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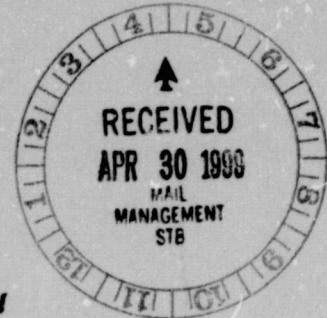
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April 30, 1999



Hand Delivery

Honorable Vernon A. Williams
Secretary
Surface Transportation Board
1925 K Street, N.W.
Suite 700
Washington, D.C. 20423

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Office of the Secretary

MAY - 3 1999

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Public Record

Re: Finance Docket No. 33388 (Sub-No. 88)
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
(Arbitration Review)

Dear Mr. Williams:

I enclose for filing in the above-referenced proceeding the original and ten copies of the Joint Reply To The Motion Of The International Association Of Machinists And Aerospace Workers For Expedited Action On Its Previously Filed Request For A Stay.

Thank you for your attention.

Sincerely,

Jeffrey S. Berlin
Attorney for Norfolk Southern
Railway Company

Enclosures

cc: Joseph Guerrieri, Jr.
Richard S. Edelman
Donald F. Griffin

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SURFACE TRANSPORTATION BOARD

Finance Docket No. 33388 (Sub-No. 88)



**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
(ARBITRATION REVIEW)**

**JOINT REPLY TO THE MOTION OF
THE INTERNATIONAL ASSOCIATION OF MACHINISTS
AND AEROSPACE WORKERS FOR EXPEDITED
ACTION ON ITS PREVIOUSLY-FILED REQUEST FOR A STAY**

The International Association of Machinists and Aerospace Workers ("IAM") has asked the Board for "expedited action" on IAM's pending request for a stay in this arbitration review proceeding. IAM's stay request has no more merit now than when it was presented as part of IAM's February 12, 1999 petition for review of the New York Dock arbitration award rendered by neutral referee William E. Fredenberger, Jr. IAM's challenge to the Fredenberger Award involves only 40 Conrail employees -- 33 roadway equipment repairmen who work at Conrail's Canton, Ohio Roadway Equipment Repair Shop and are represented by the Brotherhood of Maintenance of Way Employees ("BMWE"), and seven traveling roadway equipment repairmen, represented by IAM.

Norfolk Southern Railway Company ("NSR"), CSX Transportation, Inc. ("CSXT"), and Consolidated Rail Corporation ("Conrail") (collectively, "the railroads") replied to IAM's stay request on February 22, 1999, and to IAM's petition for review on March 4, 1999. IAM's current

motion adds nothing to its initial pleadings. All of the grounds for denying IAM's requests for relief the railroads previously set out apply with equal or greater force today.¹

IAM premises its April 29, 1999 motion on an April 22, 1999 letter sent by the railroads to the labor organizations that are parties to the arbitrated implementing agreement adopted by referee Fredenberger. The April 22, 1999 letter (reproduced as Exhibit 1 to IAM's motion) is one of three notices served by the railroads pursuant to the arbitrated implementing agreement in preparation for consolidation of roadway equipment repair functions in connection with the implementation of the Conrail transaction on June 1, 1999. The letter advises the labor organizations that certain Conrail-owned equipment, machinery, parts, tools, and supplies will be moved from Conrail's Canton Shop on or after April 29, 1999. The other two notices, also dated April 22, 1999, concern the advertising of prospective NSR and CSXT equipment repair positions to Conrail employees currently working at Canton (and to field roadway mechanics allocated to CSXT), who are being given an opportunity to bid on the positions using their Conrail seniority. The new NSR and CSXT positions will not be filled, and no employees will be required to relocate, until June 1, 1999.

These preparations lend no urgency to IAM's pending petition for review and stay request. IAM's only challenge to the arbitrated arrangements governing the consolidation of shop functions concerns the manner in which certain BMW-represented employees who transfer to NSR's Charlotte, North Carolina Roadway Shop will be integrated into the IAM seniority rosters at Charlotte. IAM has never disputed the railroads' right to effect the consolidation of shop functions

¹ BMW also filed a petition for review and a petition for a stay of the Fredenberger Award. As we advised the Board by letters dated March 24, 1999, the railroads have reached agreements with BMW, subject to ratification by the union's membership, that resolve BMW's challenges to the Fredenberger Award. BMW has advised the railroads that it expects to complete the ratification process next week. Upon ratification, pursuant to the terms of the settlement, BMW will withdraw its pending petitions.

on NSR and CSXT. IAM just complains that some transferring Canton employees (approximately 33) will be "dovetailed" onto the IAM roster at Charlotte rather than, as IAM proposed, being placed at the bottom of the roster. And IAM complains about the adequacy of the negotiations prior to the arbitration. IAM has shown no likelihood of prevailing on the merits of either challenge. As NSR explained in its reply to IAM's petition for review (at 10-12), the referee considered and rejected IAM's challenges to the adequacy of the negotiations and IAM's proposal to place transferring Canton employees at the bottom of the IAM seniority roster. Both were determinations well within the jurisdiction of a New York Dock referee, and IAM has shown no reason for the Board to second-guess the referee's findings. See Union Pacific Corp., et al.--Control and Merger--Southern Pacific Rail Corp., et al., Finance Docket No. 32760 (Sub-No. 33), served April 30, 1999 ("UP/SP Stay Denial"), slip op. at 3 ("[t]ypically the Board defers to an arbitrator's determination regarding the manner of integrating seniority"; denying request for stay).²

IAM falsely asserts that expedited consideration is warranted to address a "serious legal question" as to whether the referee exceeded his authority by supposedly "extinguishing" IAM's representation rights with respect to certain Conrail employees allocated to NSR. Motion at 2. In fact, as NSR has previously shown, there is no such issue. NSR Reply to Petition, at 8-9. Everyone -- including the referee (Award at 17)) -- agrees that questions of representation are committed

² NSR cannot simply settle the seniority integration matter with IAM alone. NSR would have to obtain BMW's consent before modifying the implementing agreement to place the transferring machinists at the bottom of the Charlotte seniority roster rather than integrating their seniority on a dovetailed basis, as referee Fredenberger found was appropriate. Moreover, there would be no principled basis for settling with IAM on terms that would treat employees who transfer to Charlotte as machinists differently from employees who transfer as electricians, sheet metal workers, shop laborers, carmen, or boilermakers/blacksmiths. Under the Fredenberger Award, all the employees transferring in those five crafts will be dovetailed, like the machinists, onto the applicable seniority rosters; none of the unions representing NSR employees in those five crafts has sought Board review of the Fredenberger Award.

exclusively to the National Mediation Board. The referee and the STB have no say in the matter. What the Fredenberger Award does do is determine the labor agreement that will apply to NSR-allocated maintenance of way employees and to the work of traveling equipment repairmen on the NSR-allocated properties. The arbitrated implementing agreement provides that those employees and operations will be governed by a BMW agreement that currently applies on NSR's "NW-Wabash" properties. IAM represents seven of the Conrail equipment repairmen who are allocated to NSR and will work under the terms of the NW-Wabash/BMW agreement beginning on Day One.

IAM's representation of those seven Conrail employees gives IAM standing to challenge the arbitrated arrangement governing those employees. But that challenge is not properly addressed to questions of representation, which have no place in this forum. Nothing that has happened since February -- least of all the railroads' April 22, 1999 notices, which have nothing to do with the seven IAM-represented equipment repairmen who are allocated to NSR -- strengthens IAM's pending petition and stay request.

IAM's petition for review and petition for stay raise no issues at all with respect to CSXT, Conrail or the Shared Assets Areas. IAM does not challenge the seniority arrangements and labor agreement that will govern IAM-represented employees allocated to CSXT. Nor does IAM assert that any supposed "representation" issue exists with respect to employees who are allocated to CSXT or retained by Conrail.

It is outrageous for IAM to ask the Board to stay the entire Fredenberger Award -- which covers more than 3,000 Conrail employees -- on the asserted basis of a complaint that pertains to only seven of those employees. IAM falsely contends, as it did in its initial stay request (at 18), that implementation of the Fredenberger Award "will result in widespread relocations and displacements that will be impossible to unscramble at a later date." Motion at 3. In fact, as we showed

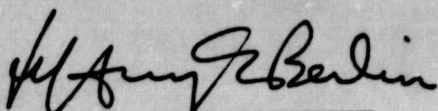
previously (Joint Reply at 7), very few maintenance of way employees will be required to relocate in connection with the initial implementation of the Conrail transaction, and all of those employees are represented by BMW (which has not challenged their relocation). The seven IAM-represented traveling equipment repairmen will not be required to relocate. Rather, they will become NSR employees, will be dovetailed onto new NSR repairmen rosters, and will continue to perform (under a different labor agreement) the same kind of work that they perform today. In any event, any losses suffered by IAM-represented employees who will be involved in the implementation would not be "irreparable" so as to warrant a stay under the Board's established standards. See Joint Reply at 6-7. Changes in labor agreements or seniority rosters could be reversed, and any intervening economic losses could be remedied after the fact in the highly unlikely event that the Board were later to grant the petition for review.

The railroads' and the public's interests also must be considered. The passage of time has not strengthened the merits or urgency of IAM's appeal, but it has increased the damage that a stay order would cause. The railroads are now only weeks away from the June 1, 1999 Closing Date. The railroads have completed necessary preparations to employ and manage their new maintenance of way workforces and to consolidate maintenance of way operations on their expanded systems in the manner permitted by the Fredenberger Award. A stay of the Fredenberger Award at this juncture would impose enormous operational difficulties and frustrate our efforts to effect a smooth transition in employment and operations on Day One. See UP/SP Stay Denial, slip op. at 4.

CONCLUSION

For all of the foregoing reasons, and for the reasons stated in the railroads' previous replies to IAM's petition for review and request for a stay in this proceeding, the Board should deny IAM's motion for expedited consideration of its February 12, 1999 stay request, and should deny the stay request.

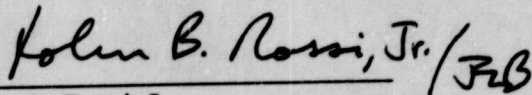
Respectfully submitted,



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Mark E. Martin
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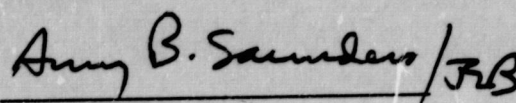
*Counsel for Norfolk Southern
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John B. Rossi, Jr.
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Counsel for Consolidated Rail Corporation

Dated: April 30, 1999



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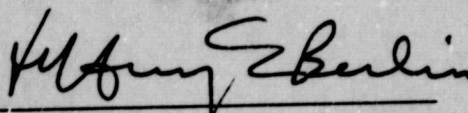
CERTIFICATE OF SERVICE

I hereby certify that I have, this 30th day of April 1999, caused copies of the foregoing Joint Reply To The Motion Of The International Association Of Machinists And Aerospace Workers For Expedited Action On Its Previously-Filed Request For A Stay to be served, by hand, upon the following:

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Richard S. Edelman
O'Donnell, Schwartz & Anderson, P.C.
1900 L Street, N.W., Suite 707
Washington, D.C. 20036

Donald F. Griffin
Brotherhood of Maintenance of Way Employees
10 G Street, N.W., Suite 460
Washington, D.C. 20002



Jeffrey S. Berlin

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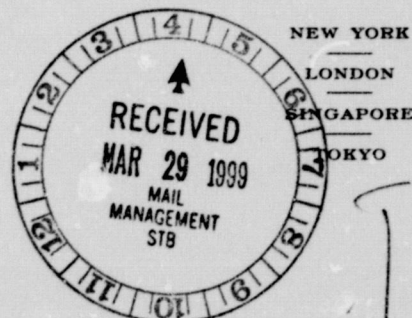
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March 29, 1999

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Re: Finance Docket No. 33388 (Sub-No. 88)
CSX Corporation and CSX Transportation, Inc.,
Norfolk Southern Corporation and Norfolk Southern Railway
Company—Control and Operating Lease/Agreements—
Conrail Inc. And Consolidated Rail Corporation
(Arbitration Review)

Dear Mr. Williams:

I enclose for filing in the above-referenced proceeding the original and ten copies of the Carriers' Joint Reply To Petition For Leave To File Comments As Amicus. A diskette containing a copy of the joint reply in WordPerfect 6.1 format is also enclosed.

Also enclosed are two extra copies of the joint reply for acknowledgment of receipt. Please file-stamp these copies and return them to our messenger.

Very truly yours,

Krista L. Edwards

Attorney for Norfolk Southern
Railway Company

Enclosures

cc: Joseph Guerrieri, Jr.
Richard S. Edelman
Donald F. Griffin
Mitchell M. Kraus

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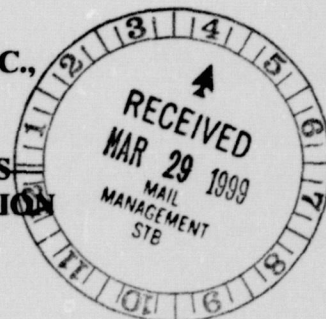
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SURFACE TRANSPORTATION BOARD

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Finance Docket No. 33388 (Sub-No. 88)

**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
(ARBITRATION REVIEW)**



**CARRIERS' JOINT REPLY TO PETITION
FOR LEAVE TO FILE COMMENTS AS AMICUS**

This is the joint reply of Norfolk Southern Railway Company ("NSR"), CSX Transportation, Inc. ("CSXT"), and Consolidated Rail Corporation ("Conrail") (collectively, "the Carriers") to the March 9, 1999 petition of Transportation Communications International Union ("TCU") in this arbitration review proceeding. TCU asks permission to file comments as amicus curiae in support of the petition of the Brotherhood of Maintenance of Way Employees ("BMWE") for review of the January 14, 1999 arbitration award rendered by neutral referee William E. Fredenberger, Jr. under the New York Dock conditions imposed by Decision No. 89. TCU's stated justification for seeking to file amicus comments is invalid, and the union's proffered comments, in any event, are duplicative of BMWE's and would not assist the Board in resolving the petition for review. TCU's request should therefore be denied.

TCU says that the Board should consider views of unions other than BMWE because this case supposedly "is the first time since the issuance of Carmen III¹ that the Board has

¹ CSX Corp.--Control--Chessie Sys. and Seaboard Coast Line Indus., Fin. Dkt. No. 28905 (Sub-
(continued...))

been asked to consider the post-transaction override of collective bargaining agreements" (Pet. at 2). In fact, the Board already has addressed the matter of "override of collective bargaining agreements" since Carmen III, when it declined to review a New York Dock award rendered in a section 4 arbitration proceeding to which TCU itself was a party. Union R.R.--Arbitration Review--United Steelworkers of America, Fin. Dkt. No. 31363 (Sub-No. 3), served December 17, 1998 ("Union R.R."), appeal pending, United Steelworkers of America v. United States, No. 98-6511 (3d Cir. Dec. 30, 1998).

Union R.R. was an action for review of an arbitration award in which neutral referee Helen Witt imposed an implementing agreement to govern the transfer of certain accounting work from the Union Railroad Company ("URR") to the Bessemer and Lake Erie Railroad Company ("B&LE").² On URR, accounting work was performed under a collective bargaining agreement with the United Steelworkers of America ("USWA"); on B&LE, accounting work was performed under a collective bargaining agreement with TCU. A principal issue in the arbitration was which labor agreement should apply to the coordinated work. The referee imposed an implementing agreement providing that the transferred work would be performed under TCU's agreement with B&LE -- the arrangement the railroads had proposed, and to which TCU agreed.³

¹ (...continued)
No. 22), served Sept. 25, 1998.

² The Interstate Commerce Commission had imposed the New York Dock conditions in an earlier decision authorizing Transtar, Inc. to acquire common control of URR and B&LE, along with several other carriers. Blackstone Capital Partners L.P., et al.--Exemption From 49 U.S.C. 10746, 11321, and 11343, Fin. Dkt. No. 31363, served December 23, 1998.

³ TCU and the railroads entered into a voluntary implementing agreement providing that the transferred work would be covered by TCU's labor agreement with B&LE. The agreement was made subject to any changes that might be imposed in any arbitration under New York Dock.

(continued...)

USWA sought review by the Board, arguing, among other things, that the New York Dock arbitrator lacked authority to substitute the TCU/B&LE agreement for the USWA/URR agreement. In a decision issued several months after Carmen III, the Board summarily rejected USWA's arguments, explaining: "There is no issue of first impression; and any issues that are likely to recur have already been thoroughly resolved by us and the courts." Union R.R., slip op. at 7-8.

In short, there simply is no force to TCU's urging that it should be allowed to participate as amicus here because the Board has not previously considered an arbitrator's authority to "override collective bargaining agreements" (Pet. at 2) since deciding Carmen III. The Board has already made clear that Carmen III works no sea change in the law; it merely reaffirms the principles that the Board and the courts had already "thoroughly resolved," Union R.R., slip op. at 8.⁴

There is no reason for the Board to entertain TCU's comments as to how those settled standards should be applied to a dispute to which TCU is not a party and in which TCU has no legitimate stake. TCU made its own New York Dock implementing agreement with the Carriers in this proceeding. That agreement was reached in November 1998 -- well after the Board issued Carmen III. TCU's voluntary implementing agreement, like the agreement adopted by referee Fredenberger, modifies the existing Conrail seniority arrangements and labor agreement

³ (...continued)

USWA opposed that arrangement, taking the position that the USWA agreement should apply to the employees being transferred, and when the matter went to arbitration, TCU was a party.

⁴ TCU also is wrong in contending (Comments at 2) that the Fredenberger Award provides for the "complete elimination" of the Conrail/BMWE agreement. Pursuant to the Fredenberger Award, the terms of the Conrail/BMWE agreement (as modified) will apply to the Shared Assets Areas and CSXT's new Northern District.

as necessary to meet the Carriers' operating needs. Like the agreement adopted by referee Fredenberger, the TCU implementing agreement places all of NSR's allocated former Conrail employees under NSR labor agreements and combines some existing CSXT employees and former Conrail employees under the terms of a Conrail labor agreement (as modified).⁵ Having agreed to those terms, TCU can hardly be heard to contend that the comparable arrangements adopted by referee Fredenberger must be set aside.

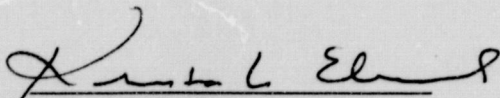
In any event, the comments that TCU proposes to file are redundant. TCU's proffered comments repeat point for point arguments made by BMW in support of its own petition for review. TCU says nothing new. Its comments would therefore not assist the Board in resolving the issues raised by BMW's petition, and serve no other legitimate purpose.

⁵ A copy of the TCU implementing agreement was included at Tab 66 of the Carriers' Joint Appendix, which was filed in support of the Carriers' replies to BMW's petition for review and petition for a stay. Chapter I, Article 1, Section 1 of the agreement provides for the establishment of new seniority districts in the field on CSXT's expanded system and for application of the Conrail agreement, as modified, to CSXT's allocated Conrail employees and certain existing CSXT (former C&O and B&O) employees in the new coordinated field seniority districts. Chapter I, Article 1, Section 2 provides for realignment of Conrail seniority districts on the NSR-allocated properties and application of NSR agreements to all employees allocated to NSR.

For the foregoing reasons, TCU's petition to file its amicus comments should be

denied.⁶

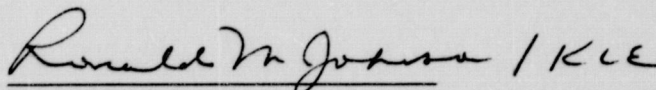
Respectfully submitted,



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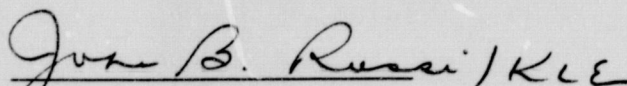
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Counsel for CSX Transportation, Inc.



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Philadelphia, PA 19101-1416
(215) 209-4922

Counsel for Consolidated Rail Corporation

Dated: March 29, 1999

⁶ In the event the Board were to permit TCU to file its comments, the Carriers should be given the opportunity to file a rebuttal.

CERTIFICATE OF SERVICE

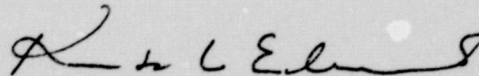
I hereby certify that I have, this 29th day of March, 1999, caused copies of the foregoing Carriers' Joint Reply to Petition for Leave to File Comments as Amicus to be served upon the following:

Richard S. Edelman (by hand)
O'Donnell, Schwartz & Anderson, P.C.
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Donald F. Griffin (by hand)
Brotherhood of Maintenance of Way
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Krista L. Edwards

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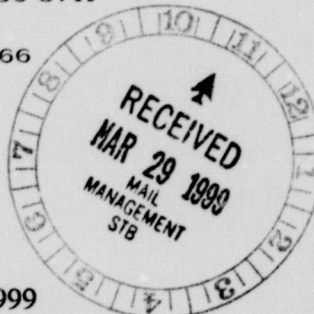
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March 25, 1999

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

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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
(Arbitration Review)

Dear Mr. Williams:

Enclosed is the original verified page for the Declaration of R. Chapman VI. A facsimile of this page was filed yesterday in support of the Reply of Norfolk Southern Railway Company to Petition for Review and Petition For a Stay of Brotherhood of Maintenance of Way Employees.

Very truly yours,

Krista L. Edwards

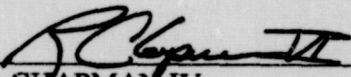
Attorney for Norfolk Southern
Railway Company

Enclosures

cc: Richard S. Edelman
Donald F. Griffin
Joseph Guerrieri, Jr.

VERIFICATION

Pursuant to 28 U.S.C. § 1746, I declare under penalty of perjury that the foregoing is true and correct. Executed this 24 day of March, 1999.


R. CHAPMAN IV

STB FD 33388 (Sub 88) 3-24-99 D 193866

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Office of the Secretary

MAR 25 1999

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SURFACE TRANSPORTATION BOARD

Finance Docket No. 33388 (Sub-No. 88)



**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
(ARBITRATION REVIEW)**

D

**REPLY OF CONSOLIDATED RAIL CORPORATION TO PETITION
FOR REVIEW OF BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYEES**

For the reasons stated in the replies submitted March 24, 1999 by Norfolk Southern Railway Company ("NSR") and CSX Transportation, Inc. ("CSXT"), which reasons are adopted by Consolidated Rail Corporation ("Conrail"), Conrail urges the Board to deny Brotherhood of Maintenance of Way Employees' petition for review of the arbitration award rendered January 14, 1999 by neutral referee William E. Fredenberger, Jr. If reviewed, the award should be affirmed in all respects, for the reasons stated in the NSR and CSXT replies.

Respectfully submitted,

John B. Rossi, Jr.
Consolidated Rail Corporation
2001 Market Street 16-A
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(215) 209-4922

*Counsel for Consolidated
Rail Corporation*

Dated: March 24, 1999

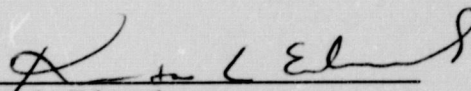
CERTIFICATE OF SERVICE

I hereby certify that I have, this 24th day of March, 1999, caused copies of the foregoing Reply of Consolidated Rail Corporation To Petition For Review Of Brotherhood of Maintenance of Way Employees to be served, by hand, upon the following:

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March 24, 1999

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Hand Delivery

Honorable Vernon A. Williams
Secretary
Surface Transportation Board
1925 K Street, N.W.
Room 715
Washington, D.C. 20423

Re: Finance Docket No. 33388 (Sub-No. 88)
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
(Arbitration Review)

Dear Mr. Williams:

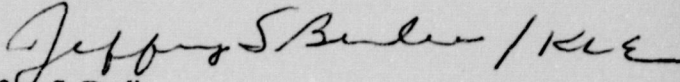
We are pleased to advise the Board that Norfolk Southern Railway Company ("NSR"), Consolidated Rail Corporation ("Conrail"), and the Brotherhood of Maintenance of Way Employees ("BMWE") have reached an agreement, subject to ratification by the union's membership, to resolve the issues presented by BMWE's pending petition for review and petition for stay in the above-referenced arbitration review proceeding, insofar as those petitions seek relief or modification of the January 14, 1999 arbitration award affecting NSR, the Conrail property to be operated by NSR, or Conrail. We have been advised by BMWE that the ratification process will take approximately three-and-one-half weeks to complete.

Upon ratification, the agreement will require BMWE to withdraw its petition for review and petition for stay, insofar as those petitions seek relief or modification of the January 14, 1999 arbitration award affecting NSR, the Conrail property to be operated by NSR, or Conrail. In the meantime, NSR is today filing its Reply to BMWE's petitions, in accordance with the procedural schedule in this proceeding.

Honorable Vernon A. Williams
March 24, 1999
Page 2

The original and ten copies of NSR's Reply are enclosed, along with the original and ten copies of NSR's Motion For Leave To File Memorandum Exceeding Page Limitation. Also enclosed is a diskette containing a copy of the pleadings in WordPerfect 6.1 format.

Very truly yours,


Jeffrey S. Berlin

*Attorney for Norfolk Southern
Railway Company*

Enclosures

cc: Honorable Linda J. Morgan
Chairman
Surface Transportation Board - Room 715
(w/o enclosures)

Honorable William Clyburn, Jr.
Vice Chairman
Surface Transportation Board - Room 715
(w/o enclosures)

Honorable Wayne Burkes
Commissioner
Surface Transportation Board - Room 715
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Richard S. Edelman
Donald F. Griffin
Joseph Guerrieri, Jr.

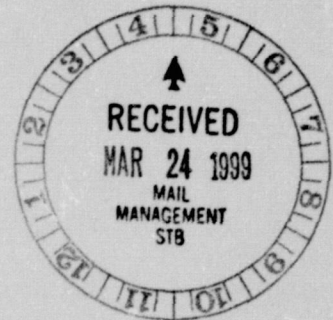
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SURFACE TRANSPORTATION BOARD

Finance Docket No. 33388 (Sub-No. 88)



**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
(ARBITRATION REVIEW)**

**REPLY OF NORFOLK SOUTHERN RAILWAY COMPANY
TO PETITION FOR REVIEW AND PETITION FOR A STAY
OF BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYEES**

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Dated: March 24, 1999

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The Brotherhood of Maintenance of Way Employees ("BMWE") has asked the Board to review and set aside an arbitration award rendered January 14, 1999 by neutral referee William E. Fredenberger, Jr. and to "stay" the Award pending the Board's review. The Fredenberger Award adopted an implementing agreement ("the Arbitrated Implementing Agreement") to govern the selection and assignment of maintenance of way employees in connection with initial implementation of the authorized transaction under Article I, Section 4 of the New York Dock conditions, which the Board imposed in Decision No. 89. The agreement prescribes the arrangements that are necessary in order for Norfolk Southern Railway Company ("NSR") and CSX Transportation, Inc. ("CSXT") to divide the use and operation of the properties of Consolidated Rail Corporation ("Conrail") and conduct the new operations authorized in Decision No. 89. This Reply addresses provisions of the agreement that involve NSR's new operations. BMWE's challenge to those provisions, and its petition for stay of the Award, have no merit.¹

STATEMENT OF THE CASE

When NSR takes over its allocated share of Conrail's properties on June 1, 1999, it will extend its rail network by nearly one-half (approximately 7,000 miles), expand its workforce by approximately 11,000 employees, and undertake an extraordinary competitive and operational mission. The nature of this undertaking -- and the enormous public benefits that it promises -- are well documented in the record of this proceeding, beginning with the June 23, 1997 application, in

¹ The railroads have submitted a three-volume appendix containing copies of pertinent materials from the arbitration record, including the Carriers' Prehearing Submission, selected exhibits, and excerpts of the transcript of the arbitration hearing. References in this Reply to materials in the Carriers' Joint Appendix are indicated by the prefix "R-," followed by the page numbers (e.g., "R-10-15"). The Fredenberger Award is reproduced at Tab 1 (R-1-45) of the Carriers' Joint Appendix.

which the applicants detailed their plans to bring vigorous, two-carrier competition to rail markets that have been served exclusively or almost exclusively by Conrail for nearly two decades. R-622-93.

The success of NSR's Operating Plan, as we first detailed in the Application, lies in operating NSR's allocated Conrail properties as an integrated part of the NSR system for all purposes, including maintenance of way work. NSR recognized that fulfillment of its Operating Plan would require workforce arrangements consistent with its own method of operations -- that any effort to operate the allocated properties under the remains of Conrail's existing seniority arrangements and labor agreements would impose artificial barriers to the expanded NSR operations made possible by the transaction.

NSR made its views known at the outset, submitting a detailed Appendix A to its Operating Plan, in which it described the workforce arrangements that it maintained would be necessary to realization of the public benefits of the transaction. R-684-728. NSR's Appendix A proposals called for allocation of the Conrail workforce among NSR, CSXT, and Conrail and for the extension of NSR labor agreements or nonagreement practices to cover the NSR-allocated properties and employees. With respect to maintenance of way operations, NSR proposed arrangements suitable to the performance of routine line maintenance and program maintenance on NSR's allocated properties, to the consolidation of centralized functions (equipment repair shops and rail welding), and to the timely completion of construction projects required in connection with initial implementation of the transaction. R-158, 698-701.

In Decision No. 89, the Board rejected a challenge to NSR's Appendix A proposals brought by several labor organizations (including BMWF), which asked the Board to declare that the proposed changes are not necessary to implementation of the transaction. The Board declined to prejudge the merits of the proposed arrangements, holding that the necessity for such changes should

be determined in the first instance by a referee under the New York Dock Article I, Section 4 procedures. Decision No. 89, slip op. at 123 (Board will resolve issues relating to labor agreement changes "only as a last resort, giving deference to the arbitrator").

NSR has now completed the Article I, Section 4 procedures in connection with all of the operating changes described in the Application and has negotiated or obtained in arbitration all necessary implementing agreements. R-1000-1724, 1939-2205. Each of the negotiated agreements incorporates the essential features of NSR's original Appendix A proposals, including division of the Conrail workforce and, in every instance, the application of NSR labor agreements and practices to NSR's allocated employees and properties.²

NSR achieved the same result in the one other implementing agreement imposed through arbitration with respect to NSR-allocated employees. On February 27, 1999, referee Richard Kasher issued an award imposing an implementing agreement for the carman craft which, consistently with NSR's original Appendix A proposals, provides (among other things) for the application of appropriate NSR agreements to NSR's allocated properties and carman employees, and for the realignment of Conrail seniority districts to fit the needs of NSR's expanded and integrated operations. R-46-88.

The railroads' efforts to reach a voluntary implementing agreement covering maintenance of way operations were unsuccessful. The railroads submitted the dispute to arbitration. The National Mediation Board ("NMB") appointed Mr. Fredenberger. The parties submitted written proposals and prehearing submissions and participated in a four-day hearing in December 1998. The

² See R-964, 1012, 1067, 1072, 1096, 1106, 1126, 1170, 1223, 1486, 1591-91.1, 1636, 1713, 1944, 2096, 2104, R-2111, 2116, 2129, 2136, 2156.

railroads' prehearing submission included extensive written testimony and exhibits in support of the railroads' proposals. BMWWE offered no testimony or other evidence in support of its proposal.

The Fredenberger Award resolved all of the matters at hand and adopted an implementing agreement, in the form proposed by the railroads, that prescribes a comprehensive set of arrangements to govern the initial division of Conrail's maintenance of way workforce and operations pursuant to Decision No. 89. BMWWE now asks the Board to vacate the provisions of the Arbitrated Implementing Agreement that allocate Conrail's BMWWE-represented employees among the new operations; realign the seniority of employees allocated to NSR; extend the NSR "NW-Wabash/BMWWE agreement" to cover the allocated properties; and permit NSR to use third-party contractors to perform certain capital projects necessary to the initial implementation of the transaction.

ARGUMENT

The Fredenberger Award is subject to "an extremely limited standard of review," based on a "strong presumption of finality." CSX Corp.--Control--Chessie Sys. and Seaboard Coast Line Indus., 4 I.C.C. 2d 641, 648 (1988) ("Carmen I"), reaffirmed after remand, Fin. Dkt. No. 28905 (Sub-No. 22), served Sept. 25, 1998 ("Carmen III"). The Board's established standard of review, first announced in Chicago & North Western Transp. Co.--Abandonment, 3 I.C.C. 2d 729, 735-36 (1987) ("Lace Curtain"), aff'd, International B'hd of Elec. Workers v. ICC, 862 F.2d 330 (D.C. Cir. 1988), accords "substantial deference to the arbitrator's competence and special role in resolving labor disputes." Carmen I, 4 I.C.C. 2d at 648.³

³ See also Indiana R.R.--Leases & Oper. Exemp.--Norfolk & Western Ry., etc., Fin. Dkt. No. 31464 and 31470, served July 13, 1990, slip op. at 4 ("Arbitrators possess a special understanding of the complex concerns and practices of rail labor negotiation. Their competence has allowed the Commission to delegate to them the resolution of complicated issues arising under the (continued...)")

An arbitral award reviewed under Lace Curtain may be overturned only "when it is shown that the award is irrational or fails to draw its essence from the imposed labor conditions or it exceeds the authority reposed in arbitrators by those conditions." Delaware & Hudson Ry.--Lease and Trackage Rights Exempt.--Springfield Terminal Ry., Fin. Dkt. No. 30965 (Sub-No. 1), served Oct. 4, 1990, slip op. at 16-17, reaffirmed after remand, served Sept. 25, 1998. The referee's resolution of factual disputes -- such as the "necessity" for modifying labor agreements -- will stand absent "egregious error." Union Pacific Corp., et al.--Control and Merger--Southern Pacific Transp. Co., et al., Fin. Dkt. No. 32760 (Sub-No. 22), served June 26, 1997, slip op. at 3.

Deference is especially appropriate in this case. Referee Fredenberger is an experienced railway labor arbitrator and New York Dock referee, and former General Counsel of the NMB. The case involved multiple parties, proposals, and issues, presenting myriad factual disputes over the necessity and appropriateness of the various proposals for changing pre-transaction workforce arrangements. The parties had no significant dispute over the legal standards governing the referee's decision making; they differed with regard to the proper application of those standards to the Conrail transaction. The Fredenberger Award resolves all disputed issues, makes findings in support of all provisions of the Arbitrated Implementing Agreement, and is based on an extensive record. See Award at 4 (R-4) (explaining that referee's findings are based on consideration of "approximately 300 pages of prehearing submissions or briefs together with several hundred pages of exhibits and attachments thereto, as well as over 1,000 pages of hearing transcript").

³ (...continued)

labor protective conditions"); Fox Valley & Western Ltd.--Exempt. Acq. & Oper.--Certain Lines of Green Bay & Western R.R., et al., Fin. Dkt. No. 32035 (Sub-No. 1), served Dec. 19, 1994, slip op. at 4 ("Under our well established Lace Curtain standard of review, we allow arbitrators substantial latitude to use their expertise in arbitrating disputes concerning these arrangements to carry out New York Dock conditions.").

BMW makes only passing reference to Lace Curtain (Pet. at 7), and does not confine its analysis to that decision's standard. BMW's brief reads like a request for de novo review. BMW purports to incorporate large passages of its arbitration submission into its petition for review (Pet. at 1 n.1), selectively repeating the same contentions it made unsuccessfully in arbitration. On that basis -- and, tellingly, without a single reference to the record of the hearing -- BMW urges the Board to reach a different result. The Board should reject BMW's invitation to second-guess the referee's expert judgment.

As a threshold matter, BMW seeks to avoid the Board's practice of according deference to its arbitrators. The union claims the "entire award must be vacated" because referee Fredenberger assertedly "misunderstood his mandate." Pet. at 12-13. BMW contends that the referee made findings "directly contrary to the Board's declaration [in Decision No. 89] that it did not implicitly or explicitly approve the Carriers' plans with respect to employees" and that this supposed error "underlies everything he did." Id.

BMW is wrong. The Fredenberger Award fully respects the Board's determination not to prejudge the merits of the railroads' Appendix A proposals and its intent to leave the matter in the first instance to Section 4 arbitration, where the "arbitrators are free to make whatever findings and conclusions they deem appropriate with respect to CBA overrides under the law." Decision No. 89, slip op. at 127. In this connection, referee Fredenberger properly described the nature and scope of the Conrail transaction as it was authorized by the Board, including the fact that the transaction contemplates the division of Conrail's workforce among the railroads. Referee Fredenberger certainly did not assume the Board had approved any of the specific proposals described in Appendix A. The Award, in fact, contains no reference to the railroads' Appendix A proposals.

The Fredenberger award reflects a clear and correct understanding of the referee's role in the Article I, Section 4 process and of the scope of the disputes that the referee was charged with resolving. The Award also reflects the referee's clear and correct understanding of the legal standards that governed his determinations, including the established standards for modifying labor agreements. Award at 5-7 (R-5-7). The fact that the arrangements adopted by the referee match NSR's original Appendix A proposals does not reflect any failure in the Article I, Section 4 process or in referee Fredenberger's consideration of the record before him. It should come as no surprise that NSR's proposals -- which were so integral to the proposed operational restructuring as to have been obvious to NSR from the outset -- would, in the final analysis, be found "necessary" to carry out the transaction, within the meaning of the Board's established New York Dock framework. Carmen III, slip op. at 23-25; Railway Labor Executives Ass'n v. United States, 987 F.2d 806, 813-14 (D.C. Cir. 1993) ("Executives"). BMWWE offers no reason why the Board should disturb those findings or otherwise question the referee's judgment in this proceeding.

I. THE BOARD SHOULD DECLINE TO REVIEW THE ALLOCATION ARRANGEMENTS.

BMWWE contends that the referee committed "egregious error" in adopting the railroads' proposal for allocating employees among the new operations, and rejecting the union's alternative proposal. Pet. at 13. This is a particularly empty challenge, both because it asks the Board to second-guess the referee on a matter uniquely suited to arbitral decision making and because rejection of the allocation arrangement at this juncture would disrupt the railroads' ongoing efforts to effect an orderly transition in operations and employment on Day One.

The referee was presented with two very different proposals for allocating Conrail's employees. The allocation arrangement advanced by the railroads, and adopted by the referee

(Article I, Section 1 and Appendix A to Attachment 1 to the Award (R-22.2, 23-25)), serves the interests of the transaction. That arrangement is based on several objective rules, which are designed to achieve adequate staffing levels with minimal operational disruption. R-308-24.

Most BMW-represented Conrail employees will be allocated in place on the basis of their headquarters locations on the designated "allocation date." With a few exceptions designed to address isolated special circumstances, an employee working in a fixed headquarters position will be allocated to the railroad that will operate the property on which the employee reports. Appendix A, Section I(A) (R-23). This allocation rule covers, among others, all employees engaged in routine inspection, preventive maintenance, and repair of rail lines and structures. An employee currently assigned to a Conrail regional or zone production gang (which works over a designated region or zone, with no fixed headquarters location) will be allocated on the basis of his earliest district seniority, in most cases to the railroad that, after consummation, will operate most of the property in which the employee first established seniority on Conrail. Appendix A, Section I(B) (R-23-24).⁴

Once allocated, the Conrail employees will become (or remain) exclusively employees of either NSR, CSXT, or Conrail/SAA and will work under the applicable arrangements on each property, as determined by other provisions of the Arbitrated Implementing Agreement.

BMW's allocation proposal, by contrast, was incomplete and unwieldy, and did not serve the transaction's purposes. Under the union's proposal, before allocation of Conrail's employees to NSR, CSXT, or Conrail/Shared Assets Areas could occur, Conrail would first have to readjust its seniority districts, create new, consolidated seniority rosters, provide written notice to the employees of their placement on the new rosters, and permit employees to protest their placement on the rosters.

⁴ BMW inaccurately contends (Pet. at 14) that these employees are allocated on the basis of their "trackman" seniority. In fact, the determination is based on the employee's earliest district seniority in any classification.

And after that extended process came the heart of BMW's proposed allocation mechanism: Conrail's simultaneous abolishment of all of its approximately 3,000 maintenance of way jobs and rebulletining of new jobs -- associated with the properties to be allocated either to NSR, CSXT, or Conrail/Shared Assets Areas -- for bid by Conrail's existing maintenance of way workforce, followed by the awarding of those positions.

BMW's proposed allocation mechanism was not only unduly disruptive and prolonged, but did not ensure that allocation would be permanent. The union's proposal assumes that an employee would continue to hold all his former Conrail seniority even after Conrail's property was divided. As a consequence, a Conrail employee holding seniority on a district to be split among two or more of the three railroads could in certain circumstances "flow" back and forth among the three. In BMW's proposed universe, an employee who was initially allocated to NSR but who was at some later date unable to hold a job on that railroad could bid to a job on another carrier where he still would hold Conrail seniority -- or, alternatively, he could come to NSR from one of the two other railroads. R-307-10, 325, 448-58, 1923-24.

The referee's decision to reject this proposal and instead adopt the railroads' proposed allocation arrangement deserves the highest deference. The referee unquestionably had jurisdiction to fashion an allocation arrangement. The task calls for exercise of judgment informed largely by practical considerations, based on the size and nature of the workforce, the railroads' relative staffing needs, and the effect of the arrangement on the railroads' ability to effect an orderly and prompt transition in operations and employment. The railroads and BMW advanced competing allocation proposals, with each side claiming to offer the more efficient, fair, and reasonable arrangement. There was a full hearing on the issue, and the referee acted well within his discretion, and consistently with the principles of the protective conditions, in adopting the railroads' proposal.

Now BMWÉ just repeats the failed arguments that it made in the arbitration, ignoring the opposing record, and urges the Board to overrule the referee's determination. Such a challenge should not be entertained. But if it is entertained, it should be rejected.

The fundamental problem with BMWÉ's analysis, as we showed in the hearing, is that it confuses the matter of determining which railroad an employee will work for (allocation) with the process for assigning employees to particular positions. R-303-04. BMWÉ calls the Arbitrated Implementing Agreement's allocation arrangement unfair and inefficient because it fails to place employees in the jobs where the railroads need them. That is not a meaningful criticism. The function of the allocation arrangement is to decide which railroad will employ each Conrail employee -- not to place employees in particular jobs. The assignment of employees to jobs is a different matter, to be determined in each case pursuant to the labor agreement made applicable by the Arbitrated Implementing Agreement.

The task of allocation is permanently to divide Conrail's more than 3,000 available maintenance of way employees among NSR, CSXT, and Conrail/Shared Assets Areas. The railroads' proposal, which the referee adopted, is appropriate to the transaction and satisfies the requirement of New York Dock because it allocates employees in a manner that meets the railroads' staffing needs, corresponds to the division of Conrail's lines, and accomplishes the task in a workable manner that minimizes operational disruption and the need for employees to relocate, leaving most employees at locations where they have elected to work.

BMWÉ contends that the New York Dock conditions require that each of the 3,000 available Conrail maintenance of way employees be permitted to choose his new employer, and the union objects to the Arbitrated Implementing Agreement because it does not provide for such choice. But the protective conditions impose no such requirement. No one ever suggested that New York

Dock required that Southern Pacific's employees had to agree to be employed by Union Pacific when the latter acquired control of the former. The circumstances here are no different, except that each current Conrail employee will be employed by one of three different railroads following implementation of the transaction. The protective conditions command only that the referee prescribe an arrangement that is appropriate to the transaction. Nothing in New York Dock compels the referee to impose an implementing agreement that allows each employee to direct which railroad will be his new employer.⁵

BMWE purports to rely on Southern Ry.--Control--Central of Georgia Ry., 331 I.C.C. 151, 172 (1967), and Fox Valley & Western Ltd., et al.--Exempt. Acq. & Oper.--Certain Lines of Green Bay & Western R.R., 9 I.C.C. 2d 272 (1993), but these cases address only the right of employees to participate in the implementing agreement process itself, not what the outcome of that process should be. Southern Control establishes that carriers involved in an authorized control transaction must obtain a pre-consummation implementing agreement -- that is, the railroads cannot

⁵ See American Train Dispatchers Ass'n v. ICC, 26 F.3d 1157, 1163 (D.C. Cir. 1994) ("Section 4 does not provide a formula for apportioning the 'selection of forces.' Instead, it frees the hand of the arbitrator to fashion a solution that is 'appropriate for application in the particular case.'") (ATDA v. ICC).

Of course, no Conrail employee can be required to accept employment with NSR or CSXT, any more than he could be required to continue working for Conrail. An employee, however, may have to accept employment with NSR or CSXT in order to remain eligible for protective benefits.

To the extent that BMWE contends that the Arbitrated Implementing Agreement unduly restricts employee choice of jobs once the employee is allocated (see Pet. at 14-15), the union is wrong. The railroads' proposals on that matter, adopted by the referee, offer employees broader job opportunities than they currently have under the Conrail/BMWE agreement (which, as we explain below, limits bidding rights to relatively narrow seniority districts, zones, and regions). R-345; R-196. Once an employee is allocated to one of the railroads, his seniority will be integrated into new rosters corresponding to his Conrail job classification and he will be permitted to fill positions and exercise his new seniority in accordance with the terms of the applicable labor agreement provisions.

unilaterally determine what employment arrangements to apply to employees affected by the transaction. Fox Valley, in which a railroad ran afoul of the New York Dock conditions by unilaterally imposing a preferential hiring arrangement on nonunion employees, similarly holds only that employees must be given a voice in the selection and assignment process in accordance with the Article I, Section 4 procedures. These cases do not suggest that a duly-appointed Section 4 referee must prescribe employee choice (or any other particular formula) as the arrangement for allocating employees among the railroad employers. Here, New York Dock is satisfied because the affected employees (through their representative) had a full and fair opportunity to participate in the fashioning of an implementing agreement under Section 4.

In the end, BMWWE is left to contend that the referee misjudged the relative merits of the two allocation proposals. First, BMWWE faults the referee for assertedly giving undue weight to the interest in prompt implementation of the Conrail transaction. Pet. at 14.⁶ This is a baseless argument. The very purpose of the New York Dock procedures is to expedite the establishment of workforce arrangements that are necessary to the implementation of authorized transactions. New York Dock, 360 I.C.C. at 71. BMWWE acknowledges that a New York Dock implementing agreement generally should (among other objectives) permit the transaction to "occur promptly." Pet. at 14. And the referee here had every reason to find that prompt implementation would promote the

⁶ There is no merit to BMWWE's repeated suggestion (e.g., Pet. at 16) that the railroads failed to provide sufficient advance notice to BMWWE of the planned Closing Date. The railroads' Section 4 notice stated that the railroads intended to consummate the transaction on or after November 22, 1998 (90 days after the notice date). Although the railroads were unable to advise BMWWE (or any one else) of the planned Closing Date until after November 22, 1998, the railroads made no secret of the fact that they intended to commence the new operations as soon as practicable, consistently with their commitment to effect a smooth implementation. And, in fact, the allocation proposal adopted in arbitration was first presented to BMWWE in a written negotiation proposal in September 1998. In these circumstances, BMWWE cannot seriously contend that it misunderstood the need for prompt implementation.

objectives of the Conrail transaction. There is no force to BMW's suggestion (Pet. at 14) that the so-called "NITL condition" somehow shows that the Board disfavors prompt implementation. As the Board explained in Decision No. 89, the NITL agreement expressly provides that "CSX and NS will, consistent with safe and efficient implementation of the transaction, initiate their separate operations of the Conrail routes as soon as possible after control has been authorized." Slip op. at 53; *id.* at 126 n. 199.

There is no substance in BMW's assertion that its proposal would effect a more efficient and orderly allocation of Conrail employees. BMW contends that the Arbitrated Implementing Agreement allocates employees without regard to their current jobs and therefore will leave the railroads without the right types of employees in the right places. BMW's professed concern about the efficiency of the railroads' new operations should not be credited. The railroads are satisfied that their proposed allocation arrangement, which the referee adopted, will yield balanced workforces of sufficient size and composition to staff adequately their new operations.⁷

BMW wrongly complains that the allocation arrangement adopted by the referee supposedly requires regional and zone production gang employees to relocate to "follow 'allocation'." Pet. at 15. BMW made the same false contention in the arbitration proceeding, and we corrected it there by showing that BMW was again confusing allocation with post-Day One job assignment

⁷ BMW's professed concern about workforce imbalance rests on a misrepresentation of the allocation arrangements. By their terms, the Appendix A arrangements allocate employees on the basis of their work. By allocating fixed headquarters employees in place, the allocation arrangement distributes the numbers and types of employees needed for routine maintenance work in reasonable, direct proportion to the railroads' relative allocated shares of the Conrail properties. The railroads' proposal for allocating mobile forces likewise was fashioned to meet each railroad's need for employees involved in production work. The railroads tested the allocation arrangement to ensure that it would meet the railroads' operating needs by conducting simulated allocations before proposing the arrangement to BMW in negotiations. There is no reason to believe, as BMW suggests, that one railroad will find itself with an imbalanced workforce on Day One.

R-911-13, 457-58. Employees working on production gangs will indeed be allocated among the railroads on the basis of their earliest Conrail district seniority. But, contrary to BMW's assumption, an employee is not required physically to return to that former seniority district for any purpose -- and certainly not for the purpose of holding a position. Rather, once he has been allocated to either NSR, CSXT, or Conrail/Shared Assets Areas, the employee will hold a position as provided under the labor agreement applicable to him on that carrier. For example, a Conrail regional or zone production gang employee whose earliest district seniority is on Conrail's Harrisburg district will be allocated to NSR and may (depending on his exercise of seniority) work anywhere on the NSR-allocated properties, without regard to his former Conrail seniority district.

For its part, BMW's alternative allocation proposal was demonstrated to be unworkable, and was properly rejected by the referee. BMW's proposal did not permanently divide Conrail's workforce at all -- the most basic task the implementing agreement must accomplish. Instead, as we have explained, under BMW's proposal, employees would retain their Conrail seniority and would have the right to "flow" among the railroads' operations, creating a common or pooled workforce serving all of the separate railroads operating portions of what was once, but is no longer, a unitary Conrail railroad system.

As we explained in the arbitration, this sort of joint arrangement would greatly complicate the filling of assignments, impose administrative burdens (including FRA injury reports and qualification certification), and interfere with each railroad's ability to train and retain a stable workforce. And such an arrangement would require NSR and CSXT to share information, such as production schedules, capital priorities, and manpower needs, in a manner inconsistent with the

vigorous competition the Board expects to occur.⁸ The referee agreed, properly finding that BMW's flow-back arrangement "could impair establishment of a well-trained and unified workforce on each of the three Carriers" and "would stifle the competition" between NSR and CSXT. Award at 8 (R-8). BMW does not even acknowledge those findings, much less attempt to refute them.

Moreover, adoption of BMW's proposal would have wreaked administrative havoc and massive operational disruption by requiring Conrail to abolish the approximately 3,000 existing BMW positions and simultaneously bulletin and assign new positions. Even on the conservative assumption that Conrail would receive ten bids for each bulletined position (a number consistent with that railroad's historical experience), Conrail would be required to handle and process some 30,000 separate bids. R-453, 793-95. For each position, Conrail would have to determine the successful bidder based on the relative seniority and qualifications of each bidder. Moreover, there is the prospect that the successful bidder for a given position might choose a different job on which he was also the successful bidder, requiring Conrail to go through the process of determining a second successful bidder for the position that remains to be filled. Such a process would tax the railroads' systems and personnel and inevitably give rise to countless disputes and claims by unsuccessful bidders, without ensuring that the railroads' staffing needs will be met. R-453-54

The railroads demonstrated at the hearing -- and BMW has never denied -- that even under the most conservative estimate, assuming the promptest possible compliance with all of BMW's administrative requirements, it would take at least 129 days to effect allocation under the

⁸ CSXT simply has no business knowing, for example, that NSR plans to add a rail gang to work on a certain territory or plans to bulletin a construction gang to build a connection in an area where NSR competes with CSXT, or that NSR has furloughed gangs in certain locations. Nor should NSR know those things about CSXT. NSR and CSXT are supposed to be competing for business; sharing information regarding the ebb and flow of their maintenance of way workforces, an inherent element of BMW's flow-back proposal, would give each railroad an inappropriate window into the business plans of the other. R-307, 459, 1923-24.

union's proposal. R-451-54, 793-95. Adopting that proposal therefore would have meant that the railroads could not divide Conrail's maintenance of way workforce until long after the date that they were then planning to implement the operating changes (March 1, 1999). The referee acted well within his discretion in adopting the only allocation arrangement before him that could be completed on a schedule consistent with the expected date of the railroads' operating changes and in rejecting BMW's proposal because of the length of time required to carry out the allocation process.

These considerations have not changed merely because the railroads now are planning to consummate the transaction on June 1, 1999. At this juncture, even if the Board were summarily to adopt BMW's allocation proposal, the allocation process would not be completed until long after the planned Closing Date.

Moreover, the railroads already have taken steps to effect employee allocation pursuant to the Fredenberger Award. On February 5, 1999, the railroads served notice pursuant to Article I, section I of the Arbitrated Implementing Agreement, thereby fixing the "allocation date" on the basis of which most BMW-represented employees will be allocated. The railroads have completed the process of identifying their allocated employees using the February 5, 1999 allocation date and are in the process of preparing and testing the payroll records and systems necessary to ensure a smooth transition in employment on June 1, 1999. As a part of that process, NSR intends to communicate with its newly allocated employees in mid-April in order to obtain and process the necessary final data (e.g., direct deposit instructions) and documentation (e.g., tax withholding election forms) and to begin training BMW-represented employees in the use of NSR's payroll system. These efforts will help in ensuring that paychecks are accurately prepared (reflecting proper rates, advances, withholding, garnishments, union dues payments, etc.) and timely issued to NSR's

new employees. Nothing that BMWWE has said would warrant short-circuiting that process now, and beginning anew.

II. THE BOARD SHOULD NOT REVIEW THE ARBITRATED ARRANGEMENTS GOVERNING "DIVISION AND SECTION" EMPLOYEES AND WORK ON NSR'S ALLOCATED PROPERTIES.

Workforce allocation is only the first step in the selection and assignment of maintenance of way employees made necessary by the Conrail transaction. The Arbitrated Implementing Agreement also prescribes the seniority arrangements and labor agreements that will govern maintenance of way employees and work for each railroad's new operations.

NSR and BMWWE advanced competing proposals for arranging maintenance of way operations and employees on NSR's allocated properties. NSR's proposal, briefly stated, provided for the realignment of seniority territories and the integration of seniority of NSR-allocated employees; application of NSR's "designated programmed gang" ("DPG") arrangements, which govern the operation of certain rail and timber and surfacing ("T&S") gangs; extension of the BMWWE labor agreement that governs other maintenance of way operations on NSR's adjoining former "NW-Wabash" properties; and consolidation of centralized equipment repair and rail welding functions in NSR's existing shops.

BMWWE's counterproposal differed in several respects. BMWWE urged the referee to apply the Conrail/BMWWE agreement, with certain limited modifications in seniority arrangements, to nearly all maintenance of way operations on NSR's allocated properties. BMWWE also proposed to permit NSR to operate rail and T&S gangs under the terms of the NSR/BMWWE DPG agreement, subject to the application of certain work rules in the Conrail/BMWWE agreement. BMWWE's proposal for the consolidation of rail welding and equipment repair shop operations differed from NSR's only in how it defined the pool of employees who would be eligible for positions in the consolidated shops.

NSR explained the necessity for its proposed arrangements in the railroads' prehearing submission (R-154-207), which was supported by written testimony and in numerous supporting exhibits. NSR offered the Declaration of Tony L. Ingram (R-881-96), the NSR General Manager who will be responsible for directing train operations on NSR's allocated properties. Mr. Ingram explained NSR's operating plan for its allocated properties and explained the need for flexible and efficient maintenance of way operations on those properties. NSR's Assistant Vice President Gary W. Woods described NSR's plans for organizing and conducting maintenance of way work on the allocated properties and explained why NSR's proposed workforce arrangements are necessary to its ability to conduct safe, responsive, and efficient operations and to achieve the other public transportation benefits made possible by the authorized operations. R-912-29. All of these considerations -- and the differences between NSR's and BMW's positions -- were explored fully in the hearing. R-332-47, 460-63, 465-66, 1925-26.

On the basis of that record, the referee adopted NSR's proposal, both as to the realignment of seniority and the application of NSR/BMW labor agreements. Award at 11-13 (R-11-13). The referee found that imposing Conrail's seniority arrangements on NSR's new operations would "seriously hamper" NSR's ability to operate its allocated properties efficiently and competitively, as authorized and contemplated by Decision No. 89; he found that "[f]lexibility with respect to the workforce is key to the success of the transaction"; and that requiring NSR to operate under Conrail/BMW seniority arrangements "would severely restrict that flexibility." *Id.* at 11 (R-11). Likewise, the referee found that requiring NSR to operate under the Conrail/BMW agreement would interfere with achievement of the efficiencies and competitive benefits made possible by the authorized transaction. *Id.* at 13 (R-13). Accordingly, the referee concluded that adoption of NSR's proposed seniority arrangements and application of the NW-Wabash/BMW

agreement are "necessary to realize a public transportation benefit" and that the arbitrated arrangements satisfy the Board's standards for modifying labor agreements, including the Board's decision in Carmen III. Id. at 11, 13 (R-11,13).

BMWE takes issue with the arbitrated arrangements as they govern what BMWE loosely calls "division and section" work and employees.⁹ The union has no serious quarrel with the legal standards that the referee applied. BMWE acknowledges that a New York Dock referee is authorized to modify pre-transaction labor agreements as necessary to yield transportation benefits made possible by an STB-authorized transaction.¹⁰ But BMWE criticizes the referee's application of those standards, contending that the Award should be vacated because the referee assertedly failed

⁹ BMWE expressly uses the label "division and section" to include "day-to-day" track maintenance and bridges and buildings ("B&B") operations and employees (Pet. at 17, 26-27), but BMWE is deliberately silent about the other categories of employees and operations necessarily encompassed by its use of the label. Ordinarily, as it is used in the industry, the term "division and section" would not encompass such production work as renewal of rail and ties and construction of new track. However, insofar as NSR's operations are concerned, BMWE's use of the label "division and section" appears to encompass all line-of-road maintenance of way work other than that performed by "regional and system" (i.e., DPG) gangs. That category encompasses, in addition to day-to-day line and B&B maintenance, line-of-road equipment repair and most production work, including program renewal of rail and ties (performed by non-DPG rail and T&S gangs and surfacing gangs). BMWE takes rhetorical advantage of the imprecision of its terminology by selectively criticizing parts of the railroads' evidence as it pertains to certain categories of "division and section" operations.

¹⁰ As BMWE acknowledges, this is an abandonment of the position BMWE strenuously asserted (as a participant in the comments of the "Allied Rail Unions" ("ARU")) in the underlying STB application proceedings. The "ARU" asserted, inter alia, that the railroads' proposals for changing workforce arrangements in connection with the Conrail transaction were subject exclusively to the procedures for changing labor agreements under section 6 of the Railway Labor Act, 45 U.S.C. § 156. The STB disposed of the "ARU" legal arguments in a footnote to Decision No. 89 (at 122 n.198), finding that the "ARU" were seeking to "revive numerous arguments about the supposed primacy of the Railway Labor Act over the New York Dock process, the immutability of rates of pay, rules, and working conditions, and other related issues that have been consistently rejected by the ICC, the Board, and the courts."

to make adequate findings of fact and, in any event, because the record assertedly does not support the arbitrated arrangements as they apply to "division and section" forces. Pet. at 17-31.

BMW's challenge is misconceived. A New York Dock award will not be reviewed on the basis of its "lack of detailed discussion" or to consider other asserted "shortcomings" in the referee's recitation of his findings.¹¹ Under Lace Curtain, a referee's factual findings in support of an arbitrated agreement -- including findings that changes in labor agreements are "necessary" to implement a proposed "transaction" -- are reviewed only for "egregious error."¹² BMW does not acknowledge, much less meet, that standard here. Instead, BMW attempts to reargue the arbitration case, contending that the railroads "failed to demonstrate" and "cannot show" the necessity of the arbitrated arrangements.

BMW proceeds as if it were raising three separate issues relating to NSR's and CSXT's "division and section" forces: (1) the railroads are not engaged in a "transaction" (Pet. at part III (B)); (2) there will be no "selection and assignment" of forces (id., part III (C)); and (3) the

¹¹ Norfolk Southern Corp.--Control--Norfolk & Western Ry., et al., 4 I.C.C. 2d 1080, 1086 (1988) ("[the union] criticizes the panel's judgment and lack of detailed discussion. These alleged shortcomings are not matters we would review under Lace Curtain," finding that, "[i]n any event, the record supports the conclusion of the arbitration panel.").

¹² Union Pacific Corp., et al.--Control and Merger--Southern Pacific Transp. Co., et al., Fin. Dkt. No. 32760 (Sub-No. 22), served June 26, 1997, slip op. at 3-4 ("UP/SP Train Operations") (The referee's finding of necessity to integrate seniority and to adopt a uniform collective bargaining agreement are findings of fact, subject to deference under Lace Curtain); CSX Corp.--Control--Chessie Sys. and Seaboard Coast Line Indus. (Arbitration Review), Fin. Dkt. No. 28905 (Sub-No. 27), served Dec. 7, 1995, slip op. at 8 ("CSX Control/Train Operations") ("The Arbitrator's decision on the issue of whether the proposed changes are linked to a prior transaction is a factual issue. That decision should not be set aside except for egregious error"), aff'd sub nom. United Transp. Union v. STB, 108 F.3d 1425 (D.C. Cir. 1997); Fox Valley & Western Ltd.--Exempt. Acq. and Oper.--Certain Lines of Green Bay & Western R.R., et al., Fin. Dkt. No. 32035 (Sub-No. 1), served Dec. 19, 1994, slip op. at 4, 6 ("Under our well established Lace Curtain standard of review, we allow arbitrators substantial latitude to use their expertise in arbitrating disputes concerning these arrangements to carry out New York Dock conditions"; arbitrator "did not commit 'egregious error' in declining to modify" labor agreements).

railroads failed to demonstrate "necessity" (id., part III (D)). At bottom, however, these amount to a single contention: that the railroads assertedly are not making any operational changes that would warrant modifying pre-transaction arrangements governing their allocated "division and section" employees. The argument fails for the same reasons each time it is made.

BMW's attack on the arbitrated arrangements rests on the union's unduly narrow and flawed understanding of the authority that the railroads are exercising pursuant to their August 24, 1998 New York Dock notice. Decision No. 89 authorized the railroads and their corporate parents to engage in a series of related transactions, beginning with the control transaction which was consummated on August 22, 1998. The control transaction itself involved no operating changes, entailed no rearrangements of forces, and required no New York Dock notice or implementing agreement. What the railroads and their corporate affiliates are now preparing to do, also pursuant to the Board's express authority, is divide the use and operation of Conrail properties. Conrail will cease to exist as a multi-region line-haul railroad, and CSXT and NSR will operate their allocated Conrail properties -- in direct competition -- as parts of their expanded systems. It is the operational restructuring that will generate the transportation improvements, efficiencies, and public benefits on the basis of which the application was approved.

NSR showed that the success of the Conrail Transaction, with regard to NSR, depends on its ability to offer responsive, efficient, and competitive train service over expanded single-line routes, offer and meet demanding train schedules, serve new markets and customers, and boost the traffic levels on Conrail's former system properties by attracting the time-sensitive traffic that is now moving by truck. Meeting these competitive challenges will place significant demands on NSR's new maintenance of way organization and operations. NSR must perform sufficient ongoing maintenance and repair to support the level, speed, and frequency of train operations planned for the expanded

system, while at the same time minimizing the disruption to train operations that maintenance of way work inevitably causes. To balance these competing demands, NSR must be able efficiently and flexibly to schedule and manage maintenance operations. R-160-6, 886- 88.

NSR demonstrated, and referee Fredenberger properly found, that NSR could not perform its planned operations if its maintenance of way operations were subject to Conrail's existing workforce arrangements. By virtue of the nature and structure of the Conrail transaction, the Conrail/BMWE arrangements would operate more restrictively on the NSR-allocated properties than they do on Conrail today. NSR's new operations over its allocated lines will both require more maintenance -- because of increased traffic density (and NSR's generally higher maintenance standards) -- and be more vulnerable to maintenance-related delays and disruptions than are Conrail's operations today. Moreover, the configuration of the allocated properties will provide NSR fewer options than Conrail enjoys today for rerouting traffic so as to minimize operational interference caused by maintenance of way operations. R-193-94, 334-35, 887-90, 918-20.

NSR showed that the Conrail/BMWE agreement does not fit, geographically or operationally, with NSR's planned operations. The agreement was adopted in 1982 to replace the patchwork of labor agreements that governed maintenance of way operations on Conrail's predecessor railroads. The Conrail/BMWE agreement was fashioned for free-standing Conrail operations under Conrail's managerial structure, neither of which will survive the authorized transaction. R-168-73. The Conrail/BMWE arrangements are predicated on multiple and overlapping seniority arrangements, which restrict the railroad's use of employees and confine most maintenance of way gangs to relatively small geographic areas, most of which will be split by the transaction. This fragmentation is graphically illustrated in the exhibits reproduced at tab 16,-18 of

the Carriers' Joint Appendix, which depict the authorized division of Conrail properties in relation to the Conrail/BMWE seniority arrangements. R-918--19.

In each map, the Conrail properties allocated to NSR (depicted by a solid black line within the colored lines) consist of fragments of Conrail's existing seniority arrangements -- which, under the terms of the Conrail/BMWE agreement, define the physical boundaries within which employees are permitted to work. NSR will be operating parts of the two Conrail/BMWE production regions (R-799) and six production zones (R-800). Conrail's eighteen seniority districts, which govern day-to-day line maintenance, B&B, and equipment repair forces, will be split among the three railroads. Only five of the eighteen districts will be conveyed intact to NSR. NSR is authorized to operate parts of eleven others. R-304-05, 798, 801-11.¹³ Maintaining those arrangements on NSR's expanded system would confine the work of all of NSR's allocated maintenance of way employees -- including "division and section" forces -- to restrictive and arbitrarily defined territories. NSR demonstrated that operating under such fragmented arrangements would impede efficient operations by unduly restricting the territorial range of its maintenance gangs and roadway equipment. In several cases, the line segments to be allocated to NSR will consist of only a few miles of track -- far too little to generate sufficient work for a maintenance gang headquartered in those locations. In all cases, the fragmented territories bear no relationship to NSR's planned operations. R-192-93, 343, 918.

The Conrail properties are further subdivided into approximately 129 separate "working zones," many of which also will be split by operation of the Conrail transaction. R-760--92. The working zone arrangement limits the mandatory exercise of Conrail/BMWE seniority and

¹³ This fragmentation affects the seniority arrangements governing nearly all BMWE-represented maintenance of way employees. Of the employees holding seniority on the lines to be allocated to NSR, 80 percent hold seniority on one or more of the eleven fragmented districts. R-918.

therefore limits the railroad's ability to deploy forces when and where they are required to meet operating needs. By selectively designating their working zones, Conrail employees may avoid filling assignments (but remain eligible for monetary benefits under Conrail's Supplemental Unemployment Benefits ("SUB") plan) without regard to the railroad's operating needs. The railroads showed that this arrangement has increasingly restricted Conrail's operational flexibility, as the designated "working zones" have been reduced in size (some to a fraction of a mile of track) through line sales and abandonments. R-200, 306. The referee properly found that Conrail's work zones would operate even more restrictively if they were applied to the allocated properties. R-925-26.

NSR offered extensive evidence showing that operating under Conrail's workforce arrangements and the Conrail/BMWE agreement would wed NSR to Conrail's practices and methods and interfere with NSR's ability to operate its allocated properties as part of its expanded system. The Conrail/BMWE agreement is inconsistent with a number of NSR's basic operating, administrative, and safety practices and with the scope of other NSR labor agreements that will be applied to the NSR-allocated properties under the terms of implementing agreements reached with the representatives of other crafts of employees. The Conrail/BMWE rules governing the bulletining of positions and the handling of claims, for instance, are inconsistent with NSR's centralized managerial organization. Application of the Conrail/BMWE rules also would prohibit NSR's established use of nonagreement assistant track supervisors to perform minor track repairs in connection with federally-mandated track inspections -- one of the practices that NSR credits for its outstanding safety record. And application of the Conrail/BMWE agreement would create potential variations and conflicts over the scope of work to be performed by different crafts of employees on the NSR-allocated lines. R-200-04, 923-30.

Against the record in this case, there is no basis for questioning the referee's findings. Not even BMWWE can quarrel with the need to change the Conrail/BMWWE arrangements. BMWWE advanced its own proposals for modifying the Conrail/BMWWE agreement and seniority arrangements, and now concedes that it has no objections to the arbitrated arrangements that will govern the consolidation of roadway equipment repair shop functions, the consolidation of rail welding operations, and the extension of NSR's DPG arrangement to the allocated properties. As to all of those changes, BMWWE is satisfied that the railroads are engaging in a "transaction," that the transaction entails or warrants a "selection and assignment of forces," and that the arbitrated arrangements are "necessary" within the meaning of the Board's New York Dock standards.

But BMWWE denies that NSR is engaging in operational changes that warrant modifying the Conrail/BMWWE work arrangements in relation to any other maintenance of way operations. As BMWWE has it, the authorized restructuring of Conrail's operations -- the very object of the authority conferred in Decision No. 89 and made subject to the New York Dock conditions -- is not itself an occasion for rearranging Conrail's "division and section" forces under the conditions. According to BMWWE, NSR would be engaging in a cognizable operational change only to the extent that NSR either integrates the seniority of its existing and allocated employees or proposes to require employees to "work across . . . NSR-Conrail lines." Pet. at 19, 24. BMWWE simply fails to come to terms with the fundamental fact that the Conrail transaction will result in Conrail's ceasing to exist in its current form. NSR and CSXT are going to reconfigure operations throughout their expanded and integrated systems, with respect to all maintenance of way operations, in order to provide the more efficient and competitive service contemplated by Decision 89.

BMWWE acknowledges, as it must, that the Board intended for the transaction authorized in Decision No. 89 to yield public benefits in the form of enhanced efficiency and

competition. Pet. at 19. But the union then faults the referee for measuring the competing proposals against those very objectives -- hardly a basis for disturbing the Fredenberger Award.

BMW asserts (Pet. at 20-26) that the Fredenberger Award supposedly runs afoul of Carmen III and other cases addressing operational changes made pursuant to New York Dock conditions imposed on a merger or control transaction that the ICC (or STB) had approved in the past. This is a smokescreen. The issue in those "follow-on" transaction cases is whether the current operational change is an action taken in the exercise of authority conferred under the Interstate Commerce Act. Resolution of that question depends on a factual determination -- to be made in the first instance by the neutral referee -- as to whether there is a sufficient link between the operational change and the original control (or merger) transaction approved by the ICC or STB.¹⁴ But that threshold inquiry presents no serious issue here. NSR and CSXT are engaged in the initial implementation of the Conrail transaction, not carrying out an operational change years down the road in circumstances where the connection to the approved transaction could be subject to genuine contest.

There is simply no doubt that the operational changes NSR will undertake are incident to the Conrail transaction. The referee correctly found that NSR and the other railroads are proposing to exercise the authority conferred in Decision No. 89 by operating their allocated Conrail properties in direct competition as parts of expanded NSR and CSXT systems. Award at 11 (R-11). For its part, as we have described, NSR will operate its allocated lines as part of new NSR rail routes

¹⁴ And when considering such "follow-on" coordinations, the term "transaction" in Article I, Section 4 of New York Dock is given a broad construction, encompassing "subsequent transactions that are directly related to and fulfill the purposes of the principal transaction (i.e., those which . . . allow 'the efficiencies of consolidation' to be achieved)." Carmen III, slip op. at 22-23 (quoting CSX Corp. --Control--Chessie Sys. and Seaboard Coast Line Indus., 8 I.C.C.2d 715, 722, aff'd, ATDA v. ICC).

under NSR's management structure, policies, and practices and with NSR employees. R-327, 336, 882-87, 944-50, 952. And, as it is authorized to do, NSR will commence its new operations immediately upon allocation of the Conrail properties. The only issue is whether, as the referee found, the operational changes necessitate the modifications in the Conrail/BMWE workforce arrangements contained in the arbitrated implementing agreement.¹⁵

There is no basis for distinguishing, as BMW does, between the necessity for modifying arrangements governing employees engaged in rail and T&S operations (as to which BMW accepts the referee's findings) and employees engaged in all other line-of-road maintenance of way operations. Contrary to BMW's contention (Pet. at 27), NSR is not planning to "continue" Conrail's existing "division and section" operations on its allocated properties. As we explained in the arbitration proceeding, NSR will rearrange all of its allocated employees by integrating them into a unified workforce in support of operations on NSR-allocated properties. All allocated employees will have their seniority dovetailed into new rosters for each classification of employees required in NSR's new operation and, in each case, covering an appropriate seniority territory aligned with NSR's managerial divisions and regions. NSR will establish new maintenance of way gang operations, including "division and section" operations, and will apply its own operating standards, practices, and management to the operation. NSR also plans, on a limited basis, to integrate "division and section" operations at NSR-Conrail common points by using gangs constituted on the allocated properties to

¹⁵ There is likewise no force in BMW's assertion that the selection and assignment of employees necessitated by the Conrail transaction fails to meet some independent standard supposedly established by the record of arbitration awards under pre-1980 employee protective arrangements. Pet. at 24. The task presented to the referee was that of fashioning an appropriate arrangement for nearly 2,000 NSR-allocated employees in circumstances in which the vestiges of Conrail's existing arrangements were not suited to, and indeed would impede, NSR's authorized operations. The referee correctly understood that the standard to be applied was the established "necessity standard," as approved by the D.C. Circuit, and as confirmed by Carmen III, slip op. at 25-27.

perform work on adjoining former NW-Wabash properties (and the reverse), as needed to meet immediate operating needs. R-174, 345046, 920-21, 923.

All of these undertakings, as we explained in the arbitration, are part of the selection and assignment of forces that is occasioned and made necessary by the railroads' implementation of the authorized transaction. And all of the considerations that supported the referee's necessity findings -- including the fragmentation of seniority arrangements and working zones, the operational incompatibility of Conrail/BMWE arrangements, and the need for flexibility in scheduling and performing maintenance of way work -- apply equally, and in some cases more so, to division and section employees and operations.

Against the record in this case, there is no basis for questioning the referee's necessity determination, much less for concluding that the purpose of the arbitrated arrangements is only to "improve the carrier's labor relations position" (Pet. at 28-29) or promote NSR's "convenience" (*id.* at 30). The necessity for the arbitrated arrangements is a function of the division of Conrail's properties, which makes it impossible to "preserve" existing workforce arrangements, and, in NSR's case, also a function of the nature of the operations that NSR is authorized to conduct on its allocated properties. This is not a case in which the railroad applicants could have continued operating under their separate labor arrangements (as has sometimes been done, as BMWE points out (Pet. at 27), in prior merger and control cases). R-302. Referee Fredenberger properly found that operating under the Conrail/BMWE arrangements would "severely hamper" NSR's new operations. And he properly considered the more efficient use of employees to be a transportation benefit justifying the arbitrated arrangements. See UP/SP Train Operations, slip op. at 12. Those findings are not based on a relative assessment of the two agreements, but on the referee's reasoned understanding, informed by the extensive record in this case, of how the existing Conrail/BMWE arrangements would restrict

NSR's ability to conduct its authorized operations. It is those operations, not the labor agreement changes or any prohibited "transfer of wealth," that will produce the public transportation benefits on which the referee's findings were based.

None of these considerations was overcome by BMW's proposal, which provided for only modest -- and incomplete -- modifications to the Conrail/BMW seniority arrangements. BMW proposed to realign the Conrail/BMW seniority zones to correspond to NSR's new managerial divisions and to realign some of the split seniority districts in ways that assertedly would have recreated the Conrail/BMW arrangements within the confines of NSR's allocated properties. In fact, however, as NSR showed at the hearing, BMW proposed no reconfiguration of three of the split seniority districts, including two of the largest districts (Columbus and New Jersey) and the two districts (New Jersey and Philadelphia) that are to be split among all three railroads. R-451-52. Under BMW's proposed terms, NSR would have been bound by the Conrail/BMW arrangements in the territories where modification was most needed.¹⁶ In any event, as NSR established in the

¹⁶ Contrary to BMW's contention (Pet. at 27), BMW's proposal did not realign the Conrail/BMW seniority regions. Instead, as NSR pointed out at the hearing, BMW's proposal would have abolished the Conrail/BMW regional gang arrangement, requiring NSR to establish DPG gangs for all future rail programs on the allocated properties. R- 463.

BMW contends that it "agreed to" the railroads' "proposals on regional and system gangs." Pet. at 2. As to NSR, BMW is wrong. Under BMW's proposal, NSR would have been required to operate DPGs on the allocated properties subject to local Conrail/BMW rules, which would not have provided NSR sufficient flexibility in the scheduling of rail and T&S gang operations. This deficiency in BMW's proposal was addressed extensively on the record in the hearing. We explained the necessity for conducting DPG operations in combination with the NW-Wabash/BMW local rules, not the Conrail/BMW rules, in order to permit flexible scheduling of DPG gang operations. BMW's petition does not challenge any aspect of the arbitrated arrangements governing DPG operations, including the application of NW-Wabash/BMW local rules to DPG operations on the allocated properties. R-338-40, 356-57, 461-52, 1924-25.

hearing, BMW's proposal did not satisfy NSR's operating plan and would not meet NSR's operating needs. R-342-44, 356, 462.¹⁷

Lost in all of BMW's rhetoric is the fact that the arrangements that will govern maintenance of way operations on NSR's allocated properties are the same ones that BMW negotiated on behalf of employees on NSR's NW-Wabash properties. The new seniority divisions and region on the NSR-allocated properties are comparable in size to the corresponding divisions and regions on NSR's adjoining properties. R-185, 922. BMW's calling the new arrangements "mega-districts" does not change that fact or otherwise advance the analysis. The NW-Wabash/BMW Agreement and the Conrail/BMW Agreement are largely the products of national negotiations, and their economic terms are comparable. In fact, many of the terms of the agreements, including the basic health and welfare benefits packages, are the same. BMW has never argued, nor could it show, that the differences between the agreements render the NW-Wabash/BMW agreement inherently or objectively "inferior" to the Conrail/BMW agreement. See UP-SP/Train Operations, slip op. at 6. Nor does BMW contend that the Arbitrated Implementing Agreement fails to preserve any "rights, privileges, and benefits" subject to protection under Article I, Section 2 of the New York Dock conditions. In fact, Conrail employees allocated to NSR will be eligible to participate in NSR's more generous 401(k) savings plan (which, unlike Conrail's plan, provides for a partial employer

¹⁷ BMW's attack on the referee's necessity findings is not bolstered by its reliance on Decision No. 101, in which the Board clarified the scope of its earlier decision to "override" a 1982 order of the Special Court that gave Providence and Worcester Railroad Company a right to acquire Conrail's New Haven Station properties in certain enumerated circumstances. In the part of the decision relied on by BMW, the Board clarified that it did not intend to override the Special Court order for all purposes, but only to the extent that it could be read to "block" the transfer of the station properties to CSXT. Decision No. 101 says nothing about the meaning or construction of the New York Dock conditions or the scope of the exemption "from all other laws" in 49 U.S.C. § 11321(a), as it applies to the Board's well established authority to modify labor agreements. The decision is confined to its unique facts, which have no parallel here.

match of employee contributions); will be eligible for protective benefits under the February 7, 1965 Stabilization Agreement, as modified and extended (subject to the election of benefits requirements of Article I, Section 3 of New York Dock and otherwise-applicable qualification requirements); and, as directed by the referee, will retain protective benefits under Conrail's SUB Plan. R-204-07 ¹⁸

Finally, it is also a fact that, to the extent that NSR's "division and section" employees or any other allocated employees may be adversely affected by the transaction, they will be compensated in accordance with the New York Dock conditions.

III. THE BOARD SHOULD NOT REVIEW THE ARBITRATED ARRANGEMENTS GOVERNING USE OF THIRD PARTY CONTRACTORS TO PERFORM TRANSACTION-RELATED CAPITAL PROJECTS.

The Arbitrated Implementing Agreement also contains a provision (Article I § 1(h)) for expediting infrastructure changes and improvements necessary to the railroads' new operations. The provision permits NSR, under certain circumstances, to use third party contractors to augment its BMW-represented forces, in order to meet the extraordinary construction schedule necessitated by the Conrail transaction. BMW-urges the Board to vacate the provision on the ground that it assertedly exceeded the referee's jurisdiction under New York Dock Article I, Section 4. The challenge is without merit.

The arbitrated contracting arrangement addresses a specific transaction-related operating need, which is well documented in the records of both the application and arbitration proceedings. See R-219-27, 891-95, 936-42. NSR first described its plan to use outside rail

¹⁸ Other employee benefits will not change. The Conrail and NW-Wabash Agreements incorporate the same basic health and welfare benefits package, which was negotiated nationally by BMW. The Plan includes, among other benefits, the national dental plan; the national supplemental sickness plan; and the nationally negotiated early retirement major medical benefits. Allocated employees will experience no lapse in coverage and, where applicable, will continue to receive benefits in accordance with their existing elections. R-206.

construction contractors in the STB application, which described specific capital projects (totaling more than \$500 million in investment) that NSR planned to undertake within the first three years of its new operations. NSR's capital plan included regulated rail connection projects necessary to link NSR's existing and allocated properties and capacity improvement and upgrading projects (such as the addition of new rail sidings and double-track crossovers and tunnel clearance improvements) necessary to prevent operational "bottlenecks" and enable NSR to handle the types, volumes, and patterns of traffic planned for the expanded system. Since the STB application was prepared, NSR has further refined its capital plan to encompass additional projects necessary to accommodate its system's new traffic patterns and volumes and comply with environmental mitigation requirements imposed by Decision No. 89. NSR now plans to install more than 164 miles of new track in connection with implementation of the transaction.¹⁹ NSR demonstrated in the arbitration proceeding that it had yet to complete dozens of transaction-related capital projects, involving the construction of more than 126 miles of new track. R-219-20, 895, 953.²⁰

NSR showed that these remaining projects exceed its manpower and equipment capacity, and that the costs of expanding its capacity to meet the short-term operating needs are

¹⁹ The number of necessary construction projects, and the speed with which NSR must complete them, are unprecedented. During the last three years, BMW-represented forces on NSR's former NW properties alone completed an average of 11.9 miles per year of new track construction. NSR now needs to perform nearly four times that amount in each of the next three years. Under the best of conditions, it would take NSR far more than three years to complete the remaining construction projects using only its expanded BMW-represented workforce. R-939.

²⁰ NSR started work on transaction-related capital projects on its existing properties well before the STB application was approved. Since the Conrail transaction was announced, NSR's BMW-represented employees have been fully employed, on both transaction-related projects and routine line and program maintenance. Other than the regular seasonal cut-off of program gangs, NSR has not reduced its BMW forces or furloughed BMW-represented employees, and many employees have worked substantial overtime on transaction-related projects. R-937.

prohibitive. NSR showed that it would have to hire and train scores of additional maintenance of way employees (and nonagreement supervisors) in order to shift manpower to the construction projects and that the process of hiring and training that number of new employees would be costly, disruptive to NSR's planned operations, and inconsistent with NSR's management practices. NSR's practice is to recruit and train employees for long-term employment, not to hire a transient labor force or conduct mass furloughs that disrupt the workforce, require retraining of employees upon return from furlough, and jeopardize employee morale. Moreover, NSR showed that even if it could hire and train the necessary employees on the schedules demanded by its Operating Plan, NSR could not efficiently equip those forces to perform the remaining capital projects. At a minimum, depending on the sequencing and scheduling of projects, NSR would have to make substantial investments in construction equipment not otherwise needed for its ongoing operations. NSR showed that using outside contractors to augment its expanded maintenance of way workforce would permit timely and efficient completion of the necessary capital projects, with little or no impact on NSR's existing and allocated employees. R-222-25, 350-55, 938-41.²¹

On the basis of that record, the referee properly found that performing the projects under otherwise applicable BMW E agreements would "cause serious delay to implementation of the transaction insofar as capital improvements are concerned" and that "elimination" of the restrictions on the use of outside contractors under the BMW E agreements satisfies the Board's "necessity test." Award at 14 (R-14).

Contrary to BMW E's contention (Pet. at 3), NSR did not seek or obtain an "unrestricted right to subcontract maintenance of way work" related to its Operating Plan. The arbitrated contracting arrangement covers a limited universe of projects and is narrowly tailored to

²¹ The same considerations apply to Conrail as well. R-755-56.

achieve its purpose. The arrangement does not place any permanent restriction on the BMW agreement scope rules or permanently change applicable practices under those rules. The temporary arrangement will remain in effect only so long as NSR is performing capital projects initially required to implement the Operating Plan and achieve the benefits of the transaction. Once those projects are complete, the ongoing maintenance and renewal of newly constructed track will be performed in accordance with the applicable labor agreements and practices. Moreover, no BMW-represented employees will lose work opportunities as a result of NSR's use of outside contractors pursuant to the Arbitrated Implementing Agreement. R-226.²²

BMW has never disputed the necessity of any of NSR's planned capital projects. Nor does BMW deny that the projects exceed NSR's capacity -- that is, that NSR could not meet the construction schedule using its existing and allocated employees, supervisors, and equipment. And BMW acknowledges that expediting the projects "may involve a public transportation benefit." Pet. at 33. But BMW contends that none of these considerations is "cognizable" under New York Dock because "subcontracting is not unification" and therefore assertedly is not a "transaction" within the meaning of the conditions and because, in any event, NSR did not demonstrate the necessity of the contracting arrangement. Id. at 32.

The referee properly determined that the planned capital projects are being undertaken as part of the authorized restructuring of Conrail's operations pursuant to the STB's authority. These investments are one of the many "important public interest benefits" cited in Decision No. 89 (at 51,

²² NSR committed as part of its arbitration proposal (R-226, 941-2) that it will employ third party contractors pursuant to the arbitrated arrangements only for transaction-related capital projects that cannot be completed on a timely basis using NSR's available BMW-represented forces. That is, NSR will not use an outside contractor for a transaction-related project pursuant to the Arbitrated Implementing Agreement if, on the involved operating division, any of NSR's otherwise available allocated Conrail employees or otherwise available current employees on the former NW territory are furloughed.

131) and, as NSR demonstrated in the arbitration proceeding, are necessary to NSR's ability to conduct the efficient and competitive operations authorized and contemplated by the Board. Moreover, some of the projects are rail connection projects and environmental mitigation projects that were specifically authorized or mandated by Decision No. 89. The Board found that the authorized connection projects are "integral to the competitive service that CSX and NS will provide under the primary transaction," and that the "very purpose" of these projects . . . "is to create additional competitive alternatives and to improve rail service for shippers throughout applicants' substantially expanded systems." Decision No. 89, slip op. at 142, 143-44.

In these circumstances, the referee properly applied the Board's established necessity standard to the proposed contracting arrangement. Contrary to BMW's contention, this determination does not depend on a finding that the use of third party contractors is itself a New York Dock "transaction." As we have explained, the operative "transaction" is the authorized restructuring of Conrail operations -- including the physical changes to the properties necessary to support the authorized operations. There was no reason for the referee to consider, as BMW now hypothetically posits, whether, in a case not involving the implementation of authorized operating changes, the railroads could have served a New York Dock notice "seeking the right to contract-out work," Pet. at 32.

BMW is also wrong to attack the referee's necessity finding. BMW concedes that the expedited completion of the capital projects will produce a public transportation benefit Pet. at 33. The referee correctly found that using NSR forces would delay the projects, and BMW does not take issue with that determination. That should end the inquiry. In the context of a transaction that is expected to yield over \$1 billion annually in public transportation benefits -- and that will

change traffic flows all across the eastern U.S. -- avoiding delay in the completion of necessary infrastructure improvements is reason enough to permit the use of third party contractors.

It is no answer, as BMWWE contends, that NSR could make the needed infrastructure changes simply by hiring and training more employees and purchasing more equipment. Pet. at 33. The referee properly credited NSR's showing that it could not feasibly recruit, hire, train, supervise, and equip the required number of employees on the schedule demanded by its Operating Plan. BMWWE has not demonstrated that the referee committed "egregious error" in finding that adherence to the BMWWE scope rules would delay the projects. In any event, under BMWWE's logic, it would almost never be necessary to change labor agreements because almost any operational impediments imposed by existing arrangements could be overcome by hiring more employees or maintaining additional equipment. That analysis misses the point of the necessity test, which is to ensure that pre-transaction arrangements do not interfere -- by imposing additional costs or otherwise -- with the railroads' ability to carry out the authorized transaction and achieve the public benefits of the transaction. There is no sound basis for distinguishing this case from prior cases in which the New York Dock procedures have been used to modify scope rule restrictions that otherwise would impose needless inefficiencies in the consolidation of rail operations. E.g., UTU v. STB, 108 F.3d at 1430; Carmen III.²³

Finally, BMWWE's reliance on the ICC's New York Dock decision (Pet. at 32-33) is misplaced. In the passage relied upon by BMWWE, the ICC declined to adopt "an additional sentence dealing with the effectiveness of subcontracting agreements subsequent to a transaction." 360 I.C.C.

²³ BMWWE gets nowhere by contending that the contracting arrangement constitutes a prohibited "transfer of wealth." Pet. at 30. NSR is not proposing to use contractors in order to avoid paying its BMWWE-represented employees or to shift work to lower-cost contracted employees. To the contrary, as we have explained, the arrangement is predicated on the full utilization of NSR's BMWWE-represented employees.

at 73. The ICC's determination that such a provision would have been "redundant and unnecessary" cannot reasonably be read to suggest that "subcontracting provisions" are not subject to modification under the New York Dock conditions. The implication, to the contrary, is that such restrictions are to be treated just like any other pre-transaction contractual provisions, which, as is now well settled, may be modified in accordance with the "necessity" test. The referee properly applied that test to the contractual restrictions in this case.²⁴

IV. THE BOARD SHOULD DENY BMW'S PETITION FOR A STAY OF THE AWARD.

By petition filed February 28, 1998, BMW also asks the Board to "stay" the Fredenberger Award pending the Board's ruling on BMW's petition for review. BMW's stay request is directed to the possibility that the petition for review would be unresolved as of Day One -- which is scheduled for June 1, 1999. BMW contends that implementation of the Award "likely will result in many employees relocating to new work locations" (*id.* at 4) and that it would not be "fair" for employees to be required to relocate "pursuant to work rules imposed by an arbitral award that is the subject of a pending appeal before the Board" (*id.* at 6). BMW acknowledges that the railroads already have served notice pursuant to the Arbitrated Implementing Agreement to allocate the Conrail workforce. (BMW submitted a copy of the railroads' February 5, 1999 allocation notice

²⁴ The final section of BMW's petition (part IV, pp. 33-36) warrants no serious consideration. BMW there reverts to the discredited arguments and threatening rhetoric that were employed by the "ARU" in the application proceeding. See note 10 above. BMW contends that the Fredenberger Award violated employee rights under the RLA, relying on the same arguments that the STB rejected in Decision No. 89, and -- through the thin veneer of an otherwise pointless (and distorted) recounting of the historical underpinnings of the RLA -- threatens to strike the railroads over implementation of the Conrail transaction pursuant to the Fredenberger Award. Any such strike would be unlawful (see NW v. Brotherhood of Railroad Signalmen, 164 F.3d 847 (4th Cir. 1998); CSXT v. United Transp. Union, 86 F.3d 346 (4th Cir. 1996)), and the threat of such unlawful activity has no proper purpose.

as Exhibit 1 to its Stay Petition.) But BMWWE contends that the allocation is "on paper only" and "will not be implemented until June 1, 1999." Stay Pet. at 5. BMWWE states that it is seeking a stay "to prevent any further implementation of the Award to preserve the integrity of the appellate process." Stay Pet. at 1.

BMWWE bears a heavy burden in asking the Board to stay the Fredenberger Award. A stay is "extraordinary relief," which may be granted only when the moving party shows that (1) there is a "strong likelihood" that it will prevail on the merits; (2) it will suffer "irreparable harm in the absence of a stay"; (3) other interested parties "will not be substantially harmed by a stay"; and (4) "the public interest supports the granting of a stay." Washington Metro. Area Transit Comm'n v. Holiday Tours, Inc., 559 F.2d 841, 843 (D.C. Cir. 1977) ("Holiday Tours"); CSX Corp.--Control--Chessie Sys. and Seaboard Coast Line Indus., et al. (Arbitration Review), Fin. Dkt. No. 28905 (Sub-No. 27), served Jan. 4, 1996 ("CSX/Train Operations"), slip op. at 3. Applying those standards, the Board has twice rejected stay requests in connection with implementation of the Conrail transaction. Decision No. 91, served August 19, 1998 (denying request for stay of implementation pending judicial review); Decision No. 92, served August 24, 1998 (denying request for stay of transfer of station properties pending judicial review). It should do the same now.

No Likelihood Of Prevailing On The Merits. In the foregoing parts of this Reply, and in the separate replies of CSXT and Conrail, the railroads have demonstrated that BMWWE's petition for review of the Fredenberger Award is without merit and should be denied. Because BMWWE has no likelihood of prevailing on the merits of its petition for review, its petition for a stay also should be denied.

No Showing Of Irreparable Injury. BMWWE has not shown that the employees it represents will suffer irreparable injury if a stay is not granted. To meet its burden, BMWWE must

demonstrate that the "claimed injury will be imminent, certain and great." Delaware & Hudson Ry.-- Lease & Trackage Rights--Springfield Terminal Ry., Fin. Dkt. No. 30965 (Sub-No. 4), served Nov. 2, 1995, slip op. at 2 (quoting Wisconsin Gas v. FERC, 758 F.2d 669, 674 (D.C. Cir. 1985)).

Economic loss by itself does not meet that standard. As the D.C. Circuit has explained:

The key word in this consideration is *irreparable*. Mere injuries, however substantial, in terms of money, time and energy necessarily expended in the absence of a stay, are not enough. The possibility that adequate compensatory or other corrective relief will be available at a later date, in the ordinary course of litigation, weighs heavily against a claim of irreparable harm.

Virginia Petroleum Jobbers Ass'n v. FPC, 259 F.2d 921, 925 (D.C. Cir. 1958) (emphasis in original).

BMW's claim of irreparable harm rests on its contentions that "the force rearrangements contemplated by the Award will likely result in many employees relocating to new work relocations," that "pre-merger workforces" will be "mixed," and that "it will be extremely difficult for employees to return to their pre-implementation positions if the Award subsequently is set aside or modified by the Board on appeal." Stay Pet. at 4-5. BMW largely invents the potential harm to employees. As we have explained, the allocation methodology adopted by the referee minimizes employee disruption and relocation by allocating "in place" most employees who are working at a fixed location (as opposed to a mobile gang operation). The only employees who will be required to relocate in the initial implementation of the Conrail transaction are the employees now working at Conrail's Canton equipment repair facility and at Conrail's Lucknow (Harrisburg), Pennsylvania rail welding plant, and BMW has not objected to the arbitrated arrangements governing those employees. Moreover, BMW's contention that employees face irreparable harm to the extent that they cannot be restored to "pre-implementation positions" rests on the false premise that Conrail positions will or should exist after Day One. As we have shown in the forgoing parts of this Reply, the Conrail positions are part of an operation that will cease to exist upon implementation

of the transaction. No one -- least of all BMW (which proposed, as explained in part I, to abolish all Conrail maintenance of way positions in advance of Day One) -- proposes to maintain "pre-implementation positions."

In any event, the types of harm that BMW predicts would not be irreparable. New York Dock monetary benefits are available to employees who are required to relocate or are displaced as a result of the transaction.²⁵

Harm To NSR. By contrast, NSR has no way of recouping the losses that it would sustain if the Board were to grant BMW's petition. And -- contrary to BMW's contention -- NSR would be substantially harmed by a stay in this proceeding. The extent of the harm would depend on the nature, timing and duration of any stay order.

BMW does not seem to be seeking any stay of NSR's preparations for Day One. That is, we do not read BMW's petition to seek a stay that would prevent NSR from finalizing its

²⁵ See Canadian Pacific Ltd., et al.--Purchase and Trackage Rights--Delaware & Hudson Ry., Fin. Dkt. No. 31700 (Sub-No. 13), served Nov. 6, 1998 ("CP/D&H"), at 3 (no showing that employees would suffer irreparable injury if required to relocate pending judicial review); CSX/Train Operations, slip op. at 5 (fact that a few employees would be discharged, required to relocate, and/or experience minor changes in compensation did not establish irreparable harm because carriers could restore operations if award were overturned and, in the meantime, employees would be eligible for New York Dock monetary benefits); I&M Rail Link, LLC--Acq. & Oper. Exempt.--Certain Lines of Soo Line R.R., Fin. Dkt. No. 33326, served April 4, 1997 ("I&M/Soo"), slip op. at 3-4 (allegation that employees would be displaced and required to relocate did not demonstrate irreparable harm); New England Central R.R.--Acq. & Oper. Exempt., Fin. Dkt. No. 32432, served Dec. 30, 1994, slip op. at 4-5 (job losses would not be irreparable in light of ICC-imposed protective benefits); Wheeling Acquisition Corp.--Acq. & Oper. Exempt.--Lines of Norfolk & Western Ry., Fin. Dkt. No. 31591, served May 7, 1990, slip op. at 3 (employee relocation is "not an extraordinary event in the railroad industry and not one generally recognized under the standards of [Holiday Tours]"); Wilmington Terminal R.R.--Purchase and Lease--CSX Transp., Fin. Dkt. No. 31530, served July 31, 1990, slip op. at 3 ("the possible need for employees to relocate does not establish irreparable harm"); Norfolk Southern Corp.--Control--Norfolk & Western Ry., et al. Fin. Dkt. No. 29430 (Sub-No. 20), served June 10, 1987 ("NS/Power Distribution"), slip op. at 3 (contention that employees would be required to relocate, would lose the asserted "protections" of their labor agreement and would displace other employees did not establish "irreparable harm"; union failed to show "why it is not possible for [affected] employees to be adequately compensated under the New York Dock conditions").

payroll records and systems, and contacting and beginning training of its allocated employees, based on the allocation of Conrail employees under the Arbitrated Implementing Agreement. As NSR Assistant Vice President Accounting Operations R. Chapman explains, these and other activities are now or will soon be underway in order to ensure that NSR's new employees receive accurate and timely paychecks after Day One. Any stay order that interfered with those preparations (even if it were lifted in advance of Day One) could seriously compromise NSR's efforts to effect a smooth transition in employment and operations on Day One. See Declaration of R. Chapman VI.

BMWE seeks a broad stay order with respect to post-Day One operations. BMWE seems to contend that the railroads should be required to maintain Conrail's existing maintenance of way workforce arrangements in the event that the Board has not acted on BMWE's petition for review. BMWE cannot deny that the railroads would be harmed by such a stay order. BMWE attempts to dodge the issue altogether by asserting that the Board "should be able to rule on the merits of the petition before June 1, 1999," and that, in any event, the railroads' harm is "purely speculative" because there is "no guarantee" that the railroads will be ready to implement the transaction on June 1, 1999. The argument is futile. NSR, like BMWE, would prefer a prompt disposition of BMWE's petition for review. But our shared preference has nothing to do with the issue posed by the Board's stay standard. The railroads have invested heavily in their plans to implement the Conrail transaction, including the restructuring of maintenance of way operations, on June 1, 1999, and any interference with those plans will be costly and disruptive. See Decision No. 92, slip op. at 2 (noting applicants' "commitment to making every effort to ensure that the division of Conrail's operations are effected smoothly," finding that stay of transfer of station property would "adversely affect the transaction as a whole"). At a minimum, the relief BMWE seeks would delay

realization of the efficiencies that referee Fredenberger found would result from conducting NSR's new operations pursuant to the arbitrated arrangements.²⁶

Public Interest. The public interest also strongly favors timely and smooth implementation of the Conrail transaction. The Board found in Decision No. 89 (at 129-34) that the Conrail transaction will generate enormous public benefits in the forms of increased competition, reduction in highway truck traffic, improved service, and greater efficiency and safety; and the Board reiterated those findings in denying an earlier stay request (Decision No. 91, at 2, citations omitted):

[W]e have found that the transaction should result in quantifiable public benefits of close to \$1 billion a year. We have also found that applicants' expanded rail operations will remove over 1 million truck trips a year from our nation's highways and reduce fuel consumption by over 80 million gallons a year. Staying the transaction pending resolution of APL's private objections would be largely disproportionate to the harm from an indefinite delay of even a portion of these public benefits. Accordingly, the petition will be denied.

The reasoning applies with equal force today.²⁷ At a minimum, the stay BMW seeks would impose added costs and uncertainty on the shipping public, while producing no corresponding public benefit.

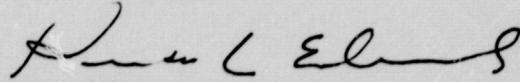
²⁶ CP/D&H, slip op. at 3 (delay in realizing efficiencies of dispatching coordination pending judicial review "weigh[ed] in favor of denial of stay request"); I&M/Soo, slip op. at 4 ("further delay in consummating the I&M acquisition transaction could cause I&M significant financial harm; could jeopardize financing; could result in a loss of business that may not be recoverable; would cause uncertainty among lenders, employees and shippers and would prevent the realization of the economic benefits from the I&M acquisition transaction"); NS/Power Distribution, slip op. at 3 ("[t]o stay the transfer would delay the coordination and thereby prevent the carriers from realizing" savings in capital and operating costs to be achieved through coordination").

²⁷ See Decision No. 106, served Dec. 7, 1998 (expediting resolution of dispute, stating "public interest in expanded CSX vs. NS competition made possible by the CSX/NS/CR transaction must be protected, and a resolution of this matter must be made well in advance of Day One"). See also CSX/Train Operations, slip op. at 5 (finding that coordination will produce public transportation benefits "strongly militates against a stay"); NW/Power Distribution, slip op. at 3 ("[t]o stay the transfer would delay these economies that have already been shown to be in the public interest").

CONCLUSION

The Board should decline to review the Fredenberger Award. If the Board does review the award, it should affirm the award in all respects. The petition for a stay of the award should be denied.

Respectfully submitted,



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Dated: March 24, 1999



SURFACE TRANSPORTATION BOARD

Finance Docket No. 33388 (Sub-No. 88)

**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
(ARBITRATION REVIEW)**

DECLARATION OF R. CHAPMAN VI

R. CHAPMAN VI deposes and says:

1. I am Assistant Vice President Accounting Operations for Norfolk Southern Corporation ("NSC"), the corporate parent of Norfolk Southern Railway Company ("NSR"). I am responsible for all of NSC's expenditure accounting functions, including the operations of NSR's Payroll Accounting Department.
2. I am submitting this declaration in support of NSR's Reply to the petition for review and petition for a stay of the Brotherhood of Maintenance of Way Employees ("BMWE") in the above-captioned arbitration review proceeding. BMWE has asked the Board to review the January 14, 1999 New York Dock arbitration award rendered by neutral referee William E. Fredenberger, Jr. and, pending the Board's review, to stay the Fredenberger Award, including the implementing agreement ("the Arbitrated Implementing Agreement") that it adopts. The purpose

of this declaration is to explain the efforts that are underway to prepare for implementation of the authorized transaction and to explain the effect that even a brief stay of the Arbitrated Implementing Agreement would have on our ability to prepare for a smooth transition in employment and payroll systems on "Day One," which is scheduled for June 1, 1999.

3. NSC and NSR began planning for Day One nearly two years ago, shortly after NSR, CSX Transportation, Inc. ("CSXT"), Consolidated Rail Corporation ("Conrail") and their corporate parents announced their plans to seek STB approval to divide the use and operation of Conrail's properties. Day One will place significant demands on the NSR Payroll Accounting Department. On that day, NSR will expand its workforce by approximately 11,000 former Conrail employees, nearly half the number of active employees now included in NSR's payroll system.

4. NSR's expanded workforce will include approximately 1,900 BMW-represented maintenance of way employees who will be allocated to NSR pursuant to the Arbitrated Implementing Agreement. Moreover, NSR is preparing to take over payroll accounting functions for Conrail as operator of the Shared Assets Areas only thirty days after Day One, on July 1, 1999.

5. We are now approaching the final stage in preparation for the transition. We have completed the programming involved in modifying our payroll system to include our allocated Conrail employees, have obtained current payroll data for Conrail's existing employees, and, based on the implementing agreements reached with the representatives of each craft of employees, have identified most of the approximately 11,000 individuals who will become employees of NSR. We are planning to add data for those employees to the NSR payroll system during the weekend of April 10, 1999.

6. Appendix A of the Arbitrated Implementing Agreement governs the identification of NSR's allocated maintenance of way employees. Appendix A prescribes certain rules for allocating Conrail's available maintenance of way employees based, in most cases, on the positions they are holding on "allocation date." "Allocation date" is established by written notice, which the railroads served on February 5, 1999.

7. BMWWE has not sought to stay the "allocation date" or otherwise to interfere with the railroads' identification of their allocated maintenance of way employees pursuant to the Arbitrated Implementing Agreement. BMWWE acknowledges that the railroads already have effected allocation pursuant to their February 5, 1999 notice, and states that this allocation is "on paper only." Pet. at 5. BMWWE is correct in the sense that employment changes based on the arbitrated allocation arrangement will not be made until Day One. But BMWWE is incorrect if it means to suggest that the completed allocation process is of little practical consequence, could readily be modified, or that a stay would have little effect on implementation of the transaction. In fact, the results of the allocation of maintenance of way employees are informing the Department's remaining preparations for Day One, and any significant delay in that process at this juncture would jeopardize NSR's ability to effect a smooth transition in employment and payroll systems on Day One.

8. Between now and Day One, we must continue validating and testing our databases and systems and collect, correct, and process additional payroll information and documentation. Our primary goal is to ensure that our new employees make a seamless transition to NSR without disruption in pay or payroll-related services -- an objective critical to the success of NSR's new operations.

9. To avoid disruption, we must have accurate information about our employees' addresses, Social Security numbers, work locations, tax withholding elections, pay rates, vacation and personal leave credits, and direct deposit instructions, as well as all necessary information and authorizations for withholding and processing third party payments (such as contributions to 401(k) savings plans, loan payments, union dues, child support payments, and the like) and for paying benefits under Conrail's Supplemental Unemployment Benefits Plan.

10. We also need to obtain and process information concerning payroll advances, which NSR will offer to Conrail employees who will experience a change in pay date and/or frequency when they begin working for NSR.

11. Moreover, regardless whether former Conrail employees choose to change their withholding elections when they come to work for NSR, by law NSR must obtain from each employee a new federal tax form W-4 and, in certain states, comparable state income tax withholding forms.

12. Finally, we must have accurate payroll systems and databases in place sufficiently in advance of Day One to enable NSR to train new personnel in the use of NSR's payroll system. In order to conduct effective training, the payroll system must include all of NSR's allocated employees. We are planning to begin payroll training of our new maintenance of way supervisors on April 19, 1999, in order to complete training in advance of Day One, with minimal disruption to ongoing maintenance of way supervision. Training is scheduled to be conducted division by division, until the second or third week of May.

13. NSR is planning to contact all of our allocated prospective employees, including our allocated BMWE-represented employees, by mail approximately 45 days in advance of Day One. These mailings, to be sent in mid- to late April, will welcome our prospective employees to

NSR and request verification or correction of payroll data, including instructions for direct deposit of paychecks. The April mailing also will notify our prospective employees of their NSR pay cycles and will offer interest-free recoverable advances to any employees who will experience a change in their pay cycles when they begin working for NSR. We also will enclose forms W-4 and any required state tax withholding forms for signature and return.

14. The April target date for the mailing was selected to permit NSR ample time to receive and process responses from employees and to test the payroll system and databases. In the meantime, we will continue to test and correct our system and data by comparing test payroll runs with actual Conrail payroll records.

15. Depending on its nature, scope and duration, even a brief stay of the Fredenberger Award could disrupt these preparations and, in doing so, jeopardize our ability to issue timely and accurate paychecks to our allocated maintenance of way employees after Day One.

VERIFICATION

Pursuant to 28 U.S.C. § 1746, I declare under penalty of perjury that the foregoing
is true and correct. Executed this 24 day of March, 1999.


R. CHAPMAN VI

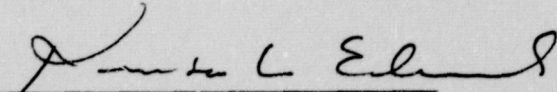
CERTIFICATE OF SERVICE

I hereby certify that I have, this 24th day of March, 1999, caused copies of the foregoing Reply Of Norfolk Southern Railway Company To Petition For Review And Petition For A Stay Of Brotherhood Of Maintenance Of Way Employees to be served, by hand, upon the following:

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Krista L. Edwards

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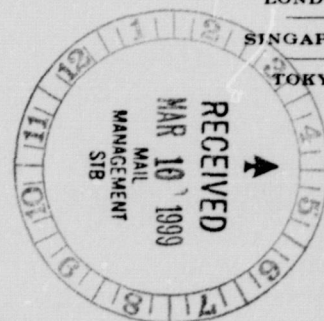
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WRITER'S DIRECT NUMBER
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March 10, 1999



Hand Delivery

Honorable Vernon A. Williams
Secretary
Surface Transportation Board
1925 K Street, N.W.
Suite 700
Washington, D.C. 20423

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Re: Finance Docket No. 33388 (Sub-No. 88)
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
(Arbitration Review)

Dear Mr. Williams:

I enclose for filing in the above-referenced proceeding the original and ten copies of Carriers' Joint Motion For Further Extension Of Time.

Thank you for your attention to this matter.

Sincerely,

Jeffrey S. Berlin
Attorney for Norfolk Southern
Railway Company

Enclosures

cc: Joseph Guerrieri, Jr.
Richard S. Edelman
Donald F. Griffin

193633

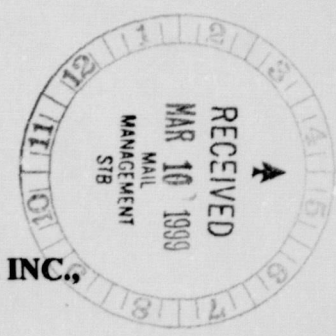
SURFACE TRANSPORTATION BOARD

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MAR 11 1999

Finance Docket No. 33388 (Sub-No. 88)

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**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
(ARBITRATION REVIEW)**

JOINT MOTION FOR FURTHER EXTENSION OF TIME

Norfolk Southern Railway Company ("NSR"), CSX Transportation, Inc. ("CSXT"), and Consolidated Rail Corporation ("Conrail") (collectively, "the railroads") jointly request an additional extension of the deadlines for replying to the petition for review and petition for stay filed by the Brotherhood of Maintenance of Way Employees ("BMWE") on February 12, 1999, and February 22, 1999, respectively. The railroads request an extension to and including March 24, 1999.

BMWE's February 12, 1999 petition seeks review, pursuant to 49 C.F.R. § 1115.8, of an arbitration award rendered by neutral referee William E. Fredenberger, Jr. on January 14, 1999, under the New York Dock conditions imposed by Decision No. 89. In support of its petition, BMWE submitted a thirty-seven page brief and hundreds of pages of exhibits, including large portions of the underlying arbitration record. BMWE's February 22, 1999 petition for stay incorporates by reference most of the text of BMWE's petition for review and asks the Board to stay the Fredenberger Award pending the Board's consideration of the petition for review.

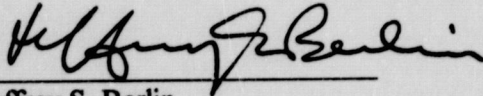
The Board has previously enlarged the briefing schedule in this proceeding. By decision served January 29, 1999, the Board granted BMW's motion to extend the filing deadline for BMW's petition for review, from February 3, 1999 to February 12, 1999. By decision served February 24, 1999, the Board granted the railroads' motion to extend the deadlines for replying to both of BMW's pending petitions, to March 12, 1999.

This request for an additional extension is based on two grounds. First, CSXT and NSR are currently engaged in settlement discussions with BMW. Representatives of CSXT and NSR have separately met with BMW representatives. Additional meetings are scheduled for the week of March 15, 1999. Settlements with BMW would make it unnecessary for the Board to act on BMW's petition for review of the Fredenberger Award and petition for stay of the award. The railroads believe that the importance of pursuing a successful outcome in the ongoing discussions justifies the railroads' dedicating staff attention and resources principally to the negotiation forum. An extension to March 24, 1999 should allow an adequate opportunity for the parties to meet, as already scheduled, and to engage in further communications as may be called for in the interest of pursuing possible settlements. Additionally, the issues presented by BMW's petition for review, together with the voluminous arbitration record, justify the further extension of time.

On March 8, 1999, counsel for the railroads contacted counsel for BMW and asked for BMW's consent to the requested further extension of time. BMW has not, however, responded to the railroads' request.

On the basis of the foregoing, the railroads request that the deadlines for responding to BMW's petitions for review of the Fredenberger Award and for stay of the award be extended to and including March 24, 1999.

Respectfully submitted,



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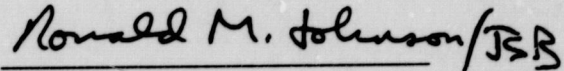
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Dated: March 10, 1999



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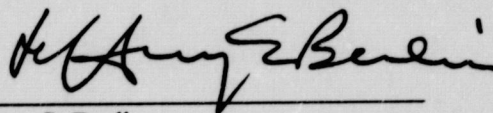
CERTIFICATE OF SERVICE

I hereby certify that I have, this 10th day of March, 1999, caused copies of the foregoing Joint Motion For Further Extension Of Time to be served, by hand, upon the following:

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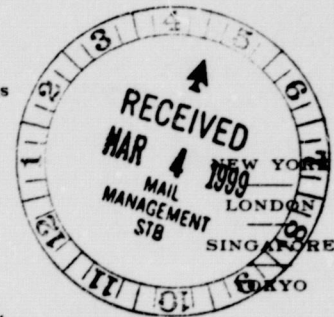
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March 4, 1999

Hand Delivery

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Office of the Secretary

MAR 05 1999

Public Record

Re: Finance Docket No. 33388 (Sub-No. 88)
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
(Arbitration Review)

Dear Mr. Williams:

I enclose for filing in the above-referenced proceeding the originals and ten copies of the Reply Of Norfolk Southern Railway Company To Petition For Review Of The International Association Of Machinists And Aerospace Workers, and Extracts From Arbitration Record Submitted By Norfolk Southern Railway Company In Support Of Its Reply In Opposition To Petition For Review Of The International Association Of Machinists And Aerospace Workers.

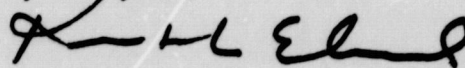
This is an action for review of an arbitration award rendered under Article I, § 4 of the New York Dock conditions. Under the Board's rules, 49 C.F.R. §§ 1115.2(d), 1115.8, the reply to a petition for review is not to exceed 30 pages in length (including exhibits). The text of our reply memorandum is 13 pages in length. However, the accompanying excerpts exceed the page limitation. The excerpts may assist the Board's consideration of the petition for review in this proceeding. Norfolk Southern Railway Company therefore respectfully requests waiver of the Board's rules as necessary to permit filing of the enclosed volume of excerpts.

A diskette containing a copy of the reply memorandum in WordPerfect 6.1 format is also enclosed.

Honorable Vernon A. Williams
March 4, 1999
Page 2

Thank you for your attention to this matter.

Very truly yours,

A handwritten signature in black ink, appearing to read "K. L. Edwards", written in a cursive style.

Krista L. Edwards

*Attorney for Norfolk Southern
Railway Company*

Enclosures

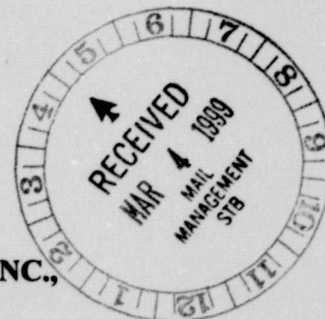
cc: Joseph Guerrieri, Jr.
Richard S. Edelman
Donald F. Griffin

MAR 05 1999

Part of
Public Record

SURFACE TRANSPORTATION BOARD

Finance Docket No. 33388 (Sub-No. 88)



**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
(ARBITRATION REVIEW)**

**EXTRACTS FROM ARBITRATION RECORD
SUBMITTED BY NORFOLK SOUTHERN RAILWAY COMPANY
IN SUPPORT OF ITS REPLY IN OPPOSITION
TO PETITION FOR REVIEW OF THE
INTERNATIONAL ASSOCIATION OF MACHINISTS
AND AEROSPACE WORKERS**

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*Counsel for Norfolk Southern Railway
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Dated: March 4, 1999

**EXTRACTS FROM ARBITRATION RECORD
SUBMITTED BY NORFOLK SOUTHERN RAILWAY COMPANY
IN SUPPORT OF ITS REPLY IN OPPOSITION
TO PETITION FOR REVIEW OF THE
INTERNATIONAL ASSOCIATION OF MACHINISTS
AND AEROSPACE WORKERS**

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- A. Carriers' Prehearing Submission, Part II, December 7, 1998
- B. Declaration of Gary W. Woods, December 7, 1998
- C. Declaration of Tony L. Ingram, December 7, 1998
- D. Hearing Transcript, December 18, 1998 (excerpt)



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

ARBITRATION PURSUANT TO ART. I, § 4
OF THE NEW YORK DOCK PROTECTIVE CONDITIONS

NORFOLK SOUTHERN RAILWAY COMPANY,
CSX TRANSPORTATION, INC., and
CONSOLIDATED RAIL CORPORATION

and

BROTHERHOOD OF MAINTENANCE OF WAY
EMPLOYES; INTERNATIONAL BROTHERHOOD
OF BOILERMAKERS, IRON SHIP BUILDERS,
BLACKSMITHS, FORGERS AND HELPERS;
BROTHERHOOD RAILWAY CARMEN DIVISION-
TRANSPORTATION COMMUNICATIONS
INTERNATIONAL UNION; INTERNATIONAL
BROTHERHOOD OF ELECTRICAL WORKERS;
NATIONAL CONFERENCE OF FIREMEN AND
OILERS; INTERNATIONAL ASSOCIATION OF
MACHINISTS AND AEROSPACE WORKERS;
and SHEET METAL WORKERS' INTERNATIONAL
ASSOCIATION.

Referee
William E. Fredenberger, Jr.

**CARRIERS'
PREHEARING
SUBMISSION**

PART II

December 7, 1998

PART II
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Finance Docket No. 33388

ARBITRATION PURSUANT TO ART. I, § 4
OF THE NEW YORK DOCK PROTECTIVE CONDITIONS

and

**BROTHERHOOD OF MAINTENANCE OF WAY
EMPLOYES, *et al.***

Referee
William E. Fredenberger, Jr.

This is Part II of the Carriers' prehearing submission in support of their proposed New York Dock implementing agreement. This part of the submission is directed to NSR's proposal for arranging maintenance of way employees in support of its expanded operations. The proposal takes the allocation of employees described in Part I of the submission as its starting point, and explains how NSR intends to integrate those allocated forces into its existing maintenance of way operations, and how NSR intends to use outside contractors to complete certain construction and upgrading projects necessary for timely implementation of NSR's Operating Plan. This proposal is supported

by the legal standards, facts, and exhibits introduced in Part I of the submission and this Part II and by the Declarations of Gary W. Woods, NS' Assistant Vice President Engineering (Exh. NSR-2); Tony L. Ingram, the NS General Manager responsible for NSR's operations on its allocated Conrail lines (Exh. NSR-1); and Timothy C. Tierney, Conrail's Acting Chief Engineer (Carriers' Exh. 2).

1. NSR's Operating Plan

The proposal we make here was first described in the Operating Plan NSR submitted in support of its application for STB approval of the Conrail transaction. The Operating Plan (which consists of more than 450 pages of text and appendices) contains a comprehensive description of NSR's plan to operate the allocated former Conrail properties as part of the expanded NSR system, including maintenance of way operations.

The expanded NSR system will be structured around eight principal routes, which will be linked to handle traffic between any two points on the system.¹ NSR's principal east west route, the Penn Route, will be formed by combining and upgrading Conrail's former Lehigh, Reading, Harrisburg, Pittsburgh, Cleveland and Chicago lines. The new Penn Route will be the shortest route from three important eastern markets (northern New Jersey, Philadelphia/southern New Jersey, and Wilmington/Baltimore/Washington) to points in the Midwest, including Chicago, with intermediate connections to mainline routes serving the northeast and eastern Canada, the southeast, and Detroit. Ingram Decl. ¶ 10. Other new routes will be formed by combining former Conrail main lines and segments with adjoining NSR lines. NSR's new Southern Tier Route, for instance, connects Conrail's

¹ The eight new routes are: the Penn Route, the Southern Tier Route, the Piedmont Route, the Shenandoah Route, the Southwest Gateway Route, the Mid-South Route, the Bridge Route, and the Butler Cut-off Route. These routes are depicted on the maps submitted as Exhibits NSR-3 through NSR-9.

former Southern Tier Line with NSR's current mainline from Buffalo to Cleveland to form a viable through route between Suffern, New York and Cleveland. Ingram Decl. ¶ 11.

The expanded route system will enable NSR to provide efficient, seamless service between points on NSR's existing and allocated lines. These new single-line operations will eliminate the delay, risk, and expense associated with interchange operations. And NSR will take advantage of other opportunities to eliminate and streamline intermediate handling by consolidating yard operations and by grouping traffic according to traffic type and service needs. Ingram Decl.

¶ 12.

These operational changes will produce immediate improvements in train service. Shippers will benefit directly from the expansion of single-line service and the elimination of costly and time-consuming interchange operations. NSR will offer new and more competitive train schedules for every major traffic type currently handled by Conrail (including coal, automotive, general merchandise, and intermodal).² Ingram Decl. ¶ 13.

NSR's expanded system will face stiff competition. By design, NSR and CSXT will be placed in head-to-head competition for most of the traffic that currently moves exclusively or principally by Conrail. Meeting that competition will require NSR to offer responsive and efficient service, which in turn will produce immediate and substantial transportation benefits for Conrail's existing rail customers. But meeting rail competition alone will not suffice. To a large degree, both financially and operationally, the public benefits of the Conrail Transaction depend on NSR's ability to expand the traffic base by attracting freight that is currently moving by truck. NSR's expanded

² NSR's planned train schedules are included in its Operating Plan (Carriers' Exh. A-4) at pages 140, 146, 149-51, 156, 162, and 166.

single-line routes are designed to compete directly with highway traffic (particularly in the I-70, I-80, I-81, I-85, I-90, and I-95 highway corridors). Ingram Decl. ¶ 14.

Competition will be most intense for NSR's intermodal traffic, which accounts for a large share of the projected traffic on the Northern Region. Intermodal service involves the movement of standardized containers that can be shipped by (and readily interchanged between) two or more modes of transportation, with minimal intermediate handling. Because containers can be handled readily by truck, intermodal is the railroad's most service- and time-sensitive traffic. NSR's ability to compete for intermodal traffic depends on the railroad's ability to offer frequent, on-time service on very demanding train schedules. Ingram Decl. ¶ 15.

NSR projects traffic increases on many line segments, yards, and terminals on the expanded system. Traffic density will increase immediately at certain locations as a result of traffic shifts related to the route restructuring. For example, traffic on Conrail's high density Harrisburg Line (between Harrisburg and Reading, Pennsylvania) will increase, with the segment between Harrisburg and Rutherford, Pennsylvania handling an average of 59 trains per day, 13 more than Conrail currently operates on that segment. NSR Operating Plan, Appendix D, at 462 (Carriers' Exh. A-5). NSR's new Southern Tier Route is currently expected to handle six trains per day more than Conrail now operates on the route segment between Corning and Buffalo, New York. And NSR will operate on average 20 more trains per day on the segment of Conrail's rail line between White and Cleveland, Ohio. Ingram Decl. ¶ 16.

NSR must make large investments in equipment, infrastructure, and facilities to implement the planned train operations on its expanded system. NSR's Operating Plan described more than \$500 million of capital improvement and expansion projects that NSR plans to complete in the first three years of its new operations. Since submitting the Operating Plan, NSR has further

refined its capital plan and has identified a number of additional projects that are equally necessary to the initial implementation of the transaction. These projects include installation of new track connections and capacity improvements involving, to varying degrees, each of NSR's new single-line routes. On the Penn Route alone, NSR is planning to complete 17 separate capital improvement projects, involving the installation or upgrading of approximately 80 miles of track. Ingram Decl. ¶¶ 24-25; Exh. NSR-12.

Most of the planned capital projects involve the construction of new track necessary to improve the efficiency and capacity of NSR's new routes. NSR is building several new track connections that will significantly enhance train service by avoiding the slow and/or circuitous connections currently required for through train operations at those locations. Ingram Decl. ¶ 26.

Many of NSR's planned capital projects are required because NSR will be operating existing rail lines as parts of new single-system routes, adding and shifting traffic densities in the process. To operate successfully, NSR needs to be able to move freight quickly and efficiently over all segments of its new routes. To that end, NSR will invest heavily in capacity improvements, such as new and expanded passing sidings, double-track cross-overs, and additional yard track in order to prevent operational "bottlenecks" at locations where the railroad will handle increased traffic volumes. Ingram Decl. ¶¶ 28, 33.

Several lines that will form principal segments in NSR's planned corridor operations on the allocated lines were operated as secondary lines by Conrail and will require substantial upgrading to accommodate expected traffic patterns and volumes. NSR plans to invest more than \$31.7 million in capacity and clearance improvements on the Lehigh Line, which will form a key segment of NSR's new Penn Route. Conrail operated the Lehigh Line as a secondary line to its Trenton Line between Bound Brook, New Jersey and Philadelphia, which is to be allocated to CSXT

pursuant to the Transaction. NSR also plans to invest up to \$35 million to upgrade its allocated portion of Conrail's Southern Tier Line. Conrail operated the Southern Tier as a secondary route to its major east-west "Water Level" route, which will be allocated to CSXT. NSR's investment will enable it to handle two-directional time-sensitive freight (especially intermodal traffic) and otherwise to operate the Southern Tier as another major east-west corridor. Ingram Decl. ¶ 34.

NSR's Operating Plan (at pages 262-72) incorporates a comprehensive plan for accomplishing its transaction-related capital projects and coordinating maintenance of way operations in support of train operations on its expanded system. NSR's plans for its expanded maintenance of way operation are vital to its planned train operations and ability to achieve the public benefits of the Conrail Transaction. No degree of coordination in train operations will reduce transit times or otherwise improve customer service if the railroad fails to maintain its rail infrastructure. Track conditions, more than any other single factor, contribute to train delays and disruptions and compromise safe train operations. Operations of trains over track causes wear to individual components (i.e., rails, ties, fasteners, etc.) and to the geometry and alignment of the track structure as a whole. Replacement of those worn components and correction of geometry and alignment is continually necessary to operate trains safely at the designed speeds. Loose bolts, if undetected, can literally derail a train. Likewise, any number of track conditions -- for example, a rail that has cracked from heavy loads or weather conditions or that has separated due to defective welds, or a low joint resulting from the stress of heavy loads -- can, if neglected, cause catastrophic operating problems. To prevent such problems, NSR adheres to the highest reasonable maintenance standards. Daily inspections take place on NSR's mainline system. NSR maintains its track to standards that exceed both federal requirements and the preventive maintenance standards of other U.S. railroads, including Conrail. And NSR invests heavily in ongoing preventive maintenance and capital renewal on all of

its lines. Through these and other practices, NSR consistently achieves the highest safety and service record of all U.S. Class I railroads. Ingram Decl. ¶ 17.

Maintenance of way work must be done in a way that minimizes interference with train operations. By their nature, thorough maintenance of way operations impose their own operational constraints. As essential as it is to train operations, line maintenance work also is inherently disruptive. Track must be placed under "slow orders" or taken out of service entirely, pending, during, and after maintenance of way operations. These delays and disruptions impair NSR's ability to meet train schedules and impose immediate and substantial costs on the railroad. The delay is substantially magnified when traffic must be detoured to other routes to avoid out-of-service track. The more traffic that is handled over the line, the more disruption that is caused by each maintenance operation. Disruption to traffic on major arteries has a negative ripple effect on train schedules and operations across the system. Moreover, because lines with greater traffic density and faster trains generally require more track maintenance, maintenance of way operations pose the greatest operational interference just where interference is least tolerable. Ingram Decl. ¶ 18.

The competition for track time (that is, the balance between transportation and maintenance of way demands to use the track) is not unique to the Transaction. It has become a matter of industry-wide concern as competition between carriers and advances in technology have required and enabled carriers to operate longer, faster, and more frequent trains. But the challenges presented by implementation of the Conrail Transaction are particularly pronounced, both because the train schedules NSR intends to operate are so demanding, and because the very structure of the Transaction complicates the scheduling of maintenance work. For much of the traffic on the Northern Region, the difference of only a few hours' transit time on a long-haul move will literally render NSR noncompetitive. Ingram Decl. ¶ 22.

Maintenance of way related disruption can never be eliminated, but it must be controlled if NSR is to compete effectively on its expanded system. NSR's Operating Plan addresses these operational and competitive demands in a manner that will enable the railroad to maintain its allocated former Conrail properties in accordance with NSR's high maintenance standards, while facilitating efficient management of track time. As explained further in this part of the submission, NSR plans to conduct maintenance operations in a manner that will permit it to perform repair and renewal projects quickly and to schedule projects to avoid interference with train operations. In addition, NSR plans to enhance the efficiency of maintenance of way operations on its expanded system by consolidating operations and eliminating duplicative facilities.

2. NSR's Existing Maintenance Of Way Operations

System-wide, NSR currently employs approximately 3,650 active BMWF-represented maintenance of way employees. The existing NSR properties are divided, for management purposes, into nine operating divisions which are organized for certain line maintenance functions into two operating regions (Eastern and Western). Woods Decl. ¶ 7.

Management of NSR's maintenance of way work is centralized under a management structure and workforce arrangements that promote system-wide planning, coordination, and administration of maintenance of way functions. The Maintenance of Way and Structures ("MW&S") Department, headquartered in Atlanta, Georgia, is the largest of the four subdepartments and groups within the NS Engineering Department. The Engineering Department also has responsibility for infrastructure design and for installation and maintenance of communications and signal systems on the NSR properties.

The MW&S Department is organized into three major functional groups, each with responsibility for one of the railroad's three core maintenance of way operations: (1) line maintenance

-- the day-to-day repair and maintenance of track and facilities (including bridges and railway structures); (2) program maintenance -- the systematic renewal and replacement of the railroad's infrastructure (i.e., rail and ties) as part of the railroad's capital program; and (3) roadway equipment maintenance -- the fabrication and repair of machinery used in line maintenance and program maintenance work. Woods Decl. ¶ 8.

The managerial and workforce arrangements for these various operations are further subdivided functionally and geographically. Regular line maintenance and certain program maintenance work is performed in each of the nine operating divisions under the direction of a Division Engineer. Each Division Engineer, in turn, reports to one of two Chief Engineers Line Maintenance, whose responsibilities correspond to the Eastern and Western Operating Regions. This organizational structure facilitates centralized planning, budgeting, scheduling, job bulletining, and administration, and places most management officials in frequent and direct contact with the line maintenance operations. Within this structure, most MW&S officers are employed as first-line nonagreement Track Supervisors and Assistant Track Supervisors, with 24-hour, seven-day per week responsibility for track conditions within their assigned territories. Woods Decl. ¶ 9.

(i) Track Supervisors direct so-called "local forces," which are primarily engaged in day-to-day line maintenance functions. Local forces include employees assigned to all-purpose headquarters "gangs," as well as certain machine operators and welders.³

NSR's method of operations stresses preventive maintenance. More than half of NSR's BMWE-represented employees hold positions in local forces. In addition to day-to-day line

³ A headquarters gang typically is composed of a foreman and three to four laborers, who perform general maintenance functions on an assigned Track Supervisor's territory. Gangs may be either "fixed" or "floating," depending on whether the employees' assignments begin and end at the same location each work day. Woods Decl. ¶ 11.

maintenance, local forces perform some upgrade work and much of the support work for program projects (e.g., dumping ballast for tie renewal or surfacing work or unloading rail and distributing track material for rail renewal work). Woods Decl. ¶ 12.

The work of these local forces is augmented by various work gangs and machines that travel across Track Supervisor territories within an operating division. In this category are various small, mechanized gangs used in certain ongoing renewal and preventive maintenance projects and/or to perform day-to-day repairs. These gangs are assigned by the Division Engineers, who ensure their efficient use by deploying equipment (e.g., bulldozers, Gradalls and cranes) and the associated operators throughout the division to meet operating needs. For example, smoothing gangs are organized and equipped to restore track alignment and geometry over certain special track segments, such as curves and bridge approaches. Tie patch gangs are used to replace deteriorated crossties on small segments of track, such as particular curves or sidings. And gauging gangs restore particular sections of track to standard gauge. Depending on the gang's specialized function, its work may be scheduled in connection with the production season. For example, crossing gangs handle repairs to road crossings on track segments undergoing rail renewal, tie renewal, or surfacing by program gangs. Additionally, depending on operating needs, some more specialized machines (e.g. lucky-loaders, yard cleaners, brush cutters, rail trains) are used across divisions throughout the operating regions to maximize their use each work season. Woods Decl. ¶ 13.

The work rules and seniority arrangements governing track forces on most of NSR's properties complement these maintenance practices and afford relatively broad and stable work opportunities to NSR's BMW-represented employees. On most of the former NW system properties, track forces are arranged on two sets of track rosters corresponding to the Eastern and

Western seniority regions.⁴ Track employees may bid onto positions working at any location within their region, and the gang positions are not rebulletined as the gang moves within the region. Woods Decl. ¶¶ 14-16.

Assistant Track Supervisors, each accompanied by a BMWWE-represented employee, perform regularly scheduled daily track inspections over their designated territories in order to ensure that track is maintained to federal safety standards and NSR's more stringent standards. In the course of performing these track inspections, Assistant Track Supervisors, as well as BMWWE-represented employees, perform remedial track repairs -- such as tightening or replacing bolts in rail joints, removing debris and obstructions along the track, cleaning switches, and correcting gauge width in a localized area -- which can be performed without deploying a full gang of employees.⁵ These inspect-and-repair functions are critical to NSR's operations, providing the first line of defense against track-related accidents and incidents. NSR typically selects and promotes Assistant Track Supervisors from the ranks of BMWWE-represented track employees, on the basis of their demonstrated skills and qualifications for this safety-critical work. NSR credits these arrangements as a major factor contributing to its excellent safety record. Woods Decl. ¶ 17.

(ii) The inspection, repair, and renewal of railway bridges and buildings (so-called "B&B functions") are managed by a separate set of nonagreement B&B Supervisors, also under the

⁴ The basic agreement covering maintenance of way employees on the lines of the former NW Proper and Wabash railroads is the July 1, 1986 agreement between the former NW and BMWWE (the "NW-Wabash/BMWWE Agreement") (Carriers' Exh. A-29), as subsequently amended. A separate BMWWE schedule agreement, originally effective February 1, 1951, applies to the remaining properties of the former NKP, which also adjoin the allocated Conrail lines. Maintenance of way operations on the lines of the former Southern Railway system are governed by an NSR/BMWWE agreement dated October 1, 1972, as amended. Woods Decl. ¶ 15.

⁵ NSR's use of Assistant Track Supervisors to perform remedial repairs has been upheld in arbitration. Award, Brotherhood of Maintenance of Way Employees and Norfolk & Western Ry., SBA (Track Patrol Dispute), July 29, 1991 (LaRocco, Arb.) (Carriers' Exh. C-3.)

direction of the Division Engineers. In addition to responsibility for bridge inspection, B&B Supervisors manage gangs consisting of BMW-represented employees in the classifications of carpenter, painter, foreman, assistant foreman, drawbridge tender, and electric welder engaged in both day-to-day maintenance and capital program work. Each B&B Supervisor typically manages three to five carpenter and/or paint B&B gangs (depending on the territory), composed of four to five employees each. These gangs operate within designated seniority divisions established under the NW-Wabash/BMW Agreement. These arrangements give employees holding positions on B&B gangs relatively stable, year-round employment. Woods Decl. ¶ 18.

(iii) Different managerial and workforce arrangements are used for the railroad's major capital improvements and maintenance of way production projects. These projects are performed principally by three categories of large, highly mechanized gangs — rail gangs (which remove and replace worn rail); timber and surfacing ("T&S") gangs (which replace crossties and resurface track); and surfacing gangs (which restore track geometry over designated track segments).

The work of these large gangs, and of certain ancillary support gangs, is scheduled ("programmed") in advance of the production season and is managed on a system-wide basis under the direction of the Chief Engineer Program Maintenance and subordinate officers with regional or system-wide responsibility for certain program maintenance functions or processes. Most of the officers in program maintenance operations are employed as nonagreement first-line supervisors, e.g., T&S Supervisors, Welding Supervisors, and Rail Supervisors, who supervise gangs of track employees organized and equipped to perform program maintenance functions. Woods Decl. ¶¶ 19-20.

Depending on the requirements of its capital program, NSR operates certain production gangs as "designated programmed gangs" ("DPGs"), which are governed by a separate

collective bargaining agreement in effect on the lines of the former NW system.⁶ The DPG arrangement permits NSR to operate certain rail and T&S gangs over the entire former NW system lines, without regard to the territorial limitations otherwise applicable to the employment of track forces on those properties. Under the DPG Agreement, NSR maintains consolidated rosters (for track laborers, machine operators, foremen, and assistant foremen) composed of all track employees on the former NW properties. Gangs bulletined as DPGs stay together throughout the production season, as the program work takes the gang across seniority boundaries. As will be discussed further below, NSR's DPG operations facilitate the efficient and safe use of specialized equipment and employees, minimize the disruption associated with major production work, and promote stable and year-round employment of maintenance forces. NSR's production work, including DPG operations, is conducted under flexible work rules that enable the carrier to schedule work during non-peak traffic times so as to minimize operational interference. Woods Decl. ¶¶ 21-22.

(iv) Program maintenance, line maintenance and B&B functions are supported by equipment repairmen, who work as part of or with certain gangs to perform preventive maintenance and repairs on equipment used by those gangs. Work equipment is used across the NSR system to meet operational needs and maximize productive use of the equipment. Employing qualified repairmen in field operations optimizes equipment use by minimizing lost time associated with routine maintenance and equipment malfunctioning. Equipment repairmen who work within operating divisions are under the direction of a Roadway Equipment General Supervisor Work Equipment, and, on most of the NSR system (including the properties governed by the NW-Wabash/BMWE

⁶ As described further, below (at pp. 29-30), the former NW obtained the right to operate DPGs pursuant to an agreement that resulted from an arbitration following the conclusion of the 1988 round of national BMWE bargaining. The terms of the DPG arrangement are set forth in an Arbitrated Agreement dated June 12, 1992 ("the DPG Agreement") (Carrier's Exh. A-27).

Agreement), work under corresponding seniority arrangements. Equipment repairs and renewals that cannot be handled in the field are performed by Shopcraft employees in NSR's system equipment repair and refurbishment shop located in Charlotte, North Carolina. Woods Decl. ¶ 37.⁷

NSR manufactures and refurbishes much of the material used in its track work. NSR's rail welding plant located at Atlanta, manufactures quarter-mile continuous welded rail segments, which are distributed and installed throughout the NSR system. NSR also manufactures or rebuilds frogs and similar switch components, and other track parts, in its own facilities located in Atlanta, Georgia, Birmingham, Alabama, and Roanoke, Virginia. Woods Decl. ¶ 38.

(v) NSR's maintenance of way operations are supported by centralized administrative functions. Bulletining and bidding for most maintenance of way assignments are handled on a centralized basis by the Atlanta-based personnel office within the Engineering Department. This organizational structure promotes uniform and objective administration of seniority bidding and displacement rights, ensures effective notice of work opportunities, and frees local supervisors from responsibility for administration of the bulletining process. NSR conducts skills training programs for certain maintenance of way employees in its system training facility located in McDonough, Georgia. Centralized training ensures uniformity of instruction and methods related to equipment use, repair and maintenance, and safety practices. Woods Decl. ¶ 39.

⁷ NSR employs approximately 175 active Shopcraft employees involved in the fabrication, repair, and maintenance of equipment used in maintenance of way work in field and shop operations. Each of these employees is represented by one of six unions (collectively "the Shopcraft Unions"): the International Association of Machinists and Aerospace Workers ("IAM"); the Sheet Metal Workers International Association ("SMWIA"); the International Brotherhood of Electrical Workers ("IBEW"); the International Brotherhood of Boilermakers, Iron Ship Builders, Blacksmiths, Forgers and Helpers ("IBB"); the National Conference of Firemen and Oilers ("NCFO"); and the Brotherhood Railway Carmen Division of the Transportation Communications International Union ("BRC"). Woods Decl. ¶ 7.

Labor relations functions and all labor relations staff are organized on a centralized basis under the Labor Relations Department in Norfolk, Virginia, promoting efficient and uniform interpretation and application of work rules. Payroll functions for all maintenance of way employees likewise are coordinated and centralized through the Payroll and Accounting Office, located in Roanoke. Woods Decl. ¶ 40.

3. Conrail's Maintenance Of Way Operations

Conrail's BMWE-represented employees perform many of the same functions, under a different supervisory structure and workforce arrangements. Conrail's maintenance of way workforce is managed on a decentralized basis on each of Conrail's five operating divisions. Each operating division has a Division Engineer and four Assistant Division Engineers, who are responsible for all line and structures maintenance (as well as roadway equipment repair and communications and signals functions) on the division. Organizationally, the Division Engineers (and their subordinate officers) are part of the Service Delivery Organization in the Transportation Department. However, Division Engineers have dual reporting responsibilities. For purposes of capital planning, budgeting, and program work, the Division Engineers report to the Chief Engineer, who heads the Roadway assets subdepartment within the Conrail Engineering Department. On a day-to-day basis, each Division Engineer reports directly to one of five Division General Managers, who are the highest transportation and commercial officers on each division.

Below the assistant division engineer level, maintenance of way functions are directed by officers (Track Engineers) and agreement supervisors with territorial responsibility for certain gang operations. First-line supervision is performed by Track Supervisors and B&B Supervisors represented by the United Railway Supervisors' Association ("URSA"). Tierney Decl. ¶ 8.

Field labor relations functions and administration of bidding rules are likewise decentralized on Conrail. Divisions post job bulletins and process bids independently of other divisions, and each division has a separate management officer responsible for initial claims handling under the Conrail/BMWE Agreement. Tierney Decl. ¶ 9.

Conrail's BMWE seniority arrangements and work rules mirror the railroad's decentralized management structure. Each Conrail operating division is divided into two to four seniority districts -- a total of eighteen -- for purposes of day-to-day line maintenance, B&B, and equipment repair work. Each seniority district maintains separate rosters for track, B&B, and repairman classifications. Within these districts, work is typically performed by small gangs (of two to three employees) and by maintenance employees operating individual machines -- including cranes, bulldozers, and backhoes. Under the Conrail/BMWE rules governing day-to-day line maintenance, machines may be operated only to the limits of the operator's seniority district; Conrail must rebid the operator position each time the equipment crosses a seniority district line. To avoid such disruption, the railroad maintains equipment and operators on each seniority district and generally does not move equipment across seniority district lines for use in day-to-day line maintenance work. This arrangement requires Conrail to acquire and maintain more equipment than would otherwise be needed. Woods Decl. ¶ 57.

Track and bridge inspection functions are performed under the Conrail/BMWE Agreement by so-called "Inspect and Repair Foremen" (for track) and B&B Inspectors,⁸ both under the supervision of their URSA-represented supervisors. Scale inspection functions on parts of the Conrail system (including most of the lines to be operated by NSR) are performed by scale inspectors working under the terms of the Conrail/BMWE Agreement. On the lines of the former New York

⁸ On former New York Central property, bridge inspectors are represented by ARASA.

Central Railroad (certain of which will be allocated to NSR), scale inspectors are represented by IAM. Tierney Decl. ¶ 17.

For purposes of certain production functions, Conrail's eighteen seniority districts are arranged into two production regions and six production zones. Regional gangs can be used only for major program rail renewal work and for programmed undercutting. The zone arrangement governs other production work -- including the work of smoothing, surfacing and T&S gangs -- that is performed as part of Conrail's annual capital program. Under these arrangements, each regional or zone production gang may work across its respective region or zone without having to rebulletin whenever it crosses from one seniority district to another within the particular zone or region. Conrail's zones were established in 1992 to align with its then-existing six operating divisions. Tierney Decl. ¶¶ 14-15.

The eighteen BMW seniority districts are further divided into approximately 129 "working zones," which limit the mandatory exercise of Conrail/BMW seniority. Under the Conrail/BMW Agreement, an employee is required to exercise seniority to positions only within his designated "working zone." Under this arrangement, employees can avoid working by selectively designating working zones on which the railroad is unlikely to post assignments (such as one of the many working zones that have been reduced in size through the sale and abandonment of rail lines since the effective date of the Conrail/BMW Agreement). Tierney Decl. ¶ 12.

Conrail also performs certain centralized maintenance of way support functions with BMW-represented employees. Conrail's Canton, Ohio equipment repair shop performs repair and limited overhauls of roadway equipment. Rail welding functions are performed by an outside contractor in Conrail's Lucknow (Harrisburg), Pennsylvania plant. BMW-represented employees perform incidental loading, unloading, and inspection functions at the Lucknow facility. All other

maintenance of way support functions -- such as equipment and parts fabrication and supply of manufactured track work (for example, frogs and turnouts) -- are performed by outside contractors and suppliers. Tierney Decl. ¶ 18.

Conrail's maintenance of way arrangements reflect the railroad's unique origins and history. Conrail began its operations on April 1, 1976, as a product of federal initiatives, including the Regional Rail Reorganization Act of 1973 ("the 3R Act"), Pub. L. 93-236, 87 Stat. 985. The 3R Act reorganized the properties and operations of six bankrupt carriers, including Penn Central Transportation Company.⁹ The 3R Act, as amended by the Northeast Rail Service Act of 1981, Pub. L. 97-35, 95 Stat. 665, mandated single collective bargaining agreements for each of the fifteen labor organizations representing Conrail employees. The Conrail/BMWE Agreement negotiated pursuant to that provision replaced with a single unified agreement the patchwork of agreements and inconsistent craft lines that had governed maintenance of way employment on the properties of Conrail's predecessor railroads. But certain vestiges of Conrail's previous segmentation were preserved and remain to this day under the Conrail/BMWE Agreement. Conrail's eighteen seniority districts and multitude of "working zones" were established in compromise of the interests of employees and operating requirements for the newly established Conrail. In addition, certain craft lines on some of the predecessor railroads were "grandfathered" under the unified agreement. On the lines of the former New York Central Railroad, for instance, Conrail's roadway equipment repair forces are represented by IAM. BMWE represents all other Conrail equipment repairmen. Tierney Decl. ¶ 5.

⁹ Penn Central Transportation Company was created by the merger of the former Pennsylvania Railroad Company and the former New York Central Railroad Company.

Conrail originally inherited nearly 35,000 miles of track, and years of deferred maintenance. As summarized by a government analysis:

Simply stated, the condition of the bankrupt railroads, and especially that of the Penn Central, represents a transportation disaster unparalleled in the nation's history. Most of the bankrupt properties, including key yards, major main lines and essential shops are in a serious state of disrepair. Areas appearing in relatively good physical shape are that way largely due to cosmetic efforts - the track has been ballasted and smoothed, but, the rail and ties are both well beyond their normal lives.

United States Railway Association, Preliminary System Plan For Conrail, Vol. I, p. 42 (1975).

Between 1976 and 1987, Conrail undertook a massive rehabilitation of its railroad infrastructure, investing more than three billion dollars in federal funds. During the same period, under special abandonment arrangements and through the spin-off of properties to short line railroads and commuter rail operations, Conrail dramatically reduced the size of its system. The eighteen original seniority districts were considerably reduced in size in this process. For example, Conrail's Allegheny B seniority district is now less than half the size that it was when the districts were established in 1982. In total, the Conrail system was reduced by 14,300 miles, or 46 percent, between 1982 and today. Tierney Decl. ¶ 21.

This history leaves Conrail substantially behind other American railroads in the development of flexible working arrangements for maintenance of way operations. In particular, as we explain below, Conrail does not have a system-wide program maintenance arrangement or alternative work week and rest days rules comparable to those obtained in the 1988 round of nationwide bargaining with BMW. Woods Decl. ¶ 71.

Conrail's operations are further limited by their geography. The severe winter weather in Conrail's Northeast-Midwest territory prevents the railroad from working a production season longer than eight to nine months. The railroad's geography also limits the work available to its

employees, as it has no mild climate locations where it can move employees to work during the winter months. Woods Decl. ¶ 54.

In combination, Conrail's restrictive workforce arrangements and severe climate limit most of Conrail's BMW-represented employees to irregular and seasonal work, with frequent and unpredictable job changes as positions are abolished and rebulletined in response to operational needs. Conrail's BMW-represented employees have a substantially higher furlough rate, and work far fewer hours per year, than their counterparts on NSR. For all but the most senior employees, those who wish to maximize their work opportunities under this system must establish and exercise seniority on multiple districts and must travel to fill assignments as they become available. Woods Decl. ¶¶ 48.

4. Proposed Operation Of NSR-Allocated Lines

NSR intends to operate the allocated lines under its existing management structure and in coordination with its existing maintenance of way operations. NSR will establish three new operating divisions on the allocated properties -- to be designated the Dearborn, Pittsburgh, and Harrisburg Divisions -- and will operate those divisions as NSR's new Northern Region. The lines encompassed in the new divisions and Northern Region are depicted in the map submitted as Exhibit NSR-11, which also shows the relative size, arrangement, and location of NSR's nine existing operating divisions and two existing operating regions. Woods Decl. ¶ 42.

Major rail and T&S programs for the expanded NSR system will be planned and scheduled on a system-wide basis, without regard to the former territorial boundaries of NSR and Conrail. The key to the efficient performance of this work is NSR's proposal to extend its NW DPG arrangement to the allocated lines and to establish integrated DPG rosters including all line maintenance employees on the allocated and former NW system lines. Using its DPG arrangement and practices will enable NSR to perform programs on the allocated lines with minimal disruption to

NSR's planned train operations. Ingram Decl. ¶¶ 19-21. Adding new lines to the existing DPG arrangement also will enhance NSR's efficiency and reduce employee travel requirements by increasing the geographic concentration of DPG operations in areas (such as the states of Ohio, Indiana, Illinois, Pennsylvania, and West Virginia) that include both NSR-allocated and former NW system lines. Woods Decl. ¶ 54.

NSR will achieve similar efficiencies by arranging its allocated employees, for other maintenance of way functions, on newly established regional and divisional rosters. Specifically, NSR proposes to establish regional seniority (corresponding to the new Northern Region) for all classifications of track employees and to integrate its B&B and equipment repair forces on divisional rosters. This arrangement will permit NSR to deploy forces in order to meet operating needs and to make efficient use of equipment and manpower. Woods Decl. ¶ 60-62.

Consistently with these workforce arrangements, NSR intends to operate the allocated lines under the terms of the NW-Wabash/BMWE Agreement, which currently applies on most of the NSR lines adjoining the NSR-allocated properties. As explained further below and in the Woods Declaration, the NW-Wabash/BMWE Agreement contains scope and work rules that are consistent with NSR's proposed operations and necessary to support the train operations described in NSR's Operating Plan. Woods Decl. ¶¶ 67-82.

Finally, NSR intends to integrate the allocated lines into its existing system-wide maintenance of way support functions. NSR intends to supply welded rail and manufactured track materials for the expanded operation using its existing fabrication facilities. NSR also intends to use its own centralized facilities to maintain and refurbish roadway equipment used on the allocated lines and to supply parts and components for roadway equipment used on the allocated lines, and NSR will coordinate all administrative and personnel functions for the allocated lines with its existing

centralized support functions. These plans will produce immediate and long-term efficiencies by eliminating duplicative facilities and functions and by lowering the cost of maintenance of way materials, supplies and administration for the allocated lines. Woods Decl. ¶¶ 83-90

These efficiencies will not come at the expense of employees' interests. NSR plans to employ all of its allocated maintenance of way employees in its expanded operations. Moreover, as explained further below, NSR's proposed workforce arrangements will expand the work opportunities for nearly all maintenance of way employees. In some cases — in particular, through the planned in-sourcing of parts and materials — the coordination will create more work for employees represented by BMW and the Shopcraft Unions.

Despite its benefits for individual employees, NSR's proposal is opposed by the unions. The Shopcraft Unions apparently take issue principally with the proposed integration of seniority for former Conrail employees who will be given an opportunity to obtain positions at NSR's Charlotte Roadway Shop. There is also an issue involving line of road equipment repair currently performed by seven IAM-represented employees. This narrow dispute is addressed below, at Section B and Section A.2.b.

NSR anticipates that BMW will challenge NSR's proposal on additional and broader grounds. Predictably, BMW will object to NSR's proposal on the ground that it would require employees on the NSR-allocated lines to work under different labor agreements and seniority arrangements. BMW may assert that the former Conrail employees should be covered by the BMW/Conrail Agreement when they come to work for NSR and that the changes that NSR proposes may be achieved, if at all, only through collective bargaining under Section 6 of the Railway Labor Act ("RLA"), 45 U.S.C. § 156. NSR anticipates that BMW also will contend that some or all of the terms and conditions of the Conrail/BMW Agreement must be preserved pursuant to

Article I, Section 2 of the New York Dock conditions, which pertains to certain "rights, privileges, and benefits."

BMWE made such contentions in the underlying STB proceeding, and it repeated those contentions in our recent negotiations. In the STB proceeding, BMWE, along with several other railway labor unions (calling themselves the Allied Rail Unions ("ARU")), filed public comments urging the STB to rule that NSR's proposed coordination of operations (including maintenance of way work) is not necessary to implementation of the Transaction and, therefore, cannot be effected through the New York Dock procedures at all. The STB denied ARU's request, ruling that the parties' dispute over implementation of the Transaction must be resolved in the first instance through the New York Dock Article I, Section 4 procedures. Control Order at 126.

As explained in Part I of this submission, NSR attempted to resolve its dispute with BMWE in negotiations. NSR representatives met with BMWE representatives on at least thirteen occasions, both before and after the Carriers formally invoked the New York Dock procedures, in an effort to reach agreement on workforce arrangements for the NSR-allocated lines. In the course of those negotiations, the parties exchanged various bargaining proposals. NSR's initial proposal, like the proposal NSR makes here, provided for application of the NW-Wabash/BMWE Agreement and the DPG Agreement to NSR's allocated properties; for the consolidation of equipment repair and rail welding work and workforces under NSR's existing labor agreements; and for the application of standard New York Dock protective benefits to any employees adversely affected by the Transaction. BMWE's initial proposal called for continued application of the Conrail/BMWE Agreement, including seniority arrangements in place under that agreement. Thereafter, the parties exchanged various "off-the-record" bargaining proposals. The parties continued their negotiations well beyond the date

mandated under the Article I, Section 4 procedures. However, the parties were unable to reach agreement, and all bargaining proposals were considered withdrawn.¹⁰

In the meantime, other arrangements have been made in preparation for NSR's expanded maintenance of way operations. NSR's corporate parent, NS, has filled new management and supervisory positions and is otherwise prepared to integrate the allocated lines into its existing Engineering Department organization. NSR has reached a voluntary arrangement with URSA under which Conrail's Track and B&B Supervisors on the NSR-allocated lines will be offered various nonagreement positions (including Track Supervisor and Assistant Track Supervisor positions) with responsibility for the allocated lines. Carriers' Exh. E-4. And NSR has reached an implementing agreement with ARASA to employ ARASA-represented Bridge Inspectors (on the former New York Central Railroad lines to be operated by NSR) in various nonagreement positions.

It is now necessary to obtain an implementing agreement through arbitration to avoid delay in the implementation of the Transaction. In the remainder of this part, NSR explains its specific plans for conducting maintenance of way operations on its expanded system and explains the workforce arrangements, including labor agreements, that must be adopted in order to enable NSR to achieve the objectives of its Operating Plan. As we show, the arrangements proposed by NSR are necessary and appropriate to the Transaction and otherwise satisfy all standards governing this New York Dock Article I, Section 4 proceeding.

¹⁰ As we explained in Part I, NSR also was unable to reach agreement with the Shopcraft Unions concerning the selection and assignment of equipment repair forces.

A. NSR'S PROPOSAL FOR THE ARRANGEMENT OF TRACK AND STRUCTURES FORCES ON ITS EXPANDED SYSTEM IS APPROPRIATE TO THE TRANSACTION.

1. NSR's Proposed Consolidation Of Rail Gangs And Timber And Surfacing Gangs

NSR proposes to integrate its allocated properties and workforce into NSR's existing system, including its DPG arrangement, for the purpose of performing rail and T&S programs on the allocated lines. This is necessary in order to apply NSR's successful program maintenance methods and practices on the allocated lines, to minimize service disruptions associated with tie and rail renewal programs, and to capture the efficiencies made possible by the size and geographic scope of NSR's expanded operations. As we detail here, this element of NSR's proposal alone accounts for over \$9.6 million in estimated annual cost savings and efficiencies. Woods Decl. ¶ 55.

a. NSR's Operating Methods And Workforce Arrangements Promote Efficient And Responsive Rail And Tie Renewal Programs.

NSR's Operating Plan calls for the use of DPG rail and T&S gangs throughout NSR's allocated Conrail and former NW properties. Carriers' Exh. A-4, at 337. These gangs are used both in upgrading existing track and, to a greater extent, in the ongoing systematic replacement of rail and crossties necessary to maintain the railroad's infrastructure over time, as the track materials deteriorate through use and age. Work in both categories is planned in advance of the production season and requires large-scale commitments of manpower and equipment. These projects require replacing rail and ties, and restoring the gauge and geometry of the track surface. This is the railroad's heaviest and costliest work, involving significant capital investment, and is the work most disruptive to train operations. Woods Decl. ¶ 19.

As Mr. Woods explains, NSR has developed special equipment and methods for performing major rail and tie renewal projects efficiently and with minimal disruption to train

operations. The success of these operations lies in the efficient use of machines and equipment and the specialization of gangs for particular categories of production projects. Each gang is furnished with a complement of equipment, each item of which is designed for specific functions. A dual rail gang, for instance, is equipped to install two continuous welded rails simultaneously. A dual rail gang is typically composed of about 55 employees and approximately 35 pieces of machinery, which move along the track in a sequence, performing a coordinated series of functions.¹¹ By operating the equipment in a coordinated fashion with an experienced and specialized workforce, NSR is able to bring "assembly line" speed and proficiency to major production projects. Woods Decl. ¶ 23-24.

NSR saves money by using its equipment efficiently. By scheduling the work of a single gang over a large segment of its system, NSR is able to maximize equipment use and thereby lower the unit cost of the mechanized operations. Each equipment consist represents a multi-million dollar investment. It costs more than \$3.2 million, for instance, to equip a single T&S gang, and approximately \$7.8 million to equip a dual rail gang. These investments are justified because the equipment can be used, and thus the costs can be spread, over large territories and through much of the year. Woods Decl. ¶ 25.

These program maintenance methods are equally important — and necessary — as a means of managing track time. The size and mechanization of rail and T&S gangs speeds their

¹¹ As a dual rail gang proceeds through a project, it sets the new rail to be laid in a cradle, which holds it in preparation for replacement; removes the existing spikes and anchors; removes the worn rail; removes the tie plates; adzes the ties; replaces the tie plates; lays the new rail on the tie plates; and, finally, secures the new rail. A dual rail gang uses specialized machines in this process, including a wide gauge threader, tie plate spike and anchor loading machines, a dual adzer cribbes, a standard gauge threader, a plate lining machine, rail heating machines, an electromatic tamper, nipper spikers, all-terrain cranes, spike pulling machines, rail pulling machines, a tie plate broom cribber, gauge spikers, and automatic rail anchor machines. Woods Decl. ¶ 24.

work, minimizing disruption to train operations caused by rail and tie renewal projects. Woods Decl. ¶ 26.

Special work rules and workforce arrangements are necessary to permit system-wide operations and otherwise to take advantage of the efficiencies created by mechanization of rail and T&S gangs. NSR operates under two basic production arrangements (one on its southern side lines and one on its northern side), which together promote system-wide coordination of programmed maintenance work. Rail and T&S programs on the lines of the former Southern Railway System are governed by the basic NSR-BMWE working agreement, which establishes four regions for purposes of programmed maintenance and establishes a methodology for gangs' working across all four regions. Woods Decl. ¶ 27.

On the northern side, the lines of the former NW system are organized under the 1992 NW DPG Agreement, which provides for the operation of rail and T&S gangs throughout the former NW system territory. The NW DPG arrangement permits the establishment of rail and T&S gangs of 20 or more maintenance of way workers drawn from a single set of rosters covering the former NW system lines. Positions on DPG gangs are bulletined in advance of the season and, unlike other maintenance of way positions, need not be rebulletined as the scheduled work takes the gang from one seniority region within the former NW system to another.¹² Woods Decl. ¶¶ 27-28.

¹² Not all rail and T&S gangs are operated as DPGs on the former NW system lines. Depending on the capital program, some rail and T&S gangs may be operated under the NW-Wabash/BMWE local agreement, which NSR proposes to apply to the allocated lines. The relative numbers of DPG and non-DPG Rail and T&S gangs vary depending on the program each year. In recent years, NSR has operated most rail and T&S gangs on the former NW system lines as DPGs and has used some non-DPG rail and T&S gangs to perform programs that were limited to particular regions. Although some rail and T&S gangs may be bulletined under local rules, the overall efficiency of the rail and T&S programs depend on the carrier's ability to schedule gangs, in accordance with program needs, to operate across seniority boundaries. Woods Decl. ¶ 29.

These arrangements also promote productive and safe working conditions. Employees working on DPGs stay in the same gang throughout the production season on the former NW system lines and, as a result, can build on and apply their experience with particular functions and machines. Familiarity with the equipment also enables employees to maintain the equipment in better working condition and to be more familiar with safety features and practices, thus reducing their chances of injury. In NSR's experience, permanence and cohesion among members of a gang boost morale and generate a sense of pride in the gang's performance, which translates into higher rates of safety and productivity. Woods Decl. ¶ 30.

Using DPG rail and T&S gangs enables NSR to conduct its program work flexibly and responsively to meet the needs of the operations and/or the needs of particular customers on the former NW system lines. Unrestrained by narrow territorial boundaries, NSR can utilize forces to perform large-scale projects efficiently and quickly, minimizing the length of time a particular rail corridor is out of service. The DPG arrangement also facilitates system-wide scheduling of rail and tie programs, which greatly minimizes the disruption to train operations caused when program maintenance is performed simultaneously on multiple corridors. Woods Decl. ¶ 31.

Under both arrangements, rail and T&S gangs operate under special flexible work rules that permit efficient and flexible scheduling of work. Work site reporting rules permit the carrier to begin and end assignments at the scheduled work site, reducing travel and down time. Flexible work week and flexible starting time rules enable NSR to schedule individual gang operations on a weekly basis to avoid peak traffic times or days. The same flexibility enables NSR to perform production work within and around the production schedules of its major customers. For instance, NSR routinely schedules programmed work on lines serving its automotive plants during the customers' scheduled plant shut-downs. Woods Decl. ¶ 32.

The former NW obtained the right to use DPGs under procedures established pursuant to recommendations of Presidential Emergency Board 219 ("PEB 219"), which was appointed to recommend a resolution to national wage and work rules disputes between most of the nation's railroads and rail unions growing out of the 1988 round of national collective bargaining. PEB 219 recommended the establishment of regional or system-wide gangs to replace then-existing arrangements, under which employees were generally limited to working within confined seniority districts, without regard to the geographic scope of the program. Because of such territorial restrictions, the work on a production project that spanned several seniority districts could not be performed by a single group of employees. Rather, the employees working on a production gang could stay with the project only to the limits of that group's seniority district; at each seniority border, the work was halted, the existing gang disbanded, and a new gang, made up of employees holding seniority on the proper territory, created and trained. Woods Decl. ¶¶ 28, 34. These territorial restrictions substantially slowed production work and reduced productivity and safety. Each time a gang is reconstituted, some productivity is lost as the gang members adjust to their new assignments. Moreover, the frequent rebulletining of production assignments is itself a cumbersome and disruptive process. Depending on the level of work and workforces in each seniority district, carriers often encountered manpower shortages, and were required to leave positions open, when employees elected not to bid onto arriving production gangs. To remedy this situation, railroads needed to hire and train more employees than were required for the available work and to furlough employees in the area the gang had left, depending on the volume of work on each district. Moreover, the need to rebulletin gangs disrupted work and project continuity, both to the production project and to the regular ongoing maintenance operations on the district. Finally, the changeover of employees also

reduced safety, as the new production gang employees were required to learn or relearn how to operate particular pieces of equipment, or to perform work associated with that equipment.

To eliminate these problems, and to address BMW's concerns about maintaining job opportunities for its members, PEB 219 recommended a procedure, including binding arbitration, for the establishment of regional and system-wide maintenance of way production gangs to be operated under special flexible work rules. PEB 219 Report, at 80 (Carriers' Exh. A-8). The recommendations of PEB 219 were made binding on BMW and the railroads participating in national bargaining by Act of Congress, Pub. L. No. 102-29, 105 Stat. 169 (April 18, 1991). Pursuant to that legislation, BMW and the participating railroads, including NSR, adopted an "Imposed Agreement," dated February 6, 1992, to implement the recommendations of PEB 219, including the arbitration procedures for establishment of regional or system-wide gangs.

The DPG Agreement applicable on the former NW system lines was obtained pursuant to those procedures by award of neutral referee John C. Fletcher on June 12, 1992 (Carriers' Exh. A-27). The NW DPG Agreement sets forth the terms and conditions by which the former NW (now NSR) is permitted to use DPGs for certain work on the former NW system lines. The agreement generally permits the carrier to operate its large (over 20-man) rail and T&S gangs on the former NW system properties as DPGs. Woods Decl. ¶ 28.

Through various other proceedings and/or negotiations, similar regional and system wide gang arrangements were put in place on most major railroads.¹³ Conrail did not participate in the 1988-92 national bargaining round and is therefore not a party to the Imposed Agreement. All

¹³ At the time of the Imposed Agreement, as explained in Part I (at n. 3), NW was a separate, wholly-owned subsidiary of NSR. NSR's basic labor agreement with BMW applicable on the lines of the former Southern Railway System provided a method for NSR's operation of certain program gangs across regional boundaries. Accordingly, NSR did not seek a DPG arrangement for the Southern Railway lines under the Imposed Agreement. Woods Decl. ¶ 33.

of the other large Class I railroads -- CSXT, Union Pacific Railroad ("UP"), and Burlington Northern Santa Fe Railway ("BNSF") -- now have the ability to use regional or system-wide production gangs on at least parts of their systems.¹⁴

The transportation benefits anticipated by PEB 219 have been realized under the NW DPG arrangement. Prior to 1993, programmed maintenance on the lines of the NW system was scheduled and performed by gangs bulletined separately on each region of the NW-Wabash/BMWE Agreement and the lines of the former NKP. Each gang required a separate equipment complement and worked a relatively short production season (typically nine or fewer months). Because the gangs worked simultaneously on different parts of the NW system properties, the carrier often experienced multiple corridor disruptions during the height of the production season. The bulletining of seasonal production forces also produced corresponding disruption in the operation of day-to-day maintenance, and workforce shortages, as employees bid to and from local forces. Woods Decl. ¶ 34.

The DPG arrangement has produced a number of operational benefits. By establishing DPG gangs for some or all of its annual rail and tie programs on the former NW system lines, the carrier is able to operate more productively and with fewer maintenance-related delays. Under the DPG arrangement, the annual rail and T&S program is performed with fewer gangs (and correspondingly less equipment) operating over a longer work season. In this manner, since commencing DPG operations, NSR has improved equipment utilization by 20.5 percent. In addition to other, less measurable customer service and transportation benefits, NSR has saved close to one million dollars

¹⁴ Both BNSF and UP used the New York Dock procedures to extend the scope of their existing regional and system-wide gang arrangements following their recent mergers. The extended arrangement on BNSF was negotiated voluntarily; on UP, the arrangement was imposed in Article I, Section 4 arbitration (by award of referee Peter Meyers, discussed further below).

annually through the more efficient operation of rail and T&S gangs under the DPG arrangement. Woods Decl. ¶ 35.

These benefits have not come at the expense of employees. DPG employees voluntarily bid into such positions. Employees who work on DPGs enjoy special protection from furlough and receive sizable cash bonuses and generous travel allowances.¹⁵ Moreover, employees are benefitted by the same factors that make the operation more efficient for NSR: the longer work season, and the reduced risk of injury. The longer work season means higher and more stable income for maintenance of way employees. In 1991, approximately 75 percent of maintenance of way employees on the combined NSR/NW system were employed year-round; with the advent of DPG operations, that percentage has increased. Today, close to 90 percent of NSR's maintenance of way employees work year-round. Moreover, the establishment of DPGs has not resulted in any furloughs during the work season. In fact, the former NW (now NSR) has hired additional track workers each year since DPGs were established. During the same period, the combined NSR/NW system experienced a substantial reduction in the rate of injuries to program maintenance employees. Woods Decl. ¶ 36.

b. Application Of The Conrail/BMWE Agreement Would Impede NSR's Operating Plan.

NSR could not employ its efficient DPG methods -- and otherwise could not achieve its Operating Plan -- if it were required to perform rail and tie renewal programs under Conrail's existing arrangements. Much like the pre-1992 production arrangements on the former NW system,

¹⁵ Employees working on DPG gangs at their initiation are paid an additional bonus (5 percent, up to \$1,000) for remaining with the gang in excess of six months per year. In addition, pursuant to the 1996 national BMWE agreement, employees on DPG gangs receive a mileage-based travel allowance for weekend travel home. The NW DPG Agreement (Section 4) guarantees employees on DPG assignments a minimum of six months of DPG work (or, if work is not available, supplemental unemployment benefits) in each calendar year.

Conrail's existing operations are premised on multiple seniority arrangements, which confine most maintenance of way gangs to relatively small geographic areas. Woods Decl. ¶ 47.

By all measures, Conrail's existing production operations are substantially less productive than corresponding operations on NSR. In 1997, NSR installed an average of 5.3 ties per manhour, compared to Conrail's rate of 4.2 ties per manhour. NSR's rail gangs achieved installation rates of 4.8 track feet per manhour on curve rail gangs and 10.7 feet per manhour on dual rail gangs, compared to Conrail's rates of 2.5 and 3.9 feet, respectively.¹⁶ Woods Decl. ¶ 50.

Conrail's arrangements would be even less efficient if applied to rail and T&S gangs on the allocated territories. The lines to be allocated to NSR comprise approximately fifty-eight percent of the former Conrail system. By its very structure, as was previously explained, the transaction will fragment existing Conrail production zones and seniority regions. The Conrail operating divisions will no longer exist, and over half of the seniority districts will be substantially truncated by the Transaction. Any effort to operate the NSR-allocated lines under the Conrail/BMWE Agreement would necessarily produce operations far less efficient than Conrail's current operations, and significantly less efficient than under the proposed NW-Wabash and DPG Agreements. In addition, NSR will not have the alternative major east-west routes that Conrail had, affording it far less opportunity to ameliorate the effects of out-of-service track time. Woods Decl. ¶ 51.

¹⁶ In the same period, NSR's injury rate for maintenance of way employees was substantially lower than Conrail's. NSR achieved a Federal Railroad Administration safety performance ratio of 0.92 injuries per 200,000 manhours in comparison to Conrail's safety performance ratio of 2.47. Woods Decl. ¶ 51.

c. Extending NSR's DPG Arrangement To The Allocated Lines Is Appropriate And Necessary To The Transaction.

NSR intends to integrate its allocated lines into its DPG arrangement.¹⁷ This plan promotes two objectives central to NSR's Operating Plan: (1) it will enable NSR to schedule and manage production work on the allocated lines so as to avoid undue interference with train operations; and (2) it will enable NSR to realize operating efficiencies and savings in its expanded operations.

Both of these objectives are related to NSR's plan to maintain the allocated lines to higher standards. As described above, NSR intends to increase the level of maintenance on the allocated lines both to bring the lines up to NSR's track maintenance standards and to support the increased traffic and schedules anticipated to result from NSR's planned operations. Many of the allocated lines that NSR proposes to operate as principal and mainline routes, e.g., the Southern Tier, were formerly used by Conrail as secondary routes and therefore will require extensive upgrades. Moreover, even without a change in traffic levels, NSR's more stringent maintenance standards will call for more frequent rail and tie renewals than were performed by Conrail on certain segments of the allocated lines. Woods Decl. ¶ 41.

That work must be done in a manner that minimizes interference with train operations. Using DPGs for major rail and tie renewal programs on the allocated lines will permit NSR to

¹⁷ The mechanics of NSR's proposal are straightforward and are not seriously challenged by BMW. As provided in the Carriers' proposed Implementing Agreement (Carriers' Exh. 1, Article I, Section 1(d)), NSR's allocated former Conrail track employees will be integrated into the existing DPG seniority rosters according to their existing classifications (laborer, machine operator, assistant foreman and foreman) and Conrail seniority dates. The allocated Conrail employees will be afforded bidding preference for assignments operating on the allocated lines under the terms of the DPG Agreement, as modified in accordance with the proposed implementing agreement. As detailed in Section A.2.b, below, rules changes are necessary for efficient application of the DPG arrangement. These include the rules covering: alternative work weeks and rest days; markup time; meal periods; starting time; and temporary vacancies.

complete projects as quickly as possible, minimizing the time that track must be kept out of service. The DPG arrangement also will enable NSR to schedule and perform certain of its rail and T&S projects in response to particular customer service considerations. As on NSR's existing system, the DPG arrangement will afford NSR the flexibility to coordinate production projects to coincide with customers' anticipated or scheduled vacations or down times. Woods Decl. ¶ 59.

Finally, the proposed integration is necessary to realize the operating cost savings and other transportation benefits made possible by the expansion of NSR's operations. By virtue of its geography and existing seniority arrangements, Conrail is limited to a short maintenance of way work season. Under the best of conditions, Conrail's production gangs work no more than eight to nine months per year, with an average season of 31 weeks per year. (Rail and T&S gangs on NSR, by comparison, work an average of 50 and 46 weeks per year, respectively.) By merging the Conrail lines with NSR's operations, NSR will be able substantially to reduce the unit costs of maintenance of way operations by lengthening the production season of gangs working on those lines. NSR will achieve additional efficiencies by combining production operations in a single geographic region, without regard to the prior Conrail/NSR boundaries. This will yield immediate and obvious efficiencies on the many allocated lines that adjoin or closely parallel NSR's existing lines. Woods Decl. ¶ 54.

The savings to be achieved through the integration will vary from year to year, depending on the size of NSR's annual capital programs. On the basis of NSR's 1999 capital program, NSR expects to save more than \$9.6 million annually by extending its DPG operation to the allocated lines. These are the savings in manpower, equipment, and related costs achieved by integrating the lines into NSR's existing workforce arrangements, including the DPG operations, rather than attempting to maintain separate operations under the remains of the Conrail/BMWE Agreement. The estimated savings include approximately \$500,000 in avoided equipment purchases,

approximately \$1.6 million in equipment maintenance costs, and approximately \$7.5 million associated with more efficient manpower use. Woods Decl. ¶ 55.

None of these savings is attributable to differences in wage rates under the two agreements or otherwise represents a "transfer of wealth from employees to employer." Executives, 987 F.2d at 815. Woods Decl. ¶ 36.

These anticipated benefits more than warrant the extension of the DPG arrangement under the New York Dock standards, as set forth above. See, e.g., Norfolk & Western Ry. and Southern Ry. and American Train Dispatchers Ass'n, May 19, 1987 (Harris, Arb.) (centralization of power distribution functions across entire railroad system would generate savings of \$26 million in capital investment and \$2 million per year in operating expenses, exclusive of labor costs), aff'd, NS/NW Control/Power Distribution.

Under those standards, referee Peter Meyers recently approved a similar integration of system-wide maintenance of way gang operations on the merged Union Pacific/Southern Pacific system:

The Carrier convincingly has shown that if it implements a system operation, then it will be able to schedule its maintenance of way employees in a more efficient and productive manner. It will be possible for the Carrier to schedule work projects over its entire western territory, thereby making allowances for weather extremes and corridor traffic needs. The need to abolish and re-bid positions on various road work gangs as the work crosses over currently existing seniority district boundaries, and the delay and administrative costs associated with these steps, also would be eliminated; the entire western territory effectively would become a single seniority district under the Carrier's proposals. On this record, it is evident that under the particular circumstances surrounding the approved merger underlying this proceeding, the implementation of system operations for the Carrier's maintenance of way work, as proposed in the Carrier's February 4, 1997 notice, will yield significant economies and efficiencies in its operations.

As the ICC/STB repeatedly has found, such efficiencies and economies constitute a public transportation benefit. Moreover, this is precisely the showing that the Carrier must make in this proceeding to support

its proposal for the implementation of system operations. The purpose of the approved merger is to generate a transportation benefit for the public. As emphasized by the United States Court of Appeals for the District of Columbia Circuit, transportation benefits include the promotion of economical and efficient transportation. Railway Labor Executives Association, 987 F.2d 806, 815 (D.C. Cir. 1993).

It is not possible to properly implement a system operation, and achieve the economies and efficiencies associated with such a consolidation, if a carrier and organization attempt to continue to operate under several collective bargaining agreements. Conflicting contractual provisions, differences in work rules, and basic problems of coordination between and across several collective bargaining agreements inevitably will cut into question, and perhaps completely destroy, any possibility of achieving the efficient, coordinated, economical operation promised by a rail consolidation. If the Carrier's maintenance of way work is to be consolidated into a more efficient, economical system operation, as is necessary to achieve the purposes of the approved merger, then it is necessary for the parties to operate under a single collective bargaining agreement.

As is its right, the Carrier has chosen to adopt the provisions of the collective bargaining agreement between UP and BMWE to govern its maintenance of way operations in the western portion of the combined system. The Organization has not argued that one of the other relevant contracts should be adopted instead of the one chosen by the Carrier. The Carrier's election means that the relevant SP and DRGW system production gang agreements are effectively abrogated. There is no legitimate basis for insisting that the parties attempt to operate under several collective bargaining agreements, when it is abundantly clear that the post-merger consolidated rail operation can exist and do business most efficiently if the maintenance of way employees in the expansive western territory of the consolidated system are working under a single set of contractual provisions, seniority protections, and work rules.

UP/SP BMWE Arbitration, at 21-23 (Carriers' Exh. C-4).

The STB and the courts reached the same conclusion in analogous circumstances involving the consolidation of train operations. E.g., UTU v. STB, 108 F.3d at 1431 (Court agrees with the ICC that the consolidation of seniority rosters was necessary to permit unified train operations; changing crews at the previous territorial boundaries of the former railroads would increase costs, slow down transit times and prevent the system from operating in a unified manner);

Union Pacific Corp., Union Pacific R.R. and Missouri Pacific R.R. -- Control and Merger -- Southern Pacific Transportation Co., et al. (Arbitration Review), Finance Docket No. 32760 (Sub-No. 22), decision served June 26, 1997 (upholding arbitrator's finding that consolidation of seniority districts was necessary to the transaction and would yield enhanced efficiency in train operations) (Carriers' Exh. B-15).

Here the justification for extending the DPG arrangement is even stronger. Unlike Union Pacific Railroad, which acquired the entire Southern Pacific Railroad System, NSR is authorized to operate only a part of the Conrail system. In view of the authorized division of operations, there is no practical way to leave the existing production arrangements intact following consummation of the Transaction. Any attempt to do so necessarily would further restrict production work, rendering operation of the allocated lines even less efficient than it is today. In these circumstances, change is an unavoidable and immediate operational necessity, and the specific changes that NSR proposes here constitute the only appropriate rearrangement of forces.

2. NSR's Proposed Arrangement Of Track Forces, B&B Forces, And Roadway Equipment Repair Forces

NSR intends to achieve similar transportation benefits by organizing its remaining field operations -- that is, line maintenance (including non-DPG program maintenance), B&B, and equipment repair functions -- under workforce arrangements and work rules applicable to maintenance of way operations on NSR's adjoining former NW-Wabash lines.

a. **NSR's Proposal To Establish Regional And Divisional Seniority For Line Maintenance And Equipment Repair Forces Is Necessary And Appropriate To The Transaction.**

NSR's proposal to realign seniority boundaries for its allocated Conrail employees is necessitated immediately by the structure of the Transaction. As we have explained, the lines to be operated by NSR consist of fragments of Conrail's seniority districts, zones, and regions. Only five of Conrail's eighteen seniority districts will be conveyed intact to NSR. NSR is authorized to operate parts of eleven others.¹⁸ The maps submitted as Carriers' Exhibits A-32 through A-41 depict the fragmentation of seniority districts on the lines to be allocated. In several cases, the line segments to be allocated to NSR (depicted in green) will consist of only a few miles of track — far too little to generate sufficient work for a maintenance gang headquartered in those locations. Woods Decl. ¶ 56.

The same is true of the Conrail production regions and zones, which confine certain Conrail program maintenance functions. As depicted in the maps submitted as NSR Exhibits A-30 and A-31, the lines allocated to NSR will consist of fragments of each of Conrail's existing production zones and of both Conrail production regions. If NSR were to attempt to operate the allocated lines under these arrangements NSR would be required to conduct correspondingly fragmented operations, rebulletining gangs frequently to perform work over relatively small territories. This would create very unstable and inexperienced gang consists, and, in all likelihood, severe manpower shortages in some areas and surpluses in others. At a minimum, the operation would be inefficient. Worse, it

¹⁸ This fragmentation affects the seniority arrangements governing nearly all BMW-represented maintenance of way employees. Of the employees holding seniority on the lines to be allocated to NSR, 80 percent hold seniority on one or more of the eleven fragmented districts. Woods Decl. ¶ 56.

would impede NSR's ability to perform the level of maintenance and upgrading required to accommodate the new operations and meet transportation needs. Woods Decl. ¶ 57.

Even without such fragmentation, the Conrail workforce arrangements would frustrate implementation of the Transaction by impairing efficient operations on the allocated lines. As Mr. Woods explains, Conrail's seniority arrangements narrowly restrict the pools of available employees, imposing costly delays and creating artificial manpower shortages as traveling production gangs move between seniority territories. As a practical matter, as Conrail's experience demonstrates, these arrangements limit the carrier to operating with small gangs, which perform maintenance functions slowly. Woods Decl. ¶ 47.

Delays in performing maintenance of way projects impede train operations by increasing the time that track remains out of service or subject to maintenance-related slow orders. By way of example, a 20 mph slow order on a single mile of 60 mph track delays each train crew 21 minutes. The resulting impact on productivity and train schedules is magnified as the number of trains and the number and duration of slow orders increase. When maintenance work is underway, the line must be taken out of service causing even greater disruption. Ingram Decl. ¶ 18; Woods Decl. ¶ 59.

Maintenance-related delays and disruptions cannot be avoided, but they must be minimized if NSR is to achieve the level of train operations and responsive customer service contemplated by the Control Order. NSR will be competing in territories previously served exclusively (or principally) by Conrail, and its ability to compete effectively (with trucks as well as CSXT) will depend on its ability to meet the demanding schedules planned for its expanded operations. NSR's new operations over its allocated lines will both necessitate more maintenance — because of increased traffic density (and NSR's generally higher maintenance standards) — and be more competitively vulnerable to maintenance-related delays and disruptions than are Conrail's operations today.

Those are sufficient reasons alone not to hold NSR to the restrictive seniority arrangements and rules under which Conrail has operated. Woods Decl. ¶ 59.

Moreover, Conrail's arrangements would impose even greater burdens in the new competitive environment. As Mr. Ingram explains, the seniority arrangements in effect on Conrail would operate more restrictively on the expanded NSR system than they do on Conrail today. Conrail today enjoys multiple routing options for most of its traffic flows. If train operations on a particular route or corridor are blocked or slowed by maintenance of way operations, Conrail is able to detour traffic to alternate routes. For instance, when Conrail needed to perform maintenance on its Water Level Route between Albany and Buffalo, New York, it could minimize operational interference by temporarily detouring trains to its parallel Southern Tier Line. Such routing options enabled Conrail more readily to tolerate disruptions associated with maintenance of way operations. When the Conrail lines are operated as part of the expanded NSR system, however, the alternate routes will be operated by CSXT in direct competition with NSR; they will not be available to NSR for detour operations. For east-west traffic, CSXT exclusively will operate the Water Level Route, while NSR will operate the Southern Tier Line in direct competition. NSR will not have the same means to avoid or mitigate the substantial disruptions caused by maintenance of way operations. In these circumstances, extending Conrail's restrictive workforce arrangements to the allocated lines would frustrate the authorized operations. Ingram Decl. ¶ 23; Woods Decl. ¶ 52.

Instead, NSR proposes to realign seniority arrangements consistently with its proposed management structure and with the seniority arrangements that are in effect on NSR's former NW-Wabash properties. Specifically, NSR proposes to establish new regional seniority rosters for each track classification by dovetailing its allocated employees onto those rosters based on comparable work classifications and seniority dates from the Conrail/BMWE rosters. So arranged, the affected

employees will be eligible to exercise their seniority to positions on fixed headquarters gangs or production gangs throughout NSR's newly established Northern Region. Woods Decl. ¶ 60.

For roadway equipment repair functions, allocated employees who hold seniority on Conrail's existing repairman rosters (and certain former Conrail machinists) will be dovetailed onto newly created repairman rosters. On the Northern Region lines, a separate set of rosters will be established for each managerial operating division. NSR similarly proposes to arrange its newly allocated B&B employees under corresponding classifications on new divisional rosters. Woods Decl. ¶ 61.

These seniority arrangements are expected to yield numerous transportation benefits. The arrangements principally are designed to establish employee pools of sufficient size to support efficient and flexible maintenance operations. As on NSR's existing properties, the ability to move gangs quickly in response to maintenance needs will minimize train delays and disruptions caused by track-related slow orders and line closings. By using relatively larger gangs to perform maintenance functions, NSR will complete needed maintenance work quickly and efficiently, with minimal disruption to train operations. Moreover, these arrangements will permit NSR to operate with employees who remain on assignments long enough to gain proficiency, to facilitate efficient work schedules, and to minimize down time and administrative burdens associated with frequent rebulletining of gangs. Woods Decl. ¶ 62.

The more flexible arrangements also will generate immediate cost savings and efficiencies in the use of maintenance forces and equipment. NSR expects to achieve more than \$1.2 million in annual savings in labor and equipment costs by operating its surfacing gangs on its allocated lines under a regional seniority arrangement (Woods Decl. ¶ 62), reason alone for NSR's proposed rearrangement of seniority rights. See CSX Control/Train Operations.

The arrangements proposed by NSR will expand the seniority rights of nearly all affected employees. This should, in general, be a welcome change. Expanding seniority rights gives employees more work opportunities and enhanced financial security. Woods Decl. ¶ 63.

The proposed expanded seniority territories are on a par with those existing under the NW-Wabash/BMWE Agreement. The largest of the proposed seniority territories for the allocated lines is coextensive with NSR's newly established Northern Region, which extends from Chicago, Illinois to Secaucus, New Jersey. The longest distance that an allocated former Conrail employee could travel while working on a gang that pays expenses will be 804 highway miles. By comparison, the Western Region under the NW-Wabash/BMWE Agreement is 764 highway miles in length. Under the NSR/BMWE agreement (in effect on the lines of the former Southern Railway), employees can be required to protect territories as long as 1,000 miles. Consistently with those arrangements, the furlough rate of BMWE employees on NSR is a fraction of the Conrail rate. Woods Decl. ¶ 64.

Moreover, as a practical matter, the size of a seniority district bears little relationship to the distances that will be covered by individual employees. As explained above (at pp. 9-11), most maintenance of way employees on the NSR system work on local forces, within an assigned Track Supervisor's territory. NSR plans to establish Track Supervisor territories on the NSR-allocated lines of comparable size to Conrail's existing Track Supervisor territories. The distances to be traveled by other forces will be limited by the number of gangs operating on the region.¹⁹ When required to travel, employees are compensated for expenses. Woods Decl. ¶ 66.

¹⁹ Moreover, under NSR's proposal, employees will not be required to protect assignments on fixed headquarters gangs. Under the NW-Wabash/BMWE Agreement, which NSR proposes to apply to the allocated lines, employees holding seniority on BMWE rosters are required only to exercise their seniority to positions on non-fixed headquarters gangs. Woods Decl. ¶ 67.

b. Extension Of The NW-Wabash/BMWE Agreement Is Appropriate And Necessary To The Transaction.

Consistently with its proposed rearrangement of forces, NSR proposes to operate the allocated lines, along with its adjoining former NW-Wabash properties, under the rules of the NW-Wabash/BMWE Agreement. As NSR shows in this section, this arrangement will facilitate the coordination of maintenance of way work on NSR's expanded system, will promote efficient maintenance of way operations necessary to NSR's Operating Plan, and will ensure consistency in the craft allocation of work rules on the allocated lines.²⁰

Application of the NW-Wabash/BMWE Agreement will facilitate further coordination of NSR's maintenance of way operations at the numerous points where NSR's existing lines adjoin and parallel the lines allocated to NSR at numerous points across the system. Woods Decl. ¶ 69.

The NW-Wabash/BMWE Agreement contains rules, not found in the Conrail/BMWE Agreement, for further merging maintenance of way operations as needed to address immediate and future needs. Rule 18 permits NSR to use employees outside their seniority districts for up to thirty days. This enables the carrier efficiently and flexibly to deploy gangs to respond to unscheduled or immediate maintenance needs, without effecting lasting workforce changes. Applying this rule to the allocated lines, in coordination with the adjoining NW-Wabash lines, will enable NSR to deploy its workforces quickly and efficiently to meet operational needs, without regard to historic territorial

²⁰ As provided in Article II, Section 1 of the proposed implementing agreement with BMWE (Carriers' Exh. A-1, at p. 5), NSR proposes to conduct all of its field maintenance of way operations (line maintenance, B&B, and line-of-road equipment repair) on the allocated lines under the terms of the NW-Wabash/BMWE Agreement. The separate proposed NSR IAM agreement (Carriers' Exh. A-1, at p. 25) expressly provides that the IAM-represented Conrail employees performing line-of-road equipment repair work on the former New York Central Railroad lines to be operated by NSR (a total of seven individuals) will be employed by NSR under the terms of the NW-Wabash/BMWE Agreement. This arrangement will enable NSR to use its line-of-road equipment repair forces efficiently and will expand the work opportunities of the seven IAM-represented equipment repairman to be allocated to NSR.

restrictions. Woods Decl. ¶¶ 68, 69. This flexibility will be particularly important to NSR's ability to operate the allocated lines as a part of its expanded system, rather than as fragments of a formerly separate rail system. See CSX/Train Operations, at 14 ("Were the Carrier required to continue operating this territory as four separate railroads, each with its own workforce and seniority districts, the operating efficiencies contemplated by the coordination would be illusory.") (emphasis omitted).

As depicted in the map submitted as Carriers' Exh. A-46, the NSR-allocated lines cross or parallel NSR's existing lines at many points, including Columbus, Ohio; Cincinnati, Ohio; Sandusky, Ohio; Hagerstown, Maryland; Detroit, Michigan; Butler, Indiana; Wabash, Indiana; and Deepwater, West Virginia. In order to take operational advantage of these common points, NSR needs the ability to deploy gangs based on geographic proximity or availability without regard to the previous NSR/Conrail boundaries. Applying Rule 18 of the NW-Wabash Agreement to the allocated lines will enable NSR to integrate operations as needed, promoting efficient and responsive transportation. Under NSR's proposal, for example, a surfacing gang working under the NW-Wabash/BMWE Agreement on the former NW line north of Columbus could be directed to surface a segment of a former Conrail line in the immediate vicinity, rather than deploying a surfacing gang working at a more distant location on the NW-Wabash lines. Likewise, a tie patch gang working on the former Conrail lines could be directed to an adjacent former NW line to meet operating needs. Woods Decl. ¶ 69.

Application of the NW-Wabash/BMWE Agreement also is necessary to obtain the benefits of NSR's planned coordination of rail and T&S gang operations. Article X of the February 6, 1992 Imposed Agreement contains flexible work week and rest day rules that enable NSR to use employees for four ten-hour days, and to assign employees to work on one weekend day, in order to minimize operational disruption during peak traffic times. These rules are complemented by the

so-called "make-up time rules" provisions of Rules 50 and 51 of the NW-Wabash/BMWE Agreement. Used together, these rules enable NSR to schedule employees to work eight consecutive days, with six consecutive days of rest. This flexibility enables the carrier to schedule work to minimize operational interference and, at the same time, reduce employee travel requirements. Woods Decl. ¶ 70.

Rule 45(a) of the NW-Wabash/BMWE Agreement also promotes efficiency in the daily management of track time by enabling the carrier to schedule the meal period based on operational considerations. Under this rule, the meal may be provided at any time between the fourth and seventh hour of work, or at any other time on agreement of the employees and carrier. This rule, like Article X of the February 6, 1992 Imposed Agreement, provides needed flexibility in the conduct of maintenance of way operations, including DPG operations. Woods Decl. ¶ 71.

The Conrail/BMWE Agreement does not permit such flexible scheduling. To the contrary, the agreement imposes narrow restrictions on the posting of assignments that restrict Conrail's ability efficiently to manage track time. Under Rule 10 of the Conrail/BMWE Agreement, most maintenance of way employees work Monday through Friday, with at least Saturday and Sunday as rest days, while production work is limited to Monday through Thursday, ten hours per day. Rule 3 of the Conrail/BMWE Agreement requires the carrier to specify, among other terms, the rest days and meal periods for each advertised position. Under Rule 18(1), the meal period must be provided between the fifth and sixth hour after starting time, unless the General Chairman and Division Engineer agree otherwise. Rule 4 of the agreement permits an employee to exercise seniority in a number of circumstances, including when the starting time or rest day for his position is changed. Individually and cumulatively, these requirements limit Conrail's ability to work around train schedules and otherwise impede the efficient use of employees, equipment, and track time.

These requirements would operate even more restrictively after Day One, when many of the allocated lines will handle more traffic and require more maintenance. Woods Decl. ¶ 72.

Under the terms of the 1992 DPG Agreement, DPGs are governed by the work rules in effect on the territory where the gang works on Monday of each week. Operating under the terms of the Conrail/BMWE Agreement, with its inflexible scheduling rules, would impede NSR's planned DPG operations. Woods Decl. ¶ 73.

Application of the Conrail/BMWE Agreement would impede NSR's expanded operations in other respects as well. A number of the rules in the Conrail/BMWE Agreement are incompatible with the seniority arrangements necessitated by the authorized transaction and with the type of operations NSR is authorized to conduct. For example, Rule 4, pertaining to the mandatory exercise of seniority, limits the carrier's ability to staff operations by permitting an employee to select a single, relatively small territorial "working zone" to which he must exercise seniority. An employee is not obligated to accept an available position outside of his narrow working zone. As explained above (at 22), the Conrail system is comprised of 129 such zones, many of which, like Conrail's basic seniority districts, will be fragmented by the Transaction. Applying the Conrail "working zone" rule would undermine the efficiency and flexibility of NSR's planned maintenance of way operations on the allocated lines. Woods Decl. ¶ 74.

Rule 3 of the Conrail/BMWE Agreement, pertaining to the filling of vacancies, permits temporary vacancies to be filled by active employees in the same rank -- for example, it permits a temporarily vacant machine operator position to be filled by an active machine operator. Each time a position is filled in this manner, a new vacancy is created which also must be filled, thereby creating another vacancy that must be filled, and so on until all affected positions in the applicable seniority district have been restaffed. The process is then reversed if the vacancy was filled temporarily and

the permanent employee returns. By contrast, under the NW-Wabash/BMWE Agreement, NSR fills temporary vacancies with qualified employees in lower ranks. A machine operator vacancy, for instance, may be filled by a laborer on the same gang, thus limiting disruption. If Rule 3 of the Conrail/BMWE Agreement were applied under the seniority arrangement proposed for the allocated lines, the "ripple effect" of temporary vacancies would create serious operational disruptions and inefficiencies. Woods Decl. ¶ 75.

Another provision of Rule 3, regarding qualification for positions, also is incompatible with NSR's expanded seniority arrangements. Rule 3 requires the carrier to provide a senior unqualified employee an opportunity to demonstrate his qualifications for a position within the weekly bid period, before the position may be awarded to a junior qualified employee. This rule imposes minimal burdens on Conrail today, because of the relatively small pools of employees who may bid on each vacancy and the relatively small numbers of vacancies open to bidding by each pool at any given time. However, the disruption associated with the qualification process would be magnified under NSR's proposed seniority arrangements, which will increase both the numbers of vacancies that will be bulletined at any given time and the number of employees eligible to bid on each vacancy. In some circumstances, application of the Conrail/BMWE qualifications rule could require the carrier to provide numerous employees an opportunity to qualify on multiple pieces of equipment during a single seven-day bid period. This requirement would impose a significant administrative burden on NSR and could interfere with the timely filling of vacancies on the allocated lines. Woods Decl. ¶ 76.²¹

²¹ Under the NW-Wabash/BMWE Agreement, machine operator positions are awarded based on seniority, pending qualification. That is, a machine operator position is awarded to the senior machine operator (or, if no machine operator bids, to the senior laborer), without regard to the bidder's qualification on the particular machine. If the position is awarded to an employee not
(continued...)

The scope rules of the Conrail/BMWE Agreement also are incompatible in certain respects with NSR's planned management and operation of the allocated lines. The Conrail/BMWE Agreement would reserve bridge inspection and scale inspection functions on parts of the allocated lines (excluding the lines of the former New York Central Railroad), and ail track inspection work on the allocated lines, to BMWE-represented employees, thus undermining NSR's planned use of nonagreement employees to perform and/or delegate these functions. Likewise, NSR could not use its nonagreement Assistant Track Supervisors to perform minor track repairs in the course of conducting daily track inspections. Instead, under the Conrail/BMWE Agreement, NSR would be required to dispatch a separate BMWE gang to work with or behind the Assistant Track Supervisor to correct minor defects found by the Assistant Track Supervisor. Finally, the Conrail/BMWE Agreement establishes a separate classification of Track Lubricator Maintainers, who perform work that, on NSR, can be performed by any available line maintenance employee under the NW-Wabash/BMWE Agreement. In each case, maintaining Conrail's classifications rules would be far less efficient and more disruptive than the method employed on the rest of the NSR system. Woods Decl. ¶ 78.²²

Application of the Conrail/BMWE Agreement also would frustrate NSR's Operating Plan by creating potential variations and conflicts over the scope of work to be performed by different crafts of employees on the NSR-allocated lines. As noted above (Part I at pp. 11-12), the Carriers

²¹ (...continued)
previously qualified on the machine, he is given a set period (ten days in the case of a machine operator, or 30 days for promotion of a laborer) following the assignment in which to demonstrate his qualifications. Woods Decl. ¶ 77.

²² The Conrail/BMWE Agreement also includes a single welder roster. By contrast, NSR maintains separate rosters for electrical and thermite welders, reflecting the different techniques and equipment used in these distinct welding operations. Woods Decl. ¶ 79.

have reached implementing agreements with a number of organizations, including all Shopcraft Unions (except TWU), to govern the authorized operations. None of those agreements provides for continued application of a Conrail labor agreement on the NSR-allocated lines. Instead, NSR has extended the application of its labor agreements with appropriate modifications (or, as in the case of URSA and ARASA, agreed to convert affected employees to nonagreement officers). NSR is now in a position (subject to consummation of the Transaction), to operate its allocated shop facilities under NSR's rules, standards, and practices and NS' managerial structure. In these circumstances, application of the Conrail/BMWE Agreement would invite endless and disruptive craft jurisdictional conflicts with respect to work -- such as certain plumbing and facilities maintenance -- that may have been subject to differing past practices on NSR and Conrail. Woods Decl. ¶ 80.²³

Likewise, variations in past practices under the Conrail/BMWE Agreements also could give rise to disputes over NSR's ability to use outside contractors for certain discrete repair and maintenance functions -- such as installation of certain types of fences, construction of certain retaining walls, certain bridge repairs, and paving of crossings. Application of potentially inconsistent scope rules would complicate the performance of those tasks and could, in some cases, require NSR to maintain additional specialized forces, who would not be fully utilized on NSR's allocated share of the former Conrail lines. NSR's proposal to apply the NW-Wabash/BMWE Agreement, by contrast, will enable NSR to make full and productive use of all available forces. Woods Decl. ¶ 81.

These represent only a few of the differences between the Conrail and NW-Wabash rules. The Conrail/BMWE Agreement also contains differing rules regarding, inter alia, the

²³ Application of the Conrail/BMWE Agreement could create conflicts over work (such as certain maintenance work in Mechanical Department facilities and the maintenance of switch heaters), which has been performed by BMWE-represented plumbers on Conrail and by other crafts on NSR. Woods Decl. ¶ 80.

advertisement and award of positions (Rule 3(3)); the provision of employee meals (Rule 24); the handling of claims and grievances (Rule 26); and the handling of disciplinary hearings and appeals (Rule 27). Although most of the differences are not individually unmanageable, cumulatively they would interfere with NSR's operation of the allocated lines as part of its expanded system. Woods Decl. ¶ 82.

Because of these numerous differences, application of the Conrail/BMWE Agreement would require NSR to incur needless additional administrative expenses. If NSR were required to operate the allocated lines under the terms of the Conrail/BMWE Agreement, it would need to maintain multiple claims handling procedures, bidding processes, training facilities and payroll systems, necessitating duplicative computer systems and staffs. Such requirements would impose additional costs on NSR, while producing no corresponding benefits for employees or the public. Instead, NSR intends to achieve substantial efficiencies through unification of bidding, training, payroll and other personnel practices and systems on its existing and allocated lines. Woods Decl. ¶ 83.

3. NSR's Proposal Adequately Protects Employees' Interests.

Adopting the proposed implementing agreement will not compromise the interests of individual employees. The NW-Wabash/BMWE Agreement and the Conrail/BMWE Agreement are largely the products of national negotiations, and their economic terms are comparable. In fact, many of the terms of the agreements – including the basic health and welfare benefits packages – are the same. To be sure, BMWE could point to particular Conrail/BMWE rules that, viewed in isolation, might seem more generous to employees than comparable rules under the NW-Wabash/BMWE Agreement. Certain NW-Wabash/BMWE rules are more generous than their Conrail/BMWE counterparts. But there is no occasion for such a comparison. Parties are not entitled to “cherry

pick" between the rules of two different agreements. Union Pacific Corp., et al.--Control and Merger--Southern Pacific Rail Corp. et al., Finance Docket No. 32760 served August 12, 1996, slip op. at 174. Certainly, the differences do not render the NW-Wabash/BMWE agreement inherently or objectively "inferior" to the Conrail/BMWE agreement. UP-SP/Train Operations, slip op. at 6 ("This is not a case where the carrier is using New York Dock as a pretext to apply a new, uniform collective bargaining agreement that is inferior in matters such as wage levels, benefits levels, and working conditions.").²⁴

Finally, NSR's proposal adequately protects employee rights under the New York Dock conditions. Conrail's Supplemental Unemployment Benefits ("SUB") Plan provides certain monetary benefits to qualified employees who are furloughed by Conrail. NSR acknowledges that the Conrail SUB Plan is covered by Article I, Section 3 of the New York Dock conditions, governing the application of "existing job security or other protective conditions or arrangements," and, accordingly, will continue the SUB Plan (consistently with the seniority arrangements and obligations under the NW-Wabash/BMWE Agreement to be applied to the allocated properties). Allocated employees who otherwise are covered by the SUB Plan at the time of allocation may elect to receive

²⁴ As referee Simon reasoned in his Article I, Section 4 award in CSX Radio Repair Shop Consolidation at 25):

Nor is it appropriate to make qualitative judgments about the different agreements. ... [It] would be an impossible task to determine which agreement, taken in its entirety, is "the best." Some "better" provisions of one agreement may be outweighed by "better" provisions on different matters in another agreement. Furthermore, what may be beneficial for one employee may be immaterial to another.

the Plan benefits in lieu of any New York Dock protection in the event they are furloughed from NSR.²⁵

Likewise, NSR's proposal adequately protects all "rights, privileges, and benefits" subject to protection under Article I, Section 2 of the New York Dock conditions. As we explained in Part I (at pp. 23-24), Section 2 protection covers only certain benefits – such as pension benefits – that are considered "vested and accrued." Carmen III, slip op. at 27; UP-SP/Train Operations, slip op. at 7 (quoting UTU v. STB, 108 F.3d at 1430). Moreover, Section 2 is implicated only if the differences between the comparable benefits is material and substantive. UP-SP/Train Operations, slip op. at 7. Section 2 is not implicated by NSR's proposal here.

NSR, like Conrail, offers its BMW-represented employees the opportunity to participate in a 401(k) savings plan as a matter of company policy. NSR proposes to place its allocated BMW-represented employees under NSR's own, more generous policy. NSR contributes a thirty percent match (up to certain dollar amounts) to employee contributions. Under Conrail's plan, by contrast, the carrier does not match contributions made by BMW-represented employees.

Other employee benefits will not change. The Conrail and NW-Wabash Agreements incorporate the same basic health and welfare benefits package, which was negotiated nationally by BMW. The Plan includes, among other benefits, the national dental plan; the national supplemental sickness plan; and the nationally negotiated early retirement major medical benefits. Allocated

²⁵ In addition, and subject to the election of benefits requirements of Article I, Section 3 of New York Dock, allocated former Conrail employees who otherwise meet the qualification requirements will become eligible for protective benefits under the February 7, 1965 Stabilization Agreement (Carriers' Exh. A-11), as modified and extended, by virtue of the application of the NW-Wabash Agreement. The Conrail/BMW Agreement does not incorporate and apply the February 7, 1965 Agreement to Conrail employees.

employees will experience no lapse in coverage and, where applicable, will continue to receive benefits in accordance with their existing elections.

**B. NSR'S PROPOSAL FOR CONSOLIDATING SHOP FUNCTIONS IS
APPROPRIATE.**

Other public benefits of the Transaction will be secured through the integration of shop functions in support of maintenance of way operations on the expanded NSR system. Pursuant to the Transaction Agreement, roadway equipment repair and rail welding functions for the retained and allocated Conrail lines may be performed on an interim basis at the roadway equipment repair shop at Canton, Ohio, and the rail welding plant at Lucknow (Harrisburg), Pennsylvania. The agreement enables either Carrier to terminate its use of the Canton and Lucknow facilities on six months' notice.

As described in Part I of the Carriers' submission, NSR and CSXT have agreed to close the Canton and Lucknow facilities and to consolidate the functions currently conducted in those facilities with the operations at existing NSR and CSXT facilities. This will involve abolishing all remaining positions at the Canton and Lucknow facilities, including a number of positions subject to the Conrail/BMWE Agreement. Conrail currently employs 90 BMWE-represented employees at the Canton shop and six BMWE-represented employees at Lucknow. Under the Carriers' joint proposal for the allocation of the BMWE-represented workforces at the Canton and Lucknow facilities, as explained in Part I, such employees affected by the plant closings will be afforded an opportunity, in accordance with their existing seniority standing, to fill newly established positions, either by following their work to one of its new locations on the NSR system or on the CSXT system (in regard to roadway equipment repair), or by exercising existing seniority rights to other maintenance of way positions on Conrail, NSR, or CSXT. Woods Decl. ¶ 84.

Here, NSR explains its plans for integrating functions previously performed at Canton and Lucknow into NSR's existing operations and its proposal for rearranging the workforces pursuant to New York Dock Article I, Section 4. Specifically, NSR intends to transfer the equipment repair functions associated with its allocated lines to NSR's Charlotte Roadway Shop in Charlotte, North Carolina and to relocate the rail welding functions for the allocated lines to NSR's Rail Fabrication Plant in Atlanta. Woods Decl. ¶ 85.

NSR's plans for these functions are part of its larger plan, as described above (at 11-19), to integrate its allocated lines into its existing MW&S Subdepartment operations. The functions performed at Canton and Lucknow -- along with various maintenance of way support functions performed by outside contractors for Conrail -- are performed on a centralized basis on the NSR system. NSR intends to take advantage of the opportunities made possible by the Transaction to achieve greater operating efficiencies and economies by expanding its existing support operations to encompass the allocated lines.

The proposed shop coordinations present familiar New York Dock transactions. See, e.g., Norfolk Southern Ry. and Norfolk & Western Ry. and Brotherhood of Railway Carmen Division-TCU, June 19, 1995 (Muessig, Arb.) ("NSR-NW/Car Shop Consolidation") (coordination of rail car repair functions is the type of action which ICC anticipated and which has as its purpose the creation of operational efficiencies) (Carriers' Exh. C-17); Norfolk & Western Ry., et al. and Brotherhood of Railroad Signalmen, February 9, 1989 (LaRocco, Arb.) ("NS Signal Shop Consolidation"), at 19-20 (signal shop work consolidation "is of the type that the carriers could reasonably be expected to pursue under the auspices of the control case." (Carriers' Exh. C-16). Such coordinations are subject to the same basic legal standards -- including the "necessity" standard for modifying existing labor agreements -- that govern NSR's proposed coordination of field operations (as described in Part

I, at pages 18-23). Coordinations such as these, involving the integration of centralized functions, yield public benefits by enabling carriers to eliminate duplicative facilities and to staff operations more efficiently. CSX Corp. --Control--Chessie System, Inc. and Seaboard Coast Line Industries, Inc., 8 I.C.C. 2d at 720 (Carriers' Exh. B-4) (affirming arbitrator's ruling that centralization of power distribution function would permit "obvious efficiencies and thus economies"); NS Signal Shop Consolidation, at 20 (consolidation of signal repair shop work allows the carriers "to accrue the same economic savings that the acquisition was designed to achieve and the coordination will provide the public with more efficient and affordable rail services").

In order to achieve those benefits, it is nearly always necessary to provide for the application of a single labor agreement at the consolidated facility. Id.; Union R.R. and Bessemer & Lake Erie R.R. and United Steelworkers of America, October 21, 1997 (Witt, Arb.) (Carriers' Exh. C-21) (consolidation of clerical functions under single agreement) ("URR-BLE/Clerical Coordination"), petition for review pending sub nom. Blackstone Capital Partners L.P., Blackstone Transportation Partners L.P., and USX Corp. -- Exemption, Finance Docket No. 31363 (Sub-No. 3), filed November 10, 1997; Conrail and IAM, June 21, 1993 (Peterson, Arb.), at 13 (terms of Conrail agreement applied to merged operations).

The agreement to be applied is that of the "controlling carrier" — that is, the surviving carrier's agreement is applied to the consolidated operation. E.g., Conrail and Monongahela Ry. and United Transportation Union (E) ("Conrail/Monongahela and UTU"), October 29, 1992 (LaRocco, Arb.) (Carriers' Exh. C-9), at 17 (applying the "controlling carrier" principle in concluding that the transferring locomotive engineers should be placed under the engineers' agreement of the surviving carrier); NS Signal Shop Consolidation, at 27 (endorsing and applying the "controlling carrier" principle in holding that signal shop work transferred from NSR to NW would be governed by the

NW agreements); Brotherhood of Locomotive Engineers and Union Pacific R.R., January 17, 1985 (Seidenberg, Arb.) (Carriers' Exh. C-2) (agreement of controlling carrier applied to coordinated train operations).

Applying the controlling carrier's labor agreement eliminates contractual restrictions that otherwise would stand in the way of full operational integration. As referee LaRocco explained in a dispute arising out of a Conrail merger:

Conrail is the controlling Carrier in the merger and thus, it is most appropriate to place MGA Engineers under the Agreement applicable to Locomotive Engineers on Conrail. Southern Railway-Purchase-Illinois Central Railroad Line, 5 I.C.C. 2d 842 (1989). Complete integration of train operations makes it unwieldy for MGA Engineers to carry any portion of the MGA agreement with them to Conrail. Imposing multiple agreements on the former MGA territory would render the coordination not just awkward but would thwart the transaction.

Conrail/Monongahela and UTU, at 17. The specific arrangements proposed by NSR here fully satisfy those standards.

1. Consolidation Of Roadway Equipment Repairs

NSR's plan to consolidate roadway equipment repair functions on its expanded system will yield numerous benefits by centralizing equipment repair functions in NSR's Charlotte Roadway Shop. This integration, as described specifically in NSR's Operating Plan (Carriers' Exh. A-4 at 339), will facilitate NSR's plans to apply its equipment maintenance practices and techniques to its operation of the allocated lines. Woods Decl. ¶ 86.

As Mr. Woods explains, NSR's roadway equipment maintenance operations are qualitatively different, and substantially more extensive, than the repair functions performed on Conrail today. Conrail's centralized equipment maintenance operations are limited to repairs of roadway equipment. Conrail purchases its equipment parts and components from outside suppliers and

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uses outside contractors to perform any rebuilding or major refurbishing of equipment. Woods Decl. ¶ 87.

NSR, by contrast, performs its own equipment design, fabrication and major equipment overhauls, in addition to and in connection with its centralized maintenance operations. Equipment that is sent to the Charlotte Roadway Shop for maintenance is not only repaired but refurbished to the latest design standards. Equipment maintained in this fashion is more reliable, productive, and long lasting than equipment maintained under Conrail's standards and practices. Woods Decl. ¶ 88.

NSR's decision to close the Canton Shop was heavily influenced by its comparison of the relative operations and capacities of the Canton and Charlotte shops. The Charlotte Roadway Shop is an integrated, state-of-the-art equipment repair and refurbishment plant, equipped with computer-controlled machine tools and heavy metal working and cutting equipment. The shop also includes dedicated fabrication work stations equipped with modern welding and fume extraction equipment and climate-controlled painting and equipment washing facilities. The Charlotte Shop employs approximately 115 agreement and nonagreement employees, including its own staff of engineers and draftsmen dedicated to machine design, development, and innovation. Maintenance, manufacturing, and rebuilding functions are performed in the Charlotte facility by 96 employees in various Shopcrafts. Most of the Shopcrafts employees (approximately 56) are IAM-represented machinists, while the other Shopcrafts organizations represent the remaining agreement work force. Woods Decl. ¶ 89.

By comparison, Conrail's roadway equipment facilities, like its maintenance operations, are limited. The Canton Shop is a classic turn-of-the-century steam locomotive shop that was converted to an equipment repair shop and has since undergone no major renovations. The Canton

Shop has no machine shop, dedicated component fabrication areas, or equipment washing facilities. Upgrading that facility to meet NSR's operating needs would be cost-prohibitive. Instead, NSR has begun investing approximately \$13.5 million to expand its Charlotte facility to meet the needs of the expanded NSR system. Woods Decl. ¶ 90.

The consolidation of roadway equipment functions will save approximately \$1.2 million annually in operating costs through the consolidation of functions and approximately \$1.5 million annually in the costs of equipment parts and components. In addition, the integration will produce other, less readily quantifiable, benefits through improved equipment performance. These are precisely the sort of benefits that the Transaction is intended to produce. Woods Decl. ¶ 91.

The arrangements proposed by NSR are appropriate to the Transaction and fair to employees. CSXT and NSR have agreed to allocate the available Canton Shop employees based on the Carriers' operating needs. Under that formula, as reflected in Appendix A, Section I(C) of the proposed implementing agreement (Carriers' Exh. A-1 at 11), up to twenty of those employees will be allocated to CSXT, and the remainder will be allocated to NSR. Most, if not all of the affected BMW-represented employees at the shop will have opportunities to continue their railroad employment following the Canton Shop closing.

Some or all of the active Canton Shop employees also will have the option of following their work to Charlotte in accordance with the terms of the proposed NSR Repair Shop Agreement (Carriers' Exh. A-1, at 20-21). NSR plans to create 56 new shopcrafts positions at the Charlotte shop to handle the additional roadway equipment for the expanded system. Those positions will be advertised in the various Shopcrafts in accordance with NSR's staffing needs (roughly in

proportion to the current distribution of Shopcrafts employees in the Charlotte Shop).²⁶ Those new Shopcrafts positions will be advertised to employees at Canton in advance of the plant closing (around the same time that CSXT advertises its new roadway equipment shop positions at Richmond, Virginia). Positions will be awarded in order of seniority to employees with requisite experience in the work of the Shopcrafts. Employees who follow their work to Charlotte will work under the terms of the applicable agreement governing the respective classifications. NSR anticipates that all of its allocated employees will be able to secure continued employment by one of these means and, accordingly, anticipates no furloughs as a result of the Canton Shop closing. Woods Decl. ¶ 93.

Under NSR's proposal, in accordance with established New York Dock standards, employees affected by the Canton shop closing will be required to follow their work to one of its new locations or exercise their existing BMWSE seniority rights, in order to remain eligible for New York Dock benefits. E.g., Brotherhood of Railway, Airline & Steamship Clerks and Union Pacific R.R., February 4, 1986 (Sharp, Arb.) (Carriers' Exh. C-5), at 9; Maine Central R.R., et al. and International Association of Machinists, February 16, 1987 (Zack, Arb.) (Carriers' Exh. C-14), at 2; Maine Central R.R., et al. and Brotherhood of Railway, Airline & Steamship Clerks, April 1, 1987 (Lieberman, Arb.) (Carriers' Exh. C-13), at 23 ("it is well established that employees who refuse to transfer with available work" are not eligible for New York Dock benefits, even when the transfer requires relocation); Michael, et al. and Delaware & Hudson Ry., October 26, 1987 (O'Brien, Arb.) (Carriers' Exh. C-15), at 6-8 (under New York Dock, employees were obligated to "transfer with available

²⁶ NSR plans to establish positions for 33 machinists, eight blacksmiths, two laborers, five electricians, four carmen and four sheetmetal workers. Charlotte Shopcraft employees currently are represented by the Shopcraft Unions, which are parties to the March 1, 1975 Southern "Shop Crafts" Agreement (Carriers' Exh. A-12): IBEW (which represents the Charlotte Shop electricians); IAM (machinists); NCFO (laborers); IBB (blacksmiths); and the SMWIA (sheetmetal workers). Woods Decl. ¶ 92.

work . . . even if this required a change in residence"); Consolidated Rail Corp. and International Brotherhood of Boilermakers, April 8, 1994 (Marx, Arb.) (Carriers' Exh. C-7), at 9-10. An employee who elects to relocate in order to follow his work is entitled to a moving allowance under New York Dock Article I, Section 9.

Any Canton Shop employees who are unable to follow their work to Charlotte or to CSXT's equipment repair shop will be allocated to NSR. Most of the 90 active BMW-represented employees hold seniority rights on other rosters covering parts of the NSR-allocated lines, and will have the option to exercise that seniority to a position in the field forces in the event that they are unable to obtain a position at Charlotte or at CSXT's equipment repair shop. Woods Decl. ¶ 94.

Some or all of the unions may oppose NSR's proposed arrangements for the Charlotte Shop coordination; however, the grounds for potential opposition are unclear. Certainly there would be no basis for a contention on the part of BMW that employees who follow their work to Charlotte should continue to work under the terms of the Conrail/BMW Agreement. Such an outcome would be contrary to established precedent (the "controlling carrier" principle, as described above). Moreover, such an approach would be operationally infeasible. Applying the Conrail/BMW Agreement in Charlotte could prevent integration of NSR's expanded roadway equipment fleet and would impede full operational integration by requiring NSR to segregate work based on the original ownership of the work equipment (or some other similar consideration unrelated to operating efficiency). In any event, maintaining separate agreements would impede integration of the workforce at Charlotte, complicating the filling of assignments and the completion of work and otherwise standing in the way of realization of the public benefits of the Transaction.²⁷

²⁷ As referee LaRocco found in a 1989 Article I, Section 4 arbitration involving the consolidation of signal shop operations on the lines of the former NW and former Southern Railway systems:
(continued...)

The fact that the consolidated operations previously were performed under agreements with different unions does not bar application of the controlling carrier principle or otherwise require a different result than the one proposed by NSR. It is not up to the referee to resolve representational disputes, and the fact that transferring employees will be represented by different organizations at their new location is no obstacle to the imposition of an appropriate implementing agreement. URR/BLE/Clerical Coordination; CSX Control/Train Operations, Finance Docket No. 28905 (Sub-No. 27), at 15 ("[T]he effect of [ICC/STB-authorized] transactions on selection of union membership is under the jurisdiction of the National Mediation Board acting under the Railway Labor Act.")

The Shopcraft Unions' objections to NSR's proposed workforce arrangements are likewise without merit. The Shopcraft Unions do not take issue with NSR's plan to relocate equipment repair work from Canton to Charlotte. Nor do they seem to object to application of the controlling carrier principle -- that is, to NSR's proposal to place the transferred work under the scope of the Shopcrafts agreements currently in effect at Charlotte. Apparently, however, some or all of the Shopcraft Unions will oppose the proposed implementing agreement on the ground that employees

²⁷ (...continued)

Although the organization acknowledges that the work at Roanoke will be commingled, it nonetheless urges us to carry forward some rules in the CG and SR Schedule Agreements and allocate Roanoke positions among the three railroads. However, complete integration of the fungible signal repair work renders it impossible for the employees who transfer from East Point to Roanoke to import any portion of the CG or SR Schedule Agreements with them. Imposing multiple schedule agreements at the Roanoke facility would not just make the coordination unwieldy but would totally thwart the transaction. The Carriers persuasively argued that they could never attain operation efficiencies if the NW had to manage signal shop work and supervise shop workers under multiple and sometimes conflicting collective bargaining agreements.

who transfer to Charlotte should be treated as new hires for purposes of establishing seniority under the applicable Shopcraft agreements. NSR's proposed implementing agreement, by contrast, provides for the "dovetailing" of comparable seniority on the appropriate Shopcraft rosters. See NS Signal Shop Consolidation, at 31 ("Since we are applying the controlling carrier concept to this transaction, those CG and SR employees who bid on and transfer to Roanoke shall have their seniority dovetailed into the appropriate regional signalmen roster on the NW"). This arrangement is intended to give employees opportunities to follow their work, with due consideration for NSR's operating need for qualified and experienced employees. NSR believes that its proposed seniority arrangement is appropriate to the Transaction and should be adopted.

2. Integration Of Rail Welding Functions

NSR also intends to take advantage of the opportunity to achieve system-wide efficiencies by consolidating rail welding functions for the expanded NSR system. This work involves the processing of continuous welded rail segments for use in rail production projects. Both Conrail and NSR operate central rail welding facilities. On both carriers, the rail fabrication work is performed in a carrier-owned facility, which is operated by an outside contractor. BMW-represented employees at both plants perform ancillary rail loading and unloading functions. In addition, NSR's BMW-represented workforce is involved in the reconditioning of worn rail. Woods Decl. ¶ 95.

NSR's decision to consolidate the rail welding work in its Atlanta Rail Fabrication Plant was based in part on the relative condition and capacity of the carriers' respective existing facilities. NSR's rail welding facility is equipped with more modern machinery, which produces a higher quality continuous welded rail. Rail welds produced at Atlanta have a substantially lower failure rate than rail welds produced at Lucknow and, accordingly, will support safer operations and need less frequent repair. Rail welds produced at Lucknow comply with industry safety standards

but do not meet NSR's own more stringent production standards. In addition, the Atlanta facility, unlike Conrail's, is equipped to perform reconditioning of used rail. This process enables NSR to recycle for lower speed and lower density uses (such as yard track) rail that has exceeded its useful life in main line operations. Finally, the Atlanta plant, unlike Conrail's, has facilities for storage of finished rail. Rail produced at Lucknow must be loaded directly into specially equipped rail cars. If such cars are unavailable for any reason, the production process is slowed or halted. Woods Decl. ¶ 96.

Moreover, the Atlanta facility already has capacity to perform rail welding functions for the allocated lines. The Atlanta facility is equipped to weld 1200 miles of rail annually, a level that has vastly exceeded NSR's system-wide needs in recent years. The excess capacity of the Atlanta Fabrication Plant can readily be deployed to meet the needs of NSR's expanded system with no additional capital investment. Woods Decl. ¶ 97.

Conrail's Lucknow Plant, by contrast, is not equipped to handle rail fabrication or reconditioning for the expanded NSR system. In its current condition, the Lucknow Plant is capable of welding approximately 400 track miles of rail per year. Moreover, the plant's two aged rail welding machines would need to be replaced, at an estimated cost of \$3 million, in the near future. Woods Decl. ¶ 98.

By shifting the rail welding functions to Atlanta, NSR will be able to obtain the materials necessary to maintain the allocated lines to the standards set by NSR's Engineering Department and will generate other substantial public benefits. Closing the Lucknow facility will save approximately \$1.2 million annually in contractor fees and other operating expenses (exclusive of wages paid to BMW-represented employees) and will obviate the capital investment that otherwise would be required to retrofit the Lucknow facility to meet NSR's needs. Woods Decl. ¶ 99.

These benefits will be achieved with minimal effect on involved employees. Most of the workforce at Conrail's Lucknow Plant is employed by the contractor that performs the welding functions. Closing of the Lucknow Plant will not result in the furlough of any BMW-represented employees. Only six BMW-represented employees currently work at the Lucknow facility; all of those employees are to be allocated to NSR. NSR plans to allow Lucknow employees to follow their work in connection with established new positions at NSR's Atlanta Rail Fabrication Plant. The proposed implementing agreement (Article II, Section I) establishes a mechanism for the selection of assignment of employees to the expanded Atlanta Fabrication Plant operation and specifies the arrangements under which the transferred work will be performed. In accordance with the controlling carrier principle, the transferred work will be placed under the agreement currently applicable to the Atlanta operation. Employees who follow their work will have their Conrail seniority dates "dovetailed" onto the applicable rosters.

Current Lucknow employees who do not transfer to Atlanta will have continued work opportunities on the allocated lines. The Lucknow employees hold seniority on one or more of Conrail's Harrisburg Division BMW rosters and will have an opportunity, in accordance with the overall workforce allocation proposed by the Carriers, to bid on new line maintenance positions bulletined on the NSR or CSXT allocated lines.

The unions have not articulated any specific objections to the proposed coordination of rail welding work on NSR. If BMW were to oppose NSR's proposal in arbitration on the ground that it fails to impose the Conrail/BMW Agreement on NSR's rail welding plant with respect to any former Conrail employees who move with their work to Atlanta, such opposition would be without basis, for the reasons we have explained above. Imposing the Conrail/BMW Agreement on the Atlanta facility would impede the coordination and deprive NSR and the public of some of the

benefits of the Transaction. E.g., Conrail/Monongahela and UTU, at 17 (rejecting proposal that would enable employees to "carry" with them "any portion of" their prior labor agreement).

C. NSR'S PROPOSAL TO USE OUTSIDE CONTRACTORS FOR EXTRAORDINARY CAPITAL PROJECTS IS APPROPRIATE AND NECESSARY TO THE IMPLEMENTATION OF THE TRANSACTION.

Finally, the Carriers' proposed implementing agreement includes a provision (Article I § 1(h)) for expediting certain maintenance of way projects necessary to implement the Conrail Transaction. For reasons we explain here and in the accompanying declarations (Ingram Decl. ¶¶ 24-36 and Woods Decl. ¶¶ 103-119), NSR needs a temporary arrangement to permit its use of outside contractors in order to complete the capital projects that are required for the integration and improvement of train operations on NSR's expanded system in the manner described in NSR's Operating Plan.

The proposal NSR makes here was first described in the Carriers' STB Application. There, NSR described its plans to invest more than \$500 million in the construction, expansion, and upgrading of facilities and infrastructure on its existing and allocated properties. NSR identified specific capital projects that would be necessary to link its existing properties with its allocated Conrail properties and to upgrade and increase the capacity of its expanded system in order to support planned train operations. NSR Operating Plan at 199-217. At least 40 of the NSR projects identified in the Application involve work that ordinarily would be performed by NSR's BMW-represented employees under the terms of the NW-Wabash/BMW Agreement.²⁸ These projects involve the installation of more than 128 miles of new track, including new rail connections (for which

²⁸ Some of the projects identified in the Application involve new track construction and installation at locations on NSR's former Southern Railway lines. The practices under the NSR/BMW Agreement at those locations permit NSR to use outside contractors to perform such work. Woods Decl. ¶ 105.

NSR obtained the separate STB authorization required by 49 U.S.C. §10901(a)). Woods Decl. ¶¶ 104-106; Ingram Decl. ¶¶ 24-25.

NSR advised the STB that it would need to use outside contractors in order to complete its planned capital projects on the three year timetable specified in the Operating Plan (Carriers' Exh. A-4, at 12). Since the STB Application was prepared, NSR has further refined its capital plan and has identified an additional 10 projects necessary to integrate train operations on its expanded system and to accommodate the traffic increases planned for the expanded system. In total, NSR now plans to install more than 866,800 feet, or over 164 miles, of new track in connection with implementation of the Transaction. It may be necessary for NSR to add additional Transaction-related projects to this list as NSR further refines its operating and capital plans. Ingram Decl. ¶ 24; Woods Decl. ¶ 107.

As Mr. Ingram explains, NSR's planned capital program is necessary to support the train operations described in NSR's Operating Plan. Most of the planned capital projects involve the construction of new track necessary to improve the efficiency and capacity of NSR's new routes. In this category are several major track connection projects located at existing and new junction points on NSR's existing and allocated properties. For example, NSR will build a new track connection at Buffalo, which will permit efficient movement between NSR's existing Cleveland-to-Buffalo mainline and Conrail's Southern Tier route. A new track connection at Butler, Indiana will connect NSR's Detroit and Huntington Districts with Conrail's Chicago Line, creating the most direct rail route (the Butler Cutoff Route) between Detroit and the Chicago gateway. A new track connection at Ashtabula, Ohio will permit routing of ore traffic from the Ashtabula Dock to the steel mills at Mingo Junction via NSR's Cleveland line, avoiding the congested Youngstown area and providing faster service. And NSR will build a new connection at Tolono, Illinois to permit efficient handling of the

increased traffic between NSR and Illinois Central expected as a result of the Transaction, bypassing congestion in East St. Louis. This new gateway will permit NSR to compete effectively with CSXT for heavy petrochemical traffic flows moving between the Northeast and the Southwest and Gulf Coast. Ingram Decl. ¶¶ 26-27.

NSR also is undertaking a number of capacity improvement projects, which will enable the railroad to handle the types and volumes of traffic planned for the expanded system. NSR will invest heavily in capacity improvements, such as new and expanded passing sidings, double-track cross-overs and additional yard track to prevent operational "bottlenecks" at locations where the railroad will handle increased traffic volumes. For example, NSR is building signaled crossovers on the 43-mile double-track segment of its allocated Conrail property from Harrisburg to Reading, Pennsylvania, which is a heavily traveled portion of what will be NSR's new Penn Route. And NSR will invest in facilities and infrastructure -- including new and expanded terminals and clearance improvement projects -- to support its planned intermodal operations. Ingram Decl. ¶¶ 28-29.²⁹

The planned capital investments are one of the many "important public interest benefits" cited in the STB's Control Order (at 51, 131). In authorizing the Carriers' planned connection projects, the Board found the projects "integral to the competitive service that CSX and NS will provide under the primary transaction," and that the "very purpose" of these projects . . . "is to create additional competitive alternatives and to improve rail service for shippers throughout applicants' substantially expanded systems." Id. at 142, 143-44.

²⁹ NSR also will be undertaking major line construction projects in order to mitigate the environmental impacts of the Transaction-related traffic increases. For example, NSR plans to build a grade-separated route through Erie, Pennsylvania (requiring installation of 5.3 miles of new track), which will eliminate 1.24 miles of NSR line running through the streets of Erie, resulting in safer and faster movement of freight through that city. Ingram Decl. ¶ 32.

NSR began the planned Transaction-related capital work on its existing properties long before the STB gave its formal approval to the Application. NSR sought and obtained STB authorization to complete several connection projects (at Sidney, Illinois, Bucyrus, Ohio, and Alexandria, Indiana) in advance of the STB's ruling on the Application. By the time the Application was approved, as the STB noted with approval in the Control Order (at 131), NSR and the other Carriers had "already completed or [were] in the process of completing, numerous construction projects necessary to allow traffic to flow freely over their newly structured systems." The STB imposed a condition on its authorization of the Transaction requiring the Applicants to provide periodic reports on the status of the capital projects. Control Order at 162-63.

Since the Conrail Transaction was announced, NSR's BMW E-represented employees have been fully employed, on both Transaction-related projects and routine line and program maintenance, on NSR's existing properties. Other than the regular seasonal cut-off of program gangs, NSR has not reduced its BMW E forces or furloughed BMW E-represented employees, and many employees have worked substantial overtime on Transaction-related projects. Woods Decl. ¶ 108.

But the employment of existing forces will not assure timely completion of the remaining capital projects. Even after deploying all active forces through the remainder of 1998, NSR will have yet to complete at least 34 Transaction-related capital projects (as identified in Exhibit NSR-12), involving the construction of more than 126 miles of new track. Among these projects are seventeen projects involving the construction and upgrading of track segments and facilities on NSR's new Penn Route, which is to be NSR's principal east-west route, operating in direct competition to the CSXT-allocated Water Level route. Woods Decl. ¶ 109; Ingram Decl. ¶ 29.

Timely completion of these improvements is critical. Until these projects are completed, the expanded NSR system will not be fully operational; NSR will not be in a position to

effect its Operating Plan; and the public will not realize the full benefits of the Transaction. Ingram Decl. ¶ 36.

For those reasons, NSR plans to use outside contractors, in addition to its existing and allocated BMW forces, to complete its Transaction-related capital projects. The remaining construction projects exceed NSR's manpower and equipment capacity. NSR expects to be allocated approximately 1,889 Conrail maintenance of way employees under the allocation proposal set forth in Part I of the Carriers' submission. NSR will need all of those employees to perform routine line maintenance and ongoing capital renewal projects necessary to meet NSR's maintenance standards for the allocated properties. Likewise, the remaining projects that must be completed on NSR's existing lines exceed the capacity of the workforce on those lines. Therefore, NSR will not have sufficient manpower within its BMW-represented ranks to complete the necessary capital projects. Woods Decl. ¶ 110.

The number of construction projects NSR must now complete, and the speed with which NSR must complete them, are unprecedented. NSR's BMW-represented maintenance of way forces have never performed construction work on anything approaching the scale of the three-year schedule proposed for these projects. During the last three years, BMW-represented forces on the former NW system performed an average of 11.9 miles per year of new track construction. NSR now needs to perform nearly four times that amount in each of the next three years. Under the best of conditions (including the use of NSR's DPG arrangement and flexible work rules), it would take NSR far more than three years to complete the remaining construction projects using its expanded BMW-represented workforce. Woods Decl. ¶ 111.

NSR could not accelerate this process by temporarily expanding its workforce. To perform all of its planned construction projects in a timely manner, NSR would need to hire and train

scores of new maintenance of way employees (and additional nonagreement supervisors), most of whom would be left without work opportunities upon completion of the Transaction-related capital projects. Such a massive short-term workforce expansion would impair the efficiency of NSR's maintenance of way operations by directing manpower from ongoing maintenance of way work to training and supervision. NSR's practice is to recruit and train employees for long term employment -- not to hire a transient labor force, or to conduct mass furloughs that disrupt the workforce, require retraining of employees upon return from furlough, and jeopardize employee morale. NSR's approach promotes stability and efficiency in its maintenance of way workforce, which has contributed to NSR's being the safest Class I railroad in the nation.

In any event, having additional trained employees would not enable NSR to complete its capital plan on time. Even if NSR could hire and train the necessary employees on the schedules demanded by its Operating Plan, NSR would be unable to equip those forces to perform the remaining capital projects. NSR has some of the equipment necessary to perform the construction projects. But that equipment could not be diverted from its regular use in line maintenance without handicapping those operations. Woods Decl. ¶ 113.

Nor would it be feasible or efficient for NSR to acquire the equipment that would be necessary to meet its construction schedule. Certain pieces of necessary equipment, such as a Material Handling Truck, Ballast Regulator, and Production Tamper, are not available for lease, and so would have to be purchased. This equipment must be special-ordered on a first-come, first-served basis, subject to availability based on existing production orders. Even assuming such equipment could be ordered and received in time to be used on NSR's existing construction schedule, the cost of making such an acquisition could not be justified. At a minimum, assuming that the planned projects could be performed sequentially, NSR would have to purchase \$3.4 million worth of

equipment. If the same projects were commenced simultaneously, NSR would have to spend as much as \$31.7 million on new equipment. In reality, the costs of equipment would be somewhere between those amounts. In any event, most of the equipment would be surplus upon conclusion of the initial capital projects. Woods Decl. ¶ 114.³⁰

It would make no operational or economic sense for NSR to equip and hire additional employees that NSR does not otherwise need for the limited purpose of completing the remaining construction projects. Doing so would impose needless additional costs on the NSR operations, while producing no corresponding public benefit. Conversely, using outside contractors, as NSR proposes here, would permit timely and efficient completion of the necessary capital projects.

NSR anticipates that BMW will oppose NSR's use of outside contractors. BMW is likely to contend that the scope rules (and related practices) under its existing agreements with NSR and Conrail reserve some or all of the involved work to the Carriers' BMW-represented employees. We assume, for purposes of this proposal, that BMW would be correct in saying that otherwise applicable agreement rules and/or practices would hinder NSR's unrestricted use of outside contractors to complete the Transaction-related construction projects. But far from being a reason to reject NSR's proposal, the scope rule limitation is the very reason that NSR needs to address its construction projects in the New York Dock implementing agreement. In the absence of an appropriate arrangement in this proceeding, NSR's ability to complete the necessary infrastructure improvements will be frustrated.

³⁰ The specialized equipment that will be needed for the planned capital projects could not be leased for use by NSR's employees. Rather, the few third-party contractors that supply specialized railroad construction equipment require that their trained employees be used to operate the equipment. Woods Decl. ¶ 115.

NSR's proposal to use outside contractors is narrowly tailored to accomplish its purpose. The proposal covers only a limited universe of projects and does not place any permanent restriction on the BMWWE agreement scope rules or permanently change applicable practices under those rules. The temporary arrangement will remain in effect only so long as NSR is performing capital projects initially required to implement the Operating Plan and to achieve the benefits of the Transaction. Once those projects are complete, the ongoing maintenance and renewal of newly constructed track will be performed in accordance with the applicable labor agreements and practices. Moreover, no BMWWE-represented employees will lose work opportunities as a result of NSR's proposal to increase the use of outside contractors. Under its proposal, NSR will employ third party contractors only for Transaction-related capital projects that cannot be completed on a timely basis using NSR's available BMWWE-represented forces. That is, NSR will not use an outside contractor for a Transaction-related project pursuant to its proposal if, on the involved operating division, any of NSR's otherwise available allocated Conrail employees or otherwise available current employees on NW are furloughed.

NSR's proposal promotes the objectives of the Transaction in a manner that is entirely consistent with the established New York Dock framework and, more specifically, with the "necessity" test for modifying collective bargaining agreements. As the Carriers have explained, under the now well-established necessity test, modification of a scope rule is appropriate when the modification produces efficiencies and economies that generate public transportation benefits (rather than simply transferring wealth from employee to employer). E.g., UTU v. STB, 108 F.3d at 1430 (Carriers' Exh. D-7). Typically, scope rule modifications promote the purposes of the transaction by facilitating the integration of work and workforces on formerly independent railroads. Such modifications are permitted, even when the effect of the modification is to place the work within the

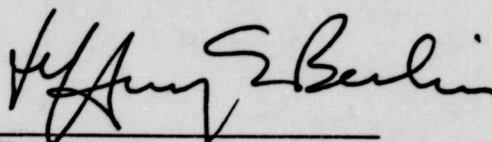
scope of another craft's agreement (e.g., NS/Car Shop Consolidation (Carriers' Exh. C-16)), or to remove work from the scope of a labor agreement altogether (NS Control/Power Distribution (Carriers' Exh. B-13); CSXT/Power Distribution (Carriers' Exh. B-4)).

The circumstances requiring a modification here are equally compelling. NSR is seeking a temporary arrangement to address an extraordinary, one-time need. The sooner NSR is able to complete its Transaction-related projects, the sooner the public benefits of the Transaction will be realized. Until that work is complete, NSR will not be in a position to offer the types, volumes, and quality of transportation services that NSR has planned for its expanded system, and shippers will be denied the full benefits of the Transaction.

CONCLUSION

NSR's proposal for the arrangement of maintenance of way employees in support of its expanded operations is appropriate to the Transaction. The Carriers' proposed implementing agreement should be adopted.

Respectfully submitted,



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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

ARBITRATION PURSUANT TO ART. I, § 4
OF THE NEW YORK DOCK PROTECTIVE CONDITIONS

NORFOLK SOUTHERN RAILWAY COMPANY,
CSX TRANSPORTATION, INC., and
CONSOLIDATED RAIL CORPORATION

and

BROTHERHOOD OF MAINTENANCE OF
WAY EMPLOYES, *et al.*

Referee
William E. Fredenberger, Jr.

DECLARATION OF GARY W. WOODS

1. I am Assistant Vice President Maintenance of Way and Structures for Norfolk Southern Corporation, the corporate parent of Norfolk Southern Railway Company ("NSR"). I am submitting this Declaration in support of the Carriers' prehearing submission in the above-captioned arbitration proceeding in which NSR, Consolidated Rail Corporation ("Conrail"), and CSX Transportation, Inc. ("CSXT") are seeking an implementing agreement to govern the selection and assignment of maintenance of way employees on the Carriers' restructured systems. The purpose of this Declaration is to describe NSR's plans for conducting maintenance of way operations on its

expanded system and to describe the workforce arrangements, including applicable labor agreements, that will be necessary to effect those operating changes. In developing this Declaration, I consulted with and obtained information from my staff and the staff of other Norfolk Southern departments, including the Labor Relations Department, particularly in regard to specialized matters such as the provisions of labor agreements and work practices on Conrail.

2. As Assistant Vice President Maintenance of Way and Structures, I am responsible for planning, budgeting, and directing all maintenance of way operations on the railroad properties owned and operated by NSR. For the last 19 months, since we began planning for the Conrail Transaction, I have been actively involved in and responsible for developing and implementing our plans to integrate maintenance of way operations on our expanded system.

3. I am advised that NSR is the corporate successor to various railroad entities that have been consolidated over time pursuant to authorization of the Interstate Commerce Commission ("ICC") and Surface Transportation Board. The existing NSR system is comprised of the lines of those various predecessor railroads, which were placed under common control pursuant to a 1982 ICC order. The 1982 ICC order authorized a holding company (later renamed Norfolk Southern Corporation) to control Southern Railway Company and its subsidiaries (collectively, the "former Southern Railway system") and the former Norfolk and Western Railway Company ("NW"). NW was the successor by merger to the lines of the New York, Chicago and St. Louis Railroad Company (commonly referred to as the "Nickel Plate" or "NKP"), the Wabash Railroad Company ("Wabash"), and the former Norfolk and Western Railway Company (the "NW Proper"), including the lines of the former Virginian Railway, which merged with NW Proper in 1959.

4. I am advised that, effective December 31, 1990, NS reorganized its railroad subsidiaries, making NW a subsidiary of Southern Railway Company, which was renamed Norfolk Southern Railway Company. On September 1, 1998, NW was merged into NSR, and therefore no longer exists as a separate corporate entity.

5. I began my career with NS in 1967 in the Engineering Department. Over the last 31 years, I have been promoted through a number of positions, beginning as an Assistant Track Supervisor in what is now the Maintenance of Way and Structures ("MW&S") Subdepartment. I was promoted to my current position as head of the MW&S Subdepartment in 1995.

I. NSR's Existing Organization And Workforce Arrangements

6. System-wide, NSR currently employs approximately 3,650 active maintenance of way employees represented by the Brotherhood of Maintenance of Way Employees ("BMWE") and additionally approximately 175 active shopcraft employees involved in the fabrication, repair, and maintenance of equipment used in maintenance of way work. The shop crafts employees are represented by six unions (collectively "the Shopcraft Unions"): the International Association of Machinists and Aerospace Workers ("IAM"); the Sheet Metal Workers' International Association ("SMWIA"); the International Brotherhood of Electrical Workers ("IBEW"); the International Brotherhood of Boilermakers, Iron Ship Builders, Blacksmiths, Forgers, and Helpers ("IBB"); the National Conference of Firemen and Oilers ("NCFO"); and the Brotherhood Railway Carmen Division of the Transportation Communications International Union ("BRC").

7. The existing NSR properties are divided, for management purposes, into nine operating divisions which are organized into two operating regions (Eastern and Western).

8. The MW&S Subdepartment is organized into three major functional groups, each with responsibility for one of the railroad's three core maintenance of way operations: (1) line maintenance -- the day-to-day repair and maintenance of track and facilities (including bridges and railway structures); (2) program maintenance -- the systematic renewal and replacement of the railroad's infrastructure (i.e., rail and ties) as part of the railroad's capital program; and (3) roadway equipment maintenance -- the fabrication and repair of machinery used in line maintenance and program maintenance work.

9. The managerial and workforce arrangements for these various operations are further subdivided functionally and geographically. Regular line maintenance and certain program maintenance work is performed in each of the nine operating divisions under the direction of a Division Engineer. Each Division Engineer, in turn, reports to one of two Chief Engineers Line Maintenance, whose responsibilities correspond to the Eastern and Western Operating Regions. This organizational structure facilitates centralized planning, budgeting, scheduling, job bulletining, and administration, and places most management officials in frequent and direct contact with the line maintenance operations. Within this structure, most MW&S officers are employed as first-line Track Supervisors and Assistant Track Supervisors, with 24-hour, seven-day per week responsibility for track conditions within their assigned territories.

A. Line Maintenance

10. Track Supervisors direct so-called "local forces," which are primarily engaged in day-to-day line maintenance functions. Local forces include employees assigned to all-purpose headquarters "gangs," as well as certain machine operators and welders.

11. A headquarters gang typically is composed of a foreman and three to four laborers, who perform general maintenance functions on an assigned Track Supervisor's territory. Gangs may be either "fixed" or "floating," depending on whether the employees' assignments begin and end at the same location each work day.

12. NSR's method of operations stresses preventive maintenance. More than half of NSR's BMW-represented employees hold positions in local forces. In addition to day-to-day line maintenance, local forces perform some upgrade work and much of the support work for program projects (e.g., dumping ballast for tie renewal or surfacing work or unloading rail and distributing track material for rail renewal work).

13. The work of these local forces is augmented by various work gangs and machines that travel across Track Supervisor territories within an operating division. In this category are various small, mechanized gangs used in certain ongoing renewal and preventive maintenance projects and/or to perform day-to-day repairs. These gangs are assigned by the Division Engineers, who ensure their efficient use by deploying equipment (e.g., bulldozers, Gradalls and cranes) and the associated operators throughout the division to meet operating needs. For example, smoothing gangs are organized and equipped to restore track alignment and geometry over certain special track segments, such as curves and bridge approaches. Tie patch gangs are used to replace deteriorated crossties on small segments of track, such as particular curves or sidings. And gauging gangs restore particular sections of track to standard gauge. Depending on the gang's specialized function, its work may be scheduled in connection with the production season. For example, crossing gangs handle repairs to road crossings on track segments undergoing rail renewal, tie renewal, or surfacing by program gangs. Additionally, depending on operating needs, some more specialized machines (e.g.

luckyloaders, yard cleaners, brush cutters, rail trains) are used across divisions throughout the operating regions to maximize their use each work season.

14. The work rules and seniority arrangements governing track forces on most of NSR's properties complement these maintenance practices and afford relatively broad and stable work opportunities to NSR's BMW-employees.

15. On most of the former NW system properties, track forces are arranged on two sets of track rosters corresponding to the Eastern and Western seniority regions. The basic agreement covering maintenance of way employees on the lines of the former NW Proper and Wabash railroads is the July 1, 1986 agreement between the former NW and BMW (the "NW-Wabash/BMW Agreement"), as subsequently amended. A separate BMW schedule agreement, originally effective February 1, 1951, applies to the remaining properties of the former NKP, which also adjoin the allocated Conrail lines. Maintenance of way operations on the lines of the former Southern Railway system are governed by an NSR/BMW agreement dated October 1, 1972, as amended.

16. Under the NW-Wabash/BMW Agreement, track employees may bid onto positions working at any location within their region, and the gang positions are not rebulletined as the gang moves within the region.

17. Assistant Track Supervisors, each accompanied by a BMW-employee, perform regularly scheduled daily track inspections over their designated territories in order to ensure that track is maintained to federal safety standards and NSR's more stringent standards. In the course of performing these track inspections, Assistant Track Supervisors as well as BMW-employees perform remedial track repairs — such as tightening or replacing

bolts in rail joints, removing debris and obstructions along the track, cleaning switches, and correcting gauge width in a localized area — which can be performed without deploying a full gang of employees. These inspect-and-repair functions are critical to NSR's operations, providing the first line of defense against track-related accidents and incidents. NSR typically selects and promotes Assistant Track Supervisors from the ranks of BMW-represented track employees, on the basis of their demonstrated skills and qualifications for this safety-critical work. These arrangements are a major factor contributing to NSR's excellent safety record. For each of the last nine years, NSR has achieved the highest safety and service record of all Class I railroads.

18. The inspection, repair, and renewal of railway bridges and buildings (so-called "B&B functions") are managed by a separate set of nonagreement B&B Supervisors, also under the direction of the Division Engineers. In addition to having responsibility for bridge inspection, B&B Supervisors manage gangs consisting of BMW-represented employees in the classifications of carpenter, painter, foreman, assistant foreman, drawbridge tender, electric welder, etc. engaged in both day-to-day maintenance and capital program work. Each B&B Supervisor typically manages three to five carpenter and/or paint B&B gangs (depending on the territory), composed of four to five employees each. These gangs operate within designated seniority divisions established under the NW-Wabash/BMW Agreement. These arrangements give employees holding positions on B&B gangs relatively stable, year-round employment.

B. Program Maintenance

19. Different managerial and workforce arrangements are used for the railroad's major capital improvements and maintenance of way production projects. These projects are performed principally by three categories of large, highly mechanized gangs — rail gangs (which remove and replace worn rail); timber and surfacing ("T&S") gangs (which replace crossties and resurface track); and surfacing gangs (which restore track geometry over designated track segments). These gangs are used both in upgrading existing track and, to a greater extent, in the ongoing systematic replacement of rail and crossties necessary to maintain the railroad's infrastructure over time, as the track materials deteriorate through use and age. Work in both categories is planned in advance of the production season and requires large-scale commitments of manpower and equipment. These projects require replacing rails and ties, and restoring the gauge and geometry of the track surface. This is the railroad's heaviest and costliest work, involving significant capital investment, and is the work most disruptive to train operations.

20. The work of these large gangs, and of certain ancillary support gangs, is scheduled ("programmed") in advance of the production season and is managed on a system-wide basis under the direction of the Chief Engineer Program Maintenance and subordinate officers with regional or system-wide responsibility for certain program maintenance functions or processes. Most of the officers in program maintenance operations are employed as nonagreement first-line supervisors, e.g., T&S Supervisors, Welding Supervisors, and Rail Supervisors, who supervise gangs of employees organized and equipped to perform program maintenance functions.

21. Depending on the requirements of its capital program, NSR operates certain production gangs as "designated programmed gangs" ("DPGs"), which are governed by a separate

collective bargaining agreement in effect on the lines of the former NW system. The DPG arrangement permits NSR to operate certain rail and T&S gangs over the entire former NW system lines, without regard to the territorial limitations otherwise applicable to the employment of track forces on those properties. Under the labor agreement that applies to DPGs on the former NW system lines, NSR maintains consolidated rosters (for track laborers, machine operators, foremen, and assistant foremen) composed of all track employees on the former NW properties. Gangs bulletined as DPGs stay together throughout the production season, as the program work takes the gang across seniority boundaries.

22. NSR's DPG operations facilitate the efficient and safe use of specialized equipment and employees, minimize the disruption associated with major production work, and promote stable and year-round employment of maintenance forces.

23. NSR has developed special equipment and methods for performing major rail and tie renewal projects efficiently and with minimal disruption to train operations. The success of these operations lies in the efficient use of machines and equipment and the specialization of gangs for particular categories of production projects. Each gang is furnished with a complement of equipment, each item of which is designed for specific functions.

24. A dual rail gang, for instance, is equipped to install two continuous welded rails simultaneously. A dual rail gang is typically composed of about 55 employees and approximately 35 pieces of machinery, which move along the track in a sequence, performing a coordinated series of functions. As a dual rail gang proceeds through a project, it sets the new rail to be laid in a cradle, which holds the rail in preparation for replacement; removes the existing spikes and anchors; removes the worn rail; removes the tie plates; adzes the ties; replaces the tie plates; lays

the new rail on the tie plates; and, finally, secures the new rail. A dual rail gang uses specialized machines in this process, including a wide gauge threader, tie plate spike and anchor loading machines, dual adzer cribbers, a standard gauge threader, a plate lining machine, rail heating machines, an electromatic tamper, nipper spikers, all terrain cranes, spike pulling machines, rail pulling machines, a tie plate broom cribber, gauger spikers, and automatic rail anchor machines. By operating the equipment in a coordinated fashion with an experienced and specialized workforce, NSR is able to bring "assembly line" speed and proficiency to major production projects.

25. NSR saves money by using its equipment efficiently. By scheduling the work of a single gang over a large segment of its system, NSR is able to maximize equipment use and thereby lower the unit cost of the mechanized operations. Each equipment consist represents a multi-million dollar investment. It costs more than \$3.2 million, for instance, to equip a single T&S gang, and approximately \$7.8 million to equip a dual rail gang. These investments are justified because the equipment can be used, and thus the costs can be spread, over large territories and through much of the year.

26. These program maintenance methods are equally important -- and necessary -- as a means of managing track time. The size and mechanization of Rail and T&S gangs speeds their work, minimizing disruption to train operations caused by rail and tie renewal projects.

27. Special work rules and workforce arrangements are necessary to permit system-wide operations and otherwise to take advantage of the efficiencies created by mechanization of Rail and T&S gangs. NSR operates under two basic production arrangements (one on its southern side lines and one on its northern side), which together promote system-wide coordination of programmed maintenance work. Rail and T&S programs on the lines of the former Southern

Railway System are governed by the basic NSR/BMWE working agreement, which establishes four regions for purposes of programmed maintenance and allows gangs to work across all four regions.

28. On the northern side, the lines of the former NW system are organized under an Arbitrated Agreement dated June 12, 1992 ("the DPG Agreement"). (I am advised that this agreement was a result of an arbitration following the conclusion of the 1988 round of national BMWE bargaining.) The DPG Agreement provides for the operation of rail and T&S gangs throughout the former NW system territory. It permits the establishment of rail and T&S gangs of 20 or more maintenance of way workers drawn from a single set of rosters covering the former NW system lines. Within each integrated roster, employees are given "zone" designations based on their local seniority -- either a NKP, Wabash, or NW "zone." An employee has bidding preference for positions on DPG gangs that are scheduled to operate over any part of the employee's designated zone. Positions on DPG gangs are bulletined in advance of the season and, unlike other maintenance of way positions, need not be rebulletined as the scheduled work takes the gang from one seniority region within the former NW system to another.

29. Not all rail and T&S gangs are operated as DPGs on the former NW system lines. Depending on the capital program, some rail and T&S gangs may be operated under the NW-Wabash/BMWE local agreement, which NSR proposes to apply to the allocated lines. The relative numbers of DPG and non-DPG rail and T&S gangs vary depending on the program each year. In recent years, NSR has operated most rail and T&S gangs on the former NW system lines as DPGs and has used some non-DPG rail and T&S gangs to perform programs that were limited to particular regions. Although some rail and T&S gangs may be bulletined under local rules, the overall

efficiency of the rail and T&S programs depend on the carrier's ability to schedule gangs, in accordance with program needs, to operate across seniority boundaries.

30. The DPG arrangement also promotes productive and safe working conditions. Employees working on DPGs stay in the same gang throughout the production season on the former NW system lines and, as a result, can build on and apply their experience with particular functions and machines. Familiarity with the equipment also enables employees to maintain the equipment in better working condition and to be more familiar with safety features and practices, thus reducing their chances of injury. In NSR's experience, permanence and cohesion among members of a gang boost morale and generate a sense of pride in the gang's performance, which translates into higher rates of safety and productivity.

31. Using DPG rail and T&S gangs enables NSR to conduct its program work flexibly and responsively to meet the needs of the operations and/or the needs of particular customers on the former NW system lines. Unrestrained by territorial boundaries, NSR can utilize forces to perform large-scale projects efficiently and quickly, minimizing the length of time a particular rail corridor is out of service. The DPG arrangement also facilitates system-wide scheduling of rail and tie programs, which greatly minimizes the disruption to train operations caused when program maintenance is performed simultaneously on multiple corridors.

32. Under both arrangements, rail and T&S gangs operate under special flexible work rules that permit efficient and flexible scheduling of work. Work site reporting rules permit NSR to begin and end assignments at the scheduled work site, reducing travel and down time. Flexible work week and flexible starting time rules also enable NSR to schedule individual gang operations on a weekly basis to avoid peak traffic times or days. The same flexibility enables NSR

to perform production work within and around the production schedules of its major customers. For instance, NSR routinely schedules programmed work on lines serving its automotive plants during the customers' scheduled plant shut-downs.

33. I am advised that at the time of the Imposed Agreement in 1992, NW was a separate, wholly owned subsidiary of NSR. NSR's own basic labor agreement with BMW E applicable on the lines of the former Southern Railway System provided a method for NSR's operation of certain program gangs across regional boundaries. Accordingly, NSR did not seek a DPG arrangement for the Southern Railway lines under the Imposed Agreement.

34. NSR is persuaded that operation under the NW DPG arrangement has produced substantial transportation benefits. Before 1993, programmed maintenance on the lines of the NW system was scheduled and performed by gangs bulletined separately on each region of the NW-Wabash/BMW E Agreement and the lines of the former NKP. Each gang required a separate equipment complement and worked a relatively short production season (typically nine or fewer months). Because the gangs worked simultaneously on different parts of the NW system properties, we often experienced multiple corridor disruptions during the height of the production season. The bulletining of seasonal production forces also produced corresponding disruption in the operation of day-to-day maintenance, and workforce shortages, as employees bid to and from local forces. Having to rebulletin gangs and address employee shortages affected employee morale as well as the safety of our operations.

35. The DPG arrangement has produced operational benefits. By establishing DPG gangs for most or all of its annual rail and tie programs on the former NW system lines, NSR can operate more productively and with fewer maintenance-related delays. Under the DPG arrange-

ment, the annual rail and T&S program is performed with fewer gangs (and correspondingly less equipment) operating over a longer work season. Since commencing DPG operations, NSR has improved equipment utilization by 20.5 percent. In addition to other, less measurable customer service and transportation benefits, NSR has saved close to one million dollars annually through the more efficient operation of rail and T&S gangs under the DPG arrangement.

36. These benefits have not come at the expense of employees. DPG employees voluntarily bid into such positions. Employees initially assigned and working on DPG gangs are paid an additional bonus (5 percent, up to \$1,000) for remaining with their gangs in excess of six months per year. In addition, pursuant to the 1996 national BMW agreement, employees on DPG gangs receive a mileage-based travel allowance for weekend travel home. The NW DPG Agreement (Section 4) guarantees employees on DPG assignments a minimum of six months of DPG work (or, if work is not available, supplemental unemployment benefits) in each calendar year. Moreover, employees are benefited by the same factors that make the operation more efficient for NSR -- the longer work season and the reduced risk of injury. The longer work season means higher and more stable income for maintenance of way employees. In 1991, approximately 75 percent of maintenance of way employees on the combined NSR/NW system were employed year-round; with the advent of DPG operations, that percentage has increased. Today, close to 90 percent of NSR's maintenance of way employees work year-round. Moreover, the establishment of DPGs has not resulted in any furloughs during the work season. In fact, the former NW (now NSR) has hired additional track workers each year since DPGs were established. During the same period, the combined NSR/NW system experienced a substantial reduction in the rate of injuries to program maintenance employees.

C. Roadway Equipment Repair

37. Program maintenance, line maintenance, and B&B functions are supported by equipment repairmen, who work as part of or with certain gangs to perform preventive maintenance and repairs on equipment used by those gangs. Work equipment is used across the NSR system to meet operational needs and maximize productive use of the equipment. Employing qualified repairmen in field operations optimizes equipment use by minimizing lost time associated with routine maintenance and equipment malfunctioning. Equipment repairmen who work within operating divisions are under the direction of the Roadway Equipment General Supervisor Work Equipment, and, on most of the NSR system (including the properties governed by the NW-Wabash/BMWE Agreement), work under corresponding seniority arrangements. Equipment repairs and renewals that cannot be handled in the field are performed by shop craft employees in NSR's system equipment repair and refurbishment shop located in Charlotte, North Carolina.

38. NSR manufactures and refurbishes much of the material used in its track work. NSR's rail welding plant located at Atlanta, manufactures quarter-mile continuous welded rail segments, which are distributed and installed throughout the NSR system. NSR also manufactures or rebuilds frogs and similar switch components, and other track parts, in its own facilities located in Atlanta, Georgia, Birmingham, Alabama, and Roanoke, Virginia.

39. NSR's maintenance of way operations are supported by centralized administrative functions. Bulletining and bidding for most maintenance of way assignments are handled on a centralized basis by the Atlanta-based personnel office within the Engineering Department. This organizational structure promotes uniform and objective administration of seniority bidding and displacement rights, ensures effective notice of work opportunities, and frees local supervisors from

responsibility for administration of the bulletining process. NSR conducts skills training programs for certain maintenance of way employees in its system training facility located in McDonough, Georgia. Centralized training ensures uniformity of instruction and methods related to equipment use, repair and maintenance, and safety practices.

40. Labor relations functions and all labor relations staff are organized on a centralized basis under the Labor Relations Department in Norfolk, Virginia, promoting efficient and uniform interpretation and application of work rules. Payroll functions for all maintenance of way employees are coordinated and centralized through the Payroll and Accounting Office, located in Roanoke.

II. NSR's Maintenance of Way Operating Plan

41. NSR plans to maintain its allocated lines in accordance with NSR's maintenance standards, which exceed federal minimum requirements and Conrail's own track maintenance standards. Mile-for-mile, NSR will increase the preventive maintenance and infrastructure renewal work on the allocated lines, both to meet NSR's higher maintenance standards and to accommodate NSR's planned train operations and schedules.

42. In general, NSR intends to operate the allocated lines under its existing management structure and in coordination with its existing maintenance of way operations. NSR will establish three new operating divisions on the allocated properties -- to be designated the Dearborn, Pittsburgh, and Harrisburg Divisions -- and will operate those divisions as a new Northern Region. The lines encompassed in the new divisions and Northern Region are depicted in NSR Exh. 11, which also shows the relative size, arrangement, and location of NSR's nine existing operating divisions and two existing operating regions.

A. Applicat DPG Arrangements

43. Major rail and T&S programs for the expanded NSR system will be planned and scheduled on a system-wide basis, without regard to the territorial boundaries. NSR plans to use DPG rail and T&S gangs throughout NSR's allocated Conrail and former NW properties. This plan promotes two objectives central to NSR's Operating Plan: (1) it will enable NSR to schedule and manage production work on the allocated lines so as to avoid undue interference with train operations; and (2) it will enable NSR to realize operating efficiencies and savings in its expanded operations.

44. In order to perform these operations, NSR proposes to extend its NW DPG Agreement to the allocated lines and to establish integrated DPG rosters including all line maintenance employees on the allocated and former NW system lines. The mechanics of NSR's proposal are set forth in the Carriers' proposed Implementing Agreement (Carriers' Exh. 1, Article I, Section 1(d), page 2), which provides for the creation of a new Conrail zone with corresponding bidding preference under the existing rules. NSR's allocated former Conrail track employees will be integrated into the existing DPG seniority rosters according to their existing classifications (laborer, machine operator, assistant foreman and foreman) and Conrail seniority dates. The allocated Conrail employees will be afforded bidding preference for assignments operating on the allocated lines under the terms of the DPG Agreement, as modified in accordance with the proposed implementing agreement.

45. These arrangements will enable NSR to apply its successful program maintenance methods and practices on the allocated lines, to minimize service disruptions associated with

tie and rail renewal programs, and to capture the efficiencies made possible by NSR's expanded operations.

46. NSR could not employ its efficient DPG methods -- and otherwise could not achieve its Operating Plan -- if it were to perform rail and tie renewal programs under Conrail's existing arrangements. I am advised that, much like the pre-1992 production arrangements on the former NW system, Conrail's existing operations are premised on multiple seniority arrangements, which confine the work of maintenance of way gangs to relatively small geographic areas.

47. I am advised that Conrail is substantially behind other American railroads in the development of flexible working arrangements for maintenance of way operations. In particular, I am advised that Conrail does not have a system-wide program maintenance arrangement or alternative work week and rest day rules comparable to those obtained in the 1988 round of nationwide bargaining with BMW. In combination, Conrail's restrictive workforce arrangements and severe climate limit most of Conrail's BMW-represented employees to irregular and seasonal work, with frequent and unpredictable job changes as positions are abolished and rebulletined in response to operational needs.

48. Information provided to me shows that Conrail's BMW-represented employees have a substantially higher furlough rate, and work far fewer hours per year, than their counterparts on NSR. The following table depicts the numbers of paid hours (including, as applicable, compensation measured by hourly wages for travel, meal periods, and overtime work) for BMW-represented employees on NSR and Conrail in 1997.

**NSR/Conrail Comparison of Number of Hours
Paid in 1997 for BMW-represented Employees**

Hours	Conrail		NSR	
	Number of Employees	% of Total	Number of Employees	% of Total
< 200	65	2.0%	19	0.5%
200-499.9	75	2.0%	30	0.8%
500-799.9	100	3.0%	23	0.6%
800-1199.9	430	13.0%	32	0.9%
1200-1599.9	697	21.0%	73	2.0%
1600-1999.9	1,059	32.0%	229	6.2%
2000-2200	502	15.0%	1,189	32.0%
> 2200	386	12.0%	2,116	57.0%
Total	3,314	100%	3,711	100%

As shown, only 27 percent of Conrail's BMW-represented workforce -- by comparison to 89 percent of NSR's -- was paid for 2,000 or more hours in 1997. For all but the most senior employees, those who wish to maximize their work opportunities under Conrail's system must establish and exercise seniority on multiple districts and must travel to fill assignments as they become available.

49. Information provided to me shows that, by all measures, Conrail's existing production operations are substantially less productive than corresponding operations on NSR. In 1997, NSR installed an average of 5.3 ties per manhour, compared to Conrail's rate of 4.2 ties per manhour. NSR's rail gangs achieved installation rates of 4.8 track feet per manhour on curve

rail gangs and 10.7 feet per manhour on dual rail gangs, compared to Conrail's rates of 2.5 and 3.9 feet, respectively.

50. In the same period, NSR's injury rate for maintenance of way employees was substantially lower than Conrail's. NSR achieved a Federal Railroad Administration safety performance ratio of 0.92 injuries per 200,000 manhours in comparison to Conrail's safety performance ratio of 2.47.

51. Conrail's arrangements would be even less efficient if applied to rail and T&S gangs on the allocated territories. The lines allocated to NSR comprise approximately fifty-eight percent of the former Conrail system. By its very structure, the Transaction will fragment all existing Conrail production zones and both seniority regions. The Conrail operating divisions will no longer exist, and over half of the seniority districts will be substantially truncated by the Transaction. On the basis of the information I have about the workings of the Conrail/BMWE Agreement, it is clear that any effort to operate the NSR-allocated lines under that agreement would necessarily produce operations far less efficient than Conrail's current operations, and significantly less efficient than under the proposed NW-Wabash and DPG Agreements. In addition, NSR will not have the alternative major east-west routes that Conrail had, affording it far less opportunity to ameliorate the effects of out-of-service track time.

52. Using DPGs for major rail and tie renewal programs on the allocated lines will permit NSR to complete projects as quickly as possible, minimizing the time that track must be kept out of service. The DPG arrangement also will enable NSR to schedule and perform certain of its Rail and T&S projects in response to particular customer service considerations. As on NSR's existing system, the DPG arrangement will afford NSR the flexibility to coordinate

production projects to coincide with customers' anticipated or scheduled vacations or down times.

53. Finally, the proposed integration is necessary to realize the operating cost savings and other transportation benefits made possible by the expansion of NSR's operations. By virtue of its geography and existing seniority arrangements, Conrail is limited to a short maintenance of way work season. Under the best of conditions, Conrail's production gangs work no more than eight to nine months per year, with an average season of 31 weeks per year. (Rail and T&S gangs on NSR, by comparison, work an average of 50 and 46 weeks per year, respectively.) By integrating the Conrail lines into NSR's operations, NSR will be able substantially to reduce the unit costs of maintenance of way operations by lengthening the production season of gangs working on those lines. NSR will achieve additional efficiencies by combining production operations in a single geographic region, without regard to the prior Conrail/NSR boundaries. Adding new lines to the existing DPG arrangement also will enhance NSR's efficiency and reduce employee travel requirements by increasing the geographic concentration of DPG operations in areas (such as the states of Ohio, Indiana, Illinois, Pennsylvania, and West Virginia) that include both NSR-allocated and former NW system lines. Adding new lines will not significantly increase the longest possible distances that a gang might travel (the longest distance on the former NW territory now is 1,155 miles, from Norfolk to Kansas City; including the NSR-allocated lines, it will be 1,227 miles, from Walton, New York to Kansas City.)

54. The savings to be achieved through the integration will vary from year to year, depending on the size of NSR's annual capital programs. On the basis of NSR's 1999

capital program, NSR expects to save more than \$9.6 million annually by extending its DPG operation to the allocated lines. These are the savings in manpower, equipment, and related costs achieved by integrating the lines into NSR's existing workforce arrangements, including the DPG operations, rather than attempting to maintain separate operations under the remains of the Conrail/BMWE Agreement. The estimated savings include approximately \$501,000 in avoided equipment purchases, approximately \$1.6 million in equipment maintenance costs, and approximately \$7.5 million associated with more efficient manpower use.

B. Arrangements For Track Forces, B&B Forces, And Equipment Repair Forces

55. NSR proposes to realign seniority boundaries for its allocated Conrail employees. The lines to be operated by NSR consist of fragments of Conrail's seniority districts, zones, and regions. Only five of Conrail's eighteen seniority districts will be conveyed intact to NSR. NSR is authorized to operate parts of eleven others. Carriers' Exhs. A-32 through A-41 depict the fragmentation of seniority districts on the allocated lines. This fragmentation affects the seniority arrangements governing nearly all BMW-represented maintenance of way employees. I am informed that of the employees holding seniority on the lines to be allocated to NSR, approximately 80 percent hold seniority on one or more of the eleven fragmented districts. In several cases, the line segments allocated to NSR (depicted in green) will consist of only a few miles of track -- far too little to generate sufficient work for a maintenance gang headquartered at those locations.

56. The same is true of the Conrail production regions and zones, which confine certain Conrail program maintenance functions. As depicted in Carriers' Exhs. A-30 and

A-31, the lines allocated to NSR will consist of fragments of each of Conrail's existing production zones and of both Conrail production regions. If NSR were to attempt to operate the allocated lines under the existing Conrail arrangements, NSR would be required to conduct correspondingly fragmented operations, rebulletining gangs frequently to perform work over relatively small territories. This would create very unstable and inexperienced gang consists, and, in all likelihood, severe manpower shortages in some areas and surpluses in others. At a minimum, the operation would be inefficient. Worse, it would impede NSR's ability to perform the level of maintenance and upgrading required to accommodate the new operations and meet transportation needs.

57. Even without such fragmentation, the Conrail workforce arrangements would frustrate implementation of the Transaction by impairing efficient operations on NSR's allocated lines. I understand that Conrail's existing properties are divided into eighteen basic seniority districts for purposes of day-to-day line maintenance, B&B, and equipment repair work. Each seniority district maintains separate rosters for track, B&B, and repairman classifications. I understand that Conrail typically uses small gangs (of two to three employees) and maintenance employees operating individual machines -- including cranes, bulldozers, and backhoes. I am advised that, under the Conrail/BMWE rules governing day-to-day line maintenance, machines may be operated only to the limits of the operator's seniority district; Conrail must rebid the operator position each time the equipment crosses a seniority district line. To avoid such disruption, I understand that the railroad maintains equipment and operators on each seniority district and generally does not move equipment across seniority district lines for use in day-to-

day line maintenance work. This arrangement requires Conrail to acquire and maintain more equipment than would otherwise be needed.

58. In addition, the seniority arrangements narrowly restrict the pools of available employees, imposing costly delays and creating artificial manpower shortages as traveling production gangs move between seniority territories. As a practical matter, as Conrail's experience demonstrates, these arrangements limit the carrier to operating with small gangs, which perform maintenance functions slowly.

59. Delays in performing maintenance of way projects impede train operations by increasing the time that track remains out of service or subject to maintenance-related slow orders. Maintenance-related delays and disruptions cannot be avoided, but they must be minimized if NSR is to achieve the level of train operations and responsive customer service that we have planned. NSR's new operations over its allocated lines will both necessitate more maintenance -- because of increased traffic density (and NSR's generally higher maintenance standards) -- and be more competitively vulnerable to maintenance-related delays and disruptions than are Conrail's operations today.

60. NSR proposes to realign seniority arrangements consistently with its proposed management structure and with the seniority arrangements that are in effect on NSR's former NW-Wabash properties. Specifically, NSR proposes to establish new regional seniority rosters for each track classification by dovetailing its allocated employees onto those rosters based on comparable work classifications and seniority dates under the Conrail/BMWE Agreement. So arranged, the affected employees will be eligible to exercise their seniority to

positions on fixed headquarters gangs, various headquarters gangs, or production gangs throughout NSR's newly established Northern Region.

61. For roadway equipment repair functions, allocated employees who hold seniority on Conrail's existing repairman rosters (and certain former Conrail machinists) will be dovetailed onto newly created repairman rosters organized by operating division. NSR similarly proposes to arrange its newly allocated B&B employees under corresponding classifications on new divisional rosters.

62. These seniority arrangements are expected to yield numerous transportation benefits. The arrangements principally are designed to establish employee pools of sufficient size to support efficient and flexible maintenance operations. As on NSR's existing properties, the ability to move gangs quickly in response to maintenance needs will minimize train delays and disruptions caused by track-related slow orders and line closings. By using relatively larger gangs to perform maintenance functions, NSR will complete needed maintenance work quickly and efficiently, with minimal disruption to train operations. Moreover, these arrangements will permit NSR to operate with employees who remain on assignments long enough to gain proficiency, to facilitate efficient work schedules, and to minimize down time and administrative burdens associated with frequent rebulletining of gangs.

63. Our proposed, more flexible arrangement also will generate more immediate cost savings and efficiencies in the use of maintenance forces and equipment. NSR expects to achieve more than \$1.2 million dollars' annual savings in labor and equipment costs by operating its surfacing gangs and its allocated lines under a regional seniority arrangement.

64. The arrangements proposed by NSR will expand the seniority rights of nearly all affected employees, giving employees more work opportunities and enhanced financial security.

65. The proposed expanded seniority territories are comparable to those existing under the NW-Wabash/BMWE Agreement. The largest of the proposed seniority territories for the allocated lines is coextensive with NSR's newly established Northern Region, which extends from Chicago, Illinois to Secaucus, New Jersey. The longest distance that an employee could travel while working on a gang that pays expenses on his or her region will be 804 highway miles. By comparison, the Western Region under the NW-Wabash/BMWE Agreement is 764 highway miles in length. Under the NSR/BMWE agreement (in effect on the lines of the former Southern Railway), employees can be required to protect territories as long as 1,000 miles. Consistently with those arrangements, the furlough rate of BMWE employees on NSR is a fraction of the Conrail rate.

66. Moreover, as a practical matter, the size of a seniority district bears little relationship to the distances that will be covered by individual employees. As explained above (at 4), most maintenance of way employees on the NSR system work on local forces, within an assigned Track Supervisor's territory. NSR plans to establish Track Supervisor territories on the NSR-allocated lines of comparable size to Conrail's existing Track Supervisor territories. The distances to be traveled by other forces will be limited by the number of gangs operating on the region. With the exception of certain DPGs, few positions ordinarily will be required to travel the length of NSR's new Northern Region. When required to travel, employees are compensated for expenses.

67. Moreover, under NSR's proposal, employees will not be required to exercise seniority onto fixed headquarters gangs. Under the NW-Wabash/BMWE Agreement, which NSR proposes to apply to the allocated lines, employees holding seniority on BMWE rosters are required only to exercise their seniority to positions on non-fixed headquarters gangs.

68. Consistently with these workforce arrangements, NSR intends to operate the allocated lines under the terms of the NW-Wabash/BMWE Agreement, which currently applies on most of the NSR lines adjoining the NSR-allocated properties. The NW-Wabash/BMWE Agreement contains rules, not found in the Conrail/BMWE Agreement, for further merging maintenance of way operations, as needed, to address future needs. Rule 18 permits NSR to use employees outside their seniority districts for up to thirty days. This enables the carrier efficiently and flexibly to deploy gangs to respond to unscheduled or immediate maintenance needs, without effecting lasting workforce changes. Applying this rule to the allocated lines, in coordination with the adjoining NW-Wabash lines, will enable NSR to deploy its workforces quickly and efficiently to meet operational needs, without regard to historic territorial restrictions. This flexibility will be particularly important to NSR's ability to operate the allocated lines as a part of its expanded system, rather than as fragments of a formerly separate rail system.

69. As depicted in Carriers' Exh. A-46, the NSR-allocated lines cross or parallel NSR's existing lines at many points, including Columbus, Ohio; Cincinnati, Ohio; Sandusky, Ohio; Hagerstown, Maryland; Detroit, Michigan; Butler, Indiana; Wabash, Indiana; and Deepwater, West Virginia. In order to take operational advantage of these common points, NSR needs the ability to deploy gangs based on geographic proximity or availability without

regard to the previous NSR/Conrail boundaries. Applying Rule 18 of the NW-Wabash Agreement to the allocated lines will enable NSR to integrate operations as needed, promoting efficient and responsive transportation. Under NSR's proposal, for example, a surfacing gang working under the NW-Wabash/BMWE Agreement on the former NW line north of Columbus could be directed to surface a segment of a former Conrail line in the immediate vicinity, rather than deploying a surfacing gang working at a more distant location on the NW-Wabash lines. Likewise, a tie patch gang working on the former Conrail lines could be directed to an adjacent former NW line to meet operating needs.

70. Application of the NW-Wabash Agreement also is necessary to obtain the benefits of NSR's planned coordination of rail and T&S gang operations. Article X of the February 6, 1992 Imposed Agreement contains flexible work week and rest day rules that enable NSR to use employees for four ten-hour days, and to assign employees to work on one weekend day, in order to minimize operational disruption during peak traffic times. These rules are complemented by the so-called "make-up time rules" provisions of Rules 50 and 51 of the NW-Wabash/BMWE Agreement. Used together, these rules enable NSR to schedule employees to work eight consecutive days, with six consecutive days of rest. This flexibility enables the carrier to schedule work to minimize operational interference and, at the same time, reduce employee travel requirements.

71. Rule 45(a) of the NW-Wabash/BMWE Agreement also promotes efficiency in the daily management of track time by enabling the carrier to schedule the meal period based on operational considerations. Under this rule, the meal may be provided at any time between the fourth and seventh hour of work, or at any other time on agreement of the

employees and carrier. This rule, like Article X of the February 6, 1992 Imposed Agreement, provides needed flexibility in the conduct of maintenance of way operations, including DPG operations.

72. I am advised that the Conrail/BMWE Agreement does not permit such flexible scheduling. To the contrary, the agreement imposes narrow restrictions on the posting of assignments that restrict Conrail's ability efficiently to manage track time. Under Rule 10 of the Conrail/ BMWE Agreement, most maintenance of way employees work Monday through Friday, with at least Saturday and Sunday as rest days, while production work is limited to Monday through Thursday, ten hours per day. Rule 3 of the Conrail/BMWE Agreement requires the carrier to specify, among other terms, the rest days and meal periods for each advertised position. Under Rule 18(1), the meal period must be provided between the fifth and sixth hour after starting time, unless the General Chairman and Division Engineer agree otherwise. Rule 4 of the agreement permits an employee to exercise seniority in a number of circumstances, including when the starting time or rest day for his position is changed. Individually and cumulatively, these requirements limit Conrail's ability to work around train schedules and otherwise impede the efficient use of employees, equipment, and track time.

73. Under the terms of the 1992 DPG Agreement, DPGs are governed by the work rules in effect on the territory where the gang works on Monday of each week. Operating under the terms of the Conrail/BMWE Agreement, with its inflexible scheduling rules, would impede NSR's planned DPG operations.

74. I am advised that several of the rules in the Conrail/BMWE Agreement are incompatible with the seniority arrangements necessitated by the authorized transaction and with

the type of operations NSR is authorized to conduct. For example, Rule 4, pertaining to the mandatory exercise of seniority, limits the carrier's ability to staff operations by permitting an employee to select a single, relatively small territorial "working zone" to which he must exercise seniority. An employee is not obligated to accept an available position outside of his narrow working zone. The Conrail system is composed of approximately 129 such zones, many of which, like Conrail's basic seniority districts, will be fragmented by the Transaction. Applying the Conrail "working zone" rule would undermine the efficiency and flexibility of NSR's planned maintenance of way operations on the allocated lines.

75. Rule 3 of the Conrail/BMWE Agreement, pertaining to the filling of vacancies, permits temporary vacancies to be filled by active employees in the same rank -- for example, it permits a temporarily vacant machine operator position to be filled by an active machine operator. Each time a position is filled in this manner, a new vacancy is created which also must be filled, thereby creating another vacancy that must be filled, and so on until all affected positions in the applicable seniority district have been restaffed. The process is then reversed if the vacancy was filled temporarily and the permanent employee returns. By contrast, under the NW-Wabash/BMWE Agreement, NSR fills temporary vacancies with qualified employees in lower ranks. A machine operator vacancy, for instance, may be filled by a laborer on the same gang, thus limiting disruption. If Rule 3 of the Conrail/BMWE Agreement were applied under the seniority arrangement proposed for the allocated lines, the "ripple effect" of temporary vacancies would create serious operational disruptions and inefficiencies.

76. Another provision of Rule 3, regarding qualification for positions, also is incompatible with NSR's expanded seniority arrangements. Rule 3 requires Conrail to provide a

senior unqualified employee an opportunity to demonstrate his qualifications for a position within the weekly bid period, before the position may be awarded to a junior qualified employee. I understand that this rule imposes minimal burdens on Conrail today, because of the relatively small pools of employees who may bid on each vacancy and the relatively small numbers of vacancies open to bidding by each pool at any given time. However, the disruption associated with the qualification process would be magnified under NSR's proposed seniority arrangements, which will increase both the numbers of vacancies that will be bulletined at any given time and the number of employees eligible to bid on each vacancy. In some circumstances, application of the Conrail/BMWE qualifications rule could require the carrier to provide numerous employees an opportunity to qualify on multiple pieces of equipment during a single seven-day bid period. This requirement would impose a significant administrative burden on NSR and could interfere with the timely filling of vacancies on the allocated lines.

77. Under the NW-Wabash/BMWE Agreement, machine operator positions are awarded based on seniority, pending qualification. That is, a machine operator position is awarded to the senior machine operator (or, if no machine operator bids, to the senior laborer), without regard to the bidder's qualification on the particular machine. If the position is awarded to an employee not previously qualified on the machine, he is given a set period (ten days in the case of a machine operator, or 30 days for promotion of a laborer) following the assignment in which to demonstrate his qualifications.

78. I am advised that the scope rules of the Conrail/BMWE Agreement also are incompatible in certain respects with NSR's planned management and operation of the allocated lines. The Conrail/BMWE Agreement would reserve bridge inspection functions on

parts of the allocated lines (excluding the lines of the former New York Central Railroad), and all track and some scale inspection work on the allocated lines, to BMW-represented employees, thus undermining NSR's planned use of nonagreement employees to perform and/or delegate these functions. Likewise, NSR could not use its nonagreement Assistant Track Supervisors assisted by their BMW-represented Foreman Track Patrol to perform minor track repairs in the course of conducting daily track inspections. Instead, under the Conrail/BMW Agreement, NSR would be required to dispatch a separate BMW gang to work with or behind the Assistant Track Supervisor and Foreman Track Patrol to correct minor defects found by the Assistant Track Supervisor team. Finally, the Conrail/BMW Agreement establishes a separate classification of Track Lubricator Maintainers, who perform work that, under the NW-Wabash/BMW Agreement, can be performed by any available line maintenance employee. In each case, maintaining Conrail's classifications rules would be far less efficient and more disruptive than the method employed on the rest of the NSR system.

79. The Conrail/BMW Agreement also includes a single welder roster. By contrast, NSR maintains separate rosters for electrical and thermite welders, reflecting the different techniques and equipment used in these distinct welding operations.

80. Application of the Conrail/BMW Agreement also would frustrate NSR's Operating Plan by creating potential variations and conflicts over the scope of work to be performed by different crafts of employees on the NSR-allocated lines. The Carriers have reached implementing agreements with most of the affected labor organizations, including all of the Shopcraft Unions (except the Transport Workers Union, which represents some of Conrail's employees in the carman craft), to govern the authorized operations. None of those agreements

provides for continued application of a Conrail labor agreement on the NSR-allocated lines. Instead, NSR has extended the application of its labor agreements with appropriate modifications (or, as in the case of URSA and ARASA, agreed to convert affected employees to nonagreement officers). NSR is now in a position (subject to consummation of the Transaction), to operate its allocated shop facilities under NSR's rules, standards, and practices and NS' managerial structure. In these circumstances, I am advised that application of the Conrail/BMWE Agreement would invite endless and disruptive craft jurisdictional conflicts with respect to work that may have been subject to differing past practices on NSR and Conrail. Certain maintenance work in Mechanical Department facilities and the maintenance of switch heaters, for instance, has been performed by BMWE-represented plumbers on Conrail and by other crafts on NSR.

81. Likewise, variations in past practices under the BMWE Agreements also could give rise to disputes over NSR's ability to use outside contractors for certain discrete repair and maintenance functions -- such as installation of certain types of fences, construction of certain retaining walls, certain bridge repairs, and paving of crossings. Application of potentially inconsistent scope rules would complicate the performance of those tasks and could, in some cases, require NSR to maintain additional specialized employees, who would not be fully utilized on NSR's allocated share of the former Conrail lines. NSR's proposal to apply the NW-Wabash/BMWE Agreement, by contrast, will enable NSR to make full and productive use of all available forces.

82. These represent only a few of the differences between the Conrail and NW-Wabash rules. I am advised that the Conrail/BMWE Agreement also contains differing rules regarding, inter alia, the advertisement and award of positions (Rule 3(3)); the provision of

employee meals (Rule 24); the handling of claims and grievances (Rule 26); and the handling of disciplinary hearings and appeals (Rule 27). Although most of the differences are not individually unmanageable, cumulatively they would interfere with NSR's operation of the allocated lines as part of its expanded system.

83. Because of these numerous differences, application of the Conrail/BMWE Agreement would require NSR to incur needless additional administrative expenses. If NSR were required to operate the allocated lines under the terms of the Conrail/BMWE Agreement, it would need to maintain multiple claims handling procedures, bidding processes, training facilities and payroll systems, necessitating duplicative computer systems and staffs. Such requirements would impose additional costs on NSR, while producing no corresponding benefits for employees or the public. Instead, NSR intends to achieve substantial efficiencies through unification of bidding, training, payroll and other personnel practices and systems on its existing and allocated lines.

C. Consolidation Of Equipment Repair And Rail Welding Functions

84. NSR and CSXT have agreed to close the Canton and Lucknow facilities and to consolidate the functions currently conducted in those facilities with the operations at existing NSR and CSXT facilities. This will involve abolishing all remaining positions at the Canton and Lucknow facilities, including a number of positions subject to the Conrail/BMWE Agreement. I am advised that Conrail currently employs 90 BMWE-represented employees at the Canton shop and six BMWE-represented employees at Lucknow. Under the Carriers' joint proposal for the allocation of the BMWE-represented workforces at the Canton and Lucknow facilities (Appendix A to the proposed implementing agreement), some of the employees affected

by the plant closings will be afforded an opportunity, in accordance with their existing seniority standing, to continue their railroad employment, either by following their work to one of its new locations on the NSR or CSXT systems, or by exercising existing seniority rights to other maintenance of way positions on Conrail, NSR, or CSXT.

85. NSR intends to transfer the equipment repair functions associated with its allocated lines to NSR's Charlotte Roadway Shop in Charlotte, North Carolina and to relocate the rail welding functions for the allocated lines to NSR's Rail Fabrication Plant in Atlanta.

86. NSR's plan to consolidate roadway equipment repair functions on its expanded system will yield numerous benefits by centralizing equipment repair functions in NSR's Charlotte Roadway Shop. This integration will facilitate NSR's plans to apply its equipment maintenance practices and techniques to its operation of the allocated lines.

87. NSR's roadway equipment maintenance operations are qualitatively different, and substantially more extensive, than the repair functions performed on Conrail today. Conrail's centralized equipment maintenance operations are limited to repairs of roadway equipment. Conrail purchases its equipment parts and components from outside suppliers and uses outside contractors to perform any rebuilding or major refurbishing of equipment.

88. NSR, by contrast, performs its own equipment design, fabrication and major equipment overhauls, in addition to and in connection with its centralized maintenance operations. Equipment that is sent to the Charlotte Roadway Shop for maintenance is not only repaired but refurbished to the latest design standards. Equipment maintained in this fashion is more reliable, productive, and long lasting than equipment maintained under Conrail's standards and practices.

89. NSR's decision to close the Canton Shop was heavily influenced by its comparison of the relative operations and capacities of the Canton and Charlotte shops. The Charlotte Roadway Shop is an integrated, state-of-the-art equipment repair and refurbishment plant, equipped with computer-controlled machine tools and heavy metal working and cutting equipment. The shop also includes dedicated fabrication work stations equipped with modern welding and fume extraction equipment and climate-controlled painting and equipment washing facilities. The Charlotte Shop employs approximately 115 agreement and nonagreement employees, including its own staff of engineers and draftsmen dedicated to machine design, development, and innovation. Maintenance, manufacturing, and rebuilding functions are performed in the Charlotte facility by 96 employees in various shop crafts. Most of the shopcraft employees (approximately 56) are IAM-represented machinists, while the other shop craft organizations represent the remaining agreement work force.

90. By comparison, Conrail's roadway equipment facilities, like its maintenance operations, are limited. The Canton Shop is a classic turn-of-the-century steam locomotive shop that was converted to an equipment repair shop and has since undergone no major renovations. The Canton Shop has no machine shop, dedicated component fabrication areas, or equipment washing facilities. Upgrading that facility to meet NSR's operating needs would be cost-prohibitive. Instead, NSR is investing approximately \$13.5 million to expand its Charlotte facility to meet the needs of the expanded NSR system. NSR began work on the Charlotte Roadway Shop expansion on December 1, 1997, and expects to be ready to relocate operations from Canton by the end of the second quarter of 1999.

91. The consolidation of roadway equipment functions will save approximately \$1.2 million annually in operating costs through the consolidation of functions and approximately \$1.5 million annually in the costs of equipment parts and components. In addition, the integration will produce other, less readily quantifiable, benefits through improved equipment performance.

92. Some or all of the Canton Shop employees also will have the option to follow their work to Charlotte in accordance with the terms of the proposed implementing agreement among NSR, Conrail, BMW, and the Shopcraft Unions. NSR plans to create 56 new shopcraft positions at the Charlotte shop to handle the additional roadway equipment for the expanded system. Those positions will be advertised in the various shopcrafts in accordance with NSR's needs, roughly in proportion to the current distribution of shopcraft employees in the Charlotte Shop. Under that formula, NSR plans to establish positions for 33 machinists, eight blacksmiths, two laborers, five electricians, four carmen and four sheetmetal workers. Charlotte shopcraft employees currently are represented by the Shopcraft Unions, which are parties to the March 1, 1975 Southern "Shop Crafts" Agreement: IBEW (which represent the Charlotte Shop electricians); IAM (machinists); NCFO (laborers); IBB (blacksmiths); and the SMWIA (sheetmetal workers).

93. The new shopcraft positions will be advertised to employees at Canton in advance of the plant closing (at the same time that CSXT advertises its new roadway equipment shop positions at Richmond, Virginia). Positions will be awarded in order of seniority to employees with requisite experience and qualification in the work of the shopcraft. Employees who follow their work to Charlotte will work under the terms of the applicable agreement

governing the respective classifications. NSR anticipates that all of its allocated employees at the Canton Shop will be able to secure continued employment by one of these means.

94. Any Canton Shop employees who are unable to follow their work to Charlotte or to CSXT's equipment repair shop will be allocated to NSR. Most of the 90 active BMW-represented employees hold seniority rights on other rosters covering parts of the NSR-allocated lines, and will have the option to exercise that seniority to a position in the field forces in the event that they are unable to obtain a position at Charlotte or at CSXT's equipment repair shop.

95. NSR also intends to take advantage of the opportunity to achieve system-wide efficiencies by consolidating rail welding functions for the expanded NSR system. This work involves the processing of continuous welded rail segments for use in rail production projects. Both Conrail and NSR operate central rail welding facilities. On both Carriers, the rail fabrication work is performed in a carrier-owned facility, which is operated by an outside contractor. BMW-represented employees at both plants perform ancillary rail loading and unloading functions. In addition, NSR's BMW-represented workforce is involved in the reconditioning of worn rail.

96. NSR's decision to consolidate the rail welding work in its Atlanta Rail Fabrication Plant was based in part on the relative condition and capacity of the carriers' existing facilities. NSR's rail welding facility is equipped with more modern machinery, which produces a higher quality continuous welded rail. Rail welds produced at Atlanta have a substantially lower failure rate than rail welds produced at Lucknow and, accordingly, will support safer operations and need less frequent repair. Rail welds produced at Lucknow comply with the

American Railway Engineering Maintenance Association safety standards but do not meet NSR's own more stringent production standards. In addition, the Atlanta facility, unlike Conrail's, is equipped to perform reconditioning of used rail. This process enables NSR to recycle for lower speed and lower density uses (such as yard track) rail that has exceeded its useful life in main line operations. Finally, the Atlanta plant, unlike Conrail's, has facilities for storage of finished rail. Rail produced at Lucknow must be loaded directly into specially equipped rail cars. If such cars are unavailable for any reason, the production process is slowed or halted.

97. Moreover, the Atlanta facility already has capacity to perform rail welding functions for the allocated lines. The Atlanta facility is equipped to weld 1,200 miles of rail annually, a level that has vastly exceeded NSR's system-wide needs in recent years. The excess capacity of the Atlanta Fabrication Plant can readily be deployed to meet the needs of NSR's expanded system with little or no additional capital investment.

98. Conrail's Lucknow Plant, by contrast, is not equipped to handle rail fabrication or reconditioning for the expanded NSR system. In its current condition, the Lucknow Plant is capable of welding approximately 400 track miles of rail per year. Moreover, the plant's two aged rail welding machines would need to be replaced, at an estimated cost of \$3 million, in the near future.

99. By shifting the rail welding functions to Atlanta, NSR will be able to obtain the materials necessary to maintain the allocated lines to the standards set by NSR's Engineering Department and will generate other substantial public benefits. Closing the Lucknow facility will save approximately \$1.2 million annually in contractor fees and other

operating expenses and will obviate the capital investment that otherwise would be required to retrofit the Lucknow facility to meet NSR's needs.

100. These benefits will be achieved with minimal effect on protected employees. Most of the workforce at Conrail's Lucknow Plant is employed by the contractor that performs the welding functions.

101. Only six BMW-represented employees currently work at the Lucknow facility. All of those employees are to be allocated to NSR. The proposed implementing agreement (Carriers' Exhibit A-1, Article II, Section I; page 5-6) establishes a mechanism for the selection and assignment of employees to the expanded Atlanta Fabrication Plant operation and specifies the arrangements (including labor agreement) under which transferring employees will work.

102. Current Lucknow employees who do not transfer to Atlanta will have continued work opportunities on the allocated lines. The Lucknow employees hold seniority on one or more of Conrail's Harrisburg Division BMW rosters and will have an opportunity, in accordance with the overall workforce allocation proposed by the Carriers, to bid on new line maintenance positions bulletined on the NSR or CSXT allocated lines.

D. Use Of Outside Contractors For Transaction-Related Capital Projects

103. Finally, NSR needs a temporary arrangement to permit our use of outside contractors in order to complete the capital projects that are required for the integration and improvement of train operations on NSR's expanded system.

104. In our Operating Plan in the STB proceeding, we described our plans to invest more than \$500 million in the construction, expansion, and upgrading of facilities and

infrastructure on our existing and allocated properties. NSR identified specific capital projects that would be necessary to link NSR's existing properties with our allocated Conrail properties and to upgrade and increase the capacity of our expanded system in order to support planned train operations. NSR Operating Plan at 199-217.

105. Some of the projects that we identified in NSR's Operating Plan involve new track construction and installation at locations on NSR's former Southern Railway lines. The practices under the NSR/BMWE Agreement at those locations permit NSR to use outside contractors to perform such work.

106. At least 40 of the NSR projects identified in the Application involve work that ordinarily would be performed by NSR's BMWE-represented employees under the terms of the NW-Wabash/BMWE Agreement. These projects involve the installation of more than 128 miles of new track.

107. NSR advised the STB that we would need to use outside contractors in order to complete our planned capital projects on the three year timetable specified in the Operating Plan (Carriers' Exh. A-4, at 12). Since the STB Application was prepared, NSR has further refined its capital plan and has identified ten additional projects necessary to integrate train operations on our expanded system and to accommodate the traffic increases planned for the expanded system. In total, we now plan to install more than 866,000 feet, or over 164 miles, of new track in connection with implementation of the Transaction. The separate declaration of NSR General Manager Tony L. Ingram explains the necessity of these projects to NSR's planned train operations on the expended NSR system.

108. NSR began the planned Transaction-related capital work on its existing properties long before the STB gave its formal approval to the Application. Since the Conrail Transaction was announced, NSR's BMW-employees have been fully employed, in both Transaction-related projects and routine line and program maintenance. Other than the regular seasonal cut-off of program gangs, NSR has not reduced its BMW forces or furloughed BMW-employees, and many employees have worked substantial overtime on Transaction-related projects. NSR expects to exceed its overtime budget for maintenance of way operations this year by \$3.4 million, most of which is attributable to Transaction-related work.

109. The employment of our existing and allocated forces will not assure timely completion of the remaining capital projects. Even after deploying all active forces through the remainder of 1998, we will have yet to complete at least 34 Transaction-related capital projects (as identified in NSR Exhibit 12), involving the construction of more than 126 miles of new track.

110. Instead, NSR plans to use outside contractors, in addition to our existing and allocated BMW forces, to complete the Transaction-related capital projects in a timely fashion. The remaining construction projects exceed NSR's manpower and equipment capacity. NSR expects to be allocated 1,889 Conrail maintenance of way employees under the allocation proposal that the Carriers are presenting in this proceeding. NSR will need all of those employees to perform routine line maintenance and ongoing capital renewal projects necessary to meet NSR's maintenance standards for the allocated properties. Likewise, the remaining projects that must be completed on NSR's existing lines exceed the capacity of the workforce on those lines.

Therefore, NSR will not have sufficient manpower within its BMW-represented ranks to complete the necessary capital projects.

111. The number of construction projects NSR must now complete, and the speed with which we must complete them, are unprecedented. NSR's BMW-represented maintenance of way forces have never performed construction work on anything approaching the scale of the three-year schedule proposed for these projects. During the last three years, BMW-represented forces on the former NW system performed an average of 11.9 miles per year of new track construction. NSR now needs to perform nearly four times that amount in each of the next three years. Under the best of conditions (including the use of NSR's DPG arrangement and flexible work rules), it would take NSR far more than three years to complete the remaining construction projects using its expanded BMW-represented workforce.

112. NSR could not accelerate this process by temporarily expanding its workforce. To perform all of our planned construction projects in a timely manner, NSR would need to hire and train scores of additional new maintenance of way employees (and additional nonagreement supervisors), most of whom would be left without work opportunities upon completion of the Transaction-related capital projects. Such a massive short-term workforce expansion would impair the efficiency of NSR's maintenance of way operations by directing manpower from ongoing maintenance of way work to training and supervision. NSR's practice is to recruit and train employees for long term employment -- not to hire a transient labor force, or to conduct mass furloughs that disrupt the workforce, require retraining of employees upon return from furlough, and jeopardize employee morale. NSR's approach promotes stability and

efficiency in our maintenance of way workforce, which has contributed to NSR's being the safest Class I railroad in the nation.

113. In any event, having additional trained employees would not enable NSR to complete its capital plan on time. Even if NSR could hire and train the necessary employees on the schedules demanded by its Operating Plan, we would be unable to equip those forces to perform the remaining capital projects. NSR has some of the equipment necessary to perform the construction projects. But that equipment could not be diverted from its regular use in line maintenance without handicapping those operations.

114. Nor would it be feasible or efficient for NSR to acquire the equipment that would be necessary to meet its construction schedule. Certain pieces of necessary equipment, such as a Material Handling Truck, Ballast Regulator, and Production Tamper, are not available for lease, and so would have to be purchased. This equipment must be special-ordered on a first-come, first-served basis, subject to availability based on existing production orders. Even assuming such equipment could be ordered and received in time to be used on NSR's existing construction schedule, the cost of making such an acquisition could not be justified. At a minimum, assuming that the planned projects could be performed sequentially, NSR would have to purchase \$3.4 million worth of equipment. If the same projects were commenced simultaneously, we would have to spend as much as \$31.7 million on new equipment. In reality, the costs of equipment would be somewhere between those amounts. In any event, most of the equipment would be surplus upon conclusion of the initial capital projects.

115. The specialized equipment that will be needed for the planned capital projects could not be leased for use by NSR's employees. Rather, the few third-party contractors that supply specialized railroad construction equipment require that their trained employees be used to operate the equipment.

116. It would make no operational or economic sense for NSR to equip and hire additional employees that NSR does not otherwise need for the limited purpose of completing the remaining construction projects. Doing so would impose needless additional costs on our operations, while producing no corresponding public benefit. Conversely, using outside contractors, as we propose here, would permit timely and efficient completion of the necessary capital projects.

117. NSR's proposal to use outside contractors is narrowly tailored to accomplish its purpose. The proposal covers only a limited universe of projects. We do not intend to place any permanent restriction on the BMWWE agreement scope rules or permanently change applicable practices under those rules.

118. The temporary arrangement will remain in effect only so long as NSR is performing capital projects initially required to implement the Operating Plan and to achieve the benefits of the Transaction. Once those projects are complete, the ongoing maintenance and renewal of newly constructed track will be performed in accordance with the applicable labor agreements and practices.

119. No BMWWE-represented employees will lose work opportunities as a result of NSR's proposal to increase the use of outside contractors. NSR will employ contractors under

this proposal only for Transaction-related capital projects that cannot be completed on a timely basis using NSR's available BMW-represented forces. That is, we will not use an outside contractor under this proposal for a Transaction-related project if, on the involved operating division, any of NSR's otherwise available allocated Conrail employees or otherwise available current employees on NW are furloughed.