STB FD 33388 12-15-97 D 184826V3A 11/12

amended) of the Basic Agreement between Railroad and NRPC governing the operation of intercity passenger service over lines of Railroad where such failure is attributable to the presence of EQUIPMENT, personnel, passengers, or property of Commissions or of an OPERATOR or to the operation, normal or abnormal, or to the malfunction, of the SERVICE.

Section 5.3. In addition to the payments specified elsewhere in this ARTICLE FIVE, Commissions shall also pay to Railroad, within 30 days of demand when supported by appropriate documentation, any amounts which become due to be so paid pursuant to the provisions of ARTICLE TWO. Whenever in this Agreement, including, without limitation, the provisions of ARTICLE TWO hereof, Commissions are obligated to pay to Railroad the cost of any item or service, including, without limitation, the cost of any installation, maintenance, repair, modification, renewal, change, removal, construction, assistance, restoration, salvage, replacement, supply, or the cost to furnish, Railroad's cost shall include additives as shown in the then current **Norfolk Southern Schedule of Rates and Surcharges for Billing Railroads and Others for Use of Facilities, Services and Equipment**, current copies of which shall be furnished to Commissions.

Section 5.4. In the event that any contract governing the relationship of Commissions with an OPERATOR contains provisions specifying additional compensation to the OPERATOR contingent upon particular levels of schedule adherence in the operation of the SERVICE, then, in addition to the payments specified elsewhere in this ARTICLE FIVE, such payments shall be shared by Railroad and OPERATOR on such terms as they may agree upon.

Section 5.5. If Railroad is at any time required by order of a court or of any administrative agency to give the commuter rail service priority over Railroad's freight operations, and if Commissions do not accede to immediate termination of this

Agreement upon request of Railroad, Commissions shall pay Railroad, as liquidated damages for injury to Railroad's business and the increased costs to Railroad of transacting its business, $5.00 per minute of freight train delay occasioned by Railroad's compliance with such order for the remaining term of the Agreement.

Section 5.6. During the Agreement term, Railroad shall keep full and accurate records from which Railroad's costs and charges are determined. Commissions may inspect and audit at their own expense and obtain copies of the accounting and operating records of Railroad pertaining to the SERVICE at any mutually agreeable time during regular business hours at Railroad's place of business where said records are regularly kept. Such actions shall not unreasonably interfere with the business or accounting functions of Railroad. Railroad shall cooperate fully with Commissions in the explanation of the contents of said records. All charges shall be deemed to have been finally accepted and approved by Commissions unless exceptions, in writing, shall be made thereto within thirty-six (36) months after the submission of such charges. Once a charge has been audited, that charge shall be considered closed and not open to further audit.

ARTICLE SIX - Maintenance

Section 6.1 Subject to the provisions of Sections 2.8, 2.9, and 2.10 hereof, and excepting force majeure, Railroad shall, during the term of this Agreement, keep and maintain the TRACKS in a condition which will permit the operation of the SERVICE. Railroad does not guarantee the condition of the TRACKS or that the SERVICE will not be delayed or interrupted. Failure on the part of Railroad to maintain the TRACKS as required in this ARTICLE SIX shall in no event impose any liability on Railroad, nor shall any such failure absolve Commissions of any of the obligations imposed upon them by ARTICLE NINE hereof.

ARTICLE SEVEN - **Claims Service**

Section 7.1. The provision of claims handling service in connection with any aspect of the commuter rail service shall be the exclusive responsibility of Commissions, and in no event shall Commissions or any OPERATOR assert any right to require provision of such service from Railroad or any affiliate thereof, the terms of any preexisting agreement between any OPERATOR and Railroad to the contrary notwithstanding. Commissions hereby agree to indemnify, protect, and save Railroad harmless against any cost or expense for the provision of claims handling service which Railroad may incur attributable to the institution, operation, maintenance, or discontinuance of the SERVICE and which is sought to be imposed on Railroad under the terms of such a preexisting agreement.

ARTICLE EIGHT - **Railroad Police**

Section 8.1. The provision of the services of railroad police or law enforcement personnel in connection with any aspect of the commuter rail service shall be the exclusive responsibility of Commissions, and in no event shall Commissions or any OPERATOR assert any right to require provision of the services of such railroad police or law enforcement personnel from Railroad or any affiliate thereof, the terms of any preexisting agreement between any OPERATOR and Railroad to the contrary notwithstanding. Commissions hereby agree to indemnify, protect, and save Railroad harmless against any cost or expense for the provision of the services of railroad police or law enforcement personnel which Railroad may incur and which is attributable to the institution, operation, maintenance, or discontinuance of the SERVICE and is sought to be imposed on Railroad under the terms of such a preexisting agreement.

ARTICLE NINE - **Risk of Liability**

Section 9.1. (a) Commissions shall protect, defend, indemnify, and save harmless Railroad from any loss, cost, expense, or liability for death, personal injury or property damage, including the property and employees of Railroad which is attributable in any way to, or which is exacerbated by, the institution, operation, maintenance, or discontinuance of the commuter rail service over the TRACKS of Railroad, or to the presence of cars, equipment, personnel, contractors, agents, or passengers of Commissions or an OPERATOR on or about the property of Railroad. Commissions shall indemnify and save Railroad harmless under this ARTICLE whether or not such death, injury, or damage is caused, in whole or in part, by the negligence, regardless of its character or degree, of Railroad, and whether the damages are compensatory or exemplary; provided, that the liability of Commissions under this ARTICLE shall not exceed $200,000,000 (or such greater sum as may be required by the provisions of Sections 9.2 or 9.3 hereof) in any one calendar year.

(b) To guarantee payment of their obligations under this ARTICLE, Commissions shall, subject to the approval and continuing supervision of the Department of General Services, Division of Risk Management of the Commonwealth of Virginia (the "Division"), procure and at all times maintain a policy or policies of liability insurance, with annual aggregate limits of at least $200,000,000 (or with such additional limits as may be required by the provisions of Sections 9.2 or 9.3 hereof) covering the liability assumed by Commissions under this ARTICLE. Such insurance may consist, in whole or in part, of a program of self-insurance approved and administered by the Division, or may consist, in whole or in part, of commercial insurance. All insurance policies obtained by Commissions pursuant to this Agreement shall be endorsed to require thirty (30) days prior written notice to Railroad if the policies are to be terminated or modified during the term of this Agreement. Commissions shall provide Railroad with copies of all commercial or other insurance policies, including all current endorsements, carried by Commissions pursuant to this Section 9.1, and a copy of all agreements, including amendments thereto, between Commissions and the Division relating to the coverage, structure, administration, or funding of Commissions' insurance program.

(c) In accordance with Section 2.1-526.8:1 of the Code of Virginia, the Division has established the Northern Virginia and Potomac and Rappahannock Transportation Commissions Commuter Rail Operations Liability Insurance Plan (the "Plan"), a copy of which is annexed as APPENDIX D. The Plan is maintained by Commissions and administered by the Division in accordance with Section 15.1-1358 of the Code of Virginia and constitutes a "liability policy" for purposes of that Section and Section 15.1-1364. The parties agree that implementation and maintenance of the Plan shall fulfill the obligations of Commissions under this ARTICLE NINE with respect to the procurement and maintenance of liability insurance.

(d) It is anticipated that Commissions, in fulfilling their obligation to obtain the insurance required by this ARTICLE NINE, may purchase commercial insurance policies providing annual aggregate limits, and that a claim or claims against such policies may reduce the available coverage in any one policy year below $200,000,000. Should this occur, and should claims paid, or reasonably expected to be paid, in any one calendar year reduce the available coverage below $175,000,000, notice of such fact shall be given promptly by the Division to Commissions, Railroad, and the OPERATOR. If Commissions fail within ten (10) days to restore the available insurance coverage to a level of at least $200,000,000 (or such higher level as may be required by the provisions of Sections 9.2 or 9.3), the SERVICE and all rights granted Commissions under ARTICLE THREE of this Agreement shall immediately cease and shall not be resumed until the full $200,000,000 in insurance coverage (or such higher level as may be required by the provisions of Sections 9.2 or 9.3) has been obtained.

(e) The Division administers the Commuter Rail Operations Liability Insurance Trust Fund for the purposes of implementing and funding Commissions' obligations under the Plan and this ARTICLE NINE, including obligations under the CFAs. Commissions shall arrange for a review by the Division of the financial condition of such Trust Fund and the adequacy of commercial insurance and self-insurance maintained under the Plan from time to time as may be requested by Railroad. Such review shall include written certification to Railroad that the Trust Fund is solvent and that the Plan's insurance program is adequate and actuarially sound for the purposes contemplated by this Agreement. If, at any time, the Division determines that the Plan is not adequately funded, the Division shall promptly give notice of such inadequacy to Commissions, Railroad, and the OPERATOR. If Commissions fail within ten (10) calendar days thereafter to provide funding in amounts determined by the Division to be adequate, all operations under this Agreement shall immediately cease until funding deemed adequate by the Division and Railroad is provided.

(f) The term "Railroad," as used in this ARTICLE NINE, shall include not only Norfolk Southern Railway Company but also its corporate affiliates and its and their respective officers, agents, and employees.

Section 9.2. At any time during the term of this Agreement, Railroad may request a review of the number and cost of claims which have been made against the Plan, including the actual and potential liabilities incurred by Commissions for death, personal injury or property damage since its inception. The review shall include consideration of inflationary and other relevant trends in the cost of tort claims, and the likelihood and potential cost of future claims. Based on this review and evaluation, the parties will determine whether there are reasonable grounds to increase the limit of Commissions' liability under Section 9.1(a) or to increase the limits and expand the coverage of the insurance required to be carried by Commissions under Section 9.1(b) and Section 9.1(d) hereof. If the parties are unable to agree, the dispute shall be arbitrated pursuant to ARTICLE ELEVEN hereof; provided, however, that in no event shall the liability of Commissions or the amount of insurance to be carried by Commissions be reduced below the limits required by Section 9.1 hereof. Any increase in the amount of insurance coverage which results from the application of this Section 9.2 shall automatically cause a proportionate adjustment to the limits specified in Sections 9.1(b) and 9.1(d) hereof.

Section 9.3. If as a result of any statute enacted by the Commonwealth of Virginia or the United States, the limits on the liability of Commissions stated in Section 9.1(a) are increased to an amount in excess of $200,000,000; or if for any reason the amount of liability insurance Commissions are required to procure and maintain in order to guarantee their obligations under this ARTICLE NINE or to the general public is increased to an amount in excess of $200,000,000; or if the exposure of Railroad to liability under this Agreement or under the CFAs is substantially increased by statute or judicial decision, then, and in any of such events, the limits on the liability of Commissions pursuant to this Agreement shall be increased proportionately and the limits of liability insurance carried by Commissions shall be increased to reflect such higher amount or increased exposure. As a condition of employing self-insurance to cover such higher amount or increased exposure, Commissions agree to obtain the advance approval of Railroad and the Division. In the event

Commissions fail to maintain the insurance required by this Section for any reason (including unavailability of such insurance), either party shall have the right to terminate this Agreement by delivery of written notice to the other party.

Section 9.4. The rights granted to Commissions in this Agreement relate to use of the TRACKS of Railroad for the operation of TRAINS. As set forth in ARTICLE THREE hereof, the CFAs have been entered into between Commissions and Railroad (and have been extended by the terms of this Agreement) concerning the construction, maintenance, use, and removal of certain ancillary facilities (scheduled in APPENDIX F of this Agreement), including, among others, stations, platforms, canopies, parking areas, and depots, for the accommodation of Commissions' employees and, particularly, passengers. It is understood and agreed that the indemnification and insurance provisions of this ARTICLE NINE of this Agreement shall apply with respect to such construction, maintenance, use, and removal by Commissions, any OPERATOR, its or their employees, agents, contractors, passengers, invitees, and the general public of any such facilities.

Section 9.5. Commissions expressly understand and agree that their obligations to indemnify Railroad and hold Railroad harmless under the provisions of this ARTICLE NINE also extend to and include the obligation to indemnify and hold Railroad harmless from and against any and all damages (including exemplary damages), penalties, losses, fines, claims, liens, suits, liabilities, costs (including clean-up costs), judgments and expenses (including attorneys', consultants', or experts' fees and expenses) of every kind and nature suffered by or asserted against Railroad as a direct or indirect result of or due to the presence or escape of any hazardous materials, substances, wastes or other environmentally regulated substances on or from the TRACKS, a TRAIN, or EQUIPMENT, or on or at property subject to a CFA, which presence or escape is attributable in any way to, or is exacerbated by, the institution, operation, maintenance, or discontinuance of the SERVICE over the TRACKS of Railroad or to the presence of Commissions' or any OPERATOR'S EQUIPMENT, personnel or passengers on or about Railroad's property including property subject to a CFA.

Section 9.6. (a) Railroad shall give notice to the Division and to Commissions as soon as reasonably practicable whenever Railroad receives credible notice from any party that it is the intention of such party to hold Railroad responsible for an incident for which Commissions are potentially liable under Section 9.1 hereof.

(b) Railroad agrees: (i) to cooperate in the defense of claims of which it gives the Division notice hereunder; (ii) to allow the Division, within its sole discretion, to settle or defend any claim which falls within the limits for which Commissions have agreed to assume responsibility hereunder; and (iii) to execute all documents reasonably required to enable the Division to recover amounts paid by the Division on behalf of Commissions to persons other than Railroad.

ARTICLE TEN - **Labor Claims**

Section 10.1. Commissions will indemnify and hold harmless Railroad, its corporate affiliates, and its and their respective officers, agents, and employees against any and all costs and payments, including, but not limited to, awards of benefits, back pay, penalty pay, allowances, and awards of damages of any kind, however they may be denominated, and all arbitration, administrative, and litigation expenses, arising out of claims or grievances made by or on behalf of employees of Railroad or its corporate affiliates in connection with the implementation, operation, or termination of this Agreement or any CFA, whether under employee protective conditions imposed by a governmental agency as conditions for that agency's approval or exemption of the SERVICE or this Agreement, or under a collective bargaining agreement.

ARTICLE ELEVEN - **Arbitration**

Section 11.1. Any claim, dispute or controversy arising out of or relating to this Agreement, the parties' relationship under this Agreement, or a claim of breach of this Agreement, shall be determined by arbitration by a single arbitrator pursuant to the applicable Rules of Practice and Procedure of The Private Adjudication Center, Inc. (an affiliate of the Duke University School of Law) in effect at the time the demand for arbitration is filed. The location of the arbitration shall be at the Center's facilities at the North Carolina Bar Center, Cary, North Carolina. The decision of the arbitrator shall be final and binding.

Service of process in connection therewith shall be made by certified mail. In any judicial proceeding to enforce this Agreement to arbitrate, the only issues to be determined shall be the existence of the agreement to arbitrate and the failure of one party to comply with that agreement, and those issues shall be determined summarily by the court without a jury. All other issues shall be decided by the arbitrator, whose decision thereon shall be final and binding. There may be no appeal of an order compelling arbitration except as part of an appeal concerning confirmation of the decision of the arbitrator.

ARTICLE TWELVE - **Default**

Section 12.1. Failure on the part of Commissions or an OPERATOR to comply with the conditions of ARTICLE TWO shall, in the case of conditions related to safety of operations or to Commissions' agreement in Section 2.6(a) of ARTICLE TWO, immediately terminate the rights of access granted Commissions in ARTICLE THREE hereof and shall, in the case of any other conditions of ARTICLE TWO, give Railroad the right to terminate such rights of access on ten (10) days prior written notice.

Section 12.2. Failure on the part of Commissions to comply with any of the provisions of ARTICLE NINE hereof shall constitute a default giving rise to a right in Railroad, on ten (10) days prior written notice, to terminate this Agreement.

Section 12.3. Failure on the part of Commissions immediately to replace any OPERATOR which becomes unacceptable to Railroad following notice delivered to Commissions by Railroad of such OPERATOR's unacceptability shall constitute a default giving Railroad the immediate right to terminate this Agreement.

Section 12.4. Failure of Commissions timely to make any payment required to be made to Railroad under any provision of this Agreement shall constitute a default giving rise to a right in Railroad, on ten (10) days prior written notice, to suspend the rights of access granted Commissions in ARTICLE THREE hereof. If any such default shall persist for thirty (30) days, or if any such default of the sort provided for in this Section 12.4, having been previously cured, shall recur more than two (2) times during the term of this Agreement, then Railroad may terminate this Agreement on ten (10) days prior written notice.

Section 12.5. Failure on the part of Railroad to comply with its obligations under ARTICLE SIX of this Agreement shall constitute a default by Railroad giving Commissions the right to terminate this Agreement on ten days prior written notice. Nothing in this Section 12.5 shall affect any other legal or equitable remedy available to Commissions.

ARTICLE THIRTEEN - Notices

Section 13.1. Any report, notice, or other communication required or permitted hereunder shall, unless otherwise specified, be in writing and shall be delivered by hand or deposited in the United States mail, postage prepaid, addressed as follows:

If to Railroad:

Manager, Amtrak Operations
Norfolk Southern Railway Company
Operations Control Center
185 Spring Street, S.W.
Atlanta, Georgia 30303
[tel. (404)529-1737; fax. (404)529-1645]

If to Commissions:

Director of Operations
Virginia Railway Express
6800 Versar Center, Suite 247
Springfield, Virginia 22151
[tel. (703)642-3808; fax. (703)642-3820]

Either party may change the address or officer title at which it shall receive communications and notifications hereunder by notifying the other party in writing of such change.

ARTICLE FOURTEEN - Miscellaneous

Section 14.1. Neither party shall be liable to the other in damages nor shall this Agreement be terminated nor a default be deemed to have occurred because of any failure to perform hereunder caused by a "Force Majeure". Each party will be excused from performance of any of its obligations hereunder, except obligations involving the payment hereunder of money to the other party or to a third party, where such non-performance is occasioned by Force Majeure. Force Majeure shall mean fire, earthquake, flood, explosion, wreck, casualty, strike, unavoidable accident, riot, insurrection, civil disturbance, act of public enemy, embargo, war, act of God, inability to obtain labor, materials or supplies, any governmental regulation, restriction or prohibition, or any other similar cause beyond the party's reasonable control.

Section 14.2. This Agreement is being executed and delivered in the Commonwealth of Virginia and shall be governed by and construed and interpreted in accordance with the internal laws of the Commonwealth of Virginia.

Section 14.3. All Appendices and Exhibits referred to in this Agreement are integral parts of this Agreement, incorporated by reference and made a part hereof, and shall bind the parties hereto to the same extent as if such provisions had been set forth in their entirety in the body of this Agreement. All terms defined in the Agreement and the Appendices and Exhibits shall have the same meaning throughout the Agreement and such Appendices and Exhibits.

Section 14.4. The Article and Section headings herein are for convenience only, and shall in no way be held or deemed to define, modify, or add to the meaning, scope, or intent of any provision of this Agreement.

Section 14.5. In the event that any provision of this Agreement is found to be invalid or unenforceable in any respect, the remaining provisions shall nevertheless be binding with the same effect as if the invalid or unenforceable provision were originally deleted; provided, however, if the deletion of an invalid or unenforceable provision materially or substantially alters or changes the rights or obligations of either party under this Agreement, either party shall have the right to terminate the Agreement on sixty (60) days written notice to the other. During the pendency of any such notice, the parties shall meet to reach agreement on new provisions to substitute for the invalid or unenforceable provision.

Section 14.6. The failure of either party to insist at any time upon the strict observance or performance of any of the provisions of this Agreement, or to exercise any right or remedy in this Agreement, shall not impair any such right or remedy or be construed as a waiver or relinquishment thereof.

Section 14.7. This Agreement and each and every provision hereof are for the exclusive benefit of the parties hereto and not for the benefit of any third party. Nothing expressed or implied herein is intended or shall be construed to confer upon or to give to any person, firm or corporation, other than the parties hereto, any right, remedy or claim under or by reason of this Agreement or of any term, covenant or condition hereof, and all the terms, covenants, conditions, promises and agreements contained herein shall be for the sole and exclusive benefit of the parties hereto and their successors.

Section 14.8. The rights and obligations of Railroad and of Commissions hereunder may be assigned only with the prior written consent of the other party, or its or their successors.

Section 14.9. While it is understood and agreed that Commissions shall act together in all matters affecting the SERVICE, reference to Commissions shall include either Commission and the rights and obligations of Commissions hereunder shall be joint and several.

Section 14.10. This Agreement has been executed in several counterparts each of which shall be deemed to be an original, and all such counterparts shall together constitute but one and the same instrument.

Section 14.11. This Agreement shall not be terminated, amended, supplemented, waived, or modified except upon execution of a written document duly signed by both parties hereto, unless a specific provision of this Agreement otherwise permits one party to effect such termination, amendment, supplementation, waiver, or modification.

IN WITNESS WHEREOF, Commissions and Railroad have caused their names to be signed hereto by their officers thereunto duly authorized and their seals, duly attested, to be hereunto affixed as of the day and year first above written.

NORTHERN VIRGINIA TRANSPORTATION COMMISSION

by: ____________________________
(Chairman)

[Seal]
Attest:

____
(title)

POTOMAC AND RAPPAHANNOCK TRANSPORTATION COMMISSION

by: ____________________________
(Chairman)

[Seal]
Attest:

____
(title)

NORFOLK SOUTHERN RAILWAY COMPANY

by: ____________________________
(title)

[Seal]
Attest:

____
(title)

EXTENSION OF OPERATING ACCESS AGREEMENT

THIS AGREEMENT, made and entered into as of this __12th__ day of July, 1996, by and between NORFOLK SOUTHERN RAILWAY COMPANY, a Virginia corporation, with its principal place of business at Three Commercial Place, Norfolk, Virginia, 23510-2191 ("Railroad"), and the NORTHERN VIRGINIA TRANSPORTATION COMMISSION and the POTOMAC AND RAPPAHANNOCK TRANSPORTATION COMMISSION, bodies politic and corporate and political subdivisions of the Commonwealth of Virginia, having principal places of business at 4350 N. Fairfax Drive, Suite 720, Arlington, Virginia 22203 and 1549 Old Bridge Road, Suite 209, Woodbridge, Virginia 22191, respectively (collectively "Commissions");

WITNESSETH:

WHEREAS, pursuant to an agreement dated as of December 1, 1994 between Railroad and Commissions (the "Operating Access Agreement"), Commissions have operated rail commuter service over Railroad's line from Manassas to Alexandria, Virginia; and

WHEREAS, unless terminated earlier, the Operating Access Agreement will terminate on July 15, 1996; and

WHEREAS, Commissions wish to continue to operate or have operated rail commuter service over the TRACKS (as defined in the Operating Access Agreement); and

WHEREAS, Railroad is willing to permit continued use of the TRACKS and certain related facilities and services as specified in the Operating Access Agreement and herein;

NOW, THEREFORE, in consideration of the mutual covenants and promises herein contained, the Parties agree as follows:

ARTICLE 1. The Operating Access Agreement shall be extended for two years from July 15, 1996, and, unless terminated earlier in accordance with its terms, shall terminate automatically on July 15, 1998.

ARTICLE 2. Railroad acknowledges that substantial progress has been made towards development of the plan required by § 4.2 of the Operating Access Agreement. Commissions acknowledge that Railroad's agreement to extend the Operating Access Agreement is conditioned on Commissions' continued efforts, and those of the Commonwealth of Virginia, to work diligently to develop that plan prior to the expiration of the extension permitted by this Agreement.

ARTICLE 3. In consideration of this extension, Commissions agree to increase compensation due Railroad under the Operating Access Agreement, including but not limited to BASE PAYMENTS, TRAIN-MILE LEASE FEES and fees for SPECIAL TRAINS (all as defined in, and as may be adjusted or amended pursuant to, the Operating Access Agreement), by four percent (4%), effective as of the date of execution of this agreement, and by an additional four percent (4%), effective twelve months thereafter.

ARTICLE 4. Except as modified above, the Operating Access Agreement shall remain in full force and effect during the term of this extension.

IN WITNESS WHEREOF, the Commissions and Railroad have caused their names to be signed hereto by their officers thereunto duly authorized as of the day and year first above written.

NORTHERN VIRGINIA
TRANSPORTATION COMMISSION

By:__________________________
(Title)

Attest:

____
(Title)

POTOMAC AND RAPPAHANNOCK
TRANSPORTATION COMMISSION

By: ______________________
(Title)

Attest:

____
(Title)

NORFOLK SOUTHERN RAILWAY
COMPANY

By: ______________________
(Title)

Attest:

____
(Title)

extenvre

SECOND AMENDED AND RESTATED

NORTHEAST CORRIDOR

FREIGHT OPERATING AGREEMENT

Dated October 1, 1986

between

NATIONAL RAILROAD PASSENGER CORPORATION
("Amtrak")

and

CONSOLIDATED RAIL CORPORATION
("Conrail")

such prohibition or removal and bear the cost of any claims growing out of any improper prohibition or removal.

Section 2.3. Freight Service Operations

(a) General. Conrail shall have the right to operate scheduled and unscheduled Freight Service on the NEC. The scheduled Freight Service is as set forth in Conrail's NEC freight service schedule, as amended from time to time in the manner provided in (b) below. Copies of such schedules and all amendments have been or will be delivered to Amtrak.

(b) Modification of Scheduled Freight Service. Conrail shall have the right from time to time to request, and subject to and in accordance with the terms and conditions of this Agreement, Amtrak hereby agrees to permit changes in or additions to the Scheduled Freight Service. The changes or additions requested shall be subject to the physical limitations of the NEC, to Amtrak's speed, weight and similar operating restrictions and rules or safety standards, and to the needs of, and in particular to the adequacy, safety and efficiency of, Amtrak passenger train operations and commuter service.

(c) Other Freight Service. At any time, Conrail shall have the right to request, and subject to and in accordance with the terms and conditions of this Agreement, Amtrak hereby agrees to permit, the operation of unscheduled Freight Service over the NEC. Unscheduled Freight Service will be subject to the last sentence of subsection (b) above. Subject thereto, Amtrak agrees

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to use its best efforts to accommodate unscheduled Freight Service requested under this Agreement in an expeditious and efficient manner.

Section 2.4. Standards of Performance

Amtrak agrees to use its best efforts to operate the NEC in an economic and efficient manner, and shall make every reasonable effort, consistent with the expeditious, safe, and efficient operation of Amtrak passenger trains and of commuter service, to permit the operation of scheduled Freight Service in accordance with the agreed-upon schedules, and the operation of Freight Service presented for movement at unscheduled times as expeditiously as possible.

Section 2.5. No Violation of Labor Agreements

Conrail agrees that it will not require the performance of services hereunder by Amtrak, nor will it exercise its rights hereunder, in a manner which would cause Amtrak to violate the terms of or incur penalties, unless reimbursed by Conrail, in connection with any then current labor agreements between Amtrak and any organization representing any of its employees. Amtrak agrees that it shall: (i) as promptly as practicable, notify Conrail of any claim that the requested services or exercise of rights has caused or will cause such violation or the incurrence of such claims or penalties, damages, loss or liabilities; and (ii) at Conrail's request and expense cooperate with Conrail in which relate to the operation of the NEC during regular business hours of the location where such records are retained. Amtrak shall retain or record on microfilm all such books, records, and accounts for at least three years following the end of the period covered therein or the period of time required by Commission record retention rules, whichever is longer, except for TMS records which shall be maintained for six months.

Section 3.7. Payment Disputes

In the event that either party shall disagree with a freight cost statement or payment or settlement thereof, the party in disagreement shall promptly notify and provide to the other party a written statement setting forth the nature and basis for the disagreement and enumerating those aspects, if any, of such statement, payment, settlement, or determination which are not in dispute. Unless otherwise agreed, such undisputed amounts shall be promptly paid or refunded, and the parties shall confer promptly for the purpose of resolving the disputed amount. In the event the parties cannot resolve such disputed amounts, the matter shall be submitted to arbitration pursuant to the provisions of Section 4.3. Within 15 days after resolution of such disputed amounts, the amount determined to be payable shall be paid with interest as provided in Section 4.11.

Section 3.8. Redetermination of Compensation

Sections 3.1 through 3.7 shall be the basis for compensation for the services and activities performed for, and the facilities and equipment provided to, Conrail by Amtrak hereunder, commencing October 1, 1986, and continuing until the parties have reached a new agreement with respect to compensation or until the Interstate Commerce Commission has determined such compensation pursuant to the provisions of this section. At any time after April 1, 1991, either Amtrak or Conrail may notify the other that it wishes to negotiate redetermination of the amount or method of computing the amount of payment for services and use of facilities provided to Conrail hereunder. In such event, the other party shall promptly negotiate with respect to such a redetermination.

If, within 90 days after the date of such notice, Amtrak and Conrail are unable to agree as to a new amount or basis of compensation, Amtrak and Conrail shall, at the request of either, jointly make application to the Commission under Section 402(a)(2) of the Act for an order determining appropriate compensation payable by Conrail for the provision of the services and use of Amtrak facilities as are provided for herein. Until a new basis of compensation is established, Conrail shall continue to make periodic payments to Amtrak in the manner and amount provided in this Article III. Any agreement entered into or determination of compensation made shall take effect on a date which is six months after the date on which notice was first given pursuant to this section; provided, however, that unless the parties specifically agree to the contrary, no such agreement or determination shall apply retroactively for a period that exceeds 12 months (plus any amount of time that an application is pending in an active status before the Commission pursuant to the first sentence of this paragraph or is pending review from a Commission decision before a court).

Section 3.9. Substitute Compensation

So long as the Car Mile Rates established by Sections 3.1 and 3.2 remain in effect, if, subsequent to October 1, 1986, Amtrak enters into an agreement (other than an Excluded Agreement as defined below) with any other railroad or third party permitting such entity to provide rail freight services over any rail properties comprising all or any part of the NEC on which rail freight service is then being operated by Conrail, Amtrak shall give Conrail immediate notice of the Compensation Provisions (as defined below) contained in such agreement. Conrail shall have the right, exercisable by giving written notice to Amtrak no later than 30 days after receipt of such notice, to elect to substitute the Compensation Provisions of such agreement in their entirety for the Compensation Provisions contained in this Agreement (such substituted Compensation Provisions being called the "Substitute Compensation Provisions"). In the event that Conrail elects Substitute Compensation Provisions, Amtrak shall have, commencing April 1, 1991, the right to request a redetermination of compensation as provided in Section 3.8 of this Agreement, regardless of any

EXHIBIT A

FREIGHT SERVICE AGREEMENT

RESERVING AND EXCEPTING TO THE GRANTOR:

1. The easement and right ("Freight Service Easement") contemplated for retention by the Grantor under the Final System Plan certified by USRA exclusive against any and all persons except Grantee, its subsidiaries and successors in interest, to operate upon the real property conveyed by this Deed to the Grantee ("real property") local and long-haul freight service (including mail and express) and special train service to the full extent required by (i) the Act, or (ii) the Interstate Commerce Act or any future law of like import, including, without limitation, to the extent so contemplated and so required, the exclusive easement and right:

(a) to operate freight trains, cars and locomotives;

(b) subject to availability of space in light of the needs of Grantee, except in those facilities occupied by Grantor as of the date of this Deed as to which

Grantor has no viable alternative, to occupy and use such portions of stations, buildings and other facilities now upon the real property (and replacements thereof) and subject to availability of space in light of the needs of Grantee, to construct, operate and maintain additional or substitute stations, buildings and other facilities, which are reasonably necessary or legally required in connection with the provision of freight service;

(c) to use in conjunction with Grantee the presently existing railroad system telephone cable communication equipment and facilities now upon the real property (and replacements thereof) and subject to the availability of space, to construct, operate and maintain such additions to or substitutions for the presently existing railroad system telephone cable communications equipment and facilities as are reasonably necessary or legally required in connection with the provision of freight service;

(d) to install track connections for rail lines and trackage, now or hereafter owned, leased, controlled or operated by Grantor, contiguous or adjacent to the real property to secure its freight customers or to connect with its rail properties;

(e) to provide all new and additional freight service at any point along the real property;

(f) to use appropriate portions of the maintenance of equipment facilities now upon the real property (and replacements thereof) for the provision of maintenance of equipment service for equipment used in provision of freight service (including mail and express) and special train service; and

(g) to have reasonable access over the real property to permit the exercise of the foregoing easements and rights;

the exercise of which such exclusive easement and right shall be subject to such terms, provisions, qualifications and limitations as the Grantor and the Grantee have agreed upon in a certain Northeast Corridor Freight Operating Agreement, dated March 31, 1976, as said agreement may be amended, and as the Operations Review Panel established under Section 702 of the Railroad Revitalization and Regulatory Reform Act of 1976 may impose; in return for which exclusive easement and right, the Grantor shall pay the fair and equitable share of the cost to the Grantee of operating rail service upon the real property occasioned by exercise of the Freight Service Easement, as determined by agreement between the parties, or, in the event of the failure of the parties to so agree, by the Interstate Commerce Commission under Section 402(a) of the Rail Passenger Service Act, as such provision may be amended; provided, that in the event that the Grantor shall elect to abandon or assign the Freight Service Easement in whole or in part, other than to a subsidiary, affiliate or successor entity, the Grantee shall have a first option to acquire such easement, or portion thereof, at the purchase price of one dollar ($1.00);

right to request a renegotiation of this Article V pursuant to Section 5.17(a), regardless of any inconsistent provisions in the Substituted Compensation Provisions.

IN WITNESS WHEREOF, Conrail and Amtrak have caused this Agreement to be duly executed by their respective officers thereunto duly authorized, all as of the day and year first above written.

Attest:

NATIONAL RAILROAD
PASSENGER CORPORATION

By:
Its: ACTING PRESIDENT

CONSOLIDATED RAIL CORPORATION

Attest:

ASSISTANT SECRETARY

By:
Its: PRESIDENT

TRACKAGE RIGHTS AGREEMENT BETWEEN
NEW JERSEY TRANSIT CORPORATION
AND THE CONSOLIDATED RAIL CORPORATION

This TRACKAGE RIGHTS AGREEMENT ("Agreement"), effective as of October 1, 1984, is made between New Jersey Transit Corporation ("NJTRANSIT"), an instrumentality of the State of New Jersey, with offices at P.O. Box 10009, Newark, New Jersey 07101, and the Consolidated Rail Corporation ("Conrail"), with offices at Six Penn Center Plaza, Philadelphia, Pennsylvania 19103.

WITNESSETH

WHEREAS, the Northeast Rail Service Act of 1981 (NERSA) directs in Sections 1136 and 1137 that Conrail shall convey to commuter authorities rail properties used or useful in the operation of passenger service and retain appropriate trackage rights for its freight operations; and

WHEREAS, in accordance with NERSA §1137 (§506(b)), the Parties hereto have executed a Transfer Agreement, dated September 1, 1982 (NERSA Agreement); and

WHEREAS, in accordance with NERSA and the NERSA Agreement, it is necessary to establish appropriate operating rights, maintenance responsibilities, and financial arrangements between the Parties for continued operation of passenger and freight service over NJTRANSIT and Conrail Rail Properties and to supersede the Freight Service Agreement between NJTRANSIT and Conrail for Properties Acquired By New Jersey dated May 13, 1981; and

WHEREAS, the parties entered into an Interim Trackage Rights Agreement effective January 1, 1983, which by extension terminates September 30, 1984;

NOW, THEREFORE, in consideration of the covenants, agreements, representations, and warranties contained herein, and intending to be legally bound, NJTRANSIT and Conrail agree as follows:

(c) Conrail hereby grants to NJTRANSIT the right to enter upon and use tracks and related operating facilities as identified in Section 2.07(c)ii and Exhibit No. 5 of the NERSA Agreement.

Section 2.04 Additional Use of Rail Properties Owned by Conrail

Subject to the provisions of this Agreement and Section 2.07(c)i of the NERSA Agreement, Conrail grants to NJTRANSIT the right and license to enter upon and utilize other existing tracks and related operating facilities owned by Conrail which are not presently used in NJTRANSIT passenger service. NJTRANSIT's use shall not unreasonably interfere with Conrail's freight service. NJTRANSIT shall give ninety (90) days written notice to Conrail of NJTRANSIT's intent to use said properties.

IN WITNESS WHEREOF, the Parties to this Agreement, by their authorized representatives, hereby cause this Agreement to be executed this sixth day of February 1985.

ATTEST:

CONSOLIDATED RAIL CORPORATION

BY: Stuart M. Reed

J. D. McGEEHAN
ASSISTANT SECRETARY

ATTEST:

NEW JERSEY TRANSIT CORPORATION

BY: Jerome C. Premo

NEW JERSEY TRANSIT RAIL OPERATIONS, INC.: Acceptance by NJTRO of NJTRANSIT Assignment

John C. Tone

BY Alan G. Lustig

The aforementioned Agreement has been reviewed and approved as to form only.

IRWIN I. KIMMELMAN

Attorney General of New Jersey

BY:

PULLER SERVICE AGREEMENT

BETWEEN

THE TOLEDO TERMINAL RAILROAD COMPANY

AND

THE NEW YORK CENTRAL RAILROAD COMPANY

\- - -

[illegible]

AGREEMENT BETWEEN [illegible]

RAILROAD [illegible]

THE NEW YORK CENTRAL RAILROAD COMPANY

THIS AGREEMENT, Made this 1st day of January, 1932, between THE TOLEDO TERMINAL RAILROAD COMPANY, hereinafter called "the Terminal Company", and THE NEW YORK CENTRAL RAILROAD COMPANY, hereinafter called [illegible] Central Company

WITNESSETH:

WHEREAS, the Central Company desires to use the tracks, facilities and services of the Terminal Company in the interchange of certain traffic between the said Central Company's tracks and the tracks of other railroads having direct track connection with the Terminal Company:

THEREFORE:

ARTICLE 1

(a) In consideration of the covenants and agreements herein contained and upon the terms and conditions hereinafter stated, the Terminal Company agrees to furnish to the Central Company the facilities and services hereinafter mentioned, and grants to the Central Company, subject to similar grants to and agreements heretofore or hereafter made with other railroads, the right to use the tracks of the Terminal Company, hereinafter sometimes referred to as the "Joint Section", for the purpose of moving such interchange traffic in co-operation with the Terminal Company.

(b) The right hereby granted shall not be exclusive but shall be contemporaneous with the right of the Terminal Company to use its tracks in the conduct of its own sole business, and such right of the Central Company shall further be subject to and be exercised in common with such rights as may heretofore or hereafter be granted to any other railroad company or companies in the use of said tracks, facilities and services.

(c) The right so granted to the Central Company is solely for the passage of its engines and trains, in continuous movement, over the tracks of the Terminal Company between the Central Company and the other companies having direct track connection with the Terminal Company, and shall include only interchange traffic destined beyond Toledo, Ohio

(d) "Joint Section", as used in this agreement, means such part of the track or tracks of the Terminal Company as may be used for the passage of any train of the Central Company, as such train is hereinafter defined, beginning at the point where such train enters upon such track or tracks, ending where it leaves the same, and continuing while such train is upon any part thereof.

(e) The Terminal Company shall have sole and exclusive charge and control of the operation and maintenance of the Joint Section, the use of which is hereby granted to the Central Company, and such operation and maintenance shall be at the sole expense of the Terminal Company. The Central Company [illegible] conform to such reason[illegible]

[illegible] Company may fr[illegible] time to time [illegible]

PULLER SERVICE AGREEMENT

BETWEEN

THE TOLEDO TERMINAL RAILROAD COMPANY

AND

THE PENNSYLVANIA RAILROAD COMPANY

- - - -

AGREEMENT

AGREEMENT [illegible]

[illegible]

THE PENNSYLVANIA RAILROAD COMPANY

THIS AGREEMENT, made [illegible] 1st day of January, 1932, between THE TOLEDO TERMINAL RAILROAD COMPANY, hereinafter called "the Terminal Company", and THE PENNSYLVANIA RAILROAD COMPANY, hereinafter called the Pennsylvania Company.

WITNESSETH:

WHEREAS, the Pennsylvania Company desires to use the tracks, facilities and services of the Terminal Company in the interchange of certain traffic between the Pennsylvania Company's tracks and the tracks of other [illegible] having direct track connection with the Terminal Company; not only for the purpose expressed in this agreement but also for the handling of any traffic originating at or destined to City of Toledo, excepting to and from industries located on said Toledo Terminal Railroad.

THEREFORE:

ARTICLE I

(a) In consideration of the covenants and agreements herein contained and upon the terms and conditions hereinafter stated, the Terminal Company agrees to furnish to the Pennsylvania Company the facilities and services hereinafter mentioned, and grants to the Pennsylvania Company, subject to similar grants to and agreements heretofore or hereafter made with other railroads, the right to use the tracks of the Terminal Company, hereinafter sometimes referred to as the "Joint Section", for the purpose of moving such interchange traffic in co-operation with the Terminal Company.

(b) The right hereby granted shall not be exclusive but shall be contemporaneous with the right of the Terminal Company to use its tracks in the conduct of its own sole business, and such right of the Pennsylvania Company shall further be subject to and be exercised in common with such rights as may heretofore or hereafter be granted to any other railroad company or companies ~~in the~~ use of said tracks, facilities and services.

(c) The right so granted to the Pennsylvania Company is solely for the passage of its engines and trains, in continuous movement, over the tracks of the Terminal Company between the Pennsylvania Company and the other companies having direct track connection with the Terminal Company, ~~and shall include only interchange traffic destined beyond Toledo, Ohio~~.

(d) "Joint Section", as used in this agreement, means such part of the track or tracks of the Terminal Company as may be used for the passage of any train of the Pennsylvania Company, as such train is hereinafter defined, beginning at the point where such train enters upon such track or tracks, ending where it leaves the same, and continuing while such train is upon any part thereof.

(e) The Terminal Company shall have sole and exclusive charge and control of the ope[illegible] of the Joint Section, the use of which is [illegible] to the Pennsylvania Company, and such operation an[illegible] shall [illegible] the sole expense of the Terminal Comp[illegible] Pennsylvania Company shall conform to such reasonable [illegible] Company may fro[illegible] time to time [illegible]ing the [illegible]

SUB-OPERATING AGREEMENT

This Agreement is made and entered into this 26 day of March, 1996, by and among R. J. CORMAN RAILROAD COMPANY/WESTERN OHIO LINE (hereinafter "SUB-OPERATOR") and the SPENCERVILLE-ELGIN RAILROAD, INC. (hereinafter "SPEG" or "OPERATOR").

WITNESSETH:

WHEREAS, SPEG has been granted pursuant to contract with the OWNERS, the rights to operate a line of railroad that extends from Lima, Ohio Mile Post 54.4 to Glenmore, Ohio Mile Post 84.2 and covering approximately thirty miles (hereinafter the "Line");

WHEREAS, no freight rail service has been conducted on the Line since November of 1993;

WHEREAS, SPEG desires to facilitate a restoration of freight rail service on the Line in accordance with the terms of this Agreement;

WHEREAS, SUB-OPERATOR is willing to provide freight rail service on the line in accordance with the terms and conditions of this Agreement;

NOW, THEREFORE, the parties agree as follows:

Section 1. Definitions

When used in this Agreement, the following capitalized terms shall have the meanings set forth below:

"Freight Rail Service" shall mean a provision of common carrier freight rail service on the Line by the OPERATOR.

"Line" shall mean the line of railroad between Lima, Ohio (M.P. 54.4) and Glenmore, Ohio (M.P. [84.2]). a distance of approximately 29.8 miles, which line shall include without limitation the following: the right-of-way; rail line; buildings; structures; facilities, if any, except engine house at Ohio City that are subject to the Agreement between SPEG and the Van Wert County Port Authority and the Port Authority of Allen County, if any; leads; spurs; turn-outs; tails; sidings; team tracks; signals; crossing protection devices; railroad communication systems; poles and all other operating and non-operating appurtenances owned by OWNERS that are situated on or adjacent to the rail Line.

"OPERATOR" shall mean the Spencerville-Elgin Railroad, Inc.

"SUB-OPERATOR" shall mean R. J. Corman Railroad Company/Western Ohio Line.

"OWNERS" shall mean the Van Wert County Port Authority and the Port Authority of Allen County.

Section 2. Grant of Operating Rights: Use of Line

Subject to the terms and conditions of this Agreement, SPEG hereby grants to SUB-OPERATOR the exclusive right to conduct Freight Rail Service on the Line, including but not limited to the right to operate trains, locomotives, cars and equipment with its own crews for its account. The OPERATOR also grants to the SUB-OPERATOR the non-exclusive right to use the Line for any other purposes, provided that such other uses shall not conflict with the provision of Freight Rail Service on the Line. The OPERATOR covenants not to operate or grant any type or form of non-freight railroad operating rights to third parties on the Line.

Section 3. Freight Rail Service To Be Provided

Subject to the terms and conditions contained herein, SUB-OPERATOR hereby agrees to provide Freight Rail Service on the Line in accordance with the Description of Service attached hereto as Exhibit 1.

The operation of the Line shall be subject to the exclusive control of SUB-OPERATOR, provided that SUB-OPERATOR shall operate the Line under reasonable rules established in accordance with its practices on the rail lines that it owns and operates.

In addition to the other terms and conditions of the Sub-Agreement, SUB-OPERATOR's obligation to provide service on the Line is contingent upon the OWNERS and the Ohio Rail Development Commission (ORDC) securing authorization in writing for salvage of the secondary main line track material in accordance with this paragraph. SUB-OPERATOR shall designate to OWNERS track and improvements on the secondary main line to be left in place and excluded from the salvage project. SUB-OPERATOR understands that the salvage project must be placed for bid by the OWNERS and the successful bidder shall be chosen in compliance with law. As part of a proposed upgrade program, provided that the OWNERS receive authorization to salvage the secondary mainline track as described in Section 3., SUB-OPERATOR shall make a Five Hundred Thousand Dollar and no/100 ($500,000.00) upgrade to the remaining line comprised of labor and materials, and equipment on terms and conditions to be mutually agreed upon by all parties.

Section 4. Maintenance

After upgrading the line with funds from the Federal Railroad Administration, SUB-OPERATOR, at its own expense, shall maintain the Line in such a manner as to keep it in FRA Class 2 condition. In the event SUB-OPERATOR fails to maintain the Line to the prescribed condition, SPEG may, on Thirty (30) Days' notice, terminate this Agreement, or at OPERATOR's option, perform such maintenance at its expense and recover from SUB-OPERATOR the reasonable cost of restoring and maintaining the Line to its upgraded condition; provided that if OPERATOR chooses to maintain the Line at a level higher than its present condition, such maintenance costs shall be borne solely by OPERATOR. SUB-OPERATOR will notify the Federal Railroad Administration that it is responsible for maintenance of the Line pursuant to 49 C.F.R. § 213.5(c).

SUB-OPERATOR shall maintain the lease property to comply with all federal, state or local laws and regulations, and specifically agrees that weed control and crossing maintenance will avoid all nuisance.

Section 5. Additions or Alterations

With the concurrence of OPERATOR, SUB-OPERATOR may make any changes in and/or additions to the Line which it deems necessary or desirable for the safe, efficient, and economical use of the Line for Freight Rail Service. Any such changes in and/or additions to the Line shall be made by SUB-OPERATOR and payment for such changes and additions shall be agreed upon by the parties. Without limiting the generality of the foregoing, the parties have agreed to the alterations described in Exhibit 2, hereto.

Section 6. Insurance

SUB-OPERATOR shall procure and maintain at full force and effect during the term of this Agreement a policy or policies of insurance covering any and all liability to which SUB-OPERATOR is or may be subject under this Agreement. Such insurance shall provide limits of five million dollars ($5,000,000.00) per occurrence but may be subject to an annual aggregate limit of five million dollars ($5,000,000.00) and a per occurrence self-insured retention of not more than one hundred thousand dollars ($100,000). Within thirty (30) days, SUB-OPERATOR shall provide OWNERS with a certificate of insurance providing proof that the insurance required under this section has been issued and is in full force and effect. OPERATOR shall be notified immediately of any changes in this insurance coverage contained here.

Section 7. Regulatory Approval

OPERATOR shall take all reasonable action necessary to renew or revalidate its modified rail certificate or to obtain a new modified rail certificate. Thereafter, SUB-OPERATOR shall obtain a modified rail certificate from the Surface Transportation Board, pursuant to 49 C.F.R. § 1150.21, et seq. for operation of the Line.

Within ten (10) days of the filing of the Modified Certificate by SUB-OPERATOR, OPERATOR shall, at its sole expense, seek to formally terminate whatever remaining authority Indiana Hi-Rail Corporation (IHRC) may have with respect to operations on the Line.

Section 8. Term; Default Termination

This Agreement shall have a term of two years. In the event of any failure on the part of the SUB-OPERATOR or OPERATOR to comply with any of their obligations contained in this Agreement and the continuation of such failure for a period of thirty (30) days after receipt of notice thereof from the other party, the other party shall have the right, at its option, to declare a default. Upon giving the party in default an additional notice of thirty (30) days and an opportunity to cure the default, party not in default may terminate this Agreement.

The right to terminate shall be in addition to other rights and remedies provided hereunder as well as those available at law or in equity, including claims from money damages and specific performance, which remedies shall be cumulative.

Section 9. Liability

Whenever any loss of, damage to, or destruction of property, or injury to or death of any person or persons resulting from, arising out of, or incidental to, the management, control, use or operations of SUB-OPERATOR solely, and absent any cause of SPEG, or third parties, SUB-OPERATOR shall assume all liability therefrom and shall bear all cost and expense in connection therewith, including all cost, expense (including reasonable attorneys' fees), and liability, and shall forever protect, defend, indemnify, and save harmless SPEG and its officers, agents, employees, lessors, subsidiaries, affiliates, successors, and assigns from and against any such liability, cost and expense.

Whenever any loss of, damage to, or destruction of, property, or injury to or death of any person or persons resulting from, arising out of, or incidental to, the management control, use or operations of SPEG or by any third party business invitees of SPEG, then SPEG assumes all liability therefrom and shall bear all costs and expense in connection therewith, including all costs, expense (including reasonable attorneys' fees), and liability and shall forever protect, defend, indemnify, and save harmless SUB-OPERATOR and its officers, agents, employees, lessors, subsidiaries, affiliates, successors, and assigns from and against any such liability, cost and expense.

Without limiting the generality of the foregoing, it is agreed that such losses arising from the combination of SUB-OPERATOR's operations and track conditions, absent any other cause (except Acts of God), shall be construed as losses resulting from, arising out of, or incidental to, the management, control, use or operations solely of

SUB-OPERATOR.

Section 10. Arbitration

Any claim, dispute, or controversy between SPEG and SUB-OPERATOR arising out of or relating to this Agreement or the breach of this Agreement which cannot be settled by the parties themselves shall be determined by arbitration under the commercial arbitration rules of the American Arbitration Association in effect at the time the demand for arbitration is filed. The location of the arbitration shall be in Cleveland, Ohio. The decision of the arbitrator shall be final and binding. Any award of monetary relief by the arbitrator shall be limited to awarding the prevailing party its actual damages. Judgement to enforce the decision or award of the arbitrator may be entered in any court having jurisdiction, and the parties hereto agree not to object to the jurisdiction of the State of Ohio for such purpose. Service of process in connection with such arbitration shall be made by certified mail. In any judicial proceeding to enforce this Article, the only issues to be determined shall be the existence of an agreement to arbitrate and the failure of one party to comply with such agreement, and those issues shall be determined summarily by the court without a jury. All other issues shall be decided by the arbitrator, whose decision thereon shall be final and binding. There shall be no appeal of an order compelling arbitration except as part of an appeal concerning a confirmation of the decision of the arbitrator. Each party to the arbitration shall pay the compensation, costs, fees, and expenses of its own witnesses, exhibits, and counsel arising from the arbitration. The compensation, costs, and expenses of the arbitrator, if any, shall be borne by SPEG and SUB-OPERATOR, on a per capita basis.

Section 11. Non-Waiver

At any time during the term of this Agreement, either party may waive any default of the other party under this Agreement without affecting or impairing any right arising from any other default under this Agreement.

Section 12 Miscellaneous

a. This Agreement, together with the exhibits hereto, constitute the entire agreement between the parties, which agreement shall supersede all prior agreements and understandings, oral or written, between the parties, hereto concerning the subject matter of this Agreement.

b. No modification, addition or amendments to this Agreement or any of the attached Exhibits, shall be effective unless or until such modification, addition or amendment is in writing and signed by the parties.

c. This Agreement shall be binding upon and inure to the benefit of the successors and assigns of each party. This Agreement shall be governed and construed in accordance with the Laws of the State of Ohio.

d. This Agreement may be executed in any number of counterparts, each of which shall be deemed to be an original and all of which together shall be deemed to be one and the same instrument.

e. SUB-OPERATOR shall inspect the Line to the extent it deems necessary and shall accept the Line in "AS IS, WHERE IS" CONDITION AND WITHOUT ANY EXPRESS OR IMPLIED WARRANTIES, INCLUDING, BUT NOT LIMITED TO, ANY WARRANTIES OF MERCHANTABILITY, HABITABILITY, OR FITNESS FOR A PARTICULAR PURPOSE.

f. All notices, demand, requests, or other communication which may be or are required to be given, served or sent by either party to the other parties pursuant to this Agreement shall be in writing and shall be deemed to have been properly given or sent by mailing registered or certified mail, return receipt requested, postage prepaid addressed to:

SUB-OPERATOR: R. J. Corman Railroad Company/Western Ohio Line
One Jay Station
P. O. Box 788
Nicholasville, KY 40356
Attention: Tom Hammerstone

OPERATOR: Spencerville-Elgin Railroad, Inc.
c/o Countrymark Cooperative, Inc.
950 North Meridian Street
Indianapolis, IN 46204-3909
Attention: Terry Schlotfeldt

Each notice demand, requests or communication which shall be mailed by registered or certified mail to either party in the manner aforesaid shall be deemed sufficiently given, served or sent for all purposes at the time such notice, demand, request or communication shall either be received by the addressee or refused by the addressee upon presentation.

Either party may change the name of the recipient of any notice, or his or her address, at any time by complying with the foregoing procedure.

g. If any term or provision of this Agreement is illegal, invalid or enforceable under present or future laws, then in that event, it is in the intention of the parties hereto that the remainder of the Agreement shall not be affected thereby shall be valid ar hall be enforced to the fullest extent permitted by law.

h. This Agreement is intended for the sole benefit of the parties hereto, and nothing in this Agreement is intended or may be construed to give any person, firm, corporation, or any other entity other than the parties hereto and their respective officers, agents, employees, lessors, parent corporation, subsidiaries, affilia , successors, and assigns, any right pursuant to any revision or term of this Agreement, and all provisions and terms of this Agreement are and will be for the sole and exclusive benefit of the parties to this Agreement.

IN WITNESS WHEREOF, the parties hereto have caused this Agreement to be executed as of the day and year first above written.

R. J. CORMAN RAILROAD COMPANY/WESTERN OHIO LINE

By: [signature]

Title: EVP / & M

SPENCERVILLE-ELGIN RAILROAD, INC.

By: Terry [signature]

Title: President

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EXHIBIT 1

DESCRIPTION OF SERVICE

SPENCERVILLE-ELGIN OPERATING PLAN

March 6, 1996

The R. J. Corman Railroad office personnel in Celina, Ohio, 419-586-6585, will process customers' requirements and contact train crews for car movements. Celina will be the headquarters for train dispatching, locomotive repairs, car repairs, track repairs, and signal maintenance.

R. J. Corman Railroad has 4 - GP16 locomotives assigned in this area to serve customers' needs and has a total of fifty-five locomotives system-wide. R. J. Corman Railroad can service any customer requirements. Train service schedule will be dictated by customer demand.

- Five and six day schedule - Normal basis
- Sunday and Holidays - Exception basis

The method of operations between Lima, Ohio, and Glenmore, Ohio will be Directed Traffic Control System (DTC) and CSXT operating rules.

R. J. Corman Railroad will interchange with Conrail, Norfolk Southern, and CSXT at Lima. All accounting functions, interchange reports, and weigh billing will be performed at Nicholasville, Kentucky.

R. J. Corman Railroad, in conjunction with the 3 Class 1 Carriers, will promote new business on Spencerville-Elgin.

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EXHIBIT 2

ALTERATIONS

R. J. CORMAN RAILROAD COMPANY
WESTERN OHIO LINE

March 6, 1996

SPENCERVILLE-ELGIN RAIL LINE UPGRADE COSTS

	Upgrade Costs	Required Start-Up Costs
Tie Installation	$1,216,270.	$ 0.
Surfacing	135,537.	15,000.
Brush Cutting	102,680.	51,340.
Bridge Work	200,000.	40,000.
Signal Maintenance	36,000.	36,000.
TOTAL	$1,690,487.	$142,340.

Costs to be funded are as follows:

a.) Owners-ORDC: 60% of Take-up Proceeds

b.) RJCW (Sub-Operator): $500,000.00

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NJ TRANSIT

BURLINGTON-GLOUCESTER TRANSIT SYSTEM

Special Study No. 2

CAMDEN - TRENTON RAIL CORRIDOR

Prepared by

BGTS DBOM General Design Assistance Consultants

Daniel, Mann, Johnson, & Mendenhall

Booz·Allen & Hamilton, Inc.

June 1996

000373

EXECUTIVE SUMMARY

In January 1996, the New Jersey State Senate enacted legislation which required New Jersey Transit Corporation to study the feasibility and cost of instituting rail passenger service between the cities of Camden and Trenton, making use of existing rail freight lines or rights-of-way, with stops at intermediate points in municipalities bordering, or adjacent to the Delaware River.

In early May 1996, New Jersey Transit Corporation commenced a study to determine the feasibility of instituting rail service in the Camden-Trenton corridor along the Delaware River. Three technology alternatives were studied and are the subject of this report. The three technology alternatives are:

- ***Electrified Light Rail*** - Electrified light rail technology is defined in this analysis as a "typical" modern North American light rail system, as exemplified by light rail systems in Baltimore, St. Louis and San Diego. Such systems are characterized by overhead power transmission and articulated three-truck vehicles. This Electrified LRT alternative includes a partial low floor articulated vehicle configuration, low station platforms, and operational separation from freight trains by use of either dedicated track or time-separation. This Electrified LRT alternative is the same technology under consideration for the Camden-Glassboro corridor as described in the December 1995 *Burlington, Camden, Gloucester Transit Project Major Investment Study* (MIS).
- ***Diesel Light Rail*** - This technology alternative, described as "diesel light rail," uses diesel powered vehicles, and therefore does not need the electrification infrastructure of catenary and substations. Like the electrified light rail alternative, the Diesel LRT technology includes partial low floor articulated vehicles, low station platforms, and separation from freight trains or other rail traffic, either by use of dedicated track or time-separation.
- ***Diesel Multiple Units*** - The DMU alternative is similar to the Diesel LRT alternative except that (in general) the cars are heavier, larger, and cannot negotiate small radius curves. Vehicles in this technology alternative comply with all currently applicable FRA requirements and regulations to permit shared use of track with freight trains. The DMU technology alternative will include a partial low floor vehicle configuration and associated low station platforms or on-board wheelchair lifts.

A comparison of the three alternatives is presented in Table 1. This study indicates that:

- Rail service can be instituted along this corridor under any of the three alternatives.
- Patronage does not vary significantly between alternatives.
- Either LRT alternative provides the opportunity to implement a single system operating between Trenton and Glassboro.
- The DMU alternative is more intrusive than other alternatives on an urban environment and cannot directly serve the waterfront area due to sharp horizontal and vertical curves along the waterfront alignment.

- The DMU alternative can be implemented in 30 months; the LRT alternatives require 60 months.

- The costs of the alternatives vary significantly with Electrified LRT being the most expensive, at $458 million, and DMU being the least expensive, at $216 million.

Route Alignment

The alignment for all three alternatives evaluated in this study follows what is known as the Conrail Bordentown Secondary Track. It is approximately 33 miles long and passes through Camden, Burlington, and Mercer Counties along the Delaware River for much of its length. The grades are relatively small. The Bordentown Secondary is double tracked and signalized between Pavonia Yard and Controlled Point (CP) Hatch interlocking, in the vicinity of the Delair Bridge, a distance of approximately 2.7 miles. This segment of the Bordentown Secondary Track handles numerous heavy and long trains from and to Pennsylvania. From CP Hatch to Trenton, a distance of approximately 28.5 miles, the line is generally single track and is not signalized. One freight train operates at night to distribute and collect cars along the line. Two switching locomotives work to switch cars to industries located along the line during daylight hours.

Station Locations

Eighteen stations are proposed including two terminal stations, one at the Walter Rand Transportation Center in Camden and one at the AMTRAK/New Jersey Transit train station in Trenton (see Figure 1). Station locations are the same for all three technology alternatives. Six of the stations will have park and ride lots which accommodate 100 or more cars. The remainder of the stations will include small parking lots (approximately 25 spaces) for local community use. The stations are generally located at or near community centers, major employment areas, or intersections with major roadways.

Track Configuration, Upgrades and Passing Sidings

The LRT alternatives require separate track or time separation throughout the length of the alignment. Under the LRT alternatives, the freight service and LRT alternatives can operate separately with freight activities confined to nighttime hours in the portion of the alignment from CP Hatch to Trenton.

Based on the current level of Conrail freight traffic from CP Hatch to Pavonia Yard and beyond, it is not practical for freight and LRT traffic to operate under time separation. Accordingly, tracks must be provided that separate the freight and LRT alternatives for a distance of 3.4 miles. It is assumed that the DMU alternative will allow passenger and freight traffic to share the same tracks throughout the alignment as they are compatible from an FRA standpoint. An additional track, however, must be provided for the portion of the DMU alignment through the Pavonia Yard because of the high freight volumes and 24 hour freight switching operations.

Both of the LRT alternatives require significantly more track improvements than the DMU alternative. In particular, welded rail is recommended for the Electrified LRT alternative for the following reasons:

- It will be expensive and less reliable to electrically bond the existing jointed rail to provide a path for power return and signals.

- The existing rail joints are in poor condition and cannot be satisfactorily improved without rail replacement; join bars are four bolt instead of six bolt, and as such are unsuitable for passenger service.

The Diesel LRT alternative does not require the electrical power return path using the running rails that the Electrified LRT alternative requires thus eliminating the need for reliable power bonding or welded rail. However, due to the current condition of the rail including excessive head wear, bent and battered joints, and substandard joint base, welded relay rail is recommended for both the Diesel LRT and DMU alternatives. Tie replacement is recommended at 50% for the Diesel LRT alternative and 30% for the DMU alternative.

Passing Sidings

An engineering evaluation of passenger service operations indicates the need for seven passing sidings for the light rail alternatives; three sidings suffice for the DMU alternative which includes a lower level of service. These sidings are shown on Figures 2 and 3, as well as Appendix A, Track Charts. Based on similar vehicle performance characteristics for all three alternatives, passing siding locations, but not quantities, will be identical. Due to Conrail switching operations for various customers along the line during the daytime hours, it will be necessary to provide additional trackage for rail freight operation in order to eliminate disruption to the passenger service. The additional switching trackage will be the same for each of the three alternatives.

Vehicles

Three general vehicle types were considered, which correspond to the three study alternatives - Electrified LRT, Diesel LRT and DMU. A representative vehicle was selected for each vehicle type and the performance data for that representative vehicle used in the operational analysis.

	TECHNOLOGY		
	Electrified LRT	**Diesel LRT**	**DMU**
Representative Vehicle	Siemens LRV St. Louis Metro Link	ADtranz Regio Shuttle	Siemens 628.4

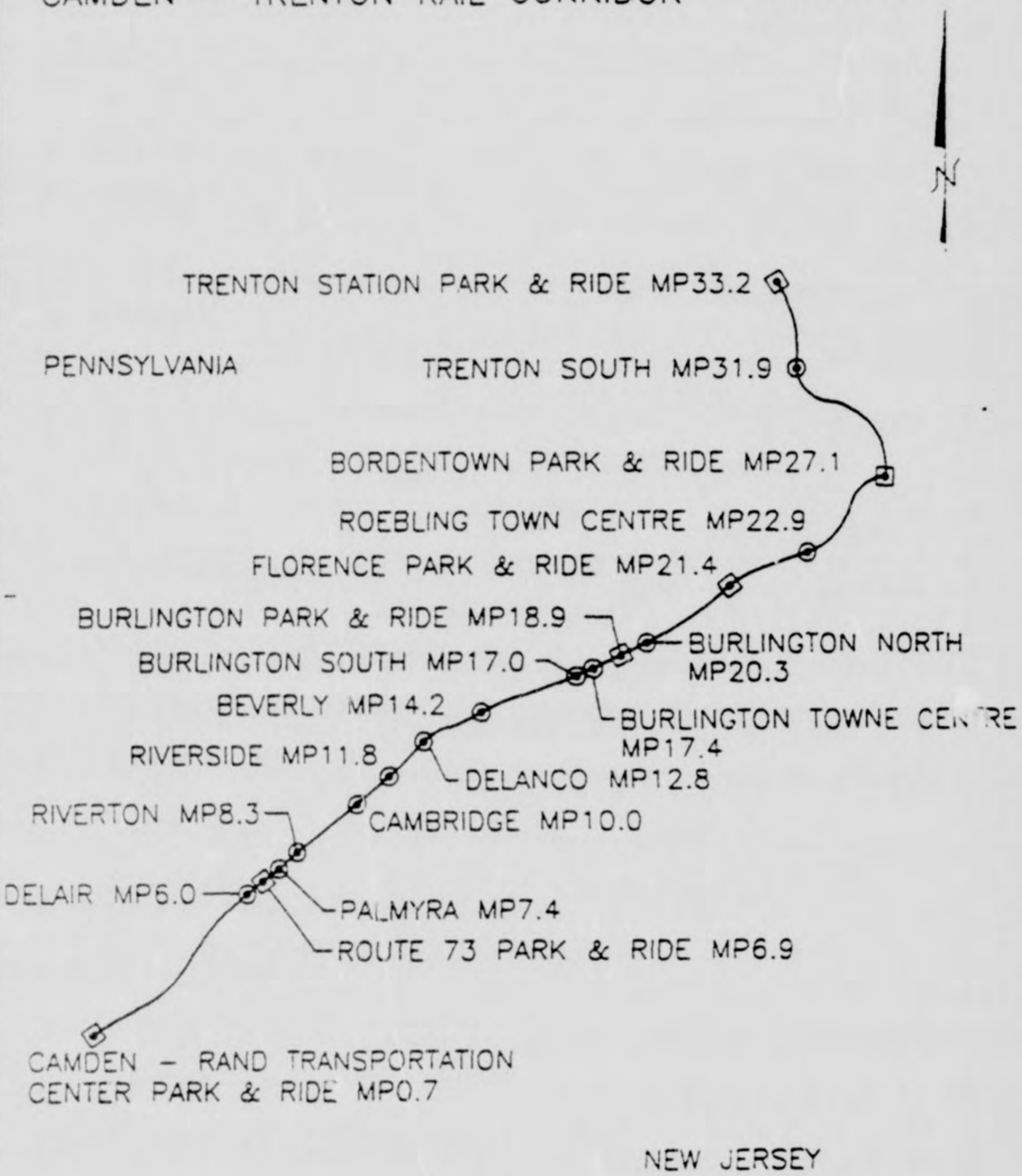
Illustrations of typical representative vehicles are provided in Appendix B.

ADA Compliance

Ensuring accessibility for patrons with disabilities depends primarily upon the interface between vehicles and stations. The treatment of this interface in the study corridor is complicated by the operation of freight trains on the same tracks as passenger trains. This requires low station

SPECIAL STUDY No. 2
CAMDEN – TRENTON RAIL CORRIDOR

NJT-20-P



LEGEND:

- ⦿ PROPOSED STATION STOP
- ⊡ PROPOSED PARK & RIDE STOP
- —— EXISTING TRACK

000380

FIGURE 1

file: f:\dwg\325700\electrical\rb2.dwg plot date: 6/19/98 platforms, which in-turn drives ADA compliance solutions to focus on partial low floor vehicles with bridge plates or high floor vehicles with wheelchair lifts.

Propulsion System

The Electrified LRT alternative assumes a conventional 750 VDC overhead catenary system (OCS), with 24 traction power substations distributed relatively uniformly over the length of the corridor. For the Diesel LRT and DMU alternatives there is no corresponding system element.

Signal System

There is currently no signal system over the majority of the length of the study corridor. Safe passenger operation will require installation of a new signal system. The study considers both conventional and communications-based signal system technologies. Each system has certain advantages in terms of flexibility, maintainability, and compatibility with freight operations. A conventional signal system has been assumed. The LRT alternatives have assumed a higher level of signalization, based on a higher level of service. The option to implement to a communications-based system is preserved because of the similarity of the capital cost estimates for both systems. Additional analysis will be required to identify the cost benefit trade-offs between the two approaches in more detail.

Speeds, Travel Time, and Ridership

Track conditions and the Conrail Timetable currently limit the maximum speed on the line to 25 miles per hour. The maximum speed considered for rail passenger service in this study (and the maximum permitted historically) is 60 miles per hour for all of the alternatives.

Travel times vary only slightly among the three technology alternatives, from approximately 50 minutes for the Electrified LRT, to approximately 53 minutes for the Diesel LRT and approximately 52 minutes for the DMU.

Ridership estimates have been developed for the Camden-Trenton corridor. The estimate combines conventional forecasting techniques with provisions for induced development and corresponding induced ridership. The results show approximately 11,200 daily trips in the year 2000 (estimated service start year), and approximately 16,900 daily trips in the year 2020. These 2020 ridership numbers are nearly identical to those in the December MIS for the Mt. Holly-Amphitheater Alternative. This similarity is expected, given that both the Camden-Trenton and the Mt. Holly-Amphitheater alternatives serve similar, and in some cases overlapping markets and are located in the same general geographic area.

The ridership estimates assume a transfer at the Walter Rand Transportation Center, which would typically impose a penalty on the rider. The fact that the total trip time on the rail line is significantly shorter than the bus, however, mitigates this penalty. The estimates assume a free or minimal cost transfer. It was also assumed that the half hour peak headway on the DMU alternative generally reflects the bus headways in the corridor and therefore no penalty was assessed for this factor.

Bridge Upgrades

Based on preliminary inspections of bridges along the line it will be necessary to refurbish seventeen bridges. In addition, the LRT alternatives will require the construction of six new bridge spans.

Based on inspection and determination of expected remaining service life, the Delanco Movable Bridge is recommended for replacement with a fixed structure for both of the LRT alternatives. The vertical clearance is recommended to be twenty-five feet above the mean high water.

For the DMU alternative, the approach spans for the Delanco Movable Bridge are to be replaced and the swing mechanism and controls are to be renewed. Bridge operation is proposed to be changed to normally closed with openings arranged for specific hours.

Grade Crossings

There are approximately 52 grade crossing on the alignment between Camden and Trenton. Of these, 26 are protected with warning flashers and 12 are protected with flashers and gates. There are 14 crossings that are unsignaled including 5 private crossings. For both of the LRT alternatives, grade crossing improvements must be made to the activation circuit to accommodate a maximum speed of sixty miles per hour. The current maximum train speed is 25 mph and the crossings are designed for this approach speed, providing twenty seconds of flasher activation before the train reaches the crossing. Accordingly the approach circuits must be lengthened to accommodate the higher speeds and preserve the twenty second warning prescribed by regulation. Although longer approach circuits have been assumed, depending upon the ultimate resolution of the freight operating issues, it may be necessary to install speed sensing/constant warning time systems. The combination of the higher speed and the structural limitations of Light Rail vehicles justifies the need for the addition of gates at all crossings.

A maximum speed of sixty miles per hour is also contemplated for the DMU alternative. Accordingly, the approach circuits for this alternative will be changes as is contemplated under both LRT alternatives. The addition of crossing gates is also considered necessary for all 52 grade crossings.

Yards and Shops

Both of the LRT alternatives will require a maintenance and service facility to provide a base for the transportation, maintenance, and administration personnel. It is estimated that approximately 80-100 staff will be assigned to this facility. Suitable locations have been identified between Florence and Burlington that have excellent access to Route 130 and the New Jersey Turnpike, or it may be desirable to combine yard and shop facilities with the Camden-Glassboro LRT. Some yard and shop locations near downtown Camden have been identified and can be used by both rail lines. A combined facility will be more economical and will provide jobs in the Camden area. This report includes the cost of adding, to the Camden-Glassboro yard and shop, those facilities and spaces needed for the additional fleet.

The DMU alternative is envisioned to use existing AMTRAK maintenance facilities in Philadelphia that are currently used by NJ Transit. In addition, it will be necessary to provide a facility on the rail line for overnight storage, inspection, train crew reporting, and administrative personnel. This service and inspection facility will be sized for 30-40 staff members. The full cost for this facility is included as part of the cost for this alternative.

Environmental

The environmental effects of the three alternatives are similar with regard to the impacts associated with the stations and alignment. The major environmental impacts are associated with the introduction of new elements into the project area. The Electrified LRT alternative introduces new visual elements associated with the overhead catenary system along the entire length of the alignment. The Electrified LRT also requires the addition of substations along the alignment and presents the potential for concerns about electro-magnetic fields (EMF). The Diesel LRT and DMU alternatives introduce new emissions which must be quantified when considering air quality impacts.

The DMU alternative is consistent with the freight traffic on the alignment but is less compatible than the LRT alternatives with in-street running operations in downtown Camden, because of its "larger" appearance. The additional weight of the DMU has the potential to increase impacts from noise and vibration.

Right-of Way Acquisition

Conrail freight operations are heavy in the area between CP Hatch and where the alignment leaves the Conrail corridor near Mickle Street in downtown Camden. Numerous long and heavy trains move to and from Pavonia Yard. For either of the LRT alternatives to operate in this segment, the LRT alignment must be physically separated from Conrail operations. Because of the need to separate the LRT and freight operations in the vicinity of the Pavonia Yard, the LRT alternatives will require NJ Transit to obtain a partial taking from Conrail. The LRT alternatives will require additional property acquisition of seven residences and one commercial/industrial building.

From CP Hatch to Trenton, Conrail freight operations consist of one train operating each night and two that operate during the day. The concept of time separation has been accepted by Conrail for other transit projects (e.g., Baltimore Light Rail) where freight service is present. Either a land sale or a trackage rights agreement is applicable for this section.

Should the DMU alternative be chosen, the existing NJ Transit/Conrail agreement allows NJ Transit to operate under a trackage rights agreement. This arrangement could avoid the capital cost of land acquisition for the DMU alternative.

Redevelopment Potential

The rail corridor is home to a number of cities and towns which are hoping to leverage the rail link to stabilize or revitalize their downtown area. Based on experience in other areas throughout the U.S., a number of observations regarding the potential success of these redevelopment efforts can be made:

- Advance planning and interest in land development in the corridor will be a key factor in development plans moving forward.
- Because of high auto accessibility in the corridor, the rail line will not automatically spur development at station areas. Involvement by local municipalities is essential.

- Of particular promise for development is the niche market for suburban transit based housing. This is for people who choose a suburban lifestyle, including auto ownership, but also choose to use transit for the work commute. The rail line will serve this market quite well.

Connection with Camden-Glassboro Corridor

The current plans for the Burlington-Gloucester Transit System as described in the December 1995 MIS is based on electrified light rail technology. The alignment under consideration for Camden-Trenton will operate in a corridor with Conrail as well as in various streets in Camden with a terminal near the Walter Rand Transportation Center. Both of the LRT alternatives considered in this study are compatible with the LRT alternative between Glassboro and Trenton, and provide a through ride from Trenton to Glassboro.

The DMU alternative will not be capable of operating through Camden to Glassboro. The anticipated street track alignment in Camden includes curves with far sharper than DMU railcars are capable of negotiating. Accordingly, the DMU alternative will terminate at the Walter Rand Transportation Center and require a transfer to Camden-Glassboro corridor trains.

FRA Regulation

The LRT alternatives are assumed to be operated as a transit system, separated from the general railroad network, and under the jurisdiction of regulatory bodies other than the FRA. The DMU alternative, in contrast, will be operated in mixed traffic, and will be subject to regulation by the FRA as a railroad.

Labor Issues

In the context of a DBOM contracting environment, and given that the service is new, it is anticipated that the operator will have the maximum degree of latitude in establishing its relationship with its workforce, not unlike a newly organized bus operator. Further, such operation could conceivably be instituted under existing agreements between NJ Transit and Conrail, which will cause existing Conrail labor terms to be applied to the service. Additional analysis will be required to assess the degree of flexibility which an independent operator might enjoy under the DMU alternative. That degree of flexibility will be affected, in large measure, by the terms of sale if NJ Transit ultimately acquires the Camden-Trenton corridor from Conrail, and whether a short line railroad operator provides freight service or Conrail continues to operate on the line.

Capital Costs

The NJ Transit-commissioned Major Investment Study draft, dated December 1995, developed a capital cost estimate for an electric LRT system between Glassboro and Camden's Walter Rand Transportation Center; the estimated cost is $729 million. Unit costs taken from this estimate were used as a starting point for estimating the cost of the Electrified LRT alternative. In addition, major differences, such as mostly single track with short passing sidings were incorporated into the Electrified LRT alternative. In contrast, the Diesel LRT and DMU alternatives are "bottom up" estimates which incorporate refined unit costs and revised quantities.

The estimated costs for the Electrified and Diesel LRT alternatives are $458 million and $314 million respectively. The major differences are in trackwork, traction power and catenary. The DMU alternative is estimated at $216 million. All alternatives include 35% contingency and appropriate escalation.

Implementation Time Frame

It is estimated that it will take approximately 60 months to implement either LRT alternative from the time that the design and environmental process begins to commencement of revenue service. The following durations are considered sequential, except as noted:

1. NTP to Preliminary design completion - 18 months
2. Begin Real Estate acquisition 5 months after NTP - 15 months
3. Bid and award starts at 18 months after NTP - 5 months
4. DBOM design complete - 10 months
5. Construction - 24 months
6. Start-up and Testing - 3 months

Total Duration 60 months

The DMU alternative is estimated to take approximately 30 months from the time the design begins to commencement of revenue service. The following duration's are considered sequential, except as noted:

1. NTP to preliminary design completion - 6 months
2. Begin Real Estate acquisition 4 months after NTP - 13 months
3. Bid and award starts at 6 months after NTP - 5 months
4. DBOM design complete - 6 months
5. Construction - 12 months
6. Start-up and Testing - 1 month

Total duration 30 months

Table 1: Comparison Matrix

NJT-20-P

PROJECT ELEMENTS	Electrified LRT (non-FRA Compliant)	Diesel LRT (non-FRA Compliant)	DMU (FRA Compliant)
Route Alignment	Same	Same	Special design consideration in Camden, crossing major streets
Track Configuration	• New separate track - Camden to CP Hatch • Time separation - CP Hatch to Trenton	• New separate track - Camden to CP Hatch • Time separation - CP Hatch to Trenton	• Shared track / mixed traffic throughout • New separate track through Pavonia Yard
Stations Locations	Same	Same	Same
Track Upgrades	New 115RE welded rail, ties, and ballast section	Relay rail, 50% tie renewal, tamp and align	Relay rail, 30% tie renewal, tamp and align
Passing Sidings	Seven passenger sidings, two freight sidings	Seven passenger sidings, two freight sidings	Three passenger sidings, two freight sidings
Signal System	Automatic Train Protection, Three-aspect absolute block system	Automatic Train Protection, Three-aspect absolute block system	Manual block/ limited signalization
Propulsion System	OCS / AC propulsion	Diesel self-propelled	Diesel self-propelled
ADA Compliance • Vehicle • Stations	 • Partial low floor / Bridgeplate • Low platform	 • Partial low floor / Bridgeplate • Low platform	 • High floor / lift - or - Partial low floor / Bridgeplate • Low platform
Speeds	60 mph maximum	60 mph maximum	60 mph maximum
Bridge Upgrades (General)	• Refurbish 17 bridges • Construct 6 new spans	• Refurbish 17 bridges • Construct 6 new spans	• Refurbish 17 bridges
Delanco Movable Bridge	Replace with fixed	Replace with fixed	Renew/Change to normally closed with openings arranged for specific times
Grade Crossings (52)	Add/upgrade protection at all crossings	Add/upgrade protection at all crossings	Add/upgrade protection at all crossings
Yard and Shop	Requires new facility / Can combine with B/G line	Requires new facility / Can combine with B/G line	Use existing NJT contracted facilities
Ridership (Daily) • Year 2000 • Year 2020	 • 11,200 • 16,900	 • 11,200 • 16,900	 • 11,200 • 16,900
Travel Time (one way)	50 minutes	53 minutes	52 minutes
Service Level	• 15 minute peak • 30 minute off-peak	• 15 minute peak • 30 minute off-peak	• 30 minutes all day

STB FD 33388 12-15-97 D 184826V3A 12/12

PROJECT ELEMENTS	Electrified LRT (non-FRA Compliant)	Diesel LRT (non-FRA Compliant)	DMU (FRA Compliant)
Environmental • Electro-Magnetic Fields • Visual Impacts • Noise/Vibration • Emission	 • Due to electrification • Addition of catenary to route • Minimal • None	 • None • None • More • Some	 • None • "Larger" appearing train units in downtown Camden • Greater • Some
Railroad Right-of-Way Acquisition	• Acquire Separate ROW from Conrail - Camden to CP Hatch. • Acquire operating rights, CP Hatch to Trenton	• Acquire Separate ROW from Conrail - Camden to CP Hatch. • Acquire operating rights, CP Hatch to Trenton	• Operate under existing NJT/Conrail Agreement
Potential Takings	Seven residences, one building, partial takings at Pavonia yard	Seven residences, one building, partial takings at Pavonia yard	None
Redevelopment Potential	Good	Good	Good
FRA Regulations/ Jurisdiction	None if transit is separate	None if transit is separate	Under FRA jurisdiction
Labor Rules	Transit Labor	Transit Labor	RR Labor
Connection with Woodbury/ Glassboro	Capable of operating from Trenton to Glassboro	Capable of operating from Trenton to Glassboro	Requires transfer to Glassboro LRT at Walter Rand Transportation Center in Camden
Capital Cost • Rolling Stock • Civil • Systems • Administrative • Other Total Cost	 10 vehicles @ $2.5M ea. $126.9M $83.6M $85.1M $137.9M **$458.4M**	 10 vehicles @ $1.5 M ea. $104.4M $35.0M $68.2M $91.3M **$313.9M**	 6 vehicles @ $3.0M ea. $52.7M $18.9M $63.7M $62.8M **$216.0M**
Implementation Time Frame	60 months	60 months	30 months

ECONOMIC DEVELOPMENT CORPORATION

■ NOTICE

REQUEST FOR QUALIFICATIONS FOR PROFESSIONAL SERVICES RELATED TO A MAJOR INVESTMENT STUDY FOR CROSS HARBOR FREIGHT MOVEMENT

Notice is hereby given that the New York City Economic Development Corporation (EDC), on behalf of the City of New York, is seeking to retain professional services for a Major Investment Study of cross harbor freight movement. This federally and locally funded project (PIN X500.19) will examine freight movement and recommend a preferred alternative that can improve freight movement into, around, and out of the New York City region. This project was previously advertised in the NYS Contract Reporter on September 29, 1997.

Based on an analysis of forecasted freight volumes, engineering characteristics and costs, environmental and economic impacts and financial feasibility, the project will recommend a preferred transportation alternative(s) for a future environmental impact assessment.
EDC is seeking firms with demonstrated experience in freight movement logistics and modeling, engineering, transportation planning, environmental assessment, economics, finance, knowledge of federal, state, and city environmental review requirements; public participation and management of large-scale infrastructure planning projects and public-private partnerships.

Potential firms should have experience in the following professional services, including: managing a public participation program, documenting existing needs and conditions of regional freight movement, conducting a freight market analysis, developing and applying a freight model diversion model, developing freight movement alternatives, examining engineering requirements, and conducting environmental assessment, conducting performance, economic and financial evaluations; and assessing opportunities for public-private partnerships in construction and facility operations.

The study is anticipated to start in spring 1998 and take 24 months to complete. The anticipated total work effort of the successful firm is 60,000-80,000 person-hours.
Interested firms should submit a one-page *Letter of Interest* (LOI) to Margaret Temple, Contracts Division, NYCEDC, 110 William Street, NY, NY 10038 by 4 p.m. on *Monday*, December 15, 1997. All firms responding to this advertisement with *LOI* will be issued a *FRQ* when it becomes available. Firms that submitted a DOI following the September 29, 1997 NYS Contract *Reporter* advertisement for this project do not need to resubmit a LOI. The RFQ will contain further information on the project, as well as material required to submit a proposal. Responses to the RFQ will be due at 4 p.m. *Friday*, January 23, 1998.

Designated *firms* must submit proof of authority to practice engineering in New YOrk State immediately upon designation. Subconsultants, subcontracting and/or joint ventures are permitted. Disadvantaged, minority-owned and women-owned firms are encouraged to submit proposals. Other proposers are encouraged to submit DBE/MBE/WBE subconsultants where appropriate.

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LEVEL 1 - 1 OF 25 STORIES

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Coal

May, 1996

SECTION: MARKETWATCH; Pg. 29

LENGTH: 925 words

HEADLINE: The outlook for the U.S. coal industry: moderate demand growth and soft prices

BYLINE: by Larry Metzroth; Larry Metzroth is principal and senior economist with Resource Data International, Inc., Boulder, Colo.

BODY:

Consumption of U.S. coal increased by 2.7% in 1995 -- a nearly 28 million ton boost from 1994. The export sector, which increased 20 million tons, had the highest growth. Volume was 25% above the level for 1994. This resulted from an improving European economy and new coal-fired generation in the Pacific Rim. Steam coal exports increased by 13.1 million tons; metallurgical shipments were up by 6.8 million tons. Low coal prices and ocean freight rates make

U.S. coal very competitive in overseas markets. One bright development for Northern Appalachia coal producers is strong demand for higher sulfur steam coal in Europe. A sustained increase of export demand will reverse the decline that this market experienced in the early 1990s. Coal supply growth in Australia, South Africa, and South America has slowed appreciably, just as strong expansion in the Pacific Rim adds impetus to coal demand growth. While rapid coal production expansion is proceeding in China and Indonesia, much of the new production is for internal use. U.S. West coast export capacity will expand at the Port of Los Angeles. RDI is projecting coal export increases of 2% annually during the next five years.

Exports constitute about 9% of total U.S. coal demand. In the domestic electric utility sector, which constitutes about 78% of total demand, market performance was modest. Utility coal demand increased about 8 million tons, or 1%, in 1995. Sluggish growth occurred despite electric load and generation growth of 2.8% and 2.6% respectively. Coal generation increased less than 0.5%, and generation share declined by a full percentage point. Utility coal demand was flat in the Northeast, and declined by 11.4 million tons in the West, where hydro availability reached a nine year high. However, demand increased by 15.6 million tons in the central regions, and by 3.6 million tons in the South Atlantic region. Utility coal demand is projected to grow in the next five years at a modest 1.3% annually through 2000. Coal will experience

strong challenges for gener-ation share from natural gas in the Northeast, Florida, Texas, and the West.

Consumption at industrial and non-utility generators (NUGs), coke plants, and steel mills also was flat. Industrial demand is projected to decline as low natural gas prices stimulate some shifting to that fuel. Demand at NUGs will increase 3 million tons by 2000. Coking coal consumption will decline slowly as ovens are closed, but consumption of steam quality coal for carbon injection will increase.

Some regions fared better than others. Demand growth for Central and Southern Appalachia low sulfur coals stimulated a 14.2 million ton increase. Western producers, who ship compliance coal, had a 17 million ton increase. Northern Appalachia was supported by strong export market growth, and despite weak domestic utility demand, it was able to eke out a 1.4 million ton increase. The interior regions, which supply high sulfur coal, experienced a 5.1 million ton decline as implementation of new environmental mandates caused widespread switching to lower sulfur coal.

The irony lies in supply/demand balance and pricing problems. Recognition that low sulfur and compliance coal demand will increase has stimulated expansion of capacity in Central Appalachia and the West. So far, expansion

Coal, May, 1996

vastly has exceeded market growth. The result in 1995 was a sharp decline of prices for most qualities of low sulfur and compliance coal. Production restraint and hot weather somewhat corrected the Eastern market imbalance but Western production continues to expand despite high hydro availability and a growing challenge from natural gas. The supply/demand dynamics indicate continued low coal prices for the next few years. Although the coal production "overhang" is less serious in the Eastern coal fields, low western prices and aggressive transportation pricing enable Western coal producers to enter traditional Eastern markets. This penetrations forces Central Appalachian coal producers to maintain low prices.

The real winners are the coal consumers, who are experiencing historically low delivered prices for coal just as we enter Phase I of the "acid rain" reduction initiative. Cheap low sulfur and compliance coal makes the initiative cost less. The country is achieving significant environmental goals, while keeping electricity prices under control. Coal producers only can hope that these trends stimulate more rapid coal demand growth and ultimately solve the supply/demand imbalance problem for them.

Table 1 -- U.S. Coal Demand Forecast by Market Sector
(1,000s of tons)

Coal, May, 1996

Note: This table may be divided, and additional information on a particular entry may appear on more than one screen.

Sector	1994	1995	1996
Utility	808,143	816,141	829,417
Ind/R&C	82,934	82,653	81,445
NUG	14,475	15,255	15,868
Coke Plants/Steel Mills			
Met Quality	30,594	29,306	29,111
Steam Quality	5,843	6,030	6,910
	941,989	949,385	962,751
Export	71,250	91,508	94,571
Total	1,013,239	1,040,893	1,057,322

Sector	2000	2005	2010	2015
Utility	871,835	957,784	1,032,637	1,133,020
Ind/R&C	78,337	79,907	89,453	95,508
NUG	18,233	19,478	19,493	19,493

Coke Plants/Steel Mills				
Met Quality	25,807	22,186	15,523	12,382

Steam Quality	10,240	13,065	18,240	19,040
	1,004,452	1,092,420	1,175,346	1,279,442
Export	101,077	104,465	108,566	114,839
Total	1,105,529	1,196,885	1,283,911	1,394,281

LANGUAGE: ENGLISH

LOAD-DATE: May 23, 1996

LEVEL 1 - 2 OF 25 STORIES

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Coal

August, 1994

SECTION: MARKETWATCH; Pg. 24

LENGTH: 720 words

HEADLINE: Implications of Phase II compliance for southern Powder River Basin coal

BYLINE: By Gerald E. Vaninetti; Vaninetti is senior consultant with Resource Data International, Boulder, Colo.

BODY:

The increased demand for southern Powder River Basin coal from Wyoming has been well documented in the trade press during recent months, including the April 1994 Marketwatch. The imbalance in supply and demand has caused spot prices for PRB coal to climb above new contract levels. Spot coal prices which ranged from $ 3.35 to $ 4.25 per ton in prior years, depending on heating value and sulfur content, have increased from $ 0.75 to $ 1.00 per ton,

respectively. Contract prices have seen a smaller increase.

The coal produced in the southern parts of the Wyoming PRB traditionally has commanded a premium over the coal produced in the northern parts because of quality and logistical advantages. The 300- to 500-Btu difference between the coal produced by southern and northern mines has caused the more remotely sited power plants to favor the higher-Btu coal because of the effect on

The Northeast Corridor Transportation Plan
Washington, D.C. to New York City

Phase II

Report to Congress
September 1997

Washington - Richmond Supplement
Draft Report

Federal Railroad Administration National Railroad Passenger Corporation

- Lengthening industrial sidings to allow local freight trains to clear main tracks while serving shippers.

A related project, separate from the railroad investments, is the extension of intercity passenger operations from the Staples Mill Rd. Station to the Main St. Station in downtown Richmond. Main St. Station is being converted into an intermodal passenger terminal and retail and commercial complex. This project will provide direct access to the central business district, thereby improving the desirability of the proposed service.

Reconfigure Tracks - Shepherd Jct. to Anacostia to Virginia

This project would upgrade train speeds to 30 mph from 10 mph through the Virginia Avenue Tunnel and implement improvements to minimize the length of single-track in this corridor. If the CSX merger is approved, and depending on the associated proposed operating plan, Anacostia would be reconfigure. This reconfiguration would make the route to the Alexandria Subdivision the straight move and the move to Landover Line the diverging move, with a 30 mph turnout to the Landover Line to minimize the operational impact of the change. The Alexandria Subdivision from Anacostia to Shepherd Jct. would be double tracked a new junction created north of Benning. The latter option would allow use of the existing double track on the Landover Line from M Street to Benning, a distance of 2.0 miles. Reconfigure Anacostia and Shepherd Jct to universal interlockings, if retained, with sufficient flexibility to facilitate freight movements at these critical locations.

A structural integrity analysis of the Virginia Avenue Tunnel would be performed. If deemed feasible, the tunnel would be daylighted[33] [footnote number 34] and the alignment between M Street and New Jersey Avenue would be double-tracked..

Modifications at CP Virginia Interlocking are described separately.

Increasing freight train speeds from 10 to 30 mph through the Virginia Avenue Tunnel will reduce transit times through the segment. Lengthening the double track segment on the north side of the tunnel will assist in reducing delays. A reduction in freight train delays through this segment will have a positive effect on passenger train performance south of Washington.

Reconfigure Tracks - CP Virginia to Long Bridge

At this location an additional track would be installed with No. 15 turnouts on each end, the south end leading from Track 1 just east of L'Enfant Station and the north end connecting to the Landover Line as close as practical to the Virginia Avenue Tunnel. The existing CP Virginia Interlocking would be upgraded to facilitate freight and passenger operations at this critical junction. Existing

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Mergers, Sell-Offs, and Economic Efficiency

DAVID J. RAVENSCRAFT
F. M. SCHERER

THE BROOKINGS INSTITUTION
Washington, D.C.

JAN 13 1988

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1775 Massachusetts Avenue, N.W., Washington, D.C. 20036

Library of Congress Cataloging-in-Publication data:
Ravenscraft, David J., 1952–
Mergers, sell-offs, and economic efficiency.
Includes index.
1. Consolidation and merger of corporations—United States. 2. Corporate divestiture—United States.
I. Scherer, F. M. (Frederic M.). II. Title.
HD2746.5.S34 1987 338.8'3'0973 87-14018
ISBN 0-8157-7348-X
ISBN 0-8157-7347-1 (pbk.)

9 8 7 6 5 4 3 2 1

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spent as a visiting fellow at Brookings. David J. Ravenscraft was a staff member of the Federal Trade Commission's Bureau of Economics through the project. The FTC's computer facilities were used to process the Line of Business data. The FTC's Disclosure Avoidance Officer has certified that the data in this volume do not identify data on individual companies in the Line of Business survey. Although the data on individual companies are confidential, data sets are available to researchers under FTC confidentiality rules.

Research assistance for the project was provided by Kevin Bespolka, John Caparusso, David Chapman, Susan Danzig, Geoffrey Hazard, and James Lamberth under Swarthmore College financing; by Nathaniel Levy of the Brookings Institution staff; and by Jonathan Broadnax, Ernest Cowan, Michael Dodman, Amie Ingber, Kenneth Ofori-Atta, Gloria Reyes, Diana Voss, Mike Warner, and Dorothy Wilson of the FTC's Line of Business program staff.

Valuable critical comments were received from Geoffrey Meeks, Dennis Mueller, Lawrence J. White, and Lee Sheppard, and from the participants in seminars at the National Bureau of Economic Research, the Econometric Society, the University of Maryland, the University of Massachusetts, the University of Chicago, Yale University, the U.S. Department of Justice, and the Federal Trade Commission. The authors are particularly grateful to the participants in 70 case study interviews, both for their openness and generosity in the interviews and for their responses to follow-up and verification inquiries.

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BRUCE K. MACLAURY
President

August 1987
Washington, D.C.

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Query - unnamed:1 Results

TRENTON

12/07/97

Plant	Originating Transportation	Year	Tons (000s)
Trenton Channel	CONRAIL	1997	24.00
Trenton Channel	CSX	1997	59.00
Trenton Channel	NORFOLK SOUTHERN	1997	218.00
Trenton Channel	UNION PACIFIC	1997	463.00

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Query - unnamed:1 Results

TRENTON

12/07/97 -

Plant	Originating Transportation	Year	Tons (000s)
Trenton Channel	BURLINGTON NORTHERN	1995	71.00
Trenton Channel	CONRAIL	1995	11.00
Trenton Channel	CSX	1995	312.00
Trenton Channel	NORFOLK SOUTHERN	1995	416.00
Trenton Channel	UNION PACIFIC	1995	590.00
Trenton Channel	WESTERN RAILROAD PROPERTIES, INC.	1995	279.00

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Query - unnamed:1 Results

TRENTON

12/07/97 .

Plant	Originating Transportation	Year	Tons (000s)
Trenton Channel	CSX	1996	600.00
Trenton Channel	MONONGAHELA RAILROAD	1996	78.00
Trenton Channel	NORFOLK SOUTHERN	1996	93.00
Trenton Channel	UNION PACIFIC	1996	1,136.00

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THE JOURNAL OF INDUSTRIAL ECONOMICS

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YAMAWAKI, H., 1985, 'Dominant Firm Pricing and Fringe Expansion: The Case of the U.S. Iron and Steel Industry, 1907–1930', *The Review of Economics and Statistics*, 67, pp. 429–437.

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THE JOURNAL OF INDUSTRIAL ECONOMICS 0022-1821 $2.00
Volume XXXIX March 1991 No. 3

SYNERGY, AGENCY, AND THE DETERMINANTS OF PREMIA PAID IN MERGERS*

ALEXANDER R. SLUSKY and RICHARD E. CAVES

Hypotheses about the creation of value by mergers are tested on premia paid in a sample of 100 recent acquisitions. The premia increase with financial although not with real synergies and with the scope for "managerial" behavior in the target firms. The acquirers' willingness to pay also increases with their scope for managerial behavior. The presence of either actual and potential rival bidders has a powerful effect, and we ascertain that market gains (losses) to acquirers' shareholders do not distort the associations between acquisition premia and sources of value.

IN MERGER transactions among large US corporations, shareholders of target firms receive large premia over market value for yielding control to the acquiring firm. Because on average the acquirer's shareholders break even, targets' gains represent most of the value that the market assigns to these transactions. Some observers ascribe this value to synergies in the coordination of business assets. Others attribute it to gains from shifting control of assets into the hands of more effective managers.

Each hypothesis claims some support. The stock market assigns more value to mergers between firms that exhibit some potential for relatedness, as identified in the theory of corporate diversification (Singh and Montgomery [1987]; Shelton [1988]). Potential target firms following poorly selected policies are more likely to be acquired (Palepu [1986]). However, there has been little use of multivariate analysis to impute the variance among premia paid for targets to these and other sources of gain (cf. Jahera, Hand, and Lloyd [1985]; Walkling and Edmister [1985]). That is our goal.

The first section provides a conceptual framework and presents the main hypotheses, and the second gives them quantitative forms. The third describes the sample and reports the results.

I. ANALYTICAL FRAMEWORK

The premium paid in a completed merger transaction, PR, can be related to the market value of the target as an independent firm (MV) by this expression:

$$PR = (BRES[X_i]/MV)B(Z_i) \tag{1}$$

* We are grateful to Denise Neumann and Kenneth C. Griffin for assistance and to Cynthia Montgomery for suggestions. Research support was provided by the Division of Research, Harvard Business School.

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where $BRES$ is the reservation price of the successful acquirer, net of the buyer's transaction costs. It depends on factors (X_i) that predict the increase in cash flows due to combining the two firms' assets or changing the policies of the target's management, but also any factors that represent the acquiring management's willingness to pay for those cash flows. The X_i could include any propensity of the target's management to elevate the transaction costs incurred by the acquirer, and thus to lower $BRES$, in order to preserve its independence. $B(\bullet)$ is a bargaining function that determines where the actual price falls between the reservation prices of the would-be acquirer ($BRES$) and current owners (MV), and the Z_i are determinants such as the presence of competing bidders.

We derive the X_i and Z_i variables by considering the two main hypotheses about the sources of value in mergers—labelled synergy and managerial effectiveness—as well as factors determining the acquirer's bargaining situation.

Synergistic gains

A coherent account of synergistic gains comes from the theory of corporate diversification. This theory rests on the assumption that the large business enterprise can be regarded as a coalition of heterogeneous, "lumpy" assets subject to administrative coordination. Some assets have multiple uses, entering into the production functions of several activities or generating externalities between activities that can be internalized by the firm. The lumpiness of such an asset induces the owning firm to deploy it in several activities rather than use its full capacity to produce one output that faces a downward-sloping demand.[1]

This model of diversification explains mergers as firms' responses to growing markets and changing conditions. At any time some firms find themselves either needing the services of such a lumpy asset or possessing one with excess capacity. Mergers provide a common solution, although the arm's-length rental of the services of such assets is an alternative. This explanation of mergers has several implications for their empirical analysis. It warrants expressing the dollar premium paid for the target as a ratio to its value as a free-standing firm, because the acquirer's reservation premium should rest on the target's value as a source of or site for the use of such assets. However, the scales of some of the acquirer's assets may also affect the potential value of the merger. If the target's assets generate an externality, such as a technical skill, for the acquirer's activity, then the gain is related to the scale of the acquirer's assets.

[1] This approach has evolved from Penrose [1959] and numerous other contributors. For a recent application see Montgomery and Hariharan (forthcoming).

Managerial effectiveness

Mergers are also believed to create value by shifting business assets into the hands of managers who can generate more value from them, thanks to greater ability or stronger incentive to maximize value. The evidence supporting this gain from mergers is thin. Acquired firms' book profits are not subnormal for their industries (Ravenscraft and Scherer [1987, ch. 3]). Mergers pick off firms with low ratios of market to book value (Hindley [1970]), but the synergy hypothesis suffices to explain that regularity.[2] Some evidence indicates improvement in three aspects of management of the target firms' resources: (1) ending suboptimal use of debt (papers cited in Caves [1989]); (2) eliminating mismatches between their market opportunities and policies (Palepu [1986]); and (3) making profitable asset switches and sales that the target's managers had not chosen to make (Bhagat, Shleifer, and Vishny [1990]). Relevant if indirect is the finding of Lang, Stultz, and Walkling [1988] that the largest increases in the combined values (abnormal returns) of acquirer and target occur when firms with high values of Tobin's q acquire targets with low values of q.

The value potentially created by a merger and thus the maximum premium paid ($BRES/MV$) should increase with the target management's underperformance. To test that hypothesis requires either an independent measure of the target management's performance or a hypothesis about the source of its shortfall. We shall focus on the incentives provided by compensation and governance arrangements identified by the theory of principal–agent relationships. High levels of managerial shareholding (or compensation strongly tied to share value) encourage managers to select policies aligned with the interest of shareholders in maximum value, reducing the value that a managerial change could create.

However, this familiar hypothesis about incentives runs counter to another based on entrenchment: managers with substantial shareholdings can more easily resist a hostile tender offer and thus can entrench themselves and defend any preference for other objectives over maximum income from their shareholdings (Stulz [1988]). The entrenchment hypothesis also applies to managers who are short of competence rather than motivation. Underperforming managers should lose more utility following a change in control because their compensation exceeds their productivity.[3] Therefore they gain more from using the firm's resources to create transaction costs for the

[2] The fact that shares of acquired firms tend to yield negative abnormal returns in months or years previously has been ascribed to inferior managerial performance; however, a sufficient explanation (tested below) is that acquiring firms pick up what they see as bargains in the market for corporate control (Scherer [1988]).

[3] Replacing a less accomplished management with a better but costlier one does not obviously create value, which is why overcompensation is up to a point the core issue (a poor manager would of course depress the firm's value by more than his total compensation).

acquirer and deter an acquisition that will terminate their rent streams. The entrenchment effect makes it uncertain how levels of underperformance and resistance to takeovers vary with managerial shareholding. Walkling and Long [1984] found that resistance to takeover bids is more likely, the smaller are the shareholdings of the target's managers and directors. They also found some evidence associating resistance with the size of estimated rent components in the salaries of targets' executives. However, large managerial shareholdings sometimes help to install value-impairing antitakeover provisions (Brickley, Lease, and Smith [1988]),[4] and managerial shareholdings beyond a threshold seem to decrease the firm's value of Tobin's q (Morck, Shleifer, and Vishny [1988]).

Entrenchment complicates determining which managements are likely to be underperforming and thus the premia earned for displacing them. The incentive-alignment hypothesis proposes that the premium will decrease with some measure of alignment such as the fraction of the target's shares held by insiders ($TINS$). In equation (1) we defined the bidder's premium $PR = BRES/MV$, which can be expanded to $PR = BRES'/MV - T/MV$, where $BRES'$ is the acquirer's gross reservation price and T the transaction cost of making the acquisition. The incentive-alignment effect holds simply that $\partial PR/\partial TINS < 0$ because $\partial(BRES'/MV)/\partial TINS < 0$ and $\partial(T/MV)/\partial TINS = 0$. If managers with low shareholdings place more obstacles before would-be acquirers,[5] entrenchment implies that $\partial(T/MV)/\partial TINS < 0$ and possibly $\partial PR/\partial TINS > 0$. If high-shareholding managements value their independence, the effective reservation price for the firm is raised, although not the MV that we observe. Some takeovers are precluded; in those that occur entrenchment acts like a Z_i variable in $B(\cdot)$ to press the purchase price up toward $BRES$. With $\partial B/\partial TINS > 0$ (and possibly $\partial(BRES'/MV)/\partial TINS > 0$ as well), $\partial PR/\partial TINS > 0$. Thus the effect of managers' shareholdings on PR is of indeterminate sign, negative on the incentive-alignment hypothesis, positive from the entrenchment effect in either of its forms.

Although discussion of managerial behavior in merger transactions has focused mostly on target firms, acquirers have also come into the spotlight. Jensen's [1986] "free cash flow" hypothesis holds that managers assign low opportunity costs to internally generated funds not needed for reinvestment in their base activities and squander these on low-yield acquisitions. Mergers can provide utility to the acquirer's managers by reducing risk to the viability of the enterprise (Amit and Livnat [1988]) or conveying advantages associated with increased size, such as higher compensation (Firth [1980]) and decreased vulnerability to takeovers. You, Caves, Smith, and Henry [1986] demonstrated empirically that excess returns to acquiring firms' shareholders are smaller (more likely to be negative), the smaller is the fraction of shares held by managers and directors and the larger is the proportion of insider members of the board of directors. Thus the agency situation of the acquiring firm also affects the premium paid for the target,[6] because a managerial bidding firm's reservation price can exceed a value maximizer's.

[4] Debate persists over whether these provisions are hostile to shareholders' welfare, but a negative effect is clearly possible. See Dann and DeAngelo [1988], Malatesta and Walkling [1988], and the survey by Jensen and Warner [1988].

[5] Golden parachutes, poison pills, and the like. Some of these devices can in principle be used to assist management to extract maximum value from an acquirer for the target's shareholders (Knoeber [1986]), but their negative effect on the firm's value in the face of a takeover attempt is clear (Dann and DeAngelo [1988]).

Bargains in market for corporate control

Unless stock-market efficiency is believed to hold in the short run, mergers can occur because the market undervalues the income stream expected to flow from the target's assets (Scherer [1988]). The financial investor cannot readily arbitrage between the markets for physical capital assets and for financial claims on the income streams of those assets, but some acquiring firms can. The prices of financial claims are typically more volatile than the prices of capital goods—certainly during the years 1986–1988, covered in our empirical investigation. If stock prices were also more volatile than the cash flows expected by business investors, then their reservation premia for acquisitions should move inversely with the general level of securities prices relative to the prices of real capital goods.

Bargaining considerations

The bargaining function $B(Z_i)$ determines where the premium falls between the buyer's reservation price and the target's market value. It should depend on the number of actual and potential competitors for each target. Within the limits set by competing bidders it should depend on tactical bargaining skills and objectives (assumed as unobservable in practice).[7] That leaves the Z_i with the role of representing the density of the upper tail of potential bidders' reservation prices. The synergy and agency hypotheses offer different implications about these densities. The synergy hypothesis implies that going concerns represent different bundles of assets that are heterogeneous in attributes and qualities, and therefore have diverse reservation prices for a given target firm. The managerial-efficiency hypothesis can be read narrowly

[6] This proposition implies that excess returns to the shareholders of acquiring and target firms in a merger should be negatively correlated, which was confirmed by You *et al.* [1986] and Bradley, Desai, and Kim [1988].

[7] It is not obvious, for example, that a target management pursuing objectives other than maximum value in managing the firm would choose to forego extracting the maximum price from the successful acquirer.

to predict the contrary: all efficient, value-maximizing managements can wring the same value from a given asset bundle and will have the same reservation prices.

The densities of reservation-price distributions could be pursued along this and other lines, but with little practical value. We control for the presence of active competing bidders, a factor that has repeatedly been found to increase merger premia. Although the closeness of potential competition for acquirers may defy direct measurement, it can perhaps be inferred indirectly from the structure that the successful bidder chooses for its transaction.

The position of the acquisition premium within the bargaining range can be approached indirectly, because any surplus expected to accrue to the acquiring firm should generate excess returns to the acquirer's shareholders at the time the acquisition is announced. We shall indeed use acquirers' excess returns to assure that findings about the determinants of the premium are not distorted by systematic relationships between the hypothesized determinants of the premium and the estimated gains (losses) to the acquirer's shareholders.[8]

II. EMPIRICAL SPECIFICATION OF THE MODEL

We now propose variables to embody these hypotheses about takeove premia and test them on a sample of large merger transactions among U nonfinancial companies during 1986–1988.

Synergistic gains

The synergistic potential implied by the theory of lumpy, multi-use assets c be measured in various ways. The relatedness of the businesses of a diversifi firm can be calculated by observing the policies used to integrate its assort businesses (or from the lack of such policies) (Rumelt [1974]), but it rais questions of objectivity and replicability when applied to mergers. Th standard industrial classification (SIC) has served to measure relatedne objectively because of its construction based on similarities of technolog and principal inputs (e.g. Caves [1975]). The potential synergy resulting fro a merger can be measured similarly from the closeness of the activities of th acquiring and acquired enterprises.

We employ a variant of the approach developed by Shelton [1985, 1988] t measure a merger's potential for relatedness. She obtained the distribution o sales among SIC industries for each acquirer and target firm shortly before th time of the acquisition. She then determined judgmentally (on stated criteri

[8] The potential importance of controlling for the change in the acquiring firm's value is sho by the finding of You *et al.* [1986] that the estimated *total* values of 24 of their 133 mergers w negative, despite pervasive gains to the target's shareholders.

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TABLE I
SUMMARY OF VARIABLE DEFINITIONS AND DATA BASE

Symbol	*Definition*	*Mean*	*Std. dev*
PR	Transaction price % prior market value	50.5%	41.4%
FIT	Extent of relatedness of companies' assets	0.52	0.42
H	Horizontal merger dummy	0.31	0.46
V	Vertical merger dummy	0.09	0.29
R	Related merger dummy	0.45	0.50
SIZE	Sales of acquirer/sales of target	31.6	61.5
TDEBTEQ	Target long-term debt/equity	10.4%	24.4%
ADEBTEQ	Acquirer long-term debt/equity	22.9%	38.0%
DEDIF	*TDEBTEQ – ADEBTEQ*	–12.5%	45.8%
TINS	Target shares of managers, directors	19.1%	19.3%
TFIVE	Target shares in blocks > 5%	12.0%	11.7%
TBOARD	Target officers % board of directors	36.3%	17.1%
AINS	Acquirer shares of managers, directors	8.5%	12.2%
AFIVE	Acquirer shares in blocks > 5%	6.5%	10.2%
ABOARD	Acquirer officers % board of directors	34.9%	18.5%
S&PCLOSE	S&P index, closing day of transaction	265	27.8
ALLCASH	Dummy for all-cash transactions	0.72	0.45
RIVAL	Dummy for presence of rival bidder	0.25	0.44

Sources: Transactions were identified and dated from ADP Network Services, which also supplied information on *PR, SIZE, ALLCASH*, and *RIVAL*. Standard and Poor's Compustat provided information used to calculate *FIT, H, V, R*, and *DEBTEQ, INS, FIVE*, and *BOARD* were obtained from Moody's Corporate Reports, Value Line Reports, and corporate annual proxy statements. The history of each transaction as traced through stories published in the *Wall Street Journal* and retrieved through its index. *S&PCLOSE* as also obtained from the *Journal*.

ether each pair of activities of the two firms held synergistic potential. For ch pair deemed to fit she calculated the product of the activities' shares of quirer's and target's sales, then summed the resulting products. Specifically, is procedure yields the measure:

$$FIT = \sum_{1}^{AT} \delta_{at} s_a s_t$$

ere s_a is the share of activity a in the acquirer's total sales ($a = 1, \ldots, A$), s_t is e share of activity t in the target's total sales ($t = 1, \ldots, T$), and δ_{at} equals e if activity pair at is deemed to possess synergistic potential, zero if they do ot. We set $\delta_{at} = 1$ when the two activities serve a common set of customers, ss through similar distribution channels, employ related technologies of oduction, or utilize important inputs in common.[9] Of course, all these ommonalities will be present when the combined firms operate in the same arket, and combinations of vertically related activities have their own miliar set of bases for creating value, so horizontally and vertically related

[9] These criteria flow from Rumelt [1974] and subsequent research and were strongly pported in the statistical study of diversification by Lemelin [1982].

activities will be assumed to achieve a synergistic fit.[10] *FIT* ranges between zero (when no pair of acquirer and target activities is deemed related) and one (when every pair shows relatedness). The premium paid in a merger should increase with *FIT*. Table I lists all regressors used in the analysis, gives their sources, and reports means and standard deviations for the sample.

We also assigned each transaction a zero/one dummy variable to indicate whether the synergistic element arose chiefly from a horizontal (*H*), vertical (*V*), or related (*R*) pair of activities.[11] These types of relation need not generate systematically differing surpluses, but it is interesting to check the possibility.

FIT does miss one dimension of synergy that arises if the target's assets yield positive externalities for the acquirer's business units, once integrated into the acquirer's organization. The relative sizes of the two firms then matter, and the gain in productivity of the target's assets (expressed as a proportion of their free-standing market value) should increase with:

SIZE = total sales of acquiring firm divided by total sales of the target.

On the hypothesis stated, the effect of *SIZE* should be interactive with *FIT*, or *SIZE* should be measured from individual fitting pairs of businesses.

A discrepancy between the two firms' levels of financial stringency can also make a merger valuable. If parties' opportunity costs of internal funds differ, and obtaining funds externally entails significant transaction costs, a merger could create value to the extent of the avoided costs of securing external funds net of the transaction costs of the merger itself. Bruner [1988] found evidence that acquirers had significantly greater financial slack in the two years prior to the merger and targets displayed significantly higher leverage than their acquirers; nonetheless his data rejected the hypothesis that the market value of the merger depends on the extent of this financial synergy.

We obtained the variable:

TDEBTEQ = ratio of long-term debt to the sum of debt, common equity (market value), and preferred stock, target firm, year prior to merger.

ADEBTEQ is its counterpart for the acquiring firm. What should matter is the relation between *TDEBTEQ* and *ADEBTEQ*. Either the absolute or the algebraic value of their difference might be appropriate: in principle a merger could absorb the financial slack of either partner, although Bruner's [1988] results suggest the primacy of the acquirer's slack. Rhoades [1987] found that premia paid for acquired banks increase with a measure analogous to their

[10] Horizontal and vertical mergers can of course also generate monopoly rents. In this paper we simply neglect any discrepancies between private and social gains.

[11] Because most target firms in the sample were not large enough to operate diversified lines of business, determining the principal mode of fit was uncomplicated.

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leverage (i.e. decrease with the ratio of equity and subordinated notes to assets).

Agency situations of target and acquirer

Value could arise either because value-maximizing managers differ in effectiveness or because some managers are more strongly motivated than others to maximize value. The former source is impossible to test except on *ex post* evidence, which allows that hypothesis to be put aside without deep concern for omitted-variable bias; see Ravenscraft and Scherer [1987] and other evidence surveyed by Caves [1989].

That leaves the state of the principal–agent relation between owners and managers of both target and acquiring firms as a basis for predicting differences in managerial performance. We expect the alignment of the objectives of managers to shareholders' interest in maximized present value to depend on the effectiveness of external monitoring of the managers and the structure of their compensation. The following variables are used:

TINS = fraction of shares held by corporate officers and members of the board of directors;

TFIVE = fraction of shares not held by officers and directors that are in the hands of individual shareholders owning five per cent or more of the firm's outstanding equity shares;

TBOARD = fraction of members of the board of directors who are officers of the company.

TFIVE embodies the hypothesis that substantial (minority) shareholding blocks emerge where the payout of intensive monitoring is high (Demsetz and Lehn [1985]) and serve as a base for potential takeovers (Shleifer and Vishny [1986]). The premium should therefore decrease with *TFIVE*. Similarly, directors who are outsiders monitor managers more efficiently (Weisbach [1988]), so that the premium should increase with *TBOARD*.[12] The effect of *TINS* is ambiguous, however, for the reason developed above—its incentive and entrenchment effects run in opposite directions.

If changes in the policies of a managerial target firm yield increased value, we also expect that managerial firms will pursue acquisitions more actively than value-maximizing managers, and variables *AINS*, *AFIVE*, and *ABOARD* were developed for each acquirer exactly parallel to those for the target. Managers who gain utility from mergers can imprint their preferences

[12] If entrenched managers can choose their boards of directors freely, and substantial outside holders can demand representation, *TBOARD* becomes an endogenous variable partially explained by *TINS* and *TFIVE*. Hermalin and Weisbach [1988] did establish some endogeneity in *TBOARD*, but also observed a fairly high long-run stability in firms' values of *TBOARD*.

on merger transactions in two ways. They can simply overpay, causing premia to increase with *AINS* and *ABOARD* and decrease with *AFIVE*. Also they can undertake mergers with value-creating potential less than the owner's reservation price for yielding control. In that case *AINS* and *ABOARD* would be negatively correlated with *FIT* (*AFIVE* would be positively correlated), but the acquirer variables would not necessarily be associated with *PR* once we control for *FIT* and the variables that measure the managerial situation of the target. You *et al* [1986] concluded that utility-maximizing managers of acquiring firms tend to undertake mergers that diminish the wealth of their shareholders; the acquiring firm's owners fare worse, the lower is *AINS*[13] and the higher is *ABOARD*. Such managers also undertake mergers that create less value for target and acquiring shareholders taken together.

Other regressors

Several variables remain to be defined. The first of them tests the hypothesis that merger premia decrease with the costliness of acquiring financial claims on productive assets rather than the assets themselves. The variable used is:

$S\&PCLOSE$ = value of the S&P 500 index at the end of the closing day of the transaction, normalized by the GNP deflator for capital expenditures in the year of the transaction.

The variable is crude because it neglects the fact that the relations between prices of financial and real assets for individual sectors diverge substantially from the economy-wide average represented by *S&PCLOSE*. The premium should decrease with *S&PCLOSE*.

One regressor picks up an effect on the premium of the form of the nominal payment offered by the acquirer. Payments may be in cash or packages of various securities with or without a cash component:

$ALLCASH$ = 1 if the payment of the takeover price is made entirely in cash, zero otherwise.

Target shareholders may discount noncash payments due to uncertainty about their value or transaction costs of redeeming them. On the other hand, cash payments force the target shareholders to pay capital-gain taxes that could under some other payment arrangements be deferred until the swapped securities are sold. Thus no sign can be predicted for *ALLCASH*; Huang and Walkling [1987] reported a positive coefficient, implying that the tax effect dominates. Another significance was recently proposed for the means of

[13] The same ambiguity may apply to *AINS* as to *TINS*, insofar as acquisitions increase the utility of an entrenched management, and large shareholdings assure entrenchment. The results of You *et al* [1986] imply that convergence of interests dominates.

payment. One reason for an acquirer to employ an all-cash offer is to complete the transaction quickly, without regulatory and other delays that occur when issues of securities are involved, before potential rival bidders can spring into action. Formally, *ALLCASH* can register the acquirer's signal of a high valuation and intent to pre-empt potential rivals (Fishman [1989]).

Actual competition for the acquirer is measured by:

$RIVAL$ = 1 if some other entity submitted a rival bid for the target, zero otherwise.

RIVAL and *ALLCASH* are the only variables entering the $B(Z_i)$ function. Other influences on the bargain that must go into the error term include the availability of other target firms that might similarly satisfy the acquirers' objectives, as well as tactical skills, temporal urgency, and competing but qualitatively different transaction opportunities that may have been available to the two firms.

Dependent variable

The exact construction of the dependent variable remains to be specified. The denominator of *PR* is the target's stock price one month (twenty trading days) before the offer's announcement. The announcement date is the day on which the target received its first official bid. The first bid need not come from the eventual acquirer, but it must be the obvious first link in a chain of events leading to the acquisition. The final price per share (numerator) is the one at which the deal is consummated, and the premium is adjusted for the movement of the stock market (S&P 500 Index) between the base date and the date of closing the transaction.

It is important to determine the premium for the full transaction period, not just for the value offered at the announcement date. The acquirer who negotiates a deal at a given price for later completion obtains the equivalent of a free "call" on the entire target company. If the equities market is rising, some of the premium can be expected to be absorbed by the general price increase. The acquirer, however, bears little downside risk. It can usually back out if a fall of the equities market should make the transaction no longer attractive, and indeed most of the deals agreed to but not completed before the crash of October 1987 were later renegotiated at lower prices. We assume that the target held out for a price at the date of announcement that compensated target shareholders for this risk.

III. SAMPLE AND STATISTICAL RESULTS

Sample of mergers

Because patterns of merger activity and abnormal returns associated with them have changed over time (Jarrell, Brickley, and Netter [1988]), we chose to analyze a sample of mergers that were completed within a short period, the years 1986–1988. A list of merger transactions was obtained from the Merger and Acquisitions Database collected by ADP Network Services. It includes all corporate acquisitions that were completed during the stated period and brought independent publicly held corporations under the control of other publicly held corporations. The acquisition mechanism could not be a two-tier tender offer. The consideration paid for the target had to exceed \$50 million. The target's main line of business had to lie outside of the banking and savings and loan sectors, and it could not possess two or more substantially different classes of common stock. Both the target and acquiring companies had to be incorporated and based in the United States, and the acquiring corporation could not own more than 25 percent of the target's stock before the acquisition announcement was made.

The 100 observations that remained after this screening yielded an average premium over the market price one month earlier of 50.5 percent. The distribution is substantially skewed, and the standard deviation is 41.4 percent.[14] Only 15 mergers showed no evident relatedness between the companies' activities, with related (45) and horizontal (31) mergers prevalent.[15] The mean value of FIT is fairly high. The targets were on average only 3.2 percent as large as their acquirers. Neither group was highly leveraged on average, but the targets less so. Nearly one-fifth of the targets' shares (nearly one-tenth of acquirers' shares) were held by managers and directors, but the concentration of outside shareholdings was fairly low for both groups. About two-thirds of board members were outsiders. About three-fourths of the transactions were paid entirely in cash and involved no evident competing acquirers.

Final model

To summarize the model, the acquirer's normalized reservation price should increase with *FIT* (interacting positively with *SIZE*) and *DEDIF* (the difference between the target's and the acquirer's leverage) and decrease with *S&PCLOSE*. The consideration of incentive alignment indicates that the reservation price should decrease with *TINS*, *TFIVE*, *AINS*, and *AFIVE*, and increase with *TBOARD* and *ABOARD*, due to the entrenchment effect; the signs of *TINS* and *AINS* are ambiguous. Premia could either increase or decrease with *ALLCASH*. The outcome within the bargaining range should increase with *RIVAL*, and a positive sign for *ALLCASH* could indicate the

[14] The premium was also obtained on the price one week before announcement, yielding a mean premium of 44.7 percent (standard deviation 38.4 percent). The reduction in the mean premium can be read as a measure of the average effect of anticipations and insider trading.

[15] The criterion for a horizontal merger was that the companies operate in the same four-digit industry in the Standard Industrial Classification, which may mean potential rather than actual direct competition. The targets were smaller (*SIZE* = 44.5) in horizontal than in other mergers.

effect of potential competition. The absolute values of the slope coefficients of the reservation-price variables should be greater where a rival is present,[16] with the exception of *ALLCASH* and perhaps the variables related to the acquirer's agency situation.

We report one modification that was made to the model prior to estimation. In this sample the proportions of shares held by managers and directors and the insider proportions of boards of directors are highly correlated, 0.43 for targets and 0.30 for acquirers. When regression models include both *TINS* (*AINS*) and *TBOARD* (*ABOARD*) the board-composition variable is always insignificant and usually takes the wrong sign. Because managerial shareholding seems more likely to influence board composition than to be determined by it, we put the board-composition variables aside.

With that decision taken, equation 1 in Table II represents an initial naive version of the model that treats *RIVAL* only as an additive influence and omits the interactive effects of the presence of rival bidders. Equation 2 continues in this fashion to test for a positive interaction between *FIT* and *SIZE*. Equation 3 adopts the interactive specification of the model to let slope coefficients differ when rival bidders are present. Notice that equation 3 possesses considerably greater explanatory power than equations 1 and 2.

Results: real and financial synergies

The first result of the analysis is a surprising negative one—the absence of any favourable effect of fit between acquirer and target on the premium received by the target, despite the use of a more sophisticated measure of fit than in most previous studies. The weak negative relation between premium and fit is present in the zero-order relationships and the mean values of the premia for mergers with various types of fit.[17] Equation 2 tests the hypothesis that the target's assets have positive externalities for the value generated by the acquirer's assets; the coefficient of *FIT•SIZE* is positive as expected but not significant. Allowing the slope coefficient of *FIT* to differ between mergers with and without rival bidders clears up some of the mystery. When rivals are absent, *FIT*'s coefficient is positive though still insignificant, while in the presence of a rival bidder it is negative and highly significant. Could it be that rivalry unleashes competitive instincts that promote overbidding, and that bids grow more inflated the less synergistic basis exists for establishing a "hard" reservation price? *RIVAL* certainly exerts a large and highly

[16] This would be the case if the price falls in the middle of the bargaining range in the absence of rivalry (a Nash solution)—see Rubinstein [1982]—but the presence of a rival results in a Bertrand auction that extracts all but epsilon of the acquirer's expected surplus.

[17] The average premium for mergers classed as horizontal or vertical was about 46 percent, that for related or unrelated mergers about 53 percent. The zero-order correlation between *PR* and *FIT* is −0.06.

significant influence on the premium, with its regression coefficient in equations 1 and 2 not much smaller than the mean difference of 36.5 percent found in the data set.[18]

In the reported models *TDEBTEQ* and *ADEBTEQ* are entered as the difference $DEDIF = TDEBTEQ - ADEBTEQ$. Its highly significant positive coefficient implies that the opportunity to infuse capital to a heavily leveraged or capital-constrained target may be a more important basis for gains from mergers than operating synergies.[19] When *DEDIF* is factored into its components, the (absolute) value of *ADEBTEQ*'s coefficient is somewhat but not significantly larger than *TDEBTEQ*'s; the disaggregation does not improve the model's overall fit. *DEDIF*'s coefficient differs as expected between mergers with and without rivals present (equation 3).

Results: managerial effectiveness

Of the agency-related variables, the concentration of external shareholding in the target firm (*TFIVE*) exerts its expected negative influence on the acquisition premium and is statistically significant. The coefficient of *TINS* is negative, its significance short of 10 percent in a two-tail test. A negative effect is predicted by incentive-alignment considerations and contradicts the entrenchment hypothesis. When transactions with rival acquirers are distinguished (equation 3), the expected effect on *TFIVE*'s coefficient is strongly evident—indeed, *TFIVE*'s effect is negative only when rivals are present to affect the premium. That pattern is not evident for *TINS*, however.[20]

The agency situation of the acquiring firm also affects the merger premium. Managements that hold larger proportions of their firms' shares offer smaller premia (significant at 5 percent in a one-tail test); the effect of the concentration of outside shareholding (*AFIVE*) is also negative but not

[18] Jahera, Hand, and Lloyd [1985] reported 14 percent, Walkling and Edminster [1985] 33 percent, Bradley, Desai, and Kim [1988] 20 percent. We checked for major differences in other regressors between transactions with and without rival bidders. Surprisingly, the target is relatively smaller in cases where rivals are present ($SIZE = 54.0$) than when absent (24.1). *FIT* does not differ significantly. More rivalrous transactions are all-cash deals (88 percent vs. 67 percent), probably because cash transactions can be executed more quickly. Insider holdings of the target's shares are much higher when rivalry is absent (22.4 vs. 9.3 percent), suggesting that these deals may commonly be negotiated with entrenched managements.

[19] Recall the finding of Ravenscraft and Scherer [1987] that small target firms have typically been abnormally profitable before their acquisition, consistent with a high marginal return to additional capital. You *et al.* [1986] did not find a significant influence of leverage differences, but the target firms were on average much larger in that study than in the present one.

[20] Because the target firms are rather small, one might expect that their shareholdings are concentrated and that *TFIVE* and *TINS* would be negatively correlated, decreasing the chances that both variables will reveal significant negative effects on premia. The correlation is in fact −0.24. For the larger acquiring firms it is positive, 0.12. Walkling and Edminster [1985] did not test directly for agency effects, but they did conclude that premia decrease with the target's ratio of market to book value.

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significant. When *AINS*'s coefficient differs between transactions with and without rival bidders, the deterrent effect of managerial shareholding is found to operate only when rivals are absent; it does not seem to curb the competitive-spirits effect of rivalry on merger bids noted above.

Results: other variables

The effect of *S&PCLOSE* is negative as expected but significant only when rival bidders are present. The weakness of this support for the hypothesis of arbitrage between real and financial assets is consistent with the insignificance of *FIT*; the acquisition of "bargain" assets should yield little net payoff unless the buyer has some specific use for or competence in their management.

Finally, the coefficient of *ALLCASH* is positive and significant at 5 percent (two-tail). The size of its coefficient, similar (and comparable) to that of *RIVAL* in equations (1) and (2), exceeds any reasonable estimate of the tax effect and must reflect the role of potential competition. *RIVAL* and *ALLCASH* together indicate that competition in the market for corporate control exerts a powerful influence on merger premia.

Changes in acquiring firms' values

We have taken the premium paid for control by the acquirer to measure the buyer's expected gain. However, the acquirer's shareholders register their own view of their net gain or loss from the transaction in the abnormal returns to acquirer's stock. Acquiring firms' stockholders about break even on average, but behind this mean lurks a substantial variance. If their net gains should be systematically related to any of the hypothesized determinants of premia, the coefficients reported in Table II would be biased estimators of effects on total benefits. One result of You *et al.* [1986] illustrates the hazard: their measure of operating synergy was found to increase the excess return to the acquiring firm's shareholders but not the sum of gains to acquirer and target shareholders together.

We were reluctant to use the standard measure of returns to the acquirer's shareholders—the cumulative abnormal return at the announcement date—because it does not correspond to *PR*, the premium paid adjusted for the market return from before the announcement to the completion of the transaction. If the acquisition price should reflect the call option on the target, the gain to the acquirer's shareholders should be measured over the same interval by the change in the value of the acquirer's shares (adjusted for the change in the market index) between one month prior to the announcement and the date of closing.[21] To make it commensurable with *PR* the market-

[21] The objections to this measure are its failure to take account of the acquirer's beta and its inclusion of noise from new information other than the announcement of transaction itself.

TABLE II
REGRESSION RESULTS, DETERMINANTS OF MERGER PREMIA

Independent variable	Equation 1	Equation 2	Equation 3: RIVAL = 1	Equation 3: RIVAL = 0
FIT	−1.836	−3.866	−53.851	10.205
	(0.20)	(0.38)	(2.93)	(1.12)
DEDIF	0.211	0.207	0.547	0.132
	(2.40)	(2.34)	(3.30)	(1.39)
TINS	−0.342	−0.323	0.249	−0.168
	(1.62)	(1.50)	(0.43)	(0.87)
TFIVE	−0.702	−0.686	−3.663	0.229
	(2.04)	(1.98)	(5.74)	(0.68)
AINS	−0.574	−0.609	−0.341	−0.621
	(1.84)	(1.91)	(0.39)	(2.07)
AFIVE	−0.385	−0.430	−0.609	−0.214
	(1.00)	(1.09)	(1.04)	(0.49)
S&PCLOSE	−0.158	−0.149	−0.849	−0.119
	(1.11)	(1.04)	(2.20)	(0.95)
ALLCASH	22.823	23.326	18.800	
	(2.53)	(2.57)	(2.37)	
RIVAL	26.234	25.246	301.585	
	(2.79)	(2.64)	(2.74)	
FIT•SIZE		0.069		
		(0.57)		
Constant	95.260	92.752	64.582	
	(2.30)	(2.22)	(1.77)	
R^2	0.224	0.218	0.[illegible]49	

adjusted change in the acquirer's value is divided by the pre-merger market value of the target firm (not the acquirer). It is designated *APR*.

To determine whether hypothesized influences on *PR* were partly or wholly captured by *APR*, we simply substitute *APR* for *PR* in the models reported in Table II. For equation 1 of Table II the result is:

$$\begin{aligned} APR = & -2000 - 666FIT - 0.216DEDIF + 6.455TINS \\ & \quad (0.91) \quad (1.34) \quad\quad (0.05) \quad\quad\quad (0.58) \\ & + 10.42TFIVE + 14.03AINS + 80.80AFIVE \\ & \quad (0.57) \quad\quad\quad (0.85) \quad\quad (3.97) \\ & + 7.462S\&PCLOSE - 616ALLCASH + 336RIVAL \\ & \quad (0.99) \quad\quad\quad\quad (1.29) \quad\quad\quad\quad (0.68) \\ \bar{R}^2 = & \; 0.120 \end{aligned}$$

The negative result supports Table II's findings. *APR* is significantly related only to *AFIVE*, confirming that mergers provide more benefit to acquirers' shareholders when the managers are closely monitored. The coefficient of *AINS* is positive although not statistically significant (as it was for You *et al.*).[22] When equation 3 of Table II is reestimated with *APR* as the dependent variable, *RIVAL* takes a significant negative coefficient, and the positive effect of *AFIVE* is found entirely in transactions where no rivals are present. This result is consistent with the "competitive spirits" hypothesis offered for the perversely signed and significant coefficient of *FIT* in Table II, equation 3, for transactions with rivals present.[23]

IV. CONCLUSIONS

This paper brings together in a single analysis the various factors that have been hypothesized (and in some cases found) to affect the value created by mergers—real and financial synergies, behavior of managers in both the target and acquiring firms, and arbitrage between real and financial assets. We obtained no evidence of real synergies, some evidence of arbitrage, and clearly significant effects of both agency and financial synergy. We can quantify these differing effects on merger premia roughly by determining how much their explained variance is reduced by removing the variable or variables that embody each factor. With nearly half of the (uncorrected) variance unexplained in equation 3, this exercise faces the uncertainty that important components or dimensions of each causal factor may have been omitted. With that caveat noted we find the following proportional reductions in the variance explained when the variable(s) embodying the indicated factor are deleted from equation 3: real synergies, 10.6 percent; arbitrage between real and financial assets, 5.9 percent; financial synergy, 13.5 percent; agency factors, 46.0 percent; rivalry, 20.8 percent.[24] Interestingly, real and financial synergy together evidently contribute less to explaining the variance of premia than do agency factors.

We close with brief comments on the study's normative implications. The negative findings on real synergies are a surprise, and we do not stress them because of their disagreement with both other studies of mergers and analyses of corporate diversification (Lemelin [1982]; Wernerfelt and Montgomery [1988]). Our findings about agency factors agree with other evidence of the salutary effect of the market for corporate control on managers of potential targets. However, they qualify that benign effect sharply in showing that weakly monitored managers of acquiring firms overpay (and presumably undertake too many mergers). Also, the dramatic effects on premia of actual

[22] *APR* has a very large variance and outlying values, both positive and negative. That pattern results when plausibly distributed percentage returns on the market values of the acquirers are re-expressed as returns on the market values of targets on average only 3 percent as large. It accounts for the extreme coefficient values in the equation.

[23] Equation 3 with *APR* as dependent variable is unsatisfactory in ways suggested by note 22, however, so this conclusion does not deserve much weight.

[24] The incremental effect of *RIVAL* was inferred from the effect of deleting that variable from equation 1.

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THE JOURNAL OF INDUSTRIAL ECONOMICS 0022-1821 $2.00
Volume XXXIX March 1991 No. 3

THE PRICING OF SPORTS EVENTS: DO TEAMS MAXIMIZE PROFIT?*

D. G. FERGUSON, KENNETH G. STEWART, J. C. H. JONES AND ANDRE LE DRESSAY

A model of price setting behaviour by National Hockey League teams based on the assumption of profit maximization is developed, estimated, and tested. The model implies parameter restrictions across equations of a two-equation simultaneous nonlinear econometric model, tested by a likelihood ratio test, and implies restrictions on the first and second derivatives of the revenue function, tested with Wald tests. The results in large measure support the hypothesis that hockey teams are profit maximizers, in contrast to some suggestions in the literature. The analysis provides an attractive example of the potential of sports data for testing behavioural hypotheses in economics.

> I bought the team out of love of the game and pride in the city
> and not for profit....
> You're kidding!
> You guessed, eh.
>
> Harv Antoine, *Apocryphal Northern Tales*

INTRODUCTION

THE LONGSTANDING debate over whether firms are profit maximizers has been given new life by recent evidence that both buyers and sellers are influenced by the perceived fairness of prices. Okun [1981], in particular, has argued that the threat of withdrawal of patronage can serve to punish firms who set prices in excess of those perceived by customers to be fair (warranted by costs). This enforces an implicit contract at prices below short run profit maximizing levels. Kahneman, Thaler and Knetsch [1986a, b], generalizing from the results of an extensive series of surveys, have gone further and argued that perceptions of fairness affect pricing on a much wider scale and do so even if the means of enforcement are not available. While this leads them to question the relevance and scope of profit maximization as a behavioural assumption, their case is far from conclusive.

Although buyers may express a dislike for profit maximizing prices and while suppliers may deny that they are motivated by profit maximization, it is not clear what this means for their actual behaviour. By their very nature, no number of surveys can resolve the issue. Consider the case of professional sports which is cited by both Okun and Kahneman *et al.* Despite their

* We would like to thank our colleague Serge Nadeau for his comments on an earlier draft of this paper.

and potential competing acquirers qualify the precision of acquiring managers' judgments. Agency and managerial factors are strongly bound up with corporate mergers, and we cannot say whether too many or too few mergers take place.

ACCEPTED MAY 1990

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

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December 1997

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IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

THE BALTIMORE AND OHIO CHICAGO TERMINAL RAILROAD COMPANY, an Illinois corporation, Plaintiff, v. WISCONSIN CENTRAL, LTD., an Illinois corporation, Defendant.	)	No. 93 C 3519
WISCONSIN CENTRAL, LTD., an Illinois corporation, Counter-Plaintiff, v. THE BALTIMORE AND OHIO CHICAGO TERMINAL RAILROAD COMPANY, an Illinois corporation, and CSX TRANSPORTATION, INC., a Virginia corporation, Counter-Defendants.	)	

MEMORANDUM OPINION AND ORDER

After a lengthy arbitration, Baltimore and Ohio Chicago Terminal Railroad Company ("BOC") and its parent company, CSX Transportation, Inc. ("CSX"), seek an order confirming and entering judgment on a $19 million award entered in its favor and against Wisconsin Central, Ltd. ("WCL"). Also pending is WCL's motion to vacate or modify the arbitration award and WCL's motion to file an amended counterclaim against BOC and CSX.[1] Finally, BOC moves for leave to file a supplemental affidavit and conditionally waive part of its claim.

I. BACKGROUND

On October 11, 1987, WCL began operations as an interline rail carrier serving parts of Illinois, Wisconsin, Michigan and Minnesota. Before commencing its operations, WCL arranged for the interchange of its eastbound traffic at Chicago. These arrangements were necessary because WCL's railroad tracks were not physically contiguous with most of the carriers with which it did business. If two interline carriers can reach each other either by using their own tracks or the tracks of the other carriers, they can directly interchange cars. If, however, two interline carriers rails do not meet end-to-end, intermediate switching allows the carriers to exchange traffic via an intermediate carrier. The intermediate switching carrier picks up rail cars to be interchanged from one interline carrier and delivers them to the other and, in return, receives a fee. WCL decided to contract with BOC to deliver its cars to eastbound carriers.

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[1]The motion of BOC to file a surreply to WCL's motion to reinstate its counterclaims will be granted.

BOC is an intermediate switching carrier operating within the Chicago Switching District ("District"). BOC owns Barr Yard, a rail classification yard located within the District at Riverdale, Illinois. Since 1987, WCL has delivered thousands of cars to Barr Yard for interchange to CSX.

CSX, like WCL, is an interline rail carrier, although CSX primarily serves the eastern United States. CSX normally delivers westbound traffic and picks up eastbound traffic at Chicago and St. Louis. CSX's rail line terminates just outside of the District, at Pine Junction Indiana, where its tracks connect with those of BOC and other railroads. None of CSX's rail lines or classification yards within the District meet end-to-end with any of WCL's rail lines.

The procedural history of this case leading up to the decision of the arbitration panel is complex. On June 11, 1993, BOC filed an action against WCL to collect intermediate switching and car hire reclaim charges[2] pursuant to BOC's tariff on file with the Interstate Commerce Commission ("ICC"). In its answer and counterclaims against BOC, WCL alleged that an agreement among the parties, and not BOC's tariff on file with the ICC, governed the dispute over the charges. In addition, WCL alleged

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[2]"Car hire" is a rental charge that each rail carrier must pay to the owner of a car in the carrier's custody. Under the AAR Car Hire Rules, a carrier performing intermediate switching service is entitled to recover from the delivering interline carrier an intermediate car hire reclaim, which is designed to reimburse it for any car hire expense it incurs while handling the car.

that BOC owed compensation to WCL under various theories of relief, including breach of the Interchange Agreement, promissory estoppel and quantum meruit.

Although BOC initially denied that an agreement existed between the parties, BOC later moved to amend its answer to WCL's counterclaims to acknowledge that a preliminary, but binding, draft interchange agreement ("Interchange Agreement")[3] existed.[4] BOC further moved to amend its complaint to add a claim against WCL based on the Interchange Agreement.

On January 10, 1994, BOC submitted a demand to WCL for arbitration pursuant to the mandatory arbitration provision of the Interchange Agreement. On March 1, 1994, an order was entered directing arbitration and allowing BOC to amend its complaint to add claims based on the Interchange Agreement. Baltimore and Ohio Chicago Terminal R. Co. v. Wisconsin Central, Ltd., 1994 WL 71431 (N.D. Ill. 1994). WCL had opposed arbitration on the grounds that BOC had waived its right to invoke the mandatory arbitration provision because of its delay in demanding arbitration. These contentions were rejected and BOC's complaint and WCL's countercomplaint were dismissed without

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[3]The genesis of the Interchange Agreement was an exchange in July 1987, when E. A. Burkhardt, president of WCL, contacted a CSX representative regarding a proposed agreement between WCL, BOC and CSX. A draft agreement was prepared by John Booth of CSX and he submitted the agreement to Burkhardt. The draft was subsequently revised by Burkhardt.

[4]The parties also agree that the Interchange Agreement incorporates a letter sent by Burkhardt to A. P. Fish of CSX.

prejudice pending arbitration. Jurisdiction was retained to confirm any arbitration award or to consider a motion by either party to reinstate any nonarbitrable claim within 60 days after the issuance of an arbitration award.

Subsequently, the parties entered into a supplemental arbitration agreement and submitted their dispute to a panel of arbitrators (the "Panel"). On November 9, 1995, the arbitration hearings concluded.[5] On June 10, 1996, the Panel issued a written award ("Award"). The Panel awarded BOC (i) $17,276,290.30 for past intermediate switching charges, car hire reclaims, interest, and improper set-offs; (ii) the principal amount of intermediate switching charges on CSX-destined traffic that WCL delivered to BOC during the period from September 1, 1995 through June 10, 1996, along with interest at a statutory rate of five percent per annum on that amount; (iii) interest at the rate of five percent per annum from April 1, 1996 through June 10, 1996, on the amount of $13,188,146.00 in outstanding intermediate switching charges; and (iv) interest at the rate of five percent per annum from April 1, 1996 through June 10, 1996 on the amount of $1,135,070.35 in outstanding car hire reclaim charges. BOC and CSX submit the affidavit of Alison Brown, Assistant Controller - Revenue Reporting for CSX, which computes

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[5]The arbitration hearing was extensive. Twenty-one witnesses testified and more than 400 exhibits were submitted. The transcript of the hearing is 3,186 pages. In addition, the parties submitted post-hearing memoranda to the Panel.

the amount of damages for (ii), (iii), and (iv) above though May 31, 1996 to be $2,702,536.90 based on BOC's billing records. The Award provides that interest will continue to accrue on all amounts owed by WCL until paid.

BOC now moves to confirm and enter judgment on the Award in an amount of $19,978,827.20, which includes $17,276,290.30 as itemized in the award and $2,702,536.90 as computed in Alison Brown's affidavit. In addition, BOC requests that this court retain jurisdiction to enter a supplemental judgment on the Award for all additional charges incurred by WCL under the Interchange Agreement through August 4, 1996.[6] BOC also moves to file a supplemental damages affidavit, conditionally waive part of its claim, and simplify issues. Finally, WCL moves to reinstate its counterclaims.

II. JURISDICTION OVER MOTIONS BROUGHT UNDER THE FAA

Neither § 9 nor § 10 of the Federal Arbitration Act ("FAA") constitutes a grant of federal subject matter jurisdiction. Minor v. Prudential Securities, Inc., 94 F.3d 1103 (7th Cir. 1996); O'Leary v. Fanghella, 866 F. Supp. 1119, 1120 (N.D. Ill. 1994). Before a district court may entertain a motion to vacate or confirm under section § 9 or § 10 of the FAA, there must be an independent basis of federal jurisdiction. Minor, 94

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[6]The Interchange Agreement was formally terminated on August 4, 1996.

F.3d at 1104-05; O'Leary, 866 F. Supp. at 1120. Since the parties are not diverse, they must base jurisdiction on the existence of a federal question. "[F]ederal question jurisdiction arises only when the complaint alone 'establishes either that federal law creates the cause of action or that the plaintiff's right to relief necessarily depends on resolution of a substantial question of federal law.'" Minor, 94 F.3d at 1105 (quoting Franchise Tax. Bd. of State of Cal. v. Construction Laborers Vacation Trust for Southern California, 463 U.S. 1, 27-28 (1983)).

Neither of the parties' FAA motions raises a federal question on its face. WCL moves to vacate the Award under § 10 of the FAA on the grounds that the Panel improperly disregarded evidence, disregarded Illinois law, ignored terms of the Interchange Agreement and miscalculated damages due BOC. BOC's motion to confirm and enter judgment on the Award under § 9 of the FAA raises no federal question on its face; it seeks to confirm an award for damages arising out of a breach of contract claim. Thus, the parties' motions under § 9 and § 10 of the FAA do not provide independent grounds for subject matter jurisdiction.

BOC asserts that jurisdiction nonetheless exists over the parties' FAA motions because Counts I through III of its complaint raise federal questions and the motions may be heard pursuant to the exercise of supplemental jurisdiction under 28

U.S.C. § 1367. Counts I through III of BOC's complaint asserted claims based on its tariff filed with the ICC. Those claims arose under the Interstate Commerce Commission Act ("ICC Act") and created federal question jurisdiction at the time BOC filed its complaint. BOC argues that these claims provide continuing jurisdiction over the case as a whole. In contrast, WCL contends that BOC's claims under its filed tariff cannot provide a basis for federal question jurisdiction because BOC abandoned these claims when it was permitted to amend its complaint to file claims based on the Interchange Agreement.

As an initial matter, WCL questions whether jurisdiction existed to enter the March 1, 1994 order directing arbitration. WCL suggests that the March 1, 1994 order should be vacated for a lack of jurisdiction. WCL contends that BOC's filed tariff claims did not confer jurisdiction over its motion to stay the proceedings because it is now clear that BOC did not intend to pursue its tariff claims subsequent to the arbitration proceeding. At the time the March 1, 1994 order was issued, however, it was unclear whether BOC's tariff claims would be mooted by the arbitration. The fact that the Panel subsequently found in BOC's favor and BOC did not move to reinstate its tariff claims did not affect the jurisdiction to enter the March 1, 1994 order. Thus, jurisdiction existed to enter the March 1, 1994 order because BOC's claims based on its filed tariff provided an independent basis for jurisdiction at the time the order was entered. The order will not be vacated.

Even if WCL is correct, however, and BOC's tariff claims did not provide a jurisdictional basis for the March 1, 1994 order, WCL's counterclaims brought under the ICC Act provided a second jurisdictional basis upon which to enter the order. The fact that WCL's action was brought as a counterclaim is immaterial, since it possessed independent grounds for jurisdiction, which conferred jurisdiction over the case even if BOC's original federal claims should have been dismissed. See, e.g., Amoco Production Co. v. United States, 852 F.2d 1574, 1579 (10th Cir. 1988).

Although jurisdiction existed to enter the March 1, 1994 order, the question of jurisdiction over the pending FAA motions is a separate inquiry. Again, there must be an existing independent basis for jurisdiction to entertain these motions -- i.e., other viable pending claims. BOC argues that an independent basis for jurisdiction exists, as it did at the time the March 1, 1994 order was entered, because its original complaint contained claims brought under the ICC Act. BOC contends that jurisdiction was not terminated merely because a portion of this case was sent to arbitration. Although BOC's claims conferred jurisdiction over BOC's motion to stay the parties' nonarbitrable claims, BOC's tariff claims do not provide an independent basis for jurisdiction over the parties' FAA motions. Not only did BOC fail to reinstate the claims within the 60-day time limit, but an attempt to reinstate these claims would have been denied since these claims have been mooted by arbitration.[7]

On the other hand, WCL's ICC claims may provide independent jurisdictional grounds upon which to exercise supplemental jurisdiction to hear the parties' FAA motions. WCL has made a timely motion to reinstate its ICC claims. If WCL's motion to reinstate is granted, independent grounds of jurisdiction will exist because WCL's claims arise under a federal statute. Thus, WCL's motion to reinstate will be examined first.

III. WCL'S MOTION TO REINSTATE ITS COUNTERCLAIMS

WCL moves to reinstate its counterclaims against BOC. WCL's amended countercomplaint contains four Counts. Count I seeks a declaratory judgment that BOC can recover intermediate switching charges only under its tariff on file with the ICC. In Count II, WCL alleges that BOC's tariff is unreasonable, in

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[7]WCL also contends that jurisdiction over this case necessarily ended because the parties' claims were dismissed in the March 1, 1994 order. The March 1, 1994 order granted BOC's motion for a stay of the case, effected through a dismissal of the claims without prejudice and with leave to reinstate. WCL argues that the order constituted a final order and thus jurisdiction terminated at that point. WCL is incorrect in its characterization of the order. The procedural method employed by the order differs from a stay only in that dismissing the action with leave to reinstate puts the onus on the litigants to act in a timely manner if further disputes remain to be resolved.

violation of 49 U.S.C. § 10701(d), and WCL is entitled to set off any damages suffered by BOC by the difference between BOC's tariff rate damages and the damages BOC would have suffered if it had charged a reasonable rate. Count III asserts that BOC violated 49 U.S.C. § 10741 by not charging, or charging lower, intermediate switching rates to other interline carriers. In Count IV, WCL alleges that BOC and CSX failed to "provide to WCL reasonable, proper and equal facilities for interchange" because CSX has refused to engage in direct interchange of freight cars with WCL in violation of 49 U.S.C. § 10742.

As the March 1, 1994 order stated, WCL will be permitted to reinstate only nonarbitrable claims. See Baltimore and Ohio Chicago Terminal R. Co., 1994 WL 71431 at *3. WCL has waived any arbitrable claims or defenses that could have been presented at the arbitration hearing. Parties "cannot stand by during arbitration, withholding certain arguments, then, upon losing the arbitration, raise such arguments in federal court." National Wrecking Co. v. International Broth. of Teamsters, Local 731, 990 F.2d 957, 960 (7th Cir. 1993); Gateway Technologies, Inc. v. MCI Telecommunications Corp., 64 F.3d 993, 998 (5th Cir. 1995).

BOC argues that WCL has waived Count I because it is an arbitrable claim and WCL did not present it at the arbitration hearing. WCL does not dispute that it did not raise Count I at the arbitration hearing. Thus, WCL may file Count I only if it was outside the scope of claims covered by the arbitration clause of the Interchange Agreement. The Interchange Agreement provides that "[a]ny irreconcilable dispute arising between the parties with respect to this Agreement shall be settled through binding arbitration." Therefore, Count I is nonarbitrable only if it does not "aris[e] with respect to" the Interchange Agreement.

Arbitration clauses are to be liberally construed and "any doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration, whether the problem at hand is the construction of the contract language itself or an allegation of waiver, delay, or a like defense to arbitrability." Moses H. Cone Memorial Hosp. v. Mercury Const. Corp., 460 U.S. 1, 24-25 (1983). The use of the broad language "arising with respect to" in the arbitration clause of the Interchange Agreement indicates that this clause should not be narrowly construed. See Prima Paint Corp. v. Flood & Conklin Mfg. Co., 388 U.S. 395 (1967) (labeling "broad" a clause requiring arbitration of "any controversy or claim arising out of or relating to this Agreement"). A broad arbitration clause does not "limit arbitration to the literal interpretation or performance of the contract, but embrace[s] every dispute between the parties having a significant relationship to the contract regardless of the label attached to the dispute." American Recovery Corp. v. Computerized Thermal Imaging, Inc., 96 F.3d 88, 93 (4th Cir. 1996). This is an appropriate construction for the arbitration clause of the Interchange Agreement. Keeping in mind the strong federal policy in favor of arbitration and the broad language of this arbitration clause, each of WCL's claims will be examined separately to determine if it has been waived. See id.

A. Count I

Count I seeks a declaratory judgment that the "filed rate doctrine" applies to the parties' dispute. Where it applies, the filed rate doctrine bars common carriers from making private deals that depart from its filed tariff rates. See, e.g., Louisville & Nashville R. Co. v. Maxwell, 237 U.S. 94, 97 (1915). The relevant portion of Count I alleges as follows:

> Because the Panel interpreted the interchange agreement as not providing for a direct interchange between WCL and CSXT and because the panel concluded that BOC performed intermediate switching service with respect to the cars that WCL had delivered to Barr Yard for interchange to CSXT and because the interchange agreement was never filed with the ICC, WCL has contended that BOCT can recover intermediate switching charges on said cars only if BOC brings an action for recovery under its tariff and establishes that it is entitled to recover said charges under its tariff.

In short, Count I alleges that BOC cannot collect switching charges under the unfiled Interchange Agreement because BOC's filed tariff governs.

BOC argues that Count I directly challenges the enforceability of the Interchange Agreement and hence was arbitrable. WCL responds that it agrees with BOC that the Interchange Agreement is an enforceable agreement and that the Interchange Agreement governs all aspects of the parties' relationship as to intermediate switching services performed by

BOC, but argues that BOC must nonetheless proceed under its tariff on file with the ICC to collect switching charges from WCL. WCL further contends that Count I may be properly characterized as arising under the ICC Act and not the Interchange Agreement. Under this reasoning, WCL argues, Count I raises issues separate from the Interchange Agreement and is not an arbitrable claim.

Even assuming that Count I does not challenge the enforceability of the Interchange Agreement as a whole, Count I alleges that the provision of the Interchange Agreement which entitles BOC to collect intermediate switching charges at its standard rates is unenforceable. The effect of a successful outcome on Count I for WCL would render the Award uncollectible absent a second action under BOC's filed tariff. This type of action is directly related to the Interchange Agreement and should have been raised at the arbitration hearing. The fact that Count I implicates issues arising under the ICC Act does not render the claim nonarbitrable. See S+L+H S.p.A. v. Miller-St. Nazianz, Inc., 988 F.2d 1518, 1524 (7th Cir. 1993) ("Simply because Miller has asserted a claim based on the Fair Dealership Law does not mean that the claim does not arise from or relate to the Agreement.").

WCL attempts to excuse its delay in raising the filed rate doctrine by explaining that "there was no reason . . . to assert any claim based on the filed-rate doctrine until after the panel issued their award" because it was only then that WCL's interpretation of the Interchange Agreement was rejected. This argument is without merit. WCL was required to anticipate an adverse decision by the Panel and raise all possible arbitrable defenses.[8] WCL is not entitled try each of its defenses in separate actions.

Moreover, equitable principles weigh against excusing WCL's failure to raise the filed rate doctrine at the arbitration hearing.[9] Prior to this late stage in the litigation, WCL never asserted that a filed rate supplanted the Interchange Agreement. The first time WCL raised the issue that BOC's filed tariff might apply to this dispute was on July 5, 1996. In fact, WCL has consistently argued the opposite proposition - that the Interchange Agreement, and not the tariff, applied to the intermediate switching services performed by BOC. For example, WCL expressly denied the applicability of the tariff in its affirmative defense to BOC's original action brought under its tariff. In addition, WCL specifically alleged that it denied the

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[8]It appears that WCL was aware of the danger that claims not raised might be waived. It attempted to have claims arising under 49 U.S.C. § 10701(a) and 49 U.S.C. § 10741 heard by the Panel, although the Panel ultimately ruled that these claims were nonarbitrable.

[9]BOC also argues that WCL should not be permitted to file Count I because WCL is not technically seeking to reinstate one of its dismissed claims. BOC correctly asserts that WCL did not plead Count I in its original countercomplaint. WCL's failure to assert the applicability of the tariff in its original countercomplaint is not dispositive, however, because WCL would have been permitted to amend its pleadings to assert the substance of Count I as an alternative defense or counterclaim to the enforcement of the Interchange Agreement. <u>See</u> Fed. R. Civ. P. 15(e).

applicability of the tariff in its original countercomplaint. Even when the issue of whether to send this case to arbitration was briefed, WCL took the position that the Interchange Agreement governed the parties' dispute.

Finally, even if WCL were correct that a successful judgment on Count I does not render the Interchange Agreement unenforceable, WCL would not be permitted to file Count I because Count I is futile. Villa v. City of Chicago, 924 F.2d 629 (7th Cir. 1991) ("[L]eave is inappropriate where there is . . . futility of the amendment"); Glick v. Koenig, 766 F.2d 265, 268-69 (7th Cir. 1985) ("[R]ule 15(a) do[es] not require courts to indulge in futile gestures."); Universal Mfg. Co. v. Douglas Press, Inc., 770 F. Supp. 434 (N.D. Ill. 1991) (court is justified in denying leave to amend if the proposed amendment could not withstand a motion to dismiss) (citing Foman v. Davis, 371 U.S. 178, 183 (1962)). In Count I, WCL seeks to apply BOC's tariff rates on file with the ICC. This outcome, however, has already occurred. The Interchange Agreement provided that BOC's "standard intermediate switch" charges applied -- i.e., BOC's filed tariff rates. The Interchange Agreement and BOC's filed tariff were compatible arrangements -- the Interchange Agreement "wrapped around" BOC's filed tariff rate. Enforcing BOC's tariff rates would result in the same judgment against WCL as contained in the Award, because once the Panel found liability under the Interchange Agreement, it applied BOC's tariff rates in calculating damages owed to BOC. Thus, WCL will not be permitted to file Count I.

B. Counts II and III

WCL presented claims based upon 49 U.S.C. § 10701(a), WCL's unreasonable rate claim, and 49 U.S.C. § 10741, WCL's discriminatory rate claim, to the Panel. At a hearing on June 20, 1995, the Panel determined that "all of the issues raised by the parties are arbitrable with the exception of those defenses asserted by Wisconsin Central, Ltd. based upon 49 U.S.C. § 10701(a) and 49 U.S.C. § 10741." WCL therefore has not waived Counts II and III of WCL's amended counterclaim, which assert unreasonable and discriminatory rate claims against BOC.

BOC and WCL concur that if any of the counts in WCL's amended countercomplaint are deemed nonarbitrable and reinstated, then all issues raised in those counts should be referred to the Surface Transportation Board ("STB"), the successor agency to the ICC, under the doctrine of primary jurisdiction.[10] It is appropriate to refer the discriminatory and unreasonable rate claims to the ICC. See, e.g., Burlington Northern, Inc. v. United States, 459 U.S. 131, 141 (1982); Advance United Expressways, Inc. v. Eastman Kodak Co., 965 F.2d 1347, 1353 (5th Cir. 1992). Counts II and III will be referred to the STB and will be stayed pending consideration by the STB of WCL's claims.

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[10] Although WCL may not maintain an action that seeks enforcement of the filed rate doctrine, WCL is not foreclosed from arguing that damages under the Award emanate from BOC's tariff in order to advance WCL's ICC claims.

C. Count IV

Count IV, which asserts a claim based on 49 U.S.C. § 10742, was raised in WCL's original countercomplaint. Count IV, brought only against CSX, alleges that CSX agreed to engage in direct interchange of freight cars with WCL at Barr Yard. WCL contends that despite this representation, CSX required WCL to use the services of BOC as an intermediate switching carrier to effect interchange. In addition, WCL asserts that CSX has used the trackage rights it obtained from BOC to effect direct interchange with other interline carriers or, through its manipulation of BOC, caused BOC to waive all or substantially all of the intermediate switching charges. In those instances where CSX has required interline carriers to use BOC's services, WCL alleges that CSX has absorbed the charges. As a result, WCL argues it is entitled to recover damages from CSX under 49 U.S.C. § 11704.

BOC argues that Count IV represents a "different set of allegations involving a different set of facts [than contained in the original countercomplaint] . . . and must be heard in a different proceeding." BOC is incorrect, however, in asserting that WCL's amended countercomplaint raises new allegations. To the contrary, the language of the Award demonstrates that the issue of whether WCL was entitled to a determination that a direct interchange occurred between CSX and WCL was within the scope of arbitrable issues and was in fact arbitrated. As the written decision of the Panel states, WCL argued a similar theory in support of its defense:

> WCL's first defense to BOCT's claim for intermediate switching charges is that the interchange agreement between the parties provides for direct interchange between CSXT and WCL at the Barr Yard. As a result, no intermediate switching charges arise since no intermediate switching has taken place.

At the arbitration hearing, WCL raised three theories in support of its contention that no direct interchange existed: (i) the language of the Interchange Agreement establishes that no direct interchange existed; (ii) the intent of the parties as reflected in the correspondence between the parties was to provide for a direct interchange; and (iii) because BOC was a corporate shell -- a mere instrumentality or agent of CSX, rather than a bona fide operating legal entity -- a direct interchange existed between WCL and CSX. The Panel found that WCL's "direct interchange argument is not supported by the evidence." Among other reasons, the Panel found that the language of the Interchange Agreement which stated that cars "shall be delivered in interchange direct to <u>BOCT</u>" supported the conclusion that the parties did not intend to provide for a direct interchange between <u>CSX</u> and WCL. (emphasis added).

WCL's allegation in Count IV that CSX agreed to engage in direct interchange is nearly identical with its argument to the Panel that correspondence between the parties establishes that a direct interchange existed. To the extent WCL repeats its argument in Count IV, WCL may not relitigate the issue of a direct interchange.

Similarly, the Panel's decision that CSX was not required to engage in direct interchange with WCL, absorb switching charges or require BOC to waive switching charges merely because CSX possessed trackage rights over BOC's tracks is binding on WCL and may not be relitigated. The Panel's determination is supported in the case law. See Burlington Northern R. Co. v. United States, 731 F.2d 33, 40 (D.C. Cir. 1984) ("[I]t is entirely reasonable and proper for two noncontiguous railroads to interchange traffic through an intermediate switching carrier rather than by direct connection, even though one of the railroads involved has complete ownership of the intermediate carrier.").

Moreover, WCL does not allege facts from which to infer that CSX refused to provide equal "facilities." WCL disputes only that it was required to pay for interchange services, although other carriers were not charged. This claim is indistinguishable from WCL's discrimination claim under § 10741(a), which will be referred to the STB. The purpose of § 10742, however, is to ensure the availability of interchange facilities on an reasonable and equal basis, not to ensure uniform pricing of available facilities:

> In discussing the original section on the Senate floor, Senator Cullom explained that its purpose was "to require railroads to furnish to connecting roads all reasonable and proper facilities for the interchange of traffic that

> may be necessary for the convenience of the public, and to prevent one road, or a combination of roads, from 'freezing out' a connecting line by refusing to accept traffic from it or deliver traffic to it upon any terms, as has been done." . . . In the present case, there is no allegation that direct interchange facilities are necessary to the public convenience or that the B & O has attempted to freeze out petitioner from interchanging traffic at Chicago. This observation, combined with the fact that petitioner currently has available to it reasonable, proper, and equal facilities for interchanging traffic is dispositive of its charge under section 10742.

Burlington Northern R. Co., 731 F.2d at 40 n.15 (quoting 17 Cong. Rec. 3470, 3472 (1886) (remarks of Sen. Cullom)). Count IV does not allege that a direct interchange was necessary to the public convenience or that WCL was frozen out of facilities. Even if WCL had asserted that it was frozen out of receiving interchange services, this argument would be tantamount to an allegation that CSX breached the Interchange Agreement. Any claim alleging a breach of the Interchange Agreement was, of course, arbitrable.

In sum, Count IV raises arbitrable issues or issues that already have been decided by the Panel, and WCL has waived any additional theories in support of its contention that a direct interchange existed between CSX and WCL or that CSX's control over BOC was improper. The fact that WCL asserts that CSX has violated 49 U.S.C. § 11742 by failing to acknowledge that a direct interchange existed or should have been recognized does not render the claim nonarbitrable. See S+L+H S.p.A., 988 F.2d at 1524. Count IV will be not be reinstated.

IV. BOC'S MOTION TO CONFIRM AND ENTER JUDGMENT ON THE ARBITRATION AWARD AND WCL'S MOTION TO VACATE OR MODIFY THE AWARD

Since WCL may reinstate Counts II and III, supplemental jurisdiction under 28 U.S.C. § 1367 may be exercised over WCL's motion to vacate or modify the Award and BOC's motion to confirm and enter judgment on the Award. 28 U.S.C. § 1367 provides that "in any civil action of which the district courts have original jurisdiction, the district courts shall have supplemental jurisdiction over all other claims that are so related to claims in the action within such original jurisdiction that they form part of the same case or controversy." The Seventh Circuit has noted that this section "authorizes supplemental jurisdiction coextensive with the 'case or controversy' requirement of Article III." Baer v. First Options of Chicago, Inc., 72 F.3d 1294, 1298 (7th Cir. 1995). "A loose factual connection between the claims is generally sufficient" to support supplemental jurisdiction. Ammerman v. Sween, 54 F.3d 423, 424 (7th Cir. 1995). In this case, WCL's claims seek to recoup damages awarded to BOC under the Award and both WCL's claims and the parties' FAA motions concern BOC's right to collect intermediate switching charges from WCL. The parties' FAA motions are intertwined with WCL's claims. On these bases, the exercise of supplemental jurisdiction over the parties' FAA motions is proper.

The scope of review of a commercial arbitration award is "grudgingly narrow," Eljer Mfg., Inc. v. Kowin Development Corp., 14 F.3d 1250, 1253 (7th Cir. 1994), and "excruciatingly limited." Ethyl Corp. v. United Steelworkers of America, 768 F.2d 180, 183 (7th Cir. 1985). Sections 10 and 11 of the Federal Arbitration Act set forth the grounds upon which an arbitration award may be modified or vacated.[11] 9 U.S.C. §§ 10, 11. In addition, an award may be set aside if the arbitrator deliberately disregards what the arbitrator knows to be the law in arriving at the decision. Eljer Mfg. Inc., 14 F.3d at 1254. "Factual or legal errors by arbitrators -- even clear or gross errors -- do not authorize courts to annul awards. . . . [I]nsufficiency of the evidence is not a ground for setting aside an arbitration award under the FAA." Flexible Mfg. Systems Pty. Ltd. v. Super

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[11]Section 10(a) of the FAA provides:

> In any of the following cases the United States court in and for the district wherein the award was made may make an order vacating the award upon the application of any party to the arbitration--
> (1) Where the award was procured by corruption, fraud, or undue means.
> (2) Where there was evident partiality or corruption in the arbitrators, or either of them.
> (3) Where the arbitrators were guilty of misconduct in refusing to postpone the hearing, upon sufficient cause shown, or in refusing to hear evidence pertinent and material to the controversy; or of any other misbehavior by which the rights of any party have been prejudiced.
> 4) Where the arbitrators exceeded their powers, or so imperfectly executed them that a mutual, final, and definite award upon the subject matter submitted was not made.

Products Corp., 86 F.3d 96, 100 (7th Cir. 1996) (quoting Gingiss International, Inc. v. Bormet, 58 F.3d. 328, 333 (7th Cir. 1995)). Courts may not vacate awards even if convinced that the arbitrator's interpretation of contract was not only wrong, but plainly wrong. Chicago Typographical Union No. 16 v. Chicago Sun-Times, Inc., 935 F.2d 1501, 1504 (7th Cir. 1991).

WCL asserts that a number of errors by the Panel justify vacating or modifying the Award. WCL also asserts that the reasons set forth in its motion to vacate or modify the Award provide a basis for denial of confirmation of the Award. WCL contends that (i) the Panel acted improperly in "arbitrarily disregarding" the testimony of Thomas Schmidt; (ii) the Panel "manifestly disregarded Illinois law" as to BOC's implied duty of good faith; (iii) the Panel did not apply unambiguous language of the Interchange Agreement; and (iv) charges for cars handled under other agreements between the parties should have been excluded from the Award.

The Panel's interpretation of paragraph 2(a)(i) of the Interchange Agreement is central to WCL's motion to vacate the Award. Paragraph 2(a)(i) states as follows:

> Cars destined to or routed via BOCT points and former B&O and C&O points shall be delivered in interchange direct to BOCT on Barr Yard tracks designated from time to time by BOCT's Barr Yard operating officer in charge. Standard BOCT intermediate switch charges shall apply on such cars, routed via or destined to former B&O and C&O points, provided however, that said charges will be waived should WCL pre-block certain of such cars in accordance with blocking

schedules of BOCT as may be released or revised from time to time.

In its written decision, the Panel interpreted paragraph 2(a)(i) to require WCL to pay switching charges on all cars unless BOC issued blocking schedules and WCL blocked cars in accordance with those schedules. "Blocking" is the organization of cars in a train by some characteristic of the cars. Blocking tends to reduce the amount of switching and classification work that a receiving carrier must perform once it receives the cars. Most commonly, cars are blocked when they are grouped together by their destination. A blocking schedule instructs a delivering carrier how to block the cars to be delivered. The Panel found that BOC never issued blocking schedules and, as a result, WCL was required to pay all intermediate switching charges.

A. Schmidt's Testimony

WCL contends that the Award should be vacated because the Panel exceeded its powers by arbitrarily disregarding the undisputed testimony of Thomas Schmidt, the principal negotiator of the Interchange Agreement for BOC, in interpreting paragraph 2(a)(i) of the Interchange Agreement. At the arbitration hearing, WCL argued that paragraph 2(a)(i) released WCL from any obligation to pay intermediate switching charges unless BOC issued blocking schedules and WCL failed to block the cars in accordance with those schedules. The Panel received extrinsic or parol evidence, WCL argues, because it concluded that paragraph 2(a)(i) was ambiguous. However, the Panel stated no such finding or conclusion, and the Panel's consideration of parol evidence was not the equivalent of a finding of ambiguity. See Home Ins. Co. v. Chicago and Northwestern Transp. Co., 56 F.3d 763, 768 (7th Cir. 1995) ("[I]n determining whether an ambiguity exists . . . the trial court may consider parol and extrinsic evidence."). The parol evidence rule is not a rule of evidence, but a rule of substantive contract law. Land of Lincoln Savings and Loan v. Michigan Ave. Nat. Bank of Chicago, 103 Ill. App. 3d 1095, 432 N.E.2d 378, 383 (3d Dist. 1982). The parol evidence rule was not referred to by the Panel. Rather, the Panel considered parol or extrinsic evidence because the contract was not contained "in one fully integrated writing."

The Panel found paragraph 2(a)(i) to be clear in providing BOC the option but not a duty to issue blocking schedules. The plain meaning of the paragraph was not overcome by contrary testimony by Burkhardt because of what the Panel found to be his inconsistent editing of the paragraph after a telephone conversation with a CSX representative -- a conversation the CSX representative did not recall -- agreeing with Burkhardt's interpretation that issuing blocking schedules was required. On this record the Panel's finding and conclusion is certainly possible and supported by evidence.

WCL's argument does not provide a basis upon which to vacate the Award. WCL merely asserts that its interpretation of the Interchange Agreement should be substituted for the interpretation given to the provision by the Panel. The "test for vacating an award under Section 10(a)(4) of the FAA is whether the arbitrator exceeded the powers delegated to him by the parties." Eljer Mfg., Inc., 14 F.3d at 1257. The Panel did not exceed its powers in interpreting paragraph 2(a)(1) because the arbitration clause in the Interchange Agreement delegated authority to the Panel to resolve disputes arising from the Interchange Agreement. Thus, the Panel was within its authority when it interpreted the provision.

Even if WCL is correct and the testimony of Schmidt or Burkhardt supports WCL's interpretation, the Panel's decision would not be overturned on this basis because the fact that arbitrators reject a valid, or even a dispositive legal defense, does not provide grounds for vacating an award unless the arbitrators deliberately disregarded known law. Flexible Mfg. Systems Pty. Ltd., 86 F.3d at 100. Indeed, revisiting the evidence of the arbitration hearing would be conducting the type of "searching review" of the Panel decision that the Seventh Circuit has cautioned would transform arbitration from "a commercially useful alternative method of dispute resolution into a burdensome additional step on the march through the court system." Id.

B. BOC's Implied Duty of Good Faith and Fair Dealing

WCL next argues that the Award should be vacated because the Panel "manifestly disregarded the law" in determining that the duty of good faith did not apply to BOC's discretion in issuing blocking schedules. To vacate an arbitration award for manifest disregard of the law, "there must be something beyond and different from mere error in law or failure on the part of the arbitrators to understand or apply the law." Health Services Mgmt. Corp. v. Hughes, 975 F.2d 1253, 1267 (7th Cir. 1992). WCL contends that under Illinois law, BOC had an implied duty of good faith in deciding whether to issue blocking instructions or simply collect intermediate switching charges because this decision "was contingent upon a condition that was within [BOC's] control." WCL asserts that the Award must be vacated because the Panel deliberately disregarded the law by refusing to impose a duty of good faith with respect to BOC's conduct and find a breach of this duty.

The written decision of the Panel, however, demonstrates that the Panel did not "deliberately disregard" the application of the implied duty of good faith and fair dealing to BOC's conduct. Rather, the Panel considered the argument that a duty of good faith and fair dealing applied to BOC's conduct, and reasoned that "[p]art of the answer appears to be that the implied covenant of good faith and fair dealing is difficult to apply to a case where both parties expressly retained discretion as to whether performance would occur" -- i.e., even if BOC issued blocking instructions, WCL had discretion as to whether to perform the blocking service or pay intermediate switching charges. Nevertheless, the Panel proceeded to apply the duty of good faith to BOC's decision not to issue blocking schedules. The Panel found that "a decision to collect intermediate switch charges rather than issue blocking instructions does not rise to the level of bad faith performance of the agreement." The Panel also found that the underlying reason for granting BOC discretion in this regard was to allow BOC to determine if sufficient benefits would be obtained from issuing blocking instructions. Thus, WCL is incorrect in stating that the Panel refused to apply an implied duty of good faith to BOC's conduct. Instead, the Panel expressly applied the duty of good faith to BOC's decision not to issue blocking instructions and determined that BOC did not act (or refuse to act) in bad faith.

C. Per Car Rate of $105

WCL seeks to modify the Award by recalculating damages on the basis of the switching charge rates in effect at the time the Interchange Agreement was entered into by the parties -- $75 per loaded car and $38 per empty car. In calculating damages to be assessed against WCL, the Panel utilized a switching charge of $105 per car because effective May 1, 1988, BOC had increased its switching charges as a result of CSX's decision to consolidate all interchange operations at Barr Yard. WCL contends that BOC was prohibited from raising its rates because paragraph 8 of the Interchange Agreement provided as follows:

> [T]he terms and provisions of this Agreement may require extensive modification [in the event BOC and CSX re-arrange their interchanges at Chicago], and WCL agrees to be bound by such arrangements . . . provided such revised arrangement does not increase WCL's costs or unreasonably delay user's traffic. (emphasis added).

contends that the Panel should not have used the higher rate in computing damages because the intermediate switching charge fell within the definition of "costs," as defined by the Interchange Agreement. Therefore, WCL argues, switching rates could not be increased during the term of the Interchange Agreement. In using the higher rate, WCL asserts that the Panel exceeded their powers by disregarding an "unambiguous" term of the Interchange Agreement.

Courts have held that "where the award disregards and irrationally contradicts the express terms of a contract," the arbitrators have exceeded their powers. First Commercial Financial Group, Inc. v. Baghdoian, 812 F. Supp. 837, 839 (N.D. Ill. 1993). The test for this inquiry is whether the Panel interpreted the contract. Dreis & Krump Mfg. Co. v. International Ass'n of Machinists and Aerospace Workers Dist. No. 8, 802 F.2d 247, 253 (7th Cir. 1986). As long as the Panel interpreted the agreement in making its award, the award must be affirmed, even if the agreement was erroneously interpreted. Hill v. Norfolk and Western Ry. Co., 814 F.2d 1192, 1195 (7th Cir. 1987). Only if the Panel ignored, rather than misinterpreted, the agreement has the Panel exceeded its powers under 9 U.S.C. § 10(d). Chicago and Northwestern Transp. Co. v. United Transp. Union, 905 F.2d 171, 173 (7th Cir. 1990).

The written decision of the Panel refutes WCL's argument that the Panel "ignored" paragraph 8 of the Interchange

Agreement. Instead, the Panel specifically interpreted the term "costs" and addressed WCL's argument that intermediate switching charges could not be increased as a result of this provision:

> Based on the language selected by Mr. Burkhardt, which refers to "cost" and "user," Section 8 appears to pertain to the types of operating costs associated with another agreement between the parties concerning trackage rights. If the parties had intended to place a limit on intermediate switch charges, which are not otherwise referred to as "costs," they would have specifically referred to those charges as they did in Section 2.

The record demonstrates that the meaning of the term "costs" was fully addressed and argued in the post-hearing briefs. The Panel then interpreted "costs" to exclude intermediate switching charges. WCL merely contends that the term "costs" should have been interpreted more expansively by the Panel. Thus. WCL's argument must fail.[12]

<u>D. Damages Calculation</u>

WCL next argues that the Panel erroneously included $1,726,935 in intermediate switching charges and $244,101 in car hire reclaim charges on cars covered under other contracts between the parties. WCL asserts, and BOC concurs, that no switching charges could be incurred for cars handled under other contracts. The parties, however, presented conflicting calculations of excludable charges at the arbitration hearing.

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[12]The question of whether or not the $105 rate, which on the surface appears to be high, is unreasonable is still open for consideration before the Surface Transportation Board.

In addition, the parties did not agree whether shipments covered under other contracts were excused from car hire reclaim charges. Again, these arguments were fully argued in briefs submitted to the Panel. The Panel decided to accept BOC's calculation of charges excludable from the damage amount. The Award cannot be modified to now accept WCL's calculation. Thus, WCL's motion to modify the Award will be denied and the Award will be confirmed in the amount of $17,276,290.30.

E. Computation of Charges and Interest for Period from September 1, 1995 through May 31, 1996

WCL asserts that judgment should not be entered on the intermediate switching charges owed to BOC for the period from September 1, 1995 through May 31, 1996. In the Award, the Panel determined that BOC was entitled to recover intermediate switching charges on cars that WCL had delivered to Barr Yard for interchange to CSX during this period. The Panel, however, did not reach a conclusion as to the exact amount owed to BOC. In connection with its motion, BOC has submitted the affidavit of Allison Brown, Assistant Controller - Revenue Reporting for CSX, in support of its calculation that switching charges and interest due for this period amount to $2,702,536.90. CSX performs the billing and collection services for BOC.

WCL submitted the affidavit of Michael A. Hohlman, WCL's Director of Revenue, Customer and Car Hire Accounting. Hohlman's affidavit asserts that Brown's affidavit improperly includes switching charges on cars that were handled under contracts that preclude any switching charges. In addition, Hohlman testified that Brown miscalculated prejudgment interest on the switching charges. Under Brown's calculation, interest on charges began accruing at the end of the month. WCL asserts that interest did not accrue until the switching charges became due, on the twentieth day of the following month. In light of these alleged errors in Brown's affidavit, WCL requests that resolution of these issues be remanded back to the Panel. In the alternative, WCL asks that the Award be modified or corrected under Section 11(c) of the FAA.

BOC agrees that any contested charges should be resolved by the Panel, but argues that even under WCL's calculation $1,764,840.00 in charges and $119,360.14 in interest are uncontested and should be added to the Award. Since the Panel found that WCL was liable for charges from September 1, 1995 through May 31, 1996 and WCL does not contest $1,884,200.14 of the charges, this amount will be added to the Award. The determination as to whether WCL must pay the contested portion of these charges, $779,205.00, will be remanded to the Panel.

F. Supplemental Judgment

In its motion to confirm and enter judgment on the Award, BOC requests that jurisdiction be retained to enter a supplemental judgment on the Award for (i) all additional charges incurred by WCL under the Interchange Agreement through August 4, 1996, the date the Interchange Agreement was terminated, and (ii) all additional interest accrued on amounts owed by WCL, until paid in full. The determination of the amount of these charges is most appropriately made by the Panel, especially in view of the fact that a determination as to which services were performed under other transportation contracts will be necessitated. Therefore, this issue will be remanded to the Panel for a determination of these amounts.

G. BOC's Motion to Conditionally Waive Part of Claim.

BOC moves for leave to file a supplemental damages affidavit, simply issues and conditionally waive part of its claim. BOC offers to conditionally waive the disputed portion of the switching charges from September 1, 1995 through July 31, 1996 (Part IVE above) and all charges from August 1, 1996 through August 4, 1996 (Part IVF above). BOC conditions its waiver on the confirmation of the Award; if the Award cannot be confirmed for reasons other than the conditionally waived switching charges, then BOC reserves the right to claim these charges. WCL objects to BOC's motion on the grounds that BOC's supplemental damages affidavit again miscalculates the interest due to BOC, most notably by accruing interest at the end of each service month, rather than accruing interest on the date the bill was sent to WCL. In view of the numerous and possibly meritorious objections made by WCL to the supplemental damages affidavit, disputes still exist that should be resolved by the Panel, as set forth in Part IVE and Part IVF above. Presumably, BOC revokes its offer to waive a portion of its claim in light of the remand to the Panel and BOC's motion will be denied.

V. STAY OF ENTRY OF JUDGMENT ON THE AWARD[13]

WCL moves to stay judgment on the Award in the event it is confirmed. Since several issues have been remanded to the Panel for calculation, judgment will not yet be entered on the Award. Thus, WCL's motion is premature and will be denied without prejudice.

IT IS THEREFORE ORDERED that:

(1) The motion of Baltimore and Ohio Chicago Terminal Railroad Company and CSX Transportation, Inc. to file a surreply to Wisconsin Central, Ltd.'s motion to reinstate its counterclaims [55-1] is granted.

(2) The Clerk of the Court is directed to enter a judgment as follows:

> (a) The motion of Baltimore and Ohio Chicago Terminal Railroad Company and CSX Transportation, Inc. to confirm and enter judgment on the arbitration award [39-1,2] is granted in part and denied in part.
>
> (b) Wisconsin Central, Ltd.'s motion to vacate or modify the arbitration award [41-1,2] is denied.
>
> (c) The arbitration award is confirmed in the amount of $19,160,490.44.
>
> (d) The determination as to the contested $779,205.00 in switching charges owed to Baltimore and Ohio Chicago Terminal Railroad Company for the period from September 1, 1995 through August 4,

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[12]WCL also requests that consideration of BOC's motion to confirm and enter judgment be stayed until after Count I of its amended counterclaim is decided. Since leave to file Count I is denied, no basis exists upon which to stay consideration of BOC's motion.

1996 is remanded to the arbitration panel. In addition, the determination as to the amount of interest owed to Baltimore and Ohio Chicago Terminal Railroad Company is remanded to the Panel.

(e) Jurisdiction will be retained for the purpose of confirming and entering any supplemental amounts awarded by the arbitration panel.

(f) Wisconsin Central, Ltd.'s motion for a stay of the judgment is denied as moot at the present time.

(g) Wisconsin Central, Ltd.'s motion to reinstate its counterclaims [37-1] is granted in part and denied in part. Wisconsin Central, Ltd.'s motion is denied with prejudice as to Counts I and IV and granted as to Counts II and III.

(h) Counts II and III of WCL's amended counterclaim are referred to the Surface Transportation Board. Counts II and III are stayed pending consideration by the Surface Transportation Board.

(i) Baltimore and Ohio Chicago Terminal Railroad Company and CSX Transportation, Inc.'s motion to file supplemental damages affidavit, simplify issues and conditionally waive part of its claim [58-1] is denied.

(3) The case is dismissed from this court's docket without prejudice and with leave to timely move to reinstate to confirm or vacate any subsequent arbitration order or order of the Surface Transportation Board.

ENTER:

Virginia T. Coar

UNITED STATES DISTRICT JUDGE

DATED: JANUARY 29, 1997

BEFORE THE

FEDERAL HIGHWAY ADMINISTRATION

In the Matter of **American Trucking Associations, Inc.** and **ATA Intermodal Conference,** Petitioners.	Petition for Rulemaking 49 C.F.R. § 389.31

DECISION

The American Trucking Associations, Inc. (ATA) and the ATA Intermodal Conference filed a petition for rulemaking on March 17 to amend 49 C.F.R. Parts 390 and 396 of the Federal Motor Carrier Safety Regulations (FMCSRs).

Petitioners asked the Federal Highway Administration (FHWA) to require parties which tender intermodal equipment to motor carriers to ensure the roadworthiness of that equipment. The petition pointed out that

> [t]he motor carrier -- or more precisely, the driver -- usually does not have the ability or opportunity to do a full and adequate inspection of each piece of intermodal equipment to ensure the equipment's roadworthiness or compliance with the FMCSRs when accepting intermodal equipment at a port or railhead. ... The equipment is owned or leased by the railroad, steamship line or other party tendering/interchanging it to the motor carrier. If a safety defect in the equipment is not immediately obvious to the truck driver, he/she has neither the time nor facilities to conduct a more in-depth inspection. The standard interchange agreement adopted by most equipment providers, the Uniform Intermodal Interchange and Facilities Access Agreement ("UIIA"), specifically states that the "[p]rovider makes no express nor implied warranty as to the fitness of the

ATA-P-00300

equipment." ... Further, the typical equipment provider addendum to the UIAA [sic] requires the driver to warrant that the equipment is "roadworthy."

The petition argues that poor maintenance of intermodal equipment is a serious safety problem and requests the FHWA to make the owner or operator of such equipment responsible for the roadworthiness of the vehicles it tenders to motor carriers.

Motor carriers must be held responsible for the safety of their own equipment, but intermodal transportation requires them to operate vehicles which they do not own and rarely control until just before the highway movement begins. It can be difficult, as petitioners contend, for motor carriers to comply with the requirements of the FMCSRs without taking intermodal equipment out of service for inspection, which could cause significant delay and disruption in the movement of containers or trailers.

I have therefore decided to grant the petition, with certain qualifications. The Office of Motor Carriers is hereby directed to publish an advance notice of proposed rulemaking, setting forth the arguments made by petitioners as well as their proposed solution, and requesting information on (1) the dimensions of the safety and equity problem, (2) the extent to which regulatory intervention could reduce it, (3) the operational and economic implications for intermodalism of such intervention, (4) alternatives to regulation that might achieve similar results, (5) the costs and benefits of regulatory and non-regulatory approaches to alleviating the problem, and (6) any other matters it considers relevant. I want to ensure that the FHWA understands all of the issues at stake before deciding whether to issue a notice of proposed rulemaking.

ATA-P-00301

The petition is granted, subject to the directions set forth above.

Dated: Washington, D.C.
August 12, 1997

Anthony R. Kane
Acting Deputy Administrator

ATA-P-00302

IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF PENNSYLVANIA

UNION RAILROAD COMPANY, Plaintiff, -vs- UNITED STEELWORKERS OF AMERICA -- DISTRICT 10 and UNITED STEELWORKERS OF AMERICA -- LOCAL 3263, Defendants.	Civil Action No. 96-2095

AMBROSE, District Judge.

OPINION
and
ORDER OF COURT

Plaintiff Union Railroad Company ("the Railroad"), which is located in Monroeville, Pennsylvania, engages in interstate commerce as a "common carrier." Specifically, the Railroad operates a terminal switching railroad and connects and interchanges freight with other railroads. Transtar, Inc. ("Transtar"), a transportation holding company, which is also located in Monroeville, owns all of the Railroad's stock.

Transtar acquired the stock after obtaining ICC authorization ("Control Order"), in 1988, to control the Railroad, B&LE (which operates an adjoining railroad in

Pennsylvania and Ohio), and five other railroads. See Blackstone Capital Partners L.P., et. al. -- Exemption From 49 U.S.C. 10746, 11321, And 11343, Finance Dkt. No. 31363 (Sub-No. 1), decision served December 23, 1988 ("Control Order"). As required by then - 49 U.S.C. §§ 11347 (now §11326), the ICC imposed its New York Dock employee protective conditions on its authorization of the transaction. See New York Dock Ry. -- Control -- Brooklyn Eastern District Terminal, 360 I.C.C. 60, 84 (1979), aff'd. sub. nom., New York Dock Ry. v. United States, 609 F.2d 83 (2d Cir. 1979).[1]

Eight years later, in 1996, allegedly as part of the implementation of the overall control transaction authorized by the ICC in 1988, the Railroad and B&LE sought to coordinate certain clerical work for purposes of efficiency and economy. Currently, each railroad maintains an independent accounting department, although both are housed in the same location and report to the same managers. The clerical workers employed by the Railroad are members of Defendants United Steelworkers of America ("USWA), United Steelworkers of America - District 10 ("District 10"), and United Steelworkers of America - Local 3263 ("the Local") (hereinafter collectively referred to as "the Union"). Those clerical workers employed by B&LE are members of the Transportation Communications International Union.

The Railroad notified the Union of the proposed coordination in a letter dated September 3, 1996. The Railroad characterized the notice as one issued pursuant to Article 1, § 4 of New York Dock. The notice explained that B&LE would assume all of

[1] As stated by the Railroad, "[t]he New York Dock conditions provide generous compensatory benefits to employees who are adversely affected by a railroad merger or control transaction, including protecting an affected employee's wages for up to six years." (Docket No. 14, p.4). "The conditions also provide, in Article I, § 4, that the adjustments of workforces connected with the implementation of an authorized transaction are to be made pursuant to an agreement, which is either voluntarily negotiated or else imposed in arbitration under the expedited procedures set forth in § 4." Id. "A carrier cannot put its proposed operational procedures into effect until such an implementing agreement is reached." 360 I.C.C. at 85." Id.

the accounting work for each entity, and would increase the size of its workforce by nine positions. Nine positions at the Railroad would thereby be eliminated.

The parties initially met to negotiate an appropriate implementing agreement. Negotiations ultimately proved unsuccessful, however, when the Union claimed that the proposed coordination of work could be accomplished only by resort to the procedures set forth in the Railway Labor Act, 45 U.S.C. § 151 *et seq.* ("RLA"). "The RLA generally governs the negotiation, enforcement, and modification of collective bargaining agreements between railroad carriers and rail labor unions." Railway Labor Executives' Ass'n. v. Southern Pacific Transp. Co., 7 F.3d 902, 904 (9th Cir. 1993), cert. denied, 510 U.S. 1193 (1994). "Unlike the New York Dock conditions, the RLA provides that changes to an existing collective bargaining agreement may be arbitrated only with the mutual consent of both parties." Southern Pacific, 7 F.3d at 904.

Accordingly, the Union indicated that it would treat the Railroad's September 3rd "New York Dock" letter, as a notice of proposed changes under § 6 of the RLA. The Union further explained that it would treat the negotiations to date as having occurred pursuant to the RLA, rather than pursuant to New York Dock. The Railroad responded by providing formal notice that it was invoking arbitration under New York Dock. Because the Union declined to aid in the selection of an arbitrator, the Railroad asked the National Mediation Board ("NMB") to appoint a neutral referee.

On October 29, 1996, the Union, in turn, served the Railroad with a RLA § 6 notice proposing numerous changes in the basic collective bargaining agreement ("§ 6 Notice"). The Railroad responded that the § 6 Notice was premature under a moratorium clause in the CBA, which barred the service of § 6 Notices until March

1, 1997.[2] Because all voluntary negotiations had ceased, the Union represented its willingness to resort to self-help.[3]

In an alleged effort to minimize the risk of a strike, and without prejudice to its conviction that the terms and conditions of the RLA were supplanted by those of New York Dock, the Railroad requested mediation under the RLA. By letter dated November 5, 1996, the NMB advised that it had appointed a mediator.

The Railroad subsequently commenced this action on November 18, 1996, seeking declaratory and injunctive relief under the Declaratory Judgment Act, 28 U.S.C. § 2201, and the RLA, 45 U.S.C. § 151. The Complaint requests a declaration that the Union's October 9, 1996, § 6 notice is premature under the moratorium provision, and that self-help is unavailable.

The Union filed an Answer and Counterclaim. The Union contends that the provisions of the RLA concerning changes to the CBA govern, rather than those of New York Dock. Accordingly, the Union reasons, compelled arbitration of the dispute would violate its rights under the RLA.

Pending is the Union's Motion for Summary Judgment (Docket No. 6), both with respect to the Complaint and the Counterclaim. The Union asserts that its ability to refuse to arbitrate changes to the CBA under § 7 of the RLA overrides any

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[2] The moratorium clause provides that "[n]either party ... will serve the other party any Section [6] notices under the [RLA] whatsoever to become effective prior to April 1, 1997. Any notices served prior to March 1, 1997, will be considered as being dated March 1, 1997." See Article XV of the CBA.

[3] Under § 6, after the termination of negotiations, either party may resort to self-help (for the Union, a strike; for the Railroad, unilateral imposition of the proposed changes).

provisions which the ICC imposed in New York Dock.[4] Additionally, the Union seeks the dismissal of District 10 as a defendant, on the grounds that it is neither an "employer" or "representative, " as those terms are defined in the RLA.

Also pending is the Railroad's Motion to Dismiss Counterclaim for Lack of Subject Matter Jurisdiction. (Docket No. 12). While the Railroad disputes the Union's premise that the RLA governs, it also argues that this Court is without jurisdiction to determine whether the ICA and RLA are in conflict. According to the Railroad, the Surface Transportation Board ("STB," formerly known as the "ICC"), has exclusive jurisdiction over matters raised in the Counterclaim.

Since the filing of the pending Motions, the parties have completed arbitration under New York Dock. Arbitrator Helen M. Witt scheduled a hearing date for April 19, 1997 and received briefs on July 18, 1997. In a decision dated October 21, 1997, Arbitrator Witt determined that the proposed coordination of clerical work was, in fact, a "transaction" which flowed from the Control Order issued by the ICC in 1988; that the passage of 8 years from the date of the ICC authorization did not invalidate the transaction for purposes of New York Dock; and that the transaction did not amount merely to a transfer of wealth from employees to employer. Finally, the arbitrator approved the Railroad's proposed Implementing Agreement, with some modifications. The Union has appealed Arbitrator Witt's decision to the STB.

The parties have not, however, completed the mediation process commenced pursuant to the RLA.

After careful consideration of the parties' briefs, and counsels' oral arguments,

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[4] Section 7 of the RLA provides that "[t]he failure or refusal of either party to submit a controversy to arbitration shall not be construed as a violation of any legal obligation imposed upon such party by the terms of this Act or otherwise." 45 U.S.C. § 157 First.

and for the reasons set forth below, I find that I am without jurisdiction to resolve the matters raised in the Counterclaim. Accordingly, the Railroad's Motion to Dismiss the Counterclaim for lack of jurisdiction is granted. I further find that the issues raised in the Complaint are moot. The Union's Motion for Summary Judgment is thus granted in part and denied in part. It is granted insofar as it seeks the dismissal of the Complaint; it is denied insofar as it pertains to the Counterclaim. The Union's arguments as to the propriety of naming District 10 as a party are moot.

ANALYSIS

I. The Complaint

As stated above, the Railroad commenced this action in response to the service of the Union's § 6 Notice. The Railroad sought a declaration that the § 6 Notice, which was served in October of 1996, was premature under a contractual moratorium clause precluding service of all § 6 Notices until March of 1997. Additionally, the Railroad alleged, the Union was not entitled to engage in self-help in connection with its § 6 Notice.

The passage of time has rendered moot the issues raised in the Complaint. First, the moratorium clause provides that any § 6 Notice "served prior to March 1, 1997, will be considered as being dated March 1, 1997." See Article XV of the CBA. Accordingly, although the Union's § 6 Notice was initially premature, it became timely as of March 1, 1997.

Further, during oral argument, the parties agreed that neither the Union nor the Railroad could engage in self-help during the pendency of the mediation process. This agreement eliminates any need, on my part, to address the issue of self-help.[5]

Accordingly, the Union's Motion for Summary Judgment is granted, insofar as it seeks the dismissal of the Complaint. I find that the Union's § 6 Notice is not premature and that, as both parties acknowledged during oral argument, the parties are precluded from engaging in self-help with respect to the § 6 Notice during the pendency of the mediation process.

II. The Counterclaim[6]

The Union seeks a declaration that the provisions of the RLA governing changes to a collective bargaining agreement take precedence over the New York Dock arbitration procedures. The Union's concern lies, not with the protection of those employees being transferred to the B&LE, but with its own loss of 9 Union positions.

This Court, the Railroad counters, lacks subject matter jurisdiction over the Counterclaim. Reduced to its essence, the Railroad urges, the Counterclaim challenges the Railroad's invocation of the New York Dock arbitration process. The Surface Transportation Board ("STB"), rather than this Court, the Railroad represents, has exclusive jurisdiction to determine whether New York Dock was properly

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[5] I note that the parties disagree as to whether the Complaint implicates matters raised in the Counterclaim; namely, the propriety of the invocation of the New York Dock arbitration process. After careful review, I do not believe that the Complaint involves any such issues. The Complaint does not seek a declaration that relief under the RLA is unavailable, or that relief would only be available under New York Dock. Such a contention would, necessarily, implicate the matters raised in the Counterclaim. Rather, the Complaint seeks only a declaration that the § 6 Notice served under the RLA was premature. This issue can be resolved without resort to the New York Dock controversy. At any rate, my conclusion that I lack subject matter jurisdiction over the issues raised in the Counterclaim renders this dispute irrelevant.

[6] The Railroad sought dismissal of the Counterclaim, in part, on the grounds that it failed to present a ripe controversy. The Railroad reasoned that, until the New York Dock arbitrator rendered an award, and only if the award approved the proposed consolidation, the Union would have no claim of violations of the RLA. Given that Arbitrator Witt has now entered a decision, and that such decision approves of the consolidation, the "ripeness" issue need not be addressed.

invoked.

I agree with the Railroad's contentions. As to the characterization of the Counterclaim, it is vital to keep in mind that the Union filed its claim after the Railroad commenced the arbitration process under New York Dock. Accordingly, its claim is properly characterized as one that "neither the Commission nor its arbitrator can lawfully issue an order that derogates the Union's rights under the RLA." United Transp. Union v. Norfolk & Western R. Co., 822 F.2d 1114, 1121 (D.C. Cir. 1987), cert. denied, 484 U.S. 1006 (1988).

A review of the relevant case law persuades me that the propriety of the Railroad's invocation of the New York Dock process must be resolved by the STB, and by the Court of Appeals. I do not have jurisdiction over these matters. In reaching this decision, I find particularly persuasive, the Court of Appeals for the Ninth Circuit's decision in Railway Labor Executives Assoc. v. Southern Pacific Transp. Company, 7 F.3d 902 (9th Cir. 1993), cert. denied, 510 U.S. 1193 (1994).

In Southern Pacific, certain railroads sought to coordinate work. Accordingly, they notified the unions of the proposed coordination, and the parties met, but did not reach, an implementing agreement. "The principal stumbling block was a dispute over which set of procedures would govern the development of such an agreement." Southern Pacific, 7 F.3d at 904. Believing the coordination plan to be incident to the merger recently approved by the ICC, the railroads claimed that the changes should be implemented pursuant to New York Dock. Under New York Dock, the railroads could unilaterally invoke arbitration if the parties failed to reach an agreement. Id.

The unions disagreed. "In their view, the maintenance coordination proposal was not incident to the merger, could not be implemented without the modification of existing bargaining agreements and, therefore, would have to be implemented - if at all - under the procedures prescribed by the [RLA]." Id. The "Unions maintained that arbitration of their dispute without their consent under [New York Dock] would violate their rights under the RLA." Id.

In response to the railroad's request for the appointment of a neutral arbitrator, the unions commenced suit, "seeking a declaration that they could not be compelled to arbitrate and that the RLA procedures, not the New York Dock procedures, should apply." Id. The railroad moved to dismiss the suit for lack of subject matter jurisdiction. The district court granted the motion and the unions appealed.

The Ninth Circuit court began its analysis by reviewing the Supreme Court's decision in Norfolk & Western Ry. v. American Train Dispatchers Ass'n., 499 U.S. 117 (1991) (holding that a carrier may be exempted by the ICA from its legal obligations under the RLA and collective bargaining agreements, if such obligations impede the carrying out of an ICC approved transaction). Acknowledging that the Dispatchers case did not resolve the discrete issue before it, the Ninth Circuit court nevertheless found that the holding "and its overall conception of the statutory scheme determinative ...." Southern Pacific, 7 F.3d at 906. The court explained that:

> [f]irst of all, Dispatchers reiterates the proposition that under the ICA, "the [ICC] has exclusive authority to examine, condition, and approve proposed mergers and consolidations of transportation carriers within its jurisdiction." ... Second, Dispatchers makes clear that under section 11341(a), the ICC has the effective power of exempting parties to a railroad merger from any provision of the RLA, by approving that merger. ... It follows from these propositions that where a railroad which has been

a party to an ICC approved merger claims that certain proposed actions are incident to that merger and exempt from RLA procedures under section 11341(a), the ICC has exclusive authority to resolve a challenge to these claims.

Id. (emphasis added). "[B]ecause the ICC had exclusive authority to approve the ... merger and thereby exempt the Railroads from any procedural or substantive law which might otherwise impede that merger," the court continued, "it should have exclusive authority to clarify the scope of its own approval and the corresponding breadth of the section 11341(a) exemption." Id. The court acknowledged that any order would be subject to appellate review in the circuit court of appeals.

In addition to being consistent with the holding in Dispatchers, the court further concluded that its decision comported with the objectives of § 11341(a). Section 11341(a) was designed to "promote economy and efficiency in interstate transportation by [removing] the burdens of excessive expenditure." Dispatchers, 499 U.S. at 132. Allowing district courts jurisdiction to entertain challenges such as that filed by the union, the Southern Pacific court predicted, "would invite a barrage of collateral challenges to the ICC's authority which would be likely to frustrate and delay the administration of mergers in a way that section 11341(a) was clearly meant to avoid." Southern Pacific, 7 F.3d at 906.

The Southern Pacific decision is highly instructive. Here, as in Southern Pacific, the Union claims that a compelled arbitration pursuant to New York Dock would violate its rights under the RLA. Here, as in Southern Pacific, the Union argues that district courts have jurisdiction to determine whether New York Dock provisions were properly invoked. And in Southern Pacific, under these substantially similar circumstances, the Ninth Circuit court unequivocally held that a district court does not have jurisdiction to resolve such a dispute.

Additionally, I find the Southern Pacific holding to be consistent with that announced in other decisions. See Brotherhood Ry. Carmen Div. of Transp. Comm. Int'l. Union v. CSX Transp. Inc., 855 F.2d 745 (11th Cir. 1988), cert. denied, 489 U.S. 1016 (1989) (vacating an entry of summary judgment on the grounds that a district court was without subject matter jurisdiction to address the contention that compulsory arbitration under New York Dock violated a union's rights under the RLA); and CSX Transportation, Inc. v. United Transportation Union, 86 F.3d 346 (4th Cir. 1996) (subsuming rights granted under the Norris-LaGuardia Act, to the compulsory arbitration process announced in New York Dock).

The Union's attempts to distinguish Southern Pacific are unavailing. The Union argues that the parties in Southern Pacific, were, unlike the Railroad and Union here, signatories to the Washington Job Protection Agreement ("WJPA").[7] According to the Union, this factual distinction is vital. Signatories to the WJPA, the Union explains, contractually bargained away their RLA right to refuse to arbitrate under New York Dock.

I do not, however, find the Union's protestations to be convincing. First, I have no record evidence that the parties in Southern Pacific were even signatories to the WJPA. Indeed, the Ninth Circuit court makes no reference to the WJPA in its opinion. Certainly if the WJPA had more than historical value to the Southern Pacific court's decision, the factual summary would mention the agreement. Absent explicit limitations of the holding set forth in the text of Southern Pacific, I will not

[7] The WJPA was signed in 1936 by a number of rail carriers and unions, and was designed to permit the carriers to coordinate their work. For a more detailed history of the WJPA, see ORT v. Chicago & North Western Ry., 362 U.S. 330, 337-38 (1960).

constrain the impact of the decision based upon a factual circumstance represented to me during oral argument in this case.

Additionally, I agree with the Railroad that the relevance of the WJPA is minimal in this case. The Railroad's rights are statutory in nature, and owe nothing to the WJPA. Significantly, the Union has not identified any cases finding dispositive the fact that the parties were, or were not, signatories to the WJPA.

I similarly find unpersuasive, the Union's attempts to distinguish the Southern Pacific case based upon the distinctions between an ICC "approved" transaction, and an ICC "exempted" transaction. Admittedly, the Southern Pacific case involved an "approved" transaction, while this case involves an "exemption." Yet the Southern Pacific opinion is devoid of any indication that its holding was limited to these factual circumstances. Nor has the Union identified any cases holding such a distinction to be critical.

The Union urges that the factual circumstances in this case are more akin to those in Seaboard Air Line R.R. v. Daniel, 333 U.S. 118 (1948), than to those in Southern Pacific. In Seaboard, the Supreme Court ruled that a district court had jurisdiction to enter an injunction prohibiting the State of South Carolina from prosecuting a railroad for violation of state laws, when the ICC had permitted the railroads to engage in the exact conduct prohibited by the state statutes. The Union interprets the Seaboard decision as giving district courts jurisdiction anytime that a suit "brings into question the impact of an order of the ICC/STB on another law. ..." (Docket No. 7, p. 17).

The Ninth Circuit court rejected a similar insistence, based upon the Seaboard decision, that "because [a] lawsuit seeks the protection of certain rights under the

RLA and because the federal district court has jurisdiction over the interpretation and application of that statute, the district court should have jurisdiction over this case." Southern Pacific, 7 F.3d at 908. The Southern Pacific court noted that "[g]iven that the ICC could not have granted the injunctive relief that the railroad [in Seaboard] sought, a contrary conclusion would have left the railroad without a single jurisdiction to which it could have applied for relief." Id. In contrast, the court reasoned, the unions in Southern Pacific were not presented with this dilemma. "They merely seek to establish that the ICC's merger approval order, by way of section 1131(a), does not exempt the Railroads from implementing their maintenance consolidation proposal in accordance with the RLA." Id. "This is relief," the court concluded, "which the ICC is clearly capable of granting.

I find the Seaboard decision to be distinguishable from this case for the same reasons that the Ninth Circuit court did. Here, the Union will not be deprived of a venue in which to litigate the alleged violation of RLA rights. A circuit court, if not the STB, will certainly be able to grant the requested relief. Indeed, the Union has appealed the arbitrator's decision. On appeal, the Union again argues that application of New York Dock procedures violates its rights under the RLA. Accordingly, I find the Union's reliance upon the Seaboard decision to be misplaced.

In summary, I find that, as did the Southern Pacific court, I lack the necessary subject matter jurisdiction to resolve the issues presented in the Counterclaim. Accordingly, the Railroad's Motion to Dismiss the Counterclaim is granted, and the Union's Motion for Summary Judgment, insofar as it pertains to the Counterclaim, is denied.[8]

Dismissal of the Counterclaim is also appropriate given the present procedural status. As stated above, Arbitrator Witt has entered an award approving, with some qualifications, the proposed consolidation. Given the entry of the award, the Counterclaim is fairly characterized as an impermissible collateral attack. See United Transportation Union v. Norfolk & Western Ry., 822 F.2d 1114, 1119-22 (D.C. Cir. 1987), cert. denied, 484 U.S. 1006 (1988); and Brotherhood Railway Carmen v. CSX Transportation, Inc., 855 F.2d 745, 748-49 (11th Cir. 1988), cert. denied, 489 U.S. 1016 (1989). In so holding, I acknowledge that the Union asserted, during oral argument, that it questions whether the Railroad had the right to propose the consolidation, not how the consolidation is to be implemented. I do not, however, find this distinction to be meaningful. Certainly, the Union has not provided any citations to cases recognizing this distinction, much less finding such distinction to be of import.

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DATE FILED: NOVEMBER 24, 1997

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[8] Given this disposition, I need not address any other issues raised by the Railroad in favor of dismissal.

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THE BALTIMORE AND OHIO CHICAGO TERMINAL RAILROAD COMPANY,

v.

WISCONSIN CENTRAL LTD.

WISCONSIN CENTRAL LTD.

v.

THE BALTIMORE AND OHIO CHICAGO TERMINAL RAILROAD COMPANY, and CSX TRANSPORTATION, INC.

In Arbitration Before:

Sheldon Karon
J. Michael Hemmer
Richard B. Hasselman

AWARD

This award is being made pursuant to the provisions of the Arbitration Agreement between The Baltimore and Ohio Chicago Terminal Railroad Company ("BOCT"), CSX Transportation, Inc. ("CSXT"), and Wisconsin Central Ltd. ("WCL"). The agreement recites there is a dispute among the parties as to what amount, if any, WCL owes to BOCT for intermediate switching charges with respect to freight cars interchanged in Chicago, Illinois. This dispute and related issues, particularly those concerning charges for car-hire reclaim, have been submitted to the arbitrators for resolution. This decision addresses all issues presented by the parties, including the Counterclaim, other than Interstate Commerce Act issues raised by WCL.

Hearings were held October 24, 25, 26, 27, 30, 31, November 1, 2, 3, 6, 7 and 9, 1995, at which time the parties presented the testimony of a number of witnesses and introduced exhibits. The hearings resulted in over 3000 pages of testimony and the introduction of more than four hundred exhibits. In comprehensive post-hearing briefs filed by the parties, together with various supporting materials. Under the schedule established by the parties and modified from time to time by agreement, the decision of the arbitration panel must be rendered on or before June 10, 1996, and a copy of the panel's decision served on each party.

BOCT is one of three carriers that perform intermediate and terminal switching services in the Chicago Switching District. BOCT owns Barr Yard. which is a rail classification yard located within the District, at Riverdale, Illinois. Intermediate switching allows railroads whose rails do not meet end-to-end to exchange traffic via an intermediate carrier. Terminal switching allows line haul carriers to receive cars from, and have cars delivered to, industries located within the District. BOCT derives substantially all of its revenue from intermediate, and to a lesser degree, terminal, switching. Unlike line haul carriers, BOCT receives no share of the freight transportation fees paid by shippers or consignees.

BOCT is a wholly-owned subsidiary of CSXT. CSXT is a line haul carrier that primarily serves the eastern United States. It is a Virginia corporation, and derives substantially all of its revenue from freight transportation fees. CSXT normally delivers westbound traffic, and picks up certain eastbound traffic, at Chicago and St. Louis. CSXT's rail line terminates just outside of the District, at Pine Junction, Indiana, where its tracks connect with those of BOCT and other railroads. CSXT owns no rail lines or classification yards within the District that meet end-to-end with WCL's line of rail.

WCL also is a line haul carrier. It serves parts of Illinois, Wisconsin, Michigan and Minnesota, and is the largest "regional" railroad in the United States.

WCL was created in 1987 as the result of the acquisition of approximately one thousand nine hundred eighty miles of track from the old Soo Line Railroad. As part of its preparation for commencing business, it was necessary for WCL to arrange for the interchange of its eastbound traffic at Chicago. Since its railroad tracks were not physically contiguous with most of the carriers with which it did business, one of the solutions to this problem was to contract with intermediate switching carriers to deliver the cars of WCL to the line haul carriers who would continue the eastbound journey. These intermediate carriers similarly would deliver cars to WCL received from eastern line haul carriers whose cars were bound westward on WCL's line. In order to establish one such arrangement, Mr. Burkhardt wrote to CSXT in July, 1987. As a result of his correspondence and some communications in person and by telephone with representatives of CSXT/BOCT, a draft interchange agreement was prepared by John Booth of CSXT and submitted to E. A. Burkhardt of WCL. This draft, as revised by Mr. Burkhardt, and Mr. Burkhardt's letter to A. P. Fish of CSXT constitute the agreement between the parties. Nevertheless, the panel has received and considered extrinsic evidence with respect to the proper interpretation of its provisions.

The principal dispute is a claim for breach of contract asserted by BOCT against WCL. BOCT charges WCL with breach of the interchange agreement as the result of WCL's failure to pay BOCT's standard intermediate switch charges, together with WCL's failure to reimburse BOCT for amounts due as car hire reclaim. There is no dispute that the contract between the parties consists of two documents. The first is a draft interchange agreement dated September 18, 1987, one copy of which was introduced at the hearing as BOCT Exhibit No. 6A. The second document is a letter from E. A. Burkhardt, President of WCL, to A. P. Fish, Director of Transportation Contracts at CSXT, dated October 9, 1987. A copy of that document was introduced as BOCT Exhibit No. 32. The paragraph of the agreement that is the focus of the dispute among the parties is paragraph 2(a)(i). This paragraph is attached as Exhibit A. As stated earlier, the agreement was originally prepared in draft form by Mr. Booth of CSXT who submitted it to Mr. Burkhardt of WCL. Mr. Burkhardt reviewed the draft, made handwritten changes, and then returned the draft to Mr. Booth. The paragraph set forth in Exhibit A contains the handwritten revisions of Mr. Burkhardt.

CONTRACT INTERPRETATION ISSUES

WCL's first defense to BOCT's claim for intermediate switching charges is that the interchange agreement between the

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parties provides for direct interchange between CSXT and WCL at the Barr Yard. As a result, no intermediate switching charges arise since no intermediate switching has taken place. WCL argues that the existence of a direct interchange is established by the language of the contract, itself, by the intent of the parties as reflected in the correspondence between the parties and by the fact that BOCT was merely a corporate shell -- a mere instrumentality or agent of CSXT, rather than a bona fide operating legal entity.

The direct interchange argument is not supported by the evidence. The language of the agreement states clearly that the cars "shall be delivered in interchange direct to BOCT." The term is used both with respect to the delivery of cars by WCL to BOCT and the receipt of cars by WCL from BOCT. Essentially identical language is used to describe interchange between WCL and Belt Railway, another intermediate switching carrier. BOCT is described in the "Whereas" clauses of the agreement as an intermediate switch carrier with respect to the receipt and delivery of cars in interchange from and to connecting lines at Chicago (BOCT Exhibit No. 6A, at p. 2). There is the additional recital that "WCL desires to conduct interchange with BOCT and via BOCT and, via the Belt Railway Company of Chicago (BRC), interchange with CSXT." The last recital, as well as transportation contracts introduced as exhibits by WCL, illustrates that the parties knew how to make a reference to an interchange with CSXT rather than BOCT when that was intended.

The presence of CSXT as a party to the agreement is also urged in support of the direct interchange argument. It appears clear that CSXT was named a party because of the fact that Seaboard traffic was handled through the Belt Railway at the Clearing Yard where BOCT could not operate. Consequently, it was the obligation of CSXT under the agreement among the owners of the Belt Railway to pull its traffic from Clearing Yard. The evidence was that the expense of this transfer movement, whether through use of CSXT's own road crews or by using a BOCT transfer crew, was that of CSXT. As a consequence, CSXT was made a party to the agreement to cover the deliveries that would be made by WCL of Seaboard traffic through the Belt Clearing Yard.

With respect to whether Mr. Burkhardt's early correspondence with CSXT can be construed as a request for a direct interchange, the evidence is insufficient to establish that BOCT/CSXT ever intended to honor such a request, assuming it was made.

WCL also argues that a direct interchange exists with CSXT because BOCT cannot be viewed as a legitimate corporate entity engaged in the business of an intermediate switching carrier. The fact that BOCT is a wholly owned subsidiary of CSXT and that many functions are performed for BOCT by individuals who are on the payroll of CSXT, does not convert BOCT into a sham corporation. In the present case, WCL is attempting to apply the doctrine of "piercing the corporate veil" to a corporation with whom it contracted voluntarily. Normally, the doctrine is applied in those situations where a creditor is seeking to recover from a debtor who, by reason of the alleged existence of a corporate instrumentality, is attempting to avoid payment or performance of its obligations. In the present case, the debtor is challenging the corporate legitimacy of the creditor with which it voluntarily contracted as a basis for avoiding its contractual obligations.

The use of the doctrine in this case is inappropriate. BOCT does have a legitimate corporate existence, regardless of the number of functions it performs for itself, as distinguished from those performed for it by its corporate parent. WCL does not allege or prove that any factors supporting corporate veil piercing are present in this case. WCL, for instance, does not allege that BOCT is undercapitalized, without assets, or operated solely to provide liability protection.

Moreover, the fact that CSXT had the capability, if it so desired, to create a direct interchange by acquiring trackage rights over BOCT, is not dispositive of the issue. In this connection, the decision cited by BOCT/CSXT, <u>Burlington Northern Railroad Company</u> v. <u>United States</u>, 731 F2d 33, 40 (D.C. Cir. 1984), is instructive and persuasive. In that case, the Court held that even though the old B&O Railroad had the power to establish a direct interchange with the Burlington Northern using trackage rights over BOCT, it had no obligation to do so. The Court found it to be reasonable and proper for two non-contiguous railroads to interchange traffic through an intermediate switching carrier rather than by direct connection, even though one of the railroads involved had complete ownership of the intermediate carrier.

The present case is not a situation where WCL was the target of some imposed tariff charge. WCL entered into a contractual arrangement with BOCT voluntarily. It would appear that, during Mr. Burkhardt's review of the draft agreement, he could have proposed changes to remove the description of BOCT as an intermediate switch carrier and to limit its role in the agreement or to explain why the agreement requires payment of BOCT's standard intermediate switch charges on cars for CSXT points if the intent was to have a direct interchange with CSXT.

The next major argument of WCL in opposition to BOCT's claim for payment of intermediate switching charges is based upon the language of paragraph 2(a)(i) itself. The entire provision, containing the handwritten revisions of Mr. Burkhardt, is set forth in Exhibit A to this opinion. The revised wording of this provision expressly requires WCL to pay BOCT's intermediate switch charges unless WCL actually blocks traffic for former B&O and C&O points in conformance with blocking schedules. Nevertheless, the panel considered extrinsic evidence in interpreting this provision because the agreement between the parties is not embodied in one fully integrated writing. The heart of WCL's position, with respect to the interpretation of this section, is the testimony of Mr. Burkhardt concerning a telephone conversation in early September with Mr. Schmidt, in which Mr. Schmidt told Mr. Burkhardt that, notwithstanding the language in the agreement, WCL did not have to pay BOCT's intermediate switch charges unless BOCT requested blocking and WCL failed to block. This testimony is totally uncorroborated. Moreover, it is difficult to accept in light of the fact that Mr. Burkhardt, himself, reviewed and made handwritten changes to the draft after the alleged conversation "in accordance with [that] conversation." Burkhardt Tr., p. 1633. The testimony of Mr. Burkhardt, without more, is insufficient to overcome the plain meaning of the contract provision, which, as revised, does not support WCL's claim.

WCL also argues that BOCT was obligated to issue blocking schedules either under the plain meaning of the contract provision or by reason of an implied covenant of good faith and fair dealing. WCL argues that its performance of blocking under the agreement was frustrated by BOCT's failure to issue blocking schedules and, therefore, the obligation to pay intermediate switching charges was waived.

Again, the fact that Mr. Burkhardt personally reviewed and revised the paragraph in issue must be recognized. Mr. Burkhardt deleted the verb "may" and substituted the verb "will" with respect to whether intermediate switch charges would be waived on preblocked cars. However, the verb "may" at the end of the paragraph dealing with BOCT's obligation to release blocking schedules was left unchanged by Mr. Burkhardt. As BOCT points out, Mr. Burkhardt revised the draft to eliminate BOCT's discretion to waive intermediate switch charges on blocked cars but did not make any revision that would eliminate BOCT's discretion to ask for blocking.

The doctrine of frustration of purpose has been recognized as a further extension of the doctrine of impossibility of performance. Leonard v. Autocar Sales & Service Co., 392 Ill. 182, 64 N.E.2d 477 (1946) cert. denied 327 U.S. 8021 (1946). "It rests on the view that, where from the nature of the contract and the surrounding circumstances, the parties, when entering into the contract, must have known that it could not be performed unless some particular condition or state of things would continue to exist, the parties must be deemed, when entering into the contract, to have made their bargain on the footing that some particular condition or state of things would continue to exist." In that circumstance, ". . . the contract must be construed as subject to an implied condition that the parties shall be excused in case performance becomes impossible from such condition or state of things ceasing to exist." (64 N.E.2d at 480)

In the present case, the application of this doctrine in favor of WCL would be that its opportunity to perform blocking was frustrated by the failure of BOCT to issue blocking instructions and that this constituted a change in conditions which excused WCL from its obligation to pay intermediate switching charges. However, the application of this doctrine has an important qualification to it; namely, if the event which caused the impossibility might have been anticipated or guarded against in the contract, the parties are held to any unqualified undertaking set forth in the contract. (64 N.E.2d at 480) See also, Mouhelis v. Thomas, 419 N.E.2d 956, 959 (2nd Dist. 1981) (refusing to apply doctrine where parties provided for condition of financing in the contract, demonstrating anticipation of problem); and No. Illinois Gas Co. v. Energy Co-op., Inc., 461 N.E.2d 1049, 1059 (3rd Dist. 1984) (refusing to apply doctrine to dispute over contract for naphtha supply where events complained of were foreseeable and where price fluctuations did not make performance worthless).

In the present case, Mr. Burkhardt had the opportunity to eliminate any discretion on the part of BOCT as to whether blocking schedules would be released. The failure of BOCT to release blocking schedules is a condition that could have been anticipated or guarded against in the contract. There could have been language added with respect to what rights, if any, WCL would have if BOCT failed to issue blocking instructions, thereby depriving WCL of the opportunity to obtain a waiver of intermediate switching charges. It appears that WCL's response to this position is that Mr. Burkhardt was assured, in a telephone conversation with Mr. Schmidt, that no intermediate switch charges were payable unless blocking instructions were issued and WCL failed to block. As indicated earlier, the evidence is insufficient to support this interpretation of the agreement between the parties and to overcome the plain language of the contract provision imposing intermediate switch charges. If anything, this second conversation with Mr. Schmidt establishes WCL's awareness of the potential problem. Mr. Burkhardt's failure to change the contract language under those circumstances precludes WCL from relying on the doctrine of impossibility and underscores the questions about the conversation.

WCL also argues that the failure of BOCT to issue blocking schedules was a breach of its common law duty to perform its contractual obligations in good faith. Assuming that fairly early in the operation of WCL, there were a sufficient number of cars being brought to Barr Yard by WCL to justify blocking, was a decision on the part of BOCT to collect the intermediate switch charge rather than issue blocking instructions to WCL an act of bad faith on the part of BOCT? Part of the answer appears to be that the implied covenant of good faith and fair dealing is difficult to apply to a case where both parties expressly retained discretion as to whether performance would occur. In the present case, BOCT retained discretion as to whether it would issue blocking instructions or collect the intermediate switch charge. WCL retained discretion as to whether it would perform pre-blocking if blocking schedules were issued or would pay the intermediate switch charges. In any event, the negotiations, as described at the hearings and in the documentary evidence, do not support the argument that BOCT was required to issue blocking instructions so as to relieve WCL from paying intermediate switch charges. The testimony established, in the first instance, that BOCT and CSXT had to determine if sufficient benefits were to be obtained from issuing blocking instructions There was no persuasive evidence that anyone at BOCT or CSXT made such a determination at least until 1995. Mr. Schmidt testified that, before WCL ever operated any trains, he expected that blocking would be requested based on operations of its predecessor, but he never studied WCL's traffic and the decision whether to request blocking rested with others. Further, a decision to collect the intermediate switch charges rather than issue blocking instructions does not rise to the level of bad faith performance of the agreement. Based on the contract provision itself, it does not appear that proof of the existence of legitimate blocking opportunities imposed an obligation on BOCT under the good faith performance doctrine to issue blocking instructions.

Finally, some evidence was introduced and some arguments were made with respect to whether blocking, in fact, occurred, either with or without instructions. The only credible evidence on this issue relates to WCL's placement of Illinois Central cars on the front end of WCL trains during an early period of the relationship between BOCT and WCL. This evidence was insufficient to establish that blocking instructions had been issued and that, as a result, WCL was relieved of the payment of intermediate switch charges. Moreover, as revised by Mr. Burkhardt, the waiver of intermediate switch charges does not apply to the Illinois Central cars.

WCL's argument that it would not have entered into, or received consideration under, the contract unless it had the ability to avoid paying intermediate switch charges is contradicted by the fact that, at about the same time as it negotiated this contract, it entered into similar agreements with Belt Railway and Indiana Harbor Belt. Under those agreements, WCL did not have the ability to avoid paying intermediate switch charges. WCL received benefits from all three agreements such as preparation of its trains, locomotive storage, crew calling and the ability to avoid operating a large freight yard in the Chicago area.

Several other arguments have been made by WCL in support of its defenses to the claim of BOCT for intermediate switch charges and in the Counterclaim. No attempt has been made in this opinion to address each of those arguments, each of which depends on arguments already addressed, or like WCL's estoppel and fraudulent performance claims, were abandoned. All of them are insufficient to preclude a recovery on the part of BOCT. BOCT is entitled to an award of the intermediate switch charges in the amount reflected in the damage section of this opinion. Moreover, since a finding has been made that BOCT was acting as an intermediate switching carrier with regard to WCL's cars, it follows that WCL is liable to BOCT for car-hire reclaim. The amounts owing by WCL to BOCT for car-hire reclaim are also reflected in the damage portion of this opinion.

DAMAGES

WCL contends that, under section 8 of the contract as revised by Mr. Burkhardt, any WCL liability for intermediate switch charges is limited to the intermediate switch charges in effect at the time of the contract. Section 8 does not appear to have so broad a sweep. Based on the language selected by Mr. Burkhardt, which refers to "costs" and "user," section 8 appears to pertain to the types of operating costs associated with another agreement between the parties concerning trackage rights. If the parties had intended to place a limit on intermediate switch charges, which are not otherwise referred to as "costs," they would have specifically referred to those charges as they did in Section 2.

BOCT is hereby awarded damages against WCL as follows:

1.	The principal amount of intermediate switch charges on CSXT-destined traffic through August, 1995	$13,188,146.00
2.	Five percent (5%) statutory interest on Item 1 as of March 31, 1996	$ 2,186,846.40
3.	Principal amount of car-hire reclaim through June, 1994 (as reduced by payment of $20,384.48 for terminal switching charges)	$ 1,135,070.23
4.	Five percent (5%) statutory interest on Item 3 through March 31, 1996	$ 192,213.27
5.	Principal amount of improperly claimed credit as of April 30, 1993	$ 497,341.00
6.	Five Percent (5%) statutory interest on Item 5 as of June, 1996	$ 76,673.40

In addition to the foregoing, BOCT is awarded the principal amount of intermediate switch charges on CSXT-destined traffic from September, 1995, through June 10, 1996, plus interest at the five percent (5%) statutory rate thereon through said date. In addition, interest is hereby awarded on the principal amount of intermediate switch charges and on the car-hire reclaim amount from April 1, 1996, through June 10, 1996. Intermediate switch charges will continue to apply on cars delivered by WCL to BOCT for points on CXST unless the contract is terminated or modified or blocking instructions are issued by BOCT, and interest will continue to accrue on all amounts owed by WCL until paid.

DATED: JUNE 10, 1996

Sheldon Karon
SHELDON KARON
ARBITRATOR

J. Michael Hemmer
J. MICHAEL HEMMER
ARBITRATOR

RICHARD HASSELMAN
ARBITRATOR

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Dissenting opinion of Richard B. Hasselman, Member of Panel:

I disagree with, and therefore dissent from the views expressed and findings reached by the other members of the panel, both as to their conclusions and their assessment of damages.

As a member of this three man panel, I bring more than 40 years of management experience in the railroad industry. During the final 13 years of my career I was the chief operating officer of a major U.S. railroad. I have served as Chairman of several committees which established rules and arbitrated disputes regarding railroad interchange and I have been Chairman of the Interchange Committee of the General Managers Association of Chicago. As a result, I feel that I am well qualified to understand the circumstances of this dispute, and its proper resolution.

This dispute arose because the Interchange Agreement between WCL and CSXT is subject to more than one interpretation. Under such circumstances, it is the obligation of the panel to interpret it on the basis of the mutual intent and expectations of the parties who drafted it. Those two individuals testified at the Arbitration Hearings and their testimony was clear and corroborative. However, the Panel totally disregarded that testimony and adopted instead an "off-the-wall" position urged upon them by the CSXT brief.

I find this failure to consider the facts to be an incredible and offensive act of dereliction by the Panel. My own analysis and conclusions regarding the facts of this case is set forth in Section A, which follows.

In assessing proposed damages, the panel has also adopted a view urged upon them by the CSXT brief, rather than being governed by the clear language of Interchange Agreement, which requires that a contemplated revision in CSXT interchange arrangements must not increase WCL costs. The Panel ignored that clear language in establishing damages. I consider their disregard of this contract provision to be another instance of dereliction.

The hearing evidence also established that CSXT had improperly billed WCL for intermediate switching charges and per diem reclaim on ore trains and other "contract cars" which move under transportation agreements which specifically exclude them from such charges. Now, rather than ordering CSXT to correct its billings, the panel proposes to order WCL to pay the full amount of those bills. This conclusion is incredible, and is another instance in which the Panel has ignored facts in evidence.

My own analysis and conclusior regarding damages is covered in Section B, following.

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A)The Panel has failed to consider all testimony relative to the intent of the parties, with respect to the application of Intermediate Switching Charges and Per Diem Reclaim. The facts are clear that:

1)Because the interpretation of the hastily-drawn Interchange Agreement is in dispute, the Panel must consider the intent of the parties, in drafting that Agreement. Those parties are Thomas P. Schmidt, for CSXT and Edward A. Burkhardt, for WCL.

2)Burkhardt's intent, based upon his correspondence with CSXT and his testimony before the Panel, was to have WCL deliver cars directly to, and to pull cars directly from Barr Yard, and to be relieved of any B&OCT Intermediate Switching Charges and Per Diem Reclaim payments for so doing. In addition, he offered to preblock traffic for CSXT, if requested. Based upon his conversation with Schmidt, Burkhardt believed that WCL would have to pay B&OCT charges only if CSXT requested blocking, and WCL failed to block in accordance with blocking schedules.

3 In dealing with Burkhardt's intent and understanding with Schmidt, the Panel opinion states that Burkhardt's testimony "is totally uncorroborated". This is not true, as it completely overlooks the testimony of Schmidt. Schmidt's testmony corroborates Burkhardt's in every respect, relative to the intent of the parties regarding relief from B&OCT charges.
Schmidt's intent, based upon his telephone statements to Burkhardt and his testimony before the panel, was to have WCL deliver cars directly to, and to pull cars directly from Barr Yard, and to relieve WCL of any B&OCT Intermediate Switching Charges and Per Diem Reclaim payments for so doing, if WCL preblocked traffic for CSXT in accordance with "blocking schedules" released by CSXT. Both in his August 26, 1987 letter and in his testimony, Schmidt made it clear that his intent was that WCL would pay B&OCT charges only if it failed to block in accordance with blocking schedules which Schmidt expected CSXT to issue.

4)As to blocking, Schmidt testified:

(a) That he contemplated that CSXT would desire WCL to block, just as it wished its other western connecting lines to block, and
(b) That he expected that CSXT would "release blocking schedules" as the Interchange Agreement inferred that it would, and
(c) That he was surprised to learn that such blocking schedules had not yet been released.

5) Based upon the aforementioned telephone assurance from Schmidt, Burkhardt felt that he had an understanding with Schmidt that Intermediate Switching Charges and Per Diem Reclaim would be waived, if WCL blocked as CSXT prescribed. Because Schmidt had assured him that blocking would be requested and blocking schedules issued, Burkhardt did not demand that the language of the agreement be modified further, to express this understanding with Schmidt. Although it may be inadviseable, such reliance upon the statements of counterpart officers is normal in the railroad industry, based upon my own 42 years of experience in that industry.

6) Even if CSXT did not release blocking instructions at the outset, it clearly was intended that it would do so at some point in time. As traffic volumes increased, CSXT should have analyzed such flows to determine which blocks would be useful, just as CSXT did with its other connecting railroads. Then CSXT should have released blocking schedules to WCL, so that WCL would have had the opportunity to perform such blocking, and to be relieved of all B&OCT charges, as the drafting parties intended.
The evidence shows that opportunities clearly existed for useful blocking, fairly early in WCL operations, however CSXT did not release any blocking schedules to WCL.

7) The parties never intended that CSXT would fail to, or refuse to issue blocking instructions, and by that device, deprive WCL of its ability to secure relief from B&OCT charges, as Burkhardt had proposed and Schmidt had concurred, thus the Agreement was not revised to set forth such a requirement.

8) The Panel's opinion says that the "doctine of good faith" does not apply here, because Burkhardt did not eliminate the discretion of CSXT as to whether blocking instructions would or would not be issued. However it is clear to me, from studying the briefs on this point, that the circumstances in this case are precisely those in which that doctrine should apply.

Therefore, the Panel should find that CSXT has forfeited any right to collect B&OCT intermediate switching and per diem reclaim charges, because of CSXT's failure to release blocking schedules as intended by the parties drafting the agreement.

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B) In the event that any monetary damages are owed by WCL to CSXT or B&OCT, the Panel has stated them incorrectly:

1) Paragraph 8 of the Interchange Agreement provides that CSXT may rearrange its interchanges at Chicago, and that WCL would be bound by same "provided such revised arrangement does not increase WCL costs or unreasonably delay users traffic". In fact, Burkhardt added this provision to the draft agreement in his own handwriting. Even though CSXT's Law Department made a written notation objecting to this provision, the handwritten change was included in the final agreement.
CSXT did make these contemplated changes on May 1, 1988, when it simultaneously shifted its receipt of Seaboard traffic from Clearing Yard to Barr Yard and arbitrarily increased B&OCT Intermediate Switching Charges from $75 per loaded car and $38 per empty car to $105 per car, loaded or empty, "to drive away non-CSXT traffic from Barr Yard".
The damage amounts claimed are based upon $105 per car, ignoring this provision of Paragraph 8. If any damages are applicable, they must be recalculated on the per-car rates in effect for loaded and empty cars prior to CSXT's May 1, 1988 change.
(See WCL Initial Brief, pp 167-170.)

2) The amounts claimed for intermediate switching charges still include improper charges, by CSXT, for ore trains and other "contract cars" which are exempt from such charges. The record clearly shows that such cars have not been subtracted from the amount claimed by CSXT.
If any damages are applicable, they must be recalculated to exclude switching charges and per diem reclaim for all ore trains and contract cars, which are specifically exempt from such charges.
(See WCL Initial Brief, pp 164-165, and Reply Brief, pp 44-45; also see of WCL Initial Brief, pp 165-166 and Reply Brief, p 43 as to Per Diem Reclaim)

3) The inclusion of "statutory interest" is improper. However if any such damages are applicable, they must be recalculated on the basis of the proper switching charges and must exclude all ore and contract traffic, as well as per diem reclaim on same, as outlined in the two preceding items.
(See WCL Initial Brief, pp 171-173)

Therefore, the Panel should require that the appropriate accounting personnel of CSXT and WCL get together and resolve these disputed charges to the satisfaction of the Panel, which should retain jurisdiction pending such final resolution.

Respectfully submitted,

R.B. Hasselman

Richard B. Hasselman
Member of Panel
June 5, 1996

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that on Friday, June 7, 1996, he caused to be served, via personal delivery, a copy of the foregoing Award upon the following counsel of record in this matter:

Robert H. Wheeler, Esq.
James A. Fletcher, Esq.
Oppenheimer Wolf & Donnelly
Two Prudential Plaza
45th Floor
180 N. Stetson Avenue
Chicago, IL 60601
Counsel for Wisconsin Central Ltd.

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135 S. LaSalle Street
Suite 2300
Chicago, IL 60603
Counsel for The Baltimore and Ohio Chicago Terminal Railroad Company and CSX Transportation, Inc.

Sheldon Kanoe

Keck, Mahin and Cate
77 West Wacker Drive
49th Floor
Chicago, IL 60601
312/634-7700

WHEREAS, BOCT and CSXT are agreeable to such interchange arrangements at Chicago, desiring to cover same with formal agreement.

NOW, THEREFORE, in consideration of the mutual covenants and agreements herein set forth, it is agreed between the parties hereto as follows:

1. An official interchange point between BOCT, CSXT and WCL will be Chicago, IL, more particularly described on CSXT Engineering Department Drawing No. ________ dated ____________________, attached hereto and made a part hereof as "Exhibit A."

2. (a) WCL agrees to deliver cars in its account for interchange with BOCT and CSXT as follows:

(i) Cars destined To or routed via BOCT points and former B&O and C&O points shall be delivered in interchange direct to BOCT on Barr Yard tracks designated from time to time ~~for the purpose~~ by BOCT's Barr Yard operating officer in charge. Standard BOCT intermediate switch charges shall apply on ~~all~~ such cars, provided however, that said charges ~~may~~ will be waived ~~[illegible]~~, should WCL pre-block certain of such cars in accordance with blocking schedules of BOCT as may be released or revised from time to time. J000305

routed via or destined to former B&O and C&O points.

EXHIBIT A

THE BALTIMORE AND OHIO CHICAGO TERMINAL RAILROAD COMPANY, v. WISCONSIN CENTRAL LTD.	In Arbitration Before: Sheldon Karon J. Michael Hemmer Richard B. Hasselman
WISCONSIN CENTRAL LTD. v. THE BALTIMORE AND OHIO CHICAGO TERMINAL RAILROAD COMPANY, AND CSX TRANSPORTATION, INC.	

SUPPLEMENTAL AWARD

This Supplemental Award is being made pursuant to the Memorandum Opinion and Order dated January 29, 1997, entered by United States District Judge William T. Hart in Case No. 93C 3519 entitled The Baltimore and Ohio Chicago Terminal Railroad Company (Plaintiff) v. Wisconsin Central, Ltd. (Defendant), the supplemental arbitration submission of The Baltimore and Ohio Chicago Terminal Railroad Company ("BOCT") dated February 28, 1997, the response of Wisconsin Central Ltd. ("WCL") to BOCT's supplemental arbitration submission dated March 13, 1997, and the letter from counsel for BOCT to Sheldon Karon dated March 20, 1997.

In the District Court opinion referred to above, the Court had remanded to this panel for determination whether certain switching fees are properly chargeable to Wisconsin Central Ltd. and what amount of additional interest, if any, is due BOCT from WCL. The parties have come to an agreement as to the amounts due for principal and interest to be awarded pursuant to this Supplemental Award. The panel recognizes this Supplemental Award is being made over WCL's objection and that WCL still maintains its position that BOCT is not entitled to recover any intermediate switching charges or any car-hire reclaim fees.

Accordingly, BOCT is hereby awarded damages against WCL pursuant to the supplemental submission and agreement of the parties as follows:

1.	The principal amount of intermediate switch charges on CSXT-destined traffic for the period from June 1, 1996, through August 4, 1996;	$521,745.00
2.	Five percent (5%) statutory interest on Item 1 of Panel's Award of June 10, 1996, for the period from June 1, 1996, through February 28, 1997;	$493,201.80
3.	Five percent (5%) statutory interest on Item 3 of Panel's Award of June 10, 1996, for the period from June 1, 1996, through February 28, 1997;	$ 42,448.77
4.	Five percent (5%) interest on Item 5 of Panel's Award of June 10, 1996, for the period from July 1, 1996, through February 28, 1997;	$ 16,555.59
5.	Five percent (5%) statutory interest from October 20, 1995, through February 28, 1997, on $2,286,585.00 in intermediate switch charges billed to WCL for the period from September 1, 1995, to August 4, 1996, on CSXT-destined traffic not claimed by WCL to be exempt from intermediate switch charges under rail transportation contracts or exempt rate quotes;	$104,179.11
6.	Five percent (5%) per annum statutory interest accruing daily on all principal items (Items 1, 3, and	$2,343.45/day

5 of the Panel's June 10, 1996, Award
and Item ~~5~~ 1 of this Award) unpaid
after February 28, 1997. JMH

Mr. Richard B. Hasselman continues to disagree with the original Award, as well as with this Supplemental Award. Mr. Hasselman will restate his position and dissent separately.

DATED: April 3, 1997

Sheldon Karon
SHELDON KARON
Arbitrator

J. Michael Hemmer
J. MICHAEL HEMMER
Arbitrator

RICHARD B. HASSELMAN
Arbitrator

Dissenting opinion of Richard B. Hasselman, Member of Panel:

In my June 5, 1996 dissent from the original Award of the panel, I explained my reasons for concluding that *BOCT was not entitled to recover any intermediate switching charges or car-hire reclaim for CSXT cars which WCL delivered to Barr Yard.*

Also, I explained how the governing Interchange Agreement specifically provided that *CSXT must not increase WCL costs by any changes in interchange arrangements made by CSXT.*

I have no reason to deviate from the positions which I stated in that dissent, and I hereby register my dissent to this Supplemental Award, as well.

Richard B. Hasselman

Richard B. Hasselman
Member of Panel
April 2, 1997

ARBITRATION AWARD

Established pursuant to Section 4 of Article I of the New York Dock Conditions imposed by the Interstate Commerce Commission in Finance Docket No. 32133

In the Matter of Arbitration between:

Brotherhood of Locomotive Engineers
(Organization)

and

Union Pacific Railroad Company
(Carrier)

I. Issues:

Organization's Statement of the Issue(s):

"1. Is the subject notice proper under Article I, Section 4 of the New York Dock Conditions?

2. Are the matters set forth in the subject notice an integral part of the transaction approved by the Commission?

3. Are the terms contained in the subject notice necessary to the implementation of the transaction?

4. If the answers to the above questions are in the affirmative, what shall be the terms of the applicable implementing agreements?"

Carrier's Statement of the Issue(s):

"Does the Carrier's Proposed Arbitration Award constitute a fair and equitable basis for the selection and assignment of forces under a New York Dock proceeding so that the economics and efficiencies - the public transportation benefit - which the ICC envisioned when it approved the underlying rail consolidation of the CNW into the Union Pacific will be achieved?"

II. Introduction:

On February 21, 1995, the Interstate Commerce Commission (ICC) authorized the acquisition of control of the Chicago and North Western Railroad Company (CNW) by the holding company that controls the Union Pacific Railroad Company (UP) and the Missouri Pacific Railroad Company (MP). Union Pacific/Missouri Pacific Railroad Company – Control – Chicago and North Western Railroad Company, I.C.C. Finance Docket No. 32133. To compensate and protect those employees affected by the acquisition, the ICC imposed the employee merger protection conditions as set forth in New York Dock Railway – Control – Brooklyn Eastern District Terminal, 360 I.C.C. 60, 84-90 (1979); affirmed, New York Dock Railway v. United States, 609 F.2d 83 (2nd Cir. 1979) ("New York Dock Conditions) on the UP/MP and CNW pursuant to the relevant enabling statute 49 U.S.C. Sections 11343 and 11347.

On May 3, 1995, Carrier served a Notice (Appendix "A") upon the Organization of its intent, pursuant to Article I, Section 4 of the New York Dock labor protection conditions, to negotiate an implementing agreement in order to effectuate the benefits of the merger transaction of the UP and the CNW. A copy of Carrier's merger transaction proposal was attached thereto. Said notice letter further indicated that negotiations between the parties would commence on May 25, 1995.

In a response letter to Carrier dated May 18, 1995, Organization's General Chairman advised Carrier, in pertinent part, that since Section 2 of the New York Dock conditions provided for the preservation of existing collective bargaining agreements in such situations, then "(A)ccordingly, we (Organization) are committed to preserving all existing CNW-BLE agreements, rates of pay, understandings and/or practices."

Negotiations ensued between the parties over the period of the next several months; agreement was made on some issues, but not on all.

Given the parties' inability to reach agreement on all issues through their negotiations, in a September 12, 1995 letter, Carrier advised Organization of its intent to submit the dispute to arbitration pursuant to Article I, Section 4 of the New York Dock labor protective conditions.

Carrier and Organization, through their own efforts, agreed to appoint the undersigned as Arbitrator in this matter; and so formally notified said Arbitrator of his appointment by letter dated September 26, 1995.

An arbitration hearing was held in this matter in Omaha, Nebraska on November 28 and 29, 1995. The parties presented their respective cases by means of written submissions which were reviewed and discussed at the hearing and which were supplemented by documentary evidence and the testimony of supporting witnesses. Upon the completion of their respective presentations, the parties attested that the hearing had been conducted properly, and that they had been accorded full and fair opportunity to present all relevant evidence, documentation and testimony necessary for the Arbitrator to render a decision in this matter. At the Arbitrator's request, the parties waived the thirty (30) days limitation for issuing an Award herein in accordance with Article I, Section 4(a)(3) of the New York Dock protective conditions. The hearing was then adjourned; and the matter is now properly before the Arbitrator for resolution.

III. Arguments of the Parties:

Organization, in its presentation, raised three (3) procedural issues and one (1) merits issue which is predicated upon an affirmative finding on the three (3) aforestated procedural issues.

Carrier, on the other hand, presented only one (1) merits issue herein, but in its argumentation, does address Organization's three (3) procedural issues and concludes that they are meritless and should be dismissed.

For obvious reasons, Organization's procedural issues must first be addressed and resolved in this analysis.

A. "Is the subject notice proper under Article I, Section 4 of the <u>New York Dock</u> Conditions.?"

Article I, Section 4 of the <u>New York Dock</u> Conditions, in pertinent part, states as follows:

> "4. <u>Notice and Agreement or Decision</u>
>
> (a) Each railroad contemplating a transaction which is subject to these conditions and may cause the dismissal or displacement of any employes, or rearrangement of forces, shall give at least ninety (90) days written notice of such intended transaction by posting a notice on bulletin boards convenient to the interested employes of the railroad and by sending registered mail notice to the representatives of such interested employes. Such notice shall contain a full and adequate statement of the proposed changes to be affected by such transaction, including an estimate of the number of employes of each class affected by the intended changes. Prior to consummation the parties shall negotiate in the following manner..."

Organization, it appears, takes no exception to the timing or logistics of the posting of the subject Notice. Rather, Organization does take exception to the phrasing and content of the Notice in comparison to Carrier's January 29, 1993 application for control of CNW by UP/MP which was filed with the ICC in Finance Docket No. 32133, and as further expounded upon in the Labor Impact Statement and Operating Plan which were attached to Carrier's original ICC application. In this regard, according to Organization, Carrier stated to the ICC "... that the impact upon employees would be minimal ... that there would only be relatively minor changes in yards and terminal(s) and '(m)ost major terminals would experience little change in total traffic volumes requiring classification'." However, Organization continues, "(T)he projected consolidations of common points and the operation at them set forth in the Operating Plan is far different from the proposed consolidations and changes in the Notice." Still yet further concerning this same point, Organization also notes that on October 28, 1993, Carrier submitted a supplemental application to the ICC as directed, and contained therein, "(T)he new Labor Impact Statement stated that three (3) engineers' jobs would be abolished in the first year – one each at Des Moines, Fremont and Kansas City ... (and) ... that eight (8) engineers' jobs would be created in year 2." Organization asserts that, "(N)owhere within the supplemented application was there any indication that the proposed changes contained in the Notice ... were part of the transaction or were ever presented to the Commission as part of the contemplated economies and efficiencies." In similar fashion, Organization also argues that Carrier's March 30, 1994 rebuttal, which was filed with the ICC in support of the primary application for control, was significantly different from the information which was contained in Carrier's May 3, 1995 Notice. Given Carrier's presentations and disclosures to the ICC, Organization contends, it is apparent that the ICC's approval of Carrier's application for control of CNW by UP/MP did not anticipate the "draconian measures" which are contained in Carrier's May 3, 1995 Notice to Organization and the affected employees.

In summary of this particular contention, Organization asserts that insofar as "... the Commission constantly emphasized that the purpose ... (of the merger) ... was a cooperative effort as to the end-to-end connections in order to provide high quality, seamless service 'through agreed-upon marketing and operating coordination's between UP and CNW" ... (that) ... there would only be a 'minor effect' on rail labor ... (and that) ... full integration of UP and CNW would have a substantially greater impact ...", then Carrier's now disputed May 3, 1995 Notice was improper and was contrary to the requirements of Article I, Section 4 of the applicable New York Dock Conditions.

Responding to Organization's contentions concerning the adequacy of Carrier's May 3, 1995 Notice, Carrier maintains that the ICC, in Finance Docket No. 32133, while commenting upon the Section 11341 (a) Immunity Provision of the Interstate Commerce Act, stated as follows:

> "The Commission ... has never required applicants to identify all anticipated changes that might impact on CBAs or RLA rights. Such a requirement could negate many benefits from changes that only become apparent after consummation. Moreover, there is no legal requirement for identification, since section 11341 (a) is 'self-executing,' that is, its exemptive power is effective when necessary to permit the carrying out of a project. Put another way, the exemption does not depend on a Commission finding that it is applicable. We will not limit the use of section 11341 (a) by declaring that it is available only in circumstances identified prior to approval. Cf. American Train Dispatchers Ass'n v. ICC, 26 F. 3d 1157 (D.C. Cir. 1994)."

Accordingly, Carrier asserts that, "(U)nder the ICC's merger approval, the Carrier has the discretion to identify what transactions make sense on the merged carrier ..."; that Carrier's notice in such cases is not restricted only to those specific items which were originally included in Carrier's application for control which was submitted to the ICC for approval as well as other subsequent related documents; and, furthermore, regardless of the Commission's determination described above, Carrier's May 3, 1995 Notice embodied the scope and substance of the information which was contained in the Labor Impact portion and Operating Plan portion of Carrier's original application which was submitted to the ICC for authorization and approved for the common control of UP and CNW.

B. "Are the matters set forth in the subject notice an integral part of the transaction approved by the Commission?"

Organization's basic contention concerning this particular issue is that while the Carrier applicants advised the ICC "... that their application involved a mere control transaction for purposes of voting the common stock of the Chicago and North Western owned by Union Pacific and in addition was a cooperative effort to further their already existing end-to-end arrangements ...", the disputed changes which are presently now sought, and which were included in Carrier's May 3, 1995 Notice, include,

> "... changes in the labor contracts of the Chicago and North Western engineers pertaining not to the merger or control transaction, but to the current single-line operations of the ... (CNW). The applicants are seeking to make these changes under the auspices of this Board rather than negotiating those changes with the Brotherhood of Locomotive Engineers pursuant to the Railway Labor Act ... (and) ... (T)he transaction does not require these changes, nor would it be frustrated if the changes advocated by the Carrier are rejected ..."

According to Organization, those matters which were included in the May 3, 1995 Notice, which are not an integral part of the ICC approved transaction, and which, therefore, reside outside of the Arbitrator's jurisdiction, in general form, are as follows:

1. Twin City Road Terminal Complex (Item III B. of the Notice)[1]
2. Omaha Metro Road Terminal Complex (Item II A. of the Notice)
3. Chicago Road Terminal Complex (Item II B. of the Notice)
4. Kansas City Road Terminal Complex (Item III A. of the Notice)
5. South Pekin Operation (Item IV of the Notice)
6. Wyoming Coal Operation (Item V of the Notice)
7. Midwest Gain Operation (Item VI of the Notice)

---

1 Although this particular item was included in Organization's written Submission, nonetheless, at the arbitration hearing which was held in this matter, the parties advised the Arbitrator that said item had been withdrawn from consideration by Carrier.

Organization's objection to the inclusion of the aforestated matters in Carrier's Notice and proposed implementing agreement is predicated upon a multiplicity of contentions (i. e. - "... no UP presence ..."; "... no operational advantage from such a consolidation ..."; "... blatant attempt to eliminate ... all in derogation of existing collective bargaining agreement provisions ...etc.";) which are too numerous and too detailed to include in this Award. Be that as it may, however, and while Organization acknowledges that some degree of coordination is required in the five (5) common CNW-UP/MP terminal points (i. e. - Kansas City, St. Louis/Madison, Omaha/Council Bluffs; Fremont; and Chicago), Organization does not endorse Carrier's proposals relative thereto; nor does Organization concur that the issues come within this Arbitrator's purview under the provisions of Article I, Section 4 of the New York Dock Conditions. As an alternative(s), Organization proposes that at each of the Dual Point Terminals where coordination is necessary,

> "... the terminal classification work of the respective Carriers should be quantified through engine hour/car count studies to determine the proportion of the whole represented by each Carrier (work equity). Employees should then be integrated in accordance with the respective work equities, with prior rights preserved to each group's respective former assignments .. (and also) ... that the schedule agreement which should govern employees working at the various coordinated terminals should be that which applies to the larger proportionate group of one Carrier's employees (predominate agreement)."

Carrier contends that the matters set forth in the May 3, 1995 Notice are an integral part of the transaction which was approved by the ICC, and which are the focus of the instant proceeding. In this regard, Carrier, in summary, maintains that,

> "The heart of the Carrier's Proposed Arbitration Award is found in the first three Articles - Seniority and Work Consolidations,

> New Operations and Terminals/Complexes. First, UP and CNW seniority rosters and districts must be consolidated. This is the basic selection and rearrangement of forces obligation of the New York Dock conditions which creates the 'hubs' that are critical to Union Pacific operating strategy. Second, new operations out of the newly created hubs provide the 'spokes' for UP's long run, non-stop through freight train operations. Third, all operations within each newly created hub must be under one collective bargaining agreement so that operations within, into and out of the hub are both consistent and efficient."

Furthermore, according to Carrier, the proposed combination of operations, facilities and work forces of the CNW into UP in order to form a single operation, as embodied in the May 3, 1995 Notice and Carrier's proposed implementing agreement, are "... directly related to and grow out of, or flow from ..." the ICC's decision in Finance Docket No. 32133 authorizing UP to control CNW; and "(I)ndeed, the ICC order expressly contemplated UP would take such action to realize merger efficiencies."

Carrier thus contends that the matters set forth in the May 3, 1995 Notice as well as in its proposed implementing agreement, are integral parts of the transaction which was approved for implementation by the ICC. Accordingly, Carrier notes that the ICC in its ruling in Finance Docket No. 32133 clearly stated that, "(T)he exemptive powers of section 11341 (a) is not limited to the financial and corporate aspects of the approved control transaction but reaches all changes that logically flow from that transaction." Insofar as Carrier's proposals "... provide for an appropriate rearrangement of forces so that the economies and efficiencies of the subject consolidation may be accomplished ...", which has already been determined by the ICC to be in the public interest, then, Carrier maintains, said proposals are an integral part of the transaction, and are proper.

C. "Are the terms contained in the subject notice necessary to the implementation of the transaction?"

Related to the previously discussed submission question, although posed as a separate question in its written Submission, Organization further contends that the terms contained in Carrier's May 3, 1995 Notice, and also contained in its proposed implementing agreement, are not "necessary" to the implementation of the transaction; nor would the transaction be frustrated if the changes which are advocated by Carrier were to be rejected. In this regard, using basically the same contentions/arguments/data as those which were proffered by Organization in its previous "integral part of the transaction" contention, Organization asserts that, absent a showing on Carrier's part that the avoidance of existing contractual or statutory (i. e. - Railway Labor Act) obligations are "... necessary to carry out the approved transaction ...", as is required by the the Supreme Court of the United States in its decision in Norfolk & Western Ry. v. American Train Dispatchers Association, 499 U.S. 117, 111 S. Ct. 1156 (1991), then the Section 11341 (a) immunity provision of the Interstate Commerce Act is not applicable. Under such circumstances, Organization contends, Carrier's resort to the Interstate Commerce Commission and the labor protective requirements of 49 U.S.C. Section 11347 and the New York Dock labor protective conditions is improper since Article I, Section 2 of the New York Dock conditions "... clearly mandates that 'rights, privileges, and benefits' afforded employees under such CBA's be preserved."

As further support for the aforestated argument, Organization also contends that Article I, Sections 2 and 4 of the New York Dock conditions are compatible in the instant proceeding. According to Organization, on the one hand, Article I, Section 2 provides that, " ... rates of pay, rules, working conditions and all collective bargaining and other rights, privileges and benefits ... of the railroad's employes under applicable laws and/or existing collective bargaining agreements or otherwise shall be preserved unless changed by future collective bargaining agreements or applicable statutes." On the other hand, however, Article I, Section 4 provides that, "(E)ach transaction which may result in a dismissal or displacement of employe or rearrangement of forces, shall provide for the selection of forces from all employees involved on a basis accepted as appropriate for application in the particular case and any assignment of employes made necessary by the transaction shall be made on the basis of an agreement or decision under this Section 4 ..." (i. e. - arbitration).

It is Organization's contention that Article 1, Sections 2 and 4 do not exist separately, "... and neither should be read out of the New York Dock conditions ... (but) ...(I)nstead, they 'exist in pari materia and accordingly must be read together in a way that gives effect to each'." In summary of this particular argument, Organization maintains that:

> "Collective bargaining agreements will not be overridden under Section 11341 (a) simply to facilitate a transaction, but will be required to yield only when and to the extent necessary to permit the approved transaction to proceed ... Article I, Section 2 'does have significance as a Congressional directive that, to the extent possible, the terms of CBAs are to be preserved' ... (and) ... (C)hanges that are made under that standard 'will not undermine labor's rights to rely primarily on the RLA for those subjects traditionally covered by that statute'."

Related to the preceding point, Organization further contends that the Courts, in ruling on the aforestated "necessary standard," have also emphasized that,

> "... 'necessary' does not signify merely convenient or even the most efficient. Instead, 'necessary' requires something more, the absence of which would bar the consummation of the approved transaction. A finding of necessity must be premised on a carrier's actual inability to carry out an approved transaction, not on an assessment of the relative costs or possible efficiencies of proceeding in the absence of an alleged obstacle. A comparative efficiency standard cannot be

consistently applied either by the Commission or by arbitrators who are called upon to resolve disputes between carriers and the representatives of their employees. The determination of 'necessary' is primarily a factual one."

In summary of its position concerning this particular submission question, Organization contends that,

"(T)he merger of the CNW into the UP/MP is essentially an 'end-to-end' merger with common terminal points of Kansas City, St. Louis/Madison, Omaha/Council Bluffs, Fremont, and Chicago, all with varying respective levels of business (traffic) activity ... (and) ... the specific changes set forth in the Carrier's Notice ... are outside the scope of 'necessary' changes to effect the merger and, therefore, reside outside of the Arbitrator's jurisdiction."

Given the above rationale, Organization contends that the three (3) procedural questions at issue in this matter should be answered in the negative by the Arbitrator; and the Arbitrator should remand the matters to the parties for further bargaining pursuant to the provisions of the Railway Labor Act. In the alternative, however, Organization proposes that if all three (3) procedural questions are answered in the affirmative, then the Arbitrator should adopt Organization's proposed Implementing Agreement (Attachment "B") "... since it reflects the sum and substance of the parties' accords concerning the matters at issue, and reserve jurisdiction only as to any issues that may remain involving selection, assignment and rearrangement of forces."

Carrier's response to Organization's "necessary argument" is that, "(T)he Supreme Court and the ICC have ruled that New York Dock arbitrators, as delegees of the ICC, have the authority to modify or set aside the RLA and CBAs in order to effectuate the transactions identified by the Carrier that are needed to achieve the economies and efficiencies inherent in the underlying rail consolidation." It is Carrier's contention, therefore, that the proposals which are included in Carrier's May 3, 1995 Notice as well as in its proposed Implementing

Agreement "... provide for an appropriate rearrangement of forces so that the economies and efficiencies of the underlying rail consolidation of the ... (CNW) into the ... (UP) may be accomplished." Furthermore, Carrier asserts, Carrier's proposed implementing agreement "... fully satisfies the requirements of New York Dock ... and it is consistent with both industry standards for such arbitration awards and with the agreements negotiated with other labor organizations[3] in the UP/CNW consolidation."

Carrier next argues that its (Carrier's) proposed changes, which are limited to matters pertaining to seniority and work consolidations, new operations, and terminals/complexes, all involve "acceptable merger activities," and are "necessary" if the economies and efficiencies (i. e. - "the public transportation benefits") of the subject merger are to be achieved.

Given that the Courts have recognized that both the ICC and New York Dock arbitrators have authority under Sections 11341 (a) and 11347 of the Interstate Commerce Act to override RLA procedures and collective bargaining agreements "... as necessary to allow a carrier to combine work forces and achieve the efficiencies which flow from a merger ...", and given that Carrier's proposals are "necessary" to achieve those economies and efficiencies in the instant case and include "... changes that logically flow from that transaction ..." then, according to Carrier, said proposals are proper; and Carrier's proposed implementing agreement (Appendix "C") should be adopted since Carrier's proposal "... is designed to 'promote more economical and efficient

[3] According to Carrier, in the current UP/CNW consolidation, "... most other crafts have been able to make the necessary implementing agreements, and none of those negotiations required the use of the ... (New York Dock) ... arbitration process." Those labor organizations which have agreed to such implementing agreements in the subject consolidation, Carrier asserts, are: Yardmasters, Dispatchers, Clerks, Supervisors, Boilermakers, Carmen, IBEW, Machinists, Sheet Metal Workers, and Firemen & Oilers (Carrier's Submission pp. 30-32).

transportation' and places the burden of New York Dock protection on the Carrier when it implements those economies and efficiencies." It is Carrier's position, therefore, that Carrier's proposals, as encompassed in its proposed implementing agreement, are those which are necessary to achieve the public transportation benefits of the subject merger as approved and authorized by the ICC in Finance Docket No. 32133.

Carrier summarizes its position in this dispute as follows:

> "1. The Section 11341(a) immunity provision, as well as Section 11347, gives arbitrators the authority to override the Railway Labor Act and Collective Bargaining Agreements as necessary to achieve the purpose of the underlying rail consolidation.
>
> 2. This is the clear position of the ICC and arbitrators, deriving their authority from the ICC, are obligated to follow the rulings and decisions of the ICC.
>
> 3. Procedural objections of the Organization are totally without merit. The ICC has empowered Article I, Section 4 arbitrators to address *all* issues submitted to them. Section 4 arbitration is to be decided on the merits, not procedure. This includes Section 2 versus Section 4 arguments which have now been decided in favor of Section 4.
>
> 4. The test is whether the proposed changes will achieve a public transportation benefit. A proposal which brings about more economical and efficient transportation satisfies this test.
>
> 5. The Carrier's Proposed Arbitration Award - supported by arbitration awards, court decisions, other implementing agreements for this merger and, most importantly, by the decisions of the ICC - clearly and without a doubt meets the test. The Carrier's Proposed Arbitration Award will bring about more economical and efficient transportation in the territory covered by the proposal."

Accordingly, Carrier urges that, in the resolution of this dispute, the Arbitrator should direct that Carrier's proposed implementing agreement

(Appendix "C") be adopted as the Implementing Agreement governing the collective bargaining relationship which exists between the Union Pacific/Chicago and North Western and the Brotherhood of Locomotive Engineers.

IV. Discussion, Findings and Conclusions:

The Arbitrator has carefully read, studied and considered the complete record which has been presented in this case, including the parties' Submissions which have been offered in support of their respective positions, and concludes that Carrier's position, as reviewed hereinabove, is correct; and, therefore, must be sustained. The rationale for the preceding determination is as follows:

First, Organization's contention concerning the adequacy/propriety of Carrier's May 3, 1995 Notice must be rejected. In this regard, a review of said Notice indicates that the contents thereof reasonably reflects the various components of the Operating Plan which was included in Carrier's January 29, 1993 UP/CNW control application which was originally filed with the ICC in this matter. The fact that said Notice might have contained additions, deletions or modifications which were not contained in or specifically articulated in Carrier's original control application does not appear to have compromised the propriety of said Notice. Moreover, in its ruling in Finance Docket No. 32133, the ICC clearly stated that, "(T)he Commission ... has never required applicants to identify all anticipated changes that might impact on CBAs or RLA rights ... (and that) ... there is no legal requirement for identification ..." Moreover, the Commission further stated that, "(T)he exemptive power of Section 11341 (a) is not limited to the financial and corporate aspects of the approved control transaction but reaches all changes that logically flow from that transaction." It would appear to this Arbitrator that the proposals contained in Carrier's May 3, 1995 Notice "logically flow" from the transaction and were reasonably reflected in Carrier's original control application and supplements which were submitted to the ICC.

Still yet further concerning this same point, Organization's principal objections concerning Carrier's May 3, 1995 Notice is that "... carriers advised the Interstate Commerce Commission that their application involved a mere control transaction for purposes of voting the common stock of the Chicago and North Western owned by Union Pacific and in addition was a cooperative effort to further their already existing end-to-end arrangements." Additionally, in that same application, Organization also asserts, Carrier further advised the ICC that the "... impact upon employees would be minimal ... 3 enginemen jobs would be eliminated and 18 created ... (and) ... there would only be relatively minor changes in yards and terminals ..." However, in Carrier's Notice and subsequent proposed implementing agreement, the proposed changes were comprehensive, involved the single-line operations of the CNW, and Carrier further advised that, as a result of the transaction, "667 engineers will be effected ..."

Despite Organization's aforestated assertion, it must be noted that the ICC, in Finance Docket No. 32133, when commenting on Carrier's estimates of the number of employees who would be adversely affected by the common control, stated as follows:,

> "(T)he primary applicants acknowledge that common control will have certain adverse consequences for Rail Labor. They project that, with the various coordinations envisioned with 29.5% control, 97 jobs will be abolished and 5 jobs will be transferred. They further project that, with the full integration that awaits 100% control, 891 jobs will be abolished and 788 jobs will be transferred ... (and) ...(T)he primary applicants have submitted reasonable estimates of job dislocations from common control. Rail Labor has not submitted any persuasive refutation of the estimates submitted by the primary applicants.

> Dislocations of this magnitude do not pose a barrier to our approval of this transaction" (pp. 94-95).

The significance of the preceding exerpt is that the Commission obviously was aware of the approximate scope of the "adverse consequences" which common control would have upon the employees, yet the Commission, nonetheless, was willing to approve the proposed transaction. Summarizing this particular point, in the Findings Section of Finance Dock No. 32133, the ICC further noted,

> "(e) that the adverse effect on employees affected by the proposed transaction does not make it inconsistent with the public interest but that any adverse effect will be adequately addressed by the ... (New York Dock) ... conditions imposed herein; ..."

The next element of consideration in this analysis is Organization's contentions(s) that the "... matters set forth in the subject notice are not an integral part of the transaction approved by the Commission ..." and that "... the terms contained in the subject notice are not necessary to the implementation of the transaction."

While Organization has presented these questions separately, predicated, it appears, upon a perceived distinction between "integral part of the transaction" and "... 'necessary' to the implementation of the transaction ...", the Arbitrator, nonetheless, believes that these two (2) issues are one in the same, and should be addressed as one, inclusive issue. Accordingly, the Arbitrator cannot discern any distinction between Organization's "integral part of the transaction" argument and Organization's "... 'necessary' to the implementation of the transaction" argument. "Integral" and "necessary," to this Arbitrator, would appear to be the same fundamental inquiry. Either a matter which is subject to the Article I, Section 4 New York Dock Conditions is an "integral and, hence, necessary" part of the transaction, or it is not. Therefore, Organization's

Question #2 and Question #3 are considered to be the same. Moreover, a review of the applicable case law, as well as statutory and administrative regulations, indicates that the evaluative standard which is to be utilized in such a proceeding is the "necessary" standard rather than "an integral part of the transaction" standard as suggested by Organization.

The United States Supreme Court in Norfolk and Western Railway Company v. American Train Dispatchers, 111 S. Ct. 1156 (1991) definitively resolved the issue of whether or not the ICC and arbitrators who fashion implementing agreements under Section 4 of the New York Dock Conditions have the authority to change, modify or abrogate provisions of collective bargaining agreements in order to permit merger. In its decision, the Court ruled that Section 11341 (a) of the Interstate Commerce Act permits the ICC and New York Dock arbitrators, working under the delegated authority of the ICC, to exempt railroads from existing collective bargaining agreements "... to the extent necessary to carry out ICC approved transactions." It is the "necessary standard"/necessity predicate," therefore, which delineates the Arbitrator's authority in the instant case.

Organization herein argues that the terms contained in the May 3, 1995 Notice, and subsequently in Carrier's proposed implementing agreement, are not necessary to the implementation of the transaction; and that no changes, therefore, are needed in the collective bargaining agreements which are presently in place between the parties. In the alternative, however, Organization advocates that if the Arbitrator determines that the subject May 3, 1995 Notice was proper and that the terms contained in the subject notices are integral and necessary to the implementation of the transaction, then the Arbitrator should adopt Organization's proposed implementing agreement (Appendix "B") "... since it reflects the sum and substance of the parties' accords concerning the matters at issue, and reserve jurisdiction only as to any issues that may remain involving selection, assignment and rearrangement of forces."

Carrier, on the other hand, contends that its proposed implementing agreement (Appendix "C") "... is necessary to carry out the approved transaction ..." and that said proposal constitutes "... a fair and equitable basis for the selection and assignment of forces ... so that the economies and efficiencies - the public transportation benefit - which the ICC envisioned when it approved the underlying rail consolidation of the CNW into the Union Pacific will be achieved."

There can be no doubt whatsoever in this Arbitrator's mind that the nature of the changes proposed by Carrier are "necessary" to carry out the approved transaction and will promote operating efficiencies as well as efficient manpower utilization, and will produce a transportation benefit to the public as contemplated by the ICC when it approved Carrier's request to merge with the CNW. The sheer size of the newly merged entity, the interrelatedness and overlapping nature of the previously separate operations, and the myriad of conflicting rules and agreements which presently exist necessitates that operations be coordinated so as to create a unified rail freight operation. The particular mechanism with which to achieve that goal is the issue which confronts us.

The parties' respective proposed implementing agreements (Appendix "B" and Appendix "C") have been carefully reviewed and analyzed. Given the magnitude and scope of each proposal, it is impossible to comment upon each and every separate provision contained therein. Suffice it to say that our review of the two (2) proposals leads us to conclude that Carrier's proposal, in general, appears to be fair and equitable, and thus an appropriate basis for the selection and assignment of forces under this New York Dock proceeding. Accordingly, therefore, this Arbitrator will direct that Carrier's proposed implementing agreement, with those specific modifications indicated hereinafter in Implementing Agreement Modifications (Appendix "D"), be adopted as the Implementing Agreement which is to govern the collective bargaining relationship between the parties pursuant to the New York Dock labor protective conditions which were imposed upon the parties by the ICC in Finance Docket No. 32133.

V. Award and Order:

On the basis of the preceding discussion, findings and conclusions the following determinations are made in this proceeding:

1. Carrier's May 3, 1995 Notice which was issued in this matter was proper.

2. The matters set forth in the aforestated May 3, 1995 Notice were an integral part of the transaction which was approved by the ICC in Finance Docket No. 32133.

3. The terms contained in the aforestated May 3, 1995 Notice are found to be necessary to the implementation of the approved transaction.

4. Carrier's proposed implementing agreement, as modified by the Implementing Agreement Modifications (Appendix "D") included hereinafter, is found to constitute a fair and equitable basis for the selection and assignment of forces under this New York Dock proceeding; and will, therefore, be adopted.

It is so directed.

Respectfully submitted,

John J. Mikrut, Jr.

John J. Mikrut, Jr.
Arbitrator

Issued in Columbia, Missouri on January 10, 1996.

APPENDIX "A"

UNION PACIFIC RAILROAD COMPANY

1416 DODGE STREET
OMAHA NEBRASKA 68179

May 3, 1995

NYD - 132 (BLE)

CERTIFIED MAIL - RETURN RECEIPT

MR B D MacARTHER
GENERAL CHAIRMAN BLE
217 FIFTH AVE S - STE 502
CLINTON IA 52732

MR M A YOUNG
GENERAL CHAIRMAN BLE
1620 CENTRAL AVE RM 203
CHEYENNE WY 82001

MR T H WELLS
ASST GENERAL CHAIRMAN BLE
RR #3 BOX 89AA
CHARLESTON IL 61920

MR M D WALDEMER
GENERAL CHAIRMAN BLE
12531 MISSOURI BOTTOM RD
HAZELWOOD MO 63042

Gentlemen:

The Interstate Commerce Commission (ICC) approved, in Finance Docket No. 32133, the merger of Union Pacific (UP) / Missouri Pacific Railroad (MP) and Chicago and North Western Railway (CNW) effective April 6, 1995. The ICC in its approval of the aforesaid Finance Docket has imposed the employee protection conditions set forth in New York Dock, 360 ICC 60.

Therefore, pursuant to Section 4 of New York Dock, notice is hereby given to implement the merger transaction which is set forth in Exhibit "A", attached. As you will note from reviewing the Exhibit, this merger transaction will affect employes, work and work locations and will obviously require the elimination of incompatible agreements in order to ensure the smooth transition of this merger to that of a streamlined operation.

As advised earlier by telephone, all of the elements in this transaction will be explained in a Question and Answer Session on Wednesday, May 24, 1995 at 1:00PM in Kansas City, Missouri.

Further, and as also previously advised, negotiations on this transaction will commence the following morning at 9:00AM Thursday, May 25 in Kansas City. The Kansas City meeting locations will be advised by telephone as soon as developed.

As a matter of final note, this letter and Exhibit "A" will be faxed on May 3, 1995, to your offices with the original subsequently mailed on that same date. The posting of these papers on all applicable TE&Y bulletin boards will be initiated on Monday, May 8, 1995.

Yours truly,

W. S. Hinckley

W. S. HINCKLEY
General Director
Labor Relations-Operating/South
Union Pacific
Railroad Company

L. A. LAMBERT
General Director
Labor Relations-Operating/West
Union Pacific
Railroad Company

C. R. Wise

C. R. WISE
AVP - Labor Relations-Operating
Chicago Northwestern
Railway Co.

Attachment

May 3, 1995

BCC:	T. L. Watts	- Labor Relations - Room 330
	J. J. Marchant	- Labor Relations - Room 330
	J. M. Raaz	- Labor Relations - CNW Chicago
	A. Shoener	- Operating - Room 1200
	R. D. Naro	- Transportation - Room 1206
	D. J. Duffy	- Quality - Room 430
	D. D. Tholen	- Transportation - Room 1200
	W. Sutton	- Intermodal Oprns. - Room 1200
	C. O. Malone	- Transportation - Room 1200
	S. R. Barkley	- Transportation - Room 1200
	C. Aadnesen	- Transportation - HDC
	J. E. Biebel	- CNW Trans. Center - Chicago
	T. F. Murphy	- CNW Trans. Center - Chicago
	R. O. Brownell	- CNW Trans. Center - Chicago
	C. R. Quinley	- Transportation - Room 1200

NOTE:

Will Mr. Brownell please ensure that a copy of this letter and the Exhibit "A" are posted on bulletin boards accessible to all CNW Engine Service Employes.

Will Mr. Quinley please ensure that a copy of this letter and Exhibit "A" are posted on all bulletin boards accessible to UP/MP Engine Service Employes on the entire Eastern District and C&EI as well as MP locations of Kansas City and St. Louis.

May 3, 1995

EXHIBIT "A"

NOTICE

TO ALL TRAIN, ENGINE AND YARD SERVICE EMPLOYES

WORKING ON THE TERRITORIES

UNION PACIFIC RAILROAD - EASTERN DISTRICT
MISSOURI PACIFIC RAILROAD - UPPER LINES
CHICAGO AND EASTERN ILLINOIS RAILROAD
CHICAGO AND NORTH WESTERN RAILWAY

AND WHO ARE REPRESENTED BY THE

BROTHERHOOD OF LOCOMOTIVE ENGINEERS

OR

UNITED TRANSPORTATION UNION

THE INTERSTATE COMMERCE COMMISSION (ICC), IN FINANCE DOCKET 32133, HAS APPROVED THE MERGER OF THE UNION PACIFIC (UP) / MISSOURI PACIFIC RAILROAD (MP) AND THE CHICAGO AND NORTH WESTERN RAILWAY (CNW). AS A CONDITION OF THIS MERGER, THE ICC IMPOSED NEW YORK DOCK LABOR PROTECTIVE CONDITIONS.

In order to effectuate the benefits of this merger, CNW train, engine and yard (TE&Y) service employes, facilities and operations must be integrated into the UP / MP Operations to the extent necessary.

Accordingly, to effectuate this merger and pursuant to the provisions of the New York Dock conditions, this is to serve as a ninety (90) day required notice that on or after August 5, 1995, it is the intent of the UP / MP and CNW to place the following merger transaction into effect:

I. <u>Dual Point Terminal Consolidations</u>

A. Kansas City - - - - - Eliminate all current CNW Terminal assignments including certain Des Moines Terminal classification assignments, incorporating the CNW work and its employes into the existing MP Terminal operations which are governed by the MP Collective Bargaining Agreements. The CNW Terminal Classification employes at Des Moines will be relocated to the Kansas City Terminal.

B. St. Louis/Madison --- Eliminate all current CNW Terminal assignments, incorporating the CNW work and its employes into the existing MP Terminal operations which are governed by the MP Collective Bargaining Agreements.

C. Omaha/Council Bluffs - Eliminate all current CNW Terminal assignments including Sioux City Terminal assignments, incorporating the CNW work and its employes into the existing UP Terminal operations which are governed by the UP Collective Bargaining Agreements. The CNW Terminal employes at Sioux City will be relocated to the Omaha/Council Bluffs Terminal.

D. Fremont ----- Eliminate all current CNW assignments, incorporating the CNW work and its employes into the existing UP operations which are governed by the UP Collective Bargaining Agreements.

E. Chicago ----- Eliminate all current CNW assignments, incorporating the work and its employes into a new Chicago Terminal Complex which will include Waukegan, West Chicago and all of the current Chicago and Eastern Illinois (C&EI) limits and which will be governed by the C&EI Collective Bargaining Agreements.

II. East/West Operation

A. Establish a new Omaha Metro Road Terminal Complex operation which will encompass the boundaries of Fremont, Missouri Valley, California Junction and Council Bluffs.

1. CNW Pool Freight work and its employes will be incorporated into this new Metro Terminal Complex which will be governed by the UP Collective Bargaining Agreements.

2. Eliminate all current CNW road service assignments (locals - road switchers, extras, etc.), incorporating the CNW work and its employes into the new Metro Terminal Complex operations which will also be governed by the UP Collective Bargaining Agreements.

3. CNW Pool Freight and road service employes from Sioux City as well as other road CNW employes at all other applicable locations will be relocated to the new Metro Terminal Complex.

4. Pool Freight Operation from the new Metro Terminal Complex will include the current westbound away-from-home terminal of North Platte and the new eastbound away-from-home terminal of Boone. In addition, there will also be new eastbound away-from-home terminals of Beverly, Des Moines, Mason City and Iowa Falls and a new north line away-from-home terminal of Worthington.

5. Road Service Operations (locals - road switchers, extras, etc.) established between the Metro Complex and Worthington will be protected by UP Metro Road Service employes.

6. Under this new merger operation, Pool Freight and Road Service crews may receive and or leave trains anywhere within the boundaries of the new Metro Terminal Complex.

B. Establish a new Chicago Road Terminal Complex.

1. CNW and C&EI Pool Freight work and employes will operate westbound from the new Chicago Terminal Complex described in Article I, E to the current away-from-home terminal of Clinton as well as the new away-from-home terminals of Beverly and South Pekin. In addition, these employes will operate to new north line away-from-home terminals of Sheboygan and Cleveland / Plymouth and new northwest away-from-home terminals of Adams and Madison.

2. Approximately 25% of the CNW Road Service employes at South Pekin as well as all CNW Pool Freight and Road Service employes from Clinton will be relocated to the new Chicago Road Terminal Complex for service in this operation.

3. Road Service Operations (Locals, Road Switchers, Extras, etc.) established between Janesville and Reedsburg will be protected by Road Service employes at Madison.

4. Under this new merger operation, Pool Freight and Road Service crews may receive and or leave trains anywhere within the boundaries of the new Chicago Terminal complex described in Article I, E.

III North/South Operation

A. Establish a new Kansas City Road Terminal Complex.

1. CNW Pool Freight and Road work and its employes will be incorporated into this new terminal complex operation which will be governed by the MP Collective Bargaining Agreements.

2. Approximately 25% of the CNW Road and Pool Freight Service employes from Des Moines will be relocated to the Kansas City Road Terminal Complex.

3. Northbound Pool Freight Operation from the new Kansas City Terminal Complex will include the current away-from-home terminal of Council Bluffs/Omaha (New Metro Terminal Complex boundaries) as well as operation to new away-from-home terminals of Des Moines, Boone and Iowa Falls.

4. Northbound Pool Freight Operation remaining at Des Moines will continue to operation to Mason City with additional new away-from-home terminals of Iowa Falls, Beverly and Clinton.

5. Under this new merger operation, Pool Freight and Road Service crews may receive and or leave trains anywhere within the new Kansas City Road Terminal Complex.

B. Establish a new Twin City Road Terminal Complex which will encompass the limits of St. Paul and Minneapolis.

1. Pool Freight Operation from this new Twin City Terminal Complex will include the existing away-from-home terminal of Mason City as well as new South line away-from-home terminals of Iowa Falls, Des Moines, Boone and Marshalltown. In addition, this operation will also include the new East line away-from-home terminal of Adams and the new West line away-from-home terminal of Worthington.

2. CNW employes from St. James and Altoona will be relocated to the new Twin City Terminal Complex.

3. Under this new merger operation, Pool Freight and Road Service crews may receive and or leave trains anywhere within the new Twin City Road Terminal Complex.

IV. South Pekin Operation

A. Pool Freight operation northbound from South Pekin will include the existing away-from-home terminal of Clinton as well as the new away-from-home terminal of Beverly.

B. CNW Pool Freight and Road work and its employes at St. Louis / Madison will be incorporated into the C&EI terminal operation and will be governed by the C&EI Collective Bargaining Agreements.

1. Road operations from St. Louis will include the north service to South Pekin and under this operation, Pool Freight and Road Service crews may receive and/or leave trains anywhere within the St. Louis Terminal.

2. Approximately 25% of the CNW Pool and Road Service employes at South Pekin will be relocated to St. Louis.

V. Wyoming Coal Operation

A. To immediately effectuate a merger to permit coal operation improvements prior to completion of all necessary merger track construction, current CNW crews with the home terminal of South Morrill will be permitted to receive and/or leave trains anywhere within thirty (30) miles on either side of South Morrill. Further, current UP crews with home terminal of Cheyenne and/or North Platte may also receive and/or leave trains anywhere within thirty (30) miles on either side of South Morrill.

B. Subsequent to completion of necessary merger track construction and improvements, a complete consolidation merger of the Wyoming Coal Train Operation will transpire under the following provisions:

1. CNW Pool Freight and Road work and employes will be incorporated into this new Wyoming Coal Operation which will be governed by the UP Bargaining Agreements.

2. CNW employes from South Morrill will be relocated to Cheyenne and North Platte.

3. CNW employes from Bill will be relocated to Shawnee Junction.

4. Northbound Pool Freight Operations from Cheyenne and/or North Platte will be to the new away-from-home terminal of Shawnee Junction.

5. Shawnee Junction will be the new home terminal for all turnaround operation to and from the coal mines.

6. Under this new merger operation, Pool Freight and Road Service crews may receive and or leave trains anywhere within thirty (30) miles on either side of Shawnee Junction.

VI. Midwest Grain Operation

A. Consolidate the seniority of CNW TE&Y employes within this Midwest Grain Operation which includes the primarily locations of Boone, Eagle Grove, Ft. Dodge, Marshalltown, Des Moines, Clinton, and Mason City as well as all outlining points currently protected by extra boards at the primary points.

B. Subsequent to this merger seniority consolidation, Clinton will continue as a yard service operation. Boone will be the source of supply for all other yard assignments that may be established at other locations.

C. Boone, after the merger seniority consolidation, will also be the source of supply for all future road assignments that may operate at or from any location to any location within the new Midwest Grain Operation area as well as to Beverly, Clinton and the Metro Road Terminal.

VI. Collective Bargaining Agreements

Where in the course of implementing this transaction, existing CNW Union Agreements, Understandings and/or Practices may restrict the orderly transition for a merged system, such Agreements, Understandings and/or Practices will be eliminated and applicable UP, MP or C&EI Agreements will prevail.

VII. Affected Employes

As a result of this transaction, the following approximate number of TE&Y employes will be affected:

Terminal Consolidations

Kansas City - - -	30	Trainmen/Yardmen	15	Enginemen
St. Louis - - -	2	Trainmen/Yardmen	2	Enginemen
Metro (Omaha/Council Bluffs) - - - - - -	28	Trainmen/Yardmen	14	Enginemen
Chicago - - -	192	Trainmen/Yardmen	91	Enginemen

East/West Operation

Metro Terminal Complex - - -	145	Trainmen/Yardmen	135	Enginemen
Chicago Terminal Complex - - -	166	Trainmen/Yardmen	153	Enginemen

North/South Operation

Kansas City Terminal Complex	23	Trainmen/Yardmen	13	Enginemen
Twin City Terminal Complex	27	Trainmen/Yardmen	20	Enginemen

South Pekin Operation

20 Trainmen/Yardmen 19 Enginemen

Wyoming Coal Operation

142 Trainmen/Yardmen 149 Enginemen

Midwest Grain Operation

72 Trainmen/Yardmen 56 Enginemen

◆◇◆◇◆◇◆◇◆◇◆◇◆◇◆◇◆◇◆

Please ensure that this notice is posted on all bulletin boards accessible to the affected UP, MP, CNW and C&EI TE&Y employes.

C. R. WISE
AVP - Labor Relations-Operating
Chicago North Western
Railway Co.

W. S. HINCKLEY
General Director
Labor Relations-Operating/South
Union Pacific
Railroad Company

L. A. LAMBERT
General Director
Labor Relations-Operating/West
Union Pacific
Railroad Company

ARTICLE

Terminal Consolidations

and

New Complex Operations

TRANSACTIONS

MERGER IMPLEMENTING
AGREEMENT

between the

UNION PACIFIC/MISSOURI PACIFIC RAILROAD COMPANY
CHICAGO AND NORTH WESTERN RAILWAY COMPANY

and the

BROTHERHOOD OF LOCOMOTIVE ENGINEERS

In Finance Docket No. 32133, the Interstate Commerce Commission (ICC) approved the acquisition and control of the Chicago and North Western Railway Company (CNW) by the Union Pacific/Missouri Pacific Railroad Company (Union Pacific or UP). In order to achieve the necessary operating transactions involved in this control and acquisition, the ICC in its approval imposed the provisions of the New York Dock Conditions (NYDC). Accordingly, the UP and CNW along with the Brotherhood of Locomotive Engineers (BLE) have entered into this Agreement consistent with the provisions of NYDC.

THE PROVISIONS OF EACH TRANSACTION IN THIS IMPLEMENTING AGREEMENT FOLLOW:

ARTICLE I

SECTION A - KANSAS CITY TERMINAL

1. Upon five (5) days advance written notice by UP, the work and territory of the CNW terminal operations in Kansas City will be consolidated into the existing Kansas City UP terminal operations and switching limits. All CNW yard assignments will thereafter operate within the new consolidated terminal in the same manner as UP assignments. Therefore, all new yard assignme..s will be governed by the Missouri Pacific (MP) Collective Bargaining Agreement.

2. Subsequent to this terminal consolidation, CNW and UP road crews may operate into/out of any location within the consolidated terminal. The Carrier will designate the on/off duty point(s) for road crews, in accordance with existing rules. (Okayed WSH and RDM 9/7/95).

3. The existing switching limits of the UP terminal will not be affected by this consolidation, except to the extent that the switching limits will now include the CNW rail line to CNW Mile Post 500.3.

4(a). All of the existing CNW terminal assignments (three(3) yard engines) may be discontinued. In order to effectuate this change, UP will offer the three (3) incumbents of the yard assignments along with all other CNW employees permanently headquartered in Kansas City the option of accepting a separation allowance terminating all service with the UP/CNW under the conditions specified in Attachment "B". The minimum number of separations the UP will offer will be three (3) and acceptance of voluntary applications will be in seniority order. When the assignments are abolished CNW employees will no longer have any seniority rights to such assignments.

4(b). Should any of the three (3) incumbents remain in active service subsequent to the separation program, each will be provided the following two (2) options which must be exercised within ten (10) days subsequent to the date of their position abolishment:

Option 1. Exercise seniority to another position on the employees CNW/BLE Southern Seniority District No. 3 Roster outside of Kansas City and, excluding the Omaha Metro Complex which is explained in Section "D" of this Article; or

Option 2. Exercise seniority in Kansas City on a CNW Pool Freight Turn or the CNW Road Service Extra Board.

NOTE: An employee failing to make an election of one of the two (2) options above will be considered as electing Option 2.

4(c). Junior employees who are displaced by the two (2) seniority options set forth in this Sub-Section 114 (b)", will in turn be provided these same options which must be exercised within ten (10) days of displacement.

4(d). It is understood and agreed, that seniority displacements to any CNW extra board will not automatically result in a junior employee reduced unless authorized by UP. If such reduction is not made, but later in time through the normal seniority movements a junior employee is released, the exercise of seniority by that employee will be under the provisions of the CNW Collective Bargaining Agreement.

5. All rail lines, yards and/or sidings within the consolidated Kansas City terminal described in this Section A will be considered as common to both UP and CNW crews. UP and CNW crews will be permitted to perform all permissible road/yard moves as allowed under National Agreements. Interchange rules are not applicable for intra-carrier moves within the consolidated terminal. (Side Letter or Q&A)

6. The UP extra board will protect all the consolidated work and territory in Kansas City.

7. The current CNW Kansas City extra board will protect all vacancies and extra service for CNW assignments and may perform hours of service for CNW Assignments. (Okay RDM and WSH on 9/7/95).

8. UP yard crews at Kansas City, may perform all work and Hours of Service relief within the Combined Road/Yard Service Zone in accordance with National Agreements. Such service may be in all directions out of the consolidated

terminals/complex. However, nothing in this Sub-Section will prevent the use of other employees to perform this work in any way permitted by applicable agreements.

9. The current equity work/seniority allocation for UP employees (former UP, MP and MKT) at Kansas City will not be affected by implementing this transaction.

Side letter 1

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CNW KANSAS CITY ROAD EXTRA BOARD

It is agreed that the Kansas City extra board will continue in operation and will be governed by the CNW/BLE Mediation Agreement of June 1, 1975 as amended by the CNW/BLE May 12, 1987 Memorandum of Agreement.

It is further agreed that when there is a reduction of yard assignments and extra service in Kansas City, the UP will ensure that thereafter the minimum number of employees assigned to this extra board will be equal to twenty five percent (25%) of the total number of assigned CNW pool turns at Kansas City.

Example: 12 pool turns
25% equals 3 extra board employees

In guaranteeing that this Kansas City/CNW extra board is maintained at a 25% ratio, the parties clearly recognize that this guarantee is only applicable if there are sufficient voluntary applicants for this board from CNW employees who were headquartered at Kansas City on the date of this implementing agreement. In other words if the percentage ratio calls for five (5) employees and UP has only three (3) voluntary CNW (pre-implementing Agreement) applicants, the UP will not be required to involuntarily place any employees on the board to maintain the 25% ratio.

ARTICLE I

SECTION B - ST LOUIS TERMINAL

1. Upon five (5) days advance written notice by UP, the work and territory of the CNW terminal operations in Madison, Illinois, will be consolidated into the existing St. Louis UP terminal operations and switching limits.

2. Subsequent to this terminal consolidation, CNW and UP road crews may operate into/out of any location within the consolidated terminal ~~including the Alton & Southern Railroad~~. The Carrier will designate the on/off duty point(s) for road crews. (Add Note: Foreign yards versus UP yards, interchange rule, etc., will not be changed) (WHS approved 9/7/95).

3. The existing switching limits of the UP Terminal will not be affected by this consolidation, except to the extent that the switching limits will now include the CNW rail line to CNW Mile Post 144.

4. Subsequent to the five (5) day advance consolidation notice by UP, the CNW St. Louis terminal assignments which consist of one (1) yard assignment and one (1) extra yard assignment will operate within the new consolidated terminal in the same manner as UP assignments with the following special incumbent conditions:

YARD ASSIGNMENT

a. The incumbent of the yard assignment on the date of consolidation will continue to hold such assignment and will remain as a CNW seniority employee governed under the CNW Collective Bargaining Agreement and will not be subject to any seniority displacement by senior CNW employees. However, the attrition of this CNW assignment to UP employees and governed under the MP Collective Bargaining Agreement will apply when:

(1) The incumbent accepts a separation allowance offer by UP terminating all service with the

UP/CNW under the conditions of separation set forth in Attachment "B"; or

~~(2) The incumbent Retires, resigns or is terminated from service with the CNW UP; or~~

(3) The incumbent ~~voluntarily~~(WHS OKAY) vacates the assignment, exercising seniority to another CNW assignment and such vacant yard assignment is not subsequently filled by a CNW employee occupying the CNW Monterey Mine assignment as discussed in Article II, Section A1 of this Agreement; or

(4) The assignment is abolished.

NOTE 1: It is understood and agreed that if this CNW assignment is abolished and subsequently reestablished with the same work within a one year ~~six (6) month~~ period, the assignment will not attribute to UP employees governed under the MP Collective Bargaining Agreement. (WHS and RDM 9/7/95)

~~NOTE 2. It is understood and agreed that if on the date of consolidation position is vacant (not permanently a CNW employee) the position will automatically revert to the UP.~~ (REMOVED RDM and WHS 9/7/95)

When this assignment does attrite to the UP, CNW employees will no longer have any seniority rights to such assignment.

EXTRA ASSIGNMENT

NOTE 2:~~b (1)~~. The incumbent of the extra assignment on the date of consolidation will be offered the separation conditions set forth in Attachment "B". If such incumbent elects to accept separation, this extra assignment will be eliminated and thereafter all future service (extra or regular) will be performed by UP employees governed under the MP Schedule of Agreement. CNW employees will no longer have any seniority rights to such assignment. If, however, the incumbent does not accept separation, such incumbent will continue to hold the extra assignment and will remain as a CNW seniority employee governed under the CNW collective bargaining agreement and will not be subject to any seniority displacement by senior CNW employees.

b (2). If upon the date of consolidation, the incumbent on this assignment remains in service, this extra-assignment will be shared with UP employees on a six (6) month interval, with CNW operation for the first six (6) months. These six (6) month intervals between CNW and UP will continue until such time as the assignment is abolished or it is not voluntarily filled by either the original incumbent or another Eastern District-1 CNW employee with a seniority date in engine service prior to the date of implementing this transaction.

b (3). In the event this extra assignment is not subsequently filled voluntarily at the next six (6) month CNW interval by a CNW employee, this extra assignment will automatically be governed under the MPUL Schedule Agreement and protected by UP employees. CNW employees will no longer have any seniority rights to such extra assignment.

NOTE 1: It is understood and agreed that if the extra assignment is abolished - and subsequently reestablished within a one year ~~six (6) month~~ period, the assignment will not permanently attrite to UP employees governed under the MP collective bargaining agreement. (OKAY RDM and WHS 9/7/95)

NOTE 2: It is understood and agreed that if on the date of consolidation this extra assignment is vacant (not permanently assigned to a CNW employee) this extra assignment will automatically revert to the UP.

5. All temporary vacancies (including vacation) on these two (2) CNW yard assignments covered by this Section B will be protected by the MP St. Louis Terminal Extra Board. UP employees protecting such vacancies will be governed under the MP Schedule of Agreement and National Agreements.

6. Should the CNW incumbent on the yard assignment under Subsection 4(a) or the CNW incumbent/Eastern District-1 CNW employee occupying the extra assignment under 4(b) be placed on a medical leave of absence while occupying such assignment, the employees will not lose their right to reoccupy their former assignment upon return to active service. In the interim however, the assignment(s) will be considered as a UP assignment(s) under the MP Schedule Agreement.

7. All rail lines, yards and/or sidings within the consolidated St. Louis Terminal described in this Section "B" will be considered as common to both the UP and CNW crews. UP and CNW crews will be permitted to perform all permissible road/yard moves as allowed under national agreements. Interchange rules are also not applicable for intra-carrier moves within this consolidated terminal. <u>(No changes, see Side Letter or Note interchange versus INTRAchange transfers. Possible Q&A's).</u>

8. UP yard crews at St. Louis may perform all work and hours of service relief within the combined road/yard service zone in accordance with national agreements. Nothing however will prevent the use of other employees to perform this work in any manner permitted by applicable agreements.

ARTICLE I
SECTION C - CHICAGO TERMINAL AND
NEW COMPLEX OPERATIONS

1. The new Consolidated Chicago Terminal Complex (CTC) will be the entire area within the following trackage:

> Waukegan (CNW MP 35.5~~41.0~~ on the Kenosha Branch) southwest paralleling the EJE Rail line to Geneva (CNW MP 35.5~~41.0~~ on the Geneva Subdivision) continuing on a parallel with the EJE line south through Normantown and East Joliet and then east with the EJE through Brisbane, Matteson, Chicago Heights to Griffith, and then north on the same parallel with the EJE through Van Loon and Ivanhoe ending east on the EJE line through Kirk and then Gary Yard. (Shown on Attached map). (Okay 9/8/95 RDM)

2. Subsequent to the establishment of the CTC under this transaction, CNW and UP (C&EI) road crews may operate into/out of any location within the consolidated complex. The Carrier will designate the on/off duty point(s) for road crews. Road operation in the CTC is discussed in Article III, Section B. (Q&A's or Side Letter).

3. Upon thirty (30) days advance notice by UP, the new CTC will be instituted and all involved employees will be governed under the following conditions:

A(1). A new separate CNW - CTC Seniority Roster will be established ~~solely~~ for yard assignments headquartered within the CTC. This roster will consist of all current employees holding seniority on the CNW Chicago Freight Terminal-7 roster, CNW Eastern-1 roster, CNW Northeastern-2 roster and the Chicago and Eastern Illinois (C&EI) yard roster. In addition, the roster will also include all current employees on each of these rosters engaged in engine service training. The employees from these four existing rosters will be placed on the new CTC roster based upon the employee's engineer's seniority date that was or will be established under applicable CNW/BLE and/or UP/BLE rules. If this process results in employees in engine service having identical seniority dates, seniority ranking will be determined by the employee's Company service date.

(2). Each employee placed on the new CTC roster will retain their current assignment and will also be provided prior rights and seniority to all of their former work and territory roster. The new CTC seniority roster will display prior rights in the following manner:

EXAMPLE:

Prior Rights to all Assignments

Name	Roster Ranking	Chicago Frt. Term-7	Eastern-I	North-eastern-2	C&E1
Jones, J.	#1	X			
Smith, L.	#2				x
Ames, G.	#3			x	
Baily, T.	#4	x			
Moore, K.	#5		x		

Note: The example of all prior right listing is not construed as establishing equity "slotting" of seniority.

(3). The new CTC roster will be posted on all bulletin boards of the affected locations no later than thirty (30) days from the date of implementing this section. Corrections, if any, to the roster will be made within sixty (60) days ~~thirty (30) days~~ thereafter between UP and the BLE after which time the roster will be finalized.

(4). All employees placed on the new CTC roster will have seniority rights to all assignments within the consolidated complex. However, employees with prior rights shall have seniority to their former work and territory within the CTC consolidated complex which will be superior to all other employees on the CTC roster.

NOTE: Prior right employees working assignments in other than their prior rights seniority area will be compensated under the employees' prior right Collective Bargaining Agreement but will work under the Collective Bargaining Rules governing the assignment.

(5). New employees hired and placed on the new roster subsequent to the adoption of the CTC will be governed under the CNW Collective Bargaining Agreement, but will have no prior rights to any assignments within the CTC; will have no rights to any CNW Eastern-1, CNW Northeastern-2 or C&El assignment outside the CTC; will rank below all prior right employees on the roster and will have seniority rights to all assignments within the CTC.

B. The CTC will be divided into the following work zones, with assignments in each determined by the on duty point.

Zone I - The current CNW Chicago Freight Terminal 7 Seniority Boundaries.

Zone 2 - The current CNW Eastern 1 Seniority Boundaries within the CTC.

Zone 3 - The current Northeastern 2 Seniority Boundaries within the CTC which includes the Elk Grove ~~assignment~~ Assignments and Waukegan Assignments.

Zone 4 - The current seniority rights of C&El yard employees in the CTC.

C. The C&EI, CNW Eastern-1, CNW Northeastern-2 and CNW Chicago Freight Terminal-7 Seniority presence in the CTC will be eliminated by attrition of prior right employees. Prior right employees from these four (4) seniority rosters placed on the CTC roster will not be confined to only the CTC area but will be permitted to utilize their seniority outside the CTC if any; their prior rights within the CTC; or, newly established seniority within the CTC.

D. C&El assignments in Zone 4 of the CTC will be placed under the CNW Collective Bargaining Agreement when such assignments are not filled by prior rights