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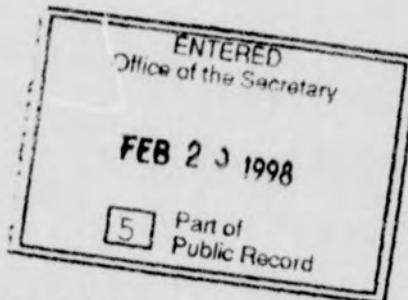
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February 23, 1998

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VIA HAND DELIVERY

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



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. 62)
Illinois Central Railroad Company --
Purchase -- Line of CSX Transportation, Inc.

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 Illinois Central Railroad Company (IC-15)**, dated February 23, 1998. A computer diskette containing the text of IC-15 in WordPerfect 5.1 format also is enclosed.

Should any questions arise regarding this filing, please feel free to contact me. Thank you for your assistance on this matter.

Respectfully submitted,

William C. Sippel

William C. Sippel
Attorney for Illinois Central
Railroad Company



WCS:tjl

Enclosures

cc: Designated Parties of Record

BEFORE THE
SURFACE TRANSPORTATION BOARD

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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. 62)

ILLINOIS CENTRAL RAILROAD COMPANY
-- PURCHASE --
LINE OF CSX TRANSPORTATION, INC.

BRIEF OF
ILLINOIS CENTRAL RAILROAD COMPANY



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Dated: February 23, 1998

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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

FINANCE DOCKET NO. 33388 (SUB-NO. 62)

ILLINOIS CENTRAL RAILROAD COMPANY
-- PURCHASE --
LINE OF CSX TRANSPORTATION, INC.

BRIEF OF
ILLINOIS CENTRAL RAILROAD COMPANY

In accordance with the Board's Orders herein served May 30, 1997 and July 23, 1997, Illinois Central Railroad Company ("IC") respectfully submits this Brief in support of its request for the imposition of conditions upon any approval of the proposed acquisition of control of Conrail, Inc. and the division of the rail assets, lines and operations of Consolidated Rail Corporation ("Conrail") by CSX Corporation and CSX Transportation, Inc. (collectively "CSXT") and Norfolk Southern Corporation and Norfolk Southern Railway Company (collectively "NS").

INTRODUCTION

The creation of "balanced competition" in the East between NS and CSXT has been asserted by the Applicants as the overarching public interest benefit of the proposed Conrail transaction. Yet, if left unremedied, CSXT will have the ability -- proven in no uncertain terms

over the last 15 months -- to assure that IC's service, including its joint line service with NS in competition with CSXT, will not be competitive. CSXT's operational control over a segment of IC's mainline at the very heart of IC's rail system gives CSXT an anticompetitive "chokehold" over the service IC will be able to provide in competition with CSXT. Given the expansion of CSXT into Conrail territory, CSXT has every incentive to use that control to undermine the efficiency of IC's system to the benefit of its own routes into Conrail territory. IC is putting in place facilities and routes (including facilities and routes with NS) to provide competition to CSXT in the post-Conrail environment. CSXT should not be allowed to use its control over IC's line to undermine the efficacy of that competition.

CSXT will also have the market power and incentive to foreclose existing shipper access to efficient IC joint line routes to and from Conrail territory. Unlike NS -- which has committed in writing to retain shipper options via IC's Illinois gateways -- CSXT has expressly refused to do so. The result will be that shipper access to efficient IC routing options and capacity via these gateways -- of extreme importance to shippers in the event of a service breakdown in the East -- will be curtailed or eliminated. In light of the recent disastrous service failure on the UP, to assure that the proposed transaction will result in adequate transportation service to the public, the Board must act now to assure that existing efficient routes via IC's Illinois gateways -- which provide shippers with a critical service "safety valve" -- remain available following the breakup of Conrail.

I. THE GOVERNING LEGAL STANDARDS.

The governing legal standard in this rail consolidation proceeding is provided by 49 U.S.C. § 11324(c), which applies to transactions involving at least two Class I railroads: "The

Board shall approve and authorize a transaction under this section when it finds the transaction is consistent with the public interest." This standard has been described as the "single and essential standard of approval" for the Board to apply in such proceedings. Missouri-Kansas-Texas R. Co. v. United States, 632 F.2d 392, 395 (5th Cir. 1980), cert. denied, 451 U.S. 1017 (1981). Accord Penn-Central Merger and N&W Inclusion Cases, 389 U.S. 486, 498-99 (1968). In determining whether a proposed transaction is consistent with the public interest, 49 U.S.C. § 11324(b)(1) requires that the Board give consideration to five factors, the first of which is "the effect of the proposed transaction on the adequacy of transportation to the public" [49 U.S.C. § 11324(b)(1)] and the fifth of which is "whether the proposed transaction would have an adverse effect on competition among rail carriers in the affected region or in the national rail system." 49 U.S.C. § 11324(b)(5).

Under 49 U.S.C. § 11324(c), the Board has broad authority to impose conditions governing railroad consolidations. Under the established standards of the Board and its predecessor the Interstate Commerce Commission ("ICC"), conditions to the approval of a rail consolidation will be imposed where: (1) absent such conditions, the consolidation will produce effects harmful to the public interest; (2) the conditions to be imposed will ameliorate or eliminate the harmful effects; (3) the conditions will be operationally feasible; and (4) the conditions will produce public benefits through reduction or elimination of the possible harm outweighing any reduction to the public benefits produced by the merger. See, e.g., Union Pacific Corp. et al. -- Cont. -- MO-KS-TX R. Co. et al., 4 I.C.C.2d 409, 437 (1988), appeal dismissed, Railway Labor Exec. Ass'n v. ICC, 883 F.2d 1079 (D.C. Cir. 1989), reh'g denied, 929 F.2d 742 (1991) (citing Santa Fe Southern Pacific Corp. -- Control -- SPT Co., 2 I.C.C.2d 709, 827 (1986)).

As discussed below, if left unremedied, the proposed Conrail transaction will be harmful to the public interest by failing to ensure that adequate transportation service will be provided to the public and failing to prevent a reduction in effective competition to the consolidated CSXT-Conrail system. IC's proposed conditions will ameliorate, if not eliminate, such harmful effects, are operationally feasible and will produce material public benefits, without reducing whatsoever the public benefits produced by the transaction.

II. IMPOSITION OF IC'S LEEWOOD-AULON DIVESTITURE CONDITION IS NEEDED TO PREVENT SERIOUS ANTICOMPETITIVE HARMS.

A. CSXT's Operational Chokehold On IC's Rail System At Memphis Has Serious Post-Merger Anticompetitive Implications and Must Be Removed.

As a vital condition to any approval of the Primary Application in this proceeding, IC must be allowed to acquire a two-mile segment of IC's mainline owned and dispatched by CSXT between Leewood and Aulon in Memphis, Tennessee, over which IC currently operates pursuant to trackage rights. See IC Responsive Application, IC-9. The Leewood-Aulon Line lies at the very heart of IC's rail system, and all traffic on IC's core north-south route must traverse the line to pass through Memphis. Despite the critical importance of this Line to IC and IC's overwhelmingly predominant use of it, CSXT owns and dispatches the line and thus has a literal chokehold on IC's operations in Memphis and in turn on IC's operations systemwide. Events of the past year have shown just how devastating CSXT's control of the Leewood-Aulon Line can be to the efficiency of IC's highly-scheduled, customer-driven rail service.

IC's purchase of the Leewood-Aulon Line and assumption of dispatching responsibilities on the line will remove the stranglehold that CSXT now has on IC's operations. Unless ameliorated in the manner proposed by IC, the anticompetitive impacts of that stranglehold

will be dramatically expanded once CSXT acquires the Conrail lines and in turn begins -- for the first time -- to compete directly with IC for the large volumes of traffic currently moving in IC-Conrail joint-line service via the Effingham, Illinois gateway to or from Conrail points. After consummation of the Conrail transaction, IC will compete intensely with CSXT's new extended-line routings through the Southeast for this traffic -- most significantly through joint-line routings with NS. Any competitive IC rail service, however, must utilize the Leewood-Aulon Line and thus will be seriously compromised by CSXT's control of that line and its corresponding ability -- already well-demonstrated -- and incentive to disable the competitiveness of IC's service in favor of competing CSXT routes.

The ability of CSXT to control and constrain a vital link in IC's service network and the incentive and opportunity CSXT will have after consummation of the Conrail transaction to utilize that chokehold to negate IC's inherent service efficiencies is plainly anticompetitive and contrary to the public interest. IC's proposed condition will remedy this harm, while preserving CSXT's operating capabilities in Memphis and in no way detracting from the benefits which CSXT anticipates as a result of the transaction proposed in the Primary Application.

**1. CSXT's Ability to Strangle IC Service
Through Its Control of the Leewood-Aulon
Line is Real and Substantial.**

As the IC route map shows, IC-6, Exhibit A, Memphis is the funnel in the middle of IC's hourglass-shaped system. From Fulton, north of Memphis, multiple IC routes extend to Effingham, Chicago, East St. Louis and Peoria. South of Memphis, parallel main lines extend to Jackson, Mississippi and then diverge to New Orleans, Baton Rouge, Louisiana and Mobile, Alabama. Between Fulton and Memphis, however, IC's route consists of a single high-density

main line. Traffic cannot move from the north half of IC's system to the south half (or vice versa) without traversing this central stem and passing through Memphis. McPherson V.S. at 8.

In turn, IC trains cannot pass through Memphis without traversing the Leewood-Aulon Line. That line is approximately two miles long and forms part of a belt line around the eastern side of the City of Memphis. IC operates over the Leewood-Aulon Line pursuant to a 1907 trackage rights agreement between multiple predecessors of both IC and CSXT. McPherson V.S. at 7.

The only other IC trackage through Memphis is the Riverfront Line, which extends into downtown Memphis and past Memphis Central Station and today is utilized only by Amtrak. The City of Memphis, not IC, owns the right-of-way of the Riverfront Line, which is plagued by extreme curvature, numerous grade crossings and slow speeds and passes through a popular and congested riverfront area which has rapidly developed a number of well-known tourist, sporting and concert attractions. McPherson V.S. at 8-9; McPherson R.V.S. at 12-14. IC's long-term lease of the Riverfront Line right-of-way from the City expired in 1990 and the City began to aggressively pursue complete removal of the line. In a compromise reached in 1995 that also involved IC's sale of Memphis Central Station to the City, the Riverfront Line was retained for Amtrak's twice-daily service, while IC -- which had not utilized the Riverfront Line as a primary route for at least several decades -- was restricted to utilizing the Riverfront Line only in the event of "emergencies." McPherson V.S. 8; McPherson R.V.S. at 13.

The Leewood-Aulon Line is thus an absolutely critical link in the Chicago-New Orleans route which is the backbone of IC's system -- the "Main Line of Mid-America." IC's use of the line reflects its centrality to the IC system. IC operates approximately 28 trains a day over

the Leewood-Aulon Line, comprising over three-quarters of the total traffic that moves on the line. McPherson V.S. at 9-10, Exhibit A.

By contrast, CSXT makes relatively little use of the line compared to IC. CSXT enters Memphis via a single route extending west from Nashville, and its principal Memphis yard facility, Leewood Yard, is located directly adjacent to the Leewood-Aulon Line. CSXT utilizes the Leewood-Aulon Line primarily to deliver trains and traffic from Leewood Yard to other carriers (including IC) in the Memphis area.¹ CSXT attempts to stress in its rebuttal filing the importance of Memphis and the Leewood-Aulon Line as a gateway to western carriers, but even combined with the traffic of its tenant, Union Pacific Railroad Company ("UP"), CSXT's use of the Leewood-Aulon Line amounts to less than one-fourth of the total traffic on the line. Nor will the proposed Conrail transaction do anything to significantly increase CSXT's relatively minor usage of the line, CSXT's operating plan indicates that, after consummation of the transaction, CSXT traffic to Memphis is expected to increase 8% -- representing barely a 2% increase in the traffic currently handled on the Leewood-Aulon Line. CSX/NS-20, Vol. 3A at 212-213, 457.

Despite CSXT's plainly subordinate use of the Leewood-Aulon Line and the peripheral nature of the line to CSXT, CSXT's ownership, maintenance and dispatching of the line gives CSXT substantial control over a critical component of IC's rail system and in turn the movement of all traffic between the northern and southern halves of IC's service territory. CSXT quite literally has its hands around the throat of IC's rail system, and the devastating impact that such control can have on the efficiency and competitiveness of IC's service has, unfortunately,

¹ As is discussed further below, CSXT also utilizes the Leewood-Aulon Line -- the absolute keystone of IC's Chicago-New Orleans main line -- to store its trains and as a switching lead for Leewood Yard.

become all too clear during the past fifteen months. In December, 1996, CSXT transferred responsibility for dispatching the Leewood-Aulon Line to CSXT's centralized dispatching center in Jacksonville, Florida. Up until that time, train operations on the Leewood-Aulon Line has been controlled by local operators stationed in a tower at Leewood. Those operators were familiar with the territory and worked closely with the involved parties, including CSXT's yardmaster at Leewood Yard and IC's yardmaster at Johnston Yard, to assure the coordination and fluidity of operations on the line. McPherson V.S. at 12.

The results of CSXT's transfer of dispatching control to Jacksonville have been nothing short of disastrous for IC. Since the end of 1996, CSXT has repeatedly caused significant interference with and delays to IC's through train movements on the Leewood-Aulon Line. CSXT trains are held at length on the line, and trains at CSXT's Leewood Yard essentially utilize the Leewood-Aulon Line as a switching lead, doubling out onto the tracks that constitute IC's main trunk line for through traffic for extended periods of time while switching, brake tests or other items are performed at the head end of the CSXT train in Leewood Yard. McPherson V.S. at 12-14; McPherson R.V.S. at 2, 6. Repeated calls to CSXT dispatchers in Jacksonville are unaddressed and often even unanswered. All the while, IC trains are held north of Leewood or south of Aulon, often for hours at a time, waiting for clearance to enter the line. The result has been what Mr. McPherson, IC's Senior Vice President - Operations, has candidly described as the number one bottleneck and operational issue on the IC today. McPherson V.S. at 17; McPherson R.V.S. at 16.

The evidence of these delays and interference is overwhelming. Attached as Exhibit 1 to Mr. McPherson's rebuttal verified statement are delay summary sheets kept by IC personnel in Memphis responsible for monitoring operations on the Leewood-Aulon Line. As

those sheets show, IC trains are facing significant delays (over at least thirty minutes) at Leewood-Aulon on a near daily basis, and frequently the delays extend for well over an hour. McPherson R.V.S. at 2. For the latter part of November alone, 37 IC trains were delayed a total of nearly 47 hours as a result of CSXT interference and IC's inability to obtain clearance move trains over the Leewood-Aulon Line. McPherson R.V.S. at 2. IC produced in discovery to CSXT over 275 delay reports for the period from December 10, 1996 and November 28, 1997 showing other instances in which IC trains -- often IC's hottest intermodal trains -- were delayed for significant periods of time. In one particularly remarkable instance -- which occurred while this case was pending before the Board -- the CSXT dispatcher in Jacksonville managed to impose virtual gridlock on the Leewood-Aulon Line and ended up delaying five IC trains a total of 10-11 hours. McPherson R.V.S. at 3.²

In yet another remarkable display of how unimportant efficient management and utilization of the Leewood-Aulon Line is to CSXT and how vitally important it is to IC, CSXT sought to park an empty coal train on one of the two main tracks of the Leewood-Aulon Line for the better part of a month. After the train had sat for a weekend, and after desperate pleading on IC's part, CSXT acquiesced and allowed IC to move the train into an IC yard for storage. McPherson V.S. at 14. No where in its extensive rebuttal filing does CSXT challenge the facts surrounding this event, or attempt to provide any plausible explanation for its actions.

² Indeed, even as this brief was being prepared, CSXT did it again, delaying four IC trains -- including two of IC's highest priority intermodal trains -- for a total of over eight hours last Wednesday night.

a. **CSXT's Actions Reek Havoc on IC's Service.**

The delays and interference which IC has faced on the Leewood-Aulon Line would be problematic for any railroad, but they are simply devastating to the efficiency of IC's highly scheduled and competitive rail service. As Mr. McPherson explains at length in his opening verified statement, IC has become the most efficient Class I railroad in the United States through careful asset utilization, innovative operational strategies and customer-driven service standards. IC has consistently had the lowest operating ratio of any major railroad, and has been found revenue adequate by the Board and its predecessor for six years running. McPherson V.S. at 3. Key to these operational and efficiency achievements has been IC's successful effort to implement scheduled train service on its rail system. IC now operates a substantial number of its trains in precise, "real time" scheduled service, with overall on-time percentages near 90% and on-time performance for time-sensitive traffic in the low 90s. Haulage traffic handled by IC for Southern Pacific between Memphis and Chicago was delivered on time an amazing 99% of the time in 1996 and with similar precision in 1997. McPherson V.S. at 4-5; Skelton V.S. at 8.

This degree of precision scheduling is revolutionary within the railroad industry. It substantially lowers costs while improving service reliability and credibility for shippers. It has also allowed IC to implement another operational innovation, a crew scheduling system called "Turnaround Service." Under that system, scheduled, opposing train movements are synchronized to meet at specified terminals and times to allow the respective crews to swap trains and return home. Unlike most railroad operating employees, who are on call 24 hours a day and spend many nights at away terminals, employees in IC's Turnaround Service know when their next call to duty is and also know that they will return home at the end of the workday. By returning crews to their home terminals, Turnaround Service has been instrumental in combating

crew fatigue. McPherson V.S. at 5-6. As is relevant to the Leewood-Aulon Line, Turnaround Service pools operate between Memphis and Fulton, Kentucky (over the Leewood-Aulon Line) and between Centralia, Illinois and Fulton. These crews exchange their trains at Fulton and return to their home terminals. McPherson V.S. at 15.

While the benefits of Turnaround Service are innumerable, its effective implementation is entirely dependent on IC's ability to consistently maintain the scheduled nature of its train service with only a very low margin of error. There is no benefit to Turnaround Service if trains do not meet on schedule to swap crews. McPherson V.S. at 6.

The continuing and systemic service disruptions which IC faces on the Leewood-Aulon Line have had a particularly harsh impact on these highly coordinated and scheduled IC train operations. Since IC trains operate on defined intervals and have precisely coordinated meets with opposing movements, an IC train delayed at Leewood or Aulon for an hour or more waiting for clearance from CSXT inevitably delays and disrupts other trains up and down IC's main line. McPherson V.S. at 15. And where such delays are occurring on a nearly daily basis -- as they do -- they not only impact operations in the Memphis area but jeopardize IC's ability to effectively implement any kind of system-wide scheduled train service.

Similarly, when crews in Memphis-Fulton Turnaround Service are delayed at the Leewood-Aulon Line by CSXT, that delay cascades up IC's line to Fulton, where the Centralia-Fulton turnaround crew is waiting to swap trains with the Memphis-Fulton crew and return home. If the delay is substantial, both crews risk exceeding their hours of service under federal law, with the concomitant expense of re-crewing those trains and the resulting disruption to assignment predictability which is the entire point of Turnaround Service in the first place. McPherson V.S. at 16.

As this evidence conclusively demonstrates, CSXT's control of the Leewood-Aulon Line and its resulting stranglehold on the main artery of IC's rail system ca - and does -- function as a major impediment to the efficiencies which are IC's hallmark and a significant constraint on IC's ability to provide competitive rail service. As Mr. McPherson concisely explains in relation to CSXT's interference with IC train operations on the Leewood-Aulon Line:

Transit times are increased, connections are missed, on-time performance suffers, service deteriorates and, over the longer term, IC's competitiveness is diminished.

McPherson V.S. at 15.

Given the fundamental threat which this situation poses to IC's core operational patterns and philosophy, IC has spent the better part of a year talking to every CSXT officer imaginable about the problems caused by CSXT's management and dispatching of the Leewood-Aulon chokepoint -- all the way up to CSXT President Pete Carpenter. McPherson R.V.S. at 15.³ As the actual operating evidence outlined above demonstrates, however, those discussions have resulted in no improvement in the delays faced by IC on the Leewood-Aulon Line, which have continued unabated throughout the pendency of this proceeding at the Board when one might have expected that CSXT would be on its best behavior.

b. CSXT's Denial of Any Problem is Nonsense.

One reason that communications and meetings between IC and CSXT may have been -- and will likely continue to be -- unsuccessful in addressing the problems which IC faces at

³ CSXT's attempt to argue that the postponement of a single meeting between IC and CSXT personnel demonstrates that "IC knows that the earlier problems have been fully resolved and that no real issue remains," CSX/NS-176 at 294; Orrison R.V.S. at 40, is thus disingenuous in the extreme. That meeting was just one of the many that IC has sought with CSXT for over a year -- each to no effect.

Leewood-Aulon is that CSXT expressly refuses to acknowledge that such problems continue to exist. In its rebuttal filed December 15, 1997, CSXT was categorical in its representation to the Board: "IC trains are not experiencing any unwarranted delays on the [Leewood-Aulon] line." CSX/NS-176 at 294. This is either a disturbingly misleading or a blindly ignorant claim. The only evidence offered by CSXT to support this assertion is Mr. Orrison's testimony (revised several times after filing) that the average time it takes IC trains to physically traverse the Leewood-Aulon Line itself is about 12 minutes. Orrison R.V.S., CSX/NS-177 at 511, as corrected by CSX/NS-189 (Errata to Applicants' Rebuttal) and CSX/NS-201 (Supplemental Errata to Applicants' Rebuttal). This statistic is nonsense:

These numbers are entirely irrelevant to the delays which IC actually experiences, since IC's trains are held by CSXT dispatchers off of the Leewood-Aulon Line until such time as clearance is obtained. An IC train which has sat at Leewood or Aulon (or at Chelsea, north of Leewood, or Hollywood, south of Aulon, where trains are often held to avoid blocking grade crossings) for 1 1/2 hours may eventually traverse the Leewood-Aulon Line in six minutes once a proceed signal is finally received, but it is still 90 minutes delayed and behind schedule. A reliance on Leewood-Aulon transit times to support an assertion that no unreasonable delays are occurring is sophomoric and misleading, and I have no doubt that my CSXT operating colleagues, at least, know better.

McPherson R.V.S. at 5.

In only a portion of the month immediately before CSXT claimed that "IC trains are not experiencing any unwarranted delays" on the Leewood-Aulon line, 37 IC trains were delayed a total of nearly 47 hours as a result of CSXT interference and blocking of the Leewood-Aulon Line. McPherson R.V.S. at 2; see discussion supra. Those almost daily delays continued

throughout the month of December and continue today, much as they have for over a year. CSXT's claims to the contrary have no credibility.⁴

The Leewood-Aulon Line is not what it may initially appear to be. As the evidence plainly demonstrates, through control of that two-mile line segment CSXT can fundamentally impact IC's ability to provide efficient and competitive rail service along its entire north-south core. That fundamental threat is embodied in the repeated interference to which IC trains have been subjected during the last 15 months, with a debilitating impact on the service of what is otherwise the most efficient major railroad in the nation.

2. CSXT's Chokehold on IC Service That Will Compete Directly with CSXT's Post-Merger Routings Is Plainly Anticompetitive and Must Be Remedied.

CSXT's chokehold on IC operations over the Leewood-Aulon Line, and the resulting impacts of that chokehold on the efficiency of IC's operations system-wide, is cause for substantial concern in this proceeding because of the competitive posture that IC and CSXT will occupy -- for the first time -- for traffic moving between the south central United States and the Northeast once CSXT and NS acquire and divide Conrail's assets. As Mr. Skelton discusses in his rebuttal verified statement (IC-13 at 30), as a direct result of the proposed Conrail transaction,

⁴ CSXT also is wrong in its self-serving claim that IC subjected itself to CSXT's operational pincer -- and thus is responsible for the devastating impacts which CSXT's chokehold on IC's operations has caused -- by recently choosing to reroute its through trains onto the Leewood-Aulon Line from the Riverfront Line through downtown Memphis. The Riverfront Line had not been a significant through route for IC for at least thirty years, and the removal of IC's last remaining train operations from the line in 1995 was hardly voluntary. Illinois Cent. Gulf R. -- Acquisition -- Gulf, M. & O., 338 I.C.C. 805, 891 (1971) ("[IC's] freight route north of Memphis is situated in the eastern section and skirts the main portion of the city."); McPherson R.V.S. at 12-14. We also note the disturbing nature of CSXT's apparent belief that anyone foolhardy enough to place themselves in the hands of CSXT deserves what they get -- a notion that will likely come as little comfort to shippers in New England.

IC/NS joint-line routings via the Tolono, Illinois gateway to and from former Conrail points commonly served with CSXT will directly compete with CSXT single-line routings (through the Southeast) and joint-line routings between the same points.

For its part, NS plainly believes that joint-line service with IC via the Tolono gateway can and will compete effectively with CSXT's post-merger long-haul routes (as well as NS' own long-haul routes), and has already made substantial preparations, of record in this proceeding, to initiate that service. In a related petition filed with the Primary Application, NS sought approval to construct a new track connection at Tolono between NS' east-west St. Louis-Cleveland main line and IC's north-south Chicago-New Orleans main line. See CSX/NS-22 at 237-244. NS indicated that construction of the new Tolono connection with IC would facilitate the efficient interchange between IC and NS of traffic which IC formerly interchanged with Conrail at Effingham (on the Conrail line to St. Louis assigned to CSXT). CSX/NS-22 at 239. Once the connection is in place, Tolono is expected to serve as a major interchange point between NS and IC. NS projects that following its acquisition of Conrail lines, two trains per day will move via the new Tolono gateway with IC. CSX/NS-23, Vol. 6C at 261. Separately, NS entered into a written agreement with IC in which, among other things, NS committed to retaining efficient shipper service and routing options via IC's Illinois gateways, including the new Tolono gateway. IC-6, Skelton V.S. at 9.⁵

⁵ CSXT refused to enter into an identical agreement with IC setting forth general principles for shippers' continued access to IC service and routings via IC's Illinois gateways. Skelton R.V.S. at 4-5 and Exhibit A. This refusal should remove any doubt about CSXT's intentions towards the IC/NS joint-line traffic that will necessarily have to traverse the Leewood-Aulon Line to reach the Tolono interchange with NS.

Mr. Skelton estimates that the amount of traffic which will be competitive between the new IC/NS joint-line routing via Tolono and CSXT's own post-merger routings is at least 40,000 carloads annually. Skelton R.V.S. at 3. Competition for this traffic will be intense. Applicants have predicated their proposed division of Conrail in large part on the creation of "balanced competition" in the East between CSXT and NS, and the new, direct competition between IC/NS joint-line routings over Tolono and CSXT's post-merger routings to and from common former Conrail points is an important component of that balance.

The problem is obvious: if IC's requested condition is not imposed, CSXT will have both the proven ability and a new-found economic incentive to use its control over IC's main line at Memphis to assure that otherwise highly efficient service via IC's-NS joint routing will not be competitive with CSXT's service to NS competitive points in former Conrail territory. The proposed Conrail transaction will (1) substantially extend the impact of CSXT's existing chokehold on IC's operations to new, otherwise efficient joint-line routings created by the Conrail transaction, (2) create incentives for CSXT to use the Leewood-Aulon bottleneck against IC in new ways and areas, and (3) deprive IC of the ability to respond competitively to the fundamental restructuring of rail service in the East. None of these outcomes would occur because IC's joint-line service to and from the Northeast is inherently inefficient or non-competitive. Instead, they will result from CSXT's ability, through the Leewood Aulon chokehold, to impair the efficiency of IC's operations and disable the competition that it would otherwise provide.

In similar situations, the Board's predecessor recognized the importance of removing existing operational impediments that could be utilized by the applicants in a merger proceeding to diminish or preclude competitive responses by other parties to the proposed transaction. In Union Pacific Corporation, Union Pacific Railroad Company and Missouri Pacific

Railroad Company -- Control -- Chicago and North Western Transportation Company and Chicago and North Western Railway Company, Finance Docket No. 32133 (ICC served March 7, 1995) ("UP/CNW"), the ICC considered the claims of the Soo Line Railroad Company ("Soo") that certain rights of the Primary Applicants to restrict Soo use or disposition of two small jointly-owned or paired-track segments of Soo's Kansas City line would preclude Soo from mounting an effective competitive response via that line to the UP/CNW combination. The Commission initially noted the important competitive role which it believed Soo could and should play in the markets affected by the UP/CNW transaction:

[W]e think that Soo in general, and its Kansas City line in particular, are an important part of the potential competitive response to the instant transaction that will be mounted by independent railroads operating in the Upper Midwest-South Central corridor.

UP/CNW at 89. Of course, IC is already an important participant in the South Central-Northeast corridor as a result of the voluminous traffic that it currently interchanges with Conrail at the Effingham gateway. And as NS has itself recognized through its actions to prepare the Tolono gateway, IC will be an important part of the new competitive routings developed in response to the proposed Conrail transaction.

Even though the restrictions of which Soo complained pre-dated the proposed UP/CNW transaction, the Commission found that the impact of those restrictions on Soo would be expanded by UP/CNW common control, and that in turn a sufficient nexus to the transaction existed to grant relief:

The restrictions, concededly, were created many years prior to UP/CNW common control; and, in this sense, the primary applicants are correct that the restrictions have no nexus to UP/CNW common control. But the evidence of record shows that

the anticompetitive effects of these restrictions plainly will be exacerbated by UP/CNW common control.

UP/CNW at 90. The same is true with respect to CSXT's chokehold on IC's operations at Memphis. While CSXT may not have a contractual right to "veto" IC's operations or actions, it holds an equally powerful club to substantially impair the efficiency and competitiveness of those operations, as the last fifteen months have shown. The proposed Conrail transaction will plainly "exacerbate" the operational and anticompetitive impacts of the Leewood-Aulon bottleneck by giving CSXT reason to use its control of the bottleneck not simply to prejudice IC local operations in favor of CSXT's own local traffic through Memphis, but also to diminish the efficiency of IC joint-line service with NS via Tolono in favor of CSXT's post-Conrail routings to the Northeast. As in UP/CNW then, the proposed Conrail transaction "will broaden the circumstances in which [CSXT] will have reason to exercise" its control over the Leewood-Aulon chokepoint. UP/CNW at 90.

CSXT's predictable argument that IC is impermissibly seeking to address only a "longstanding problem . . . not created by the merger" simply ignores the holding in UP/CNW and the circumstances in which IC and CSXT will compete post-transaction. See CSX/NS-176. Just as in UP/CNW, CSXT's ability to control and impair IC's operations over the Leewood-Aulon Line may predate the proposed Conrail transaction, but it is the new incentive arising from the transaction to use that control against IC that forms the legitimate basis for the condition which IC seeks. And just as Soo did in UP/CNW,⁶ IC has offered extensive evidence on CSXT's actions in Memphis during the last fifteen months not to demonstrate an existing harm that must be fixed,

⁶ See UP/CNW at 28 (Soo evidence that Applicants' powers over jointly-owned track at issue had been exercised in the past).

but to establish that CSXT's power to inhibit the competitiveness of IC's joint-line service with NS via the new Tolono gateway is both real and substantial. And, of course, that's exactly what the evidence shows.

B. IC's Proposed Condition Would Ameliorate the Anticompetitive Impact of the Proposed Transaction On IC's Service While Promoting Neutral and Efficient Operation of the Leewood-Aulon Line for Both Carriers.

To ameliorate the plainly anticompetitive aspect of the proposed Conrail transaction identified above, IC's Responsive Application (IC-5) seeks a condition that CSXT sell the Leewood-Aulon Line to IC at a price to be determined by the parties or, in lieu thereof, decided by the Board. Upon its acquisition of the line, IC would grant back trackage rights to CSXT on terms and conditions substantially similar to those governing IC's existing trackage rights on the line.⁷ IC and CSXT would each retain their existing rights to serve local shippers and industries on the line, and CSXT's tenant UP would continue its current usage of the line. IC would assume dispatching of the line and would continue to maintain the track to FRA Class 3 standards. McPherson V.S. at 19; IC-14 at 2 (errata sheet).

IC's purchase of the Leewood-Aulon Line and assumption of dispatching responsibilities should not deprive CSXT of any efficiencies or harm its operations in the Memphis area. The proposed purchase will not result in any overall change in traffic patterns or volume and, as is discussed supra, the proposed Conrail transaction will increase CSXT's traffic into Memphis only minimally and total traffic on the Leewood-Aulon Line by only 2%. CSX/NS-

⁷ Indeed, CSXT currently operates on IC's line south of Aulon pursuant to the same 1907 Agreement governing IC's trackage rights on CSXT north of Aulon. McPherson V.S. at 19. Thus, the proposed condition would simply extend IC/CSXT's landlord/tenant relationship north two miles to Leewood.

20, Vol. 3A at 457. Such an increase is well within the capacity of the line and certainly no indication that retention of dispatching on the line is vital or necessary for CSXT's effective implementation of the Conrail transaction. McPherson V.S. at 21. Indeed, IC ownership will bring knowledgeable and attentive dispatching to the Leewood-Aulon Line and will substantially improve the fluidity of train movements over the line. McPherson V.S. at 19-20.

Nonetheless, CSXT claims that divestiture of the Leewood-Aulon Line and IC's assumption of dispatching on the line will "profoundly interfere" with CSXT's use of the Memphis gateway to reach UP and BNSF and move traffic to and from the West. CSX/NS-176 at 291-292, 295-296. Nothing could be further from the truth.

First, as Mr. McPherson explains, there are no inherent capacity constraints on the Leewood-Aulon Line. McPherson R.V.S. at 5-7. This is not an instance in which a rail line is hopelessly congested with too much traffic on too little physical track.⁸ The Leewood-Aulon Line is a double-track railroad maintained to FRA Class 3 standards and equipped with centralized traffic control. If properly managed and dispatched to maximize the utilization of the line and minimize or at least more effectively coordinate the kind of capacity-robbing storage and holding activities that now characterize the line, all trains could traverse the line in the twelve-minute, continuous movement that CSXT refers to. McPherson R.V.S. at 7. IC will bring that type of dispatching to the Leewood-Aulon Line, to the benefit of both IC's through trains and the western carrier gateway trains that CSXT expresses concern over.

⁸ Indeed, as Mr. McPherson has aptly noted, CSXT has never indicated that its trains suffer any significant delays on the Leewood-Aulon Line, as one would expect if capacity constraints rather than poor management and dispatching were the cause of delays which IC consistently faces. McPherson R.V.S. at 5.

Second, IC would have a direct interest in the efficient and expeditious handling of at least six of the ten daily through trains that CSXT operates on the Leewood-Aulon Line. Four of those trains operate to and from IC's Johnston Yard to interchange with IC. Failure to dispatch those trains properly could only harm IC's own business interest in that interchange traffic. Two other daily CSXT trains operate on IC's line south of Aulon to reach a BN line known Line A. Since those trains operate in a continuous movement from IC's line south of Aulon to the current CSXT line north of Aulon, any delay which IC caused these trains on the Leewood-Aulon Line would necessarily result in cascading delays on IC's line south of Aulon as well and work to IC's disadvantage. CSXT currently has no comparable direct interest in assuring the movement of any of the IC trains which operate over the Leewood-Aulon Line subject to CSXT dispatching authority. McPherson R.V.S. at 10.

Third, in a related and more broad manner, IC's assumption of dispatching authority on the Leewood-Aulon Line will allow more effective coordination of train movements between that line and IC's line south of Aulon. Dispatching of these trains is currently fragmented, since CSXT controls the track from Leewood to Aulon and IC controls the track from Aulon south. Unification of that dispatching authority will allow IC to effectively coordinate IC and CSXT operations on both lines. McPherson V.S. at 8-9. IC will also have the ability that CSXT does not to "see" beyond the ends of the Leewood-Aulon Line onto the IC lines that generate three-fourths of the trains that operate over the Leewood-Aulon Line. IC will have prior knowledge of, and control over, the vast majority of upcoming train movements on the line, and will be able to dispatch accordingly. IC thus will be able to avoid the all-too-frequent situation in which a southbound IC train that could clear the Leewood-Aulon Line in ten minutes arrives at

Leewood to find that a CSXT train has just doubled out of Leewood Yard and will be blocking the line for an hour or more. McPherson R.V.S. at 8.

Fourth, as the operator of by far the majority of trains on the Leewood-Aulon Line, it is in IC's self-interest that the trains of all parties traverse the Leewood-Aulon Line as quickly as possible and that the line be kept clear for subsequent train movements. McPherson R.V.S. at 9. The incentive will apply equally to CSXT's western gateway trains and IC's north-south trains.

Fifth, despite CSXT's legal argument that any transfer of the Leewood-Aulon Line would be "devastating" to service over CSXT's Memphis gateway, CSXT's own operating witness indicated at deposition that 1) he had no reason to believe that IC would not dispatch the Leewood-Aulon Line neutrally and 2) if IC dispatched the line neutrally, its acquisition of the line would not result in any disruption of or significant impact on CSXT's operations. Deposition of John W. Orrison, January 9, 1998, at 157-158, IC-13 at 44. IC concurs in Mr. Orrison's analysis.

All of this evidence supports IC's request to purchase the Leewood-Aulon line from CSXT to assure fair and equitable treatment of IC trains which use the line. IC is fully prepared to implement this condition and purchase the line.

As IC indicated in its rebuttal filing, however (IC-13 at 4, McPherson R.V.S. at 11-12), IC would also be willing to consider an effective alternative to outright purchase, such as the establishment of joint dispatching of the line. Such joint dispatching could take the form of utilizing a joint IC-CSXT employee at an on-site location to oversee operations on the Leewood-Aulon Line or some other joint arrangement acceptable to the parties. A joint employee would have no reason to favor one railroad's trains over the other's. Neither railroad would possess the means to use the line to sabotage the other's service. According to recently published news

reports, UP and BNSF recently agreed to establish joint dispatching of certain critical trackage in the Houston area as a means of assuring fair and equitable movement of their respective trains over such trackage. This is consistent with UP Chairman Richard Davidson's testimony at the hearing before the STB on UP's service crisis in the West on December 3, 1997 that there are certain critical areas where local dispatching may be preferable to centralized dispatching. If necessary to facilitate joint dispatching, IC would be willing to purchase an undivided one-half interest in the Leewood-Aulon line, thus making it truly a joint line. In any event, whether by purchase or joint dispatching, what IC is seeking is not control over CSXT's operation, but rather to assure fair and equitable use of the line for its own trains.

Under either scenario, IC's proposed condition is operationally feasible and desirable, will not unduly harm or burden CSXT, and will effectively address the serious anticompetitive impacts which IC has identified as arising from the Leewood-Aulon bottleneck in connection with the pending Conrail transaction. IC's request that it be allowed to acquire the Leewood-Aulon Line or, in the alternative, that CSXT and IC be required to jointly dispatch the line should accordingly be imposed as a condition in this proceeding.

III. THE BOARD MUST ACT TO ASSURE THAT ADEQUATE TRANSPORTATION SERVICE WILL BE PROVIDED TO THE PUBLIC.

STB consideration of the proposed Conrail transaction, the most complex rail consolidation ever proposed, inescapably takes place in the context of the worst (and as yet unabated) rail service failure in 30 years. The effects of the current "rail transportation emergency" (as the Board has referred to it), precipitated by the collapse of Union Pacific ("UP") service in the West following its acquisition of Southern Pacific ("SP"), has reverberated throughout the national rail transportation system. The depth and scope of UP's problems have

adversely affected shippers and other carriers including IC. The effects of this transportation "emergency" are mind-numbing. According to recent news accounts, UP's service problems may already have cost the U.S. economy as much as two billion dollars. See Wali Street Journal, February 9, 1998 at A. 10, Column 3. The UP's difficulties and the singular inability of BNSF, the other major western railroad, to provide effective service options for shippers during this service crisis casts to the forefront of the Board's consideration of the proposed Conrail transaction the critical importance of the finding the Board must make in this proceeding that the transaction result in adequate transportation service to the public. As these dramatic developments have painfully demonstrated, the Board cannot simply proceed to address and fix the competitive problems associated with the proposed Conrail transaction and then just stop. To fully carry out its responsibilities to the public interest under the statute, it must address and act to protect the long term and short term public need for adequate rail service.⁹

As Donald Skelton, IC's Senior Vice President Marketing and Sales, testified in this proceeding, UP has long been regarded in the rail industry as a very capable company with extensive capital and human resources and planning expertise. UP has also had more experience with implementing rail consolidations than any other railroad in the modern era, having added five major railroads to its system over the last 15 years. If there is any railroad that could be expected to successfully plan and implement a rail consolidation, it would be UP. Skelton V.S. at 2. Yet, even the resources and experience of UP were not sufficient to prevent the current service

⁹ "We would be remiss if we did not consider today's limits when imposing conditions on a railroad merger instead of viewing the industry as static." Burlington Northern, Inc. -- Control & Merger -- St. L., 360 I.C.C. 784, 950 (1980), aff'd sub nom. Missouri-Kansas-Texas R. Co. v. U.S., 632 F.2d 392 (5th Cir. 1980), cert. denied, 451 U.S. 1017 (1981) ("BN/Frisco").

"meltdown" which has continued for more than seven months. Nor is this the first time that UP, with all of its considerable resources, was unable to provide the post-consolidation levels of service it had promised. UP also experienced serious service problems following its acquisition of the smaller Chicago and North Western Railway ("CNW") in 1995. In both cases, UP, like the Applicants in this proceeding, assured the ICC/STB in no uncertain terms, that consolidation would result in substantially better transportation service to the public. Yet, experience has shown otherwise, not once, but twice at great expense to the shipping public and the U.S. economy.

The proposed Conrail transaction is a larger and inherently more complex rail consolidation than any ever proposed. Whereas UP acquired the entire SP and the entire CNW and obtained complete control over all of the lines, equipment and personnel of the carriers it acquired, that won't be the case with Conrail. Under their plan for breaking up Conrail, CSXT and NS will divide certain Conrail assets and personnel among them and share certain others. Rail service in several major "shared asset areas" will depend heavily upon an unprecedented degree of coordination and cooperation between the two surviving arch rivals. The potential for service problems to develop following consummation of a transaction of this character and complexity is far greater than with either the UP/SP or UP/CNW transactions. Given these circumstances and the country's recent experience with the service problems that followed these latter consolidations, if service on CSXT, NS or both should deteriorate following consummation, can anyone, including the STB, legitimately claim surprise?

The service problems resulting from the collapse of the Penn Central and the bankruptcies of the Milwaukee Road and Rock Island in the Midwest 20 or more years ago occurred largely in a time of excess rail capacity and stagnant or declining rail traffic volumes.

Since that time, thousands of rail lines, including main lines, have been abandoned, yards and terminals consolidated and hundreds of interchanges eliminated. Skelton V.S. at 4. In the ten years ending 1995 (the base year in these proceedings), miles of track operated by Class I railroads have decreased by about 25%, Class I cars in service have declined by 30% and Class I employment has declined by 37%. Yet, during the same period, revenue ton miles increased by almost 50% and carloadings originated increased by 22%. Id. More traffic is being handled over fewer lines, through fewer yards and terminals by fewer employees. Rail service and capacity have become recurring issues.

As has so graphically been demonstrated over the past seven months, the ability of the rail industry today to respond to a collapse of service on one of the major rail systems is limited at best. In today's environment, every efficient service option is important. That is why the Board in reviewing the proposed Conrail transaction and the effects of that transaction now must focus not only on what is needed to protect competition, but what is needed to assure that adequate transportation service will be provided to the public. The task is not just about assuring adequate rates. It is also about assuring adequate service.

It is incumbent on the Board, in exercising its statutory duty to review the proposed Conrail transaction before it is implemented, to build into any approval of that transaction appropriate measures to mitigate against the effects of a potential service breakdown following consummation of the Conrail transaction. Such a breakdown, occurring as it would in the Eastern United States, would likely be far more devastating than what has occurred in the West. If it is not the Board's responsibility to do so, then whose responsibility is it? There is no other agency with the authority, expertise and opportunity before the fact that can act now to make sure that the shipping public and the U.S. economy are not put at risk again. To do so does

not require that the Board find that Applicants' services post-consolidation will be inadequate. The Board simply must put in place reasonable safeguards and protections that will not reduce the public benefits of the transaction but that will best assure the public that adequate service will be available.

As discussed below, there are efficient service options to and from Conrail's territory available to shippers today that would be of enormous benefit to shippers in the event of a service crisis. Yet, these options will in certain instances be foreclosed to shippers as a result of the transaction. To protect the public interest, the Board must act to assure that these existing efficient service options -- which provide shippers with a critical service "safety valve" -- remain available following the breakup of Conrail.

IV. IMPOSITION OF IC'S "EFFICIENT GATEWAY CONDITION" IS ESSENTIAL TO ASSURING ADEQUATE TRANSPORTATION SERVICE AND EFFECTIVE COMPETITION.

A. Preserving Shipper Access To IC's Efficient Routes And Capacity Is Critical To Assuring That Adequate Service Will Be Available.

Shipper access to efficient IC routes to and from points on Conrail in the East is available today via IC's three "Illinois gateways:" Chicago, East St. Louis and Effingham, Illinois. Chicago and East St. Louis are well-known, major rail gateways which handle substantial volumes of traffic annually. IC's principal interchange with Conrail, however, is at Effingham, Illinois located approximately 100 miles northwest of East St. Louis at the location where IC's north-south Chicago-New Orleans main line crosses Conrail's east-west Cleveland-East St. Louis main line. IC and Conrail currently interchange over 100,000 cars per year via the Effingham gateway. Skelton V.S. at 7. In 1997, to further improve the efficiency of their joint line services, IC and

Conrail initiated run-through train service via the Effingham gateway. Id. IC's routes with Conrail via Effingham and IC's other two Illinois gateways today provide service and routing options for shippers that compete very effectively with NS-Conrail and CSXT-Conrail routes. Id. These routes handle traffic predominantly from Texas and Louisiana to the Northeast. No where in their evidence do Applicants contest the efficiency of IC's current routes to and from Conrail points via these gateways.

These gateways provide shippers with access to the efficient services and transportation capacity available from IC. IC is currently one of the few railroads in the nation which has implemented "scheduled service" across its entire system. Under IC's scheduled service plan, IC's customers know when the trains are scheduled to depart and when they are scheduled to arrive. With IC's on-time performance near 90% systemwide, IC's customers can plan their business activities knowing that their shipments will be there when IC says they will. Skelton V.S. at 5.

Via these gateways, shippers obtain access to the most efficient major railroad in North America. By focusing on asset utilization, IC has been able to achieve impressive improvements in the efficient use of tracks, locomotives and equipment and thereby lower its operating costs. Having the lowest operating ratio of all Class I railroads -- a measure of efficiency IC has held for several years -- has become an IC signature characteristic. Skelton V.S. at 6.

IC is also an extremely safe railroad having an enviable record in the safe handling of hazardous materials. IC's employee safety record is one of the best in the industry. For the last six consecutive years, IC has won a Harriman Safety Award and for the last four consecutive years, IC has had the fewest employee injuries of any freight railroad in its class. Id.

Without question, shippers to and from Conrail points who have access to IC's routes, services and capacity have benefited from these initiatives. But, it all means nothing if, as a result of the proposed transaction, that access can be foreclosed or economically disadvantaged by the consolidated carrier so that joint routes with IC are rendered not commercially viable.

Unless the Board acts to preserve shipper access to the service options provided by IC, such options with respect to traffic moving to and from points on Conrail lines to be assigned to CSXT are very likely to be unavailable on any commercially viable basis shortly after consummation. As Mr. Skelton testified, following each of the major rail consolidations over the past 20 years, i.e., BN/Frisco, UP/MP, CSX, UP/CNW and UP/SP, IC soon after experienced a wave of gateway closures through pricing actions taken by the consolidated carrier. Those gateway closures were implemented regardless of the quality or efficiency of the service provided by IC via the affected joint line route. What mattered to these carriers in a post-consolidation mode was the total amount of revenue they could obtain on the movement, not the relative profitability of the route. Skelton V.S. at 7.

Recently, IC experienced exactly such behavior in circumstances where IC's route was unquestionably more efficient. For three years prior to 1997, IC handled SP intermodal traffic between Memphis and Chicago pursuant to a haulage agreement with SP. IC's route between Memphis and Chicago was shorter in length, faster, had more available capacity and IC's service was more reliable than via SP's own route between those points. Skelton V.S. at 8. Throughout the latter half of 1997, by virtue of this haulage arrangement, IC had available capacity, locomotives, crews and schedules in place between Memphis and Chicago and its on-time performance in that corridor was nearly 98%. Id. During that same period, UP, according to published news reports, was desperate for additional locomotives, operating crews and track

capacity, and its system on-time performance had slipped to below 40%. Yet, throughout this period, UP doggedly worked to divert this intermodal traffic away from IC's haulage service to UP's own line and service between Memphis and Chicago. It cannot be disputed that under the circumstances, UP/SP's own line between Memphis and Chicago via St. Louis was less efficient than IC's direct route between the same two points and yet the diversions continued. UP was diverting traffic from IC, the most efficient carrier in the nation, to itself at the very time that UP was clearly the least efficient carrier in the nation. Such behavior may not be consistent with academic theories of how consolidating railroads are supposed to act, but it is behavior IC has seen time and time again. Id. Why do they do it? As Mr. Skelton testified, in order to achieve internal corporate revenue goals and satisfy Wall Street expectations, consolidating railroads often succumb to the need to maximize total revenues by any means, even at the expense of denying shipper access to more efficient service options via other carriers. Skelton V.S. at 8-9.

IC predicts that unless the Board acts, that is exactly what will happen here. Absent the relief sought by IC, existing IC routes of proven efficiency will be foreclosed in favor of routes that generate more total revenue (not necessarily a higher profit margin) to the consolidated carrier. Existing shipper access to efficient IC service and capacity on traffic moving to or from certain former Conrail points -- of extreme importance to shippers in the event of a "rail transportation emergency" -- will be curtailed or eliminated.

IC does not expect such gateway closure actions from NS. In a written agreement negotiated with IC shortly before the Primary Application was filed, NS committed to retaining efficient shipper routing options via IC's Illinois gateways with NS. Shipper access to IC's service

and capacity via Chicago and the new Tolono, Illinois gateway to be established with NS (as the alternative to the Effingham gateway with CSXT) will be continued¹⁰ and no condition is necessary. Skelton V.S. at 9. Accordingly, IC does not seek to have the Board impose any condition on NS.

In stark contrast, CSXT has expressly refused to make any such commitment. CSXT's refusal speaks volumes regarding its intentions. Without question, the existing CSXT system will face enormous cash flow demands. CSXT will clearly have both the incentive and the market power to foreclose or restrict shipper access to IC's efficient service and capacity so as to maximize CSXT's own revenue and accomplish its own internal objectives. CSXT clearly wants no restrictions on its ability to limit or deny shipper access to IC routes regardless of efficiency considerations. Absent STB action, the result will be that existing Texas and Louisiana shippers' access to IC's capacity and efficient transportation service via the Effingham, East St. Louis and Chicago gateways to and from points on Conrail lines owned or controlled by CSXT will be economically foreclosed to shippers in favor of long-haul CSXT routes via New Orleans and Memphis. These shippers won't continue to have access on an economically competitive basis to the efficient service alternatives available from IC in the event of a service breakdown on CSXT.

It is not just IC that expects this to happen. Numerous shippers in this proceeding have expressed similar concerns. See IC-10. For example, International Paper stated:

The ability of CSXT to adversely impact IC's route through economic closure of the gateways or creation of operating impediments at Memphis is neither appropriate nor acceptable

¹⁰ As discussed above, notwithstanding such IC-NS accord, the effectiveness of the competition which IC-NS will be able to provide to the consolidated CSXT-Conrail system via the new Tolono gateway is nevertheless threatened by CSXT's operational chokehold over a critical segment of IC's mainline near Memphis, Tennessee.

where, as here, CSXT's proposed application will enable it to control much of the rail line traffic in the Eastern United States. Illinois Central's routings and gateways to eastern markets are in heavy use now and are extremely efficient. We want those gateways to remain open and available without artificial economic constraints. CSXT should not be allowed to close those gateways through a rate structure which allows CSXT to force traffic to less efficient, CSXT long-haul routes.

Statement of Charles E. McHugh at 3. Similarly, U.S. Steel told the Board:

U.S. Steel has frequently found joint-line CR-IC or CSX-IC routes to produce equivalent or superior service at lower costs than a direct CSX route. I would trust that your Board will find just cause to provide conditions which assure all shippers that the IC would not be adversely affected by artificially constrained economic or service issues which would jeopardize pre-existing, efficient gateways.

Statement of Gary M. Bleakley (WC-15) at 2. It is clear that these shippers are unwilling to rely upon "rational carrier economic behavior" to protect them in these circumstances.

B. IC's "Efficient Gateway Condition" Will Assure Shipper Access To Existing Efficient Service Options, Without Diminishing Competition, Harming CSXT Or Violating The Agency's Policy Against "DT&I" Conditions.

In the absence of a voluntary and enforceable commitment from CSXT (similar to that provided by NS) to assure continued shipper access to the efficient service options which now exist over IC's three Illinois gateways -- Effingham, Chicago and East St. Louis -- the STB must protect access to those efficient gateways as part of any approval of the proposed Conrail transaction. IC's proposed "Efficient Gateway Condition," attached hereto as Appendix A,¹¹ would satisfy this objective by requiring that, upon request, CSXT would enter into joint rates

¹¹ As is explained *infra*, this condition has been revised slightly from an earlier version (see IC-6 at 2) to more accurately reflect the intent of the condition and respond to criticisms made by CSXT.

with IC for the movement of traffic to or from former Conrail points via IC's Illinois gateways that would provide CSXT with the same revenue per mile as CSXT would receive over its preferred long-haul route between the same origin and destination. This requirement would prevent CSXT from denying a shipper access to existing service options via those gateways by economically closing the route. Such an "efficient gateway" condition would preserve the shipper's ability to choose among efficient routes and service via efficient gateways. Most importantly, in the context of the current state of the railroad industry, it would act as an efficient "safety valve" in the event of service problems on the post-transaction combined CSXT-Conrail system.

IC's proposed condition is narrowly focused and specifically tailored to remedy the harm. First, it applies only "upon request" of a shipper or IC. CSXT would not be required to automatically provide a joint line rate quote under the condition every time it quotes a rate to a shipper, only when requested to do so. Second, the condition does not indiscriminately seek to protect all interchanges between IC and CSXT. It applies only to three specific Illinois gateways. Nor does it apply to all routes via these gateways. As the condition expressly states, it applies to joint rates via these gateways "where the applicable joint line routes are reasonably efficient (distance considered) and/or where a competitive service package can be offered to the customer." Moreover, the condition does not "lock" or "freeze" CSXT into any inefficient routes or gateways. Rather, it narrowly seeks to assure continued shipper access on reasonable economic terms to IC routes via three specific gateways -- East St. Louis, Chicago and, most importantly, Effingham -- which today carry significant volumes of interline traffic and which, by definition, have already demonstrated their value as viable, efficient and competitive service

routes. It is those routes -- and no more -- that IC's proposed "Efficient Gateway Condition" addresses.

Moreover, in addition to producing material public benefits, the condition is operationally feasible and will not reduce whatsoever the public benefits produced by the Conrail transaction. As crafted, the condition:

- protects existing service options;
- can be implemented to be effective immediately at the time of consolidation;
- is self-executing;
- encourages service (as well as rate) competition;
- promotes efficiency; and
- is far less intrusive on the consolidating carrier than other remedies.

Imposing IC's proposed condition on any approval of the Primary Application would assure that protections are in place and available from the time that CSXT and NS assume control of Conrail and split its assets between them. Shippers would know up front the routing options they have and that their access to those options on an economically reasonable basis could not be denied them if service on the consolidated CSXT-Conrail system should decline. IC's proposed condition likewise assures that the shipper can make choices among those options. Perhaps most importantly in the current environment of congested lines, strained capacity and service deficiencies, it provides the shipper with a self-executing means to access additional rail capacity and efficient service options.

At the same time, imposition of IC's "Efficient Gateway Condition" would not deprive CSXT of any of the public benefits of the proposed Conrail transaction. The condition

does not prevent CSXT from providing whatever rates and whatever service it wants via its preferred long-haul route. It most certainly does not block CSXT rate reductions resulting (for example) from the asserted benefits of new single-line service which the CSXT-Conrail pairing will allow. In fact, with the condition in place, CSXT retains every incentive and opportunity to price its long-haul movements in the most efficient and cost-effective manner possible; if IC cannot price its portion of the joint-line movement sufficiently low enough that the overall joint-line rate to the shipper matches or beats CSXT's freely-determined long-haul rate, CSXT can capture all of the involved traffic through superior rates and service, and IC comes away with nothing. Thus, IMPOSITION OF THIS CONDITION WILL NOT GUARANTEE ONE CARLOAD OF TRAFFIC TO IC.

Furthermore, unlike other potential remedies, IC's proposed "Efficient Gateway Condition" does not involve the creation of new service options that do not exist today (which potentially could change the competitive balance), but seeks solely to protect shipper access to existing service options via proven efficient gateways at Effingham, Chicago and East St. Louis. In this respect, IC notes CSXT's argument that the proposed condition "overreaches" by applying to all CSXT-IC traffic, rather than simply to traffic and routings to and from Conrail points that will be assumed by CSXT upon consummation of the Primary Application. Applicants' Rebuttal, CSX/NS-176 at 298. IC has never intended that its proposed condition govern anything but existing IC-Conrail routings via the Illinois gateways of Effingham, Chicago and East St. Louis¹²

¹² Indeed, by far the most significant of these gateways -- Effingham -- is not today served by CSXT, and thus requiring CSXT to make joint rates over that gateway on traffic to or from points on CSXT's pre-Conrail system would establish routings which do not exist in any form today.

that would become IC-CSXT routings via those gateways after consummation of the primary transaction. Consistent with this intent and CSXT's objections, IC has clarified its requested condition to confirm that it applies only to "traffic moving to or from stations on Consolidated Rail Corporation lines assigned to CSX Transportation, Inc. (including lines within any shared asset area) and on short line connections to such lines. See Appendix A.

It is thus a key element of the IC "efficient gateway" protection requirement that it would ensure service and capacity options in addition to rate competition. Specifically, it would prevent CSXT from avoiding competition to its service by denying shippers access to the highly efficient and innovative service options available through IC's Illinois gateways. The condition prevents CSXT from arbitrarily refusing to quote a rate via those gateways, or from pricing its joint-line revenue requirements so high that alternative service at admittedly efficient gateways is not commercially viable.

Moreover, unlike trackage rights or other remedies which involve use of the consolidating carrier's assets or interference with its operations, IC's proposed condition would be far less intrusive. It would allow CSXT to provide whatever service it desires, at whatever rate it desires, while precluding it from economically foreclosing shipper access to efficient service alternatives.

C. IC's Proposed Condition Does Not Replicate The "DT&I" Conditions Previously Rejected By The ICC.

CSXT's response to these points is to insist that IC's proposed "Efficient Gateway Condition" constitutes an unacceptable reincarnation of the repudiated "DT&I" conditions.¹³

¹³ CSXT also argues that "rational economic behavior" will work to protect efficient IC routes post-consolidation and, therefore, no condition is required. See Rebuttal Verified Statement
(continued . . .)

CSX/NS-176 at 297-298. See Detroit, T. & I. R. Co. Control, 275 I.C.C. 455 (1950) (adopting the standardized traffic protective conditions that became known as the "DT&I Conditions"); Traffic Protective Conditions, 366 I.C.C. 112 (1982) (announcing policy that DT&I conditions would no longer be imposed as a general matter on rail mergers and consolidations), aff'd in part and rev'd in part sub nom. Detroit, T. & I. R. Co. v. U.S., 725 F.2d 45 (6th Cir. 1984). That simplistic argument relies upon a three-fold ignorance of what the DT&I conditions were, what the former Interstate Commerce Commission's rationale for abandoning them was, and what the content of IC's proposed condition is.

The DT&I conditions were actually six separate conditions dealing with a variety of rate, service and operational matters. They were blanket, general conditions "uniformly imposed without scrutiny" which covered all joint-line interchange relationships of the consolidating carriers and did not attempt to -- and were inadequate to -- deal with the specific consequences of a specific transaction. Traffic Protective Conditions, 366 I.C.C. at 116, 118.¹⁴ The first DT&I condition required that the consolidating carriers "maintain and keep open all

(continued . . .)

of Joseph R. Kalt, CSX/NS-177 at 283-84. However, CSXT's very objection to the "revenue per mile" standard articulated in IC's proposed condition actually validates IC's point. What CSXT is saying is that it must be free to earn less revenue per mile via its preferred long-haul route than it would earn via a joint line route with IC. This confirms IC's experience, discussed infra, that CSXT's real objective will be to maximize its total revenue and that "rational economic behavior" based on the relative profitability of one route versus another won't result in the continuation of IC's efficient joint line routes.

¹⁴ In moving away from the standardized DT&I conditions, the ICC stressed that "tailor-made conditions are not affected by this rulemaking, they are not DT&I Conditions. Rather, they illustrate the Commission's traditional interest in conditions 'that might be useful in ameliorating potentially anticompetitive effects of a consolidation.'" Traffic Protective Conditions, 366 I.C.C. at 116, n.9 (quoting Railroad Consolidation Procedures (Merger Policy Statement), 363 I.C.C. 784, 792 (1981)).

routes and channels of trade via existing junctions and gateways." This condition was construed by the Commission to require rate equalization between the consolidating carriers' new single-line routes and existing joint-line routes with other carriers -- that is, the overall rate from origin to destination via both routes had to be the same, and the consolidating carriers were precluded from lowering rates on their single-line routes unless their interline partners concurred in a similar reduction in the applicable joint-line rate. Traffic Protective Conditions, 366 at 113, 117; Seaboard Coast Line R. Co. -- Invest. of Control, 360 I.C.C. 582 (1979).

Throughout the late 1970s and early 1980s and culminating in the Traffic Protective Conditions rulemaking, the Commission correctly rejected this rate equalization condition as plainly anticompetitive. As the core component of the DT&I conditions, it froze existing rates in place, prevented the consolidated carriers from pricing their services in accordance with the actual costs of their new single-line routes, insulated inefficient routings, and eliminated not only the ability of the consolidating carriers to vigorously compete for traffic via their new single-line routes but also the incentive for their interline traffic partners to competitively price joint-line service to draw business away from those single-line routes. As the Commission found, this "indiscriminate" pricing rigidity inherent in the DT&I conditions was inconsistent with Congressional policy granting carriers greater freedom and flexibility to set rates. Traffic Protective Conditions, 366 I.C.C. at 130.

IC endorses each of these holdings, and nothing in its proposed "Efficient Gateway Condition" is inconsistent with the ICC's rationale for abandoning the DT&I conditions. IC's condition has one component, and involves none of the operational and service restrictions that were contained in the DT&I conditions. Rather than "indiscriminately" requiring CSXT to keep all existing routes open regardless of their attributes or use, it is tailored to protecting shipper

access to three specific, known gateways with demonstrated efficiencies, substantial existing traffic flows and undisputed competitiveness and only where the applicable joint line routes via those gateways are "reasonably efficient and/or where a competitive service package can be offered to the customer."¹⁵ Most importantly, far from stifling competition and preventing shippers from obtaining the lowest rates and best service available, IC's proposed condition can only result in increased competition between new CSXT-Conrail single-line or long-haul routes and existing IC-Conrail joint-line routings via Effingham, Chicago and East St. Louis.

Contrary to CSXT's assertion, IC's efficient gateway condition does not require rate equality over different routes." CSXT would be free to price its services via its preferred route at any level it wanted, and with all due consideration for the efficiencies and cost benefits of its new CSXT-Conrail routes. Traffic would move via a corresponding IC-CSXT joint-line routing over one of IC's Illinois gateways only when IC's efficiency allowed its revenue requirement for its portion of the movement to be low enough that, when combined with CSXT's share of the revenue, the overall rate to the shipper was competitive with the rate via CSXT's preferred route. Nothing is locked in or frozen; the burden is solely on IC to beat CSXT's long-haul rate through IC's own efficiency and competitiveness or it won't handle the traffic.

¹⁵ These facts distinguish this case from Burlington Northern, Inc. and Burlington Northern Railroad Company -- Control and Merger -- Santa Fe Pacific Corporation and The Atchison, Topeka and Santa Fe Railway Company, Finance Docket No. 32549 (ICC served August 23, 1995) ("BNSF"), in which IC had sought a similar condition. In BNSF, the ICC found that IC interchanged little traffic with the Santa Fe and that the projected impacts on IC routings related not to the transaction before the Commission, but to a prior rail consolidation involving BN (i.e., BN/Frisco). Such a condition was therefore not appropriate. In this case, IC currently interchanges huge volumes of traffic with Conrail and the projected impacts on IC routings unquestionably result directly from the proposed disposition of Conrail.

Thus, unlike the DT&I conditions, IC's proposed condition does not prevent shippers from realizing the benefits of more efficient routings that may be created by the CSXT-Conrail transaction. Quite to the contrary, whether the proposed condition has any practical impact at all will be wholly dependent on how effectively CSXT-Conrail and IC can exploit the efficiencies and competitiveness of their respective rail routes. The more efficiently CSXT prices its single-line or long-haul routing for the traffic, the lower IC's division for its portion of a CSXT-IC joint-line movement would need to be in order for IC to capture any traffic under the proposed condition.

IC's "Efficient Gateway Condition," then, is just that. The practical effect of the condition is that, unless routes via IC's Illinois gateways are not only efficient but more efficient than CSXT's preferred routes, IC will not likely be able to generate joint-line rates that can compete with CSXT's preferred long-haul routes and the traffic will move via CSXT at CSXT's freely-determined rates. This, of course, is a far cry from the mandatory rate equality that characterized the DT&I conditions. It is also a far cry from providing IC with the inflexible and unduly high divisions that the agency has found can too easily result from enforcement of the DT&I conditions. See Seaboard Air Line Railroad Company -- Merger -- Atlantic Coast Line Railroad Company (Petition to Remove Traffic Protective Conditions), Finance Docket No. 21215 (Sub-No. 5) (ICC served March 27, 1995). Here, if IC does not accept a revenue share low enough to make a joint-line IC-CSXT routing via an Illinois gateway competitive compared to CSXT's longer-haul routes, it gains nothing from the proposed condition.

IC's "Efficient Gateway Condition" thus will only have any meaning if IC vigorously and successfully competes with CSXT's longer-haul routes. It provides shippers with the opportunity to continue to route traffic via IC's efficient Illinois gateways -- an opportunity

that will otherwise be too easily lost even though it is critically needed in this time of service disruptions and capacity constraints. Yet it appropriately places the burden on IC to exploit the efficiencies of its routes and service and to compete as vigorously as possible with the new, longer-hauls of the combined CSXT-Conrail system. Competition between IC and CSXT is maximized, not stifled.

IC's proposed gateway condition is precisely the type of narrowly focused condition that the Commission recognized as continuing to be appropriate in Traffic Protective Conditions, even as it was repudiating the anticompetitive DT&I standards. Its finding that the DT&I conditions were not generally necessary to ensure against the loss of efficient joint-line routes was conditioned with the caveat that:

[T]here may be some situations in which the setting of specific narrowly focused protective conditions may be appropriate, assuming that they are drafted so as not to prevent competition among individual carriers.... We remain willing to consider imposing specific, narrowly focused traffic protective conditions if they meet the standards set forth in the Merger Policy Statement.

Traffic Protective Conditions, 366 I.C.C. at 126, 133. IC's condition will not "prevent competition" between CSXT and IC; indeed, as discussed above, the only possible impact which the condition could have is to promote competition between those carriers. The more efficient the carrier, the greater its ability to capture the business.

IC in no way seeks to recreate the DT&I conditions. But an approach which assumes -- as CSXT has done and has asked the Board to do -- that any condition involving "gateways," no matter how crafted and how pro-competitive, cannot survive the death of DT&I ignores both the unique needs and attributes of today's national rail system and the reality of what the ICC did in Traffic Protective Conditions and its progeny. IC's proposed "Efficient Gateway

Condition" is essential to assuring that shippers will have access to adequate transportation services, facilities and capacity via IC's Illinois gateways after CSXT's absorption with NS of Conrail's lines. At the same time, the condition will promote competition and the exploitation of efficiencies by both IC and CSXT, will result in no harm to CSXT, and will remain true to the governing principles articulated by this Board and its predecessors regarding the approval and conditioning of railroad mergers. The Board should impose IC's Efficient Gateway Condition on any approval of the Primary Application in this proceeding.

WHEREFORE, IC respectfully requests that the Board grant IC's Responsive Application and impose the conditions requested herein on any approval of the Primary Application in this proceeding.

Respectfully submitted,

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**ATTORNEYS FOR ILLINOIS CENTRAL
RAILROAD COMPANY**

Dated: February 23, 1998

PROPOSED EFFICIENT GATEWAY CONDITION

For traffic moving to or from stations on lines of Consolidated Rail Corporation allocated to or served by CSX Transportation, Inc. ("CSXT") (including shared asset areas) and on connecting short lines, upon request of a shipper or Illinois Central Railroad Company ("IC"), CSXT will join with IC in market competitive joint rates via IC's Illinois gateways (Chicago, East St. Louis, and Effingham) where the applicable joint line routes are reasonably efficient (distance considered) and/or where a competitive service package can be offered to the customer. In constructing joint rates via IC, CSXT agrees that its portion of such joint rates shall be at rate levels comparable on a per mile basis with CSXT's revenue requirement via the portion of its preferred long-haul route between the same origins and destinations. CSXT's revenues shall be calculated by determining its revenue per car mile (revenue per car divided by CSXT's route miles) over its preferred long-haul (e.g. via New Orleans) and multiplying such revenue per car mile by CSXT's route miles for the routing via IC (e.g. via Effingham). Any absorbed switching charges or other unusual terminaling costs shall be added to this calculation. The parties by mutual agreement shall be free to establish joint rates on bases differing from those specified above.

CERTIFICATE OF SERVICE

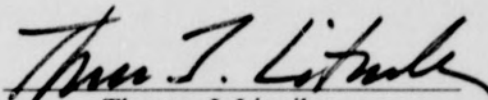
I hereby certify that on this 23rd day of February, 1998, a copy of the foregoing **Brief of Illinois Central Railroad Company (IC-15)** was served by overnight delivery upon the Primary Applicants herein, as follows:

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and by first class mail, postage prepaid, upon all designated parties of record appearing on the Surface Transportation Board's official service list in this proceeding, served August 19, 1997 and revised on October 7, 1997 and December 5, 1997.


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