

STB FINANCE DOCKET NO. 33388 (SUB-NO. 91)

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

Decision No. 10

Decided November 5, 2002

The Board concludes that the reports, comments, and replies filed in the third annual round of the Conrail “general oversight” proceeding demonstrate that the conditions imposed on the Conrail transaction are working as intended, that the Conrail transaction has not resulted in any competitive or market power problems, and that substantial progress has been made in implementing the various environmental conditions and settlement agreements.

BY THE BOARD:

We discuss, in this decision, the issues that the parties have raised and the conclusions that we have reached in the third annual round of the Conrail “general oversight” proceeding.

BACKGROUND

Merger Dec. No. 89. In a decision served July 23, 1998,¹ we approved, subject to various conditions (including a 5-year general oversight condition): (1) the acquisition of control of Conrail Inc. and Consolidated Rail Corporation (collectively, Conrail) by (a) CSX Corporation and CSX Transportation, Inc. (collectively, CSX) and (b) Norfolk Southern Corporation and Norfolk Southern Railway Company (collectively, NS); and (2) the division of the assets of Conrail by and between CSX and NS. The acquisition of control of Conrail by

¹ *CSX Corp. et al. — Control — Conrail Inc. et al.*, 3 S.T.B. 196 (1998) (*Merger Dec. No. 89*), *aff'd sub nom. Erie-Niagara Rail Steering Committee v. STB*, 247 F.3d 437 (2d Cir. 2001).

CSX and NS took place on August 22, 1998 (the “Control Date”). The division of the assets of Conrail by and between CSX and NS took place on June 1, 1999 (the “Split Date”).

The General Oversight Condition. In *Merger Dec. No. 89*, we established general oversight for 5 years so that we might assess the progress of implementation of the Conrail transaction and the workings of the various conditions we had imposed, and we retained jurisdiction to impose additional conditions and/or to take other action if, and to the extent, we determined that it was necessary to impose additional conditions and/or to take other action to address harms caused by the Conrail transaction. *See Merger Dec. No. 89*, 3 S.T.B. at 217 (item 38), 365-66, 385 (ordering paragraph 1).

First Annual Round Of General Oversight Proceeding. In a decision served February 2, 2001,² we addressed the issues that had been raised in the first annual round of the Conrail general oversight proceeding. We concluded that CSX and NS had made progress in resolving their transitional service problems, that the conditions we had imposed were working as intended, that no problems related to increased market power had been demonstrated, and that CSX and NS had made significant progress in implementing various environmental conditions and settlement agreements.

Second Annual Round Of General Oversight Proceeding. In a decision served December 13, 2001,³ we addressed the issues that had been raised in the second annual round of the Conrail general oversight proceeding. We concluded that CSX and NS had resolved the service problems resulting from the implementation of the Conrail transaction, that the conditions we had imposed were working as intended, that no competitive or market power problems stemming from the merger had been demonstrated, and that CSX and NS continued to make significant progress in implementing the environmental conditions and settlement agreements we had imposed.

² *CSX Corporation and CSX Transportation, Inc., Norfolk Southern Corporation and Norfolk Southern Railway Company — Control and Operating Leases/Agreements — Conrail Inc. and Consolidated Rail Corporation [General Oversight]*, STB Finance Docket No. 33388 (Sub-No. 91), Decision No. 5 (STB served February 2, 2001) (*Oversight Dec. No. 5*).

³ *CSX Corp. et al.—Control—Conrail Inc. et al.—General Oversight*, 5 S.T.B. 1125 (2001) (*Oversight Dec. No. 6*).

Third Annual Round Of General Oversight Proceeding. We have considered, in this decision, the issues raised in the following pleadings that were filed in the third annual round of the Conrail general oversight proceeding: the CSX-9 and NS-8 annual reports filed June 3, 2002, by CSX and NS, respectively; the comments⁴ filed on or about July 17, 2002, by the Susquehanna Economic Development Agency—Council of Governments Joint Rail Authority (SEDACOG JRA), the Wheeling & Lake Erie Railway Company (W&LE),⁵ the American Chemistry Council (ACC), Indianapolis Power & Light Company (IP&L), PPG Industries, Inc. (PPG), the New York City Economic Development Corporation (NYCEDC), the Port Authority of New York and New Jersey (PANYNJ), the State of Maryland, the City of Cleveland, OH, United States Representative Dennis J. Kucinich (10th District, Ohio), and the United States Department of Transportation (DOT); and the CSX-10, NS-9, and DOT-6 replies filed August 7, 2002, by CSX, NS, and DOT, respectively. The contents of these submissions are summarized in the appendix to this decision.⁶

DISCUSSION AND CONCLUSIONS

In General. The reports, comments, and replies filed in this third annual round of the Conrail “general oversight” proceeding demonstrate that the conditions we imposed on the Conrail transaction are working as intended, that the Conrail transaction has not resulted in any competitive or market power problems, and that substantial progress has been made in implementing the various environmental conditions and settlement agreements. The reports, comments, and replies further demonstrate that the service problems that occurred immediately after the Split Date have not recurred. The implementation of the Conrail transaction is now largely complete.

⁴ By decision served June 11, 2002, interested parties were advised that, as in the past, they could address all aspects of applicants’ progress in implementing the Conrail transaction, including whether oversight should be continued or discontinued. *CSX Corporation and CSX Transportation, Inc., Norfolk Southern Corporation and Norfolk Southern Railway Company — Control and Operating Leases/Agreements — Conrail Inc. and Consolidated Rail Corporation [General Oversight]*, STB Finance Docket No. 33388 (Sub-No. 91), Decision No. 7 (STB served June 11, 2002) (*Oversight Dec. No. 7*).

⁵ W&LE’s request for leave to late-file its comments (filed July 23, 2002) is granted, and its late-filed comments are accepted for filing and made part of the record.

⁶ We will address, in a separate decision, the comments filed August 5, 2002, by Cargill, Incorporated. CSX and NS and Cargill remain in negotiation in an attempt to privately resolve the issues raised by Cargill.

In regard to the question of whether oversight should be ended early or continued for the full 5 years, we have considered the comments submitted by various parties. While, as we have already stated, implementation of the transaction is now largely complete, we recognize that the Conrail transaction was perhaps the most complicated “rail merger” transaction in American history, and that certain parties still have concerns about its future course. On a single day (June 1, 1999), a large Class I railroad was divided into two, and each of the divided parts was immediately integrated into another Class I railroad. Only in the Shared Assets Areas, which are operated by Conrail, is the divided railroad operated for the common benefit of the principals and shippers. Against this background, however satisfactory, a healthy sense of caution counsels “a continuation of some form of oversight.” DOT-6 at 5.

We agree that oversight should continue with some adjustments in the oversight process. In each of the first three rounds of this “general oversight” proceeding, we had established a three-part sequential regime: reports by CSX and NS; comments that allow interested parties an opportunity to voice any grievances; and replies that allow the parties (principally CSX and NS) to respond. We see no need to continue to require CSX and NS to initiate this process with the filing of formal reports. As DOT has noted, the reports have outlived their usefulness.⁷ We agree with DOT and will no longer require CSX and NS to file these formal progress reports. In addition, we will no longer require CSX and NS to make available to interested persons their 100% traffic waybill tapes.⁸ We will, however, continue to allow interested parties to comment and provide CSX and NS the opportunity to respond to those comments.

We will therefore conduct the fourth annual round of the “general oversight” proceeding in accordance with the following schedule: comments of interested parties concerning oversight will be due on July 14, 2003; and replies will be due on August 4, 2003. As is customary, however, *see Oversight Dec. No. 6*, at 1135, we reserve the right to alter this schedule and/or to reinstate the reporting requirement if (and to the extent that) circumstances warrant.

⁷ See DOT-6 at 6: “The Department accordingly proposes that the Applicants be relieved of the necessity to prepare comprehensive progress reports on an annual basis.”

⁸ Because the record does not show that any party has made use of the 100% waybill data to date in this general oversight proceeding, we will not require CSX and NS to continue to make the data available on a date certain prior to the due date for comments. Parties may, however, seek relief from the Board to gain access to these data for the remainder of the oversight process, if needed for their submissions, should they not be able to obtain the data directly from CSX and NS.

Issues Raised By Commenting Parties. We turn now to the specific issues raised by the parties that filed comments in the third annual round of the “general oversight” proceeding.

SEDACOG JRA Parties. In 1997, the six affiliated “North Shore” railroads⁹ entered into a settlement agreement (the 1997 NS/NSHR settlement agreement) with NS. In 2001, these same railroads negotiated a trackage rights agreement (the 2001 NS/NSHR trackage rights agreement) with NS. By letter dated August 21, 2001, these railroads advised that the 2001 NS/NSHR trackage rights agreement represented the “formal implementation” of the 1997 NS/NSHR settlement agreement.¹⁰

Despite this representation by the North Shore railroads, a claim has been made by the “SEDACOG JRA parties”¹¹ that the 2001 trackage rights agreement does not fully implement the 1997 settlement agreement. These parties contend, in essence, that they have an enforceable interest in the 1997 settlement agreement.

The SEDACOG JRA parties, though asserting an enforceable interest in the 1997 settlement agreement, have not actually sought any specific relief. As NS has observed, all that these parties presently want is a continuation of ongoing discussions. In view of NS’ statement that it is willing to continue to engage in discussions with the SEDACOG JRA parties, we think that the best approach at this time is for us to encourage the parties to continue their discussions. Thus, no Board action is required.

Wheeling & Lake Erie Railway Company. W&LE has asked that oversight be continued with respect to two W&LE conditions imposed on NS. W&LE and NS agree that NS is presently in compliance with these two conditions. W&LE

⁹ The six affiliated “North Shore” (sometimes “NSHR”) railroads are North Shore Railroad Company, Juniata Valley Railroad Company, Nittany & Bald Eagle Railroad Company, Lycoming Valley Railroad Company, Shamokin Valley Railroad Company, and Union County Industrial Railroad Company.

¹⁰ The letter dated August 21, 2001, was filed in STB Finance Docket No. 33388 on August 23, 2001. Although a copy of the letter itself was sent to “all parties of record,” the attached material (the 2001 NS/NSHR trackage rights agreement) was submitted under seal.

¹¹ The “SEDACOG JRA parties” are: SEDACOG JRA, a Pennsylvania municipal authority; two “Joint Owners” (West Shore Railroad and Lewisburg and Buffalo Creek Railroad); and eight “Joint Shippers” (Brandt Mills Inc.; Agway Agricultural Products; Ag Resources, Inc.; Clark’s Feed Mill, Inc.; Co-Operative Feed Dealers; Corning Incorporated; PP Distribution; and Raisio Chemicals U.S., Inc.).

and NS have not yet reached a final agreement on the formal terms to implement these conditions, however, and W&LE believes that oversight will help ensure that the parties can move toward a permanent and productive resolution of the issues remaining between them.

As CSX has noted, *see* CSX-10 at 14, we have “continuing powers” to enforce the various “permanent conditions” that were imposed on the Conrail transaction. These continuing powers are not dependent on oversight, and thus will remain with us even after oversight ends. A negotiated resolution of the final terms of the two W&LE conditions would of course be preferable, but, if the parties cannot achieve such a resolution on their own, we remain available, upon request, to set the terms ourselves. However, because neither party has yet asked us to set the terms, we have no occasion to take any action with respect to the two W&LE conditions.

American Chemistry Council. ACC’s interests appear to be focused on the South Jersey/Philadelphia and North Jersey Shared Assets Areas (SJPSAA and NJSAA, respectively). ACC’s concerns are three-fold. First, ACC claims that there has recently been a deterioration in service and responsiveness to customers in these two Shared Assets Areas (SAAs). Second, ACC indicates that its members have heard that CSX and NS have been discussing future changes in the way SAA operations are to be conducted. Third, ACC appears to be concerned with NS’ reading of Section III(A) of the NITL agreement, governing CSX’s and NS’ access to facilities within SAAs.¹²

We have examined ACC’s concerns and determined that they do not, as yet, require any action by us. (1) The Board’s Office of Compliance and Enforcement (OCE) continues to monitor the SAAs through weekly reporting and through regular meetings with SAA officials. There has been no indication by shippers, or in the discussions with SAA management, of any service, congestion, or other

¹² The NITL agreement is the settlement agreement that CSX and NS entered into with The National Industrial Transportation League (NITL). *See Merger Dec. No. 89, 3 S.T.B. at 449-51.* The terms of the NITL agreement were imposed, with certain modifications, as conditions. *See Merger Dec. No. 89, 3 S.T.B. at 388* (ordering paragraph 20) & n.264. Section III(A) of the NITL agreement clarifies that the SAA Operating Agreements generally provide: that both CSX and NS will have access to existing or new shipper-owned facilities in the SAAs; that both CSX and NS will have the opportunity to invest in joint facilities in the SAAs in order to gain access to such facilities; and that either CSX or NS may solely develop, within the SAAs, facilities that it will own and control (such as transloading facilities or automotive ramps) that will be accessed exclusively by the railroad that develops such facilities. *See Merger Dec. No. 89, 3 S.T.B. at 450.*

problem seriously affecting SAA operations.¹³ (2) Even if CSX and NS have been considering changes in the way SAA operations are conducted, it is likely that any significant change would require our approval, either because the change would conflict with a condition we imposed on the Conrail transaction or because, even without any such conflict, the change would require our approval under the governing statute. (3) NS has indicated that it is aware of its obligations under *Merger Dec. No. 89* and its legal obligations generally, and it has pledged that it will continue to conduct its business, including its operations within the SAAs, in compliance with both. Thus, no Board action is needed in response to ACC's comments.

Indianapolis Power & Light Company. IP&L is apparently interested in making yet another request, within the framework of this “general oversight” proceeding, for relief it has not heretofore been able to secure. The continuation of this proceeding will allow IP&L to make that request within the desired framework.

PPG Industries. PPG asked us to continue oversight until after the next sustained strong level of rail activity. We see no reason to assume that there will be any substantial merger-related problems during such a period and thus to extend the 5-year formal oversight period for that reason. But even after the end of the formal oversight period, the Board may address parties’ concerns related to the merger and the conditions imposed by the Board, and grant relief, as appropriate.

New York City Economic Development Corporation. In *Merger Dec. No. 89*, we noted that concerns had been expressed regarding the impacts on air quality of additional drayage across the George Washington Bridge. We indicated that, although there had been a suggestion that over 1,000 truck movements a day would shift from the relatively uncongested Tappan Zee Bridge to the George Washington Bridge to take advantage of the new intermodal staging areas in the

¹³ At the request of Conrail, the Director of OCE has recently approved expanding the weekly SAA reporting to include the use of 7-day data in lieu of the 5-day data previously used to construct the monitoring reports. However, should individual or specific issues exist that are not apparent in the monitoring reports, any shipper or affected party can bring that issue to OCE’s attention informally through its Rail Consumer Assistance Program (by e-mail at railconsumer@stb.dot.gov, or by fax at 202-565-9011) and the issue will be immediately addressed with SAA management as well as with CSX and NS.

NJSAA, we believed that the number would be no higher than 253 (which, we pointed out, amounted to a negligible 1% increase in the daily truck traffic on the George Washington Bridge). We further indicated, however, that, because of the potential adverse environmental effects that would result from an unexpectedly large merger-related increase in truck traffic through the City of New York and over the George Washington Bridge, we would require CSX and NS to monitor origins, destinations, and routings for motor carrier traffic at their intermodal terminals in Northern New Jersey and in Massachusetts. The study has fulfilled its purpose by confirming our assessment that the transaction would not result in substantially increased truck traffic over the George Washington Bridge. *See Merger Dec. No. 89, 3 S.T.B. at 282.*

A question has been raised as to whether the George Washington Bridge Survey reporting requirement should be continued or ended now. NYCEDC contends that it should be continued. CSX and NS argue that it should be ended.

We think that the time has come to end the George Washington Bridge Survey reporting requirement. Sufficient time has elapsed to enable us to conclude that our original assessment was accurate: the Conrail transaction has not generated an appreciable increase in the daily truck traffic on the George Washington Bridge. Although the additional uses to which NYCEDC would put this information are no doubt of interest to it, we did not impose this reporting requirement to facilitate NYCEDC's collection of, for example, "market trend information" that can be used to inform "feasibility analyses" of publicly-owned rail freight facilities. We imposed this requirement, rather, for a specific purpose, and that purpose has been fulfilled. Thus, no further Board action is required.

Port Authority of New York and New Jersey. PANYNJ is concerned that, absent oversight, CSX and NS, acting on their own initiative, may make fundamental changes in the nature of operations within the NJSAA. But even after oversight ends, we will have the power to prohibit any NJSAA change that conflicts with a condition imposed on the Conrail transaction or that otherwise requires our approval under the governing statute. And this is certainly true with respect to any fundamental changes to the SAAs.

State of Maryland. The State of Maryland requests that oversight be continued, and claims that various representations CSX and NS made to the State during the course of the Conrail proceeding and in their 1997 settlement agreements have not yet been fulfilled. The State, however, has not sought specific relief in this regard, and, for this reason, we have no occasion to take more detailed action respecting this matter.

City of Cleveland. The two matters addressed by the City of Cleveland — respecting “noise walls” (also called “noise mitigation structures”) and the Lakeshore Line Study — do not call for any action on our part at the present time. Specifically, CSX has advised (and the City has not disputed) that the City/CSX noise wall negotiations have now been successfully concluded, and that the City is now ready to seek bids on a contract to construct the noise walls. Negotiations respecting the Lakeshore Line Study have not yet reached a successful conclusion. However, in view of CSX’s statement that it remains prepared to discuss an arrangement under which “Short Line” train count data would be provided to the City, and in view of the fact that the City has not actually sought specific relief respecting this matter, we do not think it would be appropriate to take, at this time, any action regarding this matter. We note that CSX has specifically stated that it “understands that Cleveland may present specific issues to the Board for its resolution, whether or not the formal oversight proceeding is continued, in the event that the parties cannot resolve this issue through negotiation.” *See* CSX-10 at 19.

United States Representative Kucinich. Rep. Kucinich has again raised an issue respecting the level of train traffic on the C-069 rail segment that runs parallel to Brookpark Road behind the homes on Idlewood Drive in the City of Brooklyn, OH. *See Oversight Dec. No. 5*, slip op. at 95 (issue previously raised by Rep. Kucinich), 95-96 & n.138 (CSX’s response). CSX, in responding to the revived issue, has advised that it “is not aware of any material change in facts or circumstances” respecting the C-069 rail segment, CSX-10 at 20, which would appear to indicate that no additional action by us is warranted. CSX, however, has stated that it is willing to consult further with Rep. Kucinich’s office respecting this matter, and to report to the Board on those consultations. We expect that it will do so.

Summary. Oversight will continue as modified in this decision. The concerns raised by the commenting parties require no formal action by the Board at this time.

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

VICE CHAIRMAN BURKES, commenting:

In this decision, we continue to find, as we did last year in Decision No. 6 in this oversight proceeding, that CSX and NS had resolved the service problems resulting from the implementation of the Conrail transaction, that there continues to be no competitive or market power problems stemming from the merger, and that the conditions we imposed are working as intended. Based on these facts, I continue to believe that the formal oversight reporting procedure is an unnecessary burden and should be discontinued.

It is ordered:

1. The George Washington Bridge Survey reporting requirement established in *Merger Dec. No. 89*, 3 S.T.B. at 388 (ordering paragraph 22), is terminated.
2. As respects the fourth annual round of the Conrail “general oversight” proceeding: comments of interested parties concerning oversight will be due on July 14, 2003; and replies will be due on August 4, 2003.
3. As indicated in *Oversight Dec. No. 6*, at 1135 (ordering paragraph 5), CSX and NS must continue to file quarterly environmental status reports for the duration of the oversight period.
4. This decision is effective on the date of service.

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

APPENDIX: SUBMISSIONS OF THE PARTIES

CSX: In General.

CSX contends that its rail network is now operating at or near record performance levels. The difficulties encountered in the early post-Split Date period, CSX advises, are now far behind it, and CSX is now in a position to take advantage of the enhanced single-system service and the opportunities for growth in revenue and market share inherent in the value created through the acquisition and integration of the new Conrail routes into the CSX system. CSX adds that the conditions the Board imposed have generally continued to work well, and CSX has complied with them to the best of its ability.

Integration Largely Complete. CSX advises that a “substantial preponderance” of the steps necessary to integrate the properties whose operation CSX acquired from Conrail have been taken. CSX adds that, although there will be many more steps that will need to be taken over time to carry out the Conrail transaction, these further steps will be modest compared to what has already been done.

Metrics At Record Or Near-Record Levels. CSX indicates that it is now performing at record or near-record levels as measured by all operational metrics. (1) As respects safety, CSX advises that reports to the Federal Railroad Administration (FRA) show a 55% improvement in number of derailments, and a 46% improvement in personal injuries, from 2000 to 1Q 2002. (2) As respects congestion, CSX advises that the number of cars-on-line shows a 13% improvement since the beginning of 2000. (3) As respects velocity, CSX advises that overall velocity improved from the beginning of 2000 through 1Q 2002 by 27%, and merchandise train velocity improved by 34%. (4) As respects crew utilization, CSX advises that the measurement of crews on duty greater than 12 hours has improved 52%, that recrews are down 78%, and that the number of hours that trains are delayed for crews is down 62%. (5) As respects performance in yards and terminals, CSX advises that overall dwell time has improved 33% since 1Q 2000, that on-time train originations have improved 80%, that trains arriving at destination on time has improved 136%, and that the number of cars spending more than 30 hours in their current terminal has improved 62%. (6) As respects local switching performance, CSX advises that its measurement of local switching performance has improved 12%. (7) As respects the company’s effectiveness in managing locomotives, CSX advises that

the number of hours of train origination delay due to power availability has improved 98%.

Formal Oversight Reporting Mechanism Should Be Discontinued. CSX contends that the formal oversight reporting mechanism (i.e., the formal annual rounds of reports, comments, and replies), having served its intended purpose, should now be discontinued. CSX explains that, at the beginning of the consummation phase, formal reporting and operational monitoring afforded the interested public timely and responsive data and resolution processes. CSX adds that, in view of the sustained improvement to service and the successful completion of so many of the implementation projects, the interests of all concerned would best be served by the elimination of the annual reporting mechanism. CSX notes, in this regard, that the operational monitoring reporting requirements, to which CSX and NS were subjected starting with the Control Date, were largely terminated by the Director of the Board's Office of Compliance and Enforcement in a communication dated June 17, 2002.¹⁴

Reserved Jurisdiction Would Continue Regardless. CSX notes that, in *Merger Dec. No. 89*, the Board "expressly reserve[d] jurisdiction over the STB Finance Docket No. 33388 proceeding and all embraced proceedings in order to implement the 5-year oversight condition imposed in this decision and, if necessary, to impose additional conditions and/or to take other action if, and to the extent, we determine it is necessary to impose additional conditions and/or to take other action to address harms caused by the CSX/NS/CR transaction." *Merger Dec. No. 89*, 3 S.T.B. at 385 (ordering paragraph 1) (footnote omitted). These reserved powers, CSX advises, would remain in full force and effect pursuant to their terms, even if the formal oversight procedure were discontinued. CSX observes that these powers can be exercised by the Board either on formal petition, on informal request, or on the Board's own motion. And, CSX adds, if parties should have grievances that are appropriate for the Board to address, the Board can address those grievances under the five-year reservation of jurisdiction. CSX also notes that, in addition to the powers reserved by the Board under *Merger Dec. No. 89*'s ordering paragraph 1, the Board also has continuing powers to enforce the various "permanent conditions," CSX-10 at 14, imposed on the merger.

¹⁴ CSX notes that, although most of the operational monitoring reporting requirements were terminated by the Director, the reporting requirements respecting the SAAs were continued. See CSX-10 at 12 n.11.

Norfolk Southern: In General.

NS contends that its implementation of the Conrail transaction is proceeding steadily and satisfactorily, and that it has made progress, and will continue to work hard to continue its progress, in streamlining its service, improving its operational efficiency, and increasing its productivity. NS further contends that it has continued to comply with the various conditions imposed by the Board, that those conditions are working as intended, and that no further conditions or other actions by the Board are necessary at this stage of the oversight process.

Positive Trends In Operational Performance. NS advises that its system remains fluid and that its operational efficiency is increasing. NS indicates, in particular, that three key measures of operational performance — average train speed, terminal dwell time, and total cars on line — reflect a continued positive trend.

Future Of The Formal Oversight Proceeding. NS contends that, although a separate, formal proceeding like the Conrail “general oversight” proceeding may be useful in soliciting, marshaling, and collectively airing and resolving issues if there is a demonstrated, ongoing, and significant volume of problems or issues requiring active Board intervention, the record of this proceeding shows that is simply not the case here. NS further contends that a continuation of the Conrail general oversight proceeding, with its annual schedule of reports, comments, and replies, is not necessary; the Board’s ongoing oversight authority, and the mechanisms that already exist apart from this formal proceeding, are, NS explains, fully sufficient to afford parties an avenue of redress on an as-needed basis with regard to any perceived transaction-related issue that may arise in the future. NS, advancing an argument much like CSX’s, adds that there is no reason why the Board cannot terminate the formal Sub-No. 91 proceeding, with its annual reporting requirement and comment schedule, while at the same time making clear that its 5-year oversight jurisdiction under *Merger Dec. No. 89* will continue, so as to permit parties to come before it with transaction-related issues on an as-needed basis.

SEDACOG JRA.

SEDACOG JRA, which is affiliated with the Susquehanna Economic Development Agency—Council of Governments, is a Pennsylvania municipal authority formed by seven Central Pennsylvania counties (Centre, Clinton, Lycoming, Northumberland, Montour, Columbia, and Union Counties) to

acquire, and preserve service on, rail lines slated for abandonment or other disposition. SEDACOG JRA indicates that it now has, in Central Pennsylvania, five rail lines that formerly connected with Conrail and that now connect with NS. SEDACOG JRA further indicates that these five lines, which handle approximately 30,000 carloads of traffic annually, are operated by five Class III railroads (North Shore Railroad Company, Juniata Valley Railroad Company, Nittany & Bald Eagle Railroad Company, Lycoming Valley Railroad Company, and Shamokin Valley Railroad Company) that are managed by Mr. Richard D. Robey. SEDACOG JRA adds that the preservation and ready availability of rail service on its rail lines has been instrumental in economic development activity and expansion of employment in Central Pennsylvania.

SEDACOG JRA advises that, although it has previously expressed serious concerns arising out of transition problems and in regard to unresolved interchange commitments that had been made by NS in connection with the Conrail transaction,¹⁵ the transition problems have been resolved or are being managed to the extent that they no longer present serious problems. SEDACOG JRA further advises that, although not all of its previously expressed concerns relating to service expectations arising out of pre-acquisition commitments by NS have yet been resolved, it nevertheless is hopeful that on-going efforts will produce long-term solutions that will be satisfactory and beneficial to all interested parties.

SEDACOG JRA contends that, although it does not believe that continued regular reporting by NS needs to be required, it does believe that we should continue our oversight jurisdiction of the Conrail transaction for at least 1 more year to ensure that the transaction continues to be implemented in the interests of all concerned parties.

Joint Statement Of Shippers. A “joint statement of shippers” (herein referred to as the “Joint Shippers”) was submitted with the SEDACOG JRA comments. This joint statement was submitted by eight shippers (Brandt Mills Inc.; Agway Agricultural Products; Ag Resources, Inc.; Clark’s Feed Mill, Inc.; Co-Operative Feed Dealers; Corning Incorporated; PP Distribution; and Raisio Chemicals U.S., Inc.) located on rail lines that are operated by North Shore Railroad Company and its affiliates (collectively, NSHR) and that are owned either by

¹⁵ See *Oversight Dec. No. 5*, slip op. at 144-45.

SEDACOG JRA, or by West Shore Railroad, or by Lewisburg and Buffalo Creek Railroad.¹⁶

The Joint Shippers contend: that, in June 1997, NS and NSHR entered into a settlement¹⁷ under which NSHR would, among other rights, be given direct access to the Canadian Pacific (CP) system at Sunbury, PA, to interchange traffic moving to CP local points and points on railroads interchanging only with CP; that, based on the settlement, SEDACOG JRA and various shippers supported the Conrail transaction; that, in a pleading submitted in the Conrail proceeding, NSHR asked that the Board “note for the record” the NS/NSHR settlement agreement, *see Merger Dec. No. 89*, 3 S.T.B. at 422; and that the Board, in noting this agreement “for the record,” observed that it was requiring NS “to adhere to any representations made to parties in this case,” *Merger Dec. No. 89*, 3 S.T.B. at 306.

The Joint Shippers further contend: that, on or after the Split Date, NSHR and NS entered into temporary interim arrangements that allowed traffic to begin moving directly between CP and NSHR at Sunbury; that the Joint Shippers began to take advantage of the interchange and to move traffic to/from points on the “CP system”; and that the Joint Shippers understood that, for purposes of the NS/NSHR arrangement, the term “CP system” would be accorded the same broad interpretation that (according to the Joint Shippers) it had been accorded under a separate NS/CP settlement agreement.¹⁸ The Joint Shippers explain that, under the broad interpretation they have in mind, the term “CP system” would include points on CP itself, points on railroads spun off from CP over the previous 10 years, and points on railroads later spun off from CP. The Joint Shippers contend that, in connection with the temporary interim NS/NSHR arrangements, traffic continued to move “in this manner” for over 2 years.

¹⁶ The joint statement uses the acronym “NSHR” to refer to six Class III railroads controlled by Mr. Robey: North Shore Railroad Company, Juniata Valley Railroad Company, Nittany & Bald Eagle Railroad Company, Lycoming Valley Railroad Company, Shamokin Valley Railroad Company, and Union County Industrial Railroad Company. The first five of these railroads operate lines that are owned by SEDACOG JRA. The sixth of these railroads (i.e., Union County Industrial Railroad Company) operates lines that are owned by West Shore Railroad and by Lewisburg and Buffalo Creek Railroad.

¹⁷ The terms of the June 1997 NS/NSHR settlement agreement were memorialized in an NS letter dated June 10, 1997. *See Oversight Dec. No. 5*, slip op. at 143 & n.218.

¹⁸ The Joint Shippers indicate that the separate NS/CP settlement agreement, which was also entered into in connection with the Conrail proceeding, grants CP indirect access to Sunbury (i.e., the actual CP-NS interchange is at Harrisburg, PA, and NS handles CP traffic between Harrisburg and Sunbury for a fixed handling charge).

6 S.T.B.

The Joint Shippers further contend: that, after the Split Date, NSHR continued to try to negotiate a formal agreement with NS; that, however, NSHR was unable to do so because of restrictions that NS insisted on including in the agreement; and that, therefore, in the first annual round of this oversight proceeding, both NSHR and SEDACOG JRA filed comments detailing their frustrations over NS' attempts to limit the points on CP that could be origin or destination points of the traffic, the types of traffic that could be handled, and the time period of the agreement, *see Oversight Dec. No. 5*, slip op. at 142-45.

The Joint Shippers further contend: that, in July 2001, SEDACOG JRA and the Joint Shippers first learned that NSHR had reached a tentative agreement with NS; that, however, the specific terms of the trackage rights agreement that would implement the settlement were not disclosed; that, furthermore, it was not initially disclosed to SEDACOG JRA or the Joint Shippers that the negotiated terms were far different than those which NSHR and SEDACOG JRA had sought only a year before; that, in August 2001, despite objections to the proposed trackage rights agreement raised by both SEDACOG JRA and the Joint Shippers, and apparently without any changes having been made, NSHR notified the Board that a final agreement with NS had been reached over the terms of an agreement to implement the settlement.

The Joint Shippers object to the terms of the trackage rights agreement that has purportedly been reached between NSHR and NS on the basis that these terms are inconsistent with the original settlement which was made a condition of the transaction. Based upon the description of the terms of the settlement,¹⁹ the Joint Shippers object to the proposed trackage rights settlement because it fails to include the following terms. (1) Either SEDACOG JRA (the owner of the rail lines) should be a party to the settlement agreement, or the agreement should be assignable to SEDACOG JRA or any successor operators of its lines in the event NSHR is no longer the operator. (2) The term should be unlimited, or should be renewable at the option of SEDACOG JRA and its operator. Early termination provisions must be eliminated. (3) The definition of traffic that can be interchanged with CP under the settlement agreement should cover all traffic similar to the traffic that was interchanged at Sunbury between NSHR and CP between June 1, 1999, and June 30, 2001. (4) The definition of traffic that can be interchanged with CP under the settlement agreement should be consistent with the traffic that is covered under the NS/CP settlement agreement.

¹⁹ The Joint Shippers indicate that NSHR has refused to provide a copy of the trackage rights agreement. The Joint Shippers add that NSHR and NS have recently provided a copy of the agreement to SEDACOG JRA under terms of a strict confidentiality agreement that does not permit the agreement to be shared with the Joint Shippers.

The Joint Shippers advise: that SEDACOG JRA is continuing to negotiate with NS and NSHR to address these issues; that the Joint Shippers support the negotiations and are hopeful that the results will be beneficial for all concerned; but that, although negotiations are continuing, it is imperative that the Board make clear that, whether or not the formal oversight proceeding is continued, the Board retains jurisdiction to review any agreements that purport to implement settlements that were a condition of approval of the Conrail transaction (including the agreement between NSHR and NS). The Joint Shippers add that, “based on the foregoing,” they support the SEDACOG JRA comments to which their submission is attached.

Joint Statement Of Rail Line Owners. A “joint statement of rail line owners” (herein referred to as the Joint Owners) was also submitted with the SEDACOG JRA comments. This joint statement, which was submitted by West Shore Railroad and Lewisburg and Buffalo Creek Railroad, indicates that, because the Joint Owners have the same concerns as SEDACOG JRA about the proposed settlement entered into between NSHR and NS, the Joint Owners join in the comments filed by SEDACOG JRA. The Joint Owners further indicate that they support the changes the Joint Shippers believe are necessary to fulfill the terms of the original settlement between NSHR and NS. The Joint Owners add that they support the ongoing negotiations with NS, and hope that the result will be arrangements that benefit all concerned parties.

Wheeling & Lake Erie Railway Company.

In *Merger Dec. No. 89*, we required NS: (a) to grant W&LE overhead haulage or trackage rights access to Toledo, OH, with connections to Ann Arbor Railroad and other railroads at Toledo (the Toledo Access condition); and (b) to extend W&LE’s lease at, and trackage rights access to, Huron Dock on Lake Erie (the Huron Dock condition). See *Merger Dec. No. 89*, 3 S.T.B. at 310-11, 392 (ordering paragraph 68).

NS has advised that it is presently in compliance with the Toledo Access and Huron Dock conditions, even though (NS concedes) NS and W&LE have not yet reached final agreement on the formal terms of these conditions. NS has further advised that, although NS believes there is no need for Board intervention at this point, “NS reserves the right to seek relief from the Board with respect to these matters should circumstances warrant.” NS-8 at 36.

W&LE has advised that it has no material dispute with NS’ discussion, in the NS-8 report, of the status of negotiations between the parties with respect to the two conditions. W&LE contends, however, that these conditions are critically

important to the operation and viability of W&LE, and that it is important that the final arrangements that will permanently establish and govern these conditions be fair, effective, and even-handed. W&LE insists, therefore, that it is vital that the Board continue its oversight over at least this aspect of the Conrail transaction for the full 5 years initially contemplated or until NS and W&LE reach final agreement on these matters. The ongoing nature of the Board's oversight role, W&LE contends, helps ensure that the parties can move toward a permanent and productive resolution of the issues remaining between them. W&LE further contends that, if it is not feasible to discontinue oversight of the remainder of the Conrail transaction while retaining the original 5-year oversight condition solely with respect to this aspect of the transaction, the Board should continue its oversight of the entire transaction for the full 5-year period contemplated in 1998.

American Chemistry Council.

(1) *Oversight.* ACC contends that we should continue oversight for the full 5 years to ensure both that CSX and NS comply with the conditions imposed in *Merger Dec. No. 89* and also that problems growing out of the Conrail transaction are addressed expeditiously. ACC explains that, although CSX and NS have overcome the transitional issues associated with the division of Conrail and the initiation of post-Split Date service, service issues in the former Conrail territory remain and, in fact, appear to be increasing, particularly in the SAAs in Philadelphia and New Jersey.

(2) *Shared Assets Area Issues.* ACC contends that rail-to-rail competition in the SAAs, as well as the level of service to shippers, is potentially threatened by several developing trends. ACC explains that its members have heard that CSX and NS are discussing how operations in the SAAs may be changed to reduce the role of Conrail as the SAA operator and to increase the direct control of CSX and NS. It appears, ACC indicates, that the options under consideration by CSX and NS include the transfer of Conrail assets to CSX and NS and the cutting of Conrail budgets. ACC further explains that its members have noticed a recent deterioration in service and responsiveness to customers in the South Jersey/Philadelphia and North Jersey SAAs, apparently because Conrail employees who deal with customers' inquiries (over late or missing cars, for example) have retired and have not been replaced. ACC argues that, although CSX, NS, and Conrail should be accorded some leeway to conduct SAA operations in the most efficient manner, changes that impair the ability of Conrail to act as an independent and neutral switching carrier are of serious concern. ACC insists that any CSX or NS proposals that might arguably have competitive

implications, or that might otherwise arguably affect the merger conditions, should be aired before the Board.

(3) *NITL Agreement Issue.* ACC notes that NS has said that the NITL agreement, *see Merger Dec. No. 89*, 3 S.T.B. at 449-51, construes the Shared Assets Areas Operating Agreements “as generally providing that both CSX and NS shall have access to existing and new customer-owned facilities in the SAAs, that both CSX and NS may invest in joint facilities in the SAAs in order to gain access to such facilities, and that either NS or CSX may solely develop facilities that it will own or control and exclusively access. NS continues to comply with this condition.” NS-8 at 26-27; *see also Merger Dec. No. 89*, 3 S.T.B. at 450. It would be helpful, ACC advises, if NS would confirm that its understanding of its obligations in the SAAs under its Operating Agreements with CSX conforms to what it cites as the NITL agreement’s construction of those operating agreements.

Indianapolis Power & Light Company.

IP&L contends that “if but only if” we are prepared to entertain, at any time, comments from parties claiming that their circumstances require relief and are the result, in whole or in part, of the Conrail transaction, we can dispense with the remaining 2 years of general oversight and provide instead that comments or petitions for relief may be filed in STB Finance Docket No. 33388. IP&L also contends that, if it seeks relief under such circumstances, it should not have to meet the usual standard for reopening, in light of the “new evidence” and “changed circumstances” it presented in the second annual round of the general oversight proceeding²⁰ and in light of our prior statements that IP&L was free to offer additional evidence if the remedies it was afforded were not providing effective competition.²¹ IP&L further contends that a filing fee for such a petition for relief should not be required (because a filing fee would not have been required during the general oversight proceeding) and the matter should not be different based solely on the procedural posture in which the dispute arises.

²⁰ See *Oversight Dec. No. 6*, at 1142-1146.

²¹ “[D]emonstrated deficiencies in the operations into [IP&L’s Stout facility] may be examined as part of our review in the oversight process of whether there is a need at that time to modify the terms of the relief we have granted in order to preserve competition that existed prior to implementation of the approved transaction.” *CSX Corp. et al.–Control–Conrail Inc. et al.*, 4 S.T.B. 25 (1999), at 29 (*Merger Dec. No. 115*).
6 S.T.B.

PPG Industries.

PPG recommends that general oversight be continued over the initial 5-year period. PPG advises that, although CSX and NS have strived to improve operations, their service does not always meet pre-transaction levels. We should consider our mission complete, PPG adds, only after CSX's and NS' newly designed service offerings hold up under the next sustained strong level of rail activity.

New York City Economic Development Corporation.

(1) *Oversight, In General.* NYCEDC²² contends that the Conrail general oversight proceeding should be continued for the full 5 years originally contemplated. NYCEDC explains that CSX and NS made, during the course of the Conrail proceeding, numerous representations both to NYCEDC and to shippers. Continued oversight, NYCEDC further explains, is necessary to ensure that CSX and NS adhere to their representations, not all of which (NYCEDC notes) have yet been fulfilled. And, NYCEDC adds, the potential remains that either a public agency or a shipper may need to ask the Board to step in to determine that additional conditions are necessary to address unforeseen harms caused by the Conrail transaction.

(2) *George Washington Bridge Survey.* NYCEDC notes that *Merger Dec. No. 89* requires CSX and NS to provide regular reports (on a quarterly basis) of “origins, destinations, and routings for the truck traffic at their intermodal terminals in Northern New Jersey and in the Commonwealth of Massachusetts in a manner that will allow us to determine whether the CSX/NS/CR transaction has led to substantially increased truck traffic over the George Washington Bridge.” *Merger Dec. No. 89*, 3 S.T.B. at 388 (ordering paragraph 22). NYCEDC further notes that *Oversight Dec. No. 5*, slip op. at 32 n.55, requires CSX and NS to provide these reports directly to NYCEDC’s representatives. NYCEDC contends that this information is quite valuable. NYCEDC explains: that this information provides important data on the volume of intermodal traffic that is off-loaded from rail to truck for direct transport to the east-of-the-Hudson market; that this is useful for understanding the volume of truck traffic and the environmental consequences of this traffic for the region; that the market trend information derived from this data is critical to informing feasibility analyses of many publicly-owned rail freight facilities in

²² NYCEDC submitted its comments on behalf of the City of New York.

6 S.T.B.

that market; that this information will continue to be important after completion of the Cross Harbor Freight Movement Project Environmental Impact Statement that relates to funding Cross Harbor Improvements; and that the intermodal operational reporting is also needed to help transportation agencies assess multimodal use of the Hudson River crossings, as congestion increases over time.

NYCEDC indicates uncertainty as to whether CSX and NS are preparing and submitting this information as part of the reporting related to the Conrail general oversight proceeding or as part of the Operational Monitoring imposed on the Conrail transaction itself. NYCEDC contends that, if this reporting is part of the general oversight proceeding, it should be continued for the remaining 2 years of general oversight. NYCEDC further contends that, if this reporting is part of the Operational Monitoring, then the decision (dated June 17, 2002) of the Director of the Board's Office of Compliance and Enforcement, to permit the railroads to discontinue the weekly and monthly operating reports (effective with the weekly report for the week ending June 28, 2002, and the monthly report for the month ending June 30, 2002), should be rescinded, at least to the extent that it applies to this intermodal traffic information. The Director's decision, NYCEDC explains, was made without notice and comment to the public that might have an interest in the information provided, and should be reversed to the extent that it is contrary to the interests of parties that rely on the data who do not have recourse to the information from other sources.

Port Authority of New York and New Jersey.

PANYNJ, an agency of the States of New York and New Jersey that (among other things) is charged with the protection of the commerce of the New York/New Jersey Port District,²³ indicates that rail transportation to, from, and within the NJSAA is of vital importance to the economy of the Port District. PANYNJ, which notes that it has invested billions of dollars in port-related facilities, warns that these investments would be severely imperiled without the rail services necessary to move export/import traffic through the Port of New York and New Jersey. PANYNJ advises that, although many of the service problems that initially plagued the NJSAA have been resolved, all is not well. PANYNJ explains that localized service problems still exist from time to time, and it adds that CSX and NS remain woefully short of the capital needed to make investments in the NJSAA.

²³ PANYNJ indicates that the New York/New Jersey Port District, a more-or-less circle-shaped area that encompasses the portions of New York and New Jersey that lie within a roughly 25-mile radius of the Statue of Liberty, includes virtually all of the NJSAA.

6 S.T.B.

PANYNJ contends that, for several reasons, oversight should continue to the extent necessary to provide the necessary scrutiny within the NJSAA and the Port District and to keep in place the conditions (described in PANYNJ's comments at 2-3) agreed to by the carriers and PANYNJ as a basis for PANYNJ's support of the Conrail transaction. (1) PANYNJ indicates that the volumes of traffic moving through PANYNJ's on-dock "ExpressRail" facility are reaching record levels on a regular basis. PANYNJ further indicates that it is working with the City of New York to provide renewed rail service to Staten Island and the Howland Hook marine terminal facility located there. Such rail service, PANYNJ advises, will increase the number of rail containers moving through the Port District and will strain the already strained rail capacity of the NJSAA. (2) PANYNJ indicates that it has heard persistent rumors that the carriers may seek to fundamentally alter the nature of operations within the NJSAA. PANYNJ contends that, because the NJSAA concept was an integral part of the transaction that we approved, any significant change in that concept or the relations determined by that concept should be the subject of meaningful review by interested parties (including PANYNJ) and ultimate review and approval by the Board. And, PANYNJ adds, maintaining oversight provides the easiest and most reliable way to provide that necessary review and (if warranted) approval.

State of Maryland.

The State of Maryland²⁴ contends that the Conrail general oversight proceeding should be continued for the full 5 years originally contemplated, to ensure adherence by CSX and NS to the representations they made during the course of the Conrail proceeding. The State claims that CSX and NS made numerous representations to the State during the course of the Conrail proceeding and in settlement agreements dated September 24, 1997, that have not yet been fulfilled, even though (the State advises) it has worked with both railroads to achieve the benefits for Maryland that they touted during the Conrail proceeding. (1) The State indicates, with respect to CSX, that it is continuing to discuss the improvements that were part of the CSX settlement agreement. The State further indicates, with respect to the impacts of the transaction on MARC train service, that it has seen marked improvement on a regular basis on Camden Line service but a continuing intermittent problem on the Brunswick Line. The State advises

²⁴ The comments of the State of Maryland were submitted by its Department of Transportation (MDOT), which includes the Maryland Transit Administration and the MARC Commuter Rail Service.

that there appear to be capacity issues on the Brunswick Line, notwithstanding CSX's representation that there is plenty of capacity on that line to handle both freight traffic and commuter traffic. (2) The State indicates, with respect to NS, that NS has completed none of the capital infrastructure improvements it described either in its Operating Plan or in the NS settlement agreement.

City of Cleveland.

The City of Cleveland contends that CSX has not honored its settlement agreement obligations to the City to assist in noise mitigation and to provide critical train traffic data, and that, for this reason, oversight of the Conrail transaction should not be limited. The City indicates that, although many of the issues surrounding the various rights and obligations of the parties contained in the settlement agreement have been resolved, continued oversight of the Board has been invaluable in promoting the cooperation of CSX to achieve resolution of these issues. The City therefore asks that the Board continue to oversee compliance by CSX with its obligations under the settlement agreement. Outstanding issues may never be resolved, the City warns, without the Board's continued oversight.

(1) *Noise Mitigation Structures.* The City claims that, although the settlement agreement provides that CSX will not unreasonably withhold concurrence with the design, schedule for construction, and/or installation of noise mitigation structures, CSX has failed to approve plans for noise walls that were delivered to CSX in August 2000. The City further claims that, although the City has always been responsive to the requests of CSX's engineers, CSX has been uncooperative and untimely in providing approvals, which (the City adds) has significantly impaired the City's ability to provide noise mitigation structures to its citizens. The City warns that, if Board oversight is terminated, it is unlikely that the noise mitigation structure project will be completed without additional significant delays caused by CSX's withholding of review and approval of designs.

(2) *Lakeshore Line Study.* The City's settlement agreement with CSX includes a requirement that CSX conduct a "Lakeshore Line Study" concerning the feasibility of the diversion by CSX of two trains from CSX's Short Line to NS' Lakeshore Line. The City indicates that, although this study was supposed to be provided to the City by December 1999, it was not provided to the City until March 2001. The City further indicates: that, prior to receiving the study, the City determined that a much greater amount of train traffic was occurring on the Short Line than CSX had represented; that, since the scope of the City's noise mitigation efforts depends on the number of trains moving on the Short Line, and

since CSX claims that train diversion is not feasible, CSX agreed to provide the City with train count data on an ongoing basis; and that negotiations are underway to supplement the settlement agreement with the requirement that CSX continue to provide the train count data. The City argues that, in view of the extraordinary efforts to obtain information from CSX, oversight by the Board on this issue is essential.

United States Representative Kucinich.

(1) *In General.* Rep. Kucinich indicates that, in general, he is pleased with the progress that has been made in the communities of Ohio's 10th Congressional District. Rep. Kucinich cites, in particular, the progress that has been made in Bay Village, Rocky River, Lakewood, Olmsted Falls, Olmsted Township, and Berea.

(2) *City of Brooklyn; Relief Requested.* Rep. Kucinich indicates: that, in the Final Environmental Impact Statement, the C-069 rail segment that runs parallel to Brookpark Road behind the homes on Idlewood Drive in the City of Brooklyn was not predicted to meet the "5 dBA increase" criteria for noise mitigation; that this failure to meet the criteria was premised on the projection that there would be, after the Split Date, 43.8 trains per day on this segment; that, however, there is now reason to believe that more than 43.8 trains per day may be using this segment; and that, if this is true, there may indeed have been the 5 dBA increase required for noise mitigation. Rep. Kucinich therefore asks that the Board and CSX work with his office and the City of Brooklyn to attain an accurate train count and to determine the noise levels along the C-069 segment near the homes on Idlewood Drive, which (Rep. Kucinich advises) will enable the City of Brooklyn to receive any mitigation for which it may be eligible.

United States Department of Transportation.

(1) *Safety.* DOT, which notes that the Federal Railroad Administration (FRA) has monitored the implementation of the Conrail transaction in accordance with the Safety Integration Plans (SIPS) filed by CSX and NS in the Conrail proceeding, advises that CSX and NS appear to have managed the Conrail transaction well after an initial period of difficulty. DOT indicates that the systemic safety shortfalls that were identified early in the integration process (e.g., information technology deficiencies, hazardous materials documentation defects, and operating procedures problems) have been satisfactorily resolved, and that, for all practical purposes, CSX and NS have successfully completed the safe integration of Conrail. DOT adds that, although there is no longer any basis

to continue formal SIPS-based FRA oversight of the safety of operations on CSX and NS, FRA will continue to scrutinize the safety of operations on CSX and NS, both separately and in the Shared Asset Areas, according to the normal Safety Assurance and Compliance Program applicable to the industry at large.

(2) *Continuation Of Oversight.* DOT advises that, although CSX and NS have completed a great many of the steps and conditions necessary to a successful implementation of the Conrail transaction, it is apparent that some issues remain outstanding. DOT therefore contends that general oversight should continue, but should be tailored to a more narrow focus. DOT contends, in particular, that the Board: should determine whether, and to what extent, CSX and NS have complied with all the conditions imposed on the transaction; should take appropriate steps to ensure that unfulfilled conditions are satisfied; should inquire into changes in the competitive status between CSX and NS in the Shared Assets Areas of New Jersey; and should indicate its willingness to entertain, during the next 2 years, claims of unforeseen harms arising from the Conrail transaction. DOT adds that, although CSX and NS should not be required to continue to prepare comprehensive progress reports on an annual basis, they should be required to continue to submit reports tailored to any of the specific claims raised by commenting parties that the Board determines must be satisfied.

CSX: Replies To Commenting Parties.

CSX has replied to the comments filed by ACC, NYCEDC, PANYNJ, the State of Maryland, the City of Cleveland, and Rep. Kucinich.

CSX's Reply To ACC. CSX contends that, if CSX and NS were to propose changes relating to the SAAs that either conflicted with a condition imposed on the Conrail transaction or required Board approval under the governing statute, the two carriers would be obligated to bring the matter to the Board's attention and, therefore, the legitimate interests of shippers would be well protected.

CSX's Reply To NYCEDC. CSX, which advises that it filed its most recent George Washington Bridge Survey report on July 26, 2002, *see* CSX-10 at 8, indicates that the George Washington Bridge Survey reporting requirement did not end with the termination of operational monitoring (which, as noted above, was terminated by the Director of the Board's Office of Compliance and Enforcement in a communication dated June 17, 2002). CSX further indicates that the George Washington Bridge Survey reporting requirement would not end even if (as CSX urges) the formal oversight reporting mechanism were to be terminated.

CSX contends, however, that “the time is ripe” for the Board to end the George Washington Bridge Survey reporting requirement. *See* CSX-10 at 8-10. CSX argues: that *Merger Dec. No. 89* indicates that the Survey was limited “at the outside” to the five years of Board retention of jurisdiction;²⁵ that the purpose of the Survey was to determine the extent to which the Conrail transaction would increase drayage over the George Washington Bridge as opposed to the Tappan Zee Bridge, thereby possibly raising health issues (mainly as to the Bronx);²⁶ that the purpose of the Survey has been fulfilled, with 5 months’ experience prior to the Split Date²⁷ and 36 months thereafter; and that the Survey has not shown any adverse trends concerning its original purpose, and, indeed, no one has even contended that any such trends have been shown. CSX adds that, although NYCEDC has suggested a new purpose for the Survey (transportation planning in the Greater New York area), there is no reason why CSX and NS — which do not use the Survey in their own marketing or operational functions — should be conscripted for this purpose.

CSX’s Reply To PANYNJ. (1) CSX contends that, although PANYNJ appears to believe that, unless the Board continues the annual formal oversight proceedings, CSX and NS could make major changes in the SAAs without Board consideration or approval, this is simply not true. CSX insists, in essence, that, with or without the annual formal oversight proceedings, the Board has power to block any SAA change that conflicts with a condition imposed on the transaction or that requires Board approval under the governing statute. (2) CSX notes that one of the conditions agreed to by CSX and PANYNJ gives PANYNJ standing to seek relief from the Board “during such time as the Board maintains oversight following approval of the transaction.” CSX advises that it construes this as applying to the five-year period (i.e., the period set out in *Merger Dec. No. 89*’s ordering paragraph 1), not to the period of existence of formal oversight proceedings. CSX-10 at 14 n.12.

CSX’s Reply To State Of Maryland. CSX contends that, although “intermittent” problems occur in any ongoing operation, CSX believes that, overall, it has improved MARC service on the Brunswick Line (on-time

²⁵ CSX cites our statement, in *Merger Dec. No. 89*, that the George Washington Bridge Survey reporting requirement “will be specifically included in the 5-year oversight condition that we are imposing.” *Merger Dec. No. 89*, 3 S.T.B. at 282.

²⁶ CSX cites our statement, in *Merger Dec. No. 89*, that “[t]he Nadler Delegation is concerned about the impacts on air quality of additional drayage across the George Washington Bridge.” *Merger Dec. No. 89*, 3 S.T.B. at 282.

²⁷ The Survey commenced on January 1, 1999.

performance averaged 94% for the first 5 months of 2002, CSX advises) and has addressed intermittent problems as they arise. CSX further contends that it does not believe that intermittent delays, caused largely by bad weather, provide any basis for regulation by the Board. And, CSX adds, it will continue to work with MDOT with respect to the ongoing implementation of its 1997 settlement with the State of Maryland, as well as with regard to other transportation issues of interest to MDOT and CSX as they arise.

CSX's Reply To City Of Cleveland. (1) *Noise Walls.* CSX disputes the claim, made by the City of Cleveland, that CSX has failed to approve plans for noise walls that were delivered to CSX in August 2000. CSX explains: that the “plans” that were delivered to CSX in August 2000 were only preliminary plans, on which CSX offered its comments; that, when CSX first received detailed plans in May 2001, its engineers promptly reviewed those plans and commenced a series of communications with the City’s contractor; that revised plans, reflecting CSX’s concerns, were submitted to CSX in December 2001; that CSX conditionally approved those plans, subject to the completion of a license agreement that would permit the construction of the walls on CSX property and a warranty agreement that would extend to CSX the benefits of warranties that the City would obtain from its contractor and one of its suppliers; that both parties understood that completion of these agreements, both of which raised numerous issues, was a necessary precondition to construction of the walls; that those negotiations were successfully concluded in June 2002; and that the agreements, having now been executed by both parties (by CSX on June 27, 2002, and by Cleveland on July 25, 2002), are now in effect. CSX further explains: that, during the course of discussion of the license and warranty agreements, the City requested that CSX provide written approval of the City’s final noise wall designs; that CSX forwarded a draft of an approval letter to the City on June 12, 2002; and that CSX forwarded a final, executed letter to the City on July 23, 2002. CSX adds that, because the noise wall negotiations have now been successfully concluded (indeed, CSX suggests, the City is now ready to seek bids on a contract to construct the noise walls), there is no need for any intervention by the Board.

(2) *Lakeshore Line Study.* CSX contends that the City’s discussion of the Lakeshore Line issue does not offer a complete picture. CSX explains: that the Lakeshore Line study that CSX provided to the City in March 2001 demonstrated, with train count data, that CSX was not in fact operating more trains on the Short Line than had been projected in CSX’s operating plan filed in the Conrail transaction; that the City has nevertheless requested CSX to provide additional Short Line train counts on a continuing basis, information (CSX points

out) that CSX is under no present obligation to provide; that, although CSX has offered to conduct such train counts for a period of time as part of an overall understanding on several matters, the City and CSX have not reached agreement on this matter, and, in fact, the City, in recent months, has not pursued this matter further with CSX; and that, should the City wish to resume consultations, CSX remains prepared to discuss an arrangement under which train count data would be provided. CSX concedes that, although it expects this issue can be resolved through negotiations, it understands that the City may present specific issues to the Board for resolution, whether or not the formal oversight proceeding is continued, if the parties cannot resolve this issue through negotiations.

CSX's Reply To Rep. Kucinich. CSX advises: that the residents of the City of Brooklyn have previously expressed their disappointment to Rep. Kucinich that they were not eligible for noise mitigation under the Board's criteria; that CSX has previously worked with Rep. Kucinich's office to respond to this concern; and that CSX is not aware of any material change in facts or circumstances during the past year. CSX adds that it is prepared to consult with Rep. Kucinich's office and to report to the Board on those consultations, as (CSX notes) it has done in the past.

NS: Replies To Commenting Parties.

NS has replied to the comments filed by SEDACOG JRA, W&LE, ACC, IP&L, NYCEDC, PANYNJ, and the State of Maryland.

NS' Reply To SEDACOG JRA. NS contends that we should not grant any relief to any party on the theory that the 2001 NS/NSHR trackage rights agreement is inconsistent with the 1997 NS/NSHR settlement agreement. (1) NS disputes the assertion, made (explicitly or implicitly) by all of the SEDACOG JRA parties,²⁸ that these parties have an enforceable interest of some sort in the June 1997 NS/NSHR settlement agreement. (a) NS explains that it entered into this settlement agreement with NSHR, and not with any of the SEDACOG JRA parties. The "real party in interest" as respects the 1997 settlement agreement, NS argues (citing *Oversight Dec. No. 5*, slip op. at 22), is NSHR, which, NS adds, has not asserted any problems with the 2001 trackage rights agreement it voluntarily entered into with NS. (b) NS further explains that the claim, advanced by the Joint Shippers, that, "based on" the 1997 NS/NSHR

²⁸ SEDACOG JRA, the Joint Shippers, and the Joint Owners are herein referred to collectively as the "SEDACOG JRA parties."

settlement agreement, at least some of the SEDACOG JRA parties supported the Conrail transaction, is misleading. The fact of the matter, NS insists, is that none of the SEDACOG JRA parties filed statements in support of the Conrail transaction, whether “based on” the 1997 settlement agreement, or in exchange for any commitments made by NS, or otherwise. (2) NS contends that none of the SEDACOG JRA parties has actually requested the Board to intervene or impose any relief. All that these parties presently want, NS claims, is a continuation of ongoing discussions; and, NS adds, it is quite willing to continue discussing these issues with SEDACOG JRA and to talk individually with any shipper or other party.

NS’ Reply To W&LE. NS notes that, because neither W&LE nor NS has asked the Board to step in to impose a final arrangement between W&LE and NS, no action by the Board in that regard is necessary or warranted.

NS’ Reply To ACC. NS contends that operations in the SAAs remain generally smooth and within normal operating parameters. NS adds that it is well aware of its obligations under *Merger Dec. No. 89* and its legal obligations generally, and will continue to conduct its business, including its operations within the SAAs, in compliance with both.

NS’ Reply To IP&L. NS contends that, if the Board decides to end the formal oversight process now, there is no basis for doing so in a way that gives any party or class of parties preferential standing vis-à-vis other parties for airing future concerns with the Board or a more lenient legal standard for obtaining future relief than that afforded to all parties generally under the Board’s governing statutes, regulations, and precedents.

NS’ Reply To NYCEDC. NS’ position as respects the George Washington Bridge Survey reporting requirement differs from CSX’s position. NS contends that, because the George Washington Bridge Survey was initiated as part of the general oversight proceeding²⁹ and for a specific, limited purpose, the reports required by the Survey should be continued only if the Board continues the formal oversight process, and even then only if the Board concludes that the

²⁹ NS cites *Merger Dec. No. 89*, 3 S.T.B. at 282 (we said that the George Washington Bridge Survey “will be specifically included in the 5-year oversight condition that we are imposing”), and at 366 (we said that oversight would enable us “to monitor the routings for truck traffic at applicants’ intermodal terminals in Northern New Jersey and in the Commonwealth of Massachusetts, which could affect truck traffic moving over the George Washington Bridge”).

6 S.T.B.

reports continue to serve the specific transaction-related purpose for which it imposed the George Washington Bridge Survey reporting requirement.

NS' Reply To PANYNJ. NS advises that operations in the NJSAA remain within normal operating parameters. NS further advises that it will continue to work to ensure smooth and reliable service in the NJSAA and to resolve any service issues as they arise.

NS' Reply To State Of Maryland. NS concedes that certain contemplated infrastructure improvement projects have not been implemented, primarily (NS explains) because of higher than anticipated costs. NS notes, however, that it has continued to discuss these projects with Maryland officials and that it will continue to work with the State in this regard. NS adds that it has continued to work with the Port of Baltimore and the State of Maryland to keep the Port competitive and to increase NS' business in Maryland, and that it has participated in efforts to address ways to increase rail capacity and performance in the mid-Atlantic rail corridor, including to/from the City and Port of Baltimore and the Delmarva Peninsula.