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February 23, 1998

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

SUB 78

RE: STB 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

Dear Secretary Williams:

Enclosed for filing please find the original and 25 copies of the Brief of Ann Arbor Acquisition Corporation d/b/a Ann Arbor Railroad ("Ann Arbor"). The original and 25 copies of Ann Arbor's Highly Confidential Brief is being filed under seal. Also enclosed is a 3.5 inch diskette containing the filing of the Highly Confidential version in WordPerfect 5.2.

Please time and date stamp the extra copy of the filing and return it with our messenger.

If you have any questions, please contact me.

Respectfully,

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Karl Morell

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Attorney for:
ANN ARBOR RAILROAD

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BEFORE THE
SURFACE TRANSPORTATION BOARD

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STB 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

STB FINANCE DOCKET NO. 33388 (SUB-NO. 78)

ANN ARBOR ACQUISITION CORPORATION D/B/A ANN ARBOR RAILROAD
--TRACKAGE RIGHTS--
NORFOLK SOUTHERN RAILWAY COMPANY

BRIEF OF
ANN ARBOR ACQUISITION CORPORATION D/B/A ANN ARBOR RAILROAD

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

PAGE

CASES

AGENCY DECISIONS AND PROCEEDINGS

STATUTES

CODE OF FEDERAL REGULATIONS

BEFORE THE
SURFACE TRANSPORTATION BOARD

STB FINANCE DOCKET NO. 33388

CSX CORPORATION AND CSX TRANSPORTATION, INC.
NORFOLK SOUTHERN CORPORATION AND
NORFOLK SOUTHERN RAILWAY COMPANY
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--TRACKAGE RIGHTS--
NORFOLK SOUTHERN RAILWAY COMPANY

BRIEF OF
ANN ARBOR ACQUISITION CORPORATION D/B/A ANN ARBOR RAILROAD

Ann Arbor Acquisition Corporation, d/b/a Ann Arbor Railroad ("AA"), pursuant to Decision No. 12 in these proceedings and the Surface Transportation Board's ("STB" or "Board") Railroad Consolidation Procedures at 49 C.F.R. Part 1180, hereby submits its brief in support of AA's Responsive Application and Request For Conditions. AA respectfully submits that the Railroad Control Application ("Control Application") filed by CSX Corporation ("CSXC"), CSX Transportation, Inc. ("CSXT"), Norfolk Southern Corporation ("NSC"), Norfolk Southern Railway Company ("NSR"), Conrail Inc. ("CRR"), and Consolidated Rail

Corporation ("CRC")[1] (collectively referred to as the "Primary Applicants") should be denied unless the conditions requested by AA are approved.

SUMMARY OF ARGUMENTS

In its Responsive Application and Rebuttal filing, AA amply demonstrates that the Primary Transaction, if approved without appropriate conditions, will eliminate essential services on the AA rail system and significantly reduce competition in the Toledo to Chicago rail transportation market. AA is not seeking to derail the Primary Transaction, rather it simply seeks the imposition of two modest conditions that would have the dual beneficial effect of preserving essential services and ameliorating the anticompetitive effects of the Primary Transaction in the Toledo-Chicago corridor.

AA stands to lose approximately $3 million, or about 42 percent of its annual gross revenues, as a result of traffic diversions to NSR and CSXT and the loss of trackage rights fees. Revenue losses of this magnitude would have a devastating impact on AA. As a result, most of AA's shippers will lose essential rail service, since they have no economic transportation alternative.

Primary Applicants do not deny the essential service provided by AA, they simply dispute some of the projected revenue losses and claim that other losses would not be related to the Primary Transaction. Their evidence, however, is unavailing. AA's evidence demonstrates that the projected losses are real and directly attributable to impacts of the Primary Transaction. AA's

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[1] CSXC and CSXT are referred to collectively as CSX. NSC and NSR are referred to collectively as NS. CRR and CRC are referred to collectively as Conrail. In their Control Application filed on June 23, 1997, Primary Applicants seek Board approval for: (1) the acquisition by CSX and NS of control of Conrail; and (2) the division of the assets of Conrail by and between CSX and NS (hereinafter referred to as the "Primary Transaction").

evidence further demonstrates that losses of this magnitude would force AA to raise rates and drastically reduce some services and eliminate other services altogether. AA projects that these offsetting measures would produce further traffic losses and force even more drastic measures until, ultimately, all of AA's rail-dependent customers are harmed by the loss of economic rail service.

AA's evidence also demonstrates that the Primary Transaction, if approved without appropriate conditions, will significantly reduce competition in the Toledo-Chicago rail corridor. There are currently seven routing options between the AA rail system and Chicago that are physically possible. Only three of these options, however, are operationally efficient and economically practicable. Two of the competitive routes are currently owned by CRC and the third is owned by NSR. Post-Transaction, NSR will own all three routes and dominate this market. CRC and NSR now vigorously compete for traffic moving between Toledo and Chicago. Post-Transaction, all effective competition will be lost in this important rail corridor.

The conditions requested by AA are uniquely designed to rectify both the loss of essential rail service on the AA system and the significant loss of competition in the Toledo-Chicago rail corridor.

BACKGROUND

The AA originally provided rail service between Frankfort, Michigan, and Toledo, Ohio, and has also operated car ferries between Frankfort and points in Wisconsin. The Detroit, Toledo, and Ironton Railroad Company purchased the entire AA, including car ferries, from the Wabash Railroad in 1963. In 1974, the AA entered into reorganization under the Bankruptcy Act and was one of the seven northeastern railroads covered by the Railroad Revitalization and Regulatory Reform Act of 1976. Because of its importance to shippers, the portion of the AA rail system that remains today -- between Ann Arbor, Michigan and Toledo -- was included in the Final System Plan that created CRC. The State of Michigan, however, wanted to keep the entire AA system intact for the benefit of shippers and communities. To accomplish this goal, the State of Michigan purchased the portion of the AA between Ann Arbor and Toledo in March 1976, and the remainder of the AA, including the car ferries, in 1980. CRC operated the entire line for the State of Michigan from April 1976 until September 1977. On October 1, 1977, Michigan Interstate Railway Company ("Michigan Interstate") was designated the new operator of the line. The car ferry operation was discontinued in April 1982. Subsequently, in 1983, Michigan Interstate filed for reorganization under the Bankruptcy Act. The Trustee for the estate purchased the portion of the AA between Ann Arbor and Toledo in September 1985. The AA, as now constituted, was sold to the Ann Arbor Acquisition Corporation in October 1988.

Today, the AA is a Class III rail carrier providing rail service over approximately 46 miles of main line track between Ann Arbor and Toledo. AA has 40 full time employees and maintains a car and locomotive repair and service facility in Toledo. AA currently has rail connections and interchanges traffic with four Class I carriers at Toledo: Canadian National Railway Company ("CN"), CRC, CSXT, and NSR. In addition, AA has interchange connections with NSR at Milan, Michigan, and with CRC and the Tuscola & Saginaw Bay Railway Company Inc. ("TSBY") at Ann Arbor.

There are 10 active rail shippers located on the AA rail system that are served on-line. AA currently operates 2 trains daily and it handles approximately 17,500 carloads per year. AA's gross revenues for 1997 were approximately $7.2 million. Approximately 20 percent of AA's business is bridge traffic handled between the rail carriers that connect with AA. All of the remaining traffic is interlined with the connecting carriers. Consequently, AA's financial survival is highly dependent on providing efficient and economical switching services for other carriers. About 50 to 60 percent of AA's traffic base consists of automobiles and auto parts. The other commodities handled by AA include cement, grain products, paper, potatoes, lumber, sugar, oats and flour.

CONDITIONS REQUESTED BY AA

In its Responsive Application, AA requested the Board to condition the approval of Primary Transaction by granting AA trackage rights between Toledo and Chicago as follows:

Limited trackage rights between Toledo, Ohio, and Chicago, Illinois, via Elkhart, Indiana, over the CRC rail line to be acquired by NSR.

AA also requested that the Board condition approval of the Primary Transaction by imposing a condition permitting AA to interchange traffic with CP Rail System ("CP") at Ann Arbor, Michigan.

GOVERNING LEGAL STANDARD

Under 49 U.S.C. § 11324 (c), the Board shall approve a transaction when it finds the transaction consistent with the public interest.[2] In applying the statutory "public interest"

[2] The "single and essential standard of approval is that the (Board) find the (transaction) to be consistent with the public interest." *Missouri-Kansas-Texas R. Co. v. United States*, 632 F. 2d 392, 395 (5th Cir. 1980), *cert denied*, 451 U.S. 1017 (1981).

standard, the Board must balance the benefits applicants and the public will derive from the transaction against the potential competitive harm. Finance Docket No. 32760, *Union Pacific Corporation, Union Pacific Railroad Company, and Missouri Pacific Railroad Company -- Control and Merger -- Southern Pacific Rail Corporation, Southern Pacific Transportation Company, St. Louis Southwestern Railway Company, SPCSL CORP., and the Denver and Rio Grande Western Railroad Company,* Decision No. 44 (slip op. at 98-99, served August 12, 1996) ("*UP/SP*").[3]

In determining whether a proposed transaction involving two or more Class I railroads is consistent with the public interest, the Board is directed to consider, at a minimum, the following five factors:

> (1) the effect of the proposed transaction on the adequacy of transportation to the public;
>
> (2) the effect on the public interest of including, or failing to include, other rail carriers in the area involved in the proposed transaction;
>
> (3) the total fixed charges that result from the proposed transaction;
>
> (4) the interest of rail carrier employees affected by the proposed transaction; and
>
> (5) whether the proposed transaction would have an adverse effect on competition among rail carriers in the affected region or in the national rail system.[4]

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[3] The Board's general policy statement on rail consolidations provides, in pertinent part, that:

> In determining whether a transaction is in the public interest, the (Board) performs a balancing test. It weighs the potential benefits to applicants and the public against the potential harm to the public.

49 C. F. R. § 1180.1 (c).

[4] Subsection (5) was added by the Staggers Rail Act of 1980 (Public Law 96-448) and was amended by the ICC Termination Act of 1995 (Public Law 104-88) to require the Board to consider adverse impacts upon competition "in the national rail system". This subsection was originally enacted to statutorily obligate the Board's predecessor to analyze the loss of rail competition in relevant regional markets. As explained by the sponsor of the subsection:

> I am offering an amendment...to specifically direct the Interstate Commerce Commission to consider the question of rail competition whenever making a determination of a railroad merger transaction. The escalation of rail mergers

49 U.S.C. § 11324 (b).

The first and last of these factors are relevant to AA's Responsive Application and Request For Conditions.

Section 11324 (b)(1) requires the Board to examine the public benefits that will result from the transaction. The Board has defined public benefits "as efficiency gains such as cost reductions, cost savings, and service improvements...(that) in varying degrees...are passed on to most shippers as reduced rates and/or improved services." *UP/SP* at 99. Benefits that accrue to the applicants as a result of increased market power, however, "are exclusively private benefits that detract from any public benefits associated with a control transaction." *Id.*

Section 11324 (b)(5) requires the Board to assess the effects of the transaction on competition. The Staggers Act increased the need for more careful scrutiny of anticompetitive effects of merger transactions. As the Board's predecessor noted:

> The new (Rail Transportation Policy) favoring increased reliance on competition to regulate activities will govern the environment in which the new system will operate. The ability of the railroads to take various actions free of regulatory restraints will make it easier to exert or abuse market power gained as a result of consolidation. For these reasons we must take even greater care to identify harmful competitive effects and to mitigate those effects where possible.

> now taking place in the industry is causing concern among our Nation's farmers and ranchers was well as other shippers. The Interstate Commerce Commission is facing decision on several mergers that would have the effect of eliminating or nearly eliminating rail competition within entire sections of the country. I think it is important, therefore, that the ICC consider the question of competition as a regular part of the process of evaluating whether to allow mergers.

126 Cong. Rec. H8604 (September 9, 1980); Remarks of Congressman Panetta.

Union Pacific - Control - Missouri Pacific; Western Pacific, 366 I.C.C. 459, 502 (1982) ("*UP/MP/WP*").

The Board considers two types of potential harm that may result from a proposed consolidation transaction: reduction of competition and harm to essential services. 49 C.F.R. § 1180.1 (c) (2).

The Board is concerned not only with the possible "elimination" of competition by consolidations, but also with any significant "lessening" or "reduction" in competition. *Railroad Consolidation Procedures,* 363 I.C.C. 784, 786-87 (1981). "Competitive harm results from a merger to the extent the merging parties gain sufficient market power to raise rates or reduce service (or both), and to do so profitably, relative to premerger levels." *UP/SP* at 100. Whenever possible, the Board attempts to ameliorate competitive harms with conditions. *Id.*

In determining whether a proposed transaction will result in competitive harm, the Board looks to the affected market. The affected market has two dimensions: product and geographic. *Rio Grand Industries, et al. - Control - SPT Co., et al.,* 4 I. C. C. 2d 834, 885 (1988) ("*RGI/SPT*"). The product sold by railroads is the transportation of freight. *Id.* at 886; *Rio Grande Ind., Inc. -- Pur. & Track. -- Soo Line R. Co.,* 6 I. C. C. 2d 854, 878 (1990) ("*RGI/SOO*"). The Board generally considers alternative rail service and, where relevant, intermodal options. *RGI/SOO* at 886-87; *Union Pacific Corp. et al. - Cont. - MO-KS-TX CO. et al.,* 4 I. C. C. 2d 409, 433-35 (1988) ("*UP/MKT*"). In past merger cases, neither the Board nor its predecessor has applied a fixed definition of the relevant market. Instead, they have examined the specific circumstances in each case to determine if the relevant market should be confined to rail transportation or enlarged to include other transportation modes. See Finance Docket No.

32133, *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,* Decision No. 25 (slip op. 57, served March 7, 1995); *UP/MKT* at 433-34.

The area in which providers of a particular product operate is the relevant geographic market. The area may be as small as a city or as large as the entire country. *RGI/SPT* at 887. The Board's predecessor noted that "the distinctions between product and geographic markets are not as clear in transportation as they are in other industries, for carriers, in particular railroads, effectively sell their geography." *UP/MP/WP* at 505, n 28. Accordingly, the determinations of the relevant product market and the relevant geographic market in a particular case will necessarily by interrelated. The Board's predecessor analyzed traffic flows between city pairs, as well as traffic flows in rail corridors, and at specific points in the area in which the merging rail carriers operate. *UP/MKT* at 437.

The Board also considers whether a proposed transaction affects essential services. The Board's focus is on the preservation of essential services and not on the survival of any particular carrier. 49 C.F.R. § 1180.1 (c) (2) (ii). *See also, UP/MKT* at 431. The Board uses a two-step analysis in determining whether a proposed transaction will harm essential services. *UP/MP/WP* at 546. First, the Board considers whether any affected carrier faces financial losses on a particular line that would reduce its operational viability. *See Guilford Transportation - Control - B&M, et al.,* 5 I. C. C. 2d 202, 215 (1988). Second, the Board considers whether the rail line suffering the losses provides essential service. *UP/MP/WP* at 546. A service is considered essential "if there is a sufficient public need for the service and adequate alternative transportation is not available." 49 C.F.R. § 1180.1 (c) (2) (ii).

The Board has broad authority to impose conditions on its approval of a consolidation transaction in order to ensure that the public interest standard is met. 49 U.S.C. § 11324 (c). *UP/MP/WP* at 562. In determining whether conditions are warranted, the Board's "overriding concern is the public interest." *Id.* The Board can impose conditions to remedy new problems created by the transaction, or preexisting problems that will be exacerbated by the transaction.

Public interest conditions will be imposed to ameliorate anticompetitive consequences of a proposed transaction if the conditions: (i) are operationally feasible; (ii) ameliorate or eliminate the harm threatened by the transaction; and (iii) are of greater benefit to the public than they are detrimental to the transaction. *UP/MP/WP* at 564.

A condition to protect a carrier when the transaction affects essential service on the carrier's rail lines is imposed upon a showing that the condition: (i) is related to the impact of the consolidation; (ii) is designed to enable shippers to receive adequate service; (iii) would not pose unreasonable operating or other problems for the consolidated carrier; and (iv) would not frustrate the ability of the consolidated carrier to obtain the anticipated public benefits. 49 C.F.R. § 1180.1 (d) (1).

THE CONDITIONS REQUESTED BY AA SHOULD BE GRANTED

Approval of the Primary Transaction, without appropriate conditions, will cause a loss of essential services on the AA rail system and significantly reduce competition for rail shippers in the Toledo to Chicago rail corridor. The conditions requested by AA are uniquely designed to ameliorate both of these competitive harms. If the conditions are granted, AA will be able to preserve service to its on-line customers that are dependent on rail service and remedy the loss of competition in the Toledo to Chicago rail market. Furthermore, the conditions AA seeks meet the Board's criteria for imposing conditions to preserve essential services and to protect the public from competitive harm.

THE PRIMARY TRANSACTION WILL FINANCIALLY HARM AA AND DEPRIVE ITS ON-LINE SHIPPERS OF ESSENTIAL SERVICES

AA stands to lose approximately $3 million in annual gross revenues if the Primary Transaction is approved without the conditions requested by AA. The loss of about 42 percent of its revenues would have a devastating impact on AA. AA would be forced to dramatically reduce costs by curtailing service and maintenance over its entire system and increasing rates for its remaining shippers. These cost-saving measures would undoubtedly lead to further traffic losses, forcing AA to take even more drastic steps to stop the hemorrhaging losses. If AA is unable to survive, many of its shippers would lose essential rail service, since they have no economic transportation alternatives.

Mr. Erickson, the President of AA, and his staff performed a traffic study of the likely impacts of the Primary Transaction on AA's traffic and revenues. They conducted a shipper-by-shipper analysis of all traffic handled by AA in 1996 that would likely be diverted as a result of the Primary Transaction. As a result of this analysis, Mr. Erickson concluded that $3,350,000 of AA's gross revenues are subject to diversion. In light of Primary Applicants' representations on rebuttal that their settlement agreement with CN would not permit CN to increase its use of the CRC line between Detroit and Toledo, Mr. Erickson, on rebuttal, revised his diversion analysis downward by $300,000.[5] Erickson R.V.S. at 4, AA-7.

Based on these estimated revenue losses, Mr. Erickson and his staff conducted a financial analysis of the impact of the Primary Transaction on AA. They concluded that AA could not withstand losses of this magnitude without resorting to drastic reductions in some services and the elimination of other services altogether. AA operates a lean organization with few opportunities to cut expenses. AA would not be able to sell any of its three locomotives or any other large assets in an attempt to scale down to the lower revenue levels without losing its remaining customers and being forced out of business. AA operates a single north-south rail line with both termini critical to its survival. The southern end at Toledo serves as AA's primary connection to Class I carriers and the Nation's rail system. One of AA's major customers is located at the northern end of AA's rail line. Consequently, AA cannot abandon any discrete section of its mainline without financially jeopardizing the remaining system. Any major cost savings AA could immediately achieve, such as eliminating all maintenance expenditures, would ultimately be counterproductive. Moreover, AA's major expenses, such as paying principal and interest on its acquisition cost of the railroad, cannot be avoided.

AA's only option to offset the revenue losses would be to increase freight rates and eliminate service to some customers. These offsetting measures would only produce further

[5] In its initial traffic diversion study, AA projected a loss of $300,000 annually in fees it currently derives from a trackage rights agreement pursuant to which CN uses AA's rail line between Diann, Michigan, and Toledo. Before settling with Primary Applicants, CN sought trackage rights over the current CRC line between Toledo and Detroit, which would have eliminated CN's need for trackage rights over the AA. If Primary Applicants' representation is correct, and CN did not gain access over the CRC line, then CN will most likely continue to use the trackage rights over AA, and AA will not lose the $300,000 annual fee.

traffic losses. Within a broad range of traffic, AA's fixed costs remain constant, given the capital intensive nature of its business. As its unit costs increase with declining traffic, AA would no longer be competitive for traffic that can move by truck. With the loss of truck competitive traffic, AA's unit costs would further increase. Ultimately, the combination of forced service reductions and increased rates would render AA's remaining rail-dependent customers noncompetitive and force them out of business.

The projected traffic diversions from AA would trigger a downward spiraling effect, as cost-saving or revenue-generating measures produce further traffic losses, which, in turn, will precipitate further and even more drastic measures. Mr. Erickson's concern over the downward spiraling effect of the projected traffic losses is confirmed extensively in economic literature and recognized by the Board's predecessor. It is almost universally accepted that the rail industry exhibits substantial economies of density.[6] Consequently, as a railroad's traffic volume declines, its unit cost increases. Economies of density arise, in part, from the fact that railroads have relatively high fixed costs. As these costs are spread over a declining amount of traffic, the unit cost of providing service increases. While unit variable costs generally vary inversely with traffic volumes, the changes are not necessarily immediate or proportional with changes in the traffic volume.

On rebuttal, Primary Applicants take seemingly inconsistent positions on AA's diversion analysis. At one point, they contend that AA "will experience but a fraction of the diversions and

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[6] *See Coal Rate Guidelines - Nationwide*, 1 I.C.C. 2d 520, 531 (1985); Ernst R. Berndt, Ann F. Friedlaender, Judy-Er Wang Chiang, and Christopher A. Vellturo, *Cost Effects of Mergers and Deregulation in the U.S. Rail Industry*, 4 The Journal of Productivity Analysis 127 (1993); A. Barbera, C.M. Grimm, K.A. Phillips, and L.J. Selzer, *Railroad Cost Structure-Revisited*, Journal of the Transportation Research Forum, Vol. 28, No. 1 237 (1987).

revenue losses" estimated by AA. CSX/NS-176 at 338. At another point, they claim that "**none** of the traffic will be diverted away from (AA)". CSX/NS-177 Vol. 2B at 793. One NSR witness addresses AA's diversion analysis but apparently reaches no definitive conclusions. *See* CSX/NS-177 Vol. 2A at 355-64.

In an attempt to downplay the significance of AA's projected revenue losses, Primary Applicants argue that "the claimed revenue losses explained by AA are actually public benefits of the Transaction because they provide some shippers and receivers of AA more competitive options." *Id.* at 355. The Board and its predecessor, however, have correctly held that transfers of revenues from one carrier to another as a result of diversions are not public benefits, but private ones. *See e.g., UP/SP* at 108-13; *UP/MP/WP* at 487-501; *RGI/SPT* at 875-85. Where, as here, the revenue diversions produce harm to essential services and enable carriers to exact monopoly profits, the diversions are deemed to be a public harm. *UP/MP/WP* at 487-88.

The revenue losses projected by AA are comprised of two elements: (1) trackage rights fees paid annually to AA by NSR of approximately $800,000; and (2) annual revenue losses of $2,250,000 consisting of traffic currently handled by AA that will be diverted to NSR and CSXT as a direct result of the Primary Transaction. In addition, AA recently made capital expenditures of $412,000 to upgrade the line over which NSR has trackage rights. AA will not be able to recoup this expenditure, which was made solely to accommodate the NSR trackage rights operations.

Primary Applicants concede that AA will lose all, or virtually all, of the $800,000 annual trackage rights fee from NSR. They acknowledge that NSR will acquire "a more direct and cost-effective route" between Toledo and Detroit than the "shortcut" route NSR uses today over the

AA. CSX/NS-176 at 340; CSX/NS-177 Vol. 2A at 359-60. Nevertheless, NSR maintains that it does not intend to eliminate its trackage rights because "[t]he AA route provides potential opportunities for some niche traffic...." CSX/NS-177 2A at 360. It appears that, at best, NSR will make some very limited use of the AA track to handle "niche traffic."

Primary Applicants also contend that the entire $412,000 investment made to upgrade the NSR trackage rights line segment cannot be attributed to NSR because AA also operates over that segment. CSX/NS-176 at 340. As Mr. Erickson explains, however, AA's trackage rights agreement with NSR obligates AA to maintain the Diann to Milan segment -- where the upgrades were made -- at FRA Class 2 Track conditions. AA needs to maintain that segment only at Class 1 standards to handle adequately its own traffic, and it would not have made that investment for its own use. Consequently, the entire $412,000 upgrade project -- an investment AA will no longer be able to recoup once NSR ceases or significantly curtails the trackage rights operations -- was undertaken solely for the benefit of NSR pursuant to the trackage rights agreement. Accordingly, it is uncontroverted that AA will lose virtually all of the annual $800,000 trackage rights fee and AA's inability to recoup its $412,000 capital expenditure made for the benefit of NSR is hardly challenged.

In its Responsive Application and Requests For Conditions, AA also projected annual revenue losses of approximately $2,250,000 from traffic that will be diverted to NSR and CSXT. AA currently derives about $500,000 of the projected losses from its participation in a three-carrier haul of sand from Yuma, Michigan, to Cleveland, Ohio. The traffic is originated by the TSBY, interchanged with AA at Ann Arbor, moved by AA to Toledo for interchange with CRC and delivered by CRC in Cleveland. Post-Transaction, CSXT will gain direct access to the shipper in Cleveland. Since CSXT connects with the TSBY at Ann Pere, Michigan, CSXT will be able to divert this traffic to a two-line haul and replace the current three-line haul. Alternatively, CSXT can divert this traffic to a single-line haul from origins in western Michigan that it serves directly.

On rebuttal, Primary Applicants raise three unconvincing arguments as to why the sand traffic will not be diverted to the CSXT route. First, they claim that the Primary Transaction will have no impact on the sand traffic because NSR will simply step into CRC's shoes in the current routing. CSX/NS-177 Vol. 2B at 794. It is not the replacement of CRC with NSR that concerns AA, but rather CSXT's direct access to the destination in Cleveland and its ability post-Transaction to move this traffic in a single-line or joint-line, as opposed to the current three-line, haul. Second, Primary Applicants claim that CSXT will not be successful in diverting this traffic because the TSBY-CSXT route would short-haul the TSBY. *Id.* at 794-95. As Mr. Erickson points out, however, TSBY's participation in the joint-CSXT routing would be only 28 miles shorter than in the current AA routing. Consequently, there is no reason why the TSBY would earn a lower division by participating in the CSXT routing. Erickson R.V.S. at 5, AA-7.

Third, Primary Applicants claim that the TSBY-CSXT route would be 53 miles longer than the current TSBY-AA-CRC route and, therefore, not competitive. CSX/NS-177 Vol 2B at 795. Primary Applicants' contention, even if correct, completely ignores the extra interchange involved in the current route and the attendant additional costs and delays involved in rail interchanges. Throughout the Control Application, Primary Applicants go to great lengths to extol the advantages and substantial benefits they expect to achieve by reducing interchanges. They seem to ignore those advantages and benefits whenever a reduction in interchanges works to their detriment. In any event, on rebuttal Mr. Erickson points out that CSXT directly serves shippers of sand in western Michigan that compete with sand traffic originating in Yuma. Erickson R.V.S. at 5, AA-7. Post-Transaction, CSXT will have a single-line haul to Cleveland over a route that is approximately the same distance as the current three-line haul via the AA. Accordingly, the ability of CSXT to divert the sand traffic and the corresponding revenue losses from AA of $500,000 annually remain unrefuted.

The remaining $1,750,000 in projected annual revenue losses consist of automotive traffic AA currently handles. A substantial portion of this divertible traffic is switched by AA to CRC in Toledo and linehauled to Chicago for subsequent interchanges with the western railroads. In Toledo, AA also switches traffic to NSR for linehaul movements to Winston Salem, North Carolina, and Atlanta, Georgia. The remainder of the automotive traffic that will be diverted from AA is switched by NSR to AA at Milan for movement by AA to Toledo, where the traffic is interchanged to either CSXT for destination to Louisville, Kentucky, or CRC for movement to Chicago.

The projected diversions of AA automotive traffic are a direct result of NSR's acquisition of rail lines and other assets from CRC in the Toledo and Detroit area as a result of the Primary Transaction. Today, NSR has no automotive loading facilities in the Toledo area. Post-Transaction, NSR will own and operate CRC's Toledo Automotive Terminal ("Airline Yard"). Erickson V.S. at 5, AA-5. Once NSR acquires the Airline Yard, it will no longer have any need for AA's switching service for traffic currently linehauled by NSR. NSR will also acquire CRC's route from Toledo to Chicago, which will enable NSR to divert the automotive traffic AA currently switches to CRC. *Id.* NSR is also acquiring CRC's route between Ann Arbor and

Chicago and CRC's direct route between Detroit and Toledo. With the acquisition of these routes, NSR will no longer find it beneficial to switch automotive traffic at Milan to AA for movement over AA's currently more direct route to Toledo for subsequent interchange with other carriers.

Primary Applicants do not contest the divertibility of the Milan automotive traffic. CSX/NS-177 Vol. 2B at 796 ("[T]he Norfolk Southern/Conrail combination will have no 'need' for Ann Arbor's switching operation at Milan following the Conrail transaction."). Instead, they contend that, because NSR is the only railroad with direct access to the automotive plant at Milan, NSR could divert the traffic today. *Id.* On rebuttal, Mr. Erickson pointed out that, post-Transaction, NSR can unilaterally increase the switch charge to AA and render AA's participation in this traffic uneconomical. Erickson R.V.S. at 6, AA-7. Primary Applicants will undoubtedly claim that there is nothing to preclude NSR from raising the switch charge today. Such an argument, however, would completely ignore the improved routings NSR will gain as a result of the Primary Transaction.

NSR points out that, for Milan traffic destined to Louisville, it already has a single-line route to Louisville and that the consignee is served directly only by CSXT. CSX/NS-177 Vol. 2A at 361. NSR's current route to Louisville, however, is highly circuitous and cannot economically compete with the AA-CSXT route via Toledo. Also, NSR currently has no direct route between Milan and Toledo or Milan and any other convenient connections with CSXT for traffic moving to Louisville. Post-Transaction, NSR will gain a direct route from Milan to Toledo and a less circuitous route to Louisville. Consequently, NSR will be able to bypass the AA either by handling the traffic direct to Louisville or to a CSXT connection at Toledo or Cincinnati, Ohio, and thereby preserving for itself a longer haul. The situation is similar with respect to the Milan traffic moving to Chicago. The current AA-CRC route is more efficient for handling the Chicago traffic than the current NSR route. Post-Transaction, NSR will acquire the CRC line to Chicago and, in combination with its current lines, will gain a more direct route than the current AA-CRC route.

Primary Applicants acknowledge that the Milan shipper considers the AA-CRC route superior from a price and service standpoint to NSR's current route. They also essentially acknowledge that, post-Transaction, NSR will have no incentive to jointly bid this traffic with AA in competition with its own direct route. CSX/NS-177 Vol. 2B at 796-95. Nevertheless, they content that AA can bid for this traffic jointly with either CSXT or CN. This contention is unavailing for three simple reasons. First, the routings via CSXT and CN are substantially more circuitous than the post-Transaction NSR route, with the CN route being over 200 miles longer. Second, the suggested NSR-AA-CN or -CSXT three carrier haul will hardly be competitive with NSR's more direct single-line haul. Third, NSR has sole access to the Milan plant and can easily disadvantage other routings by increasing the switch charge.

Primary Applicants correctly point out that, pre-Transaction, NSR could disadvantage the AA routings by increasing the switch charge at Milan. NSR would do so, however, at the risk of antagonizing a major shipper. Any diversion of AA's Milan traffic pre-Transaction would significantly increase transit times and shipping costs. Post-Transaction, NSR will be able to handle this traffic more efficiently and economically and redirect the traffic to its own lines without fear of retribution by the shipper.

The remainder of the divertible automotive traffic is switched by AA in Toledo. In its Responsive Application, AA explained that it switches traffic in Toledo to CRC for a linehaul to Chicago and to NSR for a linehaul to Winston Salem and Atlanta. NSR currently has no automotive loading facility in Toledo. Post-Transaction, NSR will own CRC's Airline Yard and will no longer have any need for AA's switching services. NSR will also acquire CRC's direct route between Toledo and Chicago and, therefore, will be able to divert the automotive traffic AA switches to CRC.

On rebuttal, Primary Applicants do not dispute the divertibility of the Toledo traffic to NSR. Instead, they claim that the diversions would not be Transaction related because AA could continue to compete for this traffic jointly with CSXT. CSX/NS-177 Vol. 2B at 798-99. CSXT, however, has its own automotive yard in Toledo and directly competes with AA. Primary Applicants fail to explain why CSXT would cooperate in a joint AA-CSXT bid in competition with a single-line NSR haul when CSXT can bid the traffic for its own single-line haul. Also, as explained below, the CSXT route between Toledo and Chicago is not competitive for automotive traffic with the route NSR is acquiring.

In an attempt to demonstrate that AA has a competitive advantage in Toledo, Primary Applicants incorrectly describe the handling of that traffic. They claim that AA's switching service avoids draying costs. *Id.* at 798. As explained by Mr. Erickson, all Chrysler traffic is currently drayed to nearby rail yards. Also, there are two Chrysler plants in Toledo and only one is adjacent to AA's Ottawa Yard. In addition, the distance of draying cars from the plant next to AA's yard is about two miles to AA's Ottawa Yard, three and one-half to four miles to CRC's Airline Yard, and about 13 miles to CSXT's Walbridge Yard. "Because of the short distances involved, the drayage costs to all three of these yards is comparable...." Erickson R.V.S. at 8, AA-7.

On rebuttal, Mr. Erickson pointed out that, after its Responsive Application was filed, "AA was successful in negotiating a multi-year agreement with Chrysler Corporation to perform switching services at their new facility in Toledo." *Id.* at 7. Although Primary Applicants were made aware of this development before December 15, 1997, they chose to ignore it in their Rebuttal filing. In any event, the recent Chrysler agreement does not diminish AA's concern over the Primary Transaction or alter the potential traffic diversions to NSR and CSXT. The agreement, at best, may have delayed some of AA's projected revenue losses, it did not eliminate them. Once the agreement is no longer in effect, Chrysler's Toledo traffic could easily be diverted to NSR and CSXT with the "increased market power these carriers will gain in the Toledo area and their extensive single-line reach from this area." *Id.* at 7-8.

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In its Responsive Application, AA explained that nearly 50 percent of its traffic base consists of bulk commodities, ideally suited to rail transportation, and that there is no realistic intermodal competition for this traffic. AA also specifically identified the on-line customers that have no direct access to another railroad and whose essential rail services are threatened by the Primary Transaction: "Ford Motor at Saline, Michigan, which ships about 2,000 carloads per year; Holnam, Inc., at Dundee, Michigan, which ships about 1,100 carloads of cement per year; General Mills at Toledo, which receives about 1,000 carloads of sugar, oats and flour per year; Viking Paper at Toledo, which receives about 200 carloads of paper per year; Ohio Blenders at

Toledo, which ships and receives about 100 carloads of grain products per year; Fingerle Lumber at Ann Arbor, which receives about 36 carloads of lumber per year; 84 Lumber at Toledo, which receives about 30 carloads of lumber per year; and Crosset at Saline, which receives about 30 carloads of potatoes per year." Erickson V.S. at 7, AA-5. AA's evidence of essential services went unchallenged by Primary Applicants.

The Ohio Attorney General, Ohio Rail Development Commission and the Public Utilities Commission of Ohio (collectively referred to as "OAG") further confirm the essential services provided by AA. OAG find AA's diversion analysis "reasonable and compelling" and support AA's Responsive Application because of AA's vital role in the area. OAG-8 at 15-16.

AA is aware that in the past decade and a half the Board and its predecessor have focused on the preservation of essential services and not on the survival of carriers. Even though AA believes that it has fully met the Board's "essential service" standard, AA nevertheless urges the Board to give heightened attention to the plight of small railroads in the current environment. Given the ever diminishing number of Class I railroads and the concentration of market power, AA believes that it is incumbent on the Board to broaden its analytical perspective to consider the survival of small carriers, as well as the survival of the shippers that rely on their service. It is well established that an agency "faced with new developments or in reconsideration of the relevant facts and its mandate, may alter its past interpretation and overturn past administrative rulings and practice." *American Trucking Ass'ns v. Atchison Topeka & Santa Fe Ry*, 387 U.S. 397, 416 (1967).

The ever increasing concentration of our Nation's rail network in the hands of a few mega-carriers is of great concern to small railroads. The growing disparity between large and small carriers creates a threat to competition and the economical and efficient services shortline and regional railroads now provide. The few remaining mega-carriers are increasingly able to utilize their enhanced market power to disadvantage small carriers and the shippers located on the small railroads. Virtually all small carriers are exclusively dependent on their connections with Class I railroads. The lifeblood of the small carriers is efficient and economical access to the National rail system.

In addressing the substantial impacts Class I mergers have on small railroads, the American Short Line Railroad Association and Regional Railroads of America ("Shortline Association") pointed out that:

> Short line and regional railroads require mandatory interchange, good service, reasonable routes and rates, appropriate gateways and effective terminal access from their Class I railroad partners in order to serve their shippers well, and succeed in business. In some ways, small railroads are akin to small shippers: We depend on Class I railroads in order to be able to provide competitive service....

Comments of The American Short Line Railroad Association and Regional Railroads of America, dated October 21, 1997 at 2-3. The Shortline Association explained that the areas of concern to small railroads "include inter-carrier relationships such as service, revenue divisions, marketing, car supply, car hire, industrial development, siting of new industries, etc." *Id* at 3.

AA shares the Shortline Association's concerns over inter-carrier relationships. In order to market its railroad and effectively serve its customers, AA must necessarily rely on the cooperation of the Class I carriers in setting rates for new and existing traffic. AA is finding it increasing difficult to get any response, much less a timely response, to requests for rate quotes from the Class I carriers. New marketing opportunities for existing customers are increasing being lost because of the reluctance of the Class I carriers to provide timely rate quotes. AA's ability to attract new industries is continually being stymied by the Class I carriers' lack of cooperation in jointly developing rates that are attractive to the potential customer.

AA is also growing increasingly concerned over car supply matters. Rail cars used to handle traffic to and from a shortline necessarily spend the preponderance of their time on the Class I railroads. If suitable freight cars are not timely returned, shortlines are unable to meet their customers' transportation needs. A significant portion of AA's traffic base consists of originating automotive traffic. In order for AA to meet its customers' needs, AA is highly dependent on an adequate supply of empty multi-levels for automobile loadings. AA's access to the fleet of multi-levels, however, is solely dependent on the cooperation of the Class I carriers. The Class I carriers can simply delay the return of suitable epuipment or divert the equipment to their own use and, thereby, disadvantage the AA. The ability and propensity to do so increases as the number of Class I railroads declines.

In light of the significant concentration of market power that has occured in the railroad industry during the past two decades, AA urges the Board to consider the imposition of protective conditions on this and future Class I mergers that preserves the ability of shortlines to compete following mega-mergers. Up until about 20 years ago, the Board's predecessor routinely imposed standard protective conditions to preserve routing options on an equal basis. The so-called DT&I conditions imposed the following requirements:

> (1) maintain and keep open all routes and channels of trade via existing junctions and gateways; (2) maintain neutrality in handling traffic so as to permit equal opportunity for service to and from all lines reaching the rails of the acquired company without discrimination; (3) continue existing traffic and operating relationships in effect between the acquired company and all connecting lines; (4) handle all traffic without discrimination in

> promptness or frequency of service as between competing carriers; and (5) forego any restraint or curtailment of the right over any or all existing routes and gateways.

See Detroit, T. & I. R. Co. Control, 275 I.C.C. 455 (1950). These conditions, particularly condition 1, have been interpreted to require rate equalization. *See Traffic Protective Conditions*, 366 I.C.C. 112, 113 (1982). The routine imposition of the DT&I conditions was rejected in *Norfolk & W. Ry. Co. - Control - Detroit, T. & I. R. Co.*, 360 I.C.C. 498 (1979).

The rate equalization provisions of the DT&I conditions required the merged carrier to quote a joint rate with a third carrier that was equal to the rate over the merged carrier. The DT&I conditions were rejected because they led to inefficient routings. *Traffic Protective Conditions*, at 122-24.

AA is not advocating the reimposition of the DT&I conditions. Instead, AA urges the Board to fashion analogous rate equalization conditions solely for the benefit of small carriers. Narrowly focused rate equalization conditions for the benefit of small railroads need not artificially support inefficient routes. The merging carriers should simply be required to quote cost-based rates for joint-line movements with small carriers. If the joint-line route over the small carrier is inefficient, the Class I's single-line route will prevail. If, however, the small-carrier joint-line route is as or more efficient, competition will be preserved and the shipping public will benefit. Such conditions would preserve efficient routing options over small carriers and enable small carriers to continue competing in an ever concentrating industry.

THE PRIMARY TRANSACTION WILL REDUCE COMPETITION IN THE TOLEDO-CHICAGO RAIL CORRIDOR

The Primary Transaction, if approved without appropriate conditions, would significantly reduce competition in the Toledo-Chicago rail corridor. Today, CRC and NSR vigorously compete for traffic in this market over their respective routes. As a result of the Primary Transaction, NSR will retain its mainline between Milan and Chicago and acquire CRC's Toledo to Chicago mainline, as well as CRC's Detroit to Chicago mainline via Ann Arbor. All other routings between the markets served by AA and Chicago are highly circuitous or otherwise not competitive. Consequently, the Primary Transaction will create a 2-to-1 corridor between Toledo and Chicago.

In its Responsive Application, AA explained that the geographic market that concerns AA in these proceedings is the communities on AA's line, on the one hand, and Chicago, on the other. All of the traffic handled by AA is interchanged with other carriers and Chicago is one of the most, if not the most, important interchange points in the Nation. Competitive access to Chicago is, therefore, vital to AA and certain shippers on its line. Currently, AA's main interchange partner is CRC. CRC has been flexible and offers AA, and AA's customers, reasonable rates and quality service. Measured by carloads and revenues, NSR is AA's second largest interchange partner, with CSXT and CN, respectively, being a distant third and fourth. Erickson V.S. at 3, AA-5. Post-Transaction, all economic AA connections to Chicago and other western destinations will be controlled by NSR.

There are currently seven routing options between the AA rail system and Chicago that are physically possible, but only three that are operationally efficient and economically practicable.

Traffic from the AA can be routed via Ann Arbor to the TSBY, over the TSBY either via Ann Pere, Michigan (about 27 miles north of Ann Arbor) to CSXT for movement to Chicago or via Durand, Michigan (about 51 miles north of Ann Arbor) to CN for movement to Chicago. Both of these routes are highly circuitous and involve an additional interchange with its attendant delay and potential damage to the freight.

AA can directly interchange with CN at Toledo. CN, however, does not have a competitive route from Toledo to Chicago. In order to reach Chicago from the AA interchange at Toledo, CN would have to haul the traffic northeast about 114 miles through Detroit to Port Huron, Michigan, and then west to Chicago. The direct CN route between Toledo and Chicago is about 455 miles, or approximately 225 miles longer than the CRC line over which AA seeks trackage rights. CN's direct route is not only highly circuitous, but it traverses such highly populated and congested areas as Detroit.

AA can also directly interchange with CSXT at Toledo. From Toledo, CSXT can route AA traffic south to Deschler, Galatea, or Fostoria, Ohio, 37, 35, and 35 miles from Toledo, respectively, and then west to Chicago over CSXT's mainline. Post-Transaction, CSXT could also route AA traffic from Toledo south to Lima, Ohio, -- about 71 miles -- and then west over the mainline CSXT will acquire from CRC. Neither the current nor the post-Transaction CSXT route from Toledo to Chicago is competitive with the three routings NSR will control post-Transaction, particularly for time-sensitive traffic.

AA and the shippers located on AA's rail system currently enjoy three competitive routings to Chicago in particular and western destinations in general. The most efficient and economical route between Toledo and Chicago is the direct route now owned by CRC. The NSR route between Milan and Chicago, while not as direct and efficient, competes with the CRC route. If CRC attempted to raise its rates or if its service between Toledo and Chicago deteriorated, the NSR Milan-Chicago route offers an effective competitive constraint. In addition, CRC currently owns a direct route between Ann Arbor and Chicago. For shippers on the AA system, this alternative CRC route provides another competitive option for traffic moving to and from Chicago.

Post-Transaction, NSR will retain its current route between Milan and Chicago and it will acquire the direct CRC route between Toledo and Chicago and the direct CRC route between Ann Arbor and Chicago. In other words, AA's economic and non-circuitous interchanges to and from Chicago will be limited to NSR at Ann Arbor, Milan and Toledo. Consequently, AA and its customers, as well as other shippers in the Toledo area, will become captive to NSR routings for traffic moving to and through Chicago post-Transaction. NSR, therefore, will be able to significantly raise its rates and/or degrade service to the point where the other circuitous and non-economic routes become competitive.

The corridor between AA's rail line and Chicago will become a 2-to-1 corridor as defined by the Board in *UP/SP* slip op. at 122. Only NSR and CRC currently offer effective competitive alternatives for traffic flows in the corridor. If the Primary Transaction is approved without appropriate conditions, NSR will become the exclusive operator in this corridor and AA's exclusive interchange carrier for traffic flows in the corridor.

On rebuttal, Primary Applicants acknowledge that NSR will control the most direct routes in the Toledo-Chicago corridor. CSX/NS-177 Vol. 2A at 356. Nevertheless, they claim that the Primary Transaction will not have any effect on AA's ability to connect with CSXT and CN at

Toledo. *Id.* As explained by Mr. Erickson, however, neither the CSXT nor the CN route is economically competitive with the NSR post-Transaction routes. R.V.S. Erickson at 9, AA-7. As already demonstrated, the CN route between Toledo and Chicago is about 225 miles longer than the CRC route NSR is acquiring. Interestingly, Primary Applicants portray the TSBY-CSXT route for sand between Yuma and Cleveland as too circuitous to be competitive -- even though it is only 53 miles longer than the TSBY-AA-CRC route -- but would lead the Board to believe that the CN Toledo-Chicago route -- which is about 225 miles longer than the CRC route -- is an economically viable alternative for shippers in the Toledo area.

Primary Applicants maintain that the CSXT route between Toledo and Chicago cannot be deemed circuitous because it is only 15 miles longer than the CRC route NSR is acquiring. CSX/NS-177 Vol 2A at 365. As explained by Mr. Erickson, however, the CSXT routings involve significant transit delays and would not be competitive for time-sensitive automotive traffic, which is over one-half of AA's traffic base. He points out that AA assembles automotive traffic in Toledo at AA's Ottawa Yard which is located about six miles from the CRC mainline to Chicago. The transit time from AA's Ottawa Yard to the CRC east-west mainline is about 30 minutes. Automotive shippers in Toledo also have convenient access to the automotive yard (Airline Yard) NSR is acquiring and which is located directly on the CRC mainline to Chicago. On the other hand, CSXT's Walbridge Yard, where it assembles automotive traffic, is about 10 miles from AA's Ottawa Yard. The transit time from Ottawa Yard to Walbridge Yard averages from two to four hours because the line is highly congested and crosses the CRC mainline at Vickers and the NSR mainline at Ironville. From Walbridge Yard, CSXT needs to haul the automotive traffic south to Willard Yard at Willard, Ohio, which will become CSXT's primary westbound hub for Chicago gateway traffic. *See* CSX/NS-20 at 192-94. The transit times from Walbridge Yard to Willard Yard is several hours. Erickson R.V.S. at 9-10, AA-7. Consequently, the local transit time in the Toledo area for moving automotive traffic to the CRC mainline for a line-haul to Chicago is up to a day less than the transit time to CSXT's closest mainline to Chicago. For automotive traffic -- where timely performance standards are measured in hours and not days or weeks -- the CSXT routings from Toledo to Chicago are simply not competitive with the direct CRC route.

THE REQUESTED TRACKAGE RIGHTS MEET ALL OF THE BOARD'S CONDITIONING CRITERIA

The conditions AA seeks are designed to ameliorate both the harm to essential services and the reduction of competition that will be caused by the Primary Transaction. If granted, the requested trackage rights between Toledo and Chicago would enable AA to retain some of the traffic that would otherwise be diverted and possibly to attract new traffic to offset a portion of the other losses. At the same time, the requested trackage rights would remedy the loss of competition in the Toledo to Chicago rail corridor. The requested condition to permit AA to interchange traffic with CP at Ann Arbor would provide AA a possible source of additional revenues to offset its projected losses. With these added revenues, AA would be able to continue providing its on-line customers essential rail services.

As previously noted, the Board has broad authority to impose conditions. The Board has an affirmative duty to impose such conditions as are necessary to insure that a transaction before it is in the public interest. *See Atlantic Coast Line R. Co. v. United States,* 48 F.2d 239, 244 (W.D.S.C. 4th Cir. 1931), *aff'd,* 284 U.S. 288 (1932). The Board "is not intended to be a passive arbiter but the 'guardian of the general public interest,' with a duty to see that this interest is at all times effectively protected." *Lamoille Valley R.R. v. ICC*, 711 F.2d 295, 322 n. 55 (D.C. Cir. 1983) ("*Lamoille Valley*").

AA's requested trackage rights satisfy each of the criteria for imposing a public interest condition and a condition designed to preserve essential services. The requested access to CP similarly satisfies the criteria for imposing an "essential service" condition. As demonstrated above, the Primary Transaction will have anticompetitive consequences and threatens harm to the public interest in the Toledo-Chicago rail corridor. Consequently, the imposition of public interest conditions is warranted.

In its Responsive Application, AA demonstrated that the requested trackage rights are operationally feasible. AA's evidence goes unchallenged. Not one witness for Primary Applicants has raised any operational concerns about the trackage rights AA seeks.

The requested trackage rights are also in the public interest and would not be detrimental to the Primary Transaction. The Primary Transaction, if unconditionally approved, would have significant detriments to the shipping public in the Toledo-Chicago rail corridor in the form of reduced rail competition. On the other hand, the general public would derive significant benefits from the trackage rights AA seeks through improved service and the preservation of rail competition in this area. At the same time, the condition would not detract in any material respect from the public benefits NSR and CSXT expect to achieve from the Primary Transaction. CSXT and NSR collectively claim public benefits of nearly $1 billion a year. *See* CSX/NS-18 at 2. The trackage rights AA seeks would simply enable AA to continue competing for some of the traffic it now enjoys and possibly attract some additional traffic from service to shippers who would otherwise lose competitive rail service.

The criteria for imposing "essential service" conditions, as set forth at 49 C.F.R. § 1180.1 (d) (1), have also been met. First, the conditions are directly related to AA's projected financial losses and the resulting loss of essential services on the AA rail system. If those conditions are granted, AA would be able to continue to compete for the Chicago traffic that it will otherwise lose and possibly attract new traffic via the CP interchange to offset some of the remaining losses AA will incur. The combination of the two conditions would give AA the opportunity to earn sufficient revenues so that it can continue providing essential services to its customers.

Second, the requested conditions are designed to provide shippers adequate service. With the additional revenues generated from the conditions, AA would remain a viable carrier and would be able to continue serving its customers. The requested access to CP would have the additional public benefit of diverting traffic from trucks to rail. The traffic AA hopes to attract now moves about 50 miles by truck from Toledo to the Detroit-Windsor area for subsequent movement by rail to Canadian destinations. Third, as explained above, the requested trackage rights are operationally feasible and would not pose any operating or other problems for NSR or CSXT. Primary Applicants have also raised no operational concerns regarding AA's access to CP.[7] Fourth, as already demonstrated, the requested conditions would not frustrate the ability of NSR and CSXT to achieve their anticipated public benefits.

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[7] Primary Applicants illogically object to AA's requested access to CP by noting that CP only has overhead haulage rights between Detroit and Chicago and that CP does not have the right to interchange with any other carrier. CSX/NS-177 Vol. 2A at 364. It is precisely because CP was not granted access to AA at Ann Arbor that AA is seeking access to CP. If CP had been given access to AA, AA would not be seeking this condition and its concerns over revenue diversions would be somewhat diminished.

Primary Applicants claim that the conditions sought by AA are not related to the asserted harms. CSX/NS-177 Vol 2A at 355. As just discussed, the conditions AA seeks are uniquely designed to address and rectify the demonstrated anticompetitive effects of the Primary Transaction. Nevertheless, if the Board finds the conditions not to be appropriate, it has the power and duty to impose alternative conditions. *Lamoille Valley* at 322. The Board could, alternatively, grant AA a rate equalization condition, as previously discussed, which would preserve for AA efficient joint-line movements.

CONCLUSION

For the foregoing reasons, AA respectfully urges the Board to condition the Primary Transaction by imposing the conditions sought by AA.

Respectfully submitted,

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Dated: February 23, 1998

CERTIFICATE OF SERVICE

I hereby certify that on this 23rd day of February, 1998, I caused a copy of the Brief of Ann Arbor Acquisition Corporation d/b/a Ann Arbor Railroad (AA-8), to be served on counsel for Primary Applicants by Hand Delivery and on Administrative Law Judge Jacob Leventhal and all other Parties of Record by first class mail, postage prepaid.

Karl Morell

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