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December 15, 1997

202 347-7170

BY HAND DELIVERY

The Honorable Vernon A. Williams  
Secretary  
Surface Transportation Board  
Case Control Branch  
ATTN: STB Finance Docket 33388  
1925 K Street, N.W.  
Washington, D.C. 20423-0001



Re: Finance Docket No. 33388, <sup>Sub 39</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

Dear Secretary Williams:

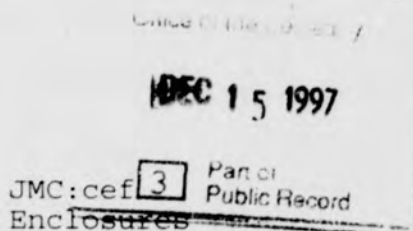
Enclosed for filing in the above-referenced proceeding,  
please find the original and twenty-five (25) copies of the  
**"Comments of the State of New York on the Responsive Application  
of the Livonia, Acon & Lakeville Railroad Corporation" (NYS-20).**  
In accordance with the Board's prior order, we have enclosed a  
Wordperfect 5.1 diskette containing this filing.

We have included an extra copy of the filing. Kindly  
indicate receipt by time-stamping the copy and returning it with  
our messenger.

Sincerely,

*Jean M. Cunningham*

Jean M. Cunningham  
An Attorney for  
the State of New York



154844

BEFORE THE  
SURFACE TRANSPORTATION BOARD

NYS-20

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

Finance Docket No. 33388  
(Sub-No. 39)

DEC 15 1997

3 Part of  
Public Record

COMMENTS OF  
THE STATE OF NEW YORK  
ON THE RESPONSIVE APPLICATION OF THE  
DEVONIA, AVON & LAKEVILLE RAILROAD CORPORATION

THE STATE OF NEW YORK BY AND  
THROUGH ITS DEPARTMENT OF  
TRANSPORTATION

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Dated: December 15, 1997

Attorneys and Practitioners

**BEFORE THE  
SURFACE TRANSPORTATION BOARD**

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CSX CORPORATION AND CSX	)	
TRANSPORTATION, INC., NORFOLK	)	
SOUTHERN CORPORATION AND	)	Finance Docket No. 33388
NORFOLK SOUTHERN RAILWAY	)	(Sub-No. 39)
COMPANY -- CONTROL AND OPERATING	)	
LEASES/AGREEMENTS -- CONRAIL, INC.	)	
AND CONSOLIDATED RAIL CORPORATION	)	

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**COMMENTS OF  
THE STATE OF NEW YORK  
ON THE RESPONSIVE APPLICATION OF THE  
LIVONIA, AVON & LAKEVILLE RAILROAD CORPORATION**

The State of New York, acting by and through its Department of Transportation ("New York"), hereby submits these Comments on the Responsive Application filed in Finance Docket No. 33388, Sub-No. 39 by the Livonia, Avon & Lakeville Railroad Corporation ("LAL") on October 21, 1997 (LAL-4).<sup>1</sup> For the reasons set forth below, New York supports LAL's Responsive Application, and urges that it be granted.

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<sup>1</sup> Decision No. 12 in this proceeding establishes December 15, 1997 as the due date for filing "responses to inconsistent and responsive applications, comments, requested conditions, and opposition evidence and argument." See 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, Decision served July 23, 1997. For purposes of these Comments, all references to "CSX" include CSXC, CSXT, and their wholly owned subsidiaries; all references to "NS" include NSC, NSR, and their wholly owned subsidiaries; all references to "Conrail" include CRR, CRC, and their wholly owned subsidiaries; all references to "Applicant(s)" indicate either or both CSX and NS.

### IDENTITY AND INTEREST

New York is a sovereign state, and a full party of record in this proceeding. The New York State Department of Transportation is the executive department charged with responsibility for the supervision and administration of State policies and interests relating to rail transportation through, within, or affecting New York.

On October 21, 1997, New York submitted Comments (NYS-10) responding to the Primary Application<sup>2</sup> filed in this proceeding. As those Comments establish, the State of New York has an enormous financial and economic stake in the northeastern rail transportation industry; the State has invested substantial taxpayer resources over the years to promote rail-related projects, and facilitate viable, ever-improving rail service for New York's businesses and individual citizens alike.<sup>3</sup>

In particular, the State has lent considerable support to its short-line railroad network. In the last two and a half decades alone, the State has allocated over \$66.18 million to projects aiding and improving smaller New York rail carriers.<sup>4</sup> This sum includes more than \$1.7 million to fund the expansion

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<sup>2</sup> For purposes of these Comments, the terms "Primary Application," or "Application" without further clarification, refer to CSX/NS-18-25, submitted by the Applicants on June 23, 1997, and accepted by the Board on July 23, 1997 pursuant to Decision No. 12.

<sup>3</sup> See NYS-10, Argument at 11, 24-25; V.S. James A. Utermark at 6-13, Exs. 2-5.

<sup>4</sup> See NYS-10, V.S. Utermark at Exs. 3, 4.

and rehabilitation of yards and tracks used by LAL.<sup>5</sup> New York has expended another \$4.9 million in support of Rochester Southern Railroad ("RSR"), a New York short-line capable of connecting with LAL, as discussed in more detail below.<sup>6</sup> New York has, furthermore, sponsored a variety of State programs, and taken advantage of Federal programs, to provide over \$145 million of assistance to New York's branch-line and short-line operations.<sup>7</sup> Taken together, these facts plainly establish New York's interest in the matters addressed by LAL-4.

#### LAL'S RESPONSIVE APPLICATION

As its Responsive Application states, LAL is a short-line railroad located in Upstate New York. LAL operates from Lakeville, New York, through Avon, to Genesee Junction near Rochester, New York. LAL presently interchanges all of its traffic exclusively with Conrail at Genesee Junction.<sup>8</sup> The rail yard at Genesee Junction consists of three tracks, totaling approximately one route-mile. Conrail accesses the east end of the yard; RSR connects at the west end.<sup>9</sup> Though LAL has sought in the past to establish an LAL-RSR interchange at Genesee Junction, Conrail's ownership of the yard and resultant control

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<sup>5</sup> Id.

<sup>6</sup> Id.

<sup>7</sup> See id. at Ex. 2.

<sup>8</sup> LAL-4 at 6-7, V.S. William D. Burt at 2.

<sup>9</sup> See LAL-4 at 8.



over interchanges occurring there have forestalled any such arrangement. As LAL details in its Responsive Application, Conrail has used Genesee Junction Yard as a "firewall" preventing interlined movements between LAL and RSR. By prohibiting coordination between these two carriers, Conrail has ensured that LAL can only route traffic through the Rochester area -- its sole outlet to other parts of New York and the country -- by dealing with Conrail.<sup>10</sup> Though RSR, LAL, and their respective customers and connections would all benefit from the alternative of moving LAL-originated traffic over RSR,<sup>11</sup> Conrail has refused to facilitate this competitive option, preferring to continue profiting from LAL's captivity at the expense of LAL's rail-dependent customers.

In its present form, the Primary Application makes no provision for the removal of Conrail's monopolistic control over Genesee Junction. The Application provides that CSX will acquire control of the yard Conrail now owns, and -- unless directed otherwise by the Board -- will keep in place the restriction on an LAL-RSR interchange there. The perpetuation of this situation at Genesee Junction, as explained both in LAL's Responsive

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<sup>10</sup> LAL-4 at 8-9, V.S. Burt at 2-6.

<sup>11</sup> See RSR Description of Anticipated Responsive Application (RSR-2), filed Aug. 22, 1997 at 2 (indicating intention to file a Responsive Application seeking the trackage rights authority LAL has requested, for purposes of interchange between RSR and LAL). Though RSR has reached an agreement with the Applicants, and thus did not submit a Responsive Application, RSR remains willing and able to interchange with LAL at Genesee Junction.

Application and below, threatens the continued reliability and economical availability of LAL rail service to its customers. The competitive alternative an LAL connection with RSR represents would alleviate the dangers posed by the Applicants' proposed transaction to LAL and the businesses it serves. In particular, elimination of the firewall would: (1) provide LAL shippers facing new, joint-line CSX-NS service to points beyond Rochester with an alternative, competitive route via RSR; (2) prevent the exploitation of LAL's captivity at Genesee Junction after the division of Conrail; and (3) place responsibility for the track and facilities at Genesee Junction with a carrier -- LAL -- who counts on and benefits directly from their proper and timely maintenance and repair. For all of these reasons, the Board should grant LAL's Responsive Application, and approve its purchase of or acquisition of trackage rights through Genesee Junction Yard.<sup>12</sup>

COMMENTS OF  
THE STATE OF NEW YORK

I. New York State Supports and Depends Upon  
Short-line Railroads

New York's substantial investment in smaller rail carriers demonstrates its recognition of those railroads' vital

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<sup>12</sup> As indicated by its Comments and Requests for Conditions filed October 21, 1997 in this proceeding, the Genesee Transportation Council ("GTC") also supports LAL's Responsive Application, and "urges Board approval" of the relief LAL seeks. See GTC-2, V.S. H. Douglas Midkiff at 8 n.8. GTC is a Metropolitan Planning Organization with responsibility for initiating and/or implementing programs and policies affecting nine western New York counties; these nine counties include those through which LAL's line runs.



contribution to and role in the State's economy and transportation system. As New York's prior Comments in this proceeding note,<sup>13</sup> and LAL's Responsive Application emphasizes,<sup>14</sup> the major eastern rail carriers have not in the past, and cannot in the future, operate in isolation. The major railroads, in addition to moving traffic between large, metropolitan-area shippers and receivers, connect smaller, off-line rail users with markets and suppliers. This they accomplish in large part through coordinated, joint-line movements with short-line railroads. LAL is among the more than two dozen short-lines in New York that provide this crucial link between industries requiring rail service, and the national rail network.<sup>15</sup>

The Verified Statement of LAL Vice President and General Manager William D. Burt confirms the significant role LAL plays in the business community it affects. As Mr. Burt describes, the customers LAL serves could not continue profitably at their present locations without access to competitively priced rail service.<sup>16</sup> The financial benefits of using LAL instead of

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<sup>13</sup> See NYS-10, V.S. Robert L. Banks at 12.

<sup>14</sup> See LAL-4, V.S. Burt at 2, 7-9.

<sup>15</sup> The ICC/STB have recognized the importance of short-lines to the rail transportation industry. See, e.g., Class Exemption for the Acquisition and Operation of Rail Lines Under 49 U.S.C. 10901, 1 I.C.C.2d 810, 813 (1985) (describing the benefits to shippers, local communities, and trunk railroads of short-line operations). See also GTC-2, V.S. Midkiff at 18-20, 22 (describing critical role of short-lines in providing service major railroads cannot economically or will not provide).

<sup>16</sup> LAL-4, V.S. Burt at 2, 7-9.

more costly truck transportation, coupled with LAL's "high service levels," are essential to these businesses' success.<sup>17</sup> Any threat to the continued availability of LAL's service at comparable or improved rates and levels would jeopardize the present prosperity of LAL shippers,<sup>18</sup> and interfere with the recent and planned expansion of production several have undertaken or anticipate in the near future.<sup>19</sup>

II. Unconditioned Approval of the Primary Application Will Result in Increased Rates and Deteriorated Service for LAL Shippers

As noted supra, the Primary Application contemplates CSX's retention of Conrail's firewall at Genesee Junction. This perpetuation of the status quo poses a substantial threat to the quality and affordability of service LAL shippers would receive after consummation of the transaction. By granting LAL's requested relief, however, and allowing an LAL-RSR route to co-exist with the LAL-CSX service presently provided for, the Board can alleviate the anti-competitive consequences at Genesee Junction that the transaction would otherwise produce.

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<sup>17</sup> Id. at 7-10.

<sup>18</sup> See LAL-4, V.S. Carlton E. Myers at 1; V.S. George Bagley; V.S. Les Cole at 1-2; Letter of Support of Richard F. Buck; Letter of Support of Ronald Vergilia; Letter of Support of Harold E. Cole III; Letter of Support of James R. Hurckes; Letter of Support of Scott Fields; Letter of Support of Steven L. Ray; Letter of Support of Rodney Lown (all emphasizing the importance of efficient, affordable rail service to their businesses, and urging the Board to grant LAL's requested relief).

<sup>19</sup> See LAL-4, V.S. Burt at 7-8; Letter of Support of Rodney Lown; Letter of Support of James R. Hurckes.

A. Without Access to RSR, LAL Shippers Will Become Captive to a New, Inefficient, CSX-NS Interline Route

The Applicants themselves recognize and have acknowledged that single-line rail transportation is more efficient, less costly, and entirely preferable to joint-line transportation.<sup>20</sup> If the subject transaction is consummated as planned, however, much traffic originating on LAL will move via new, CSX/NS joint-line service over lines formerly operated by Conrail alone. This change will leave LAL shippers not only captive to CSX as an interline partner, but dependent on its joint-line service with NS as well.<sup>21</sup> Replacing portions of Conrail's single-line service with this new, multi-carrier routing will saddle LAL -- and its customers -- with the increased costs and complications of joint-line service.<sup>22</sup> As LAL shippers have testified through their Verified Statements in this proceeding, they uniformly operate on narrow margins, and in reliance on extremely flexible, responsive rail service.<sup>23</sup> The CSX/NS

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<sup>20</sup> See, e.g., CSX/NS-18, Application vol. 1 at 12, 13, 16, 18, 22-23, 74-75, 83; vol. 3A at 14-18, 39.

<sup>21</sup> See LAL-4 at 11-12; V.S. Burt at 18-21.

<sup>22</sup> See id.

<sup>23</sup> See, e.g., LAL-4, V.S. Myers (describing necessity to Sweeteners Plus of "efficient, highly responsive, and low cost rail transportation"); V.S. Bagley (describing highly competitive nature of liquid sweetener business; stating that "ADM Corn Processing is not in a position to absorb increased transportation costs;" and noting the its need to "respond to short notice demands by . . . customers"); V.S. L. Cole (describing "thin . . . profit margins" in corn and wheat processing business, and noting that "transportation costs comprise a significant share of total costs"); Ray Letter of Support (describing J. MacKenzie

joint-line routing proposed as the only link between these shippers and many of their customers and suppliers, very likely will yield both increased rail rates, and inefficient or unreliable service for the affected LAL-originated traffic. In the face of this -- absent intervention by the Board -- LAL shippers will have no competitive options or leverage to rely on as an alternative to poor CSX/NS service, or as inducement for improvements in such service.<sup>24</sup> LAL and its customers will be at the mercy of the two major railroads, without the protection and incentives competitive rail service would provide. As discussed more specifically in Part III below, these adverse effects justify granting LAL the modest remedy it seeks through its Responsive Application.

B. Absent the Option to Interchange With RSR, LAL Will Be Placed at a Competitive Disadvantage

In its present form, the Primary Application will introduce or invigorate competition between CSX and NS in certain areas of the Northeast formerly served by Conrail alone. This perceived benefit of the transaction will have negative impacts as well, however, unless remedial steps are taken. As LAL's Responsive Application points out, markets in the Northeast captive to either CSX or NS after Conrail's division will suffer from both the disproportionate allocation of those carriers'

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Ltd.'s paper business as "extremely service sensitive," and requiring delivery to certain customers "in as little as four hours").

<sup>24</sup> See id.; see LAL-4, V.S. Burt at 18-20.



resources to other, competitive markets, and the carriers' related efforts to maximize profits on captive traffic.<sup>25</sup> Absent the corrective influence of competition through an open interchange at Genesee Junction, LAL customers will experience higher rates and declining service as CSX diverts investment and resources to regions of the Northeast where the presence of competing rail carriers forces it to do so. At the same time, LAL shippers will see their captive status exploited, should, as expected, CSX use their rail dependency to extract higher revenues, unaffected by moderating, competitive pressures. Competition for LAL's traffic at Genesee Junction, in the form of an alternative LAL-RSR route, would compel CSX to consider the needs of LAL shippers, and work to meet them. CSX would value LAL shippers as customers capable of taking their business elsewhere, and thus invest the resources necessary to supply them with adequate rail service. In addition, the introduction of an LAL-RSR interchange would impede CSX's ability to set rates on LAL traffic at supra-competitive levels, as RSR would constrain pricing to market-dictated rates.

III. Granting LAL's Request for Trackage Rights  
or Ownership Would Ameliorate Anti-competitive  
Impacts of the Proposed Transaction

In evaluating a proposed railroad consolidation, the Board may approve the transaction, either as presented or with

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<sup>25</sup> See LAL-4 at 10-11; V.S. Burt at 13-18.



conditions, only if it serves the "public interest."<sup>26</sup> Assessing the public interest involves balancing the consolidation's "potential benefits to applicants and the public," against its "potential harm to the public."<sup>27</sup> The Board considers, in particular, "competitive harm" that the transaction may cause. Such harm results, the Board has said, when parties to a consolidation "gain sufficient market power to raise rates or reduce service (or both), and to do so profitably, relative to premerger levels."<sup>28</sup> As described above, the Primary Application, in its present form, will re-configure the northeastern rail market in such a way as to produce both increased rates and deteriorated service for shippers originating traffic on LAL. CSX's control of LAL's interchange options, combined with circumstances created by the Conrail transaction,<sup>29</sup> will mean less reliable, respon-

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<sup>26</sup> See 49 U.S.C. § 11324(c); Finance Docket No. 32760, Union Pacific Corp., Union Pacific R.R. Co., and Missouri Pacific R.R. Co. -- Control and Merger -- Southern Pacific Rail Corp., Southern Pacific Transp. Co., St. Louis Southwestern Ry. Co., SPCSL Corp., and The Denver and Rio Grande Western R.R. Co., Decision served Aug. 12, 1996 ("UP/SP Merger") at 98; Finance Docket No. 32549, Burlington Northern Inc. -- Control and Merger -- Santa Fe Pacific Corp., Decision served Aug. 23, 1995 ("BN/SF Merger") at 50-51; Missouri-Kansas-Texas R.R. Co. v. United States, 632 F.2d 392, 395 (5th Cir. 1980).

<sup>27</sup> UP/SP Merger at 98-99; BN/SF Merger at 54; see 49 C.F.R. § 1180.1(c).

<sup>28</sup> BN/SF Merger at 54. In determining whether "markets served by the merging parties will suffer competitive harm," the Board examines whether competition remains in those markets, "sufficient to act as a constraint to prevent competitive harm." Id. at 55.

<sup>29</sup> See supra, at 8-10 (discussing new, multi-carrier routing that will replace of pre-existing, single-line Conrail service, and the effect of new competition elsewhere in the

sive service for LAL shippers, at a higher cost. This anti-competitive result is inconsistent with the public interest, and must be addressed in the event the Board allows the transaction to proceed. Specifically, and as LAL's Responsive Application requests, the Board should condition any approval of the Conrail division upon LAL's acquisition of trackage rights through or ownership of Genesee Junction Yard.<sup>30</sup>

The Board's authority to impose conditions on consolidation transactions is broad.<sup>31</sup> In general, however, the Board prescribes conditions only upon finding that: (1) absent a condition, the proposed consolidation will produce effects harmful to the public interest; (2) an appropriate condition will ameliorate or eliminate those harmful effects; (3) the condition contemplated is operationally feasible; and (4) the condition will yield public benefits outweighing any reduction in the benefits flowing from the consolidation.<sup>32</sup>

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Northeast on CSX's ability and incentive to exercise monopoly power at Genesee Junction).

<sup>30</sup> See GTC-2, V.S. Midkiff at 22 (endorsing removal of firewall restrictions on short-lines like LAL, as such restrictions "ultimately limit the chances of success by the short line, whose success is presumed to be in the public interest").

<sup>31</sup> See 49 U.S.C. § 11324(c); UP/SP Merger at 144; BN/SF Merger at 55; Union Pacific -- Control -- Missouri Pacific; Western Pacific, 366 I.C.C. 459, 562 (1982), aff'd sub. nom. Southern Pacific Transp. Co. v. I.C.C., 736 F.2d 708 (D.C. Cir. 1984), cert. denied, 469 U.S. 1208 (1985) ("UP/MP/WP"); Burlington Northern, Inc. -- Control and Merger -- Saint Louis Ry. Co. San Francisco, 360 I.C.C. 784, 950 (1980).

<sup>32</sup> UP/SP Merger at 144; BN/SF Merger at 55-56; UP/MP/WP at 562-65.

The trackage rights/acquisition authority LAL's Responsive Application seeks meets each of the Board's conditioning criteria. As the Responsive Application and these Comments discuss, the Primary Application in its present form will give rise to anti-competitive circumstances detrimental to the reliable, affordable rail service shippers on LAL's line require. Allowing LAL to establish an interchange with RSR at Genesee Junction will eliminate these undesirable effects. Competition provided by RSR will serve as a market-based "check" on the Applicants' monopoly power, and ensure that the service and rates LAL shippers receive are not compromised by the transaction's rearrangement of market forces in the rail industry.

The condition LAL requests is clearly operationally feasible.<sup>33</sup> Both LAL and RSR already connect to the tracks at Genesee Junction Yard, and absent the Conrail firewall, very likely would have established a direct interchange long ago. The distance between their tracks is only one mile, and new construction needed to facilitate use of the yard for LAL-RSR interchange is limited to the addition of crossover switches between the yard tracks.<sup>34</sup> LAL's proposed relief, in addition, is narrow in scope; while it provides an effective and necessary remedy, it

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<sup>33</sup> See LAL-4 at 13; V.S. Burt at 21-22.

<sup>34</sup> LAL is prepared to pay for installation of the crossover switches. See LAL-4, V.S. Burt at 22.

addresses only particular, defined harm.<sup>35</sup> LAL's proposed condition, furthermore, serves the public interest, and in no way detracts from any legitimate public benefits that the Applicants claim the transaction will produce. LAL's operation through Genesee Junction Yard will allow its interchange with RSR, providing competition to ensure continued service and rates for LAL shippers at adequate and reasonable levels. This benefits both RSR and LAL, as well as LAL's rail-dependent shippers, and the customers they serve. Vesting LAL with greater control of Genesee Junction, moreover, would transfer responsibility for the yard's proper maintenance and repair to a rail carrier that relies on its safe and efficient operation. Unlike CSX -- who would hold the yard solely as an anti-competitive firewall -- LAL has a significant interest in the upkeep of Genesee Junction's yard and facilities.<sup>36</sup>

Conversely, the only lost "benefits" the Applicants could claim as a result of LAL's proposed relief are "private" benefits rather than public, in the form of monopoly profits collected on captive LAL traffic, and investments saved through lower-quality service to LAL shippers. Such "benefits," however,

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<sup>35</sup> The ICC/STB have stated that conditions addressing adverse effects of consolidation transactions must "be narrowly tailored to remedy those effects." UP/SP Merger at 145.

<sup>36</sup> See LAL-4 at 12-13; V.S. Burt at 21 (stating that Conrail-maintained Genesee Junction Yard trackage is currently "in deplorable condition, and receives minimal maintenance," and describing past service interruptions resulting from such poor maintenance); see also CSX/NS-18, Application vol. 1 at 16 (claiming as a "public benefit" flowing from the transaction "greater public safety").

do not weigh against imposition of LAL's requested condition; as the Board has specifically stated, "benefits to . . . combining carriers that are the result of increased market power, such as the ability to increase rates at the same or reduced service levels . . . detract from any public benefits associated with a control transaction."<sup>37</sup> Thus, on balance, LAL's Responsive Application seeks relief that serves the public interest, and imposes no burden upon the any public benefits that the Applicants' transaction might otherwise produce.

#### CONCLUSION

In light of the State's substantial financial and economic stake in the continued operations of connecting railroads like LAL, New York urges that the Board take appropriate steps to protect these railroads from harm threatened by anti-competitive aspects of the Applicants' proposed transaction. To this end, New York supports LAL's Responsive Application, and urges that it be granted.

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<sup>37</sup> BN/SF Merger at 51 (emphasis added).



Respectfully submitted,

THE STATE OF NEW YORK BY AND  
THROUGH ITS DEPARTMENT OF  
TRANSPORTATION

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Dated: December 15, 1997

Attorneys and Practitioners

CERTIFICATE OF SERVICE

I hereby certify that on this 15th day of December, 1997, I caused copies of the foregoing Comments of the State of New York on the Responsive Application of the Livonia, Avon & Lakeville Railroad Corporation (NYS-20) to be served by hand upon:

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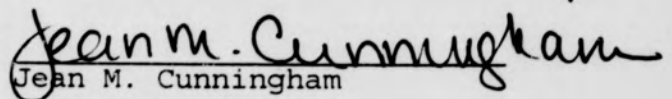
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