any theater of operations. Rep. Nadler further contends: that there is grave doubt that the nation could sustain a war of any duration because of the demonstrated limits of the rail system's capacity; that line abandonments or service discontinuances should be severely restricted, and redundancy should be provided to all major points; and that under no circumstances should the fact that service can be provided by another mode of transportation be considered in any application to reduce or terminate service on a line or to eliminate competitive rail service. And, Rep. Nadler adds, we should make explicit in the rules that returning freight to the rail system has become a primary goal of the Board.

(6) Rep. Nadler contends that we should discourage not only the complete abandonment of links in the Class I rail system but also the balkanization of former main lines. Rep. Nadler further contends: that, if former main lines are to be made available to Class II or III operators, the entire line between major terminals should be part of the application unless the application is restricted to a grant of trackage rights to provide local service; that secondary main line capacity must be maintained to accommodate increasing traffic, traffic surges, and detours; and that abandonment of economically isolated stretches of former main lines should be absolutely forbidden.

(7) Rep. Nadler contends that, if there is a major issue with regard to the ability of private enterprise to maintain a transportation system adequate to meet all public needs, the Board should make a full report to Congress. And, Rep. Nadler adds, this report should recommend steps the government can take to attract private investment to the rail industry and the necessary services and facilities that should be provided at public expense to achieve environmental or economic goals.

APPENDIX K: NITL, CURE, & ARC

NATIONAL INDUSTRIAL TRANSPORTATION LEAGUE. The National Industrial Transportation League (NITL)[141] indicates that, although it agrees with the fundamental premises of the NPR (that a significant overhaul of the Board's rail merger policies is clearly appropriate, and that the Board should revise its policies with an eye toward affirmatively "enhancing" competition in future rail consolidation proceedings rather than simply attempting to "preserve" competition), it nevertheless has several concerns. (1) NITL contends that the proposed rules are extremely vague or unclear in a variety of key areas, and that the rules should thus be significantly revised to provide both railroads and shippers with much greater specificity as to how and what competition will be enhanced, and what will be required, in future rail merger applications. (2) NITL contends that the scope of the NPR, which is focused purely on merger policy, would create a serious disparity between the competitive conditions facing merging as compared to non-merging carriers, to the detriment of both merging carriers and the shipping public. NITL therefore insists that, to create a level competitive playing field for both merging and non-merging carriers and the shippers served by them, the Board should put into place procedures that would work to insure greater rail-to-rail competition for both merging and non-merging carriers, at a minimum as part of the next major merger proceeding (if not sooner). (3) NITL contends that the proposed rules can also be improved

[141] NITL has approximately 600 separate company members, ranging from smaller shippers to some of the largest shippers in the country.

in a number of other important areas, including: the proposals on the definition and treatment of major gateways; the content of service assurance plans; the treatment of the acquisition premium in rail mergers; and the proposals for post-merger operational monitoring.

Rationale for a paradigm shift. (1) *In general.* NITL contends that it is appropriate to shift the focus of the Board's policy toward "enhancing" and not simply "preserving" competition; the result of the Board's prior policy, NITL argues, has been not the preservation but rather the loss of rail-to-rail competition. NITL further contends: that such reductions in competition have principally involved the loss of "segment competition" and the loss of product and geographic competition; that the Board's past merger policy, by narrowly focusing only on the competitive harm of parallel mergers at specific geographic points ("2-to-1" points, build-out points, etc.), while ignoring the competitive effects as end-to-end routes have been combined, has lost sight of the fact that rail mergers of the size and scope of those recently approved, and of the size and scope that could take place in the future, result in systemic losses in competition that geographically-specific ameliorating conditions simply do not cure; that, therefore, the analytical framework within which the Board operates in rail merger proceedings must be revised and broadened, and a renewed focus on and sensitivity to the complex and subtle tones and tints of competition in the rail marketplace must be the place to start; and that, in light of the losses in competition in past mergers and the likelihood that there will be even greater losses in future mergers, "enhanced competition" must be the cornerstone of the Board's new merger policy. And, NITL warns, the Board should not lose sight of the fact that, if it fails to focus on enhancing rail-to-rail competition in the transportation marketplace or if it simply gives lip-service to the concept, there could be a reversal in the rail arena of the fundamental direction of domestic and international transportation policy. The surest way to prevent comprehensive reregulation of rates and service, NITL advises, is for the Board to act now to ensure that the forces of competition flower in the rail industry to their fullest possible extent.

(2) *Segment competition.* NITL contends that, in the past, shippers have lost "segment competition" provided by carriers over part of a rail movement, when mergers involving the combination of end-to-end routes have been permitted without ameliorating conditions. NITL explains: that the Board, in reliance on its "terribly flawed in practice" "one lump" theory, has permitted mergers of an upstream Carrier A and a downstream Carrier B with no ameliorating conditions to compensate for the loss of segment competition between downstream Carrier B and downstream Carrier C; that the loss of such segment competition has had both business and legal ramifications; that the business result of a merger of an upstream carrier with one of two neutral and competitive downstream carriers has been the elimination of the competition formerly provided by the other competitive downstream carrier, when the merged carrier completely eliminates any interchange with the other downstream carrier (either by refusing to quote joint line rates over the downstream carrier or by simply increasing its portion of the rates over the joint line route so that the formerly competitive route becomes completely uneconomic); that the legal result of the merger of an upstream carrier with one of two neutral and competitive downstream carriers has been the elimination of the little protection provided by the "contract exception" to the bottleneck rules; and that the same loss of segment competition has occurred when a downstream carrier has merged with one of two competitive upstream carriers.

(3) *Geographic competition.* NITL contends that rail mergers of the size and scope of those approved since 1994 have vastly reduced the amount of potential leverage provided by geographic competition, as carriers with much broader rail systems have begun to serve more and more of the producing and consuming regions for various commodities. NITL explains: that, although the loss of geographic competition has been gradual, the cumulative effect has been very real; that, from a systemic standpoint, in chemicals, coal, agricultural products, and other commodities, a single carrier now often serves many of the producing and/or consuming regions for that commodity, thus

eliminating the leverage that a shipper might have had to enable it to argue that an unfavorable rate from the rail carrier serving its plant would simply accrue to the benefit of another carrier serving the plant of its competitor; and that, from an individual shipper's standpoint, a single carrier is today much more likely to serve multiple plants of a single shipper, thus eliminating whatever leverage the shipper may have had to play carriers off against one another, even when the shipper's individual plants were singly served.

Specificity as respects enhanced competition. NITL contends that the Board should revise the proposed rules in order to provide carriers and shippers with clear notice of what is required, and what will be expected, in the area of "enhanced competition." The proposed rules as currently written, NITL explains, are simply too vague. (1) NITL contends that the proposed rules should be revised to indicate that "enhanced competition" means enhanced rail-to-rail (*i.e.*, intramodal) competition. NITL explains: that, in all mergers since 1990, applicants have touted the "enhanced competition" that the proposed merger would provide to truck and barge competitors; that, however, such enhanced intermodal competition does nothing to cure the loss of segment competition and/or geographic competition; and that, if future merger policy is to be truly different from past merger policy, the rules should specify that "enhanced competition" must provide for enhanced rail-to-rail or intramodal competition in a significant way. NITL adds: that the Board can take the existence of enhanced intermodal competition into the calculus of the "public interest" in a particular proposed merger; that, however, the Board should not permit merging railroads to rely solely on enhanced intermodal competition to fulfill the "enhanced competition" requirement; and that, therefore, the Board should make clear that enhancements in rail-to-rail or intramodal competition must be proposed by future merging carriers.

(2) NITL contends that the proposed rules should be revised to include examples of enhanced rail-to-rail competition that the Board expects applicant carriers to consider when submitting an application. NITL contends, in particular, that NPR § 1180.1(c)(2)(iv) should be revised to read: "Applicants shall propose conditions for enhanced competition, including but not limited to enhanced rail-to-rail competition, in all or major parts of the geographic area affected by the proposed merger. Such proposals may include provisions for the introduction of reciprocal switching where it has not previously existed or expanded reciprocal switching in terminal areas or at interchanges, at rates that reflect the cost of service; commitments to provide contract and common carrier rates to interchanges; elimination of existing and future barriers to shortlines providing competitive rail service; establishment of terminal carriers to connect with railroads serving an area; and similar proposals."

(3) NITL contends that NPR § 1180.1(a)'s fourth sentence should be revised to indicate that the Board "does not favor consolidations that reduce railroad and other transportation alternatives." NITL explains: that the cited sentence can be read to suggest that, as long as there are substantial public benefits, the Board favors consolidations that reduce railroad and other transportation alternatives; that, however, such a reading would be flatly inconsistent with sound public policy, and would be inconsistent even with the Board's past practice; and that, therefore, the Board should make clear that, where a reduction in competition can be specifically proved, the Board will approve the proposed merger only if such specifically-identified reductions in competition are cured. And, NITL adds, "offsets" to such specifically-identified competitive harm that increase competition elsewhere simply cannot suffice.

(4) NITL contends that NPR § 1180.1(c)'s fifth sentence should be revised by eliminating the phrase "where both carriers are financially sound." NITL explains: that the NPR does not specify what a "financially sound" rail carrier is considered to be; that NITL would strongly object if the Board's "clearly flawed" "revenue adequacy" determinations were used in any way to dilute the strength of the proposed rule to "enhance competition," or if the standard of "financial soundness"

were used to dilute the protections envisioned by the proposed rules; and that, although general merger policy under the Sherman Act leaves room for approval of a merger where there is a "failing firm," the standards of the "failing firm" doctrine are much more stringent than the Board's apparent reliance on "financial soundness."

(5) NITL contends that NPR § 1180.1(d)'s third sentence ("The Board will impose conditions that are operationally feasible and produce net public benefits so as not to undermine or defeat beneficial transactions by creating unreasonable operating, financial, or other problems for the combined carrier.") should be revised by eliminating the words "financial, or other." NITL explains: that the statement that the Board will not impose conditions that create "financial or other" problems is far too broad, and could be a source of mischief; that the preservation of existing competition and the development of enhanced competition may result in short- to medium-term reductions in the financial benefits of a proposed rail consolidation, compared to the financial benefits that would otherwise accrue; that, however, applicants should not be allowed to argue that the preservation or enhancement of competition would result in an "unreasonable" financial burden for applicants, such that if the conditions were imposed, applicants would not go forward with (and thus the nation would lose the contemplated "benefits" of) the proposed transaction; and that, if competitive harm can only be remedied or enhancements to competition can only be obtained through the imposition of conditions that will result in a reduction in the financial benefits of the transaction, it would be better to alter the financial terms of the transaction than to ignore the competitive harm.

Scope of "enhanced competition" requirements. (1) NITL contends that the Board, by focusing purely on merger policy to accomplish the "enhanced competition" objective, may create an "unlevel playing field" for carriers and shippers. NITL explains: that, if the enhanced competition that the proposed rules require applicants to propose includes enhanced rail-to-rail competition, applicants will have to provide some type of access to their systems to non-merging carriers; that, however, because these other carriers will not be obligated to provide access to their own systems, the merging carriers will be unable to compete for traffic on the systems of the non-merging carriers; and that this will result both in a significant disincentive for potentially beneficial transactions (particularly given the vagueness of the proposed rules as to what quantum of "enhanced competition" will be necessary to win agency approval of a proposed transaction) and also in an inequitable and asymmetrical situation for shippers on the non-merging vs. the merging carriers. NITL therefore believes that the Board must act to provide for enhanced competition not just on the lines of the merging carriers but also on the lines of non-merging carriers.

(2) NITL concedes that, although the Board can clearly utilize its conditioning power to provide for enhanced competition (such as increased reciprocal switching) on the lines of the merging carriers, it would appear to be much more problematic as a legal matter for the Board to utilize its conditioning authority to require enhanced competition on the lines of non-merging carriers. NITL insists, however, that the Board can utilize its authority under 49 U.S.C. 11102 to act directly on non-merging carriers in certain areas of enhanced competition (in particular, in the areas of terminal trackage rights and reciprocal switching). This authority, NITL notes (NITL cites action taken in the UP/MP/WP and UP/SP proceedings), has been used in the past, in the merger context, to impose trackage rights in favor of applicants on the lines of non-merging carriers. The UP/MP/WP and UP/SP precedents, NITL argues, establish that, in merger proceedings, the Board has the authority to utilize terminal trackage rights and reciprocal switching broadly to promote the public interest.

(3) NITL therefore contends that the Board should revise its merger rules to make clear that, if "enhanced competition" is ordered over the lines of merging carriers, the Board will act broadly and symmetrically to impose concomitant access over the lines of non-merging carriers, to provide for equal competition. NITL contends, in particular, that a sentence should be added to NPR § 1180.1(d) to read as follows: "In the case of enhanced competition proposed by applicants

or ordered by the Board resulting in access to the lines of applicant carriers by other rail carriers, the Board will also impose access under the authority granted to it by 49 U.S.C. 11102 to permit comparable access over the lines of such other rail carriers, at the same or similar locations." NITL has in mind: that, if the Board orders "enhanced competition" through reciprocal switching at designated terminals of the applicants, it would use its authority under 49 U.S.C. 11102 to order reciprocal switching over the lines of non-merging carriers at those same terminal areas; and that, similarly, if the Board orders terminal trackage rights over the lines of merging carriers, it would also order similar trackage rights over the lines of non-merging carriers in the affected areas. NITL adds that, in the alternative, the Board could commit to reopen its 49 CFR Part 1144 "intramodal rail competition" rules when and if the next "major merger" application is filed, in order to permit competitive access to both merging and non-merging carriers in terminal areas at which merging carriers interchange cars with non-merging carriers.

Gateway preservation. NITL contends that, as respects gateways, the last sentence of NPR § 1180.1(c)(2)(i) ("Applicants shall also explain how they would at a minimum preserve competitive options such as those involving the use of major existing gateways, build-outs or build-ins, and the opportunity to enter into contracts for one segment of a movement as a means of gaining the right separately to pursue rate relief for the remainder of the movement.") needs substantial clarification and definition. (1) NITL insists that the Board should clarify the phrase "major existing gateways." NITL contends: that the phrase itself is flawed, because there is no objective measure as to what constitutes a "gateway" as opposed to an ordinary "interchange," and because the use of the adjective "major" simply confuses the issue even more; that, therefore, the phrase should be discarded in favor of a more objective and precise phrase; and that the proper area of inquiry should be whether there is an "existing interchange" between an applicant carrier and a non-applicant carrier (the existence of an "interchange," NITL explains, depends upon physically-verifiable conditions such as whether there is an actual exchange of cars between carriers at a specific geographic point). NITL further contends: that, if the Board agrees that the focus should be on whether there is an "existing interchange" between a merging and a non-merging carrier, the question then becomes the proper standard for determining whether such an existing interchange should be preserved; and that the proper regulatory standard here would forbid merging carriers, either as part of the application or in the future, from closing any existing interchange unless the carrier can show clearly that the existing interchange is not necessary to preserve the competitive routing options of any shipper or that maintenance of the existing interchange would be patently inefficient. The "patently inefficient" standard, NITL insists, would place the burden on the carrier to show that any proposed or future interchange closure was indeed justified.

(2) NITL contends that the Board should clarify what it means when it says that carriers must "preserve" gateways. NITL explains that, because interchanges can be "closed" in various ways (by tearing up track, by not permitting the exchange of cars with another carrier, and by pricing routings with another carrier so as to make transportation via that route uneconomic), the Board should make clear that carriers must explain how they would preserve the routing over such interchanges not just physically (*i.e.*, by permitting routing over the gateway) but also economically (*i.e.*, by ensuring that the rate to be charged to the interchange permits competition over the remainder of the movement).

(3) NITL contends that, to accomplish these clarifications and changes, the last sentence of NPR § 1180.1(c)(2)(i) should be revised to read as follows: "Applicants shall also explain how they would at a minimum preserve existing competitive options including but not limited to those involving the use of existing interchanges, build-outs or build-ins, and the opportunity to enter into contracts for one segment of a movement as a means of gaining the right separately to pursue rate relief for the remainder of the movement. The Board shall not permit the closure of existing interchanges by any means (through direct interchange closures, rate increases, or otherwise) unless

the applicants can show clearly that an existing interchange is not necessary to preserve the competitive routing options of any shipper, or that maintenance of the existing interchange would be patently inefficient."

Service assurance plans. NITL indicates that, although it supports the "service assurance plan" concept outlined in NPR §§ 1180.1(h) and 1180.10, it believes that the existence of a SAP, by itself, is not enough. Every SAP, NITL insists, should include a compensation requirement, a procedural requirement, and a substituted service requirement.

(1) *Compensation requirement.* (a) NITL contends that the Board should require that every SAP include provisions for the compensation of shippers in the event of a carrier's failure to provide the levels of service experienced by shippers pre-merger (NITL explains that service will truly be "assured" only if carriers are aware beforehand that failure to provide promised service levels will result in sure financial penalties). NITL adds that, although it believes that the promises of merging carriers should be scrutinized very carefully in the course of the Board's review of the merger application, it is not arguing that there should be remedies if the projections of merging carriers fail to materialize; rather, NITL explains, it has limited its right to remedies to "damages experienced as a result of the failure of the applicant carriers to provide service to any shipper at levels experienced prior to the implementation of the transaction." (b) NITL further contends that the Board should also make clear that, although a shipper's recovery cannot exceed the total damages the shipper has suffered, the remedies in a SAP will complement, and not replace, any remedies the shipper might already have against the carrier as part, for example, of a shipper's contract with the carrier (NITL explains that it is concerned that the inclusion of remedies in a SAP as a condition of the merger, combined with the agency's authority to exempt a merger from the force of other law, might act to strip a shipper of its existing rights).

(2) *Procedural requirement.* NITL contends that every SAP should include an expeditious and fair procedure for obtaining compensation for merger-related service failures. NITL contends, in particular, that every SAP should include a provision for expedited arbitration (*e.g.*, to be completed within 90 days), at the shipper's election, of disputes over compensation for rail service failures as a result of a consolidation transaction, for a reasonable time after a consolidation is implemented (recent history, NITL adds, would suggest that a "reasonable time" after implementation of a transaction would need to be at least a year). NITL explains that, in the past, if a carrier has denied a shipper's claim, the shipper has been obligated to go to court to obtain compensation for the carrier's service failures. Litigation, NITL further explains, is an expensive and lengthy proposition that has discouraged many shippers from pursuing their rights at all.

(3) *Substituted service requirement.* (a) NITL contends that the SAP should be required to provide for access by alternative carriers to remedy post-merger service failures. NITL explains that some damages resulting from service failures (*e.g.*, damages to customer relations, to a shipper's competitive presence in a particular market, or to a shipper's reputation) are difficult if not impossible to compensate, and can best be minimized by allowing affected shippers access to alternative carriers. (b) NITL contends that the Board's 49 CFR 1146.1 "expedited relief for service emergencies" regulation (which requires that a shipper, in order to obtain emergency or temporary service relief, must show "a substantial, measurable deterioration or other demonstrated inadequacy in rail service," along with advance discussions with the incumbent carrier and a commitment from another railroad to provide safe and operationally feasible service) might have a role to play in this context. NITL contends, in particular, that the Board should consider requiring applicant carriers to link service levels in their SAPs with the 49 CFR 1146.1 standards for proving a "measurable deterioration" in rail service. NITL contemplates that a carrier's SAP would be required to provide that, if service levels for any shipper deteriorated a specified percentage from service levels experienced by that shipper for a reasonable period prior to implementation of the transaction, the

Board would presume that there had been a "measurable deterioration" in rail service for the purpose of ordering relief under 49 CFR 1146.1. NITL further contemplates that, if service fell below the specified level, a shipper would not have to prove that there had been a "measurable deterioration" in rail service but would simply have to show that it had attempted to resolve the service problem with the incumbent carrier and that it had a substitute carrier willing and able to provide substituted service.

Operational monitoring and oversight. NITL indicates that, although it supports the Board's call for increased operational monitoring and post-merger oversight, it believes that the proposed rules focus too much on generalized data that give only a broad picture of a carrier's operational health (*e.g.*, on-time performance at principal yards) and do not focus sufficiently on the key operational information that is the most important and direct determinant of the quality of a carrier's service (*i.e.*, transit times and cycle times over major corridors). NITL therefore insists that, as part of the requirement for operational monitoring, applicant carriers should be required to provide information on transit times and cycle times for traffic categories over major corridors for the year immediately preceding the application, and then should be required to provide the same information on a continuing basis following the application and the implementation of the transaction.[142]

Acquisition premiums and financial burdens. (1) NITL contends that the Board should revise its proposed rules to ensure that acquisition premiums will be included neither in the calculation of the jurisdictional threshold for rate regulation nor in the evaluation of a carrier's revenue adequacy. NITL explains that the inclusion of an acquisition premium (*i.e.*, the difference between the purchase price of a rail acquisition and the market or book value just prior to acquisition) will cause the jurisdictional threshold to rise, and will increase the likelihood that a railroad is determined to be revenue inadequate. And, NITL adds, because acquisition premium costs work their way into RCAF calculations, shippers that utilize the RCAF in their contracts may also be adversely affected by an acquisition premium.

(2) NITL contends that the Board should undertake to examine, more carefully than it has in the past, the possible effects of the financial burden imposed by a proposed consolidation transaction. NITL advises, in this context, that shippers have reported that they are beginning to experience in the eastern United States rate increases that do not appear to be justified by carrier cost increases, a development (NITL adds) that shippers believe to be related, at least in part, to the very substantial debt levels assumed by both CSX and NS in connection with their purchase of Conrail.

Operational alliances. The last two sentences of the opening paragraph of NPR § 1180.1(c) provide: "When evaluating the public interest, the Board will also consider whether the benefits claimed by applicants could be realized by means other than the proposed consolidation. The Board believes that other private sector initiatives, such as joint marketing agreements and interline partnerships, can produce many of the efficiencies of a merger while risking less potential harm to the public." NITL indicates that, although it supports the first cited sentence, it believes that the second cited sentence should be deleted. As respects the second cited sentence, NITL explains that, although joint marketing agreements and interline partnerships may have anticompetitive consequences, such consequences may escape all regulatory review, because the transportation

[142] NITL notes that, whereas "transit times" are the appropriate service measure for some traffic (*e.g.*, merchandise traffic), "cycle times" are the appropriate service measure for other traffic (*e.g.*, unit coal trains).

regulatory agency (the Board) takes a narrow view of "control" and "pooling" and because the antitrust regulatory agencies (DOJ and FTC) review most agreements among competitors under guidelines that were not developed with the specific situation regarding rail alliance agreements in mind (NITL notes, by way of example, that the relevant DOJ/FTC guidelines indicate that a competitor collaboration will not be challenged when the market shares of the collaboration and its participants collectively account for no more than 20% of each relevant market in which competition may be affected). The Board, NITL insists, should not give the appearance of "blessing" in advance joint venture or alliance arrangements, but, rather, should leave it to future proceedings to determine both the proper jurisdiction for reviewing the legality of a joint venture or alliance arrangement and also the competitive or anticompetitive effects of a particular arrangement.

Cumulative impacts. (1) *Downstream effects.* NITL agrees that, because there are now only a few remaining Class I carriers, the "one case at a time" rule has outlived its usefulness; the Board, NITL insists, should examine the reasonably foreseeable downstream effects of a proposed merger. NITL contends, however, that, in order to harmonize the text of NPR § 1180.1(i) and the commentary thereon (*see NPR* at 20), NPR § 1180.1(i) should be revised to require applicants to anticipate "with reasonable certainty" what additional applications are likely to be filed.

(2) *Upstream effects.* NITL contends that the applicants to a future major merger should address what impacts, if any, the proposed merger would have on conditions imposed in previously-approved mergers. NITL explains: that, in view of the gradual loss of geographic and segment competition that has taken place since the latest wave of major mergers began in 1994, a future merger may require a re-examination of past merger conditions in order to uncover a serious loss of, for example, geographic competition that might occur if a major western carrier were to merge with a major eastern carrier; that, although such a merger might give the combined system a national stranglehold over a particular commodity, it might be possible to cure that result by altering the configuration of trackage rights granted in a previous merger, to permit access to the western origins of the commodity by the non-merging western carrier; and that, therefore, in this context, the Board needs to look at the entire picture, and should not only look forward.

Transnational issues. NITL indicates that it supports the NPR's approach to transnational issues. It is crucial, NITL explains, that, in cases involving major foreign railroads, applicants should submit "full system" competitive analyses and operating plans, including operations in the foreign country.

CONSUMERS UNITED FOR RAIL EQUITY. Consumers United for Rail Equity (CURE)[143] agrees that future rail mergers must be measured against a procompetitive standard; CURE argues

[143] CURE's membership includes Algona Municipal Utilities, American Electric Power Service Corporation, American Public Power Association, Arizona Electric Power Cooperative, Arkansas Electric Cooperative Association, Buckeye Power, Inc., Camelot Coal Company, Carolina Power and Light Company, Consumers Energy Company, Dairyland Power Cooperative, Duke Energy Company, Edison Electric Institute, Empire District Electric Company, Entergy Services, Inc., Ethyl Corporation, Exelon Corporation, Kansas City Power and Light Company, Minnesota Power, Municipal Electric Systems of Oklahoma, National Rural Electric Cooperative Association, Nebraska Public Power District, The Ohio Valley Coal Company, Potomac Electric Power Company, Shawnee Coal Company, Southern Indiana Gas and Electric Company, Sunoco, Inc., and Wisconsin Power and Light Company.

that merger rules that are unequivocal in their demand that future rail mergers result in enhanced competition are critical to the future health of the rail industry and many aspects of the national economy; and CURE insists that the necessary components of a national rail policy include a merger policy focused on enhancing competition, rules that allow competitive rail opportunities to develop for captive shippers, and actions that create healthy regional railroads throughout the U.S. CURE contends, however, that the rules proposed in the NPR fail to make effective competition the centerpiece of U.S. rail policy. CURE further contends: that the Board should revise the proposed rules so that the final rules have a demonstrable impact on the fundamental problem facing the rail industry today (a regulatory framework that encourages monopolistic behavior); and that, where the Board believes that it lacks the authority to act, it should give Congress a clear signal so that Congress may take the steps necessary to pass legislation that will result in a comprehensive rail policy that keeps railroads healthy and provides transportation competition for shippers.

Scope of proceeding. CURE contends that the Board must reach beyond the merger context and must develop (either in this rulemaking or in a separate rulemaking) procompetitive rules that apply to the industry as a whole, whether or not future mergers are approved. This more expansive approach is necessary, CURE explains, to address effectively the concerns repeatedly raised by rail shippers, to promote a more robust and competitive rail industry, and to meet the principal goals of the Staggers Act. CURE further contends that the following changes to current policy are critical to the promotion of effective rail competition: (1) CURE contends that, as respects any rail merger in which the application is filed after January 2000, the Board should adopt stronger merger review guidelines that evaluate each merger's impact on competition and that apply the following requirements: a requirement that applicants demonstrate that an increase in competitive options will be available to shippers following the merger; a requirement that no merger will be approved that reduces transportation alternatives available to current railroad customers, including an analysis beyond any "bottleneck" affecting a rail shipper; and a requirement that no merger will be approved that fails to provide additional options and enhanced service for railroad customers.

(2) CURE contends that the Board should reverse its current policy regarding "bottlenecks" and adopt a new policy requiring a railroad to quote a rate between any two points on its system where traffic can originate or be interchanged.

(3) CURE contends that the Board should affirmatively grant the right of Class I and small railroads to interchange at terminal areas and interchange points without being disadvantaged in any way in terms of operations or pricing.

(4) CURE contends that the Board should eliminate all "paper barriers" that arbitrarily restrict full interchange rights for Class II and III railroads.

Discretion. CURE contends that the proposed rules do not provide that certain procompetitive standards must be met as a condition to merger, but, rather, give the Board absolute discretion concerning whether to apply procompetitive conditions to merging railroads. CURE insists that, because the discretionary application of the proposed rules falls short of ensuring that the public interest will be protected adequately in future mergers, the Board must amend the rules to establish mandatory procompetitive provisions that will apply to all merging railroads. CURE contends, in particular, that the final rules should require a merged railroad: to quote a rate between any two points on its system where traffic can originate or be interchanged; to allow other rail carriers to interchange at terminal areas and interchange points without being disadvantaged in any way in terms of operations or pricing; and to eliminate all paper and steel barriers that arbitrarily restrict full interchange rights for Class II and III railroads.

ALLIANCE FOR RAIL COMPETITION. The Alliance for Rail Competition (ARC)[144] contends that, although the NPR's procompetitive rhetoric reflects a "paradigm shift," there is little to indicate that the proposed rules can or will achieve the stated goal of "balanced and sustainable competition in the railroad industry." ARC further contends that, because the Board has provided no specific guidelines indicating how it would balance its stated goal of enhanced competition with the public benefits that (the Board claims) resulted from past rail mergers, ARC does not believe that the proposed rules live up to the spirit of the rail customer community's recommendations. ARC argues that, for good public policy to result from this proceeding, the Board must take the difficult step of developing a clearly defined merger policy that recognizes and adequately responds to the procompetitive intentions of the statute and the legitimate concerns repeatedly forwarded by the rail customer community and others. And, ARC adds, because it believes that the Board's statutory authority is not likely to be appropriately exercised to achieve the public benefits that would result from increased competition among railroads, ARC will call even more insistently upon Congress to undertake a complete overhaul of the existing regulatory framework in order to introduce and expand competition among railroads.

Public interest considerations. ARC contends that the public interest requires a competitive rail system that provides consistent, reliable, and safe service at a fair price to all who wish to use rail service. Such a system, ARC explains, would play a major role in the nation's transportation network, alleviating highway congestion, reducing air pollution, and providing critical transportation services supporting and encouraging economic development and growth. ARC further contends: that the past several "major mergers" have not significantly improved service, enhanced competitive service alternatives for any but a select few, resulted in remarkably more efficient or more responsive rail transportation, or generally reduced the costs associated with rail transportation; that increasing the discretion of the Board regarding how it balances the railroads' future merger proposals with the need for enhanced rail-to-rail competition will not likely improve the chances that any future merger will produce different results; that no amount of regulatory monitoring will correct the harms caused by a merger that does not live up to expectations; that service disruptions harm rail customers, result in significant losses to local, state, and national economies through lost wages, lost tax revenues, lost sales, and lost productivity, add to highway congestion and air pollution by putting more trucks on the road, and generally lower the bar on expectations of rail performance; that, in the highly consolidated rail marketplace, it is imperative that the Board view any future mergers as an opportunity to increase competition between railroads throughout the rail industry under the auspices of its broad authority; that efforts to ensure that gateways remain physically open, but without specifically requiring that they remain economically open, provide little or no assurance that even existing competition will be maintained; that, for those customers that must rely solely on rail transportation, competition can only be enhanced through increased rail transportation options; that the dwindling number of Class I railroads and the lack of competition among those railroads allows them to behave in ways that determine the viability of geographic markets; and that the unreliability and inconsistency of rail service performance undermines rail transportation as a viable mode of freight movement, and, as a result, contributes to the congestion of highways and associated air pollution in many urban areas of the country.

[144] ARC, which describes itself as a representative of the rail customer community, indicates that two organizations (the National Council of Farmers Cooperatives and the National Farmers Union) have requested to be listed as endorsing ARC's comments.

Guidelines. ARC contends that the Board, in crafting actual, specific, and definitive rules, should take into account: that a viable freight railroad industry is in the public interest; that railroad viability can and should be enhanced with competition; that the net impact on customers should be the key merger criterion; that competitive access is the preferred protection for customers; that railroad customers need "safe harbor" protection; that railroad mergers are not the only way to lower operating costs; that post-merger performance must be closely monitored for a period of 10 years; and that, when railroad mergers cause unanticipated adverse impacts on customers, or when competitive alternatives provided for within a merger proceeding are determined either to have not worked or to have disappeared, the situation should be rectified post-merger by opening competitive access and/or by making economic regulation more effective.

APPENDIX L: COAL INTERESTS

THE "SUBSCRIBING COAL SHIPPERS" GROUP. The "Subscribing Coal Shippers" group (referred to as SCS)[145] indicates that it is disappointed with the NPR. SCS explains that, whereas it expected the NPR to propose "fundamental changes" in the merger rules, the NPR actually proposes only "opaque linguistic changes" that leave the Board, carriers, and other parties to flesh out the details (whatever they may be) in the next major rail merger case. SCS further explains that, although the Board claims to have "raised the bar" for approval of the next round of major rail mergers, the Board's proposed new standards are so elastic that no one will really know whether the "bar" has been raised and if it has, by how much, until the rules are applied in an individual case. SCS insists: that there is no certainty that the "bar" has been raised to address competitive and service concerns previously mentioned by SCS; that the "bar" can only be truly raised if the Board includes in its new merger rules specific conditions that will require merging carriers to open up their systems to increased competition via the access, bottleneck, and paper barrier relief conditions previously advocated by SCS; and that, similarly, "service assurance" plans can provide meaningful relief to shippers only if the Board requires merging carriers to reimburse shippers for merger-related service failure costs resulting from failure to meet such plans. SCS specifically contends that the Board should include in the new rules the procompetitive merger remedies advocated by SCS, and should require merging carriers to compensate shippers for post-merger service failure costs and to exclude acquisition premiums and service failure costs in calculating rail costs for regulatory purposes, including the RCAF calculations.

Competitive remedies. SCS contends that the Board's new competition-enhancing standard, no matter how well intentioned, is so open-ended that it is likely to provide no meaningful relief to captive coal shippers; the rail applicants in all recent major rail merger proceedings, SCS insists, have claimed that the mergers will enhance competition, and in some cases (SCS adds) the ICC/STB has agreed. SCS further contends that the only way to ensure that competition will be meaningfully enhanced is to prescribe, in advance, procompetitive conditions of the type previously advocated by SCS (*i.e.*, conditions that would require merging carriers to provide access, bottleneck, paper barrier,

---

[145] The members of the SCS group are Western Coal Traffic League, American Public Power Association, National Rural Electric Cooperative Association, Alliant Energy Corporation, City of Grand Island, NE, City Utilities of Springfield, MO, Lafayette Utilities System, Platte River Power Authority, Salt River Project Agricultural Improvement and Power District, Texas Municipal Power Agency, and Xcel Energy Inc.

and other forms of competitive relief). SCS, which insists that this proceeding was initiated because of fears that the next round of major rail mergers would result in a national rail duopoly, argues that, if this "frightening" concentration of economic power in the hands of two mega-carriers is allowed to occur, it must include major competition-enhancing conditions.

Access relief condition. SCS contends that the Board should condition every major rail consolidation transaction by allowing "any person, including an affected shipper, [to] request the consolidated carrier(s) to allow a second carrier to use its or their facilities to provide competitive rail service." The access relief condition contemplated by SCS: would allow the carrier 90 days to respond to the request; would, if the carrier denies the request, allow the requesting person to seek relief in an administrative proceeding; would, in the case of such a proceeding, result in an order requiring "railroad facilities owned by the involved rail carrier to be used by another rail carrier if the Board finds that use will not substantially impair the ability of the rail carrier owning the facilities or entitled to use the facilities to handle its own business;" and would, if such an order were issued, require that the owning carrier be compensated "for the use of the facilities on a usage basis based upon a sharing of the total costs incurred." SCS indicates that its access relief condition is intended to promote effective rail competition by giving shippers the opportunity to obtain competitive access relief from the consolidated carrier in those instances where access relief is physically practicable. SCS further indicates that its access relief condition is also intended to promote shipper/carrier negotiated access solutions, subject to Board intervention in those instances where the parties are unable to work out the terms of the relief via negotiations.

Bottleneck relief condition. SCS contends that the Board should condition every major rail consolidation transaction by requiring the consolidated rail carrier(s) to establish, upon the request of a shipper, "a rate for transportation and [to] provide service requested by the shipper between any two points on the system of that carrier where traffic originates, terminates, or may reasonably be interchanged." The bottleneck relief condition contemplated by SCS would require the carrier to establish a rate and provide service upon request and would allow the shipper to challenge the reasonableness of such rate, without regard to (a) whether the rate is for only part of a movement between an origin and a destination, (b) whether the shipper has made arrangements for transportation for any other part of that movement, or (c) whether the shipper currently has a contract with any rail carrier for part or all of its transportation needs over the route of movement. SCS, which argues that rail mergers exacerbate bottleneck problems (by, *e.g.*, converting a bottleneck involving a separate destination carrier that connects with 2 competing origin carriers into a situation where the bottleneck destination carrier also serves the origin), indicates that its bottleneck relief condition is intended to promote competition by requiring consolidated carriers to provide transportation rates over bottleneck route segments. SCS further indicates that its bottleneck relief condition is intended to allow a shipper to seek maximum rate relief from the Board if the bottleneck rate established by the consolidated carrier is unreasonably high.

Paper barrier relief condition. SCS contends that the Board should condition every major rail consolidation transaction by allowing "any person (including an affected shipper)" to request that the consolidated carrier(s) remove any paper barrier (*i.e.*, any term in an agreement between a Class I railroad, on the one hand, and a Class II or Class III railroad or noncarrier, on the other hand, that impairs or penalizes the freedom of the Class II or Class III railroad to interchange traffic with carriers with which the Class II or Class III railroad can physically connect). The paper barrier relief condition contemplated by SCS: would require the consolidated carrier to respond within 30 days; would, if the consolidated carrier does not grant the request, allow the requesting person to seek relief in an administrative proceeding; and would, in the case of such a proceeding, result in an order directing the consolidated carrier to remove the paper barrier, "unless the carrier can demonstrate that retention of the paper barrier is in the public interest." The paper barrier relief condition contemplated by SCS further provides that, in making a public interest finding, the Board would be guided: (1) by the principle that paper barriers to interchange are inherently anticompetitive, and are unreasonable unless they are necessary to the achievement of a public benefit that outweighs the harm they cause to competition, and then only if they are no broader or more restrictive than necessary to achieve that benefit; and (2) by the rebuttable presumption that a paper barrier is unreasonable insofar as it (i) lasts longer than 5 years from the date of the agreement containing the paper barrier, or (ii) includes any financial penalty on a Class II or Class III railroad that is triggered by the interchange of traffic with another carrier, or (iii) includes credits for traffic interchanged with a carrier against a rental or sale price that reflects a return of more than the railroad industry's cost of capital on the fair market value of the properties sold or leased. SCS indicates that its paper barrier relief condition is intended to eliminate restrictions that prevent Class II and Class III railroads from providing competitive interchanges with major rail carriers. SCS further indicates that its paper barrier relief condition would allow shippers and carriers to first negotiate removal of unreasonable paper barriers, subject to Board resolution of disputes that the parties are unable to successfully negotiate.

Service failure monetary damage remedy. SCS contends that the Board should condition every major rail consolidation transaction by requiring the consolidated carrier(s) to make every shipper "financially whole for any injuries the shipper incurs as a result of post-consolidation service problems." The service failure monetary damage remedy contemplated by SCS: would apply to all major consolidation transactions approved on or after January 1, 1996; would require the consolidated carrier either to pay a claim or to reject the claim (and to explain, with specificity, the reason for the rejection) within 14 days of the receipt thereof; would, in the case of a rejected claim, allow the shipper to institute an administrative proceeding to obtain payment; and would require the Board to complete any such proceeding within 180 days after the filing of the request for relief. The service failure monetary damage remedy contemplated by SCS would also preclude the consolidated carrier from raising as a defense that its liability to any shipper is limited by the terms of any contract or other arrangement with the shipper. SCS indicates that, although it does not object to the "service assurance plans" proposed in the NPR, it believes that SAPs alone are not sufficient. SCS argues that recent experience has taught that, despite "assurances," detailed service integration plans, etc., mergers can cause major service problems; SCS further argues that recent experience has also taught that, when a major railroad experiences severe service problems, marketplace solutions (*e.g.*, the substitution of a second rail carrier) are extremely limited; and SCS concludes that the Board should therefore require as part of any "service assurance plan" the service failure monetary damage remedy advocated by SCS. SCS adds that, with such a remedy in place, shippers will have a meaningful "assurance" that they will be directly reimbursed for increased costs they incur as a result of the service failures of merging carriers. SCS further adds that it would not be enough to require that such "assurances" be included in "contractual agreements" between shippers and merging carriers; the problem with that approach, SCS insists, is that it assumes that the merging carriers will voluntarily enter into such contractual arrangements, a result (SCS claims) that is most unlikely given the industry's articulated position in this proceeding.[146]

Regulatory cost remedy. SCS contends that the Board should impose on every major rail consolidation transaction approved on or after January 1, 1996, a condition providing that, "[i]n any proceeding at the Board involving development or use of a consolidated carrier's costs for providing rail transportation service, costs associated with rail service problems, or purchase premiums paid for a carrier's assets,[147] shall be excluded from the carrier's cost of service under the Board's General Purpose Costing Systems." SCS argues that it is fundamentally unfair to make shippers pay for service congestion costs and acquisition premiums; a consolidated carrier, SCS insists, should not be allowed to pass through increased costs in the form of service disruption costs and purchase premiums to shippers via the inclusion of these costs in the Board's General Purpose Costing Systems (*e.g.*, the Uniform Railroad Costing System) and in its calculation of the RCAF.

THE "CERTAIN COAL SHIPPERS" GROUP. The "Certain Coal Shippers" group (referred to as CCS)[148] contends: that recent major rail mergers have not resulted in the efficiencies and improved service touted by the merger applicants in their merger proceedings; that the deterioration of rail service that has occurred in the recent past is directly tied to and rooted in the diminishment of competition between the major Class I railroads and in the industry as a whole as the rail industry has become consolidated; and that this cause-and-effect relationship between the deterioration of service and the lack of meaningful competition between the Class I railroads and in the rail industry is particularly evident in the coal transportation segment of the rail industry, and more particularly in the transportation of coal from western coal mines to electric generating plants in the western and mid-western United States. CCS insists that the Board should clearly revise its rules with the goal of adopting regulatory changes that will facilitate improved service in the railroad industry by enhancing meaningful competition between the major Class I railroads and in the rail industry generally. CCS adds: that, although the NPR incorporates certain measures designed to improve rail service after a major rail merger, the NPR is impermissibly vague (*i.e.*, it does not provide meaningful standards that merging railroads can rely upon when preparing a merger application, nor does it enable parties affected by a proposed merger to evaluate whether to expend valuable resources to participate in a merger proceeding in order to protect their interests); that the enhancement of rail-to-rail competition and improved rail service go hand-in-hand; and that the goal of improved rail service will only be realized if rail-to-rail competition is improved and if specific, meaningful regulatory "hammers" are in place that provide the major railroads with incentives to improve rail service or continue good rail service. (1) CCS agrees that the Board, in reviewing future merger

---

[146] SCS rejects the argument that its service failure monetary damage remedy would turn the Board into a "claims tribunal." SCS explains that the principal reason the Board exists is to hear and adjudicate shipper claims. And, SCS adds, an agency with the broad authority to approve rail mergers certainly has the statutory authority to remedy harms caused to rail shippers by the exercise of that authority.

[147] SCS defines "purchase premium" as the difference between net book value and purchase price.

[148] The members of the CCS group are Otter Tail Power Company, Public Service Company of Colorado, Southwestern Public Service Company, TUCO INC., Tucson Electric Power Company, and Western Resources, Inc. Public Service Company of Colorado and Southwestern Public Service Company are operating divisions of Xcel Energy Inc.

applications, should require the enhancement of competition; CCS explains that the fact that competition and service levels have generally decreased (both in the rail industry in general and in the coal transportation segment of the rail industry in particular) as the rail industry has become more consolidated demonstrates that the overall standard applied by the ICC/STB in prior mergers (preservation of pre-merger competitive levels) has been insufficient; and, CCS adds, the Board's new merger policy must be structured so that the overall state of the rail industry improves as further consolidation occurs (*i.e.*, the Board, CCS argues, must act in future major rail merger proceedings to rectify not only the competitive harm and service deterioration associated with such future mergers but also the competitive harm and service deterioration that have already resulted from past mergers). CCS insists that the competition that must be enhanced is intramodal (*i.e.*, rail-to-rail) competition), which (CCS explains) is the kind of competition that is lost when railroads merge. CCS contends: that the NPR has changed the nature of the competition that would be enhanced as a result of a proposed rail merger from rail-to-rail competition to something much broader and less clear; that the NPR does not even expressly state that the Board's merger policy will henceforth be to require rail mergers to result in the improvement or increased intensity of rail-to-rail competition, rather than merely preservation of pre-merger competition levels; that, in fact, the NPR can be read to allow the reduction of rail transportation alternatives available to shippers if there are substantial and demonstrable public benefits to the transaction that cannot otherwise be achieved, or if the applicants can show enhanced competition in the broader "transportation infrastructure;" and that, therefore, the rules proposed in the NPR should be revised by clearly defining the "enhanced competition" concept as expressly requiring the enhancement of rail-to-rail competition. CCS, which insists that the Board has ample statutory authority (CCS cites 49 U.S.C. 10101, 11102, and 11324 in particular) to adopt specific measures that require the enhancement of intramodal competition as part of the process of considering a major rail merger application, adds that the final rules should also state that future railroad mergers should not result in any reduction of railroad options to any shipper.[149]

(2) CCS argues that any changes to the rules governing rail mergers should be applied to the rail industry as a whole. Such application is required, CCS claims, because a policy of improving competition and service in the railroad industry can only be accomplished by applying any changes to the rules to non-merging railroads as well as merging railroads; changing the rules only in the context of mergers, CCS further claims, would result in an unbalanced rail industry,[150] where the merged railroad would be required to provide access, rates, and service that its competitors would

[149] CCS rejects the argument that to require enhanced intramodal rail competition would be to substitute regulation for "the market." CCS explains: that the rail market is not a competitive, thriving market similar to telecommunications or automobiles or computers; that, rather, the rail market is an amalgam of separate markets controlled by regional rail duopolies, in which the railroads do not engage in competition at a fraction of the level present in other industries, and where many rail shippers do not have any rail alternatives, let alone competitive rail alternatives; that, furthermore, certain rail market participants, such as shortlines and regionals, are barred from participating for market share by anticompetitive paper and steel barriers; and that the lack of a competitive rail alternative for many shippers means that a prerequisite for participation in the "market" is regulatory relief, in the form of prescribed rates, rail build-outs and crossing proceedings, and the like.

[150] CCS cites, as examples of such imbalance, the 49 CFR part 1144 "intramodal rail competition" regulations, the 49 CFR part 1146 "expedited relief for service emergencies" regulation, the 49 CFR part 1147 "temporary relief under 49 U.S.C. 10705 and 11102 for service inadequacies" regulation, and the Board's so-called "Bottleneck Rules."

not have to provide under the Board's current regulations and decisional rules. CCS, which believes that a broad review of all the Board's rules related to rates and service must be conducted for the purpose of establishing whether the rules will facilitate improved rail service and meaningful competition as the railroad industry continues to consolidate, insists that the Board should reconsider its decision to limit any changes to its regulations regarding rail-to-rail competition and service to the narrow rail merger context. CCS further insists that, if the Board declines to reconsider that decision, the Board should provide a detailed explanation of why it believes that limiting changes to existing rules regarding competition in the railroad industry to the rail merger context will not in fact hamper the advancement of a policy of enhancing competition and improving service in the railroad industry by creating an uneven playing field, thereby discouraging rail mergers in the first place.

(3) CCS, which insists that the Board's bottleneck rules must be revised if rail competition for coal transportation is to improve as the industry continues to consolidate, contends that merging railroads should be required to provide, upon request, rates over bottleneck segments created by the merger and over pre-existing bottleneck segments on the merging railroads. CCS contends, in particular, that the Board should promulgate regulations that require merger applicants to provide rates and service terms upon request over all bottleneck segments of track in cases where (a) the merging railroad combines with a bottleneck railroad, thereby acquiring the full routing from an origin to a destination, and (b) there is an existing bottleneck on either of the merger applicants' systems where there is a current interchange between the merging carriers.

(4) CCS, which insists that the "one lump" theory that has been used to deny relief to captive shippers in the merger context is inconsistent with the "contract exception" to the bottleneck rules, contends that the Board should resolve this inconsistency by abandoning the "one lump" theory. CCS explains: that, although the BN/SF and UP/SP mergers resulted in the merged railroad obtaining a monopoly over both a bottleneck segment of track owned by a previously neutral carrier and the remainder of the movement from origin to destination, the ICC/STB denied the requests of captive coal shippers for relief from the extension of the bottleneck carrier's monopoly; that relief was denied because, the ICC/STB theorized, the level of the harm to the captive shipper after the merger was no greater than the harm existing prior to the merger, because (so the ICC/STB claimed) there is only one "lump" of profit to be had on the overall movement and the monopoly destination carrier would absorb the lion's share of that profit regardless of whether or not it merged with an upstream carrier; that, however, the Board's bottleneck rules provide that, if a coal shipper is able to obtain a contract for the movement of its coal by a non-bottleneck carrier from a different mine origin than that served by the incumbent carrier, the Board will prescribe a maximum reasonable rate over just the bottleneck portion of the movement; and that this prescription effectively prohibits the bottleneck carrier from "soaking up" all the profit remaining on the overall movement after the non-bottleneck carriers compete for that portion of the movement. CCS adds that, if the Board were to continue to adhere to the "one lump" theory in rail mergers, the "contract exception" would cease to be available to the captive shipper to the extent a merger results in the railroad with the bottleneck serving the same origin as a potential competitor over the non-bottleneck segment.

(5) CCS contends that the Board should strengthen the ability of coal shippers to achieve the intended benefits of the "contract exception" to the bottleneck rules by eliminating the "same origin" restriction and by requiring merging carriers to provide separately challengeable rates over bottleneck segments even if no contract exists for the non-bottleneck segment. (a) As respects the request that the Board eliminate the "same origin" restriction, CCS explains: that the "same origin" restriction to the "contract exception" provides that a railroad need not supply a rate over a bottleneck segment if the bottleneck railroad and the non-bottleneck railroad that wishes to contract with the shipper for service over the non-bottleneck segment serve the same origin; and that, because many key western coal mines are served both by UP and by BNSF, the "same origin" restriction discourages most

shippers of western coal from even attempting to obtain a contract for service over non-bottleneck segments (because, CCS adds, the Board, in these circumstances, will not entertain a request that a bottleneck rate be prescribed until a coal shipper has successfully prosecuted a competitive access case). (b) As respects the request that the Board require merging carriers to provide separately challengeable rates over bottleneck segments even if no contract exists for the non-bottleneck segment, CCS explains: that, because neither UP nor BNSF has actively sought to enter into competitively-priced contracts for transportation of coal over non-bottleneck segments where the other railroad holds a monopoly over a bottleneck segment, there has not been vigorous competition for captive traffic under the "contract exception" to the bottleneck rules; and that, therefore, the Board should reconsider its refusal to require railroads to provide rates over bottleneck segments of track if no contract is present for transportation above or below the bottleneck. The procompetitive goals of the "contract exception" will only be reached, CCS argues, if the bottleneck carriers are required to provide the rate first.

(6) CCS, which insists that the NPR is too open ended and vague regarding the consequences for merging railroads that fail to live up to their promises regarding post-merger rail service (the NPR, CCS maintains, does not provide clear procedures and standards that could be utilized by rail shippers to seek compensation and other relief for post-merger service problems), contends that the Board should establish remedies in the event that service declines after a rail merger and should provide for the substitution of rail service by another railroad on more lenient grounds. CCS argues: that the Board's present policies permit a certain level of service deterioration after a merger before the Board will act, and the Board has to date afforded merging railroads a substantial degree of deference in their representations regarding their ability to return service levels to pre-merger levels; that, in these circumstances, a large amount of the risk that merging railroads cannot effectively implement their merger has been unfairly shifted to the shoulders of rail customers; that, given this reality, the service problems that have accompanied the last several major rail mergers have caused tremendous harm to individual shippers and to the national economy; and that coal shippers and electric utilities alone suffered losses and damages in the tens of millions of dollars on account of the service problems that accompanied implementation of one recent merger (the UP/SP merger). CCS adds: that, in general, most coal-fired generating facilities can normally withstand not more than 30-45 days of deteriorated service before their coal inventories are depleted; that, in the event of such deterioration, it is not enough for service levels to be restored to prior levels; that, rather, in the event of such deterioration, service must be restored to a greater level to quickly build inventories back up to levels that provide adequate insurance that electric power will be supplied to wholesale and retail customers in the event of future rail service deterioration; and that, in view of the service disruptions that have accompanied the past several major rail mergers, the Board's policies and regulations must be changed to require more scrutiny of representations regarding service made by merger applicants, and less deference to merging railroads regarding rail service issues post-merger. CCS therefore contends that, in order to advance a policy of improving rail service by enhancing competition and not tolerating any reductions in overall rail service as the industry continues to consolidate, the Board should amend its rules: (a) to establish remedies in the form of damages, including consequential damages, for any measurable reduction in rail service after a rail merger; and (b) to include provisions setting forth the circumstances in which an alternate carrier may be utilized in the event of post-merger service deterioration (and, CCS adds, the Board should put the burden on the

incumbent railroad to rebut a presumption that alternative service will not interfere with its operations).[151]

(7) CCS contends that the Board should require merging railroads to provide reciprocal switching and/or trackage rights at established rate levels from established terminal points to facilities physically connected to only one major railroad. CCS argues: that the reciprocal switching should be at a single rate in a terminal and for a reasonable distance beyond the terminal for all connecting carriers; that the Board should set the switching rate at levels that enhance the competitive options available to shippers while covering the railroads' costs; and that, although agreements between railroads regarding the level of the charge should be considered, such agreements should be accepted by the Board only if the agreed-upon level enhances the feasible options of rail shippers after the merger. And, CCS adds, the Board should overrule the *Midtec* decision and its unreachable threshold requirement of showing anticompetitive conduct before reciprocal switching and use of terminal facilities will be permitted.

(8) CCS contends that, in order to advance the policy of improving rail rates and service through competition, the Board should act to ensure the viability and independence of shortline, regional, and smaller Class I railroads as competitive alternatives to major Class I railroads for coal transportation. CCS contends, in particular, that the Board should promulgate regulations intended: (a) to eliminate non-competitive "paper barriers" erected by major Class I railroads as part of the sale of a particular rail line as an outgrowth of a merger; (b) to closely scrutinize the operating plans of merger applicants for evidence of intent to close interchanges and connections with shortlines for anticompetitive reasons; and (c) to facilitate the use of smaller Class I railroads and regional shortlines as alternatives to incumbents in the event of service disruptions, even if such service is over the track of the incumbent railroad.

(9) CCS contends that, although the pace at which FERC processes utility mergers is somewhat faster than the pace at which the Board processes rail mergers, the Board should not adopt an expedited procedural schedule for rail mergers. CCS argues: that FERC's ability to proceed at a faster pace is due in large part to the fact that FERC already has in place important measures (*e.g.*, open transmission access requirements and rate freezes) that require utility merger applicants to

---

[151] CCS has also addressed several arguments that have been made respecting post-merger service problems. (1) CCS notes that an argument has been made that SAPs have to be flexible. CCS insists that, although some flexibility may be necessary, the Board must limit the flexibility of SAPs to that which is truly required for the carriers to respond to and correct service problems. (2) CCS notes that an argument has been made that railroads already have powerful economic incentives to avoid service problems, because (so the argument goes) the costs of such problems fall on the railroads. CCS, which insists that this is an exaggeration, notes: that the Board allows the costs of post-merger service deterioration to be passed on to shippers by permitting such costs to be included in the calculation of the merged railroad's variable costs; that such inclusion, combined with the fact that the Board only has jurisdiction to assess the reasonableness of rates that are greater than 180% of variable costs, allows a merged railroad to increase rates to recover service-related costs immune from Board scrutiny; and that, furthermore, current Board policy permits a merged railroad to raise rates immediately after a merger even when a so-called "merger premium" has been paid, thereby further shifting the risk of service failures from the railroad to its customers. (3) CCS notes that an argument has been made that shippers can always negotiate service guarantees. CCS insists that this is simply not true for the majority of rail shippers, and that it is particularly not true for captive rail shippers; the absence of meaningful competition in much of the rail industry, CCS adds, means the inability to negotiate meaningful service guarantees.

enhance competition and to keep rates from increasing post-merger; that, given the existence of FERC's clearly defined rules and guidelines regarding the enhancement of competition, utility merger applicants know which measures to include in their applications, and there are thus fewer questions about whether the public interest has been served; and that the Board will not be able to proceed at FERC's pace unless the Board's final rules set out much more clearly and distinctly the Board's "enhanced competition" policy, and clearly establish procompetitive measures on a par with those known to parties seeking merger approval from FERC.

THE COMMITTEE TO IMPROVE AMERICAN COAL TRANSPORTATION. The Committee to Improve American Coal Transportation (referred to as IMPACT),[152] which insists that the Board should act to enhance the chances that adequate intramodal competition can be established among Class I railroads, argues that this proceeding gives the Board a last chance to preserve the benefits of the Staggers Act reforms by turning the Class I railroad industry away from its fatal compulsion to merge its way to duopoly. IMPACT contends that, although it is still not too late to make a last effort to restore adequate intramodal competition among Class I railroads, it will be too late if the Board's merger moratorium expires without effective, procompetitive merger rules in place. IMPACT adds that trying to preserve the inadequate existing level of intramodal competition is not enough; the Board, IMPACT believes, must adopt rules that will do what the rules proposed in the NPR will not do (*i.e.*, enhance competition, and restore competition that was lost in the mergers of the last decade). And, IMPACT warns, if the Board allows the big railroads to create a North American railroad industry without effective rail-to-rail competition, a return to strict regulation is inevitable.

Adequate intramodal competition. (1) IMPACT contends: that experience has demonstrated that intramodal competition in the railroad industry is much more effective where customers have at least 3 rail options than where there are only 2 carriers; that the "2 is enough" view of the ICC/STB (*i.e.*, the belief that markets that include 2 railroads are sufficiently competitive) has led the rail industry to evolve into a duo of duopolies, one in the East and another in the West; and that, because the U.S. railroad industry already has too few Class I railroads to provide a balanced and sustainable rail transportation system, there is no way that mergers that reduce the number of Class I carriers in major markets can possibly improve that situation. IMPACT further contends that, because adequate intramodal railroad competition requires 3 railroads, the Board should seek to foster enhanced intramodal competition in the railroad industry and to increase the number of markets in which at least 3 railroads compete. It is not enough, IMPACT insists, for the Board to adopt merger policies that merely arrest the slide to duopoly and preserve the status quo. Rather, IMPACT argues, what the Board needs is a policy that will increase the number of Class I railroads serving major rail-oriented markets.

(2) IMPACT indicates that it is disturbed that the NPR not only fails to require that merger applicants provide means to enhance intramodal competition but also seems to assume that Class I rail mergers must continue to be approved, even to the point of duopoly. IMPACT argues that, although the Board is correct not to attempt to prescribe some rigid formula for how to enhance competition, the Board should make clear that future Class I rail mergers will not be approved unless they enhance effective intramodal competition by effectively introducing new carriers into significant

[152] The members of the IMPACT group are Arkansas Electric Cooperative Corporation, Edison Mission Energy, Midwest Generation LLC, and UtiliCorp United.

rail markets. IMPACT adds that how many markets need be so addressed should depend on the size of the proposed transaction, and the benefits that the applicants would gain from it.

(3) IMPACT maintains that, if the rules proposed in the NPR are adopted as is, the Class I railroads will draw the obvious conclusion that it is going to be, in the future, pretty much business as usual as far as mergers are concerned. The NPR, IMPACT argues, suggests that, if applicants provide more window dressing in terms of "enhancing" competition (ideally, from the perspective of applicants, competition with trucks), and if applicants make their statements of alleged "public benefits" look more quantitative than they have looked in the past, the Board is prepared to approve an additional round of consolidations leading to a continent-wide duopoly. This, IMPACT maintains, is the wrong message to send.

(4) IMPACT insists that the Board should make clear not only that further concentration in the rail industry is not acceptable, but also that the current degree of concentration in the rail industry is similarly not acceptable. IMPACT further insists that a merger (even an end-to-end merger) should not be approved unless it enhances intramodal competition (*i.e.*, unless it increases the number of independent rail carriers serving major markets and does not decrease the number of independent rail carriers serving any other significant, rail-dependent markets). IMPACT suggests that the "enhanced competition" it contemplates would occur if the merging carriers agreed to divest certain of their lines to other railroads. IMPACT adds: that, although proposals to enhance competition by divestiture of certain lines should be initiated by the carriers involved and not by the Board, the Board should carefully scrutinize each such proposal to be sure that it really would enhance intramodal competition as promised; and that, if the applicants fail to convince the Board of this, the proposed merger should be denied (because, IMPACT argues, it should not be the Board's job to fashion a remedy to permit consummation of a merger if the applicants fail to do so).

(5) IMPACT argues that, if participants in an industry that is already too concentrated want to obtain the prospective profits of a merger, there is no reason why they should not be required to share a portion of that private benefit of the merger with the public by conditioning the merger in a way that will enhance rail competition. IMPACT further argues that, because the now-concentrated rail industry is no longer financially weak, it no longer makes sense to say that competition-enhancing conditions should not be imposed because they would impair the benefits that the merging railroads would obtain from the merger.

(6) IMPACT contends that certain proposals, although desirable in their own right, are inadequate to maintain intramodal competition. (a) IMPACT argues that maintaining open gateways, while desirable, is inadequate to preserve intramodal competition. IMPACT indicates that, although it agrees both that the gateways that must be kept open should not be limited to "major" gateways and also that gateways must be kept open economically as well as physically, it believes that a commitment to keep existing gateways open will do little to preserve competition and can do nothing to enhance it. (b) IMPACT argues that post-merger monitoring, while desirable, is inadequate to preserve intramodal competition. IMPACT explains that, although oversight conditions for post-merger monitoring of competitive and service issues may provide some limited benefits, such conditions are unlikely to be very effective in preserving, much less enhancing, intramodal competition. IMPACT adds, however, that it agrees that it makes sense for the Board to formalize its oversight practice. (c) IMPACT argues that elimination of paper and steel barriers, while desirable, is inadequate to preserve intramodal competition. IMPACT indicates that, although it agrees that paper and steel barriers should be eliminated (thereby opening up new markets to Class II and Class III railroads), it believes that, in most cases, such reforms can enhance intramodal competition only where they permit another major railroad to use a shortline or regional carrier to reach an otherwise captive customer. And, IMPACT adds, unless there are more Class I railroads in major markets, removal of such restrictions on small railroads can have only a minimal effect on competition.

Service assurances. (1) IMPACT indicates that it believes that the service breakdowns that have occurred in connection with past mergers raise a serious question whether the big railroads may not already be "too big" in the economic sense (*i.e.*, IMPACT suggests that difficulties in management and control may have already made the big railroads less efficient than they would be if they were smaller). IMPACT adds that the extreme concentration in the railroad industry today means that, when a merged railroad's lines and yards are so clogged that cars cannot move, there too often is no other railroad that can provide substitute service.

(2) IMPACT indicates that, although it agrees that future merger applicants should be required to provide "service assurance plans" as part of their applications, it also believes that any future major rail merger is likely to be accompanied by significant service problems, despite the applicants' best planning efforts and most sincere assurances. IMPACT therefore contends that, in addition to SAPs, the Board should require merger applicants to provide specific and enforceable assurances to their customers against service disruptions. IMPACT further contends: that these assurances should include damage recovery and financial penalties to compensate customers if the merger results in service disruptions; that customers would have the right to be heard in the merger proceedings if they were not satisfied by what the merger applicants had offered; and that the Board would weigh these concerns in deciding whether or not to approve the proposed merger. IMPACT argues that merger applicants should be required to show the Board that they have entered into agreements with their customers to provide service assurances that the customers consider adequate; and, IMPACT adds, to make this happen, service assurances offered by a merging party that are in good faith rejected by customers should be grounds for Board rejection of that merger.

(3) IMPACT indicates that, in its ANPR comments, it urged that merger applicants be required to provide back-up plans to allow independent carriers to provide service (including the right to operate over lines of the merged system, and the right to override paper barriers that restrict otherwise-accessible shortlines) when merger-related disruptions prevent a carrier from providing normal service. IMPACT further indicates that NPR § 1180.10(i) would apparently require this. IMPACT contends, however, that, to avoid any misunderstanding, the Board should state explicitly that its NPR § 1180.10(i) requirement that "contingency plans are in place" means that alternative rail service can go into effect when needed, without requiring lengthy administrative proceedings such as were required to address the UP/SP service meltdown.

Downstream effects; cumulative impacts and crossover effects; a "cooling off" period between mergers. (1) IMPACT agrees that the "one case at a time" approach should be abandoned; the Board, IMPACT believes, should consider the cumulative impacts and crossover effects likely to occur as rival carriers react to the proposed combination; and merger applicants, IMPACT adds, should be required to anticipate with as much certainty as possible what additional Class I merger applications are likely to be filed in response to their own applications and to address how such events would affect the structure of the industry, the calculation of public benefits, and the conditions to be imposed. Considering downstream effects, IMPACT explains, is simply common sense in the current highly concentrated state of the Class I railroad industry.

(2) IMPACT contends, however, that, although cumulative impacts and crossover effects should be considered, this may prove to be difficult; predicting exactly how the end game of rail mergers is likely to play out, IMPACT explains, may be controversial, and any estimate of the effects of various possible outcomes will be condemned by some interested parties as speculative. IMPACT therefore contends that the Board should require a reasonable "cooling off" period between major rail mergers. IMPACT indicates that, under the "cooling off" plan it advocates, the Board would have the power to refuse to consider any merger application involving Class I railroads that is filed within 36 months after the implementation of a previous merger of Class I railroads, although

(IMPACT adds) this cooling off period would not apply to merger proposals filed as "responsive" merger applications in the proceedings on the initial merger.

(3) IMPACT argues that its 36-month cooling off period would reduce the crossover effects that the Board would have to consider in deciding the first merger. IMPACT further argues: that, after the 36-month period had passed, the Board would be in a better position to evaluate a second merger application, because the competitive relationships created by the first merger would at least have begun to emerge; that a cooling off period would also address merger-related service problems by providing a breathing spell for rail customers, as well as for the railroad industry itself, to adjust to the new service and competitive realities created by one merger before having to address the next merger proposal; and that, because there might be circumstances in which a pause between mergers was not necessary, the cooling off proposal advocated by IMPACT would allow the Board to waive the cooling off period if it were convinced that a new merger could be effected without injury to the public.

Remedies for competitive problems in rail mergers; divestiture; construction of new rail facilities; bottleneck relief. IMPACT contends that the Board should be more specific in explaining how it intends to use its conditioning power to combat the anticompetitive effects of Class I rail mergers. (1) *Deny anticompetitive mergers.* IMPACT contends: that the practice of the ICC/STB has generally not been to disapprove a merger that it finds to be anticompetitive, but rather to approve it subject to "conditions" that are supposed to "cure" the competitive problems; that this approach, however, has fostered the increasing concentration of ownership in the railroad industry; that, therefore, the Board should make clear that it will not use its conditioning power to save a flawed transaction; and that, if applicants propose a merger without sufficient conditions to eliminate competitive injury, the Board should deny the merger. And, IMPACT adds, the Board should make clear that, where reductions in competition can be specifically proved, such specifically-identified reductions in competition must be cured if the proposed merger is to be approved.

(2) *Do not tailor conditions too narrowly.* IMPACT contends that the conditions heretofore imposed by the ICC/STB have not redressed all the competitive injuries caused by rail mergers, both because the ICC/STB has insisted that conditions be imposed only to address the specific, narrowly-defined competitive problems created by the proposed merger, and also because the ICC/STB has tended to scrutinize very strictly shippers' claims of competitive injury from proposed mergers, and to grant relief only when injury is most obvious. IMPACT also contends: that, as the rail industry has become more concentrated, it has fallen more and more to rail customer groups to propose merger remedies, whereas a decade ago this role was played by other railroads; that, however, such groups quite naturally focus on the interests of their own particular industry or membership; that small or unorganized customers or other interests may not have the resources or specialized knowledge needed to make or support a case before the Board in support of conditions; and that, because the Board has tended to impose the most narrowly tailored merger conditions possible to remedy whatever competitive problems are found to exist, it is almost inevitable that more competition has been lost than has been restored through conditions. IMPACT therefore recommends: that the Board reverse its presumptions with respect to conditions; that, if a proposed rail merger would materially increase concentration in a market (*e.g.*, if it would reduce the number of competing railroads in a market), then the burden of proof should rest on the merger applicants to establish that all competitive harm from the merger can be eliminated through appropriate conditions; that, where there is doubt about how extensive conditions need to be to remedy threatened competitive harm, the Board should err on the side of greater protection of competition, rather than less; and that, in appropriate cases, the Board should deny the merger application where competitive considerations so warrant.

(3) *Divestiture should be the preferred remedy for competitive problems.* IMPACT contends that, although divestiture is a common antitrust remedy for competitive problems, the ICC/STB has not favored divestiture, but instead has relied on lesser remedies, especially granting a supposedly-independent railroad the right to move traffic over certain lines of the merged railroad (for example, through trackage rights or haulage rights) in order to restore lost competition. IMPACT insists, however: that trackage or haulage rights may not effectively replace the competition that is lost as a result of the merger, both because trackage rights compensation is often set in a way that precludes replication of the competition that existed prior to the merger, and also because trackage rights are often limited in scope (*e.g.*, as to types of traffic that can be handled or points that can be served); and that, therefore, the grantee of the trackage rights is necessarily a less effective competitor than was the railroad that owned the line before it was merged with its competitor. IMPACT therefore recommends that the Board make greater use of divestiture of rail lines to an independent railroad as a remedy for anticompetitive merger effects, with trackage or haulage rights over the divested lines granted to the merged carrier if appropriate; the Board's objective in imposing conditions on a merger, IMPACT explains, should be to replace all the competition that the merger takes away (and, IMPACT further explains, if the lost competition was provided by a railroad that owned its own lines, then in most cases that competition can best be replaced by an independent railroad that owns those lines). IMPACT adds: that whenever trackage or haulage rights are granted in connection with a merger (whether to the merged carrier over lines divested to an independent railroad, or to an independent railroad over lines of the merged carrier), they should be structured to ensure that the recipient of the rights is able to compete effectively with the line owner, to preserve the full scope of competitive influences that would otherwise be lost in the merger; and that this means that full service rights are to be preferred to overhead or other limited rights, and that compensation should be set at a level that will encourage effective competition.

(4) *Rail line construction should be facilitated.* IMPACT contends that, because the objective of Board policy should be to encourage enhanced intramodal competition and not merely to preserve existing, inadequate levels of competition, the Board should encourage the construction of new rail lines. IMPACT argues that a new line, such as a "build-out" or "build-in," may make it possible for a rail-dependent customer that is "captive" to one railroad to obtain service from a competing railroad. IMPACT adds that the Board should expand this build-in/build-out remedy to 3-to-2 situations, and should also facilitate all new construction proposals that respond to Class I rail mergers.

(5) *Class exemption for rail line construction.* IMPACT contends that the Board should issue a general class exemption for the construction of new rail lines. IMPACT explains that, although having to file a request for exemption does not impose an insuperable burden, the absence of a specific exemption for new line construction implies a negative attitude by the Board towards such construction. IMPACT further explains: that the current procedures provide an opportunity for a railroad that opposes new competition to delay that competition and further entrench its dominance of the market; and that, although opponents of a class exemption construction project could still file a petition to revoke, that petition would not stay the effectiveness of the exemption. IMPACT also contends that environmental review, which is typically required for major line construction proposals under current regulations, should be expedited.

(6) *The Board should abandon the "one lump" theory.* IMPACT contends that the Board should abandon its reliance on the "one lump" theory as an irrefutable economic principle and should consider, instead, the ways in which vertical integration may produce competitive harm for shippers in the specific circumstances of each merger. IMPACT further contends that merger proponents who advocate the applicability of the "one lump" theory should be required to prove its relevance and application in fact. And, IMPACT adds, the Board should not approve mergers that would impair the ability of shippers to challenge the reasonableness of bottleneck rates.

Other issues. (1) IMPACT contends that the Board should not permit "acquisition premiums" to erode the rate protections available for captive shippers. (2) IMPACT contends that a rail service secondary market is a promising innovation that the Board should consider. (3) IMPACT contends that the Board should adopt a procedural schedule that allows adequate investigation and evaluation of proposed mergers. IMPACT explains: that rail merger proceedings should be as expedited as possible and as prolonged as necessary in order for the parties and the Board to explore the issues thoroughly; that, at present, a 1-year schedule seems totally unrealistic; and that the idea that effective discovery procedures should be abandoned in order to expedite merger proceedings is particularly offensive. (4) IMPACT contends that, although there is some merit in the proposal to exclude KCS from the full scope of the Board's new Class I merger rules, it is too soon to grant KCS the special treatment it requests. IMPACT explains that, given the extremely high degree of concentration in the Class I railroad industry, it is entirely possible that the acquisition of KCS by one of the larger Class I railroads could have a crucial effect on the overall structure of the railroad industry. IMPACT adds, however, that, if the Board adopts procompetition merger rules, and as a result intramodal competition among Class I railroads is increased, then it may be possible to grant KCS the special treatment it requests.

EDISON ELECTRIC INSTITUTE. Edison Electric Institute (EEI),[153] which believes that the proposal to require enhanced competition in rail merger proceedings is an appropriate response to the effects of prior mergers, contends, however, that the proposed rules would appear to permit any conceivable Class I railroad merger transaction so long as the application satisfies certain informational requirements; the proposed rules, EEI insists, do not have the "teeth" that would be necessary to enhance intramodal competition, to assure adequate service, and to require demonstrable public benefits. EEI therefore argues that the Board should propose specific rules that would become conditions of any approvals of Class I rail mergers that would assure shippers and smaller railroads that they would be protected as a result of such transactions.

Response to comments. EEI contends that the Administrative Procedure Act required the Board to respond to the important comments submitted in response to the ANPR; it was not enough, EEI argues, to summarize these comments in an appendix to the NPR. EEI further contends that the APA also requires the Board to respond to, and not merely to summarize, the important comments submitted in response to the NPR. EEI adds that failure to respond to such comments makes it unclear whether the comments of parties such as EEI have been accepted or rejected.

The NPR, in general. EEI contends: that the NPR adopts almost none of the specific proposals made by shipper interests, and proposes no non-procedural "bright line" rules; that the rules proposed in the NPR would permit any conceivable remaining rail merger; that, in fact, the proposed rules would actually provide the Board with greater discretion than before, and would produce greater uncertainty as to when mergers will occur and what conditions the Board will impose on them; and that the greatest problem with the proposed rules is that the Board has made clear that industry-wide measures to promote competition in the railroad industry are not for the Board to consider, but rather are for Congress. EEI further contends that, without industry-wide solutions, the proposed rules will almost certainly lead to one of two unpalatable alternatives: either no mergers, and a continuation of the status quo; or one merger leading to another and another, to maintain what has been called

[153] EEI is the association of U.S. shareholder-owned electric companies, international affiliates, and industry associates worldwide.

"balanced competition," with the inevitable result that there will be only 2 Class I railroads in the United States, or even in all of North America. EEI adds that, because both alternatives are unacceptable, the shipping community intends to seek a legislative solution.

Bottleneck rates. EEI indicates that, as it reads the NPR, the Board has proposed no change in its "bottleneck rate" decisions; all that the Board appears to have said, EEI believes, is that, if a shipper has a contract rate over the "non-bottleneck" carrier before a merger, it will require a separately published rate over the "bottleneck" segment after a merger. EEI contends that shippers are not satisfied with the Board's bottleneck rate decisions, and will continue to urge Congress to amend the statute to grant the Board the power to compel railroads to publish bottleneck rates so that either the competition that then can occur over the non-bottleneck segment will occur, or as a last resort a shipper will be able to challenge the bottleneck rate at the Board. EEI further contends that, to enhance competition over the non-bottleneck segments, the Board should adopt conditions requiring the merging railroads to offer bottleneck rates wherever they are the only carrier to serve a particular shipper.

Terminal trackage rights. EEI contends that the Board should overrule its *Midtec* decision because, EEI argues, the *Midtec* requirement that a shipper show "competitive harm" before the terminal trackage rights provisions of the statute can be invoked is not compelled by the language of the statute. EEI adds that, because the Board has not indicated an intention to overrule *Midtec,* shippers will seek relief from Congress. Shippers, EEI argues, believe that Congress intended the terminal trackage rights provision to be applied generally, without being limited only to those situations in which the shipper can prove "competitive harm."

Elimination of paper and steel barriers. EEI contends that the Board, by failing to state an intention to require the elimination of paper and steel barriers, has discouraged shortline and regional railroads from participating in merger proceedings to seek such relief, because (EEI explains) the cost of participation in such proceedings is substantial. EEI insists that the Board should make clear its intention to require the elimination of paper and steel barriers in appropriate circumstances.

Service standards. EEI contends that the Board should establish a framework for measuring damages incurred by tariff shippers (*i.e.*, shippers using tariff service) on account of inadequate service, and should also establish a clear obligation on the part of the railroads to pay such damages in the event that service declines after a merger. EEI adds that, although it believes that the Board should require that railroads guarantee a level of service approximately equal to that provided prior to the merger, it recognizes that exceptional circumstances, such as "force majeure" events, should not be the basis for liability. EEI further contends that there should be a presumption that a decline in service after a merger was caused by the merger; if service, EEI explains, has declined after a merger from historic levels established prior to a merger, that should constitute a prima facie case. EEI further contends: that the suggestion that the merging railroads propose their own service standards and penalties for failing to meet them provides no remedy at all; that, at this time, shippers appear to have no remedies for inadequate service unless their contracts provide for such remedies; and that the Board will not have done all that it can do to assure adequate service unless it imposes financial penalties on railroads that fail to provide appropriate service as a result of a merger. The only way to improve service, EEI argues, is to increase the incentives of the railroads to provide good service by imposing financial penalties on the railroads if they fail to provide good service. EEI, which believes that railroads should be liable for service failures that cause damages to shippers whether those failures are or are not merger-related, adds that, if the Board concludes that it cannot adopt such rules in this proceeding, the Board, after adopting merger-related rules in this proceeding, should propose rules to establish service standards in all circumstances in another rulemaking proceeding.

Open gateways. EEI contends that, although the Board indicated that it is likely not to allow open gateways to be closed, it did not acknowledge that unless it acts to ensure that a gateway can be economically kept open, that gateway will not truly be "open." EEI further contends that the Board should act to ensure that mergers will not cause gateways to be closed, economically or physically, with the only conceivable exception being when there are compelling circumstances requiring their closure. EEI adds that it is particularly concerned about this issue because the fate of the DM&E may depend on it. EEI argues that if it is likely, as many appear to believe it is, that there will be only 2 Class I railroads in the United States before too long, then it is essential that the Board adopt a policy that would ensure that railroads such as the DM&E, that can provide much-needed competition in certain regions, will be protected from the effects of transcontinental mergers.

3-to-2 shippers. EEI contends that, where there are 3 competitors, the Board should ensure that 3 competitors will remain. EEI explains that most economists insist that 2 competitors are not enough to assure competition; the evidence, EEI believes, suggests that 2 potential competitor railroads may collude, or may settle into a comfortable "dual monopoly" situation, while 3 competitors create far greater uncertainty that such understandings may hold, and thus result in a more competitive outcome.

"One lump" theory. EEI believes that, in any future merger proceeding, shippers will likely argue that a rail merger that extends a railroad's geographical reach extends its monopoly power, requiring a remedy, and that reliance on the "one lump" theory would be mistaken. EEI insists that the Board should make clear that it will take a more active role in determining whether the evidence supports the theory, including requiring the applicants to provide evidence necessary to test whether the theory applies.

Acquisition premiums. EEI contends that the Board has an affirmative duty to protect customers, especially captive customers, from increases in rates and charges, especially where acquisition premiums have been paid. EEI further contends that the merging railroads themselves would be better served if the Board's rules clearly provided that they will not be allowed to pass such premiums on to their customers (mergers, EEI explains, would then likely include only smaller premiums that the merging railroads could absorb, or none at all). EEI adds that the Board should adopt FERC's approach to ensuring protection from rate increases after merger transactions (FERC, EEI explains, has made it abundantly clear that customers may not be subject to rate increases as a result of mergers, and that acquisition premiums can never be passed through to customers).

Single-line service. EEI contends that the Board should attempt to ensure that merging companies do not cause harm to any customer due to a merger. EEI contends, in particular, that, where mergers cause shippers to go from single-line to 2-carrier service, the Board should either adopt conditions to prevent that, or, at a minimum, should require that the carriers guarantee, under pain of financial penalties, that service will not deteriorate after a merger. EEI explains that customers, especially captive customers, should not be required to bear the brunt of the service failures that are caused by mergers that they had no part in encouraging.

ADR for service failures. EEI contends that, for shippers who so desire, the Board should formalize its "hot line" for service complaints. EEI contends, in particular, that the Board should require merging railroads to agree, as a condition of approval of the transaction, that they will participate in shipper-initiated arbitration, mediation, or negotiation in which the shipper asserts that it has suffered from worse service as a result of the merger. EEI explains that the Board could, in this fashion, provide shippers with some assurance that their grievances might be expeditiously addressed, by some professional who presumably has the time to do so promptly, in a confidential setting if that is what the shipper desires.

Voting trusts. EEI agrees that voting trusts should be approved only by the Board itself, rather than by its Secretary. EEI also agrees that a voting trust should be approved by the Board only if that voting trust is in the public interest. The approval of a voting trust, EEI argues, is the "point of no return" after which, as a practical matter, it is almost impossible to deny an application for approval of a merger of 2 Class I railroads. EEI argues that, for this reason, it is certainly important for the Board to be involved in approval of the voting trust.

Procedural schedule. EEI argues that the "completely unrealistic" expedited procedural schedule advocated by some railroad parties is not supported by the analogies to such things as FERC merger proceedings. EEI explains: that those FERC proceedings that are at all analogous to mergers of Class I railroads, such as those between large electric utilities covering large sections of the Nation, have taken periods of time comparable to those of mergers involving Class I railroads; that, moreover, FERC has adopted a policy requiring electric utilities to provide open-access transmissions as a condition of the merger in order to mitigate any market power that could result from the combination of transmission lines; that, because utilities must provide open-access transmission, one of the central competitive issues presented by a utility merger has been eliminated, thus enabling FERC to process mergers more quickly; and that, furthermore, FERC has eliminated the need to consider whether an electric utility merger has public benefits that will offset the costs of such a transaction by putting the risks of such transactions on the merging entities. EEI suggests, however, that railroad merger proceedings could be expedited if railroads accepted procompetitive merger conditions and stringent service guarantees.

Traffic tapes. EEI indicates that it supports the proposal to require the availability of the 100% traffic tapes in each future rail merger proceeding; that information, EEI explains, is important, if not essential, to proving that the "one lump" theory does not apply. EEI adds, however, that, in order for the information to be useful to a shipper or other party seeking to prove that the "one lump" theory does not apply, the Board needs to ensure that shipper witnesses have the actual, not the masked, revenues/rates, because (EEI explains) the shipper would be trying to prove that the rates charged are subject to increase as a result of a merger. EEI adds that, by definition, a party requires actual rates in order to make a rate comparison.

Downstream impacts. EEI agrees that the Board should require consideration of "downstream effects" and "downstream mergers," regardless of which railroads first propose to merge. EEI, which believes that recent service problems seem due not only to specific mergers, but also to the gargantuan size of the current Class I railroads (other than KCS), contends that a transcontinental merger is likely to cause service problems, as have occurred in gateways and major interchanges in many recent mergers.

Scope of final rules. (1) EEI argues that the Board can adopt any proposal that is the "logical outgrowth" of the proposals made by the Board in the NPR, even if a proposal adopted by the Board was not itself proposed in the NPR. EEI argues, in particular, that its proposals for such things as service guarantees, protection for 3-to-2 shippers, adoption of FERC's methods of enhancing competition and protecting customers from rate increases as a result of mergers, and the like, are all the "logical outgrowth" of the Board's own proposals, and thus (EEI insists) could be adopted by the Board without further proceedings.

(2) EEI, citing 49 U.S.C. 10101 and 11324, argues that the Board clearly has the authority to require that competition be enhanced by any future merger that the Board may approve. EEI explains that § 10101 requires that competition rather than regulation be the prevailing policy with respect to the railroad industry, to the maximum extent possible; and, EEI adds, § 11324 gives Board broad power to adopt conditions on its approval of railroad mergers, and requires the Board to consider the effect on competition of the proposed transaction.

(3) EEI argues that the Board's broad authority to impose conditions on mergers to protect the public interest extends to all merger transactions still pending before the Board and still subject to the Board's authority (EEI cites the UP/SP and Conrail transactions in particular), provided, EEI adds, that the Board's exercise of its authority does not interfere with the "settled expectations" of the applicants.

AMEREN SERVICES COMPANY. Ameren Services Company (Ameren) agrees that competition among rail carriers should not merely be maintained, it should be enhanced, during future rail merger proceedings. Ameren explains that past attempts at merely preserving competition have resulted in a reduction in competition; merging railroads, Ameren claims, have promised competitive solutions during the merger process, but have then fought implementation of these promises after the merger was completed. The Board, Ameren argues, should aggressively pursue enhanced rail competition via the current rulemaking and in actual merger cases. (1) Ameren contends that the Board should preserve competition at locations that are "2-to-1" over any segment of a rail move pursuant to the contract exception of the bottleneck cases, in the same manner that any other physical 2-to-1 location has been protected in past mergers.

(2) Ameren contends that, with the lessening of alternative rail competition through mergers, the Board should seek to increase competition not only at 2-to-1 locations but also at locations that enjoy competition over any segment of their route. A merger, Ameren insists, should not result in a diminishing of competition on any portion of a shipper's route of movement.

(3) Ameren agrees "that it is appropriate to reassure the shipping public that at a minimum major existing gateways would be kept open in future mergers," *NPR* at 15, but adds that it believes that "major existing gateways" should be expanded to include all gateways, major or not, through which traffic has been interchanged to a competitor.

(4) Ameren contends that the Board should take strong action (*e.g.*, removal of paper and steel barriers, divestiture of parallel tracks, and requiring the granting of trackage rights and access to other facilities) to protect shippers not only from the anticompetitive effects of future mergers but as a remedy for the effects of past mergers. The Board, Ameren argues, should use its broad authority to encourage the viability of a number of carriers, not just existing competition.

(5) Ameren contends that one way to enhance competition during rail consolidations would be to mandate that a merging carrier allow other carriers to serve industries from overhead trackage rights already in place at the time of the merger. Ameren explains that the "overhead" nature of such trackage rights amounts to a "paper barrier" that bars service to customers located on the trackage rights line.

(6) Ameren contends that other paper barriers, such as the prohibition of service to certain shippers in line sale agreements to shortlines, should also be struck down. Ameren explains that many of these shortline sale agreements were structured to stifle competition by the Class I railroads that spun off these lines. Ameren adds that, while Class I railroads have benefitted from sales of these lines to shortlines, shippers have been harmed by the restrictions that prohibit competitive service by the shortline or other railroads.

(7) Ameren indicates that it would also support changes outside the context of a merger to encourage competition and the number of competitors. Ameren suggests, by way of example, that the Board, in dealing with efforts to construct new lines and provide alternative competitive routes, should propose rules to encourage and expedite handling of new construction and rehabilitation efforts.

(8) Ameren contends that, although the NPR speaks of enhancing competition, the absence of a specific reference to the protection of 3-to-2 shippers seems to support the Board's past reluctance to even protect the existing competition of 3-to-2 shippers. Ameren argues that, because 3-to-2 protection merely preserves and does not enhance competition, the Board should adopt specific language that at a minimum preserves all existing rail-to-rail competition at facilities served by a merging railroad whether that competition is provided by 2, 3, 4, or more different alternatives.

PPL (PPL GENERATION AND PPL MONTANA). PPL[154] contends: that, since 1980, the ICC/STB has approved mergers that have reduced competition for major railroads, and has issued rules and adjudicatory decisions that have reduced shippers' recourse to regulatory solutions; that, as a result of these developments, most shippers can now look neither to competition nor to regulation for solutions when major railroads charge too much and/or provide inadequate service; that further consolidations among major railroads will make matters even worse; and that, unless the Board acts now to reverse the trends toward less effective competition and less effective regulation, the damage is likely to be irreversible. It is, PPL argues, a fundamental tenet of American legal and economic policy that if concentrated market power is not constrained by effective competition, it must be constrained by regulation; without effective regulation, PPL adds, railroads with significant market power will exploit their captive customers. PPL therefore contends that reforms must be implemented now to enhance rail competition among, and the rail service provided by, the major Class I railroads; the Board, PPL insists, should adopt clear, procompetitive rules that will offset any new railroad market power with new accountability; and, PPL adds, it is time for the major Class I railroads to be held accountable for the projections of public benefits on which they base their merger applications. PPL further contends that enhanced competition is necessary to mitigate the enormous concentration of market power threatened by further consolidation among major railroads, and that dependable service guarantees, as opposed to empty promises, are necessary to prevent future meltdowns and integration problems. PPL argues that, the protestations of the major Class I railroads to the contrary notwithstanding, the real issues in this proceeding should be how these goals are to be achieved, not whether the goals themselves are legitimate; and, PPL adds, shippers are concerned that the Board has provided too much flexibility and initiative to the major railroads in meeting the Board's new competition and service objectives, leading to the danger that future compliance with these requirements will be more apparent than real. The Board, PPL insists, should expand and clarify its proposed rules and their explanatory text to do more to promote and enhance rail-to-rail competition, and to prevent merging railroads from funding extravagant, misguided, or bungled mergers through rail rate increases.

The Board's proposed regulations are too vague. PPL contends that the NPR is too vague. PPL explains that, although the ANPR was commendably specific (seeking public comments as to a long list of issues) and although the comments submitted in response to the ANPR addressed those issues, the NPR, although it summarizes these comments, does not otherwise address these matters.

---

[154] Affiliated entities PPL Generation, LLC and PPL Montana, LLC are referred to collectively as PPL.

PPL insists that, unless the Board provides additional specificity either in its final regulations or in the explanatory text or preamble accompanying the final regulations, those affected by the new merger regulations will not know what the Board has done in many critical areas. Shippers and other interested parties, PPL argues, need to know what to expect from the Board before the next merger application is filed; due process and commercial necessity, PPL insists, require greater specificity than the NPR provides. PPL further contends that greater specificity is also needed to meet the requirements of the Administrative Procedure Act, which (PPL believes) requires a discussion of the issues raised by the comments and an explanation of the connection between the agency's reasoning as to key issues and the resulting regulations; and, PPL adds, because publication of the NPR was preceded by voluminous comments on the ANPR, it is important for the Board to present such an analysis in the explanatory text accompanying the proposed regulations (merely summarizing the comments without discussing them in any detail, PPL insists, is not an adequate substitute).

The Board should limit merging railroads' ability to recover the costs of mergers, or the costs of remedial action for merger problems, through rate increases. PPL contends that, although it argued (in its ANPR comments) that Class I railroads should not be allowed to fund future consolidations through rate increases on captive traffic, this issue was ignored in the NPR; nothing in the NPR, PPL insists, indicates that Class I railroads that pay excessive acquisition premiums, or incur millions of dollars in remedial costs due to poor planning or poor implementation of their mergers, cannot simply increase their rates and make shippers pay for their blunders. PPL, which insists that neither contracts nor rate cases are an adequate answer to this problem,[155] argues that the Board's claim of having "raised the bar" in major rail consolidation proceedings will ring hollow if obtaining Board approval for a transcontinental merger merely requires giant successor railroads to be prepared to spend more of their customers' money to satisfy the new regulations. PPL therefore contends: that the Board should, at a minimum, expand its requirement of contingency plans for merger-related service disruptions to require merger partners to explain, in detail, how they plan to fund corrective action, and to state whether they will commit to funding such action without rate increases; that applicants' contingency plans in the merger proceeding should be required to provide satisfactory assurance that merger costs will not simply be recovered from shippers; and that, in addition, the Board should allow shippers whose rates may have been raised in violation of these commitments to seek relief under Board oversight jurisdiction, on a simplified basis (PPL argues that a showing that the challenged rate increases violate the merger conditions, or constitute an unreasonable practice, should be an adequate basis for relief without the need for full-blown rate cases).

The Board should promote elimination of paper and steel barriers to competition by smaller railroads. PPL contends that the Board should take vigorous action against paper and steel barriers that limit competition by smaller railroads; it is not enough, PPL insists, to call only for such relief from paper and steel barriers as merging Class I railroads are inclined to propose. PPL, which appears to concede that such barriers were part of the quid pro quo for line sales or other cooperative agreements between the Class I and smaller railroads, insists that this factor should not require preservation of such barriers; the "quid pro quo" argument, PPL explains, is not a valid defense to an anticompetitive agreement even in the unregulated marketplace; and, PPL adds, it is all the more

[155] Contracts are not an adequate answer, PPL argues, because many shippers cannot get contract service. And rate cases are not an adequate answer, PPL adds, because shippers believe that rate cases are prohibitively expensive and too hard to win.

important that this argument be rejected in the context of railroad mergers, where there is already too little competition and there may soon be even less. PPL argues that another reason for terminating paper barriers to greater participation in the national rail system is because, in many instances, the line sale in question took place years ago, and the Class I railroad has already received far more in benefit than any reasonable valuation of the access or operating restriction it demanded as a sale condition. PPL therefore contends that the Board should amend NPR § 1180.1(c) by incorporating the policies set forth in the ASLRRA "Bill of Rights" (policies, PPL believes, that offer real hope for new competition from Class II and Class III railroads).

The Board's proposals to enhance competition should be clarified and strengthened. (1) PPL indicates that, although it welcomes the NPR's many references to the need for enhanced competition, it believes that the lack of specificity in the proposed regulations, and in the accompanying explanatory text, leaves it unclear how, or even whether, the status of captive shippers will change in future merger proceedings. PPL contends that a close reading of the NPR raises more questions than it answers, because (PPL claims) the Board's expressions of support for new competition are so often equivocal. PPL notes, by way of example: that NPR § 1180.1(a)'s statement that "the Board does not favor consolidations that reduce the railroad and other transportation alternatives available to shippers" is immediately qualified by the words "unless there are substantial and demonstrable public benefits to the transaction that cannot otherwise be achieved," which may mean (PPL suggests) that applicant railroads may reduce competition if this is the price they demand for other "substantial and demonstrable" public benefits; that NPR § 1180.1(b)'s statement of the need to balance various goals, one of which is effective competition, does not expressly state that the Board has adopted a less narrow definition of effective competition than resulted from the "one lump" theory; and that, although NPR § 1180.1(c) appears to require future merger applications to contain provisions for enhanced competition, this provision contains several escape clauses (one such escape clause, PPL suggests, would apparently allow applicants to offset reduced competition for some shippers with enhanced competition for others).

(2) PPL indicates that one of its main concerns is that the major railroads will use their enormous economic power to influence patterns of consumption and distribution in the economy as a whole. PPL explains that it is concerned that sources of raw materials will thrive or wither not because they are fairly priced or efficient, but because they maximize or minimize railroad long hauls. PPL warns that, in its view, the NPR appears to invite major railroads to manipulate the enhancement of competition to maximize their own benefits. PPL suggests, by way of example, that merging railroads might enhance competition for low-margin intermodal traffic (thereby lessening their own exposure to penalties for poor service), and then argue that they are thereby relieved of any obligation to enhance competition for high-margin coal, chemical, or grain shippers. PPL suggests, by way of further example, that merging railroads might argue that by increasing competition with motor carriers, they have earned the right to reduce competition from smaller railroads, or to close gateways. PPL advises that, although it hopes that such outcomes are not what the Board intended, the absence from either the proposed rules or the explanatory text of any clear and unequivocal endorsement of increased competition creates uncertainty among shipper parties to this proceeding.

(3) Competition, PPL insists, should no longer be considered a threat from which major railroads need to be protected; experience, PPL argues, has demonstrated that competition benefits competitors, customers, the economy, and the nation. PPL therefore indicates that, although it welcomes the Board's statement in the explanatory text accompanying NPR § 1180.1(b) that "We would upgrade the importance of competition," it believes that the new rules or their preamble need to express, more vigorously and more clearly, this bedrock policy.

(4) PPL further contends that, in the interest of promoting competition, the Board: should explicitly overrule the requirement of a showing of anticompetitive conduct by major railroads as a

prerequisite to the effective implementation of the Board's competitive access rules; and should maximize the benefits of downstream review of merger impacts by equalizing the exposure to competition of merging and not-yet-merged major railroads.

The Board should make the major railroads responsible for producing the benefits they project and for remedying any service failures they cause. (1) PPL contends: that, because applicants have heretofore had a powerful incentive to claim benefits that might or might not materialize, applicants in past proceedings have too often over-promised and under-delivered; that, in future proceedings (in which the stakes are likely to be even higher than they were in past proceedings), the temptation to exaggerate public benefits in order to achieve private benefits will be overwhelming, particularly if there are no penalties for such exaggerations; that none of the Board's other reforms will make any difference, if the major railroads are allowed to claim the benefits they think necessary to obtain Board approval (service improvements, trackage rights, relief from paper barriers, funding of everything out of efficiency gains, labor benefits, whatever it takes) and then, by citing "changed circumstances," are allowed to simply fail to produce those benefits; and that, therefore, the Board should strengthen, not weaken, its proposal to require merging Class I railroads to produce the benefits they cite in their applications, making this requirement a condition of all future mergers that will be subject to penalties for nonperformance.

(2) PPL argues that, even if the possibility of unexpected developments is a legitimate concern, it does not follow that merging railroads should not keep their promises. Rather, PPL insists, if the merger partners experience new circumstances that were not reasonably foreseeable, the presumption should be that they must take steps to produce the promised benefits despite the new obstacles, not that the Board's conditions are automatically rescinded. PPL adds that, although there may be circumstances in which a waiver is warranted, such a waiver must be applied for, other parties must be able to comment for or against the request, and the petitioning railroad should bear a heavy burden of proof as to the need for relief. PPL insists that the merged firms, not their customers, must bear the risk of poor planning or poor implementation of major rail mergers.

(3) PPL contends that the likelihood of implementation problems will be reduced if the applicants must provide full compensation for such problems. PPL further contends that the claim that shippers themselves can negotiate for contractual compensation for any disruptions that may occur is simply not true. Many shippers, PPL explains, cannot negotiate rail transportation contracts of any kind, let alone binding contracts containing strong indemnification provisions.

FERC policies. (1) PPL indicates that, although it does not oppose a FERC-style screening process to differentiate between mergers that can be expedited and those that cannot, it believes that such screening has already taken place here. PPL explains that, by definition, this rulemaking concerns major mergers among the small number of remaining Class I railroads, with particular emphasis on the likelihood of a final consolidation down to 2 massive rail systems. (2) PPL argues that there are significant differences between FERC utility merger proceedings and major rail consolidations. PPL explains that FERC has been able to accelerate its processing of mergers because it has already ordered protections for captive customers, including open access and rate freezes, that provide a large measure of protection against anticompetitive conduct or rate gouging by consolidated gas pipeline systems or mega-utilities. And, PPL adds, FERC-approved mergers have been free of the service problems that have accompanied recent major rail mergers.

APPENDIX M: CHEMICALS, PLASTICS, AND RELATED INTERESTS

AMERICAN CHEMISTRY COUNCIL AND AMERICAN PLASTICS COUNCIL. The American Chemistry Council (ACC)[156] and the American Plastics Council (APC)[157] contend that, although the Board has articulated a substantial and welcome policy goal (that mergers should preserve and enhance competition), the Board has declined so far to adopt any specific remedies to ensure that this policy goal will be implemented. The Board, ACC and APC explain, aspires to a substantial change in principle but, to date, has offered little that actually goes beyond the status quo. ACC and APC insist that, in light of the unique competitive harms that would be created by a transcontinental rail merger, the proposed rules are too vague and lack objective and predictable standards.

Merger/alliance review by DOJ. ACC and APC contend that, given the extreme concentration of the North American rail industry and the serious anticompetitive dangers posed by further rail mergers or rail alliances, the authority to review and approve U.S. rail mergers and rail marketing agreements/alliances should be transferred (by statute) from the Board to the Department of Justice, which (ACC and APC advise) has developed detailed guidelines and precedents for reviewing both mergers and alliances and which (ACC and APC further advise) has extensive experience reviewing mergers in both regulated and unregulated industries, including mergers and marketing alliances among transportation companies. There is, ACC and APC argue, no reason that the rail industry should continue to be singled out for special treatment notwithstanding that it already resembles the classic heavily consolidated industries that provoked the enactment of the original antitrust laws (*i.e.*, it is monolithic, it is unresponsive to its customers, and it too often offers "take it or leave it" terms).

Strengthening of proposed rules. ACC and APC contend that, if rail merger jurisdiction remains with the Board, the Board should substantially strengthen the proposed rules by adopting specific rules with teeth. ACC and APC explain that, although the NPR in general represents a movement in the right direction, the proposed rules do not set any objective standards for evaluating mergers and omit entirely any scrutiny of proposed marketing alliances. A standard that says "we'll know what's enough competition when we see it," ACC and APC argue, is no standard at all. Concrete guidelines, ACC and APC insist, should be adopted for evaluating mergers and for ensuring that they do not have anticompetitive consequences.

Gateways. (1) ACC and APC insist that all existing gateways, and not only "major" gateways, must be kept open. ACC and APC explain: that keeping gateways open would permit connecting carriers to compete for a portion of the shipper's business, and would thus further the procompetitive intent of the proposed rules; that closing gateways would not significantly contribute to efficiency, because inefficient gateways have already largely been eliminated; and that closing any gateway, given the reality of limited shipper choices at origin and destination, would amount to an anticompetitive tying arrangement that would not be permitted in an industry subject to the antitrust laws. ACC and APC therefore propose that merging railroads be required to commit to keep all gateways/interchange points open, so long as the railroad prior to the merger had published tariffs, or participated in contract movements, via those gateways or interchange points. ACC and APC add

[156] ACC was formerly known as the Chemical Manufacturers Association (CMA).

[157] ACC (a trade association representing the leading companies engaged in the business of chemistry) and APC (a trade association representing 26 of the largest resin producers) filed jointly.

that, because railroads seldom publicly announce that they are closing gateways (rather, they employ pricing strategies to direct traffic over their preferred routes), keeping gateways open, to be meaningful, must deal with actions going beyond outright cancellation of tariffs or restrictions on routing or interchange choices.

(2) ACC and APC contend that their previously proposed "Access Condition" (*see NPR*, at 233-235) would provide the best solution to the gateway issue, and the best way to ensure that future mergers are not anticompetitive. ACC and APC explain: that the Access Condition would entitle every captive shipper on future merged systems to gain access to one competing carrier, which would choose whether to provide the service based upon whether doing so would produce a sufficient economic return; that offering a joint rate at a shipper-selected interchange point would be one method by which access could be provided under the Access Condition, but it would be up to the shipper, the origin railroad, and the connecting carrier to negotiate the precise method and terms of access (subject to best offer arbitration); that the Access Condition would be preferable to traditional regulatory solutions dependent upon maximum rate proceedings, because it would be based on actual competition rather than simulated competitive benchmarks; and that the Access Condition would be based on a competitive marketplace in which access would be permitted but not mandated so that competition would occur only where a competing carrier could efficiently and profitably compete for a movement or a portion of a movement. ACC and APC add that it is only because the Access Condition was not included in the NPR that ACC and APC have now outlined alternative suggestions regarding preservation of gateways, bottleneck rates, service and rate guarantees, and the like.

(3) ACC and APC argue that, if the Board continues to be unwilling to adopt the Access Condition, the Board, to ensure that merging railroads do not close or disadvantage gateways that exist at the time of the merger, should require merging carriers to publish rates to/from any interchange point to or from which the railroad published a rate prior to the merger, or to or from which the railroad carried traffic under a contract. ACC and APC add that such rates should be required to be published in proportion to the distance between the origin and the interchange point, as compared with the distance between the origin and the originating carrier's preferred long-haul interchange or destination point, after adjusting for costs at origin and destination. ACC and APC insist that such a market-driven proportional rate condition (which, ACC and APC believe, the Board has authority to impose under 49 U.S.C. 10701) would increase the ability of would-be connecting carriers to offer alternative joint rates, and they further insist that the resulting competition would encourage innovation, efficiency, and customer service. ACC and APC suggest that their proportional rate condition arguably has an advantage over trackage rights, haulage, or other means of providing physical access because (ACC and APC explain) the carrier cannot interfere with or penalize the competing carriers through operational means, and also because (ACC and APC add) this mechanism does not require any special efforts to dispatch the trains of more than one carrier in the local terminal area.

(4) ACC and APC concede, in essence, that their proportional rate proposal bears some resemblance to the DT&I conditions that the ICC/STB have chosen not to impose in recent mergers. ACC and APC contend, however: that times have changed drastically in the nearly 20 years since the DT&I conditions were abandoned; that, during this time, the number of carriers and carrier routing combinations has dramatically decreased; that route structures have been rationalized and inefficient gateways have already largely been eliminated; and that, therefore, rather than perpetuating an almost infinite and highly inefficient maze of routings and combinations, imposition of similar conditions today would simply preserve a dwindling number of efficient routing choices. And, ACC and APC add, their proportional rate proposal is less intrusive than other means of enabling an alternative or connecting carrier to compete for a portion of the movement.

(5) ACC and APC contend: that their proportional rate proposal should apply both to domestic gateways and interchanges and also to international gateways and interchanges; that the Board should affirm that shippers of international traffic should have all rights regarding interchange, interswitching, and competitive access that they now have under Canadian (or Mexican) law; and that, following any future merger, the Board should maintain an ongoing enforcement proceeding to hear any shipper complaints that gateways have been closed or commercially disadvantaged. ACC and APC add that, in order that merging carriers are not penalized for offering rates over new single-system routings that may be lower than former joint rates for the same or competing routes, a shipper should not have the right to argue that a gateway has been commercially disadvantaged merely because such a new, lower rate has been offered.

Bottlenecks. ACC and APC, which believe that the bottleneck rule should be changed in the case of merged systems, contend that one of the ANPR's most positive suggestions was that, in the case of merged systems, the bottleneck rule should be modified so as to permit the challenge of bottleneck rates regardless of whether the shipper has a signed contract in hand from a connecting carrier. This change, ACC and APC explain, would cut through the chief impediment to increased rail-to-rail competition today (*i.e.*, the tacit agreement of the major railroads that they will not attempt to "poach" on each other's exclusive territories by agreeing to serve shippers on routings involving bottleneck segments). ACC and APC argue that, rather than requiring railroads applying for a merger to proffer some undefined quantum of enhanced competition, the Board should say that, if carriers want to merge, they must offer reasonable rates to interchange points. The Board, ACC and APC maintain, has clear authority to do so derived from 49 U.S.C. 10701 and from the carrier's "common carrier" obligation to provide rates and service upon request. ACC and APC therefore insist that, in order to ensure that rival railroads have an opportunity to compete for a shipper's business for at least a portion of the route from origin to destination, the Board should modify the bottleneck rule to require merging carriers to publish rates to/from any reasonable interchange point with another carrier, regardless of whether the shipper has obtained a contract or commitment from the connecting carrier regarding the portion of the movement beyond the interchange point. ACC and APC add that, given the difficulty and expense of formal litigation, the Board should encourage increased use of alternative dispute resolution (including arbitration) as a means of resolving disputes respecting bottlenecks.

Acquisition premiums. ACC and APC believe that, because captive shippers have borne the financial burden of failed mergers for too long, the Board must take a hard look at the recovery of "acquisition premiums" in any future mergers. ACC and APC argue: that the consistent pattern of the past several mergers has been that service has been disrupted and costs have gone up for both railroads and shippers; that this record of failure justifies imposing a heavy burden on the railroads to show clearly and convincingly how the costs of their merger transaction will be paid without harming shippers; and that, in particular, the Board should consider how merging railroads can achieve a return on the tremendous sums they pay for acquiring each other without increasing rates on captive traffic (it is meaningless, ACC and APC argue, to say that in principle a merger enhances competition if shippers have to pay higher rates to finance the huge windfall to shareholders lucky enough to have owned stock in the acquired railroad). ACC and APC add that the analysis the Board should undertake of the "acquisition premium" issue is conceptually straightforward (How will the merged system pay off any debt incurred in the merger transaction? Will the increased costs of the merger be paid off with increased efficiencies? If so, how and over what time period? Will increased traffic enable the debt to be paid off? Again, how and over what time period?).

Joint marketing agreements and alliances. ACC and APC contend that, whereas the Board indicated during the CN/IC merger proceeding that it does not feel that it needs to review the terms of joint marketing agreements, antitrust enforcement experts recognize that marketing alliances can have anticompetitive effects, depending on factors such as the duration of the alliance, its involvement in pricing and asset allocation issues, and its exclusivity. ACC and APC further contend that DOJ and FTC, which recognize that competitor collaborations can have competitive effects identical to those that would arise if the participants merged in whole or in part, have published guidelines for assessing the competitive impacts of marketing alliances. ACC and APC believe that, so long as the Board (rather than DOJ) continues to have authority to review mergers, the Board should expand the scope of its rules to encompass review of joint marketing agreements and alliances and their potential anticompetitive effects, and (in such expanded review) should use the guidelines employed by DOJ and FTC. ACC and APC add that the Board should also clarify to what extent marketing alliances must apply for joint rate authority under 49 U.S.C. 10706, and what the standards will be for the Board's review and approval of such applications.

Geographic and industry balance. ACC and APC insist that the Board should require geographic and industry balance when merger-related harms are offset by enhanced competition or other benefits. The proposed rules, ACC and APC explain: suggest that a merger might be approved, even if it will probably cause competitive harm or service disruptions, so long as the merger also proposes some undefined quantum of "enhanced" competition; appear to suggest that the enhanced competition need not be directed to the same shipper groups, industries, or geographic areas that suffer the harm from the merger; and can therefore be taken to mean that merger applicants will no longer be required to preserve all competitive options that would otherwise be lost to particular shippers if a merger were approved without conditions. ACC and APC maintain that the NPR, if read to eliminate the current rule that all specific competitive harms resulting from a merger are to be remedied, represents a sharp step backwards. ACC and APC argue that, short of their Access Condition, no plan for enhancing competition would effectively ensure that all shippers, industries, and geographic areas that would otherwise be harmed by a proposed merger are made whole, unless the Board is prepared to require merging carriers to accept liability for money damages if their merger results in service problems or higher rates. ACC and APC therefore contend that, at a minimum: (1) the Board should clarify that it is not retreating from the longstanding insistence that there be a full, direct, and proportional condition adopted by the merging carriers to remedy each and every competitive harm that would be created by a merger in the absence of conditions; and (2) the Board should require that any plan for enhancing competition be accompanied by a study showing that the benefits of the procompetitive plan outweigh the possible harms that would be caused by the merger both in the aggregate and in the case of each shipper group, industry, and geographic area that would potentially be harmed by the merger.

Contingent remedies. ACC and APC insist that proposed contingent remedies in the event benefits fail to materialize must have real teeth. ACC and APC contend that there really is no effective remedy short of mandated post-merger rate caps (so that captive shippers do not have to pay the costs of a merger's failures) and mandated liability for degradation in post-merger service. ACC and APC further contend that any contingent remedies short of such across-the-board service and rate guarantees would be largely illusory. ACC and APC add that, because every merger applicant says that its merger will result in greater efficiency, lower costs, and better service, there really is no good reason that merging carriers should not provide across-the-board service and rate guarantees. Such guarantees, ACC and APC explain, would be the only reliable way to ensure that the railroads' claims are not just talk.

Canada-U.S. Rule 11 routings. ACC and APC insist that another issue the Board should address is the continued availability of "Rule 11" routings between Canada and the United States. ACC and APC explain: that, under Canadian law, shippers in Canada currently have the right to specify, in a bill of lading, that their traffic is to be carried by the originating carrier to an interchange point, thence via another carrier beyond to destination; that this is usually done by reference to AAR Accounting Rule 11 for the movement beyond the interchange point (although, ACC and APC add, the existence of Rule 11 is not essential for that purpose); and that the bill of lading reference signals the originating carrier that the shipper has chosen a routing for its traffic that requires the originating carrier to interchange the traffic to a connecting carrier for furtherance to destination. ACC and APC warn that this right could be affected by future mergers involving Canadian railroads; a CN/BNSF merger, ACC and APC indicate by way of example, could effectively eliminate the ability of shippers to seek competitive rates at points where CN connects with BNSF, unless (ACC and APC add) the Board and Canadian authorities reviewing the merger ordered as a condition to the merger that Rule 11 routings must continue to be offered. ACC and APC contend that the simplest and best principle, which (they argue) the Board should include in its final merger rules, is that, in any future merger, shippers of international traffic between the U.S. and Canada will continue to have all rights they enjoyed pre-merger under either Canadian or U.S. law, or under existing railroad practices, to select gateways, routings, and connecting carriers for their international traffic.

BASF CORPORATION AND WILLIAMS ENERGY SERVICES. BASF Corporation (BASF) and Williams Energy Services (Williams)[158] contend that, although the NPR gives the appearance of offering change for the future, the fact of the matter is that the NPR fails to provide solutions to the serious problems experienced in previous mergers. BASF and Williams insist that, if the proposed rules are adopted without change, shippers and other affected parties will have lost much and gained little. And, BASF and Williams add, the NPR is overly and needlessly general in nature.

Procompetitive modifications. BASF and Williams contend that, to protect individual shippers from the loss of competitive alternatives stemming from the merger of Class I railroads, the Board should implement procompetitive modifications such as reciprocal switching, competitive line rates, bottleneck rate challenges, trackage rights, and haulage rights. BASF and Williams contend, in particular, that merger applicants should be required: to identify all competitive harms that the transaction may create; to propose specific remedies to mitigate and offset each competitive harm; and to explain how they would preserve competitive options for each group of shippers and for Class II and III rail carriers. BASF and Williams further contend: that the measures applicants should be required to propose to mitigate and offset merger harms should not simply preserve, they should also enhance, competition; and that, at a minimum, applicants should be required to explain how they would preserve and enhance the use of major gateways, reciprocal switching, shared asset areas, competitive line rates, build-outs or build-ins, and other procompetitive measures, and also the opportunity to enter into contracts for one segment of a movement as a means of gaining the right separately to pursue rate relief for the remainder of the movement.

Rebuttable presumption. BASF and Williams contend that, because future end-to-end Class I mergers will significantly diminish competition without appreciably increasing efficiency (and because such mergers, given their size, may potentially disable the entire North American transportation network), the Board should adopt a rebuttable presumption that further Class I rail

[158] BASF and Williams filed separately.

mergers are not in the public interest. BASF and Williams contend, in particular, that NPR § 1180.1(a) should be revised to provide that, "[a]lthough [past] mergers of Class I railroads may have advanced our nation's economic growth and competitiveness through the provision of more efficient and responsive transportation, the Board will reject further consolidations that reduce the railroad and other transportation alternatives available to shippers unless there are substantial and demonstrable public benefits to the transaction that cannot otherwise be achieved." BASF and Williams further contend that NPR § 1180.1(c) should be revised to provide that, "[a]lthough the Board cannot rule out the possibility that further consolidation of the few remaining Class I carriers could result in efficiency gains and improved service, the Board adopts the rebuttable presumption that additional consolidation in the industry will result in a number of anticompetitive effects, such as loss of geographic competition, that are increasingly difficult to remedy directly or proportionately. Additional consolidations could also result in service disruptions during the system integration period. To overcome this presumption, merger applications must include provisions for enhanced competition, with no reduction or loss of service. Unless merger applications are so framed, [the proposal] of proposed combinations where both carriers are financially sound will cause the Board to reject the application or, alternatively, to make broad use of the powers available to it in 49 U.S.C. 11324(c) to condition its approval to preserve and enhance competition." And, BASF and Williams add, NPR § 1180.1(c)(1) should be revised to provide that "[a] merger transaction must improve existing competition or provide new competitive opportunities."

Sequential implementation. BASF and Williams contend that the Board should apply comprehensive and rigorous pre-merger testing within a merger review process segmented into 3 sequential steps: Step 1 (the corporate merger); Step 2 (the business merger); and Step 3 (the operational merger). BASF and Williams indicate that the sequential process they contemplate does not contain additional review or approval steps compared to the procedures proposed in the NPR, but, rather, places the steps for approving a merger into a logical progression in order to assure a higher degree of confidence in its success. (1) *Step 1 (the corporate merger)*. BASF and Williams contemplate that the filing requirements for the corporate merger would consist of all financial and organizational information, an estimation of downstream effects, and generalized statements of the harm and benefits of the merger and the applicants' plans for overcoming the harms. The objective, BASF and Williams explain, would be to determine whether the applicants can establish a prima facie case that overcomes the rebuttable presumption against further mergers. BASF and Williams further explain that, if the applicants fail the preliminary test, that ends the matter, saving the railroads, the Board, and the economy in general considerable time and effort. BASF and Williams add: that they have previously suggested that the applicants should be able to proceed to consummate a corporate merger (by exchanging stock, electing common directors, and beginning to merge the corporate entities) following Step 1; that, however, BASF and Williams now realize that implementing this plan would require prior preparation of a retrograde movement, in case the combination needs to "un-merge;" that, once the corporate entities are merged, it can become difficult to contend that if the railroads fail to resolve their anticompetitive problems, they should "un-merge" into competing entities; and that, therefore, BASF and Williams now suggest that approval to consummate the merger should occur only after applicants pass the tests in Step 2.

(2) *Step 2 (the business merger)*. BASF and Williams contemplate that most of the requirements that would have to be met by applicants would be part of the second step (*i.e.*, the business merger phase). BASF and Williams contemplate, in particular: that the first event in Step 2 would be the market study, which would identify the competitive harms; that applicants and participants would then develop or determine the conditions that would resolve those harms and enhance competition; and that this would be followed by comments by shippers and small railroads. BASF and Williams add that Step 2, which would culminate in approval or disapproval of the

merger, would also include the operational integration plans (*i.e.*, part of the decision in Step 2 would be the schedule for Step 3).

(3) *Step 3 (the operational merger).* BASF and Williams contemplate that the schedule for the operational merger phase would prescribe the testing programs, the capacity measures, and the detailed operational changes that would be required to make the merging railroads operate as one. BASF and Williams add: that the testing programs they contemplate would be comprehensive and rigorous, and would be applied in a step-wise process to determine whether the systems to be used post-merger are capable of handling the volume of data necessary to run the merged or successor system with no computer system failures; that applicants would be required to run "parallel" systems (*i.e.*, the current system and the proposed post-merger system) for the entire merged operation for as long as needed to demonstrate that the systems are equal to the challenge; and that failure of the merged computer system during the recommended test would not necessarily cause the merger to be denied but would more likely lead to delay until the problems with the successor system are fixed.

Shipper compensation for reduced service. BASF and Williams contend that the Board should guarantee shippers compensation for reduction and loss of rail service caused by mergers. BASF and Williams contend, in particular, that the Board should require both a temporary remedy (BASF and Williams argue that shippers damaged by deteriorated service and other merger problems should be compensated in monetary terms for the losses sustained) and a permanent remedy (BASF and Williams argue that the permanent remedy would be restoration of service to pre-merger or better standards). BASF and Williams add: that, while monetary damages should continue to accrue until service has been restored, they are not the goal; that monetary damages are not sufficient to recoup the losses sustained by shippers during a merger-related service collapse; that the real and lasting remedy is restoration of service; and that the monetary damages are designed to motivate railroads in that direction. BASF and Williams further add that the Board should establish rules and procedures for the prompt resolution of merger-related service complaints.

Blue Ribbon Advisory Panel. BASF and Williams contend that a Blue Ribbon Advisory Panel should be created to provide timely and objective oversight during merger review and implementation. BASF and Williams add: that the Advisory Panel would be assembled by, and would report to, the Secretary of Transportation, and would assist the Board by developing objective and impartial recommendations on issues designated by the Secretary; that the Advisory Panel, which would be representative and balanced to ensure objectivity and impartiality, would be made up of representatives of railroads (including small railroads) and shippers (including small shippers) as well as government (including a Board representative); that the Advisory Panel would be activated by the filing of a merger application; that the Advisory Panel, once activated, would conduct technical reviews, would issue approvals for passing milestones in the step-wise process, and would conduct other tasks assigned by the Secretary (such other tasks, BASF and Williams note, might involve the methodology for testing post-merger systems, or the measurement of service benchmarks and compensatory damages for merger-related service failures); that the recommendations of the Advisory Panel would be binding on the Board unless subsequent compelling evidence indicated otherwise; that the Advisory Panel would focus on technical issues for which the Board's resources are insufficient (*e.g.*, review of railroad operating plans and approval of railroad testing plans, processes, and results); and that the Advisory Panel would advise whether the railroads' systems can be merged with some assurance that efficiency and effectiveness will not be materially harmed.

Other issues. (1) *NPR § 1180.1(c).* BASF and Williams contend that, although "enhanced competition" is among the more promising policy changes articulated in the NPR, the NPR falls considerably short of what is needed; it is necessary, BASF and Williams insist, to build effective procedures that will implement the "enhanced competition" policy change. BASF and Williams claim that, although the competitive enhancements called for by the NPR would be proposed by the applicant railroads, applicant railroads in past merger proceedings have volunteered this type of action only to the extent required to get an application approved. BASF and Williams further contend: that, at the present stage of the railroad merger process, there will be only limited improvements to competition; that there will also be possible losses in the choice of connecting carriers on east-west movements; that, accordingly, "enhanced competition" is vitally important; that, unless the Board is willing to condition approval on opening additional access to competing carriers, the NPR's proposed enhancement of competition rings hollow; and that, without a defined set of criteria and procedures, any enhancement of competition is likely to be at best minimal and superficial. BASF and Williams insist that a simple remedy would be to call for all of the involved parties to propose enhancements of competition, or procedures to enhance competition; the record already established in this case, BASF and Williams advise, identifies numerous procedures that could meet that need.

(2) *NPR § 1180.1(c)(1).* BASF and Williams contend: that the types of potential benefits listed in NPR § 1180.1(c)(1) are those already addressed in rail mergers; that, in reality, the benefits to be shared with shippers are limited to those situations in which the railroads operate in a competitive environment, at the time of the merger; that, as a practical matter, many shippers do not have rail competitive options today; and that, therefore, if the sharing of potential benefits is limited to situations where the railroads currently operate in a competitive environment, those benefits are for the most part non-existent or, at best, inconsequential. BASF and Williams therefore insist that the Board should remove the constraining condition that limits the provision to situations in which the railroads operate in a competitive environment at the time of the merger. BASF and Williams insist, rather, that the Board should apply this provision broadly and should use it to truly enhance competition.

(3) *NPR § 1180.1(c)(2)(i).* BASF and Williams believe that it is inappropriate to designate the applicants as the parties to propose remedies to offset harms resulting from reduction of competition; this "self-policing" policy, BASF and Williams explain, is weak in design and likely to be weaker in application. BASF and Williams insist that the proposed regulations should be modified to allow and encourage all parties to propose remedies to offset competitive harms.

(4) *NPR § 1180.1(c)(2)(ii).* BASF and Williams contend that the terms "essential services" and "sufficient public need" should be defined to clarify the Board's intent. BASF and Williams explain that, without an understanding of the intent, the responses may be off-point and the policy implementation may be misguided.

(5) *NPR § 1180.1(c)(2)(iii).* BASF and Williams warn that NPR § 1180.1(c)(2)(iii) will not enable the Board to foresee service problems before they arise, but, rather, will perpetuate the procedures that have already produced monumental service failures. BASF and Williams explain that NPR § 1180.1(c)(2)(iii): does not specify the procedures the Board will use to weigh the likelihood of service problems; does not address pre-merger testing of operations or other systems; and does not discuss the identification and establishment of pre-merger operations benchmarks. BASF and Williams add: that applicants should be required to explain how they would cooperate with other carriers in overcoming serious service problems; that a plan should be in place with other railroads to cope with natural disasters or service disruptions; that service problems require agreements in place with other railroads; that, although applicants can speculate about what they would do if the situation arises, without an agreement with other railroads this may be rhetoric; and that, therefore, the merger applicants must be required to obtain a commitment in writing from the other railroads, including involved shortlines.

(6) *NPR § 1180.1(d).* BASF and Williams contend that it is inappropriate to designate the applicants as the parties to propose the solutions that will enhance competition; history, BASF and

Williams insist, has shown that this is a prescription for incomplete and sub-competitive remedies. BASF and Williams argue that the Board: should require input from shippers, from non-applicant railroads, and from the Advisory Panel; and should mandate consideration of that input by requiring a revised applicant railroad mitigation plan, reflecting shipper and non-applicant input. BASF and Williams add that the revised plan might be produced by the Board's staff, by the applicant railroads, or by the Advisory Panel.

(7) *NPR § 1180.1(h).* BASF and Williams contend that, although any future mergers will be critically in need of pre-merger testing, the NPR's "service assurance and operational monitoring" proposal makes no provision for pre-merger testing, but, rather, is geared entirely to a post-approval process (which, BASF and Williams claim, is the same failed process used in recent mergers). BASF and Williams argue that the Board must act before the merger; discovering problems by means of another plunge into chaos, BASF and Williams explain, is not good policy. BASF and Williams insist, therefore, that the Board needs to take steps before the merger to reduce the chances of a repeat of the major service problems encountered in previous mergers.

(8) *NPR § 1180.3(b).* BASF and Williams contend that, although Canadian railroads and U.S. railroads have different accounting systems and different reporting requirements, it is important that full reporting of appropriate data not be obscured by national boundaries. BASF and Williams therefore insist: that the Board should specify the requirements on the content and format of financial and cost data to be provided by non-U.S. railroads; that non-U.S. railroads that merge with U.S. railroads should be required to submit the same cost information on the same basis as U.S. railroads, and to submit such information for the entire merged network; and that, likewise, U.S. railroads operating outside the U.S. should be required to include the costs of those operations in their reports to the Board and other regulatory agencies.

(9) *NPR § 1180.4(e).* BASF and Williams contend that, although NPR § 1180.4(e) indicates that the evidentiary proceeding will be completed within 1 year after the primary application has been accepted for a major transaction (180 days for a significant transaction; 105 days for a minor transaction), this plan has a serious procedural weakness. BASF and Williams explain: that, if substantial problems arise, the applicants may try to handle them during the approval period; and that, if shippers raise important issues during the process, the Board may inappropriately defer addressing the issues due to the exigencies of ongoing operations. BASF and Williams add that, because "acceptance" starts the clock, the regulations should clearly identify the requirements for acceptance and should specify exactly what constitutes acceptance.

(10) *NPR § 1180.6(b)(10)(ii).* BASF and Williams contend that, although NPR § 1180.6(b)(10)(ii) gives the appearance of progress, the fact of the matter is that the requirement for applicants to explain how they are going to improve service has been a part of the application process for many years. BASF and Williams, which claim that few if any of the service improvements predicted in past merger proceedings have ever materialized, insist that, without proper testing, the merits of claimed service improvements cannot be properly evaluated.

(11) *NPR § 1180.6(b)(11).* BASF and Williams insist that applicants should be required to measure and report public benefits. It is not enough, BASF and Williams argue, to require quantification of public benefits and negative effects only "where possible."

(12) *NPR § 1180.6(b)(12).* BASF and Williams contend that it is not enough to require applicants to analyze and evaluate the impacts of downstream mergers; applicants' estimates of downstream effects, BASF and Williams argue, will be largely "guess work." BASF and Williams therefore insist that time and effort should be allotted explicitly in the procedural schedule for the comments and views of the non-applicant railroads on downstream effects.

(13) *NPR § 1180.6(b)(13).* BASF and Williams contend that the requirement that applicants discuss "[t]he purpose sought to be accomplished by the proposed transaction" is not really new. BASF and Williams, which insist that the Board is missing an opportunity to focus on and elevate

the priority of purposes such as the public interest, enhanced competition, and maintenance of adequate service levels, argue that the Board should adopt a proactive pre-merger approach to identifying and solving problems.

(14) *NPR § 1180.10.* BASF and Williams, which believe that the "service assurance plan" proposal does not actually require applicants to perform any more analysis than they did in previous mergers, insist that NPR § 1180.10 should specify that necessary and sufficient testing of the operating plan must be accomplished and that the test results must be provided to the Board, the Advisory Panel, and other interested parties for evaluation. BASF and Williams further contend that the Board should establish 2 specific remedies for service failures that lead to "service damage." (a) The first remedy contemplated by BASF and Williams is monetary and would have 2 levels. At the first level, if rail service falls more than 20% below pre-merger levels (as measured by pre-merger transit times), the applicant railroad(s) would be required to pay, within 30 days, the lease costs of securing the additional equipment required to compensate for service deterioration. At the second level, if service failures (based on a 20% or greater increase in transit times) cause a plant to curtail production or to shut down, the railroad(s) would be required to pay, again within 30 days, the costs of the shut down or curtailment. BASF and Williams add that the Advisory Panel could review and certify the "service damage" bills as being reasonable, and that the Board, or a court of competent jurisdiction, could rule on causation if that became an issue. (b) The second remedy contemplated by BASF and Williams would be a long-term lasting remedy, *i.e.*, restoration of service to pre-merger levels or better. BASF and Williams note, however, that this might take months or years, and, indeed, might never be realized. BASF and Williams indicate that, in the interim, the "service damage" bills would rightly assign financial responsibility for the service failure to the railroad(s) causing that failure.

(15) *NPR § 1180.10(e).* BASF and Williams contend: that, although pre-merger testing of information technology systems has taken place in past mergers, it was done with only samples of the post-merger movements; that, however, experience has shown that such samples were not sufficient; and that, therefore, as a condition of future mergers the merging railroads should be required to run parallel systems (their current system and the proposed post-merger system) for the entire merged operation for at least 3 months, in order to demonstrate whether or not the systems to be used post-merger are capable of handling the volume of data necessary to run the merged system without computer system failures.

(16) *NPR § 1180.10(i).* BASF and Williams contend that having a contingency plan in place seems more of a ready excuse than an effective remedy. BASF and Williams add: that the requirement for preventive measures and rigorous pre-merger testing is clear; that the people on the railroad rescue team will almost inevitably be largely the same people that designed the initial operations in the potential trouble area; that, again, the NPR is defaulting to problem solving in a crisis mode rather than designing a managed and controlled rail network; and that this is another area where the Advisory Panel can have a positive impact.

(17) *Intramodal competition.* BASF and Williams contend: that rail-to-rail competition is what is lost in mergers; that, however, it is doubtful that rail-to-rail competition will be much affected by the next round of mergers, except at the gateways; that, therefore, it is critically important that rail competition be enhanced; and that haulage rights, trackage rights, and reciprocal switching are just some of the possibilities for enhancing rail-to-rail competition.

(18) *Upstream effects.* BASF and Williams agree that the Board should include "upstream effects" in its deliberations.

(19) *Simplified rate reasonableness tests.* BASF and Williams contend that the Board should allow shippers to challenge bottleneck rates, regardless of the makeup of the through rate; any portion of a rate, BASF and Williams insist, should be open to challenge and should stand on its own merits. BASF and Williams explain that allowing shippers to review individual revenue divisions

can restrain monopolistic pricing; and, BASF and Williams add, combining that knowledge with a simple procedure to challenge rates that are unreasonably high will remedy many of the bottleneck rate problems. BASF and Williams further contend: that the simplified rate reasonableness challenge could also be extended to maximum rate cases; that the Advisory Panel could develop procedures to make it easier for shippers to challenge a rate; that such simplified procedures could also make it less expensive to challenge rates (the current procedures, BASF and Williams insist, present a major impediment to regulatory access except for those with the persistence and resources to pursue the seemingly interminable and frequently fruitless pathway of maximum rate challenges); and that the process could be simplified by requiring that the rate for any portion of a movement be open to challenge on its own merits.

(20) *Limited open access.* BASF and Williams contend that many shippers are now served by only 1 railroad, and that, if the remaining railroads merge into 2 transcontinental systems, many shippers currently served by 2 carriers will see their choice effectively reduced to 1 (not because the 2 serving carriers will merge, BASF and Williams explain, but because at least 1 of the carriers will be able to offer a single-line haul from origin to destination; only in rare instances, BASF and Williams add, will the shipper have both the origin and destination served by both transcontinental railroads). BASF and Williams argue: that they have previously called for relief such as trackage and haulage rights, reciprocal switching, interswitching, and competitive line rates; that, however, trackage and haulage rights often seem to leave the traffic at the mercy of the railroad owning the tracks, and competitive line rates may be too difficult for the shipper to gain; and that, although the most practical alternatives would seem to be reciprocal switching and interswitching, these options would be unavailable to the many sole-served shippers that do not have another carrier nearby. BASF and Williams further argue: that it is now time to require enhanced competition, both to prevent further damage and also to remedy the legacy of past mergers; that this will involve application of limited "open access" remedies such as those proposed by BASF and Williams (reciprocal switching, interswitching, shared asset areas, competitive line rates, trackage rights, and haulage rights); and that the design and application of such remedies to enhance competition is a matter that the Advisory Panel could assist.

(21) *Industry-wide reforms.* BASF and Williams contend that the Board should convene independent inquiries at the time it examines the next merger to consider industry-wide reforms that would enhance competition broadly, and not just within the context of the merging railroads. These reforms, BASF and Williams add, would deal with rights of access, reciprocal switching zones, competitive rate plans, and the rights of shippers to appeal against unreasonable rates and terms of service.

DOW CHEMICAL COMPANY. The Dow Chemical Company (Dow) agrees that the Board's new approach to rail mergers must be to "enhance" rather than merely to "preserve" competition; merging carriers, Dow argues, should be required to propose "enhanced competition" in order to cure the complex and subtle losses in competition that have been permitted to go unremedied in previous mergers. Dow indicates, however, that it is concerned that the proposed rules: lack sufficient specificity in major areas; are too vague or general to provide clear notice of the standards that will be applied; and are drafted so broadly that they could be applied in a way that accomplishes no real changes over the current rules. And, Dow adds, it is also concerned that the Board's insistence upon addressing competition only as it pertains to merging carriers will undermine the overall goal of "enhanced competition."

Enhanced competition. Dow contends that the proposed rules must be clarified and expanded in order to fully realize the goal of enhanced competition. Dow explains that the proposed rules are very general, and, in some places, are ambiguous. Dow also explains that the Board's reluctance to extend the focus of this proceeding beyond just merging carriers ignores a critical piece of the equation for providing enhanced competition. (1) Dow contends that the Board should clarify that its goal is to ensure enhanced and effective intramodal competition (which Dow refers to as "rail competition"). Dow argues that, because the proposed rules do not clearly refer to enhanced intramodal competition, the proposed rules may be interpreted as indicating that intermodal, geographic, or product competition could substitute for intramodal competition and still satisfy the Board's goal.

(2) Dow, which notes that NPR § 1180.1(c) indicates that the enhanced competition requirements will apply only if both merger applicants are "financially sound," contends that the Board should cure the uncertainty surrounding the "financial soundness" concept by specifically disavowing "revenue adequacy" as a factor in the determination of "financial soundness." Any other result, Dow warns, would seriously dilute, if not negate, the goal of the proposed rules to enhance competition. Dow explains that, if "financially sound" is equated with "revenue adequate," the requirement that future merger applications include provisions for enhanced competition will not apply to the major carriers most likely to be involved in future rail combinations. Dow further explains that, because the most recent rail mergers have contributed significantly to the "revenue inadequacy" of several Class I carriers, the use of "revenue adequacy" as a measure of "financial soundness" would allow the missteps of past mergers to preclude enhanced competition conditions in future mergers.

(3) Dow contends that, because competition cannot truly be enhanced unless it extends to the entire rail industry, the Board, by focusing purely on rail merger policy to enhance competition, is creating an unlevel playing field that will undermine the overall goal of enhanced competition even as applied to just merging carriers. Dow argues that, because the most recent round of rail mergers resulted in substantial reductions in competition and left the nation with rail duopolies in the Eastern and Western portions of the United States, enhanced competition was a fully justified goal even in those earlier mergers, and, therefore, the lost competition resulting from those mergers also must be remedied. Dow also argues: that very few captive rail shippers have true competition today; that even facilities currently served by 2 rail carriers are not truly competitive for most movements; that, in order for a rail shipper to enjoy the benefits of 2-carrier competition at a facility, the same 2 carriers either must serve both the origin and destination points or serve only one of those points so that the bottleneck origin or destination carrier is neutral; that, however, the former scenario is largely non-existent today and the latter has decreased dramatically with each prior rail merger; and that these harms must be remedied before competition truly can be enhanced. Dow further argues that the Board's focus on merging carriers may chill future mergers, and thereby prevent shippers from realizing enhanced competition; carriers will be reluctant to merge, Dow explains, if they are required to make their customers more competitively accessible to other rail carriers while they do not have similar access to their competitors' customers. Dow therefore insists that, in order to achieve the full benefits of enhanced competition, the Board, at a minimum, should revise its "competitive access" rules to provide for increased reciprocal switching access. Dow insists, in particular, that the Board should eliminate the "competitive abuse" test and should establish clear and definite procompetitive standards for obtaining reciprocal switching under 49 U.S.C. 11102. And, Dow adds, the Board should institute an expanded or separate proceeding to address ways to enhance competition in the rail industry that is unfettered by the purpose and scope of the Board's merger authority.

(4) Dow contends that the Board, when addressing specific competitive harms, should err on the side of increased competition. Dow explains: that, in prior merger decisions, the Board has refused to grant a full remedy for certain specific harms because the only remedy that would fully restore pre-merger competition levels also would leave the shipper in a better competitive position than it was pre-merger; that, however, this policy, which worked to the advantage of the carriers at

the expense of the shipper, is not consistent with the Board's new emphasis on enhanced competition; and that, therefore, the Board should formally reverse this policy in the new merger rules, and, in future mergers, should err on the side of enhancing competition in order to address specific competitive harms that otherwise could not be fully remedied.

Service disruptions. Dow contends that, to protect shippers from merger-related service disruptions, the Board should impose certain minimum service remedies. Dow explains that, although it believes that the proposed Service Assurance Plan is an excellent method to minimize the risk of service disruptions, and although it believes that the proposed Service Council is a helpful means of preserving open lines of communications between shippers and the merging carriers, it also believes that the proposed rules are deficient as they pertain to remedies in the event that service disruptions do occur. Dow contends, in particular, that the Board should require the applicants' service contingency plan to include the right of a shipper to short-haul a carrier, during service disruptions, by requiring a carrier, at the shipper's request, to interchange traffic at the nearest interchange point. This remedy, Dow explains, would minimize a shipper's exposure to service disruptions while diverting traffic off of an overburdened rail system at the earliest possible point; and, Dow further explains, this remedy would not burden the troubled rail system with the trackage rights operations of a second carrier.

The "one lump" theory. Dow contends that the Board has taken a positive step towards preserving competition by requiring merging carriers to present an effective plan to keep open major existing gateways and to preserve separately challengeable segment rates to be used in conjunction with contract rates in bottleneck situations. Dow further contends that the latter scenario, which Dow refers to as the "contract exception," is a tacit acknowledgment that the Board will no longer adhere strictly to the so-called "one lump" theory. Dow argues, however, that the Board should go further and should expressly abandon the "one lump" theory altogether. (1) Dow contends that the "one lump" theory is inconsistent with the "contract exception." Dow explains: that the "one lump" theory holds that, because a monopolist (*i.e.*, a bottleneck carrier) at the end stage of production is in a position to capture the entire monopoly profit, integration backwards upstream normally does not enable it to raise the profit-maximizing price; that, however, the "one lump" theory and the "contract exception" are inconsistent; that, if the "one lump" theory truly reflected reality, preservation of the "contract exception" would not be a procompetitive measure, because the "contract exception" applies in exactly the same circumstances in which the "one lump" theory has been applied; that, however, the Board has clearly recognized the procompetitive nature of the "contract exception;" and that, because the "contract exemption" preserves a competitive benefit, there is no basis for continued adherence to the "one lump" theory. Dow therefore argues that the Board should expressly acknowledge the inconsistency of the "one lump" theory and the "contract exception" by explicitly abandoning the presumptions that underlie the "one lump" theory.

(2) Dow contends that past adherence to the "one lump" theory has eliminated significant levels of competition with each successive rail merger, and that, therefore, the Board should act now to remedy the harms that have resulted from this past adherence to the "one lump" theory. Dow contends, in particular, that the Board should require all merging rail carriers to offer common carrier "bottleneck" rates to shippers regardless whether the bottleneck carrier serves both the origin and destination points. Dow notes, however, that it does not contemplate that a shipper would be able to demand any interchange point that it desires; Dow indicates, rather, that it contemplates that a shipper would be permitted to obtain a bottleneck rate only to a point where traffic was interchanged prior to the proposed merger. And, Dow adds, the condition it contemplates would preserve competition based upon service, because (Dow explains) even if the "one lump" theory is not inconsistent with the "contract exception," a vertical merger of a bottleneck carrier with a

downstream non-bottleneck carrier would still deny captive shippers a choice of rail carriers for the competitive segments of their routes (and such competition, Dow argues, is an incentive for carriers to provide good rail service, including safe transportation of hazardous substances).

Mandatory arbitration. Dow contends: that a major deficiency in the Board's proposed rules is the absence of any process for the efficient and expeditious resolution of service and rate disputes; that many of the procompetitive measures in the proposed rules will be severely limited in their effect unless the Board simplifies and expedites the process for resolving such disputes; and that, to remedy this deficiency, the Board should require mandatory binding arbitration of service and rate disputes, at the shipper's discretion. Dow insists that, from a shipper's perspective, arbitration (which, Dow claims, is more affordable and less time-consuming than litigation) would make statutory and regulatory protections more widely available. (1) Dow contends: that, in connection with the service disruptions that attended the UP/SP and Conrail transactions, shippers were forced to resort to lengthy and expensive court proceedings to obtain redress; that, however, only shippers with the largest losses could justify the expenditure of time, effort, and resources that such litigation involved; that many shippers that had sustained substantial losses were unable to assume the risk and expense associated with litigation of their claims; that, because the carriers knew that most shippers would not or could not pursue litigation, they often refused to offer a reasonable settlement; that only when there is a credible threat of litigation will carriers engage in serious negotiations; and that, if arbitration (which Dow believes is less costly and more expeditious than litigation) were available, more shippers would be able to seek relief. Dow further contends that the Board can address this issue by imposing a merger condition that would require applicants to agree to binding arbitration of service-related loss and damage claims (for both common carriage and contract carriage claims) if the shipper so elects (this condition, Dow notes, would allow the shipper to retain the right to submit its claims to a court if it desired to do so, and would also preserve any contract rights that the shipper preferred to exercise). Dow insists that, although the Board does not have jurisdiction to adjudicate loss and damage claims or contract disputes (and although the Board should not place itself in a position to review the arbitration decisions), the Board does have the legal authority to impose an arbitration condition upon a merger. And, Dow further insists, under the same principle used to promulgate claims processing regulations, the Board also has the authority to adopt a procedural framework for the conduct of "service disruption" arbitration proceedings.

(2) Dow contends that, because most shippers will not benefit from bottleneck relief (including the "contract exception") unless the Board simplifies the complex and costly process for resolving rate disputes, the Board should condition future rail mergers by requiring the applicants to establish bottleneck rates and to arbitrate, upon demand by the shipper, any disputes over the level of those rates. Dow explains: that the current process for resolving rate disputes (which Dow regards as a "bottleneck" standing between most shippers and the benefits of enhanced competition, not to mention basic regulatory protections) requires a shipper to bring an unreasonable rate complaint before the Board under procedures that are extremely complex, require enormous amounts of discovery, take a year or more to complete (not including appeals), and cost hundreds of thousands of dollars to pursue; that, therefore, shippers now file very few rate cases; that, in addition, those cases that are filed typically involve single commodity (*e.g.*, coal) unit-train movements over a single route on a regular basis; that, however, most rail movements (including Dow's) do not have these characteristics; and that the reality of the matter is that Dow, like most shippers, does not now, and would not under the proposed merger rules, benefit from the "contract exception" or other forms of bottleneck rate relief. Dow further contends that, to broaden the range of shippers that will benefit from any bottleneck relief and from the "contract exception" in particular, the Board, acting under its broad merger conditioning authority, should impose upon merging carriers the Canadian system of Final Offer Arbitration (FOA), which involves procedures that Dow believes are simple,

cost-effective, and expeditious. Dow explains: that, under the FOA system, a shipper that is dissatisfied with a rate charged or proposed to be charged by a rail carrier may submit the matter for FOA by a single arbitrator, or, if the carrier agrees, by a panel of arbitrators; that each party sets forth its final offer to the other and the arbitrator must choose one or the other (which, Dow advises, gives both parties a strong incentive to be reasonable); that the parties must exchange all information that they intend to submit to the arbitrator; that the parties may direct interrogatories to each other; that the arbitrator may request additional information on his/her own initiative; that, depending upon the dollar amount of the freight charges at issue, the arbitration must be completed within either 30 or 60 days; and that the decision of the arbitrator is final and binding.

(3) Dow contends that, because many of the enhanced measures proposed by the Board will not benefit shippers due to the costly and time-consuming process of pursuing them, the Board should consider mandatory, binding arbitration as a means to make both existing and proposed competitive benefits available to a broader range of shippers. Dow specifically contends that the Board should require arbitration of "competitive access" disputes. Dow adds: that arbitration could also streamline the resolution of disputes over competitive conditions imposed upon a merger, as well as service-related disputes; that, for example, disputes over the application of a merger condition (except general disputes over the meaning of a merger condition, or other broad policy disputes, which would be resolved by the Board in the first instance) or disputes over rail service arising within a specified time after implementation of a merger could be submitted to binding arbitration; and that the Board could establish the standards and procedures for resolving the disputes and could require that arbitration be completed within a fixed time period. An arbitration remedy, Dow insists, would resolve many of the obstacles that shippers face in their attempts to realize the full benefit of all procompetitive options.

Ratepayer protection mechanisms. (1) Dow contends that, to protect shippers from the consequences of the inflated and/or unsubstantiated claims that merger applicants have been known to make, the Board must do more than simply increase its scrutiny of public interest benefits. Dow explains that it does not understand how the proposed process of scrutinizing merger benefits to ensure that they are well-documented and reasonable will differ from current procedures; Dow indicates that, in any event, it does not believe that merger benefits can be projected and assessed with any reasonable certainty (because, Dow argues, too many variables and assumptions are required, and because the entire process is subject to substantial manipulation by the applicants to achieve any desired result); and Dow argues that, because even increased scrutiny of claimed benefits by the Board will not do much to enhance the reliability of benefit projections, the Board must undertake to protect the public interest from potentially adverse effects if the projected benefits are not fully realized.

(2) Dow contends that the greatest single threat from overstated benefit projections is their use to justify an acquisition premium, which (Dow maintains), if not offset by merger benefits, can adversely affect the rates of shippers. Dow warns that captive shippers are most at risk because they rely upon regulation to ensure that their rates are reasonable. Dow explains: that, whenever assets are sold, the acquisition cost becomes the new book value; that an acquisition premium increases the book value; that these higher book values are used to calculate the jurisdictional threshold for regulation and railroad revenue adequacy; and that the changes to both of these calculations, as a result of an acquisition premium, will adversely affect regulated rates if the premium is not offset by merger benefits. Dow further warns that many contract shippers are also at risk as a result of their rail contracts. Dow explains: that many rail contracts set a base rate that is adjusted periodically; that a common adjustment factor is the Rail Cost Adjustment Factor (RCAF); and that an acquisition premium that is not offset by merger benefits can inflate the RCAF, through the depreciation component, and cause contract rates to rise at a faster pace.

(3) Dow therefore insists that, to protect shippers from the adverse effects of an overstated acquisition premium, the Board should require merger applicants to propose ratepayer protection mechanisms that will assure that shippers are protected from the effects of the acquisition price upon their rates, if the projected merger benefits do not materialize. Dow explains that this solution, which (Dow claims) has already been adopted by the Federal Energy Regulatory Commission, places the risk that benefits will not materialize upon the applicants, where (Dow believes) it belongs.

Alliances and joint ventures. Dow contends: that the ICC/STB have adhered, in recent years, to a narrow concept of "control" that has left many non-merger cooperative agreements outside the scope of ICC/STB review; that, although DOJ/FTC might conceivably review such agreements under the antitrust laws, DOJ/FTC have adhered, in recent years, to a narrow concept of "harm to competition" that has left most such agreements beyond the scope of DOJ/FTC review; that, however, the absence of both ICC/STB and DOJ/FTC review does not automatically mean that non-merger cooperative agreements have no anticompetitive effects, especially in view of the subtle, yet significant, anticompetitive effects that have occurred in previous mergers and that have been compounded by each subsequent merger; and that, although such effects would be addressed by the enhanced competitive measures that the Board would require in the proposed merger rules, the reality of the situation is that, if the Board does not review cooperative agreements under those merger rules, the benefits of enhanced competition will never be realized. Dow argues that, because (in the current regulatory and antitrust environment) rail alliances and/or rail joint ventures that have anticompetitive consequences might escape all review, the Board should address the level of scrutiny that will be given to rail alliances and rail joint ventures. Dow indicates that it believes that most non-merger cooperative agreements should be subject to Board review, which (Dow suggests) could be accomplished if the Board were to adopt a broader concept of "control."

E. I. DU PONT DE NEMOURS AND COMPANY. E. I. Du Pont de Nemours and Company (DuPont), which agrees that new railroad merger rules are needed and that competition must be enhanced and not merely preserved, contends that the rules proposed in the NPR broadly address many of the issues that have concerned rail customers. DuPont argues, however, that the Board should develop additional specificity so that the new rules are clear and do not simply discourage formal mergers while encouraging other forms of rail combinations that could be equally anticompetitive. And, DuPont adds, it is disappointed that the NPR does not address the concentration and loss of competition that already exists. (1) DuPont contends that the Board should apply its new competitive thinking in a broad way to the entire railroad industry, and should not confine this thinking to the merger context. The rail industry, DuPont insists, has already concentrated to such a degree that broader competitive reform dealing with the entire industry, rather than just the next 2 merging railroads, is now required. DuPont notes, by way of illustration, that, at those of its facilities that are captive to a single railroad, the rates charged for rail transportation are higher, there is little incentive for railroads to provide excellent service, and there are no viable alternatives if and when safety or service falters. DuPont argues that, if balanced and sustainable competition is to be achieved, broad changes are needed in the railroad/customer competitive balance; new merger rules alone, DuPont argues, are not the appropriate way to accomplish balanced and sustainable competition now that the railroad industry has concentrated essentially to 2 monopoly-like systems in each half of the United States.

(2) DuPont agrees: that merger applicants should be required to propose a plan for enhancing competition; that there should be a permanent 5-year oversight period and a Service Council; that applicants should submit Service Assurance Plans and Safety Integration Plans; that existing gateways should be protected; that build-in/build-out options should be preserved; and that new "bottleneck" situations should be prevented.

(3) DuPont insists that the SAPs must include procedures that will allow for the recovery not only of premium transportation costs but also of consequential damages for such costs as lost production, excess labor, etc.

(4) DuPont indicates that the requirement that applicants address potential downstream mergers offers a potential mechanism to impose competitive conditions or alterations that will become effective upon a subsequent merger. DuPont advises that, if crafted carefully, such later changes might be a vehicle to expand competition in a way that is not punitive to the initial merger applicants. And, DuPont adds, it would also support the use of the 5-year oversight process on previous mergers to "balance" the competitive remedies required for new mergers.

(5) DuPont believes that the concept of ensuring "balanced and sustainable" competition, while laudable, requires clear definition, particularly as it applies to captive rail customers. DuPont explains that, for chemical companies, "balanced and sustainable" competition means rail-to-rail competition that allows for choices, alternatives, and incentives to perform. DuPont argues that it is not enough to "expect" applicants to propose plans for enhanced rail-to-rail competition; rather, DuPont insists, there must be a specific requirement for enhanced rail-to-rail competition. And, DuPont adds, because NPR § 1180.1(d) appears to suggest that enhanced rail-to-rail competition will be imposed as a condition only if proposed by the applicants, the Board should clarify that proposed conditions for enhanced rail-to-rail competition will be imposed if they meet the public interest standard and the requirements of 49 U.S.C 11324(c).

(6) DuPont contends that, to ensure that "balanced and sustainable" competition truly exists, NPR § 1180.1(c)(2) should be revised to require merging rail carriers to provide a bona fide rate (not restricted to a contract) for any new potential bottleneck segments of their combined system, with baseball-type arbitration as a dispute resolution mechanism if agreement on a reasonable rate for a bottleneck segment cannot be reached between the railroad and its customer. DuPont further contends that merger applicants should also be required to address how they will allow for enhanced terminal area reciprocal switching and trackage rights to balance increased market power.

(7) DuPont contends that the Board should not allow marketing alliances to be used to achieve, without regulatory review, anticompetitive consequences that the Board would not allow railroads to achieve by merger. Marketing alliances, DuPont explains, have the potential to create the same monopolistic effects as major mergers, but (at the present time) without regulatory oversight either by the Board or under the antitrust laws.

(8) DuPont contends that, although it supports the NPR's 5-year oversight mechanism, it also believes that, after the 5-year period has passed, some form of continuing oversight of competitive effects is needed to ensure that commitments made by the merging carriers for enhancing competition, preserving gateways, and avoiding new bottlenecks are "sustainable" after the 5-year period.

(9) DuPont contends that, because Canadian and Mexican railroads are now becoming so closely intertwined with U.S. railroads, the transnational approach of NPR § 1180.1(k) is appropriate; a common regulatory framework, compatible operating practices, and a mutual understanding of transnational issues, DuPont explains, are needed throughout North America. DuPont adds, however, that it would prefer that the Board approach this in a more proactive way by establishing a dialogue and ongoing forum with Canadian and Mexican governmental agencies to pursue this goal. Such coordination of policies, DuPont argues, is needed even if no future mergers occur.

(10) DuPont, which indicates that it generally supports the comments filed by ACC, ARC, and NITL, contends that, if the Board continues to believe that it does not now have the statutory authority to apply remedies that increase competition where it does not already exist, the Board should identify and seek the specific legislative changes needed to enhance competition. DuPont further contends that the Board should seek opportunities to use its influence to bring railroads and

their customers together to dialogue and to jointly develop, for the industry, a long-range solution that will provide expanded competition and value for rail customers, create new market opportunities and growth for railroads, and allow for constructive mergers that bring real value to rail customers.

ENTERPRISE PRODUCTS OPERATING L.P. Enterprise Products Operating L.P. (EPO) contends that the proposed rules are worded too vaguely, do little to correct the decidedly pro-merger bent of the Board, and offer shippers little in the way of reliable safeguards to preserve, much less enhance, railroad competition. EPO further contends: that the Board has an opportunity to preserve what little intramodal competition remains by promulgating meaningful rules in this proceeding; that, however, in fashioning the rules it proposes to adopt, the Board has squandered that opportunity; that the rules proposed in the NPR would establish no standards that the applicants would need to observe to safeguard the preservation of competition in gaining unconditional agency approval of their future filings; and that the unfettered discretion the Board reserves to itself as to how it will balance the alleged benefits of the railroads' future merger or acquisition proposals with the need for preserving or enhancing rail-to-rail competition renders it doubtful that merger applications will be treated differently in the future than they have been in the past. (1) EPO contends that, because keeping gateways open is the single most important means for maintaining intramodal competition when railroad mergers or acquisitions are authorized, the Board should condition every merger or acquisition by requiring the merged or controlled and controlling railroads to maintain and keep open all routes and channels of trade via existing junctions and gateways unless the applicants can prove by substantial evidence that the imposition of such a condition would be contrary to the public interest. EPO argues: that the *DT&I* conditions served to keep connecting railroads competitive; that, given the concentration that now exists in the railroad industry, there no longer is any justification for not imposing the *DT&I* or similar conditions in any major railroad merger or acquisition hereafter approved by the Board; and that, if it makes sense to keep major gateways open, it must also make sense to keep all gateways open.

(2) EPO contends that, to take appropriate action against bottlenecks, the Board should condition every merger or acquisition by requiring the merged or controlled and controlling railroads to offer, upon request of a shipper, a local or proportional rate applicable between a point it alone can serve and a point of connection with another railroad, regardless whether the shipper has a contract for service by the connecting railroad, unless the applicants can prove by substantial evidence that the imposition of such a condition would be contrary to the public interest.

(3) EPO contends that, for a shipper served by a merged or controlled and controlling railroad, access to a second carrier within essentially the same switching district or terminal area is essential if rail-to-rail competition is to be enhanced. EPO further contends that the Board should ensure this terminal access by conditioning every merger or acquisition to require the merged or controlled and controlling railroads to provide reciprocal switching or switching at reasonable fees, to be agreed to by the parties or set by the Board, to any shipper seeking to be served by another carrier within or proximate to the switching district or terminal area on the lines of the merged or controlled and controlling railroads unless the applicants can prove by substantial evidence that the imposition of such a condition would be contrary to the public interest.

(4) EPO contends that the Board should ensure that any shipper that as a result of a merger or acquisition suffers a loss of actual or potential competitive railroad service shall be protected by the imposition of a condition affording trackage or haulage rights to another railroad. EPO further contends that, to this end, the Board should condition every merger or acquisition to require the merged or controlled and controlling railroads to provide at reasonable charges, to be agreed to by the parties or set by the Board, trackage or haulage rights to another railroad so as to enable the other railroad to serve a shipper suffering a loss of actual or potential competitive railroad service as a

result of the proposed merger or acquisition unless the applicants can prove by substantial evidence that the imposition of such a condition would be contrary to the public interest.

(5) EPO contends that the goal of rail-to-rail or intramodal competitive enhancement would be well served if the rate base of the merged or controlled and controlling railroads were not inflated by an excessive price paid to effect the proposed transaction or by any extraordinary costs incurred in consummating it. EPO further contends that, to this end, the Board should condition every merger or acquisition so as to disallow any acquisition premium paid to effect the proposed transaction or extraordinary costs incurred in consummating it to be included in the merged or controlled and controlling railroads' rate bases unless the applicants can prove by substantial evidence that the imposition of such a condition would be contrary to the public interest.

PPG INDUSTRIES. PPG Industries, Inc. (PPG), which applauds the spirit of the NPR regarding competitive access, rail-to-rail competition, and service issues, insists that it is critical that future mergers guarantee substantive rail-to-rail competition and adequate levels of service, and are approved only after due consideration of downstream effects. PPG, which agrees that merger applicants should be required to provide a plan for enhancing competition through rail-to-rail competition (including the granting of trackage rights, establishment of shared or joint access, removal of paper and steel barriers, and other methods), contends, however, that the proposed rules are too general in nature and fall short by failing to outline specific requirements in key areas.

Rail-to-rail competition. PPG contends that the NPR is neither clear enough nor strong enough in addressing the need to establish and maintain rail-to-rail competition. PPG further contends that, because of the critical importance of rail-to-rail competition, it warrants the establishment of a set of specific criteria in and of itself, independent of any others that must be met in order for a merger to be approved. These criteria, PPG argues, should include specific safeguards that would protect and enhance rail-to-rail competition and preclude any degradation of competition. Such measures, PPG further argues, must include: mandatory competitive access in all currently captive situations; requirement of competitive access in mergers where non-captive shippers are likely to become captive; mandatory reasonable rate offerings by railroads on any portion of a movement and elimination of the requirement for the existence of a contract between the shipper and a connecting carrier; mandatory open routings and access to all gateways; and guaranteed rights of shortline and regional railroads to interchange traffic with any other railroad without restriction.

Service. PPG contends that, although the NPR does an admirable job in advocating required service plans as a precondition to merger approval, service assurance is an area of paramount importance that requires stronger and more specific language. More is needed, PPG insists, in establishing mandatory performance requirements and specific, well-defined remedial procedures for service failures; claims filed by harmed parties in recent mergers, PPG explains, have been a confusing array of red tape with ill-defined procedures, oftentimes resulting in stall tactics by the railroads and/or total failure to render reimbursement. PPG contends, in particular, that specific measures must include: provisions outlining mandatory performance standards, as well as follow-up service reporting and contingency plans; provisions for defined and specific penalties for service failures resulting from future mergers; and clear and specific settlement rules and required remedial timelines for service damage disputes resulting from post-merger service disruptions that apply equally to all shippers.

Downstream effects. PPG agrees that "downstream effects" must be accorded consideration in future merger proceedings. PPG insists, however, that allowing the merger applicants to project these potential downstream effects would not provide for an unbiased analysis. PPG therefore argues that, in determining downstream effects, the Board should solicit and consider input from all interested parties as well as independent analysis by an unbiased evaluation entity.

PROCTER & GAMBLE COMPANY. The Procter & Gamble Company (P&G) contends that, because the NPR leaves many critical issues (including competition and the delivery of promised public benefits) to be resolved at the discretion of the merging railroads, the proposed rules should be revised to provide maximum direction to the merger applicants relative to the achievement of the "enhanced competition" goal and also relative to other issues such as delivering on promised public benefits (including improved service and greater economic efficiencies). The final rules, P&G insists, should include specific remedies for these types of issues, as well as meaningful objective standards by which a merger application can be evaluated and approved or denied as appropriate. And, P&G adds, the preferred approach to enhancing competition should be to expand this (either in this rulemaking proceeding or in an additional rulemaking proceeding) to the entire rail industry, as opposed to just merging carriers.

NPR § 1180.1(a). P&G contends that the implication that a transaction that reduces the railroad and other transportation alternatives available to shippers will be approved if "there are substantial and demonstrable public benefits to the transaction that cannot otherwise be achieved" is not acceptable. P&G insists that competitive harm to one industry or shipper cannot be offset by a competitive advantage to a different industry or shipper, and (P&G further insists) the "substantial and demonstrable public benefits" suggested by merging railroads need to be agreed upon by shippers as opposed to merely being an opinion of the merging railroads. And, P&G adds in connection with the concept of "public benefits," a process to involve shippers in the decision to approve or disapprove a merger should be developed and defined as part of the merger rules.

NPR § 1180.1(c). P&G contends that the "trade-off" theme suggested by this provision ("The Board believes that mergers serve the public interest only when substantial and demonstrable gains in important public benefits — such as improved service, enhanced competition, and greater economic efficiency — outweigh any anticompetitive effects, potential service disruptions, or other merger-related harms.") will not meet its needs as a shipper. P&G further contends: that the regulations should specify the minimum criteria that must be achieved relative to the enhancement of competition in order for the merger to be approved; that, if a merger application fails to meet these criteria, the Board should disapprove the merger rather than approve subject to conditions specified by the Board; that whether or not "both carriers are financially sound" should have no bearing on how the merger rules are applied; that the merger should be disapproved if the public benefits claimed by the merging railroads fail to be agreed upon by shippers or if the benefits can be achieved by means other than a merger; and that the regulations should outline the consequences (to include shipper rate protection) that applicants will bear for a merger that fails to meet the promised public benefits. P&G insists that the merger rules should be framed in such a manner as to place the burden of failure on the applicants, and should not be silent on the consequences for applicants that fail to meet their commitments.

NPR § 1180.1(c)(1). P&G contends that the notion that "[t]o the extent that a merged carrier continues to operate in a competitive environment, its new efficiencies will be shared with shippers and consumers" is an assumption, not a fact. P&G further contends: that, if railroad merger benefits are to be shared with shippers, the rules will need to specifically state how that is to happen; that, for the railroad calculation of the net public benefits, the rules need to identify the specific measurements and data needed, both prior to and after the merger, to support these claims; and that, lacking any specific criteria to measure the validity of these benefits, these benefits need to be judged by shippers as opposed to the Board or the merging railroads. And, P&G adds, the rules should also specify the consequence of failing to meet or share these benefits, as opposed to having the merging railroads propose additional measures for the Board to take if the benefits do not materialize.

NPR § 1180.1(c)(2)(i). P&G contends that the requirement that applicants propose remedies to mitigate and offset competitive harms sounds a "trade-off" theme that contradicts the goal of enhanced competition and that will not meet P&G's needs as a shipper. P&G further contends that the rules: should state that merger applications that result in competitive harms will be disapproved; should mandate gateway requirements, to include pre-merger vs. post-merger pricing; and should mandate requirements for opening terminal areas to reciprocal switching, interswitching provisions, and contracts for the competitive portion of joint-line routes when the joint-line partner has a bottleneck segment.

NPR § 1180.1(c)(2)(iii). P&G contends that it is not clear how the Board will evaluate the likelihood of transitional service problems, and that it is also not clear what criteria will be used to decide if the potential for these types of problems is large enough to lead to the disapproval of the merger. P&G insists that, at a minimum, the approval/disapproval criteria should be stated in the new rules.

NPR § 1180.1(c)(2)(iv). P&G contends that the requirement that, "[t]o offset harms that would not otherwise be mitigated, applicants shall explain how the transaction and conditions they propose will enhance competition," implies that applicants do not need to enhance competition unless it is necessary as a last resort to offset other harms. P&G insists that an important improvement such as this should be stated as a clear requirement as opposed to something that is optional and that is used only if the applicants have no other choices relative to mitigating merger harms.

NPR § 1180.1(d). P&G contends that, although it is appropriate to impose conditions (*e.g.*, conditions that grant trackage rights, require access for other carriers to facilities, or establish interswitching provisions) to provide direct remedies to specific merger harms, the concept of using conditions to offset merger harms in an indirect manner will not meet P&G's needs as a shipper. P&G further contends that, rather than impose conditions to offset these types of merger harms, the merger should be disapproved. And, P&G adds, although NPR § 1180.1(d) implies that conditions will not be imposed where they would result in "unreasonable operating, financial, or other problems for the combined carrier," it would be better to disapprove the merger rather than harm shippers by protecting the combined carrier from the imposition of appropriate conditions.

NPR § 1180.1(g). P&G contends that NPR § 1180.1(g) should be revised to require that any "merger benefit projections accepted by the Board" be realized within the time period specified by the merging railroads in their application. It is not enough, P&G argues, to require that such benefits be realized "in a timely fashion."

NPR § 1180.1(h). P&G contends that this rule should clarify that the problem resolution teams and the specific procedures for problem resolution must be established and approved by the Board prior to the merger starting, and that failure to meet this requirement will cause the merger to be placed on hold or disapproved. P&G further contends that the rules should also specify the typical types of merger-related damages that are valid for a shipper to recover through the claims process.

NPR § 1180.1(i). P&G contends that, rather than having the applicants anticipate the reaction of the other Class I railroads, the rules should establish a period of time for the other Class I railroads to respond for themselves on this matter. P&G further contends that the rules should also provide that, if the strategic responses of the other Class I railroads include more mergers, the merger proceedings will stop until such time as all of the proposed mergers can be reviewed as a package.

NPR § 1180.6(b)(11). P&G contends that applicants should be required to quantify all net public benefits, and not only those they view as possible to quantify. P&G further contends that benefits described only in general terms such as "more efficient," "improved," "faster," etc., should be viewed as opinions of the applicants as opposed to commitments on the part of the applicants to produce the promised benefits. And, P&G adds, applicants should be required: to describe in measurable terms all public benefits for which they are making a commitment; to submit a detailed plan for each promised benefit outlining how the gap between the current (pre-merger) results and the promised results will be closed; to provide an analysis describing why these benefits cannot be achieved without a merger; and to establish the timeline by which they plan to deliver these benefits so that the Board will be able to better evaluate if the promises are reasonable and to easily determine if the promises are being achieved in the planned timing.

NPR § 1180.7. P&G contends that applicants should also be required: to submit an analysis of the dynamics relative to competition for interline moves that interchange at major gateways; to outline, for representative origin-destination pairs, the projected impact to a shipper's carrier choices at the gateway by virtue of the proposed merger; and to propose solutions to identified problems.

NPR § 1180.8(a). P&G contends that applicants should also be required: to outline their plans relative to increasing the number of engines in the combined fleet as well as their plans for staffing increases for additional crews to support the new system; and to provide projections on the expected timing for these assets to decrease based on the achievement of expected system efficiencies.

NPR § 1180.10(a). P&G contends that, for the route level review, applicants should be required to provide average transit time data for the year prior to the merger for these routes and to describe any expected improvements against this base.

NPR § 1180.10(c). P&G contends that applicants should be required to provide plans for yard consolidations as well as plans for capital improvements to existing yards. P&G further contends that, in addition to dwell time, applicants should be required to provide average yard inventories for the year prior to the transaction for each facility.

NPR § 1180.10(f). P&G contends that applicants should be required to identify any planned post-merger staffing reductions and consolidation of operations.

REAGENT CHEMICAL & RESEARCH. Reagent Chemical & Research, Inc. (Reagent) contends that the NPR does nothing to address competition. Reagent contends, in particular, that the proposed regulations do not impose standards with respect to gateways, bottleneck pricing, or competitive access, and do not address penalties for non-compliance. Reagent further contends: that, although competition is the engine that drives the American economy, competition in the rail industry has been allowed to disintegrate over the past 20 years; that the rail industry today is capacity constrained, with little or no resources to increase capacity; and that, without regulatory reform and the infusion of public funds, the rail industry will continue to shrink. Reagent warns that, in the near future, although there will be no significant increase in rail capacity, no increase in rail vs. rail competition, and no improvement in service, there will be a significant increase in rates.

SHELL OIL COMPANY AND SHELL CHEMICAL COMPANY. Shell,[159] which believes that increased competition (and not increased regulation) is the answer to the problems that currently plague the railroad industry, contends that the NPR does not adequately address the issues that arise from major rail consolidations. Shell further contends that the wording of the NPR is not clear and specific, leaving many of the critical issues to be handled by requiring the merging railroads to explain the steps they will take to address the impact on competition, to minimize service disruptions, and to ensure the realization of projected public benefits. Past experience, Shell argues, would indicate that explanations and pronouncements by the merging parties do not provide adequate safeguards to properly address these important issues. (1) Shell contends that the decrease in competition for rail transportation business engendered by the mergers of the 1990s has created a situation in which market forces are not sufficient to constrain rates at reasonable levels. Shell further contends that, although the theoretical reasons (*e.g.*, rationalization of duplicative rail properties, creation of longer single-line hauls, reduction of interchange costs, and elimination of redundant administrative functions) cited by merger applicants make good sense, the promise of savings passed on to shippers is rarely fulfilled. Shell explains: that the total savings rarely materialize, because unexpected expenses associated with the integration eat into the benefits; that the savings that do appear accrue more slowly than expected, which means that the immediate impact on the consolidated carrier's cost structure is much less dramatic than anticipated; and that the consolidated carrier discovers that its shippers actually have less access to rail-to-rail competition on one end of the haul or the other, which means that the need to share merger savings is not quite so pressing.

(2) Shell contends that a prerequisite of the approval of another large rail consolidation should be structural changes (particularly interswitching and open gateways, and also effective processes to successfully challenge unreasonable rates) that reduce the concentration of market power and increase competition for all affected rail shippers. Shell further contends: that increased competition might not be a good thing for every railroad; that, however, increased competition would be great for the railroad industry; and that, as competition is injected in the place of the market concentration that now exists, there will be innovative new services, better asset utilization, and increased profits, and also an increase in the investment capital flowing to the railroad industry.

(3) Shell contends that the capacity constraints that now exist in the railroad industry reflect that industry's present lack of competition and concentration of market power. The infrastructure problems that exist in the rail industry today would be alleviated, Shell claims, if barriers to entry into that industry were lowered.

(4) Shell contends that, although the railroads that are still experiencing service problems related to past consolidations should focus on addressing those problems, this does not preclude consideration of further consolidations, particularly (Shell adds) when they involve carriers that do not have current significant service issues. Shell further contends: that the solution to current service difficulties will start with carriers developing a customer focus and taking care of the business they have rather than continuing to look toward consolidation as a cure for all ills; that enhancing competition in the industry will enable the marketplace to operate in a manner that rewards good business decisions and holds accountable those responsible for poorly executed transactions; and that, without such competition, the market cannot respond in the appropriate manner.

(5) Shell insists that it does not propose reregulation, but rather further deregulation that will allow competition. Shell further contends that, although it does not propose that Open Access be

[159] Shell Oil Company and Shell Chemical Company are referred to collectively as Shell.

declared tomorrow, it does believe that the current rulemaking proceeding provides an opportune time to begin to reinvigorate the North American railroad industry by slowly introducing rail-to-rail competition. Shell argues, in particular: that the adaptation and introduction of Canadian interswitching rules in the United States would be a small, and not very painful, step toward rail-to-rail competition; that another key element of increasing competition would be to ensure that all viable gateways remain open, both operationally and economically; and that, because (even with these remedies) many captive shipper situations will continue to exist, it is essential that effective mechanisms be available to shippers to challenge unreasonable rates (Shell explains that a significant streamlining of the market dominance and rate reasonableness procedures is essential to ensure that all rail shippers can obtain reasonably priced service from rail carriers that are responsive to their needs). Shell insists that the long-run viability of the North American railroad industry depends on competition, which (Shell believes) would result in a much more vigorous industry while at the same time enhancing the competitiveness of North American refineries, plants, and manufacturing and production facilities.

APPENDIX N: AGRICULTURAL INTERESTS

AMERICAN FARM BUREAU FEDERATION. The American Farm Bureau Federation (AFBF)[160] contends that, although we have apparently recognized the importance of rail-to-rail competition in controlling shipper costs and improving railroads' service performance, we have not proposed meaningful and concrete changes to the procedure we employ to evaluate proposed rail consolidations. AFBF contends, in particular, that our proposed procedural change is deficient in 4 principal areas. (1) AFBF contends that the NPR misses the opportunity to mandate conditions that will improve competitive conditions for captive and near-captive shippers. AFBF insists that, if we have the authority to order a 15-month moratorium on rail merger proposals, we have the authority to impose meaningful competitive remedies if we choose to do so.

(2) AFBF contends that, although the NPR requires merging carriers to provide a plan to ensure that levels of service enjoyed by shippers prior to the merger will not suffer as a result of the merger, the NPR gives no indication of how to ensure that these plans actually come to fruition, rather than frustration, for shippers.

(3) AFBF contends that, although systemic competition may be beneficial in a global sense, a shipper faced with the loss of 1 of 3 or 2 competitive rail carriers could be facing economic disaster. AFBF insists that we should pay special attention to the problems faced by 3-to-2 and 2-to-1 shippers.

(4) AFBF contends that, although we have addressed so-called "transnational effects," we have merely noted that we will include transnational effects among the discretionary factors that we consider in evaluating proposed mergers.

AFBF argues that, although we have adopted new criteria intended to prevent or mitigate unintended anticompetitive consequences of future mergers, we have not put any teeth into these criteria. AFBF explains that there are no anticompetitive or procompetitive thresholds that merging railroads must cross in order to qualify as a merger the Board will approve. AFBF further explains that a failure on the part of a merged railroad to meet its competition enhancement plans will not result in any penalty to that railroad.

[160] AFBF is a national organization of family farmers and ranchers.

AFBF contends that we should add some meaningful objective standards on which we will evaluate, and perhaps reject, future merger applications. AFBF further contends that we should articulate meaningful post-merger performance standards and should accept the responsibility for requiring and enforcing conditions that will improve rather than retard competition.

THE FERTILIZER INSTITUTE AND THE CANADIAN FERTILIZER INSTITUTE. The Fertilizer Institute (TFI) and The Canadian Fertilizer Institute (CFI)[161] indicate that they agree that our merger policies must be substantially revised to meet the needs of rail transportation users and providers in light of a substantially-concentrated rail industry. TFI and CFI also indicate that they agree that our approach in future rail mergers must be to "enhance" rather than simply "preserve" competition, and that much more careful attention has to be given in rail merger applications and administration to the assurance of rail service, oversight, monitoring, and other areas. TFI and CFI further indicate, however, that they believe that the rules proposed in the NPR are deficient in a number of key respects. (1) TFI and CFI applaud the fundamental decision to require "enhanced competition." This fundamental decision is correct, TFI and CFI contend, because application of our current merger policy over the past 5 years has produced a decidedly less competitive rail system. Competitive losses, TFI and CFI claim, have been in 2 primary areas. (i) TFI and CFI contend that shippers have lost competition provided by carriers over part of a rail movement, when (on account, TFI and CFI say, of flawed application of the so-called "one lump" theory) mergers involving the combination of end-to-end routes have been permitted without ameliorating conditions. (ii) TFI and CFI further contend that rail mergers of the size and scope of those approved since 1994 have vastly reduced the amount of potential leverage provided by geographic competition, as carriers with much broader size and scope have begun to serve more and more of the producing and consuming regions for various commodities.

(2) TFI and CFI further contend that, although the fundamental decision to require "enhanced competition" is correct, the proposed rules need to be made substantially more specific in order to provide shippers and carriers with a clear idea of what will be required in future merger applications. TFI and CFI indicate that, although they recognize that the Board is acting at the level of broad policy and therefore needs to provide for a certain amount of flexibility in its rules to cover situations that may arise, they also believe that the proposed rules are so vague as to provide neither shippers nor carriers with clear notice of what is required, and what will be expected, in the area of "enhanced competition." TFI and CFI further indicate that the vagueness of the rules is such that they are extremely concerned that applicant carriers in future mergers might give only lip service to key areas of "enhanced competition" because the vagueness of the proposed rules would permit them to do so.

(3) TFI and CFI contend, in particular, that there are 3 areas upon which we should focus in making the proposed rules more specific. (i) TFI and CFI contend that the proposed rules should be revised to specify that the "enhanced competition" that will be required in future merger applications must include enhanced rail-to-rail (*i.e.*, intramodal) competition in the area affected by the proposed merger. Enhanced intermodal competition, TFI and CFI warn, would do nothing to cure such anticompetitive effects as loss of segment competition and loss of geographic competition. (ii) TFI and CFI contend that the proposed rules should be revised to include examples of the enhanced rail-to-rail competition that applicant carriers will be expected to consider when submitting an application. TFI and CFI contend, in particular, that the proposed rules should specify that proposals

[161] TFI (which is the national trade association of the fertilizer industry) and CFI (which represents the basic manufacturers of nitrogen, phosphate, potash, and sulphur fertilizers in Canada, as well as the major retail distributors) filed jointly.

for enhanced rail-to-rail competition may include: provisions for enhanced reciprocal switching in terminal areas or at interchanges; commitments to provide contract and common carrier rates to interchanges; elimination of existing and future barriers by shortlines to provide competitive rail service; establishment of terminal carriers serving all line-haul railroads serving an area; and similar proposals. (iii) TFI and CFI contend that the wording of NPR § 1180.1(a)'s fourth sentence (which provides, in part, that "the Board does not favor consolidations that reduce the railroad and other transportation alternatives available to shippers unless there are substantial and demonstrable public benefits to the transaction that cannot otherwise be achieved") should be revised to clarify what appears to be an unintended ambiguity. TFI and CFI warn that this wording suggests that the Board *would* favor consolidations that reduce railroad and other transportation alternatives where there *are* substantial public benefits that cannot otherwise be achieved. TFI and CFI insist, however, that such an interpretation, although permitted by the proposed wording, would be flatly inconsistent both with sound public policy and with the Board's past practice. TFI and CFI therefore contend that the wording should be clarified, by changing the proposed rule so that it states that the Board "does not favor consolidations that reduce railroad and other transportation alternatives." Such revised wording, TFI and CFI argue, would be consistent with our call for "enhanced competition" and would make clear that reductions in competitive alternatives must be cured before a proposed transaction can be approved.

(4) TFI and CFI contend that approval of any future rail consolidations should include a condition requiring the merging carriers to provide mandatory expedited arbitration to resolve service disputes and disputes over application of the Board's conditions in specific cases. TFI and CFI explain: that the current mechanisms for resolving disputes between shippers and carriers are seriously in need of reform; that, after the service disruptions experienced in connection with the UP/SP and Conrail transactions, shippers had to resort to the courts to obtain redress; that, however, most shippers, and particularly small shippers, simply cannot afford to pursue a "lengthy and expensive" judicial remedy; and that, while American business has moved toward inexpensive private methods (such as mediation and arbitration) for quickly resolving commercial disputes, rail carriers have never generally consented to arbitration of disputes with shippers. TFI and CFI therefore argue that, to provide to shippers an accessible and usable process for resolving problems that might flow from a merger, we should include in our rules a requirement that applicant carriers must agree to mandatory, expedited arbitration, at the shipper's choice, of any disputes over rail service arising within a specified time (*e.g.*, 2 years) of the implementation of a major merger transaction, and any dispute (regardless of when that dispute arises) over the application of any merger condition in a specific case. TFI and CFI add, however, that general disputes over the meaning of merger conditions, or other broad policy disputes, would be resolved by the Board in the first instance.

(5) TFI and CFI contend that the scope of this rulemaking, which is focused purely on merger policy, is too narrow. TFI and CFI warn that, by focusing purely on conditions in rail mergers, our approach would create a serious disparity between the competitive conditions facing merging versus non-merging carriers, to the detriment of both merging carriers and the shipping public. It would be far better, TFI and CFI believe, if we revised our rules on rail-to-rail competition to provide for a level, procompetitive playing field for all major carriers providing rail transportation service throughout the United States. TFI and CFI contend, in particular, that the approval of any future consolidation should be accompanied by a change in the Board's rules on terminal access through reciprocal switching. TFI and CFI further contend: that significantly-increased rail-to-rail competition should include the right to reciprocal switching within a specified distance of a terminal; and that, to implement this change, we should reevaluate our extremely restrictive competitive access rules, and should provide for such increased reciprocal switching access.

(6) TFI and CFI note that NPR § 1180.1(c)(2)(i) would require merger applicants to explain how they would preserve existing competitive options such as the use of major existing gateways and the opportunity to enter contracts for one segment of a movement as a means of gaining the right to separately pursue rate relief for the remainder of a movement. TFI and CFI indicate that, although they applaud these changes, they believe that our rules should also make clear that carriers must explain how they would preserve the routing over such gateways not just physically (*i.e.*, by permitting routing over the gateway) but also economically (*i.e.*, by ensuring that the rate charged to the gateway permits competition over the remainder of the movement). TFI and CFI add that this could be done, for example, through the merging carriers' promise to preserve existing rate relationships, and agreeing in advance to expedited, mandatory arbitration of rate disputes to the gateway.

(7)(a) *SAPs: in general.* TFI and CFI applaud the requirement that carriers include a service assurance plan in their merger application. TFI and CFI contend, however, that they believe that these SAPs should provide for mandatory, expedited arbitration of any service disputes, at the shipper's election. (b) *SAPs: technical matter.* TFI and CFI further contend that we should clarify that any remedies in a SAP should be in addition to, and should not replace, any remedies that the shipper might have against the carrier as part, for example, of a shipper's contract with the carrier. TFI and CFI explain that they want to ensure that the inclusion of a carrier's SAP as a condition of the merger, combined with the agency's authority to exempt a merger from the force of other law, would not strip a shipper of existing rights.

(8) TFI and CFI indicate that they support the call for increased monitoring and oversight. TFI and CFI further indicate that they believe that the Board is correct in requiring carriers to provide baseline, "benchmark" data, so that shippers may have a clear idea of how a merger is actually progressing. TFI and CFI add, however, that they also believe that, as part of this requirement, applicant carriers should be required to provide information on transit times over major corridors for the year prior to the application, and then should be required to provide that information following the merger. TFI and CFI explain that, whereas transit time information is the most important and direct determinant of the health of a carrier's service, the proposed rules appear to rely too heavily on "indirect" indicia of service such as dwell time, system average train speed, etc.

(9) TFI and CFI indicate that, although they support the call for an examination of "downstream" effects, they also believe that prospective applicants should be given a clearer idea of the extent to which such "downstream" effects should be discussed and the extent to which possible combinations of carriers should be examined. And, TFI and CFI add, we should examine not only "downstream" effects but also so-called "upstream" effects (*i.e.*, the effects of a proposed merger on conditions imposed in prior mergers).

NATIONAL GRAIN AND FEED ASSOCIATION. National Grain and Feed Association (NGFA)[162] contends: that future rail mergers must be scrutinized with extreme care to ensure that efficiencies and other benefits claimed are realistically obtainable and not otherwise available through alternative strategies; that, if mergers are to be approved, they must be conditioned in certain respects to ameliorate injury to customers and to retain the ability of shippers to move goods throughout the entire national rail system without unreasonable impediments; that a failure to issue meaningful, clearly articulated, and readily enforceable standards will invite further injury to rail customers by encouraging carriers to embark upon potentially disruptive transactions on the basis

[162] NGFA, a trade association, represents 1,000+ grain, feed, processing, and grain-related companies.

of unrealistic assessments of public benefits; and that only if carriers know with a high degree of certainty that they will be held accountable and required to make innocent rail users whole will they exercise appropriate care in structuring and implementing future merger transactions.

Enhanced competition. NGFA supports the "enhanced competition" concept, which it regards as a sound concept that is squarely within the prerogatives of the Board. NGFA contends, however, that we should clarify the parameters of "enhanced competition," and should indicate, for example, that a consolidation proposal will not be deemed to satisfy that criterion solely by resulting in a larger railroad better positioned to compete with trucks. Enhanced competition, NGFA explains, should mean enhanced competition between railroads, and not merely enhanced competition between railroads, on the one hand, and trucks or water commerce, on the other hand; and, NGFA adds, enhanced competition should be understood to mean the ability to provide better service to the railroad's customers without detracting unreasonably from the rate and service options presently available to them. NGFA further contends that the NPR contains too much uncertainty as respects competitive issues. NGFA explains: that it is unclear whether "enhanced competition" and other 49 U.S.C. 11324 considerations are to be measured under past merger standards or under new standards of benefit and harm that the Board may develop; that it is not sufficiently clear how the gateway, bottleneck, and build-out elements will function, or why that determination was left to the applicant railroads; that, because there is a genuine dispute between railroads and shippers regarding the effectuation of gateway, bottleneck, and build-out relief, it is far from "competitive enhancement" to place the resolution of these issues in the railroads' hands initially; and that, without greater clarity, these elements of the NPR will fail to provide an effective benchmark for negotiations between shippers and railroads and for use if and when shippers seek protection in merger proceedings. A better approach, NGFA argues, would be a more firm series of explanatory guidelines. NGFA also contends that we should address the substantive issues (such as whether a 3-to-2 reduction in rail service should be regarded as anticompetitive) with respect to which the ANPR solicited comments.[163]

Gateways. NGFA insists that merger applicants must be required to keep major existing gateways open if future mergers are to avoid a repetition of the market foreclosures brought about when carriers refuse to provide competitive rates from or to off-line destinations. With respect to the NPR § 1180.1(c)(2)(i) requirement that applicants explain how they would preserve competitive options such as those involving the use of major existing gateways, NGFA contends: that, if we indeed intend to require enhanced competition as an element of any future merger, then genuinely open gateways must be a part of that package; that the test of a "major" gateway should be whether it materially affects access to other rail service; that, because a gateway cannot be kept "open" if the merged carrier can block use of the gateway through rate action or inaction clearly designed to deter the movement of traffic over the gateway, gateways must be kept open economically as well as physically; and that the merged carrier should not be permitted to raise its rates over the "open" gateway to any greater extent than the carrier has raised its actual systemwide rates for the same commodities moving in the same quantities to or from the same markets. And, NGFA adds, if we intend to permit "open" gateways to be closed through rate actions intended solely to deter the use of the gateway, we should clearly say so in order that parties not needlessly waste their resources in a quest for merger conditions that we have no intention of imposing.

[163] NGFA believes that a 3-to-2 reduction in rail service should be regarded as anticompetitive and should be remediated.

Bottlenecks. With respect to the NPR § 1180.1(c)(2)(i) requirement that applicants explain how they would preserve competitive options such as those involving the opportunity to enter into contracts for one segment of a movement as a means of gaining the right separately to pursue rate relief for the remainder of the movement, NGFA contends that in any situation where a merger eliminates an opportunity that would have existed (geographically) for bottleneck relief under the Board's contract approach, it would be better to require that a rate be quoted to or from an interchange point. A quoted rate, NGFA explains, could then be challenged, if need be, under statutory provisions. It is difficult to see, NGFA argues, how a shipper can challenge the offer of a contract rate.

Reciprocal switching. NGFA disagrees with the argument that changes in our approach to reciprocal switching should be directed by Congress. NGFA insists, rather, that the Board, either under its broad merger-conditioning authority or as a matter of interpreting 49 U.S.C. 11102, can facilitate reciprocal switching; and, NGFA argues, the Board should do so to enhance competition in merger settings. NGFA adds, however, that, if we believe that changes in our approach to reciprocal switching must be directed by Congress, we should identify specifically those changes to the statute that we regard as necessary in order to bring about enhanced competition through reciprocal switching, at least in merger proceedings.

Downstream effects. NGFA contends that, although we should examine the limited possibilities for other Class I mergers as matters related to a pending merger, it is not entirely clear how the examination contemplated by NPR § 1180.1(i) will be implemented. NGFA explains that, although the consideration of downstream effects makes the most sense if it is assumed that a second merger will follow on the heels of the first and that both will be before the Board in a relatively concurrent posture, that scenario may not occur. NGFA therefore argues that we should compensate for any deficiencies resulting from a time lag between an initial merger application and a downstream merger application by stating that we will utilize our 49 U.S.C. 11324 conditioning authority to reserve jurisdiction to impose further conditions in the event that "downstream" transactions sufficiently alter the competitive situation so as to warrant such steps. NGFA adds that, in the next major Class I merger proceeding, it may be appropriate to focus on whether a North American railroad duopoly is in the public interest without requiring the applicants to specifically identify the participants or components of such a duopoly.

Service disruptions. NGFA contends: that, although a Board monitoring system and a Service Council are positive proposals, they do not supplant the need for a more disciplined approach to post-merger service failures; that mere STB monitoring of service failures, or requiring periodic report filing with the Board, will do little or nothing to deter service failures or to make shippers whole for post-merger damages; and that, although it may be difficult to prescribe exact rules that contemplate and compensate adequately and fairly for each discreet form of merger-related damage that may be suffered by shippers as a result of post-merger service failures, we should take steps that provide a persuasive incentive for carriers to avoid repetitions of the service problems that followed the BN/SF, UP/SP, and Conrail transactions. And, NGFA adds, if the merged carriers are to be allowed to recover their service failure costs through rates, they should not also be able to recover them by denying compensation to their customers; shippers, NGFA insists, should not have to pay twice for the same service failure costs. NGFA has therefore made 3 proposals. (a) NGFA proposes that railroads should be compelled to respond to service failure damage claims within 120 days of receipt of the claim (or some other time period that the Board may prefer). (b) NGFA proposes that railroads: should not be allowed to arbitrarily reject claims; should therefore be required to set forth substantive reasons for refusing claims; and should also be required to apply a "market compensation" or similar liability standard in evaluating the payment of damages for service failures. (c) NGFA proposes that applicants should be required to subject themselves to arbitration for the resolution of service failure claims that are not settled voluntarily. And, NGFA adds, we should provide that parties have the right to agree on an arbitration forum or to use arbitration under STB procedures as a fall-back system.[164]

Transnational issues. NGFA contends that NPR § 1180.1(k)'s transnational standards should be expanded to require applicants to a transnational transaction to address cross-border car distribution, marketing, and route rationalization issues. NGFA explains that it does not suffice to require applicants to present evidence only as to the United States rail network. Rather, NGFA insists, a transnational transaction that permits a foreign entity to control a railroad operating in the U.S. should be examined to determine whether the transaction will prejudice the interests of U.S. shippers.

Privately negotiated contracts. NGFA, which notes that NPR § 1180.1(e) provides that the Board will respect the sanctity of collective bargaining agreements and will look with extreme disfavor on overrides of such agreements, contends that we should include in our regulations a similar provision regarding privately negotiated contracts between railroads and their customers.

Procedural schedule. NGFA opposes the adoption of a procedural schedule shorter than allowed by 49 U.S.C. 11325 and generally utilized by the Board. NGFA argues that, because any future Class I mergers are likely to start the "final round" of North American rail mergers, the Board owes it to the public to undertake a thorough examination of the facts alleged to justify further consolidations and the consequences of such steps. And, NGFA insists, a meaningful examination of the complexities of a Class I consolidation transaction, including an adequate opportunity for discovery, cannot be accomplished with the "truncated schedule" proposed by BNSF.

THE "WHEAT, BARLEY & GRAINS COMMISSIONS" GROUP. WB&GC[165] contends that the proposed rules do not adequately meet the needs of the rail customer community at large. The rules that we have proposed, WB&GC contends, do nothing to reverse the continuing effects of market abuse by the railroads. The Board, WB&GC insists, has not caught the proper balance between the railroads and the public interest.

---

[164] NGFA insists that it is not requesting the Board to include in the final rules any determination of carrier liability for particular forms of damages. NGFA contends, rather, that it is urging that the Board establish a framework that will help guide the parties through any private-sector negotiations they wish to undertake, or, alternatively, that will serve as a benchmark for remedial requests if private negotiations fail and these issues are pursued in a merger adjudication. NGFA further contends that the framework it contemplates should include a statement that carriers will be expected to be fully responsible for service failures and should encourage the use of arbitration to resolve disputes. And, NGFA adds, the Board should make it absolutely clear that it does not intend, by addressing these issues, to preempt access to remedies that would exist in the absence of merger rules.

[165] Montana Wheat & Barley Committee, Colorado Wheat Administrative Committee, Idaho Barley Commission, Idaho Wheat Commission, Oregon Grains Commission, Nebraska Wheat Board, South Dakota Wheat Commission, and Washington Barley Commission are referred to collectively as the "Wheat, Barley & Grains Commissions" group or WB&GC.

Background. (1) WB&GC contends that the history of the past several rail mergers is instructive. These mergers, WB&GC argues, have not significantly improved service, have not increased or even maintained existing levels of competition, have not resulted in lower rates,[166] and have not produced increased efficiency. Rather, WB&GC insists, the past several rail mergers have resulted in service disruptions, closed gateways, and increased transportation costs for rail customers. The past several rail mergers, WB&GC maintains, have generated limited economic benefits but significant economic harms. WB&GC adds: that the costs associated with service disruptions go far beyond the loss of revenue to the rail customer; that loss of business to the rail customer equates to loss of employee wages, lost sales and market share, increased trucking, and attendant local air pollution; and that these increased costs and losses ripple throughout the local economies.

(2) WB&GC contends that the overly consolidated rail industry that exists today is fraught with service problems, customer suffering, and rate gouging. There is today, WB&GC argues, a lack of competition among the nation's railroads; whole states, regions, and industries, WB&GC claims, are captive to a single railroad; and there is, WB&GC maintains, continuing evidence of market power abuse and continuing abysmally poor levels of customer service. And, WB&GC adds, the concentration that exists in the rail industry today has allowed the Class I railroads to discourage economic development and to stifle value-added industrial base drives by agricultural-based states such as Idaho, Colorado, Montana, North Dakota, South Dakota, and Nebraska.

Deficiencies in the NPR. (1) WB&GC contends that, although the NPR sets out a "cookbook" on how to write future merger applications, the regulations that make up the cookbook will not serve to raise the level of competition in future mergers. The proposed rules, WB&GC argues, let the merging railroads decide what they want to merge, let the merging railroads decide what the impacts will be, let the merging railroads identify those that will be hurt by the merger, let the merging railroads decide the level and degree of mitigation, and let the merging railroads develop alternate plans about how they will develop competition for themselves. WB&GC insists that rail customers are not adequately protected by the proposed rules, which WB&GC regards as a recipe for maximum discretion and not for maximum direction.

(2) What is missing from the NPR, WB&GC contends, is an effort by the Board to increase rail-to-rail competition throughout the rail industry. WB&GC argues that, although the Board has announced that "enhanced competition" is its objective, the reality of the matter is that the proposed merger guidelines neither enhance nor even maintain competition. WB&GC contends that, although the NPR asserts that competition will be maintained in future mergers, the NPR does not provide any standards, benchmarks, or remedies that will allow judgments and restitution procedures to rail customers in the event the railroads fail to live up to their promises. WB&GC contends, by way of example, that existing gateways will not be kept open, and therefore existing competition will not be maintained, unless: we require that gateways be kept open economically as well as physically; we impose service standards applicable to such gateways; and we establish penalties that will come into play if the gateways are not kept open.

(3) WB&GC contends that, although the Board is obligated to protect those adversely affected by rail mergers, the Board seems too content after the horse is out of the barn to allow the railroads to propose new standards for keeping the door closed in the future. WB&GC argues that regulatory monitoring cannot mitigate or prevent economic damage to rail customers; once the damage has been

[166] WB&GC insists that, despite aggregated revenue per ton mile data that (WB&GC claims) has been erroneously used to suggest that past mergers have resulted in lower rates, the fact of the matter is that past mergers have not resulted in lower rates.

done, WB&GC insists, no amount of monitoring is going to undo the damage. WB&GC also argues that allowing the railroads to propose remedies to mitigate and offset competitive harms is not enough; the Board itself, WB&GC insists, should develop such remedies. WB&GC further argues that we should establish penalties or economic disincentives to mitigate the damages incurred by the public; it simply does not suffice, WB&GC insists, to require applicants to provide a detailed service plan addressing transitional service problems.

(4) WB&GC contends that the NPR's summary of participants' ANPR comments is not sufficient. The law, WB&GC insists, requires the Board to respond to the comments submitted by each party.

Recommended approach. (1) WB&GC contends that the Board should respond to what the participants in this rulemaking proceeding have asked for. WB&GC contends, in particular, that the Board should look at the problems of rail consolidations and the market dominance created by past merger policy procedures, and that the Board should adopt rules calculated to lead to a competitive rail transportation system that provides fairly priced, safe, and reliable service. WB&GC insists that, to enhance rail-to-rail competition in the final 2-railroad monopoly system, it will be necessary to open up competitive access for rail customers.

(2) WB&GC contends that, rather than allowing merger applicants to develop standards, the Board should itself adopt standards. The complete lack of rail-to-rail competition in this nation and the absence of competing railroads in this country, WB&GC argues, requires maximum direction by the Board. And, WB&GC insists, the standards adopted by the Board should be specific, easily definable, enforceable, and verifiable by all.

(3) WB&GC contends that, if rail customers are to be served as promised by the railroads, the Board must establish economic incentives for performance by the railroads and economic penalties for non-performance by the railroads. The Board, WB&GC insists, must require the carriers promising merger benefits to deliver on the benefits or face economic sanctions that will mitigate the losses incurred by rail customers. Rail customers, WB&GC argues, should not have to pay for rail mergers. And, WB&GC adds, the merging carriers that stand to make greater profits due to the merger should be required to mitigate those rail customers that are placed at an economic disadvantage due to the merger.

Specific recommended proposals. (1) WB&GC contends that the Board should adopt merger policies that do not allow any further lessening of rail-to-rail competition. The key merger criterion for measuring adverse effects, WB&GC insists, should be the effect of future rail mergers on the rail customers that pay the freight bills. And, WB&GC adds, rather than merely monitoring post-merger performance, the Board should take more aggressive actions to preserve and promote competitive options and to correct loss of merger benefits.

(2) WB&GC contends that the Board should adopt a policy that provides that, as a matter of national rail policy, all rail customers in future rail mergers should have the right to rail-to-rail competition. WB&GC further contends that, for those rail customers that do not have rail-to-rail competition, the Board should adopt a responsible regulatory relief system. WB&GC argues that, although preserving and fostering rail competition should be preferred to regulatory oversight, reasonable regulatory oversight must be economically available to captive customers in areas where rail competition is not possible.

(3) WB&GC contends that the Board should develop workable rules that provide realistic, reasonable, and fair protection methods for small captive rail customers that today have no competitive rail choice.

(4) WB&GC contends that, to protect the nation's railroad customers and U.S. industry, the Board should adopt a procompetitive stance in every action and decision. WB&GC further contends

that, if the Board does not feel it has the authority to act in a procompetitive stance, it should immediately seek such authority.

(5) WB&GC contends that the rules promulgated by the Board should provide maximum direction and minimum discretion to merger applicants.

(6) WB&GC contends that rail mergers should be reopened in the event rail competition is curtailed or lost. WB&GC further contends that clearly defined post-merger conditioning is particularly appropriate in light of recent history that (WB&GC claims) has shown that the nation's railroads have made many promises in past mergers that have never materialized.

(7) WB&GC contends that all future rail mergers should be conditioned to enhance, and not just to maintain, competition. WB&GC further contends that options such as competitive access, bottleneck pricing, terminal access, reciprocal switching, joint running rights, elimination of paper and steel barriers, and arbitration to maintain competition must be available to mitigate anticompetitive effects of mergers.

(8) WB&GC contends that railroads should be held accountable financially for service failures emanating from a merger and that customers should be compensated for economic losses suffered as a result of service diminishments.

(9) WB&GC contends that the Board should support legislative proposals to increase competition in the railroad industry without increasing regulation.

(10) As respects transnational issues, WB&GC contends that, because final offer arbitration (FOA) is available to Canadian rail customers, it should also be made available to American rail customers. WB&GC argues that, if FOA is not made available to American rail customers, the Board will be required to look at the negative effects upon American rail customers where, on a Canadian rate to a U.S. destination, a Canadian rail customer can get an FOA ruling but an American rail customer cannot get such a ruling even though both are competing for the same rail traffic movement.

AG PROCESSING INC. Ag Processing Inc. (AGP), a regional cooperative owned by 285 local cooperatives and over 300,000 farmers and ranchers, agrees that "enhanced competition" is a highly necessary goal but views the NPR as wanting because (AGP claims) the NPR does not sufficiently elaborate the measures that would satisfy the "enhanced competition" criterion. AGP contends that the NPR devotes scant verbiage to explanations of the choices made by the Board between the various specific proposals offered at the ANPR stage and the Board's own choice of proposed rules. AGP further contends that, although the NPR contains several repetitions of the Board's stated preference for private-sector solutions, the NPR contains little in the way of logical explanations for choices made between competing ANPR proposals. (1) AGP contends that one of the NPR's greatest weaknesses is its failure to recognize and remedy adequately the loss of market access that has followed all recent mergers and that is likely to follow any future mergers. It is literally axiomatic, AGP argues, that merging carriers, by limiting rate options, by failing to quote rates over gateways, and by other devices, foreclose market access to producers of goods and restrict production origination choices for buyers of goods. Rail mergers, AGP insists, have restricted producers to destination markets served by their originating carrier and have restricted buyers to origins served by their destination carrier. Mergers, AGP explains, have eliminated options for both sellers and buyers because the railroad now controls the marketing; and, AGP adds, the NPR offers no clear hope that such market curtailments will be cured through the new requirement of "enhanced competition."

(2) AGP contends that, although NPR § 1180.1(c)(2)(i) requires applicants to explain how they would preserve competitive options such as those involving the use of major existing gateways, the NPR lacks any explanation of how merging carriers would be expected or required to keep major gateways open. Many ANPR commenters, AGP argues, urged the Board to make clear that a

gateway would not be considered "open" unless it was "open" economically as well as physically; and some ANPR commenters, AGP further argues, suggested that, because the widespread elevation of rates on a merged system for gateway traffic would have the effect of embargoing the movement of that traffic onto or from a merged system, the Board should impose a requirement against rate increases over existing gateways that are higher than system increases for similar traffic. AGP notes, however, that the Board adopted no such requirement, choosing instead to leave it to the merger applicants to explain how they would keep gateways open. AGP contends: that if the Board does nothing more than require the maintenance of an interchange switch to meet the "open gateway" requirement, and then allows the gateway to be closed through rate adjustments, the "open gateway" requirement will be a sham; and that, therefore, the Board should, at a minimum, make clear that a gateway will not be considered "open" if its use is foreclosed by rate actions. AGP adds that whether, in any given instance, the disuse of a gateway is attributable to a rate action, and not to other market conditions, would be a question of fact.

(3) AGP contends that an interpretation of the "open gateway" condition that would simply require that an interchange be kept in place and that would relegate dissatisfaction with post-merger rate adjustments that deter gateway movement to regulatory proceedings attacking maximum rate reasonableness would defeat the purpose of the open gateway requirement. AGP further contends: that a gateway should be "open" to all traffic, and not just to traffic that moves at rates that are subject to the Board's maximum rate jurisdiction; that it is just as important to "enhance competition" with respect to traffic moving at, say, 170% of variable costs as it is for traffic moving at 200% of variable costs; and that, if traffic is moving over an existing pre-merger gateway at 170% of variable costs, there is no reason why it should not be able to continue to move over that gateway if the objective of an open gateway provision is to enhance competition.

(4) AGP contends that, although it may not be necessary to mandate the retention of all pre-merger gateways, a strict burden should be placed on the applicant carriers to demonstrate which pre-merger gateways can be closed without visiting harm upon traffic that has moved over those gateways. AGP further contends that, although it is one matter to say that a merged carrier should be permitted to reduce rates where they reflect newfound post-merger operating economies, it is another matter altogether to sanction rate increases aimed solely at foreclosing the movement of interline traffic or rate adjustments designed to favor system-traffic. The Board, AGP insists, should use common sense in fashioning appropriate gateway relief that is realistic and effective, but above all should make clear that actions of a market foreclosing nature will not be countenanced.

(5) AGP contends that bottleneck rate relief is not the proper solution to post-merger market foreclosures. AGP explains that this "solution" would turn every post-merger market foreclosure into a hugely expensive, complicated, and time-consuming rate case. AGP further explains: that the Board's procedures for resolving rate disputes are clearly defined only where the dispute involves high-density, repetitive movements susceptible to treatment under stand-alone cost methodology; that, in all other cases, the available procedures are so uncertain and daunting that they have not been invoked once since they were established 3 years ago; and that, in the more than 20 years since enactment of the Staggers Act, there has been no rate case in which a shipper has prevailed other than where stand-alone costs have been utilized.

(6) AGP contends that the Board should state unequivocally that, in any merger subject to the proposed rules, it will reserve the right to use its 49 U.S.C. 11324 conditioning authority in the event that a "downstream" merger changes competitive relationships. AGP explains that, if the initial applicants are placed on notice that the Board reserves the right to impose further conditions to enhance competition in the light of any subsequent merger transactions that may be proposed and approved, then the initial applicants would have the right to determine whether or not to consummate a merger so conditioned, or to delay its consummation in order to find out what conditions might ultimately be attached as a result of a later transaction that had not procedurally "caught up" with

the first transaction. AGP further explains that, in the absence of consensual retroactivity of this nature, the Board would have only two options: it would either have to deny the initial merger because of uncertainty regarding the consequences of the next merger to come before it; or it would have to grant the first merger regardless of the downstream consequences of that merger. AGP insists, however, that, if the Board takes the latter approach, then its examination of downstream consequences would appear to be an exercise in futility.

BUNGE CORPORATION. Bunge Corporation (Bunge) contends that Class I rail mergers severely foreclose the ability of many shippers to reach their traditional and necessary markets. This market foreclosure situation develops, Bunge explains: when the pre-merger carrier serving a production point does not directly reach a large number of consumption points for the product, and therefore maintains routes over connecting gateways; and when, after a merger, the new system terminates access to those gateways because the merged carrier prefers to hold traffic to its own line. The BN/SF merger, Bunge further explains, completely terminated the ability of Bunge's Emporia plant to market its products to any points other than those on the BNSF system, and thereby wiped out Bunge's market for 25% of the output of a valuable manufacturing facility. Bunge adds that, as a result of trackage rights arrangements between BNSF and other railroads, the BN/SF merger resulted in an expansion of the markets available to Bunge's competitors while Bunge's own markets were being curtailed. Bunge claims that, so far as it can determine from the NPR, Bunge's proposals to address its market foreclosure concerns were ignored in the NPR, without (Bunge insists) any explanation by the Board. (1) Bunge contends that, in past mergers, the Board has accepted such results on the theory that it is not the Board's function to protect individual competitors, but just to preserve competition. The Board's position, Bunge argues, seems to be that purchasers of products, such as those that Bunge was foreclosed from shipping from Emporia to former SP destinations, would continue to have alternative sources of supply located on the UP/SP system. Bunge insists, however, that this is an extremely narrow and unrealistic concept of competition, because it overlooks the fact that the merger not only has deprived the owner of a major production facility of the full use of that asset, but has also decreased the number of competitive sellers available to buyers of the product.

(2) Bunge further contends that loss of markets, such as that experienced by Bunge at Emporia, also has been countenanced by the Board as advancing the efficiencies of single-line service resulting from mergers. Bunge insists, however, that while single-line service may make a railroad more efficient and more profitable, it does not play out in the form of reduced rates offered to shippers; rather, Bunge argues, it just makes the railroad more profitable.

(3) Bunge maintains that, while the misfortune of one producer may be the good fortune of another, it likewise becomes the misfortune of the marketplace, which (Bunge insists) has now been segmented into two orbits (the BNSF system and the UP system) with little or no interchange between them. Bunge insists that it is difficult if not impossible to see how either competition between railroads or competition to supply a product is enhanced when merging carriers can curtail market access.

(4) Bunge contends that, despite all the talk of "enhanced competition," Bunge is unable to find anything in the NPR that even preserves the competitive marketplace available to a pre-merger production facility, to say nothing about specific rules to actually enhance competition. Bunge argues that, although requiring a truly open gateway system would be a significant step in the direction of preserving markets for shippers, NPR § 1180.1(c) is deficient because it contains no minimum standards for preservation of an open gateway. Rather, Bunge insists, the proposed rule merely invites the applicant carriers to set that standard, which (Bunge argues) is like letting a rabbit take lettuce to market.

(5) Bunge contends that, if a requirement that merging carriers continue to use existing gateways means simply that the switches will be left in place, then the "gateway" condition will fail to either enhance or preserve competition. An open gateway condition, Bunge explains, must be accompanied by minimum economic standards to ensure a useable gateway. Bunge further contends that merely stating that "enhanced competition" is the goal of the new rules will not suffice to ensure such competition. Applicant carriers, Bunge explains, almost surely will suggest, as they have in every recent merger, that competition will be enhanced by a merger that produces a stronger surviving carrier.

(6) Bunge contends that we should adopt an approach that would require merging carriers to retain effective competition over existing gateways. Bunge contends, in particular, that we should adopt an "open gateway" provision that would read as follows: "Applicants shall keep open all gateways between their system and any other railroad. This requirement shall include not merely the retention of facilities for physical interchange of traffic, but shall also mean that: (A) There shall be a rebuttable presumption against rate increases by the applicants for the movement of any traffic over an open gateway if that increase is higher, actually or on a percentage basis, than any rate increase applied by the applicants to like traffic moving between points on the merged system. The presumption against such increases may be overcome by a showing that rate increases on gateway traffic higher than on intra-system traffic are necessary to enhance intramodal or intermodal competition. (B) The applicants may not reduce rates between points on their own system without making similar reductions available, on a percentage basis, from gateways unless the applicants can establish that their system reductions are necessary to retain traffic threatened with diversion or to attract new traffic."

IMC GLOBAL. IMC Global Inc. (IMC Global), which indicates that it endorses the comments submitted by ARC, applauds the proposed change in emphasis from promoting mergers to enhancing competition,[167] but questions whether the proposed changes adequately place the focus on enhancement of the rail-to-rail competition that is lost in rail mergers. IMC Global contends: that the proposals fail to address major areas of concern raised by numerous shippers and shortlines; that the proposed rules are exceedingly vague and lacking in accountability; and that, in several key areas, the Board, instead of itself proposing merger remedies, has proposed to leave it to the applicant rail carriers to propose remedies for merger-related failures and harmful effects. Merger applicants, IMC Global insists, will not come forward with the aggressive remedies that would be required in the public interest.

Acquisition premiums. Recent rail mergers, IMC Global contends, have been characterized by bidding wars, in which 2 rail carriers vying to acquire a third have pushed acquisition prices far above what otherwise would be fair value for the acquired carrier; and, IMC Global adds, the merger applicant or applicants that have paid those acquisition premiums have invariably sought to recover them by raising rail rates for captive shippers (as, IMC Global claims, CSX and NS are now doing with respect to the acquisition premium that IMC Global insists they paid in connection with the

---

[167] IMC Global insists that the Board's 49 U.S.C. 11324 conditioning authority is not limited to the correction of competitive harms created by the merger. The Board, IMC Global argues, has authority under 49 U.S.C. 11324 to impose a condition to authorization of a merger that would enhance rail competition (rather than merely preserve rail competition that would be directly affected by the merger) as long as (1) imposition of the condition is appropriate to the public interest determination being made by the Board, and (2) the condition is not arbitrarily imposed.

Conrail transaction). IMC Global argues that, because it is anticompetitive for captive shippers to be gouged with huge rate increases so that a rail carrier having overpaid to acquire another can recover the acquisition premium that it paid, we should adopt a regulation that would prevent acquiring rail carriers from recovering acquisition premiums by raising captive shipper rates.

Competitive harms caused by recent rail mergers. IMC Global contends that, in addition to looking at the "downstream" effects of rail mergers, the Board should also look at their "upstream" effects and should consider the entire competitive picture. IMC Global further contends that the Board should take into account numerous anticompetitive situations in the rail industry that exist in large part as a result of Board or ICC action in rail merger cases or other proceedings. IMC Global argues, in particular: that numerous competitive gateways already have been officially or commercially closed as a result of concerted rail carrier action that was expressly sanctioned by the ICC; that shippers have been frustrated by the Board's restrictive position on rail carrier competitive access, as typified by the *Midtec* decision; that shippers have viewed the Board's decision that rail carriers are not required to establish bottleneck rates as inimical to enhancement of rail competition; and that the Board's lack of commitment to enhancing rail competition in merger cases was demonstrated in the UP/SP case when it refused Montana Rail Link's request for divestiture of one of the merged company's parallel Central Corridor transcontinental routes. IMC Global insists that, if the Board has now truly "seen the light" on the need to enhance rail competition in merger cases, it should make aggressive use of its 49 U.S.C. 11324 divestiture and competitive access powers to enhance existing rail competition as well as competition that would be affected by the proposed merger.

Sanctions for failure to achieve promised service improvements. IMC Global contends: that the regulations must recognize that rail service is required to improve as a result of a merger, not worsen or stay the same; that it is essential to protect against the harmful service disruptions that occurred following the UP/CNW, UP/SP and Conrail transactions; that, although applicants routinely claim that mergers will result in significant service improvements, there is a distinct need for performance measures by which pre-merger and post-merger service can be compared; that, therefore, applicants should be required to show the manner and extent to which rail service will be improved as a result of a proposed merger; and that, most importantly, there should be meaningful and enforceable penalties if the promised service improvements do not materialize. IMC Global further contends that NPR § 1180.6(b)(11), which allows applicants themselves to suggest the "additional measures" that might be taken if anticipated public benefits fail to materialize in a timely manner, is insufficient and inappropriate.

Meaningful protection for shortlines. IMC Global contends that, although effective rail competition for much shipper traffic is provided by shortlines rather than by 2 or more Class I carriers, the proposed regulations do not provide for meaningful protection for shortlines. IMC Global further contends that ASLRRA's "Bill of Rights" should be incorporated into the proposed rules; adoption of those "rights," IMC Global explains, would go a long way toward the goal of enhancing rail competition. Rail competition, IMC Global claims, would be enhanced: if shortlines were entitled to compensation for merger-related failures; if shortlines were freed of routing constraints; if shortlines were entitled to competitive and nondiscriminatory pricing; and if shortlines were to enjoy unrestricted interchange rights.

Corresponding amendment of competitive access rules. IMC Global contends that, if more liberal competitive access is to be provided as a condition to rail mergers in order to enhance rail competition, more liberal competitive access should also be provided in the nonmerger setting.

Otherwise, IMC Global explains, shippers served by a carrier that has received competitive access as a condition to a rail merger would have an unfair competitive advantage over shippers served by a carrier that has not received competitive access. IMC Global insists that, in order to prevent such unfair treatment and to enhance rail competition generally, the Board should liberalize its 49 CFR 1144.5 competitive access regulations, which (IMC Global argues) are not now in keeping with the emphasis on competitive enhancement in the proposed rail merger regulations.

APPENDIX O: MINERALS AND RELATED INTERESTS

NATIONAL MINING ASSOCIATION. The National Mining Association (NMA)[168] contends that the proposed rules represent a significant improvement in the Board's merger procedures, provided (NMA adds) that the soundness of the regulations in practice will depend heavily on the views of the Board in the future as the Board faces new merger applications and decides on what measures would raise the bar with regard to merger benefits, merger harm, preservation of competition, enhancement of competition, and service assurance. NMA further contends that, if future rail merger applications are approved by the Board, the quality of rail services may be expected to rise for affected producers, consumers, and shippers of rail-dependent commodities such as coal, metallic ores, metals, and nonmetallic minerals.

Merger benefits. NMA contends that rail-dependent commodity producers, consumers, and shippers, in particular those served only by the merged rail carrier, must have effective access to the Board for relief from possible abuse in rates and services at the hands of the merged carrier if unable to negotiate a fair and equitable railroad transportation services contract.

Merger harm. NMA contends that recent railroad mergers have resulted in substantial losses to commodity producers and consumers due to difficulties in rail service provided by merged rail carriers during periods in which trackage, yards, equipment, crews, and management systems were becoming adjusted for unified train operations. Those problems, NMA notes, created financial losses, as well as impediments in penetrating future markets. NMA argues that emergency relief stemming from difficulties in unifying railroad operations when implementing a merger, and recovery of losses experienced in such circumstances, should be provided for in merger approvals.

Preservation of competition. NMA contends that no railroad merger should be approved if it would diminish effective competition for moving the same commodity from the same origination to the same termination. NMA further contends that, to avert diminution of competition, the Board should impose such measures as "shared access," "open gateways," "reciprocal switching," and "trackage rights," provided (NMA adds) that such "trackage rights" do not result in a circuitous routing.

Enhancement of competition. NMA contends that the "enhanced competition" policy represents a marked advance in the Board's assessment of the merits of a rail merger.

Service assurance. NMA contends that assurance that a rail merger will not result in diminution of existing rail services, and will produce benefits in the quality of rail services, represents a vital controlling factor in granting approval of a merger application. NMA adds that the essential requirements in regard to service assurance are: metrics for measuring rail services post-merger vs. service levels to be provided as set forth in an adopted operational plan; monitoring of compliance by the merged carrier with commitments on post-merger services; a strategy for

[168] NMA, a trade association, represents the interests of the mining industry.

enabling immediate remedial actions for relief from difficulties in rail services if experienced in post-merger rail operations; and a process for recovery of damages incurred by commodity producers and/or shippers attributable to failure of the merged carrier to provide the levels of services committed to by the carrier.

NPR § 1180.1(a). NMA contends that NPR § 1180.1(a) seems to imply that the Board may approve a consolidation that reduces transportation alternatives if the transaction, at the same time, enhances transportation competition. NMA insists, however, that the Board should approve a transaction only if it will enhance, and not reduce, transportation competition.

NPR § 1180.1(c). (1) NMA contends that the "enhanced competition" concept is of pivotal importance in this rulemaking. NMA adds, however, that trackage rights may not always achieve enhanced competition. NMA explains that, although trackage rights can work in certain circumstances, trackage rights do not always furnish practical alternative routings, notably where their use involves substantially circuitous routings and/or when a second carrier for whom trackage rights are available refuses to provide reasonable services over the alternative route.

(2) NMA contends: that previous mergers have caused reductions in the miles of rail trackage in service, in many cases through abandonments of trackage and right-of-ways; that further shrinkage of irreplaceable rail access could result in seriously adverse impacts on a growing economy and on our national security and mobility needs as these relate to line-haul rail corridors in various rail service areas; and that rail-dependent movements (*e.g.*, coal and non-fuel minerals supplied by mines) must not become impeded by further reductions in rail infrastructure. NMA insists that this matter should be taken into account when rail carriers submit merger proposals.

NPR § 1180.1(g). NMA indicates that it strongly supports the Board's proposed formal oversight process to be effectuated for at least 5 years of merger implementation, including periodic carrier reports on compliance with commitments made in the course of seeking Board approval of a merger transaction.

NPR § 1180.1(h). NMA contends that the requirement for filing a service assurance plan with the merger application and railroad operational plan, incorporating problem resolution teams and procedures for resolving post-merger problems, is fundamental in the interest of realistically defining and evaluating performance requirements. NMA adds that it has a keen interest in the possibility of having mining industry representation on the NPR § 1180.1(h)(3) Service Council.

U.S. CLAY PRODUCERS TRAFFIC ASSOCIATION. The U.S. Clay Producers Traffic Association, Inc. (USCPTA), which represents clay producers, applauds the NPR for implicitly recognizing that merger applicants are legally responsible for the damages caused by merger-related service disruptions and for requiring that applicants establish problem resolution teams to ensure that claims are promptly addressed. USCPTA contends, however, that the NPR does not propose a complete remedy for service disruption problems. USCPTA contends, in particular, that, whereas USCPTA (in its ANPR comments) proposed implementation of a formal administrative procedure in which damages for service harm could be awarded in appropriate circumstances, the NPR opts instead for an informal, non-binding procedure that in reality is nothing more than supervised negotiation. USCPTA insists that, because the Board's sole reliance on informal procedures to address damage issues is insufficient, the Board should provide a well-defined administrative remedy that specifically mentions the Board's authority to award damages in appropriate cases. (1) USCPTA contends that the Board is moving in the right direction by requiring merger applicants to submit detailed service assurance plans and by recognizing that greater attention must be given to the potential for transitional service harms. The requirement for submission of detailed service assurance plans, USCPTA argues, will force applicants to engage in a realistic analysis of the operational issues before the transaction is consummated. USCPTA argues, however, that simple attention to or monitoring of merger-related service disruption claims is meaningless in the absence of an enforcement mechanism, which USCPTA believes should be accomplished through an administrative procedure. USCPTA contends that, if applicants are aware of the possibility of substantial damage awards compensating shippers for harm experienced as the result of a merger, they will be less likely to proceed before all the details are well planned out.

(2) The NPR, USCPTA argues, does not explain what will happen if the railroads do not honor service disruption damage claims. USCPTA, which believes that the Board clearly has the legal authority to adjudicate damage claims arising from mergers to the same extent it has authority to impose conditions, contends that a formal administrative proceeding would provide a more straightforward and direct way of ensuring that claims are properly addressed than the informal procedures proposed by the Board. USCPTA therefore argues that 3 changes should be made to the proposed regulations. First, USCPTA argues that NPR § 1180.1(g) should be revised to provide that, during the oversight period, the Board will retain jurisdiction to impose any additional conditions, including the award of damages, it determines are necessary to remedy or offset unforeseen adverse consequences of the underlying transaction. Second, USCPTA argues that NPR § 1180.1(h)(1) should be revised to provide that the levels of adequate service that applicants represent in their SAPs will be binding and that they will be held liable for any failure to meet such service levels. Third, USCPTA argues that NPR § 1180.1(h)(3) should be revised to provide that a claimant who has participated in the informal process contemplated by NPR § 1180.1(h)(3) but who is unable to reach a satisfactory resolution may petition the Board to review the claim and award damages.

(3) USCPTA contends that the "Rail Consumer Assistance Program" announced by the Board on November 2, 2000, is a form of Board intervention in the dispute resolution process, but one (USCPTA insists) that again falls short of being a truly effective remedy. The Board, USCPTA notes, has indicated that the program "is intended to strengthen the capability of the Board to informally address those issues that cannot be satisfactorily resolved through private-sector discussions." "Surface Transportation Board News" release No. 00-42 (dated November 2, 2000). USCPTA indicates that, although it agrees that aggrieved parties should first attempt to resolve problems through discussion and negotiation, it also believes that the rules should follow the thought through to conclusion and should specifically state that the Board will get involved if the negotiations fail to resolve the dispute.

MARTIN MARIETTA MATERIALS. Martin Marietta Materials, Inc. (MMM), which produces aggregates and magnesia-based chemical and refractory products, insists that the proposed rules are worded too vaguely, do little to correct the Board's apparent pro-merger bent, and offer shippers nothing in the way of reliable safeguards to preserve or enhance railroad competition. (1) MMM contends: that, because the rail transportation of crushed stone, sand, and gravel has been exempted from regulation, the railroads that haul MMM's freight can dictate the terms for their handling of MMM's freight on a "take it or leave it" basis; that, therefore, the only constraint upon the railroads' setting of rates on their aggregates traffic has been competition; that, however, on account of past mergers, rail-to-rail competition for the movement of MMM's freight has all but disappeared (MMM notes that each of its quarries and stone crushing plants is served by but a single railroad); that, although some of MMM's customers are located in markets served by a second rail carrier, that (MMM insists) is irrelevant, because, particularly on account of the Board's *Bottleneck* Decision, aggregates shipments as a practical matter cannot be interlined; and that it is therefore a matter of grave concern to MMM that the Board at a minimum preserve some semblance of intramodal competition by promulgating meaningful rules in the instant proceeding. MMM further contends that the proposed rules fall short of that objective because they contain no specific measures as to how the asserted goal of preserving and enhancing rail-to-rail competition is to be achieved. MMM argues that the unfettered discretion the Board reserves to itself as to how it will balance the alleged benefits of the railroads' future merger or acquisition proposals with the need for preserving or enhancing rail-to-rail competition renders it doubtful that merger applications will be treated differently in the future than they have been in the past.

(2) MMM notes that NPR § 1180.1(c)(2)(i) requires applicants to explain how they intend to preserve competitive options such as "the opportunity to enter into contracts for one segment of a

movement as a means of gaining the right separately to pursue rate relief for the remainder of the movement." MMM further notes that the Board indicated, in the accompanying commentary, that "we believe that it is appropriate to protect the ability of shippers to use a transportation contract obtained to a junction point to obtain a challengeable rate quote for transportation service provided beyond the junction point." *NPR*, at 17. MMM insists, however, that these abstractions do nothing for shippers, because (MMM explains) although shippers are already free to negotiate rate agreements for the competitive portion of a through route, the ability of the bottleneck railroad to retaliate against the competing railroad in a situation in which their roles are reversed makes such contracts hard, if not impossible, to come by. And, MMM adds, the Board lacks the power to compel a non-merging carrier to enter into a contract with a shipper. MMM therefore insists that, in the interest of enhancing or even just preserving competition, the Board should condition every merger by requiring the merged or controlled and controlling railroads to offer, upon request of a shipper, a local or proportional rate applicable between a point it alone can serve and a point of connection with another railroad, whether or not the shipper has a contract for service by the connecting railroad, unless the applicants can prove by substantial evidence that the imposition of such a condition would be contrary to the public interest.

(3) MMM contends that, in order to codify existing practice with respect to 2-to-1 shippers, the Board should condition every merger by requiring the merged or controlled and controlling railroads to provide at reasonable charges, to be agreed to by the parties or set by the Board, trackage or haulage rights to another railroad so as to enable the other railroad to serve a shipper suffering a loss of actual or potential competitive railroad service as a result of the proposed merger, unless the applicants can prove by substantial evidence that the imposition of such a condition would be contrary to the public interest.

(4) MMM contends that, in order to afford a shipper served only by a merged or controlled and controlling railroad access to a second carrier within essentially the same switching district or terminal area (which, MMM argues, is essential if intramodal competition is to be enhanced), the Board should condition every merger by requiring the merged or controlled and controlling railroads to provide reciprocal switching or switching at reasonable fees, to be agreed to by the parties or set by the Board, to any shipper seeking to be served by another carrier within or proximate to the switching district or terminal area on the lines of the merged or controlled and controlling railroads, unless the applicants can prove by substantial evidence that the imposition of such a condition would be contrary to the public interest.

(5) MMM argues that the goal of intramodal competitive enhancement would be well served if the rate base of the merged or controlled and controlling railroad were not inflated by an excessive price paid to effect the proposed transaction or by any extraordinary costs incurred in consummating it. MMM insists that, although the Board has previously rejected the exclusion from the carrier's rate base of the acquisition premium paid to effect the merger and the unusual costs incurred in coping with the service failures resulting from its consummation, the Board, in promulgating its revised major railroad merger rules, is not hobbled by its precedents, particularly when a fair reading of the generally accepted accounting standards would permit the Board to reach a contrary conclusion. MMM therefore contends that the Board should condition every merger by providing that any acquisition premium paid to effect the proposed transaction and any extraordinary costs incurred in consummating it shall not be included in the merged or controlled and controlling railroads' rate bases, unless the applicants can prove by substantial evidence that the imposition of such a condition would be contrary to the public interest.

TEXAS CRUSHED STONE COMPANY AND GEORGETOWN RAILROAD COMPANY. Texas Crushed Stone Company (TCS) and Georgetown Railroad Company (GRR), which are commonly controlled, contend that the proposed rules are far too vaguely worded, do little to correct the decidedly pro-merger bent of the Board, and offer shippers such as TCS and shortlines such as GRR little in the way of reliable safeguards to preserve, much less enhance, railroad competition. (1) TCS and GRR contend that they have been adversely impacted by past mergers, even though (TCS and GRR concede) TCS continues to have today, as it had when it opened its quarry near

Georgetown, TX, in 1958, two Class I connections. TCS and GRR explain: that, in 1958, the two Class I connections were the Missouri Pacific Railroad Company (MP) and the Missouri-Kansas-Texas Railroad Company (MKT); that, in the early 1980s, MP was acquired by UP; that, in the late 1980s, MKT was also acquired by UP; that, because an unconditioned UP/MKT transaction would have had a 2-to-1 impact on TCS/GRR, SP was granted trackage rights access to a connection with GRR; that, however, SP itself was acquired by UP in 1996; that, because an unconditioned UP/SP transaction would have had a 2-to-1 impact on TCS/GRR, BNSF was granted trackage rights access to a connection with GRR; and that, therefore, just as TCS in 1958 had access to two Class I railroads (MP and MKT), TCS today continue to have access to two Class I railroads (UP and BNSF).

(2) TCS and GRR contend, however, that, even with continued access to two Class I railroads, TCS has not fared all that well (TCS and GRR indicate that, whereas in 1979 TCS shipped 55,000 carloads of crushed stone and GRR was able to maintain rates competitive with other Texas quarries serving common Gulf Coast and east Texas markets, in the past 12 months TCS has shipped only 30,613 carloads of crushed stone, and the rates of GRR and its connections are no longer competitive to many of the points heretofore served). TCS and GRR attribute their problems in this regard to two factors. First, TCS and GRR claim, major railroad mergers all too often have resulted in the loss of the middle management personnel whom shippers such as TCS had come to know and trust. Second, TCS and GRR claim, whereas TCS felt close to smaller Class I railroads like MP and MKT, it feels alienated from larger Class I railroads like UP and BNSF; and, TCS and GRR add by way of illustration, whereas TCS's traffic was important to MKT (because TCS's quarry was 1 of only 2 quarries in the area served by MKT), TCS's traffic is of lesser importance to UP (because TCS's quarry is 1 of 15 quarries served by UP).

(3) TCS and GRR contend that, as respects public interest considerations and the weighing of potential benefits and potential harm, NPR § 1180.1(c) gives insufficient attention to the interests of stockholders and shippers. The mergers of the past few decades, TCS and GRR argue, have not benefitted the railroads' stockholders; the stock prices of the surviving railroads, TCS and GRR claim, have not kept pace with stock prices in other industries. The mergers of the past few decades, TCS and GRR further argue, have not benefitted the railroads' shippers either; TCS and GRR insist that, as shippers on Class I railroads, they have seen little or no reduction in their rates owing to the economic benefits and financial gains that their mergers or acquisitions were intended to bring about (TCS and GRR claim that, although the rail industry can point to stabilized or even reduced average rates, these have come about through the Class I railroads' abandonments or sales or leases to shortline operators of marginal properties and the significant changes that have been effected in employee work rules). And, TCS and GRR argue, the real potential harm of any additional major mergers or acquisitions is that, by making big railroads even bigger, they will make the railroads even more remote from their customers.

(4) TCS and GRR, which fear that further mergers will lead to reregulation of rates and services, contend that the enactment of remedial legislation could be postponed, if not avoided altogether, if only the Class I railroads would realize that they need to treat their shortline connections as partners and not as rivals. TCS and GRR argue that the Board, in considering any future major railroad mergers or acquisitions, should not ignore the important role that shortlines potentially can play in preserving what little intramodal competition remains and, more importantly, in enhancing intramodal competition. TCS and GRR further argue that the Board should not be oblivious to the fact that the Class I railroads deal with their shortline connections to suit their own interests. TCS and GRR insist that, if shortlines are to be able to play a meaningful role in preserving and enhancing competition, the merger rules must provide for express conditions to be attached to any approvals of future major merger or acquisition proposals.

(5) TCS and GRR contend, in particular, that, to safeguard the ability of shortlines to assist in the preservation and enhancement of intramodal competition, the Board should impose the following conditions: (a) Class II and Class III railroads that connect to the merged or consolidated and consolidating carriers must have the right to compensation by the railroads for service failures related to the merger or consolidation. In addition, when the merged or consolidated and consolidating

carriers cannot provide an acceptable level of service post-transaction, connecting Class II and Class III railroads must be allowed to perform additional services as necessary to provide acceptable service to shippers. (b) Class II and Class III railroads must have the right to interchange and routing freedom. Contractual barriers affecting Class II and Class III railroads that connect with the merged or consolidated and consolidating carriers that prohibit or disadvantage full interchange rights, competitive routes, and/or rates, must be immediately removed by the carriers, and none imposed in the future. The merged or consolidated and consolidating carriers must maintain competitive joint rates through existing gateways. Also, Class II and Class III railroads should be free to interchange with all other carriers in a terminal area without pricing or operational disadvantage. Any pricing or operational restrictions that disadvantage connecting Class II or Class III railroads must be immediately removed by the merged or consolidated and consolidating carriers, and none imposed in the future. (c) Class II and Class III railroads that connect to the merged or consolidated and consolidating carriers must have the right to competitive and nondiscriminatory rates and pricing. Rates and pricing of the carriers that do not meet this standard must be promptly corrected by the merged or consolidated and consolidating carriers upon request by a connecting Class II or Class III railroad. (d) Class II and Class III railroads that connect to the merged or consolidated or consolidating carriers must have the right to fair and nondiscriminatory car supply. Car supply issues regarding this standard must be promptly addressed by the consolidated carrier upon request by a connecting Class II or Class III railroad.

(6) TCS and GRR contend that the Board should encourage merger applicants to implement the foregoing conditions by negotiation with their Class II and Class III railroad connections in a mutually agreeable fashion. TCS and GRR further contend, however, that, if enforcement of the conditions is needed, the Board should have in place a mechanism whereby an expedited and cost-effective remedy can be pursued by a Class II or Class III railroad filing a complaint with the Board.

(7) TCS and GRR contend that, in considering future mergers and acquisitions, the Board, in determining whether the merger or acquisition is consistent with the public interest, should take into account the effect of the proposed transaction upon the merged or controlled and controlling railroad's ability to attract shippers, gain traffic, enlarge employment opportunities, and improve the marketing opportunities of suppliers of railroad equipment and materials. TCS and GRR further contend that future mergers and acquisitions should not be approved unless they clearly benefit and support those who have a stake in the proposed transactions: the senior officers of the railroads; the railroads' employees; existing rail customers; the merged or acquiring railroads' stockholders; connecting shortline and regional railroads; and rail equipment suppliers.

APPENDIX P: FOREST PRODUCTS, LUMBER, AND PAPER INTERESTS

AMERICAN FOREST & PAPER ASSOCIATION. The American Forest & Paper Association (AF&PA)[169] contends that the proposed regulations should be revised so as to affirmatively enhance competition. AF&PA further contends that the Board should implement procompetitive policy changes to the maximum extent permissible under the Board's authority, should finish deregulation, and should permit marketplace actions to promote competition.

Competition. AF&PA, which believes that vigorous rail-to-rail competition is necessary for a healthy rail system, is concerned that the evolving oligopolistic national rail structure will not sustain a low-cost and efficient transportation infrastructure. AF&PA further contends: that vigorous competition between transportation providers, both within a mode and between modes, is the most effective way to ensure that needed low-cost and efficient transportation is available for the shipping public; that, without competition, there is no incentive for the railroads to provide

[169] AF&PA is the national trade association of the forest products and paper industry.

consistent service levels, to improve and maintain low cost levels, and to furnish adequate supplies of quality boxcar equipment; and that, therefore, the Board's new policies and procedures should ensure that rail-to-rail competition exists to the maximum extent possible. And, AF&PA adds, it believes that the railroad industry should operate with the same economic incentives as any other business, including adherence to the antitrust laws.

Procompetitive reform principles. AF&PA contends that the "principles for reform of merger proceedings and related regulation" advocated by ARC[170] should guide the Board in its development of improved policies and procedures. AF&PA further contends that the need for improved and enhanced competition is so strong and immediate that the Board should use the full extent of its authority to revise its policies consistent with these principles. AF&PA argues that the Board's efforts in this proceeding should include, but not be limited to, all of the recommendations in the proceeding that would: increase competition among railroads; improve service and safety; and address any problems or flaws (present or future) that result directly or indirectly from rail mergers. AF&PA adds that, because the Board may not have the necessary authority to fully achieve comprehensive policy reform consistent with all of the reform principles advocated by ARC, the rail customer community will continue to press for congressional action that would provide the necessary legislative direction to achieve these principles.

Additional market-based processes. (1) AF&PA contends that shippers must have a real choice as respects the rail carriers with which they do business. AF&PA insists that, with rail choice, additional market share could be achieved by the rail industry. And, AF&PA adds, competitive access to an alternative rail carrier, where operationally safe and feasible, would actively stimulate, not merely protect, existing competition.

(2) AF&PA contends that shipper choice should be promoted through the adoption of terminal and reciprocal switching, using as a model the Canadian interswitching approach and its distance-based threshold. AF&PA further contends that Board involvement could be limited to instances where the carrier and shipper could not agree on the threshold or a fair rate.

(3) AF&PA contends that, because railroads appear to focus on moving trains rather than on time-definite door-to-door services, "third party marketers" should be afforded the opportunity to develop such shipper-desired solutions. (4) AF&PA contends that the Board should support an alternative means of managing rail market behavior by the creation of common access points to create competition.

AMERICAN FOREST RESOURCE COUNCIL. The American Forest Resource Council (AFRC),[171] which believes that its concerns were not adequately addressed in the NPR, contends that the new regulations should authorize the evaluation of any proposed merger on the basis of how it would affect service, competition, and market and trade neutrality. (1) AFRC indicates that it has 3 major areas of concern, which AFRC believes should be addressed in any revision to the merger rules. (a) AFRC insists that the forest products industry cannot afford any more service disruptions or difficulties like those experienced in the last round of major railroad mergers. (b) AFRC insists that any future changes in the North American railroad structure should result in an increased level of competition among the railroads and not further oligopolistic situations that could negatively affect service levels and rates paid by shippers. (c) AFRC insists that any changes in the North American railroad structure should be both market and trade neutral.

(2) AFRC contends that there is not, in the NPR, any discussion of how the information that applicants must submit will be analyzed and used by the Board in its deliberations on a merger

---

[170] *See NPR* at 204.

[171] AFRC, a forest products trade organization, is the entity created by the recent merger of the Northwest Forestry Association and the Independent Forest Products Association.

application. AFRC further contends that there is, in the NPR, no discussion of standards or methodologies that the Board would use in evaluating an applicant's submission or public comments on such. AFRC argues that, without these details, the proposed rules would appear to be nothing more than a large paper exercise, without substance or teeth.

LUMBER FAIR TRADE GROUP. The Lumber Fair Trade Group (LFTG), which represents numerous independent wholesale distributors of forest products, indicates that its members deal heavily in lumber produced in Canada with over 50% of that lumber originating in British Columbia. LFTG contends: that, since the early 1990s, its members have been forced to accept terms of sale dictated by the British Columbia lumber mills, which include pricing on an FOB origin basis plus a mill-determined amount that is said (by the mills) to represent the mill's delivered freight cost to destination; that the mills refuse to sell FOB origin with freight for the buyer's account unless the buyer first obtains the written agreement of CN to publish contract rates for the buyer's account; that, however, CN refuses to publish contract rates for the buyer's account unless the buyer first obtains written agreement from the mills that they will sell to the buyer FOB origin; and that all efforts to break the gridlock created by this combination of policies on the part of CN and the British Columbia mills have been frustrated. LFTG adds that its members refer to the addition of unsubstantiated and overstated freight costs as "phantom freight."

LFTG further contends that its members would be particularly concerned if a foreign railroad were to acquire control of a substantial amount of U.S. rail capacity. LFTG explains that this concern reflects the fact that the current "phantom freight" practice is shielded from application of U.S. antitrust law by the retention, outside the United States, of all freight bills and accounting records (which, LFTG advises, would document rebates, allowances, foreign currency exchange, or other reductions in net freight cost). LFTG adds that the existence of this "shielding effect" is not merely LFTG's opinion; rather, LFTG explains, it is the position that has been stated to LFTG by the Departments of Commerce and Justice, the Federal Trade Commission, and the office of the U.S. Trade Representative.

LFTG believes that any merger, marketing alliance, or other combination or quasi-combination of railroads that involves foreign control of U.S. railroad property and/or routes must require retention of full and complete records within the jurisdiction of the Board and U.S. courts. LFTG explains that, if copies of the records are not retained and accessible in the United States, no U.S. law, regulation, or order can be enforced. LFTG therefore insists that the new merger rules should ensure adequate and direct records retention and accessibility within the jurisdiction of the United States. And, LFTG adds, it opposes the establishment of an expedited review period for rail mergers and supports the inclusion of rail marketing agreements and alliances in the merger rules.

WEYERHAEUSER COMPANY. Weyerhaeuser Company (Weyerhaeuser), a forest products company with facilities across North America, contends that, although the proposed rules are a potential "good start," much more substance is needed to address shippers' need for meaningful and effective rail-to-rail competition. Weyerhaeuser, which suggests that the Board should start with the acknowledgment that today all Class I mergers are anticompetitive, further contends: that the rules must place a heavy burden of proof on the applicants to establish a compelling reason to further decrease rail-to-rail competition; that merger approval must impose significant penalties on the applicants if they fail to deliver on the benefits promised by the merger; that the rules should include provisions that will ensure that applicants retain sufficient employees to respond to the shipping public during the transition period; that the Board, in approving any merger, must impose real competitive conditions that mitigate the inherent anticompetitive nature of the merger; that these conditions should include the opening of all industries within terminal facilities to any carrier providing service to that terminal; that any approval should ensure that all existing gateways remain open, not only from an operational standpoint but from a rate and service perspective as well; and that the rules must provide shippers with procedures that ensure swift and significant redress for a merged carrier's failure to meet the Board's conditions or to provide the promised benefits.

Promoting and enhancing competition. Weyerhaeuser, which believes that the Board should adopt a regulatory framework similar to the framework that currently exists in Canada, contends that the final merger approval framework should include the following components: terminal access (interswitching); maintenance of gateways and interchange; a swift arbitration process to resolve disputes; and service performance penalties for a merged carrier that fails to meet the service levels outlined in the pre-merger service plan.

Terminal access. Weyerhaeuser contends that the Board should adopt the Canadian "interswitching" system, which (Weyerhaeuser claims) would increase competition between railroads for traffic at a substantial number of locations throughout the United States. Weyerhaeuser argues that, if necessary, interswitching costs could be established yearly by the Board and consistently applied across the country. Weyerhaeuser further contends that, as in Canada, the interswitching zones should begin where competing lines intersect and should expand outward in mileage bands, which (Weyerhaeuser advises) will provide competitive rail service to many industries located outside of current terminal areas (many of which, Weyerhaeuser claims, were established over 50 years ago and therefore no longer reflect the true "commercial" area of a location). And, Weyerhaeuser adds, in order to protect shortline and regional railroads, the terminal access zone rules advocated by Weyerhaeuser should apply only to Class I railroads and not to shortline or regional railroads.

Maintenance of gateways. Weyerhaeuser contends that, in any merger proceeding between Class I carriers, the Board should require that all existing gateways remain open, from an operational as well as an economic standpoint. And, Weyerhaeuser adds, the Board should consider a "backward" analysis to see if gateways eliminated in past mergers should be re-established as conditions to new, proposed mergers, where applicable.

Arbitration process. Weyerhaeuser contends that, because the Board's formal complaint procedures are too expensive, too time consuming, and too inflexible to be useful in resolving service and competition issues for shippers, the Board should adopt the Canadian dispute resolution process known as "Final Offer Arbitration" (FOA). Weyerhaeuser argues that FOA, which requires that a dispute be resolved within 60 days and which provides that the decision of the arbitrator is final, is a simple and speedy process that will enable carriers and shippers to achieve expeditious resolution of their commercial disputes.

Service performance penalties. Weyerhaeuser, which notes that the service disruptions resulting from recent rail mergers imposed significant costs on shippers, contends that the Board should insist that any future mergers have reasonable and realistic penalties on the merged carrier for such failures. Weyerhaeuser further contends: that these penalties could take several forms, including specific reasonable financial penalties and substitute service; that the shipper would have the discretion of asking for the specific financial penalties outlined in the merger or the implementation of the 49 CFR 1146.1 "expedited relief for service emergencies" rules; that, for the financial penalty, the shipper would file for this relief and the carrier would have 30 days to pay the claim; that the short time period would make the penalty effective in incentivizing carriers as well as in providing timely economic relief to impacted shippers; and that, in order to make this penalty system effective and timely, the service standards subject to penalty should be specifically set by the Board as conditions to any merger approval. Weyerhaeuser adds that the regulations should also provide that, if a failure persists, there will be an immediate implementation of the 49 CFR 1146.1 rules, with only a threshold trigger. Weyerhaeuser explains that this would allow the shipper to receive service from an alternate carrier, alleviating the overall costs of the service disruption and reducing the carrier's service failure penalty.

Transnational mergers. Weyerhaeuser contends that any merger of a transnational nature must include a complete review of the data on both sides of the border. Weyerhaeuser explains that, without viewing this in a holistic and systemic manner, the Board would have an incomplete view of the potential impact of any merger and the impact of any downstream effects.

Other submissions. Weyerhaeuser advises that it supports the competitive enhancement proposals advocated by NITL, ARC, and AF&PA.

APPENDIX Q: CANADIAN SHIPPER INTERESTS

CPPA, COFI, and WCSC. The Canadian Pulp and Paper Association (CPPA), the Council of Forest Industries (COFI), and the Western Canadian Shippers' Coalition (WCSC)[172] support all modifications to the merger regulations that will substantially increase the burden on applicants to demonstrate that a proposed transaction is in the public interest and that will require applicants to demonstrate that the transaction will enhance competition as an offset to negative impacts resulting from service disruptions and competitive harms likely to be caused by the transaction.

General policy statement. CPPA, COFI, and WCSC contend that, because railroad rationalization to eliminate excess capacity has been largely completed and there are now only limited efficiencies and service improvements to be achieved from further downsizing, enhanced competition should be seen as the primary consideration in major rail consolidations. CPPA, COFI, and WCSC therefore insist that a revised general policy statement should give primary emphasis to enhanced competition and should place it first among the various criteria identified therein, *i.e.*, enhanced competition, improved service, and greater economic efficiency. CPPA, COFI, and WCSC add that we should also adopt a rebuttable presumption that a major rail consolidation will substantially reduce the rail transportation alternatives available to shippers.

Competition. (1) CPPA, COFI, and WCSC contend that the final rules should explicitly state that the protection and enhancement of intramodal (*i.e.*, rail-to-rail) competition will be a significant consideration in our assessment of all applications for major railroad consolidations. CPPA, COFI, and WCSC insist that it is not enough to recognize that the railroad industry is a network of competing and complementary components, which in turn is part of a broader transportation infrastructure.

(2) CPPA, COFI, and WCSC agree that, when evaluating the public interest, we should consider whether the benefits claimed by applicants could be realized by means other than the proposed consolidation. CPPA, COFI, and WCSC explain that the ability to use co-operative endeavors such as "alliances" with other carriers requires careful scrutiny before a merger application, with its strong likelihood of diminished intramodal rail competition, should be authorized.

(3) CPPA, COFI, and WCSC support the proposed changes to the balancing test to upgrade the importance of competition and to recognize that redundant capacity is no longer the issue it once was and that improved carrier efficiency should not have the overriding priority it once had.

Other modifications. (1) CPPA, COFI, and WCSC support the proposed rule revisions respecting transitional service problems, the requirement for a detailed SAP with operational monitoring thereof, and a formal oversight process for at least the first 5 years to ensure that the

---

[172] CPPA represents companies that produce most of the pulp, paper, and paperboard manufactured in Canada. COFI is a forest industry trade association that represents 100+ companies that operate in British Columbia. WCSC's members ship Western Canadian natural resource-based products such as coal, sulphur, chemicals, oil seed products, and forest products. CPPA filed separately. COFI and WCSC filed jointly.

applicants' representations are being fulfilled and that no unforeseen harms have arisen that may require remedial action.

(2) CPPA, COFI, and WCSC also endorse the proposed revisions respecting cumulative impacts and crossover effects that will require applicants to anticipate, with as much certainty as possible, what additional Class I merger applications are likely to be filed in response to their own application and to explain how these applications, taken together, will affect the eventual structure of the industry and the public interest. CPPA, COFI, and WCSC add that, in view of the small number of remaining Class I carriers and the strong likelihood that they will participate in any major rail consolidation proceeding that is initiated, this modification will not result in undue speculation.

Transnational issues. CPPA, COFI, and WCSC contend that future merger applications involving major Canadian and Mexican railroads should require the filing of "full system" competitive analyses and operating plans incorporating the applicants' operations in Canada and Mexico. CPPA, COFI, and WCSC further contend: that we should consult with the relevant officials in other countries as appropriate to ensure that any conditions imposed on a transaction are consistent with the North American Free Trade Agreement and other pertinent international agreements to which the United States is a party; and that, to enable the development of a complete record in all affected jurisdictions, our cooperation with Canadian and Mexican agencies charged with approval and oversight of a proposed transnational railroad combination should include the coordination and exchange of data on the likely impacts and consequences of a major rail consolidation.

APPENDIX R: TRANSPORTATION INTERMEDIARIES

TRANSPORTATION INTERMEDIARIES ASSOCIATION. The Transportation Intermediaries Association (TIA),[173] which believes that the NPR provides a positive outline on improving rail merger rules, contends that the Board: should include precise details on how future rail mergers will provide rail-to-rail competition; should enhance competition; and should provide protections to IMCs from discriminatory volume and bond requirements. TIA further contends that the Board's merger rules should provide for: immediate injunctive relief through an arbitration system; punitive damages; and reasonableness of rules. The public interest, TIA insists, requires a competitive rail system that provides consistent, reliable, and safe service at a fair price to both large and small customers that wish to use the system.

Cumulative impacts. TIA contends that merger applicants should be required to look at the cumulative impacts of mergers. TIA further contends that, when reviewing these impacts, merger applicants should be required to show how their merger will provide enhanced rail-to-rail competition. TIA argues that, because the burden of proof is on the merging railroads, they should be held to the higher standard of enhancing competition; it is not enough, TIA suggests, to merely preserve the competition that existed before the merger.

Accountability for promises. TIA contends that merger applicants should be held accountable for the promises made in merger applications. TIA further contends that the Board should consider adding penalties as a condition of future mergers if certain merger promises are not met.

Injunctive relief through arbitration. TIA contends that rail customers currently believe that there is no efficient, timely, and cost-effective way to review rate or access issues. TIA further contends that one way to correct this problem would be through an arbitration process.

---

[173] TIA's 800 members include 49 intermodal marketing companies (IMCs).

Discriminatory practices. TIA contends that IMCs face increased discrimination due to rail mergers. TIA explains: that, when service deteriorates after a merger, rail carriers tend to reduce the amount of cars on-line; that, to do this, rail carriers go after their smaller customers while attempting to improve service to their larger customers; that, in this connection, rail carriers have raised annual volume minimums and bonding requirements; and that, as a result, many small to medium-sized IMCs have been forced off the rail system. The Board, TIA believes, should ensure that this rulemaking contains protections that allow continued access to both large and small customers. And, TIA adds, the use of arbitration would provide IMCs and other rail customers a timely and affordable remedy for alleged discriminatory practices.

CROSSROAD CARRIERS INTERMODAL CO. CrossRoad Carriers Intermodal Co. (CRCIC) contends that, to promote competition and to protect the deregulated environment that exists today, the Board should provide mechanisms for the small-medium shipper to demand fairness and equality.

Enhanced competition. CRCIC contends that, although the NPR recognizes the need for enhanced competition, it does not specifically address CRCIC's previously stated concerns. CRCIC further contends that the Board should outline the specific standards and minimums necessary for approval; it is not appropriate, CRCIC argues, to leave competition remedies to the 4 mega-carriers.

Immediate injunctive relief. CRCIC contends: that, the larger the rail carriers become, the less important the small-medium shipper becomes; that, many times, new railroad policies and procedures have had significant adverse impacts on smaller shippers; and that, oftentimes, rail carrier changes that have had the potential of advantaging larger shippers or the rail carrier's own interest have been implemented without consideration of the financial or commercial impact on the smaller-medium shipper. The industry, CRCIC insists, needs an efficient and low-cost mechanism to put a hold on any such policy or procedure change until the full impact can be reviewed. And, CRCIC warns, the literal existence of some small-medium carload and intermodal shippers could be in jeopardy without such a tool.

Third party arbitration. CRCIC contends that the merger rules must also include a method for a third party to cost-effectively review the facts and to rule as to what is reasonable and fair. CRCIC argues that, although many railroad contracts have arbitration provisions, many others do not. The Board, CRCIC therefore insists, needs to provide a vehicle for small-medium shippers to bring a contract, rate, service, or equipment issue to an unbiased third party for expeditious arbitration (the arbitration, CRCIC contends, should be dealt with within 90 days of the filing, with completion within 120 days).

Removal of artificial barriers. CRCIC contends that, since 1996, the 4 largest U.S. railroads have created artificial barriers (excessive guaranteed volume requirements, exorbitant penalty provisions, and unnecessary bonding requirements) that have eliminated many small-medium shippers from the marketplace. CRCIC further contends that the Board should take a firm stand against these discriminatory barriers, which (CRCIC argues) have stifled rail growth and favored the larger shippers. CRCIC contends, in particular, that all small-medium shippers should be grandfathered back to 1996 levels.

Punitive damages. It is not enough, CRCIC insists, to establish the remedies CRCIC seeks; rather, CRCIC argues, the Board must also provide severe financial penalties (which CRCIC refers to as punitive damages) for not adhering to them. Abusive and manipulative actions by the railroads, CRCIC explains, can destroy small-medium intermodal and carload shippers, on whom (CRCIC adds) thousands of employees and their families rely for their livelihoods.

TWIN MODAL, INC. Twin Modal, Inc. (TMI), which believes that the NPR represents a positive move toward improving the rail merger rules, commends the Board for recognizing the need to update the rail merger rules in view of the tremendous consolidation that has already taken place in the rail industry and the very real scenario of just two Class I carriers left to serve the country if further mergers are allowed.

Standards respecting enhanced competition. TMI contends that, although the NPR calls for enhanced competition as a standard for any future rail merger, it lacks any specificity on how this is to be accomplished. TMI insists that, if the United States is to have a healthy, competitive, and safe rail system, the Board must specify standards and safeguards to be met as a condition for merger approval.

Burden of proof. TMI contends that merger applicants should be required to demonstrate how rail-to-rail competition will be preserved or enhanced for shippers of all sizes, particularly small shippers and IMCs.

Arbitration. TMI contends that, because the cost of making a case before the Board is so high, small shippers and IMCs should be allowed to bring issues relating to contracts, rates, service, or equipment to an unbiased third party for binding arbitration. TMI further contends that such arbitration should be required to be concluded within 120 days of filing with the arbitrator.

Hold applicants accountable. TMI, which claims that railroads involved in previous mergers have made many promises that have failed to materialize, contends that the Board should consider imposition of punitive penalties on railroads that fail to deliver on material promises made during the merger application process.

Injunctive relief. TMI contends that, as railroads become larger, they impose policies and procedures (*e.g.*, volume requirements, penalties for volume shortfalls, credit terms, and bonding requirements) that discriminate against, and adversely affect the ability to compete of, small shippers and IMCs. TMI further contends that shippers and IMCs need a prompt and affordable means to put a hold on any such policy or procedure change until the full impact can be reviewed.

APPENDIX S: MISCELLANEOUS PARTIES

ENRON CORPORATION. Enron Corporation (Enron) contends that, although the policy objectives endorsed in the NPR are a step in the right direction, the NPR lacks the necessary specifics as to how these policy objectives are to be achieved. Enron further contends: that much more should be done; that many commenters, including Enron, submitted specific proposals to mitigate the competitive harms that will result as the rail industry consolidates into a few remaining railroads; that Enron, in particular, showed that the development of a secondary market for rail transportation capacity would mitigate many of the competitive harms that would result from further consolidation, and, in fact, would enhance the overall competitiveness of the rail industry; and that Enron therefore urged the Board to require applicants to explain in their applications the steps they have taken to implement such a secondary market. Enron argues that, although the NPR neither adopted Enron's proposal nor rejected it, the Administrative Procedure Act requires the Board to do more. That Act, Enron insists, requires the Board to respond to the important comments of the parties and to give its reasons for accepting or rejecting the comments. And, Enron adds, it again urges the Board: to require applicants in major rail merger, acquisition, and control proceedings to explain the steps they have taken to implement a secondary market for rail transportation capacity; and to take these steps into account in determining whether the applicants have adequately mitigated the competitive harms resulting from the merger.

MAYO FOUNDATION D/B/A MAYO CLINIC. (1) Mayo Foundation d/b/a Mayo Clinic (Mayo) indicates that its participation in this proceeding reflects its interests vis-à-vis the DM&E construction proposal. Mayo contends that the health services it provides enjoy considerable renown in no small measure because of the quality of life in the City of Rochester, MN; Rochester's peaceful environment, Mayo explains, is conducive to the treatment and healing that is vitally important to the thousands of patients and their families who rely on Mayo. Mayo further contends, however, that the quality of that environment is threatened by the DM&E construction proposal, which would transform DM&E from a grain-hauling regional carrier with modest traffic (presently 3 trains daily through Rochester) into an incessant round-the-clock presence (expected to involve 37 trains per day through the heart of Rochester and in close proximity to Mayo's facilities). Mayo insists that the issues addressed in this rulemaking proceeding are very much the same as those that are facing Mayo and others in the DM&E construction proceeding.

(2) Mayo contends that, both in merger cases and also in construction cases, the Board's current procedures do not address many of the relevant adverse community and environmental impacts. Mayo further contends that, in merger cases and construction cases alike: the Board must look much more closely at emergency service and public safety ramifications, and should commit sufficient resources and time to identify and provide for adequate mitigation or avoidance of public safety and environmental problems; the Board must assure that vital community concerns are fully considered and adequately addressed with appropriate conditions; the Board must provide that the cost of mitigating adverse community and environmental impacts will be borne by the parties that stand to benefit from the action that the Board has been asked to approve; and the Board should withhold approval of applications involving a carrier with an adverse safety record unless there is clear and convincing evidence that safety performance will be raised to fully acceptable levels.

(3) Mayo contends that the NPR does not adequately address the concerns raised by communities and others that have been or will be adversely affected by merger or construction proposals. Mayo argues, in particular, that the NPR § 1180.1(f)(2) requirement that applicants submit evidence about potentially blocked grade crossings as a result of merger-related traffic increases, though a step in the right direction, falls far short of addressing the very serious concerns that have been raised by responsible public agencies and communities that are dealing with adverse safety and environmental impacts from recent railroad mergers.

(4) Mayo contends that the Board should expand the scope of this rulemaking to encompass railroad construction proposals under 49 U.S.C. 10901. Mayo further contends that, in view of the overriding importance of public health and safety, the Board should similarly expand the scope of the SIPs rulemaking[174] to include construction proposals under 49 U.S.C. 10901.

(5) Mayo contends that the proposed merger rules should be expanded to make provision for Board approval of railroad alliances and adequate remediation of impacts resulting from such alliances. Mayo explains that railroad transactions that result in more train traffic with attendant impacts on emergency service and public health raise vital public interest issues that must be thoroughly considered and adequately remediated when necessary in the interest of the public.

NORTH AMERICA FREIGHT CAR ASSOCIATION. North America Freight Car Association (NAFCA)[175] contends that the NPR § 1180.1(h) "service assurance" procedures are not adequate, and do not go as far as they should, to protect private car owners and operators from injury due to post-merger service failures. (1) NAFCA argues that freight cars are an extremely significant asset to the railroad industry, in terms of essential operating utility and investment dollars alike. NAFCA further argues: that 54% of the revenue freight car fleet is supplied by noncarrier car owners (such as NAFCA's members); that non-railroad car ownership is an essential part of railroad infrastructure; that, without private cars, railroad fleets would be incapable of sustaining present traffic levels; and

---

[174] *See NPR* at 18 n.10.

[175] NAFCA's 20+ members manufacture, own, lease, or operate private rail freight cars.

that railroads have encouraged the development of noncarrier car fleets of various car types, in some cases without any concomitant fleet of railroad ownership (*e.g.*, tank cars and specialty covered hopper cars) and in some cases to augment carrier equipment (*e.g.*, grain cars and coal cars).

(2) NAFCA contends that, when shippers are faced with the need to acquire private cars, the determination of how many cars to obtain, and thus of how much of an investment to make, depends heavily on the operating capabilities and practices of the railroads that will handle the private cars. NAFCA further contends, however, that an inevitable consequence of post-merger service failures (NAFCA cites the BN/SF, UP/SP, and Conrail transactions in particular) is a slow-down in the handling of freight cars. NAFCA explains that, when there is such a slow-down, the shipper's investment in private cars is devalued, and, if production is not to be curtailed, the shipper must find alternate transportation (either supplemental private rail cars or premium truck service) to supplement the now inadequate car fleet. NAFCA claims, however, that, following the last several rail mergers, when expenses were incurred by shippers in the form of devalued private cars and the addition of supplemental car capacity, shipper claims to recover those damages were, in many instances, either summarily rejected or simply ignored.

(3) NAFCA contends that no segment of the shipping public should be required to bear the economic brunt of post-merger service failures without recourse; no merger, NAFCA argues, is worth that price to shippers. NAFCA further contends, however, that the NPR does little to resolve the predicament of shippers whose efforts to recover compensation have been rejected or ignored. Neither reports nor oversight meetings, NAFCA explains, will correct arbitrary carrier behavior. Nor, NAFCA adds, is the result under new rules likely to differ from past practices if the Board leaves it to a party to propose a remedy when the remedy is against the interest of that party.

(4) NAFCA therefore contends that NPR § 1180.1 should be revised to express the principle that carriers will be fully responsible for merger-related service failures, and should be further revised to include definite standards for the processing of claims (along the lines of the 49 CFR Part 1005 "loss and damage claims" rules). NAFCA further contends that refusals to acknowledge claims formally and arbitrary claim rejections (for such reasons as "we do not entertain this type of claim" or "this matter is not our responsibility") should not be countenanced by the rules. And, NAFCA adds, each carrier should be required to process claims within a stated period of time and to provide substantive reasons for rejection (*e.g.*, the injuries claimed have not been shown to be the result of a merger-related service failure).

(5) NAFCA also contends that the Board should adopt standards to assess carrier performance. NAFCA contends, in particular, that the Board should adopt rules that allow shippers to make a prima facie showing of a deterioration in service by comparing pre-merger and post-merger average fleet performance.