

STB FD 33388 (Sub 36) 2-23-98 E 185907

175907

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February 23, 1998

Via Hand Delivery

Honorable Vernon A. Williams  
Office of the Secretary  
Surface Transportation Board  
1925 K Street, N.W.  
Washington, D.C. 20423-0001

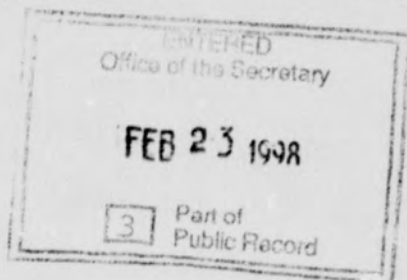


Re: STB Finance Docket No. 33388, *CSX Corporation, et al, Norfolk Southern Corporation, et al. -- Control And Operating Leases/Agreements --Conrail Inc., et al.*

Dear Secretary Williams:

Please find enclosed for filing in the above-referenced proceeding an original and twenty-five (25) copies of the Brief on behalf of Inland Steel Company, which has been designated as ISI-12.

A copy of this filing is also enclosed on a 3.5-inch diskette in WordPerfect 7.0 format.



Respectfully submitted,

*Karyn A. Booth*

Nicholas J. DiMichael  
Karyn A. Booth  
Attorneys for Inland Steel Company

**ENCLOSURES**

4896-030

cc: All Parties of Record

185907

BEFORE THE  
SURFACE TRANSPORTATION BOARD



FINANCE DOCKET NO. 33388

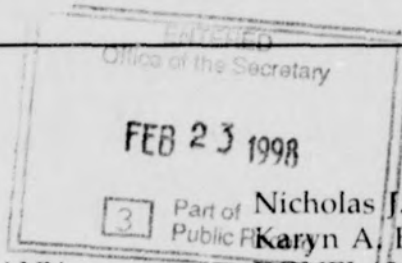
CSX CORPORATION AND CSX TRANSPORTATION, INC.,  
NORFOLK SOUTHERN CORPORATION AND  
NORFOLK SOUTHERN RAILWAY COMPANY  
—CONTROL AND OPERATING LEASES/AGREEMENTS—  
CONRAIL, INC. AND CONSOLIDATED RAIL CORPORATION

FINANCE DOCKET NO. 33388 (SUB-NO. 36)

ELGIN, JOLIET AND EASTERN RAILWAY COMPANY,  
TRANSTAR, INC. AND I & M RAIL LINK, LLC  
—PURCHASE—  
STOCK OF INDIANA HARBOR BELT RAILROAD COMPANY  
CONTROLLED BY CONSOLIDATED RAIL CORPORATION

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BRIEF OF INLAND STEEL COMPANY



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DATED: February 23, 1998

BEFORE THE  
SURFACE TRANSPORTATION BOARD

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FINANCE DOCKET NO. 33388

CSX CORPORATION AND CSX TRANSPORTATION, INC.,  
NORFOLK SOUTHERN CORPORATION AND  
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—CONTROL AND OPERATING LEASES/AGREEMENTS—  
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—PURCHASE—  
STOCK OF INDIANA HARBOR BELT RAILROAD COMPANY  
CONTROLLED BY CONSOLIDATED RAIL CORPORATION

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BRIEF OF INLAND STEEL COMPANY

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Inland Steel Company ("Inland") hereby submits its Brief to the Surface Transportation Board ("STB" or "Board") in support of its Comments and Request for Conditions, filed in Finance Docket No. 33388, on October 21, 1997 (ISI-5),<sup>1</sup> and its Opposition To The Responsive Application of Elgin, Joliet and Eastern Railway Company ("EJE"), Transtar, Inc. and I & M Rail Link, L.L.C. ("IMRL") (collectively "Responsive Applicants"), filed in Finance Docket No. 33388 (Sub No. 36) on December 15, 1997 (ISI-9).

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<sup>1</sup> In a December 15, 1997 filing with the Board (ISI-11), Inland withdrew its requests for Conditions Numbers 1 and 3, as set forth in its October 21, 1997 Comments, and expressed its support for the proposed acquisition of Conrail by CSX Corporation and Norfolk Southern Corporation, with the exception of Inland's request to the STB to impose trackage rights over the Indiana Harbor Belt Railroad to facilitate direct access by Norfolk Southern Railway Company to Inland's Indiana Harbor Works facility located in East Chicago, Indiana, as set forth in its October 21, 1997 Comments as Request for Condition Number 2.



## I. INTRODUCTION

Inland is a wholly-owned subsidiary of Inland Steel Industries, Inc. It is the sixth largest manufacturer of steel in the United States. Inland produces high-strength low alloy steels, including cold rolled and hot rolled steels, as well as coated, laminated, and alloy bar steel. Steel is produced by Inland at its Indiana Harbor Works facility located at East Chicago, Indiana.<sup>2</sup> Inland's Indiana Harbor Works facility currently receives direct rail service from two independent rail terminal switching carriers, the EJE and the Indiana Harbor Belt Railroad Company ("IHB"). Consolidated Rail Corporation ("Conrail") currently holds a 51% stock ownership interest in the IHB.<sup>3</sup>

Under the Primary Application filed by CSX Corporation, CSX Transportation, Inc. ("CSX"), Norfolk Southern Corporation and Norfolk Southern Railway Company ("NS") (collectively the "Primary Applicants"), Conrail will continue to own the 51% stock interest in the IHB. However, the voting of that stock interest by Conrail is to be governed by an agreement entered between the Primary Applicants, titled "Agreement Relating to the Contractual Rights and Ownership Interests of Consolidated Rail Corporation with Respect to the Indiana Harbor Belt Railroad Company" ("Agreement").<sup>4</sup> The Agreement provides CSX and NS with "the right to select an equal number of directors of IHB" to be elected by Conrail. Agreement Sec. 2(a). The Agreement also sets forth the Applicants' intentions as to the general managerial control over the IHB, contracting by IHB, the

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<sup>2</sup> The steel products manufactured by Inland undergo processing and finishing at I/N Tek and I/N Kote, which facilities are located near New Carlisle, Indiana and are jointly owned and operated by Inland and Nippon Steel Corporation.

<sup>3</sup> The remaining 49% interest is owned by the Canadian Pacific Railway Company.

<sup>4</sup> The Agreement is set forth in Vol. 8C of the Primary Application at pp. 693-714.

dispatching of trains over IHB lines, and the operation of certain rail yards used by IHB, among other matters. Agreement Sec. 2.

The EJE and IMRL oppose the manner in which the Primary Applicants intend to administer and operate the IHB and have, therefore, filed their own joint application requesting the Board's authorization to acquire Conrail's 51% stock ownership in the IHB. The Responsive Applicants claim that their acquisition of Conrail's stock interest is needed to prevent competitive harm from occurring to other intermediate switching carriers that operate in the Chicago, Illinois and Northwest Indiana territory, and to prevent harm to shippers that are presently served by both EJE and IHB, where CSX and NS would serve in whole or in part as the line-haul carrier.

As demonstrated by Inland in its December 15 filing with the Board, the Responsive Applicants' proposal to acquire Conrail's stock interest in the IHB would not prevent competitive harm from occurring to Inland, which today receives direct rail service from both EJE and IHB, but in fact would cause Inland direct and substantial competitive harm. By enabling the EJE to assume an ownership interest in the only other rail service provider at Inland's Indiana Harbor Works facility, the Responsive Application, if granted, would in effect eliminate the head-to-head rail competition that currently exists at this facility. It would enable all rail service to and from the Indiana Harbor Works facility to be effectively controlled by a single rail carrier, the EJE. It would result in Inland becoming a "2 to 1" shipper.

The Responsive Applicants have not refuted (because they cannot) the compelling evidence submitted by Inland which illustrates the severe loss of rail competition that would occur if the Responsive Application were granted by the Board. Nor have they adequately responded to Inland's evidence that shows that substantial rate increases and service deterioration at the Indiana Harbor Works facility would be the likely consequences of their proposal. The weak attempt that

was made by the EJE and IMRL to address Inland's valid concerns cannot disguise the obvious—that Inland's loss of competition will equate to substantial gains in profits for the EJE.

Based upon the record in this case, the Board must deny the Responsive Application. In the unlikely event that the Board were to approve the Responsive Application, then Inland requests the Board to exercise its broad conditioning power under 49 U.S.C. § 11324 and grant NS trackage rights over the lines of the IHB that are used to serve Inland's Indiana Harbor Works facility, in order to preserve Inland's existing competitive rail service.

Moreover, Inland has further shown that the grant of trackage rights to NS over the IHB's lines would be warranted even if the Board were to deny the EJE and IMRL Responsive Application, in order to ensure that Inland's Indiana Harbor Works facility is not competitively disadvantaged as a result of the terms of the Agreement entered by CSX and NS with respect to the voting of Conrail's majority stock interest in the IHB.

## **II. THE RESPONSIVE APPLICANTS HAVE FAILED TO REFUTE INLAND'S EVIDENCE THAT SHOWS INLAND WILL BECOME A "2 TO 1" SHIPPER UNDER THEIR PROPOSAL**

In their Rebuttal Comments and Evidence (EJE-17/IMRL-6) ("Rebuttal Comments"), the Responsive Applicants attempt to argue that their proposal will not cause Inland to become a 2 to 1 shipper. To support their claim, they assert that Inland's facility will experience "virtually" no change in its transportation options because the same two "independent" entities, EJE and IHB, will continue to serve the Indiana Harbor Works facility. Rebuttal Comments at 23. They further assert that Inland misunderstands the Responsive Application because the EJE and IMRL have stated that they do not intend to control the operations of the IHB. *Id.* at 24. Finally, the Responsive Applicants contend that truck competition is available to

Inland which absolves any reduction in rail competition that Inland may experience as a result of their control of the IHB.

Each of these arguments fall flat under the weight of the evidence submitted by Inland. But even more problematic for the Responsive Applicants is the utter lack of consistency in the positions they have taken in this case. On the one hand, the Responsive Applicants ask the Board to remedy the lack of neutrality and competitive harm that they claim will result from the acquisition of Conrail's stock interest in IHB by NS and CSX, because they assert CSX and NS will exercise their control in the IHB to exclude all other switching carriers from line haul movements involving CSX or NS. The Responsive Applicants further assert that this anticompetitive conduct will be driven by CSX's and NS's desire to maximize their rail revenues and profits.

On the other hand, in response to Inland, which has expressed the very same concern that ownership in the IHB by the EJE would result in a lack of neutrality and a motivation by EJE to maximize its profits at Inland's expense, the Responsive Applicants claim that no such bias could be expected to result. Try as they might, the Responsive Applicants simply cannot have it both ways. Their arguments with respect to Inland simply are not credible and must be rejected.

If the Board were to allow the EJE and IMRL to acquire Conrail's 51% ownership interest in the IHB, the transportation scenario at Inland's Indiana Harbor Works facility would not be the same because, as Inland has already established, the Responsive Applicants would acquire both the natural motive and the means to coordinate their ownership interests in an effort to maximize their profit margins.<sup>5</sup> Thus, the IHB would not remain independent. Instead, the IHB's management and operations would be subject to the influence of its owners who

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<sup>5</sup> As Inland has further shown, this motivation would be exacerbated by the Responsive Applicants' desire to recoup the costs incurred to purchase Conrail's IHB stock interest, a claim which the Responsive Applicants have not denied.



will be driven by their own vested interests. It defies logic to believe that the EJE would be willing to place Inland's interests above its own by vigorously competing against itself in providing rates and service to Inland's steel production facility. The EJE contends that it is Inland's position that is "non-sensical" because the EJE would have more to gain by capturing Inland's traffic itself and the other stock owners of IHB would not prevent IHB from competing with the EJE. But as Inland has already shown, as joint owners of the IHB, both EJE and IMRL will have a strong economic incentive to maximize their return on their investment and by jointly exercising their ownership interests (to obtain a 51% majority), they can better accomplish this common goal. By working together, the IMRL and EJE can establish IHB rates that will allow the EJE to attain margins on Inland's business that are the equivalent to what the EJE might have obtained if it captured Inland's business itself. Thus, coordination by the EJE and IMRL will allow them to effectively maximize the margins on Inland's traffic.

Moreover, in their own filing with the Board, the Responsive Applicants openly admit that "it might be possible for a railroad with a minority ownership interest in another railroad to impermissibly influence that other railroad's marketing . . ." Rebuttal Comments at 24. Despite this recognition, the EJE and IMRL claim Inland's concerns are unfounded because they have stated that they intend "to keep the IHB independent." Danzl Rebuttal V.S. at 9. The Responsive Applicants, however, have submitted no evidence (and therefore have provided no basis) that would enable Inland (or the Board) to baldly accept this statement. The Responsive Applicants have not submitted, or apparently even begun, preparation of a detailed operating plan that would explain and clarify exactly how the IHB would be managed and operated under EJE/IMRL partial ownership. The secrecy displayed by the Responsive Applicants with respect to the IHB's operations casts further doubt on their sincerity.

Recognizing this weakness in their case, the Responsive Applicants declare that a detailed operating plan is not necessary since they "inten[d] to exercise [their] ownership in IHB much as Conrail does today." Rebuttal Comments at 13, 25. But elsewhere in their rebuttal filing it is the Responsive Applicants themselves who vigorously attack Conrail's practices as they relate to the operations of the IHB. Rebuttal Comments at 19-22.

One of the EJE's primary complaints in this case has been that Conrail has refused to work with switching carriers other than the IHB in order to "enhanc[e] the economic position of its partially-owned subsidiary." Rebuttal Comments at 20. It is clear from its filings that the EJE strongly believes that its exclusion from traffic where Conrail acts as the trunk-line carrier is the result of Conrail's "power and motive . . . to exclude EJE." Rebuttal Comments at 21. According to the EJE, the profit maximization interest of Conrail has been so strong, it has foreclosed EJE from participating in its rail traffic, even when the EJE's service may be superior to that of the IHB. Accordingly, based upon the EJE's own documented experience, there is no rational basis by which to accept that the same revenue maximization motive will not exist and be acted upon if the EJE and IMRL acquire Conrail's ownership interest in the IHB.<sup>6</sup>

The EJE has also sought to create its own litmus test for determining the "independence" of a railroad that is owned in part by another rail carrier. According to EJE, that test is the maintenance of separate marketing departments. The EJE thus states that because the marketing operations of the EJE and IHB would not be merged, the IHB's independence will be preserved. But absent an agreement or plan indicating as much, there is no way for Inland or the Board to assess whether that in fact will be the case. Moreover, even if separate marketing offices were maintained

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<sup>6</sup> Moreover, it is revealing that the Responsive Applicants had no response at all to Inland's evidence concerning carrier profitability in relation to a lack of carrier competition. ISI-9, Garber V.S. at 6 (Highly Confidential).

by the EJE and IHB, the EJE has not denied that, as a significant shareholder of IHB stock, EJE representatives would still be in a position to influence IHB marketing strategy. Any participation by the EJE in the IHB marketing process, of course, could substantially effect Inland's competitive transportation options.

In addition, as explained by Inland in its previous filings, competitive and efficient rail transportation at Inland's Indiana Harbor Works facility is crucial to its steel production. Inland relies substantially on "just-in-time" rail deliveries. Consequently, Inland should not be required "to put all its eggs in EJE's basket," which would be the case if the Responsive Application were to be granted.

Finally, the Responsive Applicants claim that Inland's access to truck transportation should alleviate any competitive harm that might occur from their stock acquisition proposal. This claim, however, is unfounded. While Inland can utilize truck transportation for some of its outbound steel traffic, important steel traffic lanes cannot be truck competitive in the long run. Moreover, all of Inland's inbound coal and coke traffic is not truck competitive and is transported solely by rail. Inland's Indiana Harbor Works facility is dependent upon significant levels of rail transportation and competitive rail transportation is a critical component of Inland's steel production operations.

Accordingly, the Board should deny the Responsive Application. In the unlikely event that the Board were to decide (improperly) to grant the Responsive Application, then Inland has clearly justified the granting by the Board of trackage rights to NS over the rail lines of the IHB that serve Inland's Indiana Harbor Works facility, in order to alleviate the competitive harm that would otherwise occur to Inland's facility.



### **III. THE PRIMARY APPLICANTS HAVE FAILED TO NEGATE INLAND'S CONCERNS THAT IT WILL BE HARMED BY THEIR OPERATING AGREEMENT REGARDING THE IHB**

As expressed by Inland in its Comments and Requests for Conditions, the Primary Applicants' Operating Agreement related to the IHB lacks sufficient detail to enable Inland to determine whether the IHB will continue to provide efficient and reliable rail transportation service to Inland's Indiana Harbor Works facility. As the IHB is one of only two rail carriers that has direct access to Inland's Indiana Harbor Works facility, Inland is highly dependent on IHB service for a substantial amount of its rail traffic. The IHB services approximately one-half of Inland's inbound and outbound rail capacity and Inland is the IHB's largest shipper. Accordingly, ownership and operational changes regarding the IHB are of great concern to Inland. However, Inland's ability to discern the impact on its rail traffic that will result from the Primary Applicants' ownership and operation of the IHB has been severely hampered, since Inland is unaware of a more detailed explanation by the Primary Applicants of their proposed IHB operations.

The Agreement regarding the IHB set forth in the primary application appears to be the only basis from which Inland can judge the future service that will be provided by the IHB. In its Comments, Inland stated its concern that the Applicants' intentions concerning Gibson Yard facilities, as expressed in the Agreement, could cause serious disruptions to Inland's inbound and outbound traffic related to its Indiana Harbor Works facility. Gibson Yard facilities are currently used to interchange rail traffic related to that facility and are an essential component to Inland's receipt of timely and efficient rail service.

Under the Agreement, CSX and NS are provided joint and equal rights to access use Gibson Yard. Inland is concerned that this arrangement could lead to disruptions in rail service provided to Inland's Indiana Harbor Works facility to the

extent that either NS or CSX asserted their access rights under the Agreement. Disruptions in rail service would be very costly to Inland, as Inland's steel production facility relies heavily on tightly scheduled rail pick-up and delivery service. The Agreement between CSX and NS related to the IHB also presents a risk of management disputes and disruptions, as it allows NS to require "from time to time" a change in the General Manager of the IHB to the extent that it is dissatisfied with IHB management. Repeated changes in IHB management would seriously threaten Inland's ability to receive and maintain reliable and consistent rail service at its Indiana Harbor Works facility.

In their Rebuttal, the Primary Applicants failed to even address these legitimate concerns of Inland. Their neglect is perhaps an indication of the Primary Applicants lack of commitment to ensure that the IHB continues to provide reliable and efficient rail service to its customers under their ownership. And, their failure to respond to Inland on this important issue only heightens Inland's concerns.

Accordingly, Inland renews its request that the Board grant NS trackage rights over the lines of the IHB that access Inland's Indiana Harbor Works facility in order to prevent the occurrence of serious service deterioration at this facility.

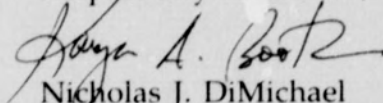
#### **IV. CONCLUSION**

For the foregoing reasons, Inland respectfully requests that the Board deny the joint Responsive Application filed by EJE, Transtar, and IMRL in these proceedings in order to prevent serious anticompetitive harm that would otherwise occur to Inland. In the alternative, Inland requests that the Board condition its approval of the Responsive Application by granting NS trackage rights over the lines of the IHB that access Indiana Harbor Works.

In addition, even if the Board denies the joint Responsive Application, Inland requests that NS be granted trackage rights to access Inland's Indiana Harbor

Works facility, in order to maintain the timely and efficient rail service that is currently provided to the facility.

Respectfully submitted,



Nicholas J. DiMichael

Karyn A. Booth

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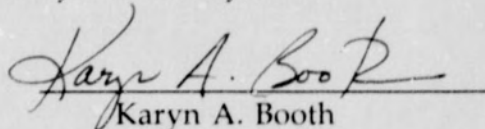
Chicago, IL 60603

(312) 899-3148

Dated: February 23, 1998

#### CERTIFICATE OF SERVICE

I hereby certify that I have caused a copy of the foregoing BRIEF OF INLAND STEEL COMPANY to be served by hand delivery or by first class mail, postage prepaid, on all parties of record in this proceeding, this 23rd day of February, 1998.



Karyn A. Booth

STB

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33388 (Sub 36)

2-23-98

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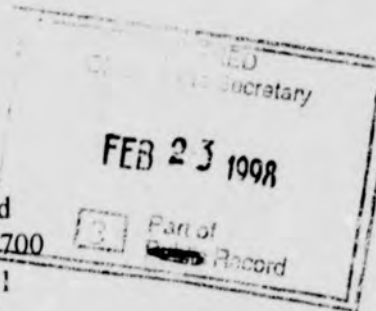
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February 23, 1998

**VIA HAND DELIVERY**

Mr. Vernon A. Williams  
Secretary  
Surface Transportation Board  
1925 K Street, N.W., Room 700  
Washington, DC 20423-0001



Firm/Affiliate Offices  
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Chicago  
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Saint Paul\*  
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Washington, D.C.\*

Re: **Finance Docket No. 33388 185890**  
**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**

**Finance Docket No. 33388 (Sub-No. 36) 185892**  
**Elgin, Joliet and Eastern Railway Company, Transtar, Inc.**  
**and I & M Rail Link, LLC -- Purchase -- Stock of**  
**Indiana Harbor Belt Railroad Company Controlled by**  
**Consolidated Rail Corporation**

Dear Secretary Williams:

Enclosed for filing with the Board in the above-captioned proceedings are an original and twenty-five copies of the **Brief of Elgin, Joliet and Eastern Railway Company, Transtar, Inc. and I & M Rail Link, LLC (EJE-19/IMRL-8)**, dated February 23, 1998. A computer diskette containing the text of EJE-19/IMRL-8 in WordPerfect 5.1 format also is enclosed.

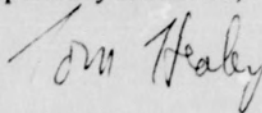
Please note that EJE-19/IMRL-8 has been designated as highly confidential and is being filed under seal. It has been served on the Primary Applicants and all parties appearing on the highly confidential restricted service list in this proceeding. A redacted version of EJE-19/IMRL-8 will be filed tomorrow and served on all remaining designated parties of record in this proceeding.

I have also enclosed herewith an extra copy of EJE 19/IMRL-8 and this transmittal letter. I would request that you date-stamp those items to show receipt of this filing and return them to me in the provided envelope.

Mr. Vernon A. Williams  
February 23, 1998  
Page 2

Please feel free to contact me should any questions arise regarding this filing.  
Thank you for your assistance on this matter.

Respectfully submitted,



Thomas J. Healey  
Attorney for Elgin, Joliet and Eastern  
Railway Company, Transtar, Inc. and  
I & M Rail Link, LLC

TJH:tjl

Enclosures

cc: Counsel for Primary Applicants  
Parties on Highly Confidential Restricted Service List

STB

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(Sub 36)

2-23-98

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Before the  
SURFACE TRANSPORTATION BOARD

Finance Docket No. 33388

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

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Office of the Secretary

FEB 23 1998

5 Part of  
Public Record

BRIEF

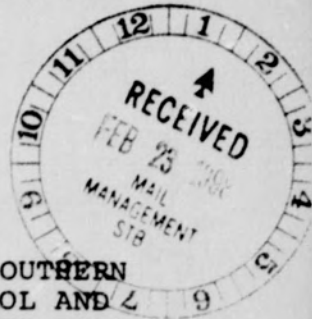
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Washington DC 20036

Due Date: February 23, 1998

Attorney for Joseph C. Szabo

\* / Embraces also Sub-Nos. 2 thru 7, and Sub-Nos. 36, 59, 80. 185846  
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185843  
UTU/IL-3



Before the  
SURFACE TRANSPORTATION BOARD

\_\_\_\_\_  
Finance Docket No. 33388<sup>\*/</sup>

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

\_\_\_\_\_  
BRIEF

\_\_\_\_\_  
Comes now Joseph C. Szabo,<sup>1/</sup> for and on behalf of United Transportation-Illinois Legislative Board (UTU-IL), and submits this brief in opposition to approval of the above-referenced transactions.

Protestant on August 7, 1997, filed a notice of intent to participate; on August 22, 1997 he filed comments with respect to Sub-Nos. 2 thru 7 (JCS-1); on October 21, 1997, comments were filed on behalf of UTU-IL, by the Assistant Director for UTU-IL, John H. Burner, with respect to the basic transaction in F.D. No. 33388 (UTU/IL-1); on December 15, 1997, he filed comments with respect to Sub-Nos. 36, 59, and 80 (UTU/IL-2).<sup>2/</sup>

It is clear from the record which has been compiled thus far that the CSX and NS proposal to divide Conrail would be contrary to the public interest, and harmful to railroad employees. The proposed transactions would be particularly adverse to the Chicago area, and

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<sup>\*/</sup> Embraces also Sub-Nos. 2 thru 7, and Sub-Nos. 35, 59, 80.

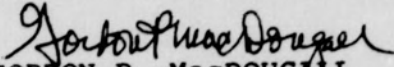
<sup>1/</sup> Illinois Legislative Director for United Transportation Union, with offices at 8 So. Michigan Ave., Chicago, IL 60603.

<sup>2/</sup> Another verified statment, also labeled JCS-1 (incorrectly) and filed October 21, 1997, is not part of the UTU/IL submission.

best interests and commerce of the state of Illinois.

The Board is required to consider the interests of all rail employees, not merely those of applicant carriers, in determining the public interest. Such a consideration, along with other factors, requires denial of the application, and the various related Sub-numbered proceedings.

Respectfully submitted,

  
GORDON P. MacDOUGALL  
1025 Connecticut Ave., N.W.  
Washington DC 20036

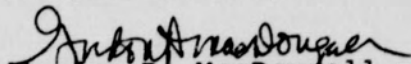
February 23, 1998

Attorney for Joseph C. Szabo

Certificate of Service

I hereby certify I have served a copy of the foregoing upon all parties of record by first class mail postage-prepaid.

Washington DC

  
Gordon P. MacDougall

STB FD

33388 (Sub 36)

2-23-98

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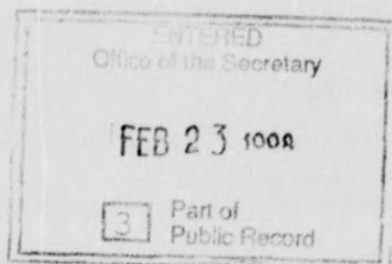
ORIGINAL

BEFORE THE  
SURFACE TRANSPORTATION BOARD

RESPONSIVE APPLICATION - ELGIN,  
JOLIET & EASTERN RAILWAY  
COMPANY; TRANSTAR, INC.; AND  
I & M RAIL LINK, LLC

FINANCE DOCKET  
NO. 33388 (SUB-NO. 36)

BRIEF



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DUE DATE: February 23, 1998

**BEFORE THE  
SURFACE TRANSPORTATION BOARD**



<b>RESPONSIVE APPLICATION – ELGIN,</b>	)	
<b>JOLIET &amp; EASTERN RAILWAY</b>	)	<b>FINANCE DOCKET</b>
<b>COMPANY; TRANSTAR, INC.; AND</b>	)	<b>NO. 33388 (SUB-NO. 36)</b>
<b>I &amp; M RAIL LINK, LLC</b>	)	

**BRIEF OF PRAIRIE GROUP  
IN SUPPORT OF THE RESPONSIVE APPLICATION**

This brief is filed on behalf of Prairie Group, to update information furnished in its statement, dated October 20, 1997. While we support the Applicants' proposed breakup and acquisition of Conrail, because we believe it has merit and the potential to provide a benefit to the shipping public, we are very concerned about the potential ramifications to us and other industries with the pending change in controlling interest of Indiana Harbor Belt Railroad (IHB) and maintain the position outlined in our previous statement, supporting the Responsive Application filed by Elgin, Joliet & Eastern Railway Company (EJE); Transtar, Inc.; and I&M Rail Link, LLC (IMRL).

Prairie Group recently acquired a seventh brick distributing company, increasing the number of these subsidiary companies that are rail served to six:

- Beck Brick, Des Plaines, Illinois
- Best Brick, Hazel Crest, Illinois
- Brady Brick & Supply, Elgin, Illinois
- Holman Brick Schaumburg, Illinois
- Illinois Brick Company, Bridgeview, Illinois
- Ramm Brick, LaGrange, Illinois



All of these companies, except Brady Brick & Supply, are in the Chicago Switching District and two of those companies, i.e., Illinois Brick Company and Ramm Brick, are presently served by the IHB.

#### SERVICE UPDATE

Since our statement was filed in October, 1997, we were encouraged by the temporary improvement in service to Illinois Brick Company, Bridgeview, Illinois. IHB switching service performance increased to 90% in December, 1997, but service has since returned to an unacceptable level. IHB's switching service performance is summarized in the exhibit attached to this statement; thus far, during the month of February, Illinois brick has received service 50% of the time. In addition to the failure to provide consistent switching service, shipments on IHB have incurred significant delays; we have a record of one car that was on IHB 21 days prior to delivery to Illinois Brick. IHB's switching service at Ramm Brick, LaGrange, Illinois also continues to be a problem.

#### FUTURE SERVICE

As stated previously, Illinois Brick Company is located on BOCT; however, due to the traffic density on IHB, BOCT is blocked from providing switching service to Illinois Brick. Therefore, the service has been sub-contracted to IHB. At the time that statement was filed, concern was expressed that we had not even been able to confirm which switch carrier will be providing switching service to Illinois Brick post merger - IHB or BOCT?

Since that statement was filed, we met with CSX and IHB sales and marketing personnel, and were informed that:

1. CSX intends to maintain status quo - nothing will change post merger.
2. BOCT will not provide switching service to Illinois Brick Company, which is located on their line - any switching service received will be provided by IHB. This is confirmed in the Applicants' rebuttal statement, Volume 1 of 3, page 306.



Prairie Group and other shippers and receivers in the IHB corridor have made numerous attempts to arrange meetings with CCY operating personnel to see if an equitable agreement can be reached that will address the service requirements in the corridor. CSX has not been willing, however, to meet with these people to listen to, and to address their concerns. Therefore, we can only believe there is no interest in the business originating and terminating on the line; that the focus will continue to be on the trains moving overhead through Chicago.

On the other hand, Prairie Group along with others in the IHB corridor did meet with marketing and operating officials of EJE and IMRL. While those carriers have been blocked from receiving information needed to develop an operating plan for the IHB, they assured us that the service needs of the on-line shippers and receivers would be given equal consideration with the service requirements of the line haul business moving through the Chicago terminal, and offered to include the shippers and receivers on the line in the planning process.

**THE APPLICANTS' REBUTTAL DOES NOT  
ADDRESS OUR CONCERNS**

The Applicants' rebuttal does not address our concerns. While each of the points made may on a stand-alone basis give the appearance of having merit, the Applicants' message is weakened by contradictory points made throughout the same statement.

The Applicants' rebuttal statement focuses on the plan to expedite movement of traffic through Chicago with no mention of any plan to improve service to the shippers and receivers in the IHB corridor. Further, they contend the plan *must* have merit because, "no other major carrier has complained about the transaction's disposition of Conrail's shares." This really comes as no surprise in view of the fact IHB operating and marketing personnel have told us, without any apparent embarrassment, that they prioritize the overhead business over business to and from industries on the line. Why should the major railroads complain? Their trains are receiving priority handling and CSX has been straight forward about their intentions to continue to focus on the overhead business.

The Applicants have gone to great length to reassure the Board that IHB will be operated as an independent rail carrier with its own management and employees in an attempt to show, "the transaction will not unduly concentrate control over switching services in Chicago." Yet earlier in the same statement, they advised they plan to relocate the IHB dispatching team to the BRC dispatching complex, centralizing dispatching operations for BRC, BOCT and IHB, which eliminates the need to question whether or not CSX will have control over switching services in Chicago. The only real question is how they will use that control. Even if we can trust the current management to control the switching in an ethical manner, the potential for abusive management of that power extends indefinitely into the future, and CSX like other major corporations in America is continually reorganizing, downsizing, reengineering, so Prairie Group and other industries on IHB need protection from that potential abuse.

The Applicants would like us to believe that we can take comfort in the fact that IHB will operate as an independent company with its own management. However, one would have to be naive to believe the General Manager of IHB will not adhere to the policies established by CSX to prioritize overhead business over shipments originating and terminating on the line, since CSX will have the authority to name and to replace the General Manager. The General Manager will be required to do what he is told because he will have no recourse unless he wants to lose his job.

### CONCLUSION

In order to avoid harm to shippers and receivers in the IHB corridor, it is essential that IHB be managed and operated as a neutral switching carrier devoted to serving its on-line customers and all carriers entering Chicago equally.

Prairie Group supports the Responsive Application of EJE and IMRL because it would result in the establishment and preservation of essential switching and routing alternatives in the Chicago gateway. In contrast, if the merger is approved without the Responsive Application, IHB will be managed and operated as an extension of CSX's rail lines and we have no reason to believe service to our subsidiary companies, Illinois Brick Company and Ramm Brick, will improve and these companies will continue to be disadvantaged by their inability to provide consistent service to their customers.

Prairie Group strongly supports the Applicants' plan to breakup and acquire Conrail. We believe that overall the plan has merit and the potential to provide a benefit to the shipping public, and we have outlined that support in letters filed early in this proceeding.

However, in view of the foregoing, Prairie Group reaffirms its support of the Responsive Application of EJE and IMRL.

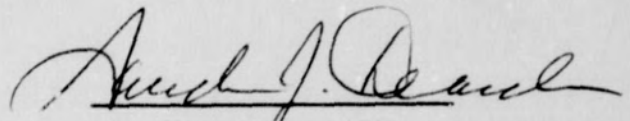
Respectfully submitted,

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DUE DATE: February 23, 1998

**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY THAT ON February 20, 1998, I mailed a copy of this Brief to all parties of record on the official service list by first-class mail.



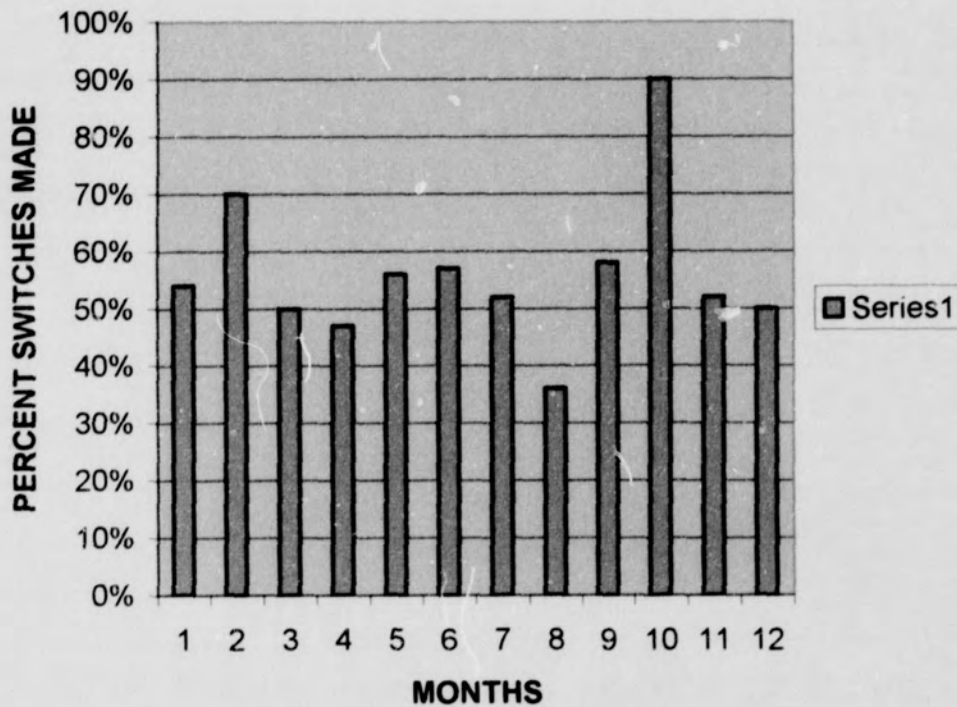
Sandra J. Dearden

INDIANA HARBOR BELT SWITCHING PERFORMANCE  
ILLINOIS BRICK COMPANY, BRIDGEVIEW, ILLINOIS  
(MARCH 1, 1997 THRU FEBRUARY 13, 1998)

MARCH	54%
APRIL	70%
MAY	50%
JUNE	47%
JULY	56%
AUGUST	57%
SEPTEMBER	52%
OCTOBER	36%
NOVEMBER	58%
DECEMBER	90%
JANUARY	52%
FEBRUARY	50%

(PERCENTAGE REFLECTS SCHEDULED SWITCHES MADE.)

**IHB SWITCHING TO ILLINOIS BRICK  
COMPANY**



STB

FD

33388 (Sub 36) 2-24-98 E

185960

OPPENHEIMER WOLFF & DONNELLY  
(ILLINOIS)

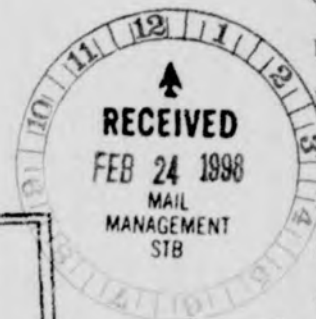
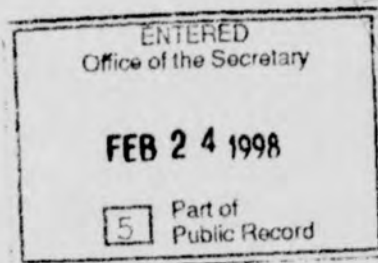
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**VIA FEDERAL EXPRESS**

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Secretary  
Surface Transportation Board  
1925 K Street, N.W., Room 700  
Washington, DC 20423-0001

February 23, 1998



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Re: **Finance Docket No. 33388**  
**CSX Corp. and CSX Transportation, Inc., Norfolk Southern Corp.**  
**and Norfolk Southern Railway Company -- Control and Operating**  
**Leases/Agreements -- Conrail Inc. and Consolidated Rail Corporation**

**Finance Docket No. 33388 (Sub-No. 36)**  
**Elgin, Joliet and Eastern Railway Company, Transtar, Inc. and**  
**I & M Rail Link, LLC -- Purchase -- Stock of Indiana Harbor Belt**  
**Railroad Company Controlled by Consolidated Rail Corporation**

Dear Secretary Williams:

Elgin, Joliet and Eastern Railway Company, Transtar, Inc. and I & M Rail Link, LLC today filed their Brief (EJE-19/IMRL-8) in the above-captioned proceedings. EJE-19/IMRL-8 was designated as highly confidential and thus was filed under seal.

I am now enclosing for placement in the public record an original and twenty-five copies of a redacted version of EJE-19/IMRL-8. Copies of this pleading have been served on all parties of record who do not appear on the highly confidential restricted service list.

Please feel free to contact me should any questions arise regarding this filing. Thank you for your assistance on this matter.

Respectfully submitted,

Thomas J. Litwiler  
Attorney for Elgin, Joliet and Eastern Railway  
Company, Transtar, Inc. and I & M Rail Link, LLC

TJL:tl  
Enclosures  
cc: "Public" Parties of Record

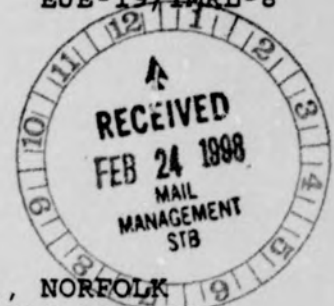


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185960 ORIGINAL

BEFORE THE  
SURFACE TRANSPORTATION BOARD

EJE-19/IMRL-8



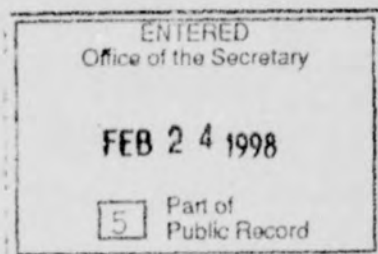
FINANCE DOCKET NO. 33388

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

FINANCE DOCKET NO. 33388 (SUB-NO. 36)

ELGIN, JOLIET AND EASTERN RAILWAY COMPANY, TRANSTAR, INC.  
AND I & M RAIL LINK, LLC -- PURCHASE --  
STOCK OF INDIANA HARBOR BELT RAILROAD COMPANY  
CONTROLLED BY CONSOLIDATED RAIL CORPORATION

**BRIEF OF ELGIN, JOLIET AND EASTERN RAILWAY COMPANY,  
TRANSTAR, INC. AND I & M RAIL LINK, LLC**



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COMPANY AND I & M RAIL LINK, LLC**

Dated: February 23, 1998



[PUBLIC]

EJE-19/IMRL-8

BEFORE THE  
SURFACE TRANSPORTATION BOARD

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CSX CORPORATION AND CSX TRANSPORTATION, INC., NORFOLK  
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Dated: February 23, 1998

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BEFORE THE  
SURFACE TRANSPORTATION BOARD

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STOCK OF INDIANA HARBOR BELT RAILROAD COMPANY  
CONTROLLED BY CONSOLIDATED RAIL CORPORATION

---

**BRIEF OF ELGIN, JOLIET AND EASTERN RAILWAY COMPANY,  
TRANSTAR, INC. AND I & M RAIL LINK, LLC**

[[[

1

]]], CSXT

has succinctly summarized the necessity for divestiture of  
Conrail's<sup>2</sup> ownership interest in the Indiana Harbor Belt Railroad  
Company ("IHB"). This candid insight strips away pages of  
Applicants'<sup>3</sup> empty posturing denying that they are assuming

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<sup>1</sup> "CSXT" is CSX Transportation, Inc. and CSX Corporation.

<sup>2</sup> "Conrail" is Conrail, Inc. and Consolidated Rail Corporation.

<sup>3</sup> "Applicants" are Norfolk Southern Corporation and Norfolk  
Southern Railway Company (collectively "NS"), CSXT, and  
Conrail.



control of the Chicago gateway. Even more troubling, the memorandum suggests a sinister intent for Applicants' control of Chicago, inimical to the public interest and clearly requiring of the Board's remedial attention.

Viewed in isolation, the referenced memorandum might be dismissed as a solitary deviation from what Applicants claim is their unyielding dedication to independent operations in Chicago. The memorandum, however, is only the most damning element in a long line of evidence pointing to one inescapable conclusion: subsequent to the Applicants' proposed Transaction<sup>4</sup>, Applicants (and, in particular, CSXT) will be the controlling force behind each of the three intermediate switching carriers in Chicago. The current state of independence, engendered by a diversification of ownership, will be reduced to subordination.

The Coalition<sup>5</sup> is not the only entity concerned about Applicants' plans for Chicago. A number of shippers and state agencies, fearful of the elimination of independent switching options in Chicago, have also come forward to alert the Board to this troubling situation. Perhaps most strikingly, a number of IHB's on-line shippers have made their support for the Coalition known, despite the obvious potential commercial repercussions. The diverse base of support garnered by the Coalition's

---

<sup>4</sup> The transaction put forth in the "Railroad Control Application" filed by Applicants on June 23, 1997.

<sup>5</sup> The "Coalition" is Elgin, Joliet and Eastern Railway Company and Transtar, Inc. (collectively "EJE") and I&M Rail Link, LLC ("IMRL").



Responsive Application is indicative of the widespread harm inherent in the Applicants' proposed control of Conrail.

The Coalition does not oppose the Applicants' transaction, and in fact its witnesses have conceded that it might bring increased competition in the Northeastern United States. However, the proposed transaction also brings with it serious anticompetitive impacts on intermediate switching in Chicago. The Coalition has proposed a viable, narrowly-crafted condition that would remedy those harmful impacts without denying to Applicants any of the legitimate benefits they seek in their merger. The divestiture to the Coalition of Conrail's 51% ownership interest in IHB should therefore be approved by the Board as a condition to this merger.

#### **I. Introduction**

##### **A. The Elgin, Joliet and Eastern Railway Company and Transtar, Inc.**

EJE has been a fixture of Chicago's railroad scene for 110 years. Verified Statement of Millard Turner ("Turner V.S."), EJE-10, p. 2. EJE's nickname, the "Outer Belt Line," is an apt description of its route structure. The EJE's tracks form a semi-circle around Chicago, approximately 30 to 35 miles from the center of the city. Id. The larger cities served by EJE include Waukegan, Elgin, Joliet, and Chicago Heights, Illinois, and Griffith and Gary, Indiana. The EJE's primary yard, Kirk Yard, is a hump yard located in Gary. A flat switching yard is located in East Joliet, Illinois.

EJE has traditionally been associated with the steel industry. Id., p. 5. Extensive tracks in Northwest Indiana's steel-making region, coupled with fast connections to steel processing and finishing facilities in Joliet, made EJE a natural link in the steel-making process. With a downturn in steel production in recent decades, EJE has served a more diverse traffic base, and has supported the growth of on-line industries. Id., p. 4. More recently, EJE has worked with certain of Chicago's trunk lines (all of which maintain connections with EJE) to provide trackage rights over EJE's system, allowing traffic to move through Chicago without incurring excessive dwell time in Chicago's congested switching district. Id.

For many years, EJE was one of several "Steel Roads," so called because they were owned by U.S. Steel. Today, EJE is owned by Transtar, Inc. Id., p. 3. Other railroads owned by Transtar include Duluth, Missabe and Iron Range Railway Company, Bessemer and Lake Erie Railroad Company, Birmingham Southern Railroad Company, The Lake Terminal Railroad Company, and Union Railroad Company.

**B. I&M Rail Link, LLC**

Unlike EJE, IMRL has a very short corporate history, commencing operations about a year ago. Verified Statement of William H. Brodsky ("Brodsky V.S."), EJE-10, p. 2. The rail lines it operates over, however, have existed for many decades, providing important connections between Chicago, Kansas City, and Minneapolis/St. Paul as a component of the Soo Line Railroad Company, and before that, as the Chicago, Milwaukee, St. Paul &

Pacific Railroad Company. Several branch lines in Iowa and Minnesota supplement IMRL's overhead traffic with an important base of on-line industries.

Unlike most railroads entering Chicago, IMRL has no yard facilities in the switching district. Id., pp. 3-4. IMRL's tracks end west of Elgin, at Pingree Grove. IMRL enters Chicago via trackage rights on the Commuter Rail Division of the Regional Transportation Authority ("Metra"). Id. IMRL maintains interchange with all railroads entering Chicago through Chicago's two primary intermediate switching carriers, IHB and The Belt Railway Company of Chicago ("BRC"). IMRL also has a direct interchange in Chicago with Canadian Pacific Railway ("CP/Soo").

IMRL's principal owner is Dennis Washington. Montana Rail Link, one of the nation's most successful regional railroads, is a sister road of IMRL. Id., p. 2.

Applicants' control over Conrail's holdings in IHB will mark a watershed for intermediate switching service in Chicago, forcing the transformation of competing, independent carriers into one unified group of carriers operating as a consolidated system. Shippers dissatisfied with service from one intermediate carrier will have no competing option; Applicants will control every switching carrier in town. Because of the harm to competition and the public interest generated by such a consolidation, divestiture of Conrail's 51% ownership interest in IHB is warranted. The Coalition, which combines the marketing savvy of a modern regional carrier with the expertise of one of

Chicago's most established railroads, is the appropriate entity to take over control of IHB from Conrail.

**II. Applicants' Control And Operation Of Conrail  
Will Lead To Their Control Of All Three  
Of Chicago's Intermediate Switching Carriers**

In order to understand the nature and extent of the harm to the public interest stemming from Applicants' impending control over intermediate switching in Chicago, it is first critical to understand the pre-merger ownership and relationship of Chicago's switching carriers. Although the district includes a number of short lines, the vast majority of intermediate switching service in Chicago is conducted by three carriers, IHB, BRC, and The Baltimore & Ohio Chicago Terminal Railroad Company ("BOCT"). Each of these carriers is addressed below.

**A. Chicago's Intermediate Switching Carriers**

IHB's rail lines extend from Norpaul Yard, on Chicago's northwest side, through the southwest and southern suburbs, and into Gary, Indiana. See IHB Map, EJE-10, Exhibit 1. IHB also has a number of branch lines along the Illinois-Indiana border, serving the industrial complexes located there. Its primary yard, Blue Island Yard, (located in Chicago's southern suburbs), is the hub for serving IHB's on-line industries. IHB performs two significant roles for railroads seeking to interchange traffic in Chicago. First, IHB operates as an intermediate switching carrier, physically moving freight cars from one railroad to another. IHB also provides trackage rights, allowing carriers to perform direct interchange over IHB's system. IHB's stock is currently owned 51% by Conrail, and 49% by CP/Soo.



In many respects, BRC is similar to IHB. Like IHB, BRC is a significant player in the movement of railroad interchange through Chicago, by both trackage rights and intermediate switching. BRC's primary yard is Clearing Yard, which is much larger than IHB's Blue Island Yard, and more centrally located. BRC is presently owned 25% by CSXT, 16.67% by Conrail, and 8.33% by NS, with the remaining stock owned by other Class I carriers.

Like IHB and BRC, BOCT also engages in intermediate switching in Chicago. However, virtually all of that traffic is moving to or from CSXT. BOCT is thus not a "true" intermediate switching carrier; it functions more as a western extension of CSXT. BOCT's primary yard is Barr Yard, located south of Chicago and north of IHB's Blue Island Yard. CSXT owns 100% of BOCT.

**B. Applicants' Plans For Dominance In  
Chicago Will Place Control of All Three  
Intermediate Switching Carriers In Their Hands**

In their Primary Application, Applicants have set forth their plans for the division of Conrail, including the disposition of Conrail's majority interest in IHB and minority interest in BRC. Applicants have asserted, both to the Board and to the public at large, that their plans for Chicago will not result in any undue control of switching operations. The inescapable conclusion to be drawn from their plans, however, is that rail shippers will no longer enjoy a competitive option in the routing of their interchange traffic through Chicago.

Beginning with the least impacted carrier, BOCT will continue to be owned by CSXT; the Transaction will not impact the ownership of BOCT. CSXT's interest in BOCT is relevant, however,

for two reasons. First, BOCT is a clear example of how CSXT operates an intermediate switching carrier under its control. Although BOCT could operate as an effective third switching carrier, providing competition to IHB and BRC for the interchange of freight cars in Chicago, it does not. Instead, BOCT operates as a division of CSXT, performing intermediate switching services only for CSXT's traffic. Second, CSXT's ownership of BOCT is relevant because of the dominance Applicants will have in Chicago's "true" intermediate switching carriers post-transaction. Coordination of the actions of all three switching carriers under one domain is made possible only through approval of the Transaction.

As to BRC, Applicants have proposed to transfer Conrail's 16.67% stock ownership to NS, giving both NS and CSXT an equal 25% interest.<sup>6</sup> Although they have not presented the Board with a formal agreement as to how their stock interests will be voted, Applicants merely have to combine their votes to dominate BRC's Board. Agreement of the two parties controlling Chicago's two other switching carriers is all that will be needed to secure a minimum 50% approval for any matter put before the BRC board. Given Applicants' interests in Chicago's other switching carriers, it is not difficult to see why coordination of Applicants' BRC voting interests is a dangerous possibility.

Unlike the situation with BRC, Applicants have well documented their plans for their handling of IHB. (See "IHB Agreement", CSX/NS-25, Vol. 8C, p. 693). Those plans, however,

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<sup>6</sup> No other owner will match CSXT's and NS' 25% ownership of BRC.



establish that the independence currently allowed IHB by Conrail<sup>7</sup> will come to a sudden halt post-transaction.

Applicants indicate that Conrail will continue to own 51% of IHB's stock. In turn, Applicants will own Conrail (NS owning 58%, and CSXT owning 42%), and thus, Applicants will have the ability to control IHB through Conrail. Applicants have contracted to vote Conrail's IHB stock as a block, as opposed to allowing CSXT and NS to vote their separate interests independently. Thus, neither NS nor CSXT may team with minority shareholder CP/Soo to defeat the other's wishes. Thus, although post-transaction CP/Soo will own the largest share of IHB, it will gain no more voice in IHB's operations than it currently possesses. Indeed, if the remainder of Applicants' plans for IHB come to fruition, CP/Soo's voice in IHB affairs will be diminished, not strengthened.

While conceding that their ownership of IHB gives them the capability of controlling IHB, Applicants protest mightily that they intend to allow IHB to operate as an independent economic entity, just as the Board has found that Conrail does today. Applicants' claim is betrayed by their own documents.

Applicants claim that post-Transaction, IHB "will have its own operating, financial, mechanical, engineering and labor relations functions." Applicants' Rebuttal ("R."), CSX/NS-276, Vol. 1, p. 309). Applicants' laundry list of IHB's "independent

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<sup>7</sup> In Decision No. 53, the Board held that Conrail currently allows IHB to operate independently. Finance Docket No. 33388, Decision No. 53 ("Decision No. 53"), p. 4. Obviously, the Board did not hold that a 51% stock ownership interest cannot afford a party the right of control.

functions" omits the most important function of an independent railroad: marketing. Nowhere do Applicants establish that they will allow IHB to market its services independently. Given the extent to which Applicants otherwise discuss the "independence" of IHB, it can only be concluded that IHB will not be allowed to market independently.

An independent marketing department is the cornerstone of an independent railroad. Marketing personnel must be focused on developing the business of the railroad, without bowing to the wishes of an owner (or owners) with separate interests. As further detailed by James H. Danzl, "control of IHB marketing will allow CSXT to remove the focus from on-line traffic and open market intermediate switching, and enhance the emphasis on CSXT's interchange to Western Class I carriers." Danzl Revised Verified Statement ("Danzl R.V.S."), EJE-17/IMRL-6, p. 8.

Applicants claim that IHB will retain a "General Manager" to oversee IHB operations. Applicants ignore the fact that the General Manager will be chosen by CSXT, owner of BOCT and largest shareholder of BRC. (CSX/NS-25, Vol. 8C, p. 698). Furthermore, NS's "effective control" over the appointed General Manager allows NS, after a year's time, to demand that CSXT appoint a new General Manager. Apparently, NS cannot propose the identity of the new General Manager. (CSX/NS-25, Vol. 8C, p. 698).<sup>8</sup> In any event, the "independent" IHB will have a General

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<sup>8</sup> NS has limited approval rights, and may demand a change after one year.

Manager serving at the whim of its chief competitor's two largest and controlling shareholders.

Moreover, Applicants have already decreed that IHB will enter new contracts, including new trackage rights agreements, with NS and/or CSXT if old agreements expire. (CSX/NS-25, Vol. 8C, pp. 698-699). By contrast, the Board found in Decision No. 53 that Conrail and IHB enter contracts at "arm's length" (Finance Docket No. 33388, Decision No. 53 ("Decision 53"), p. 4). The IHB Agreement cannot be taken any other way than terminating the freedom granted to IHB by Conrail in its contractual independence.

Further evidence of Applicants' planned control of IHB emerges in the area of dispatching. While it is true that "IHB dispatching will be conducted by IHB employees who will be responsible to IHB management", (R., CSX/NS-176, Vol. 1, pp. 309-10), and that dispatching will "continue to be the responsibility of IHB in Chicago" (Id., p. 300), it is also true that "(CSXT) will have the right to direct the exercise by (Conrail) of its Ownership Rights with respect to IHB dispatching." (CSX/NS-25, Vol. 8C, p. 699). Thus, IHB's dispatching will nominally remain with IHB's dispatchers, but those dispatchers will ultimately answer to CSXT, not IHB.

On a related topic, CSXT asserts that it will "propose" the relocation of IHB's dispatchers to the Chicago-area location currently used by the BOCT and BRC dispatchers (R., CSX/NS-176, Vol. 1, p. 310). One is left to speculate on why such a beneficial plan was not already agreed to by an independent IHB.

Further proof of the absence of IHB independence post-Transaction can be found in the testimony of CSXT's operating plan sponsor, John W. Orrison. Against the backdrop of alleged IHB independence, Mr. Orrison has detailed at some length the modifications which IHB will make to its traffic flow. (Orrison Verified Statement ("Orrison V.S."), CSX/NS-19, Vol. 2A, p. 458, for a discussion of the "counterclockwise flow" of traffic through Chicago).<sup>9</sup> While Applicants do not explain why an "independent" IHB would agree to make enormous changes to its operations at the request of a minority shareholder, a clue can be found in the fact that IHB's agreement to perform this radical change was secured from with Chuck Allen, IHB's current General Manager, whose continued presence in that job will depend upon the whim of CSXT. Deposition of John W. Orrison ("Orrison Dep."), EJE-17/IMRL-6, p. 93. In light of the discretion which Applicants will hold over Mr. Allen's employment post-transaction, it is not surprising that he gave a "very favorable response" (Orrison Dep., p. 95.) when CSXT made suggestions as to how he should operate his railroad post-Transaction.

Additionally, Applicants' claim that IHB will remain independent is effectively rebutted by the fact that Applicants have already carved up IHB's Blue Island Yard. In the IHB Agreement, CSXT won the right to exercise all of Conrail's

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<sup>9</sup> It is interesting to note Mr. Orrison's testimony that an EJE routing around Chicago for run-through interchange traffic would not be efficient because allegedly no traffic currently moves over that routing. Orrison Dep., EJE-17/IMRL-6, p. 81. By that reasoning, the unprecedented traffic patterns Applicants intend to compel on IHB are equally inefficient.



ownership interest in the use of the yard, with NS restricted to using the yard only for purposes of traffic moving to or from IHB on-line industries. CSX/NS-25, Vol. 8C, p. 700. There is no use in speculating why an "independent" IHB agreed to constrict its dealings with NS at its largest yard, because IHB was not even accorded a say in the matter. The "IHB Agreement" has signature blocks only for NS and CSXT. CSX/NS-25, Vol. 8C, p. 714. Applicants did not feel it important for the "independent" IHB to agree to this restriction. CP/Soo, the 49% owner of IHB, also was not asked for its written approval of these changes.

The function of IHB's Blue Island Yard will be modified by Applicants post-Transaction. Despite the assertions that "we don't propose how the IHB is supposed to handle its customers" and "IHB would develop their own plans on how to handle the local switching to and from (their on-line) customers" (Orrison Dep., EJE-17/IMRL-3, pp. 101-02), Applicants' operating plan dictates a significant shift in how Blue Island Yard will be used to serve IHB's local customers, from a yard where currently "60% of the cars handled at Blue Island are industrial cars going to or from local industries served by IHB" (Orrison V.S., CSX/NS-20, Vol. 2A, p. 184) to a yard where the "primary mission will be to support gateway flow traffic. To the extent practicable, local switching service will be focused in BOCT's Barr Yard." Orrison V.S., CSX/NS-20, Vol. 2A, p. 191.

Further, subsequent to approval of the Transaction, IHB will grant "the right to full, joint and equal use of services provided by IHB," including access to on-line IHB industries,

under the same terms and conditions as Conrail enjoys today, to CSXT and NS. (CSX/NS-25, Vol. 8C, p. 701). How this imposition squares with IHB's current right to participate in arm's-length contracting with Conrail (as found by the Board in Decision No. 53) is unclear, and is left unaddressed by Applicants.

The Board should also take note of CSXT's plans to invest several million dollars in improvements to IHB. (Orrison V.S., CSX/NS-19, Vol. 2A, p. 458-459; R., CSX/NS-176, Vol. 1, p. 310). CSXT is prepared to make this investment entirely with its own funds, without contribution from IHB's other owners. While the Coalition clearly supports any investment designed to facilitate the flow of traffic through Chicago, it is very doubtful that CSXT's largess would extend to an entity it did not feel confident of controlling post-Transaction. As much is evident from the fact that CSXT will await acquiring control of Conrail before making these investments.

The most telling comments on IHB's independence come from Applicants' internal documents. Those documents reveal [[[

]]] EJE-17/IMRL-6, pp. 62, 66. [[[

]]] Id., p. 68. [[[



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Id., p. 60. [[[

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Undoubtedly, Applicants will attempt to rebut all of these varied indicia of control by stating that they conducted several meetings with IHB, during which IHB indicated that all of CSXT's desires for changes on IHB could be accommodated. Orrison Dep., EJE-17/IMRL-6, p. 95. Praise over the desire to seek IHB's concurrence is dimmed when it is revealed that the first meetings with IHB regarding CSXT's sweeping changes for IHB were conducted in August of 1997, after Applicants made their plans for IHB and filed them with the Board. Orrison Dep., Id., p. 94.

Applicants' bald protestations to the contrary, the record clearly establishes that subsequent to approval of the Primary Application, Applicants will collectively own 100% of BOCT, 51% of IHB, and 50% of BRC. Moreover, the IHB Agreement leaves little doubt that IHB will not be operated independently, as the Board has found that it does today. Rather, much like BOCT, IHB will be operated by CSXT for CSXT's benefit.

### **III. Applicants' Control of Intermediate Switching In Chicago Will Have Significant Anticompetitive Effects**

It is noteworthy that Applicants have gone to some length to argue that they will not control intermediate switching in Chicago. They fail, however, to address the other half of the Coalition's case -- that Applicants' control of intermediate switching in Chicago will cause demonstrable anticompetitive impacts for all shippers using the Chicago gateway, and for the on-line shippers of those intermediate carriers.

Applicants' silence on this issue is understandable. Unlike the impacts of the remainder of their Transaction, there are no benefits flowing from their control of Chicago's switching carriers. Certainly, the concentration of ownership will not foster greater competition in Chicago. Competition arises from independence, not from consolidation. Unlike the situation elsewhere, there is no "rebirth" of rail competition for Chicago, but rather an unprecedented collapse of ownership under one roof.

Nor can Applicants be heard to protest that the numerous construction projects they have planned for Chicago are pro-competitive impacts of their Transaction. Those projects will have use to Applicants only in conjunction with the sweeping operational changes Applicants have coerced out of IHB. There is no reason why these projects could not be accomplished in the absence of the Transaction. The construction projects may be timed to coincide with the Transaction, but they are not a necessary adjunct to it, and to the extent they are viewed as

which would only result from the Transaction.

Applicants' silence on the competitive impact of their control of intermediate switching in Chicago is a curious omission, but their silence becomes deafening when contrasted with their comments touting the benefits of newly-reintroduced competition elsewhere. For example, Applicants claim that their Transaction is "unprecedented in bringing about a dramatic increase (in) competition between railroads...", (CSX/NS-176, Vol. 1, p. 14), and "the most pro-competitive transaction ever brought before the Board." (Id., p. 2). The Coalition does not contest the accuracy of these comments as applied to the much of the Transaction. However, in making these claims, Applicants overlook the adverse impact of the Transaction on Chicago.

Applicants' comments concerning their "resolution" of all "2-to-1" situations are telling.<sup>10</sup> Applicants claim they have "crafted effective agreements to ensure the preservation of competitive rail alternatives" in all "2-to-1" situations, (CSX/NS-176, p. 3), and that the "Transaction, as proposed, cures all 2-to-1 situations thereby eliminating any possible loss in competition from the combination of rival rail carriers." (Id., p. 36). The only "agreement" affecting Chicago's intermediate

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<sup>10</sup> One definition Applicants propose to define "2-to-1" situations is where "the only two railroad lines which physically enter a facility are under separate ownership prior to the Transaction but would be under common ownership or usage after the Transaction...". (CSX/NS-176, p. 47). Given the fact that Applicants own 0% of IHB and 33.3% of BRC now, but will own 51% of IHB and 50% of BRC post-Transaction, it is difficult to see how this does not constitute "separate ownership prior to the Transaction but...common ownership or usage after the Transaction."

p. 36). The only "agreement" affecting Chicago's intermediate switching carriers is the "IHB Agreement", and that Agreement merely documents the various ways in which CSXT will operate IHB for its own purposes. There is no "agreement" to preserve rail competition in Chicago. Given the importance of the Chicago gateway to the nation, Applicants' omission is glaring.

The evidentiary record establishes three distinct but related harms to competition resulting from the Transaction. First, and perhaps most obvious, subsequent to approval of the Transaction, Applicants will assume control over all three of Chicago's intermediate switching carriers. On its face, this acquisition of control, a feature of Applicant's unconditioned control of Conrail, will result in an anticompetitive concentration of power in Applicants.

Second, the evidentiary record generated by Applicants shows that intermediate switching in Chicago will be anticompetitive in operation, as well as in ownership. The myriad items of control given to CSXT in the IHB Agreement (including control of dispatching and operations of IHB's primary yard, Blue Island Yard) establish that CSXT intends to operate IHB for its own purposes, and not for the purpose it now serves: providing intermediate switching, on a neutral and unbiased basis, for all carriers in Chicago. Applicants have proposed that IHB operate at their whim, and not as a impartial and independent switching carrier to benefit all parties.

Finally, in addition to harms that will result through the loss of competition for intermediate switching in Chicago,



certain on-line IHB shippers will also lose routing options. As detailed by Transtar's Director of Marketing - West, James Danzl, EJE and IHB jointly serve roughly two dozen industries in Northwest Indiana. Verified Statement of James H. Danzl, ("Danzl V.S."), EJE-10, p. 4. Currently, both CSXT and NS move traffic into or out of these facilities using either EJE or IHB, whichever can provide the most beneficial service package. Conrail refuses to work with EJE at any facility where IHB service is possible, going to such lengths as refusing to solicit bids from EJE for traffic and failing to consider bids submitted by EJE. Danzl V.S., Id., p. 5. Once Applicants assume ownership of IHB, their interests will be the same as Conrail's, and these shippers will lose routing options. An independent IHB is the only method of assuring that Conrail's foreclosure does not spread, eliminating the routing options for these shippers on any traffic moving to or from the Eastern United States.

**IV. The Coalition Has Provided An Effective,  
Narrowly-Tailored Solution For The Anticompetitive  
Harms Generated By Applicants' Transaction**

In order to redress the competitive harms inherent in Applicants' transaction, the Coalition has proposed a narrow condition which will preserve the independent options shippers now enjoy in routing traffic through Chicago. Moreover, the condition can be imposed without denying to Applicants any of the legitimate benefits of their control of Conrail. Finally, the condition would be simple to implement, and would not require review, monitoring and/or adjustment by the Board.

As a condition to the Transaction, the Coalition seeks to purchase Conrail's 51% equity interest in IHB. The Coalition would continue to operate IHB as IHB is operated under Conrail's control today -- as an independent entity, interested in providing efficient service to the railroads entering Chicago, and their shippers. Under the Coalition's proposal, IHB would continue to operate under its own management, and answer to all of its shareholders. It would control its own dispatching, serve on-line shippers from its own yards, and market its own services, all of which Applicants desire to terminate in their Transaction.

The primary benefit of divestiture of IHB's stock would be the absolute independence of IHB's control from that of BRC or BOCT. Because the only benefit to the Coalition of IHB stock ownership would be the continued economic vitality of IHB, divestiture assures that IHB will operate in its own best interests. The Coalition's ownership of a majority of IHB's stock would preserve IHB's traditional role in Chicago, without costly implementation or oversight.

Moreover, divestiture squarely meets the standards imposed on all conditions by ICC precedent. The criteria for imposing conditions to remedy anticompetitive effects were set out in Union Pacific R.R. Co.-- Control -- Missouri Pacific R.R. Co., 366 I.C.C. 462, 562-565 (1982). There, the Commission held that conditions will not be imposed absent a finding that the transaction may produce effects harmful to the public interest (such as a significant reduction of competition in an affected market), and that the imposed conditions will ameliorate or



eliminate the harmful effects; will be operationally feasible; and will produce public benefits (through reduction or elimination of the possible harm) that outweigh any reduction to the public benefits produced by the merger. Conditions must be narrowly tailored to remedy the anticompetitive effects and must not put a shipper in a better position than it occupied before the consolidation. Union Pacific Corp. -- Control -- Chicago and North Western Trans. Co., (ICC served March 7, 1995), p. 97.

The Commission's standards for imposition of conditions have clearly been met. The harm stemming from the Applicants' control of Conrail (and, more particularly, their intended division of Conrail's ownership rights in IHB) is palpable. Applicants will assume the dominant role in the operation of all three intermediate carriers in Chicago. Their operating plan documents that IHB will cease to function as an independent switching carrier, but will become a ward of CSXT, much like BOCT, destined solely to function for CSXT's desires. The harm to shippers currently benefiting from competition between IHB and BRC for intermediate switching is manifest.

It has also been established that the divestiture of Conrail's IHB stock to the Coalition would eliminate the harm resulting from Applicants' dominance in Chicago. After divestiture, an independent IHB will continue to strongly compete with BRC for intermediate switching traffic, and will continue to focus on the needs of IHB's on-line customers. Thus, divestiture would squarely address the harm resulting from the Transaction. All incentive to re-route traffic from one intermediate switching

carrier to another (an incentive that exists under the Primary Application, and is documented in CSXT's operating plan) would be eliminated.

The Coalition's divestiture condition is operationally feasible by definition because the Coalition simply intends to continue IHB's operations, much as they are carried out today. It is Applicants who have proposed broad-based changes to IHB's operations, including implementation of a counter-clockwise flow of traffic through Chicago and the transfer of IHB's local switching service to BOCT's Barr Yard. Whether these sweeping changes can be implemented at all, and whether their implementation will result in the type of gridlock experienced in the West, is unclear. While the Coalition does not dismiss changes to Chicago's operations out of hand, it is obviously better that those changes result from the efforts of competing, independent intermediate switching carriers, who are focused on profit maximization through efficient operations, rather than from the dictates of parties controlling the only players in the market. Only the Coalition's divestiture plan ensures that the delicate balance of Chicago's interchange operations, maximized by independent, impartial switching carriers, will continue.

Further, the benefits from independent ownership of IHB clearly outweigh any alleged benefits of consolidation of IHB's ownership with that of BRC and BOCT. It is not clear that Applicants' control of Chicago's switching carriers brings any public benefits. Applicants have made no claim that their control of all three switching carriers will result in increased

competition, or that it is needed to bring about the elimination of duplicate facilities. While Applicants have proposed a number of minor construction projects and consolidation of dispatching, there is no reason why those changes cannot be made without the elimination of IHB's historic independence.

The public is best served through the preservation of strong, independent competitors. Divestiture is the only available means of maintaining competition within the Chicago switching district. If any of the "benefits" sought by Applicants in their control of Conrail are lost through divestiture of Conrail's IHB stock, those benefits can be negotiated by Applicants with an independent IHB (if they are truly in the public's interest for efficient, timely and cost-effective service), rather than imposed on a controlled IHB by Applicants.

Further, divestiture is narrowly-tailored. Certainly, the Board cannot impose a condition which relies upon Applicants' empty assurances of continued IHB neutrality and independence. Such assurances are mere lip service, designed to placate, and are without substance. Applicants' own documents destroy the myth of continued IHB independence. Moreover, a condition other than divestiture, designed to simulate IHB independence, will result in fuzzy standards, omnipresent Board oversight, and expensive and time-consuming litigation or arbitration. Nothing short of divestiture can guarantee IHB independence.

Finally, no shipper will be placed in a better position by divestiture of Conrail's IHB stock. Indeed, divestiture will

leave all shippers (both those shipping freight through Chicago, and those located on IHB's lines) in exactly the same position as they are in today.

**V.    The Preservation Of Neutral,  
Independent Intermediate Switching  
Has Precedential Support**

The Board's predecessor established a long history of concern over the neutrality of intermediate switching carriers. For example in Chicago Junction Case, 71 I.C.C. 631 (1922), the Commission imposed seventeen conditions on New York Central's acquisition of control of two of Chicago's early terminal switching carriers. The conditions were imposed because numerous intervening carriers offered proof that the neutrality of the carriers would be compromised through control by one trunk line. Although many years later Conrail later successfully challenged the necessity of the conditions in light of changing traffic patterns (Chicago Junction Case, Finance Docket No 1165 (Sub-No. 1), decided August 7, 1989, 1989 WL 239219), only the nature of the relief has changed; concern over neutrality has not.

In Niagara Junction Ry. Co. Control, Finance Docket No. 15605, 267 I.C.C. 649, 663 (1947), the Commission found that it is in the public interest that control of an intermediate switching carrier "be vested so as to insure continued neutrality of its operation and service, and equality of opportunity to all connections to solicit and obtain business, and full exercise of the shippers' right to route free from all interference of any considerations foreign to efficient and economical transportation." Niagara Junction Ry. Co. Control, at 663. See



also Fort Worth Belt Ry. Co., Finance Docket No. 8948, 187 I.C.C. 88 (1932); Belt Railway Company of Chicago, et al. -- Operation, 324 I.C.C. 597 (1965) (discussing neutrality of BRC).

More recently, in a proceeding in many respects similar to this case, the Commission denied the request of St. Louis-Southwestern Railway Company ("Cotton Belt") to control the Alton & Southern Railroad Company ("A&S") (St. Louis Southwestern Railway Company, et al. -- Purchase -- Alton & Southern Railroad, 331 I.C.C. 515 (1968) ("A&S")), despite the assurances that Cotton Belt would continue to operate A&S as a "separate independent switching carrier" (A&S, p. 521), and that the preblocking of traffic available through Cotton Belt/A&S coordination would ease rail traffic congestion in East St. Louis. Id., pp. 522-23. Instead, the Commission agreed with Missouri Pacific Railroad Company ("MoPac") that Cotton Belt's exclusive ownership of A&S "is not reconcilable with the concept of a neutrally operated switching facility." Id., p. 523. Because Cotton Belt's control of A&S would render A&S "an extension of (Cotton Belt's) line" (Id., p. 534), the Commission granted the petition of MoPac allowing MoPac and other interested carriers to jointly own A&S.

As these cases attest, impartial, independent switching service has long been a goal in terminal areas. The public's interest in that goal is not furthered by allowing Applicants to control all three intermediate switching carriers in Chicago. Divestiture is therefore appropriate.



**VI. The Coalition's Divestiture Condition  
Has Generated Broadly-Based Support**

Despite Applicants' vigorous attempts to paint the Coalition as isolated opportunists, a variety of interested parties have stepped forward to support the continued neutrality of IHB. The diverse nature of the interests represented by these supporting parties is indicative of the widespread concern over Applicant's intended control of the Chicago gateway.

Foremost among the Coalition's support is IHB's on-line shippers. Those shippers support the Coalition because "if the acquisition were to be approved without the relief sought in the Responsive Application, service to on-line IHB shippers would deteriorate to their substantial detriment." "Statement Of Ad-Hoc Committee Of On-Line IHB Shippers In Support Of The Responsive Application" ("Statement"), p. 2. Additionally, "CSX would use IHB facilities to further that interline traffic to the detriment of local IHB business in the Chicago area." Id. Because of their dependence on IHB's efficient local service:

it is essential that IHB be managed and operated as a neutral switching carrier devoted to serving its shippers and all carriers entering Chicago equally...The IHB Shippers support the Responsive Application of EJ&E and IMRL because it would result in the preservation of essential switching and routing alternatives in the Chicago gateway for all on-line IHB shippers.

Statement, p. 2-3.

The support of IHB's on-line shippers for the divestiture of Conrail's IHB stock cannot be dismissed by the Board out of hand. Like other parties involved in Board proceedings, shippers are aware that historically, conditions

have not been liberally granted. In coming forward and making their concerns a matter of public record, these shippers face a risk of commercial retribution, should the Coalition's request for divestiture be denied. Their concerns thus merit strong consideration from the Board.

The Coalition is also backed by state agencies in the two states most directly affected by IHB issues, Indiana and Illinois. The Indiana Port Commission ("IPC") supports the divestiture of Conrail's IHB stock. "Indiana Port Commission Request for Conditions," IPC-2, p. 1, 9. IPC's comments are so directly on point as to merit extended excerpt:

In particular, IPC agrees that the proposed allocation of Conrail's IHB assets will have a deleterious effect on the interchange of traffic between carriers and the provision of intermediate switching service. In addition, we express grave concern over prospective routing decisions which would benefit the acquiring parties but not their patrons... There is much to be concerned about the ability... of the Primary Applicants (and in particular CSXT) to regulate, and therefore control, nearly all traffic moving through the Chicago terminal. This will give rise to the ability of those carriers (and in particular CSXT) to favor their traffic vis a vis the traffic of other carriers with whom they are in direct competition. This aggregation of control and market power is patently unhealthy and must be avoided.

IPC-2, p. 9.

Strong support for the divestiture of Conrail's IHB stock has also been voiced by the Illinois Department of Transportation ("IDOT"). In the "Verified Statement of Kirk Brown, Secretary Of The Illinois Department Of Transportation", IDOT-2, IDOT states its support for the transaction, but excepts

from that support the transfer of control of IHB to Applicants. Specifically, IDOT states that after meeting with both CSXT and NS to discuss the impact of the Transaction on Chicago, IDOT is "convinced that the allocation of these assets in the manner proposed by the Application could be extremely damaging to the free flow of rail traffic through the Chicago terminal." IDOT-2, p. 2. Moreover,

(a)fter the proposed transaction, CSX and NS will have effective control of all three major terminal carriers in the Chicago area. In actuality, it appears that one of these carriers, the Indiana Harbor Belt (IHB), will de-emphasize its function as a switching carrier in favor of becoming purely an extension of the mainlines of NS and CSX, to the detriment of carriers who need the IHB to connect their traffic to some other railroad.

Id. Therefore, in order to avoid "another terminal 'melt-down' as seen in Houston", IDOT "urges the Surface Transportation Board to impose a protective condition similar to that urged by (the Coalition), blocking CSX and NS control of Conrail's interests in the Indiana Harbor Belt after the acquisition." Id.

The Coalition's request for divestiture has also garnered the support of the Chemical Manufacturers Association ("CMA") and The Society of the Plastics industry, Inc. ("SPI"), which have said that "the public will be served by transferring the 51% of IHB now owned by Conrail to (the Coalition) at a fair price." "Joint Response Of The Chemical Manufacturers Association And The Society Of The Plastics Industry, Inc.," CMA-16/SPI-10, p. 4. Given their nationwide memberships, there should be no doubt that divestiture is in the public interest.

Another major shipper vitally interested in the fate of IHB is Northern Indiana Public Service Company ("NIPSCO"), which operates several electrical generating stations in Indiana. NIPSCO "has reached the conclusion that the Board must act in this proceeding to preserve the continuing independence of the IHB and thereby assure fair treatment of all users of the IHB." "Comments Of Northern Indiana Public Service Company On Responsive Applications," NIPS-2, p. 4. After analyzing all possible solutions, NIPSCO concluded that the Coalition's divestiture proposal "is by far the superior proposal." Id.

Concern over Applicants' control over Chicago has also been expressed by The Detroit Edison Company ("Detroit Edison"). "Comments And Requests For Conditions Of The Detroit Edison Company", DE-02. Detroit Edison is an electric utility which moves 5,000,000 tons of Powder River Basin coal through Chicago each year. DE-02, p. 1. Because Applicants will control most sources of coal east of the Mississippi, Detroit Edison is concerned that Applicants will have an economic incentive to favor coal from their own Eastern origins, as opposed to Western-sourced coal, and control over Chicago will give them the mechanism to constrict Western traffic flows. To avoid that loss of competitive options, Detroit Edison "encourages careful evaluation" of the Coalition's concerns. DE-02, p. 4.

As these and other concerned parties attest, there is good reason to believe that Applicants' control of Chicago will be anticompetitive. The Coalition is not alone in recognizing the harm manifest in such a consolidation of ownership. Nor is



the Coalition merely pursuing its own agenda when it seeks a viable, narrowly-crafted solution to that problem. The public interest in the fate of IHB dictates that the concerns of these parties be addressed in the Board's ruling on divestiture.

**VII. Applicants Have Failed To Rebut  
Any Portion Of The Coalition's Case**

Employing some of the most inflamed rhetoric in memory, Applicants have attempted to rebut the Coalition's request for divestiture by citing to a number of alleged deficiencies in the Coalition's proposal. Their venom, however, is misspent. In most of their rebuttal, Applicants set up straw men, only to remark at how easily they are dispatched. On other occasions, Applicants labor at length about issues totally unrelated to the merits of the Coalition's case. A fair reading of Applicants' rebuttal leads a careful reader to wonder whether Applicants' purpose in filing it was to address the legitimate concerns raised by the Coalition, or merely to attempt to smear the Coalition with innuendo and vitriol in hopes that the Board will fail to notice that serious underlying issues remain unaddressed.

**A. The Coalition Has Correctly  
Described The Role Of Intermediate  
Switching Carriers In Chicago**

Applicants discuss the alleged "mischaracterization" the Coalition has made of the currently-existing market for intermediate switching in Chicago. Applicants argue that the Coalition does not understand the "complicated set of switching and interchange relationships in Chicago" (R., Vol. 1, p. C-302), and assert that the Coalition's case is premised upon the



assumption that the three Chicago intermediate switching carriers physically perform intermediate switching to effect all interchange of rail cars in Chicago.

Noticeably absent from the Applicants' alleged "summary" of the Coalition's case is a citation to any place where the Coalition made the claims conveniently "summarized" by Applicants. Indeed, no party with any familiarity with Chicago's complex rail relationships would make such claims. Undoubtedly, a number of carriers have connections from which they can interchange traffic directly. Further, a developing trend in Chicago (as elsewhere) has been the use of trackage rights over intermediate switching carriers to create "direct" connections. Finally, a greater emphasis has been placed on the use of remote connections (such as at St. Elmo, Illinois) to interchange traffic away from the congestion of traditional rail gateways.

The Coalition's case, however, is not premised on the existence of three intermediate switching carriers performing all interchange in Chicago. Some railroads have direct connections; others interchange "directly" via trackage rights. Those facts do not relieve the problems of those railroads which are forced to use Chicago's intermediate switching carriers for interchange. Applicant's control in Chicago will not be problematic for every carrier's connections. That fact does not rebut the allegation that it is a significant problem for many carriers.

Applicants' scheme for run-through trains in blocks between Class I railroads does nothing for smaller carriers, which will simply not have the volume of traffic necessary to

sustain entire run-through trains. For Chicago's smaller railroads, effective service for on-line customers or distant connections depends upon the ability of Chicago's intermediate switching carriers to properly classify their traffic, to deliver it to the correct point of interchange, timely, and at a competitive price. The focus on intermediate switching, however, will be lost through unconditioned approval of the Primary Application. Moreover, without any ownership interest in the intermediate switching carriers, and without the large volume of interchange traffic needed to bring the Class I railroads to the negotiating table, smaller railroads (and their shippers) will simply be lost in the shuffle.

Emblematic of these problems is the situation faced by IMRL, which must rely upon IHB and BRC for its Chicago connections. Applicants propose to turn the attention of IHB and BRC from intermediate switching to the facilitation of their run-through traffic. Without sufficient volumes of traffic to become an economic issue to the two remaining eastern monoliths, and without any ownership interest in the switching carriers, the ability of shippers on IMRL's lines to compete with the shippers located on western Class I carrier's lines is placed at risk.

Applicants ignore the fate of IMRL and other smaller railroads in their filings. Competition between IHB and BRC, spurred by the current diversity in their ownership, will be eliminated in one transaction. It would be foolish to think that the Applicants' plans for "closer coordination" among Chicago's three intermediate switching carriers (a notion splashed across

Applicants' filings like a vaccine to prevent Chicago from becoming "Houston Part II") will be used for the good of all railroads in Chicago. The competitive forces that compel IHB and BRC to be mindful of the needs of non-owners, lest revenue be lost to a separate economic entity, will be destroyed. Instead, traffic lost by one carrier will be gained by the other, and the only issue for IMRL to decide will be into which of Applicants' pockets the switching charge is placed. The united ownership of Chicago's connecting carriers will allow the connections of non-owners such as IMRL to wither on the vine.

Applicants' argument concerning the varied role of Chicago's intermediate switching carriers ignores the fact that even when they are not physically performing the interchange, switching carriers can have a profound impact upon the efficiency of interchanges. For example, Applicants point out that traffic moves via trackage rights over these same carriers. They infer that control of the switching carrier will not impact this move. This simplistic argument ignores the fact that the intermediate switching carrier, while not moving the rail cars directly, controls the dispatching of the railroad operating on trackage rights over its lines. Unity of ownership, and unity of purpose, could clearly impact neutral dispatching to place the trains operated by non-owners in sidings while the owners operate their run-through interchange. Certainly, [[

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In summary, focusing on the roles played by Chicago's intermediate switching carriers does not negate the problems identified by the Coalition. Instead, it serves to highlight the variety of methods by which Applicants will be able to use their control to the detriment of smaller carriers in Chicago.

**B. Applicants' Analysis Of  
Control Of Intermediate  
Switching Railroads Is Defective**

Compounding their mistakes in summarizing interchange in Chicago, Applicants provide a defective analysis of the effect their proposed transaction will have on the control of Chicago's intermediate switching carriers. Applicants are able to diminish concern over their control only by failing to take into account the inter-relationship involved in the ownership of the three switching carriers. The more serious analysis suggested by the Coalition, focusing on how the ownership interests interrelate, reveals the problem.

Applicants undertake to rebut the Coalition's case by drawing a "narrow circle. . . around each switch carrier" (R., Vol. 1, p. 305) and studying the impact of the Transaction on the ownership of that carrier. This forced, distorted perspective allows Applicants to assert that there will be no issue of anticompetitive control in Chicago.

Nowhere, of course, do Applicants justify focusing on each carrier in isolation. Chicago's intermediate switching carriers do not operate in isolation; rather, at least as to IHB and BRC, they operate in competition with one another. This competition currently fuels the service levels enjoyed today by



all of Chicago's trunk lines. And, it is this competition which is placed at risk in this Transaction.

Further, Applicants propose to analyze their control by labeling CSXT, NS, and Conrail "Eastern carriers," and then declaring that no change in ownership of Chicago's switching carriers will be gained by the "Eastern carriers." What that analysis attempts to hide, of course, is that the issue is not "East" vs. "West," but rather the ownership interest held by each of the Eastern carriers. The problem of control is seen only through analyzing each railroad's ownership interest in conjunction with its other holdings; the forced perspective of "Eastern carriers" does nothing to further that analysis.

Applicants also put forth the argument that because two entities will control Conrail's 51% stock ownership interest in IHB instead of the one that exists today, the "collective power of NS & CSXT to control IHB will be less than (Conrail) control." (R., Vol. 1, p. 309). Applicants have this argument backwards. While Conrail has the ability to control IHB,<sup>11</sup> it has no ownership interest to control BOCT, and its one-sixth interest is not enough to give it a dominant interest in BRC. By contrast, CSXT and NS will own 51% of IHB, and will own 50% of BRC, and 100% of BOCT. Thus, Applicants' ability to control IHB will be greater than Conrail's because Applicants will also control both entities providing competition to IHB today.

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<sup>11</sup> The Board's Decision 53 in this proceeding stands for the proposition that Conrail does not elect to exercise its control over IHB; it does not stand for the proposition that 51% stock ownership does not give Conrail the right to control IHB.



C. **Applicants' Claim That  
Divestiture Would Be A "Wasted  
Opportunity" Is Counter-Intuitive**

Applicants make the claim (R., Vol. 1, p. C-311) that divestiture of Conrail's 51% stock ownership interest in IHB to the Coalition would be a "wasted opportunity." They attempt to support this claim by discussing the importance of Chicago in the nation's rail system. In their zeal to disparage the Coalition's case, however, they attempt to prove too much. It is precisely because of the importance of Chicago to the nation's rail system that the Coalition's Responsive Application should be granted.

Applicants are correct that while Chicago functions reasonably well as a major point of interchange, the magnitude of rail operations there results in a certain amount of congestion, communications errors, and inefficiency. Applicants contend that the solution to this problem is the removal of the competitive forces that currently require the switching carriers to improve, and to consolidate control of the switching carriers in their hands. Undoubtedly, the Applicants will benefit from controlling the flow of traffic in Chicago. The parties who will not benefit, of course, are shippers who depend on railroads holding no ownership interest in the switching carriers, and who rely upon competition to gain effective service.

Applicants tout the efficiency of their Transaction, but one is left to speculate on why the competitive forces shaping Chicago did not hit upon these alleged "efficiencies" in the last 150 years. The answer is that the Transaction will only bring "efficiencies" to the Applicants. The changes proposed by

Applicants benefit only themselves; not IHB's on-line shippers, and not shippers elsewhere across the nation who depend upon an independent IHB for competitive service through Chicago.

Further, the Board should not be cowed by CSXT's thinly-veiled threat that its operating plan will be "put at risk" through approval of the Responsive Application. (R., Vol. 1, p. 312).<sup>12</sup> The Coalition does not propose to jeopardize CSXT's efficient operations. Rather, the Coalition proposes to maintain the IHB's focus as an intermediate switching carrier. To the extent that CSXT is able to coordinate its blocking to allow for efficient run-through interchange among major carriers, such operations could be accomplished without jeopardizing either the service of IHB's on-line shippers or the use of IHB to classify cars for interchange to smaller carriers.

**D. The Alleged "Absence Of Synergy" In The Coalition's Responsive Application Is Incorrect**

In a further attempt to decry the Coalition's Responsive Application, Applicants assert that neither of the Coalition's two rail carriers, EJE and IMRL, bring any "synergy" along with their Application. Once again, however, Applicants' argument proves far too much for Applicants.

Applicants have apparently not adequately thought out how their "synergy" spotlight reflects on CSXT, an entity with no yard facility or rail lines in the Chicago area. Burlington Northern, Inc. v. The Baltimore & Ohio Chicago Terminal R.R. Co.,

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<sup>12</sup> The Board should note that Applicants claim only CSXT's operations in Chicago are "put at risk" by the Responsive Application, not NS'.

et al., Finance Docket No. 37515 (ICC served November 21, 1981). Indeed, CSXT and its corporate predecessors has invested significant sums of money over many decades to establish the complete absence in any connection between themselves and Chicago. See Baltimore & Ohio Chicago Terminal Railroad v. Wisconsin Central Ltd., 1994 WL 71431 (N.D. Ill. 1994); Burlington Northern R.R. Co. v. U.S., 731 F.2d 33 (D. D.C. 1984). CSXT offers no synergy in its ownership of IHB, and to the extent that coordination of CSXT's wholly-owned subsidiary, BOCT, with IHB can be construed as synergy, it is more reflective of Applicants' intention to eliminate IHB's independence than it is of efficient consolidation.

Regardless of its relevance, the claim that "EJE offers no operational synergy with IHB" is false. EJE's system provides an uncongested route for traffic around Chicago, avoiding to a large degree the gridlock engendered by the physical proximity of rail lines located closer to the city. Additionally, UP has begun to utilize trackage rights over EJE for just this purpose. Turner V.S., EJE-10, p. 4. A discussion of EJE's synergy is contained in Turner R.V.S., EJE-17/IMRL-6.

Amazingly, Applicants also complain about IMRL's alleged absence of synergy. At a minimum, IMRL brings no less synergy than does CSXT, both of which depend upon trackage rights to enter the Chicago switching district, and have no yard facilities in the district. Moreover, Applicants' complaints regarding IMRL in this area ring hollow. Indeed, if EJE were the only railroad seeking divestiture of IHB, Applicants would

proclaim the absence of any trunk line carriers as a reason to deny the Responsive Application. Now, when IMRL does step forward, it is dismissed for not having enough synergy for Applicants' liking.

**E. Applicants Are Flat Wrong  
In Claiming That The Coalition  
Has Offered "No" Operating Plan**

Applicants have attempted to undercut the Coalition's Responsive Application by asserting that the Coalition as offered "no" operating plan. (R., CSX/NS-176, Vol. 1, p. 34). It is not surprising that Applicants have elected to ignore the Coalition's Operating Plan, as its witness rebutting that plan, John Orrison, never bothered to read the plan, and was informed by his counsel that no operating plan existed. Orrison Dep., EJE-17/IMRL-6, pp. 86-88.

Moreover, the need to submit a highly detailed operating plan is lessened in this instance because the Coalition intends no major change in IHB operations. One of the primary purposes of the Coalition's Responsive Application is to assure IHB's on-line shippers that they will continue to be a focus for IHB, and to assure smaller railroads requiring intermediate switching services in Chicago that they will not become second class citizens. It is Applicants, and not the Coalition, that seek to impose sweeping changes on IHB's operations. Because of the profound changes sought by Applicants, and because these changes are heavily dependent upon coordination of IHB's operations with those of BRC, it is Applicants, and not the



Coalition, which was forced to focus on a detailed operating plan.

**F. Applicants' Complaints Regarding  
The Timing Of The Coalition's  
Association Are A Clear Red Herring**

In a final effort to divert the Board's attention from the real issues presented by the Coalition, Applicants indulge in several pages of smear tactics, criticizing the Coalition as "hastily thrown together" and "contrived." Missing from any of this unseemly attack is a discussion of relevance. Shrill rhetoric aside, the Coalition's Responsive Application will stand or fail based upon the merits of its contents. The imaginary "behind the scenes" intrigue Applicants so desperately want to draw the Board into have no place in this proceeding.

Further, even assuming arguendo that there is some relevance to the timing of discussions between EJE and IMRL, the conclusions reached by Applicants clearly miss the mark. The fact that EJE and IMRL may not have reached agreement on the contents of the Responsive Application until relatively late in the day does not mean that the realization of harm to intermediate switching service in Chicago was not realized early on. As the record in this case indicates, both Wisconsin Central Ltd. and Illinois Central Railroad Company filed a "Description of Anticipated Responsive Application" on August 23, 1997, declaring an intent to seek divestiture of the IHB stock as a remedy to the concentration of control of intermediate switching services in Chicago. The fact that those parties subsequently reached an accord with NS on separate issues and stopped short of



their intention to request divestiture does not mean that there were not serious discussions transpiring prior to that time.

Moreover, the fact that the Coalition did not have many months to agree how to proceed can hardly be blamed on the Coalition. The schedule set for this case was premised upon Applicants' desire to rush their case through the Board's careful review process. Applicants readied their case at their own pace. Once that filing was made and a schedule set, however, all responsive parties, including the Coalition, were forced to then abide by the schedule set for this proceeding.

Finally, Applicants reserve their most caustic verbiage for the Coalition's outside counsel. Claiming without evidence that the Coalition was formed "in a lawyer's office in Chicago" (R., Vol. 1, p. 317) by counsel engaged in a "brokerage or other deal-making relationship". (R., CSX/NS-176, Vol. 1, p. 325), Applicants baselessly place responsibility for the formation of the Coalition on a law firm. The fact that the law firm may represent a variety of railroads, all of whom recognized the inherent harms to their shippers associated with the Primary Application, is not treated as a possibility by Applicants. In any event, the implication that that the Coalition resulted from lawyer coercion is baseless, inaccurate and unfair. See Verified Statement Of Janet H. Gilbert, EJE-17/IMRL-6, p. 43.

**G. Applicants Have Not Rebutted  
The Harm Identified By The Coalition**

After berating the mechanics of the formation of the Coalition for several pages, Applicants devote the same amount of

space discussing the harms which arise from their Chicago oligopoly. Applicants' rebuttal, however, is wide of the mark.

Initially, Applicants rely on CP/Soo (which will remain as 49% minority shareholder of IHB) and NS (which will effectively own 25.5% of IHB) to "rein in" CSXT's domination of IHB's operations. This argument conveniently ignores the obvious: Conrail's 51% stock ownership interest will continue to be voted as a block, preventing CP/Soo from gaining any additional voice in IHB operations and preventing CP/Soo and NS from effectively combining their ownership interests to defeat CSXT's desires. Moreover, under the "IHB Agreement," NS has apparently ceded control over many aspects of IHB's operations to CSXT. Thus, although CSXT will retain minimal shareholder obligations to CP/Soo, and NS has been accorded limited rights of protest, it is CSXT's influence which will be dominant in managing IHB.

Applicants also downplay the comments of Mel Turner, EJE's General Manager, regarding his observations of how CSXT manages BOCT today. The example of BOCT (a mere extension of CSXT) provides the best evidence available of how CSXT operates an intermediate switching carrier in the Chicago terminal.

Finally, Applicants dismiss the presence of IMRL in this case by claiming an inability to determine "how (IMRL) would be prejudiced by the Primary Application." (R., Vol. 1, p. C323). Applicants' inability may stem from the fact that it is the harm to the shipping public, and not the harm to IMRL, that has forced IMRL to come forward and join the Coalition.

**H. Applicants' Arguments With Respect  
To Harm To Jointly Served Customers  
In Northwest Indiana Are Inaccurate**

In addition to the harm to intermediate switching services in Chicago, the Coalition has also identified harm which will result to approximately two dozen industries in Indiana. At each of these facilities, the shipper is able to accept rail service from either EJE or IHB. However, for traffic moving to or from points on Conrail, these shippers are simply not given the option of working with EJE. In support of its Responsive Application, EJE established that Conrail refuses to work with EJE into these facilities, instead preferring to include IHB in bids for traffic, and thereby to enhance the economic position of its partially-owned subsidiary. Danzl V.S., EJE-10, p. 43.

Applicants point out that the situation described by EJE is a currently existing harm, and they claim that no condition should be granted to provide a remedy. In pressing this argument, Applicants miss the point. If their Transaction is unconditioned, the situation currently existing with Conrail will expand to IHB's to NS and CSXT. Indeed, since they are splitting up Conrail between them, most traffic moving to or from Eastern points will now be subject to an absence of competition. Precedent recognizes that exacerbation of a preexisting harm is an appropriate circumstance for the imposition of conditions.

**1. Applicants' Claim That IHB Will "Set  
Prices Independently" Is Without Support**

In attempting to reply to the Coalition's case, Applicants respond that IHB will be allowed to set prices independently. (R., Vol. 1, p. C-318). As an initial matter,

this claim is without support in the record. More fundamentally, in detailing all of the ways in which IHB will allegedly be allowed to operate independently, nowhere do Applicants state that IHB will handle its own marketing functions.<sup>13</sup> This omission is telling, because if CSXT intends to handle IHB's marketing functions (a conclusion fairly enough drawn from Applicants' comments), there can be no argument that will "set prices independently."

The notion that IHB will set prices independently is also belied by the host of changes Applicants have already mandated for IHB. Those changes are detailed elsewhere, and will not be discussed here. Suffice to say that if IHB does set prices independently, it will be one of the few areas of independence IHB experiences.

Finally, even if IHB sets prices independently, that argument misses the point. Price is not the issue raised by EJE; the issue is the willingness of the trunk line carrier to work with a non-owned terminating or originating carrier. Even if IHB operates independently, it is the trunk line carrier that submits bids for this traffic. Foreclosure takes place in the bidding process, not in the price-setting process.

**2. Applicants' Allegation That The Coalition Is Attempting To Redress Current Harms Misses The Point**

As noted above, Applicants manifest a misunderstanding of the problem when they claim that the Coalition is seeking

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<sup>13</sup> IHB "will have its own operating, financial, mechanical, engineering and labor relations functions." (R., CSX/NS-176, Vol. 1, p. C-309).



assistance to remedy an existing issue. The Coalition detailed its current experience with trying to work with Conrail at these locations not to be given relief from Conrail's actions, but instead to demonstrate that both the power and the motive are currently present to exclude EJE from these facilities. The fact of the matter is that Conrail refuses to submit bids involving EJE unless IHB cannot provide service. The absence of any evidence from Applicants as to any alleged inability by EJE to provide superior service at these locations is a strong indication that EJE's beliefs as to the reason for its exclusion are warranted.

Moreover, the issue on which the Coalition seeks relief is not the current existence of this harm to competition, but rather the exacerbation of the problem when, post-transaction, it extends over most of the Eastern United States. Nowhere in its reply evidence to Applicants deny that they will eliminate competition at these locations just as Conrail does today.

Applicants also contend that it is actually the Coalition, and not Applicants, which propose a transaction resulting in a loss of competition. The Coalition, according to Applicants, will "control" its competitor, IHB, and thereby eliminate competition at jointly served locations. In pressing this argument, Applicants speak with both sides of their mouth. On the one hand, they claim that CSXT and NS, despite having entered an agreement carving up IHB and dictating how IHB will be compelled to operate post-Transaction, are allowing IHB to be "independent." On the other hand, the Coalition, which has



professed from the beginning to a desire to see IHB operate as it does today, will "control" IHB. In any analysis of the proposals of the two parties, it is clearly Applicants, and not the Coalition, which intends control of IHB.

Applicants also rely upon "economic theory" to reply to the Coalition's claims. "Economic theory," they claim, dictates that no rational trunk line would use the services of a partially-owned subsidiary when a more viable option exists. Whatever the merits of ivory tower theorists, the real world experience today flatly contradicts this theory. Conrail, a majority owner of IHB, continues to use IHB exclusively today, despite no evidence that EJE is not fully competitive with IHB at these facilities. A careful reader is forced to conclude that either Conrail is not a "rational" railroad (an argument pressed by no one), or Applicants' economic theory is flat wrong.

**VIII. Inland Steel Company's Concerns  
Regarding Competition At Its Indiana  
Harbor Works Facility Are Unfounded**

In addition to the Applicants' opposition to the Coalition's Responsive Application, concern was also expressed by Inland Steel Company ("Inland") regarding rail service to its Indiana Harbor Works facility. Opposition of Inland Steel Company To The Responsive Application of Elgin, Joliet and Eastern Railway Company, Transtar, Inc., and I&M Rail Link, LLC (ISI-9) ("Inland"). As detailed by Inland, that facility currently enjoys rail access from both IHB and EJE. Inland fears that the result of the Coalition's Responsive Application will be

to eliminate rail competition at the Inland plant, reducing Inland to a "2-to-1" shipper and eliminating competition.

Inland's concerns are unfounded, and apparently premised on a misunderstanding of the Coalition's Responsive Application. Inland will not be a "2-to-1" shipper, as it will continue to enjoy rail access from two competing, independent railroads. With an accurate understanding of the Responsive Application, it can be shown that Inland will experience no change in its transportation picture.

At the most cursory level, the Coalition has not proposed a merger or other consolidation with IHB. Two separate railroads serve Inland today, and those two separate railroads will continue to serve Inland after approval of the Responsive Application. Inland's citations to merger and control proceedings (Burlington Northern Inc. and Burlington Northern R.R. Co. -- Control and Merger -- Santa Fe Pacific Corp. and Atchison, Topeka and Santa Fe Ry. Co., Finance Docket No. 32549, slip op. at 55 (August 23, 1995) and Union Pacific Corp. et al. - - Control and Merger -- Southern Pacific Transp. Co., et al., Finance Docket No. 32760, slip op. at 100 (August 6, 1996)) are therefore inapposite; no merger or control is proposed.

More substantively, however, while it might be possible for a railroad with a minority ownership interest in another railroad to impermissibly influence that other railroad's marketing, there is absolutely no basis to think that the Coalition intends to act that way towards IHB. Indeed, the thrust of the Coalition's filing is directed toward establishing

the opposite premise - that neutral, independent switching service is necessary in the Chicago Terminal District, and that such service (currently provided by IHB today) can be continued only under the Coalition's purchase of Conrail's IHB stock.

As the Board found in Decision No. 53, it is possible for Conrail to own the majority of the stock of IHB and still allow IHB to be operated independently. The Coalition has declared its intent to exercise its ownership interest in IHB much as Conrail does today. By contrast, Applicants have already executed the IHB Agreement, under which they have declared how IHB's yards will be used, what contracts IHB will enter, and how IHB dispatching will be controlled. Applicants intend to control IHB; the Coalition intends merely to own a portion of its stock.

Inland also presents the argument that if the Responsive Application is approved, EJE will have both the motive and the means to reduce competition at Inland's facility. Neither of these arguments make sense. As to motive, perhaps realizing that IHB's other stock owners (CP/Soo and IMRL) would not allow traffic to be forced off IHB in favor of an EJE routing, Inland argues the opposite - that EJE will simply stop competing for Inland's traffic, allowing IHB to raise rates and reduce service. This argument is non-sensical, as it is premised on a belief that EJE would gain more from traffic moved by its 25.5% ownership of IHB's stock than it would from handling this traffic directly. EJE's motivation would be to vigorously pursue as much of this traffic as it could effectively handle, and IHB's other stock owners (not restricted from opposition, as CP/Soo and

NS are under the IHB Agreement) would not allow IHB to reduce its own competitive stance.

Nor, it is clear, will EJE have the means to reduce competition to Inland. IHB's marketing department will be wholly separate from EJE's marketing staff. Danzl R.V.S., EJE-17/IMRL-6, p. 9. That separation is critical to the functioning of an independent IHB. Because the Coalition is not proposing a merger of IHB, but instead has manifested an intent to keep the marketing function separate, there is no danger of Inland becoming a "2 to 1" shipper.

**CONCLUSION**

For all of the foregoing reasons, it is appropriate for the Board to order divestiture of Conrail's 51% stock interest in IHB to the Coalition as a condition to approval of Applicants' Primary Application.

Respectfully submitted,

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**ATTORNEYS FOR TRANSTAR, INC.,  
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Dated: February 23, 1998



CERTIFICATE OF SERVICE

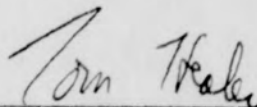
I hereby certify that on this 23rd day of February, 1998, a copy of the foregoing **Brief of Elgin, Joliet and Eastern Railway Company, Transtar, Inc. and I & M Rail Link, LLC** (EJE-19/IMRL-8) was served by overnight delivery upon the Primary Applicants herein, as follows:

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by first class mail, postage prepaid, upon all parties appearing on the highly confidential restricted service list in this proceeding and, in redacted form, upon all remaining designated parties of record appearing on the official service list in this proceeding, served August 19, 1997 and revised on October 7, 1997 and December 5, 1997.



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Thomas J. Healey